VOLUME 10

BELATCHEW ASRAT

PROHIBITION OF FORCE UNDER THE UN CHARTER

A STUDY OF ART. 2(4)

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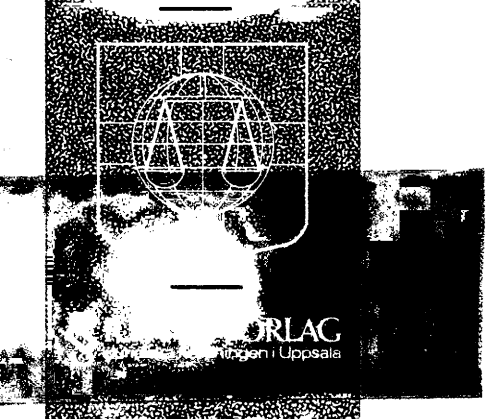

ORLAG
Uppsala

Prohibition of Force Under the UN Charter
A Study of Art. 2(4)

ERRATA

Abstract:
paragraph 1, line 5, read prohibition instead of "probibition".
paragraph 3, last line, read jurisdiction instead of "jurisdiciton".

Page	Line	Read
5	20	to this instead of "to his"
17	22	with instead of "wiht".
17	30	abroad instead of "abaorad".
26	10	aggression instead of "aggession".
27	19	commission instaed of "commisison".
44	12	*cogens* instead of "*cognes*".
54	6	despite instead of "depsite".
62	9	itself instead of "iself".
71	12	first instead of "fisrt".
71	14	forcible instead of "forcicble".
82	11	observed.instead of "obseved".
108	13	aggression instead of "agression".
148	7	places instead of "placles".
169	23	delete "so" and read sovereignty, territorial integrity and independence of Kampuchea.[137]
224	16	States instead of "State".
252	3	Dimensions, 1980.
252	11	1987 instead of "1984".
252	44	pp. 5-15.
254	42	pp. 1-344.
256	15	pp. 344-423.
257	24	move Garcia-Amador to line 3.
258	6	pp.
258	25	1968, 1969.
260	15	1987 instead of "1984".
260	40	1898 instead of "1989".

SWEDISH INSTITUTE OF INTERNATIONAL LAW

STUDIES IN INTERNATIONAL LAW

VOLUME 10

To Fana
Aida
Alemnesh
Rahel
Herouy (Timmy)

Prohibition of Force Under the UN Charter

A Study of Art. 2(4)

Belatchew Asrat

IUSTUS FÖRLAG
Juridiska Föreningen i Uppsala

Abstract

Belatchew Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2(4).* Iustus Förlag, 275 pp. Uppsala 1991. ISBN 91-7678-191-7. ISSN 0348-4718.

The threat or use of force prohibited under the terms of Art. 2(4) of the UN Charter is the outcome of the progressive development of the regulation of the use of force in international relations. As one of the fundamental obligations enjoined by a *sui generis* constitutional instrument, which the Charter is, and as an essential element of the UN principal purpose of maintaining international peace and security, the assigned scope of the probibition needs to be of a kind that would obviate its frustration. This dissertation discusses that scope in connection with the analyses of the explicit and implicit terms of Art. 2(4).

The dissertation comprises two main theses: Firstly, modalities of coercion other than armed or physical force and entities other than States proper, which can affect the protected values of States and cause a threat to or breach of international peace and security, should be brought within the governance of the Article. Secondly, the scope of the unilateral resort to lawful force should be adjusted in relation to the effective implementation of the Charter's peace enforcement scheme. Placing emphasis on the principle of good faith, the dissertation accordingly maintains that the Charter, as a unique legal instrument, should be accorded a special interpretation which would keep it functional in instances of new factors that affect international peace and security. It further maintains that there is a conditional relationship between the collective security scheme of the Charter and the unilateral abstention by States from the threat or use of force on the international plane.

In other respects, the dissertation underscores the *jus cogens* status of the norm of Art. 2(4), and discusses, with a particular reference to the *Nicaragua v. USA* Judgment (Merits), the norm's fundamental uniformity with the corresponding customary international law norm. It maintains that such uniformity would not admit of the separate applicability of either norm which will not be the simultaneous application of the other. It further maintains that the specific mention of the terms "territorial integrity" and "political independence" is not meant to restrict the scope of the prohibition, and that an unlawful violation of these protected values is *ipso facto* inconsistent with the purposes of the UN, which are also protected by the prohibition. It also maintains that the protection of the basic values of States entitles the forcible retrieval of territory where dispossession results from an unlawful use of force, and where the territory remains in an unconsolidated state of possession. Likewise, the protection entitles, in appropriate instances, the forcible proteciton of nationals abroad, and in certain limited cases, that of property and rights outsdie domestic jurisdiciton.

In regard to the implicit terms of Art. 2(4), the dissertation analyses those terms and maintains that the prohibition admits of exceptions and engenders the justifying right of self-defence and the excusing ground of necessity. Consequently, it considers that Art. 2(4) and Art. 51 are respectively the implicit and explicit sources of the right of self-defence under the Charter; that the ground of armed attack figuring in Art. 51 is not an exclusive ground for the valid exercise of the right of self-defence; and that anticipatory self-defence is validly available.

The dissertation briefly analyses the ground of "necessity" and maintains that breaches of the prohibition on that ground are excusable on account of a qualitative disparity between the breached and protected values that may be accepted to exist at any one time.

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The book chanced to be conceived because of the opportunity that I came to have at the Swedish Institute of International Law, Uppsala University. I joined the Institute when the late Prof. Atle Grahl-Madsen was its Director. He was very helpful in facilitating my placement at the Institute, and became an encouraging and a good friend. Even though I did not start researching into the topic of this study while he was the Director, I recall with gratitude his kindness and support.

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I am grateful to the Law Faculty's Board for authorizing a grant from the Ax:son Iohnson's Fund to cover the expenses of checking the language of this study, and to Ms Sue Dodd and Mr Iain Cameron for undertaking the task and suggesting improvements. Mr Cameron has in addition posed certain questions of substance some of which have assisted me to better define particular issues.

The staff of the libraries of the Law Faculty, Carolina Rediviva and Dag Hammarskjöld have enabled me to extend my reach to materials available outside the Institue. The administrative staff of the Faculty of Law have facilitated my access to materials and equipment necessary for preparing the manuscript of this study. The typesetters, Messrs P. Padoan and T. Wikman, have been patient with my alterations. The staff at *Iustus* have expedited the publication of the book with a pleasant efficiency. Even if rendered in the line of duty, I am appreciative of the courteous and prompt helpfulness which I have experienced from all concerned.

I have had a fruitful association with the doctoral candidates at the Institute, who hail from various lands, and most of whom are now JD's and more. We have participated in many seminars on different topics of international law and partaken of a variety of national dishes.

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Throughout the research on and writing of this study, I have drawn sustenance from the steadfast support and phenomenal tolerance of my wife Fana, and our children, Aida, Alemnesh, Rahel, and Herouy (Timmy). This book is dedicated to them.

Finally, I am aware of the shortcomings of this study, which embodies highly controversial issues. Despite the comments and suggestions acknowledged above, I am solely responsisble for the manner of their selection and utilization, and hence for the form, content, and language of this book.

Uppsala, December 1990
Belatchew Asrat

Contents

Abbreviations

ACR	*African Contemporary Review*
Ad. Op.	Advisory Opinion
ADRPILC	*Annual Digest and Reports of Public International law Cases*
AFDI	*Annuaire Français de Droit International*
AIDI	*Annuaire de l'Institut de Droit International*
AJIL	*American Journal of International Law*
APSR	*The American Political Science Review*
Art.	Article
ASILP	*American Society of International Law Proceedings*
AV	*Archiv des völkerrechts*
BYIL	*The British Year Book of International Law*
CE	Council of Europe
CJTL	*Columbia Journal of Transnational Law*
CWILJ	*California Western International Law Journal*
CWRJIL	*Case Western Reserve Journal of International Law*
CYIL	*The Canadian Yearbook of International Law*
DSB	*The Department of State Bulletin*
EC	European Communities
EPIL	*Encyclopedia of Public International Law*
GA	United Nations General Assembly
GAOR	*General Assembly Official Records*
GS	*The Grotius Society*
GYIL	*German Yearbook of International Law*
ICJ	International Court of Justice
ICLQ	*The International and Comparative Law Quarterly*
ILA	International Law Association
ILC	International Law Commission
ILM	*International Legal Materials*
ILQ	*The International Law Quarterly*
ILR	*International Law Reports*
IMT	International Military Tribunal
LN	League of Nations
LNOJ	*League of Nations Official Journal*
LNTS	*League of Nations Treaty Series*

MLR	*Michigan Law Review*
n.	note (footnote)
NATO	*North Atlantic Treaty Organization*
NILR	*Netherlands International Law Review*
NTIR	*Nordisk Tidsskrift for International Ret*
NYIL	*Netherlands Yearbook of International Law*
OAS	Organization of American States
OASTS	*Organization of American States Treaty Series*
OAU	Organization of African Unity
OD	Official Documents
OECD	Organization for Economic Co-operation and Development
OECS	Organization of Eastern Caribbean States
1 *OPPENHEIM*	*Oppenheim's International Law,* Vol. 1, 8th ed.
2 *OPPENHEIM*	*Oppenheim's International Law,* Vol. 2, 7th ed.
PCIJ	Permanent Court of International Justice
Pleadings	*Pleadings, Oral Arguments, Documents* (ICJ)
PLO	Palestine Liberation Organization
POLISARIO	*Frente Popular para la liberación de Saguia el-Hamra y de Rio de Oro*
PYIL	*Polish Yearbook of International Law*
RBDI	*Revue belge de droit international*
RCADI	*Receuil des cours de l'Academie de droit international de la Haye*
RDI	*Revue de droit international* (Sottile)
Repertoire	*Repertoire of the Practice of the Security Council*
Repertory	*Repertory of Practice of United Nations Organs*
Resol.	Resolution
RGDIP	*Revue générale de droit international public*
RIAA	*United Nations Reports of International Arbitral Awards*
RIIA	*Royal Institute of International Affairs*
Rivista	*Rivista di diritto internazionale*
SC	United Nations Security Council
SCOR	*Security Council Official Records*
SFS	*Svensk författningssamling*
SIPRI	Stockholm International Peace Research Institute
SIR	*Studies in International Relations* (Vienna)
SIS	*Studien zur internationalen Sicherheit* (Berlin)
Spec. Suppl.	Special Supplement
Suppl.	Supplement

SWAPO	South West Africa People's Organization
TILJ	*Texas International Law Journal*
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNCIOD	*United Nations Conference on International Organization, Documents*
UNCLS	*United Nations Convention on the Law of the Sea*
UNDY	*The United Nations Disarmament Yearbook*
UNJY	*United Nations Juridical Yearbook*
UNTS	*United Nations Treaty Series*
US *(USA)*	United States of America
USNWCILS	*United States Naval War College International Law Studies*
USSR	Union of Soviet Socialist Republics
VJIL	*Virginia Journal of International Law*
VJTL	*Vanderbilt Journal of Transnational Law*
YILC	*Yearbook of the International Law Commission*
YJIL	*The Yale Journal of International Law*
ZaÖRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Chapter 1

Introduction

The desire and hope of States to have their relations governed by the rule of law rather than the rule of force has found expression in the prohibition of the threat or use of force in international relations under the terms of Art. 2(4) of the UN Charter.[1] This eviction of the rule of force has left place for the legal order under the UN and made Art. 2(4) the bulwark of that order. The prohibition of force as formulated in the Article is therefore a fundamental obligation of States.

As a result of that prohibition, unilateral use of force by States, either singly or in organized groups, is lawful if authorized by the UN or exercised in self-defence; such use of force may also be exercised where there is a proper state of necessity. The prohibition of force, then, is not absolute, but brings forth a clear division between what constitutes the lawful and unlawful use of force.

The obligation in Art. 2(4) goes together with another fundamental obligation in Art. 2(3), which requires States to settle their disputes peacefully.[2] These fundamental obligations furnish the rationale for the UN's almost total monopoly of the lawful use of force on the international plane. This creates a legal situation which gives rise to a particular relationship between the abstention of States from unlawful use of force and the assumption of a monopoly of force by the UN. We shall refer to this relationship as contingent or conditional.

Art. 2(4) does not prohibit the normal pressure which States exert against each other to influence policies and attitudes. But the manifold development of international relations with the concomitant interdependence of States, and the increased progress of the world in different

[1] See *infra* chapter 3, p. 39 for the text of the Art.

[2] Art. 2(3) of the Charter prescribes thus: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

fields, gives varied connotations to international relations and adds diversified tools to the practice of interstate pressure. When employed without justification and in excess, these means of coercion might be taken to constitute a grave violation of the territorial integrity and political independence of target States as to raise the need for counteraction.

The extent and frequency of these counteractions will depend on how the UN peace enforcement and other purposes are implemented. Where the implementation of the purposes is defective, and the UN fails either to safeguard the security of States, or to help in the settlement of international disputes or adjustment of situations, or to hold in proper check interstate means of coercion, States will inevitably gravitate towards seeking their own unilateral remedy. They are likely to achieve such reversion to unilatleral remedial action by claiming to self-help an enlarged area within the provisions of Art. 2(4). This eventuality manifests at once the great significance of the Article for States and for the main UN purpose of maintaining international peace and security.

Such significance is in good measure accountable for the varied views about the construction of the Article and its relation to the collective security scheme of the Charter. Its terms are fraught with controversy: whether, for instance, the phrase "territorial integrity or political independence" restricts the prohibition or not, and whether the term "force" relates only to armed force or comprehends other modes of coercion, are controverted issues. Whether or not there is a conditional relationship between the prohibition of unjustified or unauthorized unilateral use of force and the UN's monopoly of the lawful use of international force is also a controverted matter.

Varied constructions aside, Art. 2(4) is explicit in what it prohibits and implicit in what it permits: Its explicit terms prohibit the use of force in international relations against values protected by the Article, and its implicit terms permit the use of unilateral force in self-defence against breaches of the prohibition of force. This legal study undertakes the consideration of the different explicit and implicit elements of the Article. However, in order to give first a general picture of the study, the principal issues and submissions are introduced in the subsequent pages of the present chapter.

Since Art. 2(4) constitutes a stage in the development of the regulation of the use of force on the international plane, the study is prefixed by a brief historical background to which chapter 2 is devoted. In that chapter,

the principal milestones along the way of the regulation are outlined, and the rules that governed measures of force short of war, that curbed the unrestrained liberty of States to resort to war, and that effected the renunciation of war as an instrument of national policy are indicated. It is also observed that so long as the resort to war remained within the competence of States, they were free to change the status of any conflict short of war in which they were engaged to that of war and submit themselves to the dictates of arms: This discretionary metamorphosis of the status of conflicts short of war, consequently, made their regualtion of limited legal value.

The study considers in chapter 3 the totality of Art. 2(4) and examines its attributes. It is submitted there that the prohibition in the Article has resulted in an allocation of the lawful use of force on the international plane between the UN and States, and that there is a contingent relationship between the prohibition and the effective implementation of the collective security scheme of the Charter. The main characteristics of the obligation in the Article are analysed, and the customary international law status of the Article is discussed. In the latter regard, together with a critical reference to the *Nicaragua v. USA* Judgment (Merits),[3] the fundamental uniformity of the Charter and the customary norms is emphasized, and the separate applicability of either is argued against. It is submitted there that any contemporary judicial or quasi-judicial decision on the use of force in international relations amounts to a construction of Art. 2(4).

A section concerns itself with what is termed accommodative interpretation. With a particular reference to Art. 31(1) of the Vienna Convention on the Law of Treaties,[4] it is submitted there that an interpretation which pays greater regard to the principle of good faith in the appreciation of the elements of the prohibition in Art. 2(4) should be employed to maintain the Article in a dynamic function.

The study then proceeds from general to particular and takes up the contents of the Article in three consecutive chapters. Chapter 4 deals with what constitutes, for purposes of the prohibition of force, the Article's terms of "international relations" and "any State". With a particular analysis of UN resolutions relating to South Africa and Namibia, which were met with the studied indifference of the South African Government,

[3] *ICJ Reports* 1986, p. 14.

[4] *UNTS* Vol. 1155, p. 331.

it is argued that the status of peoples struggling for their self-determination should entitle them to have their relation with the State against which they are contending accommodated within the frame of "international relations".

It is also argued that the term "State" should not be restricted to States proper. It is indicated further that inasmuch as the term "any State" extends the protection from illegal threat or use of force to non-Members, they are bound by the obligation of Art. 2(4) despite the principle of *pacta tertiis nec nocent nec prosunt*.

Chapter 5 discusses the kind of force that consensus holds to be included in the prohibition, and other kinds of coercion whose prohibition is debated. In the former category, the present status of war and the applicability of the laws of war is discussed to a pertinent degree. Armed aggression is discussed together with a critical appraisal of the UN Definition of Aggression – General Assembly resolution 3314 (XXIX). In the category of the debated content of the prohibited force, the opposing views and arguments are indicated; the *Corfu Channel*[5] and the *Nicaragua v. USA* Judgments are particularly canvassed to ascertain whether there is sufficient judicial authority for settling the debate. It is submitted there that the harmful effect of a mode of coercion rather than the name by which the coercion is identified should guide the determination of the content, which in any case would not remain static. In the final section of the chapter, threat of force is discussed in relation to certain instances.

The values that Art. 2(4) seeks to protect by its prohibition of force, namely, territorial integrity, political independence, and the purposes of the UN, are taken up in chapter 6. It is submitted there that the phrase "territorial integrity or political independence" does not have the effect of restricting the prohibition, and neither was it intended to have such an effect. In this connection, it is indicated, with a particular reference to the *Corfu Channel* Judgment (Merits), that the plea of an absence of designs on the territorial integrity or political independence of a State whose territory has been infringed is untenable.

The protection of territorial integrity covers not only dominium but also *de facto* possession. Even in the instance of a contested title of ownership, the possessor State would still derive a defensible right from the protection as to be entitled to retrieve by force territory of which it

5 *ICJ Reports* 1949, p. 4.

may be dispossessed by force. With a particular reference to the Falklands/Malvinas case, it is submitted there that the *de facto* possesor's right of forcible retrieval persists as long as the illegal dispossession remains unconsolidated.

As regards political independence, it is indicated that the protection does not relate to its internal manifestations alone, but extends also to its external manifestations. Insofar as it concerns this study, the manifestation of political independence is reflected in the right of States to defend themselves against illegal invasion, attack, or other sorts of use of force. This self-defence constitutes the defence of the totality of the basic components of States, namely, territory, people, and government. This does not mean, however, that each of the basic constituent elements of statehood cannot be defended singly. In this respect, it is submitted that the forcible protection of nationals abroad, and the forcible affirmation outside domestic jurisdiction of rights unlawfully denied, constitute a legitimate exercise of the right of self-defence. Such exercise reflects the external manifestations of political independence, which, it is argued, should not be qualitatively and consequentially differentiated from its internal manifestations.

Political independence can be compromised by foreign military intervention, which may or may not take place by invitation. The legality of such intervention is analysed in connection wiht a survey of certain illustrative cases which have occasioned UN resolutions. As concerns invitation which is alleged to justify the intervention and presence of foreign forces in another State, it is indicated that such allegation is not valid where the inhabitants' free exercise of political self-determination is thwarted by the intervention. This kind of invitation does not absolve the intervention from being an illegal use of force against the political independence of the particular State.

As regards protection of nationals aborad, a distinction is drawn between intervention for the protection of nationals and humanitarian intervention; the latter term is reserved for cases that relate to the protection of persons other than nationals of the intervening State. The controversial issue concerning the legality of the protection of nationals abroad is discussed in connection with the analysis of the relevant parts of the *United States Diplomatic and Consular Staff in Tehran* case.[6] The legality of such forcible protection is argued for. On the other hand, it is indicated

[6] *ICJ Reports* 1980, p. 3.

that the legality of humanitarian intervention, as here defined, appears at present to be doubtful.

In the discussion of the legality of forcible protection of property and other rights outside domestic jurisdiction, analysis is made of the legality of the US measures in the Cuban Missiles incident. It is suggested that as a result of that incident, a standard of appraisal less stringent than that which may be used for cases involving conventional weapons has been introduced for appraising threats posed by the prospective acquisition of weapons of mass destruction.

As regards the purposes of the UN, the section dealing with their protection is brief. Since the legality or otherwise of the protection of other values treated in preceding sections is correspondingly consistent or inconsistent with the purpoes of the UN, it is deemed sufficient to underline mainly the principal purpose of maintaining international peace and security. It is indicated that the maintenance of international peace and security is the sole responsibility of the UN, and unless authorized by that Organization, regional organizations are not entitled to undertake enforcement measures outside the scope of individual or collective self-defence.

Having thus far dealt with the explicit terms of the prohibition of Art. 2(4), the study considers next what the Article permits. As the Article is negatively formulated, it is indicated that the categories of unilateral use of force which it permits issue from its implied terms and constitute its exceptions. Insofar as these exceptions affect the scope of the prohibition, they are considered in chapter 7 under the titles of self-defence and necessity.

The study of self-defence underscores its inherent attachment to the prohibition of force. It is indicated that, whether or not explicitly permitted, the legality and presence of self-defence flows *ipso jure* from the legal prohibition of force. Along this line, it is argued that the right of self-defence would still have been available even without Art. 51 of the Charter.

Nonetheless, as Art. 51 is an important Charter provision, both its substantive and procedural aspects are given a general consideration before each of its principal elements is studied. The controversy surrounding the question of whether the Article is declaratory or constitutive of the right of self-defence is indicated, and it is argued that the Article is the explicit, but not the exclusive, source of self-defence whose implicit source is Art.

2(4). Critical reference is made in this regard to the distinction between the unilateral defensive remedies of countermeasures and self-defence, which the ICJ drew in the *Nicaragua v. USA* case. Further, the interim status of self-defence under the terms of Art. 51 is noted, but it is submitted that even without the Article, the exercise of the right of self-defence under the Charter would have possessed an interim status.

Under the sub-title of collective self-defence, the individual and collective "self" syndrome is indicated, and a critical appraisal is made of the holding in the *Nicaragua v. USA* Judgment where the ICJ subjected the validity of the exercise of collective self-defence to the request thereof by an attacked State. It is further indicated in connection with a comparative review of certain defence pacts that naming them collective self-defence, or collective defence, or collective security does not appear to bear any legal consequence.

Under the sub-title of armed attack, it is argued that taking armed attack as the sole permitted ground for the exercise of self-defence will undermine the prohibition of force by leaving other breaches outside the reach of forcible self-defence. It is submitted there that although the defence pacts referred to in the preceding paragraph posit armed attack as the *casus foederis* giving rise to the exercise of the collective self-defence agreed to, it does not necessarily follow that the practice of States has thereby disavowed other grounds.

Under the title of anticipatory self-defence, the legitimacy of the exercise of that type of self-defence is considered in connection with the discussion of active threats posed by armed missiles. It is submitted there that the right of anticipatory self-defence is not foreclosed, and from the review of certain incidents, it is indicated that the practice of States appears to confirm the availability of that right.

The section on the study of necessity is brief. With a particular reference to the *Neptune*[7] and the *Caroline* cases,[8] and Anzilotti's Separate Opinion in the *Oscar Chinn*[9] case, it is indicated that necessity constitutes a valid defence in customary international law. It is submitted there that within the confines of the Charter's policy on the unilateral use of force, necessity, though not specifically provided for in that instrument, con-

[7] J.B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. 4, 1898, p. 3843 *et seq.*

[8] J.B. Moore, *A Digest of International Law*, Vol. 2, 1906, p. 409 *et seq.*

[9] *PCIJ*, Series A/B, No. 63 (1934).

tinues to constitute a valid ground of defence. It is indicated further that the ground of necessity exonerates only from delictual liability and does not relieve from the duty of making reparation in due cases. In technical terms, the ground of necessity will not serve as a justification, but as an excuse.

The study of Art. 2(4) is finalized in chapter 8 where recapitulative conclusions are drawn under ten points. The thrust of the chapter is the need to hold flexible the terms of the Article, and to widen or narrow the unilateral competence to resort to lawful use of force in a commmensurate value of the degree of effectiveness attained by the UN.

In regard to materials, this study makes use of the preparatory works of the UNCIO; the practices of States and international organizations as evidenced in consensual instruments and resolutions; Judgments and Advisory Opinions of the PCIJ and the ICJ; Pleadings at the ICJ; international arbitral awards; studies and reports under the auspices of international organizations; and works of authors and learned bodies. In view, however, of the controversy attaching to the elements that constitute Art. 2(4) and Art. 51, the literature relating to the sum of both Articles is vast. References are, therefore, limited to what is considered necessary to substantiate and illustrate issues and opinions, or to comment thereon.

A number of comments that complement the study are dealt with in footnotes. This has been found preferable to encumbering the text with, or disrupting its proper sequence by, matters that do not directly belong to the discussion of particular issues.

In other respects, the work on the manuscript of this study was achieved before Iraq invaded Kuwait. It has, nonetheless, been possible, during the final stages of the manuscript, to incorporate references to three Security Council resolutions relating to the invasion.

Chapter 2

The Legal Situation Preceding Art. 2(4)

The use of force in interstate relations has been as permanent a feature of international law as the State itself.[1] Before rules of international law that circumscribed the right of States to resort to force in their relations were forged, strategies of politics much more than legal norms generally governed the conduct of independent States:[2] The latter were under no higher secular authority and had solely their interests to consult. In such an unorganized world, they enjoyed in principle an unrestrained sovereignty that made forcible self-help their recognized *modus operandi*. Whether pursuing imperial ambitions, or seeking justice for some wrong, or catering to whatever other motive, war, the ultimate forcible self-help (the *ultima ratio legis and the ultima ratio regis*), was their licensed avenue.[3] The principle of unrestrained sovereignty enabled them to prosecute at

1 As regards antiquity, see, e.g. P. Fauchille, *Traité de droit international public*, Tome 1er, Première Partie, 1922, p. 68; A. Nussbaum, *A Concise History of the Law of Nations*, 1950; 1 Oppenheim, p. 72; M.N. Shaw, *International Law*, 2nd ed., 1986, p. 13; Q. Wright, *A Study of War*, Vol. 1, 1942, pp. 163–5.

2 Q. Wright, for instance, observes in connection with the period of 1492–1648 that "[t]he practice of statesmen...followed the precepts of Machiavelli rather than those of Grotius". – *Supra* n. 1, pp. 334–5. See also, e.g. L. Delbez, *La notion de guerre*, 1953, pp. 70–2; Ch. de Visscher, *Théories et réalités en droit international public*, 4e éd., 1970, p. 335.

3 See, e.g. G. Butler and S. MacCoby, *The Development of International Law*, 1928, pp. 3–5, 107; A. Cassese, *International Law in a Divided World*, 1986, pp. 24–5; D. Nguyen Quoc, P. Daillier, A. Pellet, *Droit international public*, 3e éd., 1987, p. 808; Y. Dinstein, *War, Aggression and Self-Defence*, 1988, p. 72; W.E. Hall, *A Treatise on International Law*, 8th ed., 1924, pp. 81–2; T.E. Holland, *Lectures on International Law*, 1933, pp. 102–3, 243; 2 Oppenheim, p. 178; G. Schwarzenberger, *International Law and Order*, 1971, pp. 8, 161–2. Cf. P. Guggenheim, *Traité de droit international public*, Tome II, 1954, pp. 94–5. But see C. Parry, "The Function of Law in the International Community", in *Manual of Public International Law*, M. Sørensen ed., 1968, pp. 5, 27, 35 for the view that war was not wholly licensed; K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", ibid., pp. 741–2. However, the fact that those who resorted to war did not fail to assert the justice of their cause did not mean that war was proscribed in international law. The legal consecration of the outcome of any type of war tells against such proscription.

will warfares that could destroy the very sovereignty which was the basis of such freedom of action. This *jus ad bellum* constituted indeed an inherent contradiction.[4]

Over the years, however, this discretionary resort to war and general use of force in international relations came under the interdictive and regulative rules of positive international law. We shall trace briefly in this chapter the prominent steps that made such legal rules possible.

2.1. Prior to the Covenant of the League of Nations

As the primary function of any legal system is the maintenance of some degree of public order,[5] moral doctrine attempted to rectify the deficiency of international law in this regard. Scholastic teaching sought to give moral meaning and moral ground to war by differentiating between just and unjust war. Only that war which was undertaken by a competent authority (a prince), had a just cause, and was moved by the *right intention* was considered just. A *just cause* was conceived as constituting a grave violation of a right that the allegedly offending prince was openly reluctant to redress or resolve peacefully.[6] But, as there was no impartial and authoritative body to pass on the merits of rival claims, each adversary was left the sole arbiter of the justness of his cause together with the abuse and consequent negation of the desired differentiation

4 See, e.g. J. Stone, *Legal Controls of International Conflict*, 2nd rev. ed., 1959, pp. xxxi–xxxii; R.W. Tucker, "The Interpretation of War Under Present International Law", 4 *ILQ*, 1951, p. 18; Ch. de Visscher, "Les lois de la guerre et la théorie de la nécessité", 24 *RGDIP*, 1917, p. 79; Q. Wright, *supra* n. 1, p. 254.

5 See, e.g. M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, 1961, p. 121; Ch. Rousseau, *Le droit des conflits armés*, 1983, p. 526; Ch. de Visscher, *supra* n. 2, p. 334; Q. Wright, *A Study of War*, Vol. 2, 1942, pp. 863–5.

6 See J. Eppstein, *The Catholic Tradition of the Law of Nations*, 1935, pp. 93, 122; H. Wehberg, "L'interdiction du recours à la force. Le principe et les problèmes qui se posent" 78 *RCADI*, 1951-I, p. 13. Concerning the contribution of Eastern Christian writers to the study of war, L.J. Swift maintains that "eastern writers were preoccupied with peace within the individual soul and peace within the Christian community...the whole problem of public and private responsibility [relating to war and violence] and the moral limits surrounding the *ius belli* and the *ius in bello* were never serious topics of interest in [their] minds", whereas in the West "the lines separating imperial and ecclesial responsibility were...more clearly drawn...[and] the rules that should govern Christian behavior in the public arena were spelled out more concretely...[and] the western fathers made a unique contribution to subsequent speculation on war during the Middle Ages and in later times". – *The Early Fathers on War and Military Service*, 1983, pp. 95–6. See also ibid. pp. 110, 128–38 re the incipience of the Augustinian concept of just war.

between just and unjust wars that such auto-justification would bring.[7] Though the doctrine of the *just cause* had no legal force, it stood for its moral and political worth, and is credited to have exerted a great moral influence on the early days of what was called the European Public Law.[8]

Concrete positive law steps in the regulation of the use of force in interstate relations were undertaken by the Hague Peace Conferences of 1899 and 1907; these resulted in a total of thirteen Conventions and three signed Declarations.[9] Apart from the Convention for the Pacific Settlement of International Disputes,[10] and the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts,[11] the Conventions and Declarations concerned themselves with the laws and incidents of war. It would be easy to succumb to cynicism about the Conferences which, though ostensibly referred to as Peace Conferences, were predominantly fruitful in seeking to regulate not the liberty of States to resort to force in their relations – the *jus ad bellum* – but their conduct in the event of armed hostilities – the *jus in bello*. J. B. Scott, who seemed to have realized this anomaly, confronted the critics of the Conferences with the simple statement that "we do not live in an ideal world": a conclusive argument for intractable international relations.[12]

Still, as the Convention for the Pacific Settlement of International Disputes offered an alternative way to forcible settlement of issues, it was a definite though modest advance in the direction of regulating the unilateral use of force by States in their relations. This can be noticed in Art. 1 of the Convention where the contracting parties undertook to use their best efforts to ensure the pacific settlement of international disputes in order to prevent as far as possible the recourse to force. Even if couched in escape provisions, such a contractual undertaking "to use their best efforts" would appear to have been as important a moral and political commitment as it was a legal obligation to attempt in good faith the

7 See H. Wehberg, *supra* n. 6, p. 16. Cf. T.J. Farer, "Law and War", in *The Future of the International Legal Order*, Vol. 3, C.E. Black and R.A. Falk eds., 1971, pp. 22–4.

8 See H. Wehberg, *supra* n. 6, pp. 21, 26; A. Randelzhofer, "Use of Force", 4 *EPIL*, 1982, pp. 265–6. The term European Public Law was not defined but is said to have been employed on various occasions in the 19th century and often invoked during the First World War. – P. Fauchille, *supra* n. 1, p. 36.

9 See *The Hague Conventions and Declarations of 1899 and 1907*, J.B. Scott ed., 1915, pp. 26, 220–28.

10 Ibid., p. 41; 2 *AJIL*, 1908, Suppl., p. 43 *et seq*.

11 *Op. cit.*, *supra* n. 9, p. 89; 2 *AJIL*, 1908, Suppl., p. 81.

12 J.B. Scott, *The Hague Peace Conferences of 1899 and 1907*, Vol. 1, 1909, p. 523. See also J.H. Choate, *The Two Hague Conferences*, 1913, pp. 19–21.

peaceful resolution of disputes. Some, however, consider the Article to be devoid of a binding legal obligation.[13]

The Convention of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts was narrower in its objective and more concrete in its provisions. Art. 1 of the Convention put an obligation on the contracting powers

> not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals...[unless] the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

The prohibition in the Article related to the use of armed force, a term which comprehended both war and other forcible measures. A claimant State that found itself in the presence of a debtor State which failed to fulfil the peaceful process prescribed in the Convention would have had no legal obstacles in attempting a forcible recovery of the debt. Thus, by making the resort to armed force for the recovery of contract debts conditional on the prior failure of the peaceful process, the Convention not only sought to obviate any forcible encounter between States as regards the matters it covered, but also sought to push back the temporal threshold of the liberty of States to use force at their discretion.[14]

Similarly, the standardized treaties between the USA and a number of other countries signed at Washington, D.C., in 1913/1914,[15] pushed further back, as between the signatories and as regards disputes which the terms of the treaties required to be investigated, this temporal threshold of States' discretion of resorting to force.[16] The treaties, generally known as the Bryan Treaties, possessed four common characteristics: an object wider than the recovery of contract debts; a standing machinery for investigating and reporting on disputes; a conditional suspension of the signatories' liberty of resorting to force; and a five-year term of validity, which, upon expiry and notice for termination, continued in force for a period of twelve months after the notice. For instance, the treaty of 18

13 E.g. J.M. Mössner, "Hague Peace Conferences of 1899 and 1907", 3 *EPIL*, 1982, p. 207. But Art. 2 of the Convention seemed to require a good faith attempt of the peaceful process. See H. Wehberg, "La contribution des Conférences de la Paix de la Haye au progrès du droit international", 37 *RCADI*, 1931-III, pp. 591-3 for a general appreciation of the Convention of the Pacific Settlement of International Disputes after the Conference of 1899.

14 Cf. J.H. Choate, *supra* n. 12, pp. 59-60.

15 See the compilation by J.B. Scott, *Treaties for the Advancement of Peace*, 1920.

16 See H.J. Schlochauer, "Bryan Treaties (1913/1914)", 1 *EPIL*, 1981, p. 40.

December 1913 between the Netherlands and the USA,[17] reportedly considered by Bryan to be representative of the group of treaties,[18] provided in Art. I that the

> parties agree that all disputes between them of every nature whatsoever, to the settlement of which previous arbitration treaties or agreements do not apply in their terms or are not applied in fact, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a Permanent International Commission...and they agree not to declare war or begin hostilities during such investigation and before the report is submitted.

The signatory States' discretionary right of resorting to force was hence suspended until after the permanent international commission set up by them had submitted its report.[19] The commission's report had to be completed within one year after the date of the official opening of the investigation, unless the time-limit was either shortened or extended by the agreement of the signatories.[20]

The resort to force was thus far subjected to the observance of certain prior conditions whose violation made the force so used technically illegal but did not reflect on its inherent illegality. This technical illegality might well have furnished a good ground for claiming reparation if the parties opted for peaceful settlement *ex post facto*, or might have been used as a pretext for declaring war. It might also have activated in other countries hostile public opinion with all its unpredictable potentials. But it amounted to no more than a breach of procedure. As clearly indicated in Art. III of the treaty with the Netherlands,[21]

> [t]he High Contracting Parties reserve the right to act independently on the subject matter of the dispute after the report of the Commission shall have been submitted.

The parties therefore retained their liberty of action, whatever the merits or justice of the commission's report.

International Law that accorded recognition to the outcome of any kind of use of force failed to differentiate between resort to force illegal *per se*, as in aggressive war, and one that was not; such law to all intents and purposes was neutral in regard to the use of force, which, where

17 See in J.B. Scott's complilation, *supra* n. 15, pp. 118–21.

18 "Secretary Bryan's Peace Plan"(Editorial Comment), 8 *AJIL*, 1914, p. 567.

19 See G.A. Finch, "The Bryan Peace Treaties", 10 *AJIL*, 1916, p. 882. This kind of moratorium is noticeable in Art. 12 of the Covenant of the League of Nations. Cf. 2 Oppenheim, p. 16.

20 Art. III of the treaty.

21 *Supra* n. 17.

successful, was assigned the function of the ultimate arbiter of international issues.[22]

2.2 Under the Covenant of the League of Nations

With the Covenant of the League of Nations,[23] the monolithic legal façade of the international use of force was cracked.[24] The League of Nations, which was the first successful attempt at an organized world body albeit of a rudimentary nature, provided in Art. 10 of its Covenant thus:

> The Members of the League undertake to respect and preserve as against external aggession 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 shall be fulfilled.

The terms of this Article, which apparently sought to have the *status quo* respected and preserved, made aggression, yet undefined but qualified as "external", unlawful *per se*. There thus emerged the legal possibility[25] of classifying the resort to force against the protected *status quo* as coming or not under the category of the illegalized aggression.[26]

22 As G. Scelle, for instance, observes, "la force crée le Droit: la guerre est acte de juridiction, de législation et d'execution. Le vainqueur, qu'il procède par voie de défense ou d'attaque, impose un traité de paix ou, purement et simplement, une debellatio...d'imposer une loi au vaincu dans ses rapports ultérieurs avec lui-même *et avec les tiers*...". – "Quelques réflexions sur l'abolition de la compétence de guerre", 58 *RGDIP*, 1954, p. 6.

Art. 227 of the Treaty of Versailles, which arraigned "William II of Hohenzollern, formerly German Emperor, for the supreme offence against international morality and the sanctity of treaties", appears to be valuable for the precedent it set and the notice it served on prospective war-bent violators of international undertakings. But as its terms were general and ambiguous and its occasion special, it would not appear to have constituted a good source for differentiating between the legal and illegal types of force used on the international plane. – See *Doucments pour servir à l'histoire du droit des gens*, Tome IV, K. Strupp, ed., 1923, p. 140 *et seq.* for the Treaty of Versailles.

23 See *International Legislation*, Vol. 1, M.O. Hudson ed., 1931, p. 1.

24 See E. Kaufmann, "Règles générales du droit de la paix", 54 *RCADI*, 1935-IV, pp. 596–8.

25 See G. Scelle, *Manuel de droit international public*, 1948, p. 852 where the author explains that Art. 10 "changea le Droit. Il avait une double portée, il prohibait l'agression dans son but et dans ses moyens. D'une part, l'agression, *en soi*, est interdite; d'autre part, la *nouvelle procédure* de guerre doit la rendre impossible, parce qu'elle exige, avant de recourir à la force, l'épuisement des recours pacifiques." Cf. I. Brownlie, *International Law and the Use of Force by States*, 1963, pp. 57, 66 re the presumption against the legality of war.

26 See Q. Wright, "The Concept of Aggression in International Law", 29 *AJIL*, 1935, p. 375. The author says that "[t]here can not be an aggressor in the legal sense unless there is an antecendent obligation not to resort to force". And Art. 1(c) of the Harvard Draft Convention on Rights and Duties of States in Case of Aggression defines aggression as "a resort to armed force by a State when such resort has been duly determined, by a means which that State is bound to accept, to constitute a violation of an

The provisions of Articles 12(1), 13(1) and 15(1) of the Covenant obligated Members to submit to arbitration, judicial settlement or inquiry by the Council any dispute between them that was likely to lead to a rupture. War waged against a Member in contravention of the Covenant was deemed to be "an act of war against all other Members of the League".[27] But the licence of resorting to war was preserved so long as three months were permitted to elapse after the arbitral award, judicial decision or report of the Council,[28] and so long, further, as the war was not waged against a Member that complied with the award, decision or recommendation of the Council.[29] And where there was a non-compliance with a judicial decision, an arbitral award or a unanimous Council recommendation,[30] or where the Council, exclusive of the votes of the parties to a dispute, failed to come up with a unanimous recommendation,[31] the Members reserved "the right to take such action as they...consider[ed] necessary for the maintenance of right and justice".[32] Thus were "gaps" incorporated in the Covenant.

Whether the procedures provided for in Articles 12, 13, and 15 applied also to measures of force other than acts of war was one of the questions posed by the League's Council to a special commisison of jurists it had appointed after Italy's bombardment and occupation of Corfu in 1923.[33] The commission's reply was framed in the following terms:

> Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and of the nature of the

obligation". – 33 *AJIL*, 1939, Suppl. Sec., p. 847. Cf. V.H. Rutgers, "La mise en harmonie du Pacte de la Société des Nations avec le Pacte de Paris", 38 *RCADI*, 1931-IV, pp. 30, 79; G. Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed., 1976, p. 158 re the distinction between just and unjust wars on the one hand and legal and illegal wars on the other.

27 Art. 16 of the Covenant.

28 Ibid., Art. 12(1).

29 Ibid., Art. 13(4).

30 Ibid., Art. 15(6). A recommendation by the Assembly which was concurred in by the Council Members, exclusive of the votes of the parties to the dispute, had the same force as a unanimous Council recommendation. – Ibid., Art. 15(10).

31 The authority of the Council to make recommedations in such cases was also affected by the upholding of a plea of domestic jurisdiction. – See G. Scelle, *supra* n. 25, p. 855; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *RCADI*, 1952-II, pp. 470–1.

32 Art. 15(7) of the Covenant.

33 See W.R. Wirantaprawira, "Corfu Affair (1923)", 3 *EPIL*, 1982, pp. 130–2 re the background of the incident.

measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.[34]

The commission's report was adopted by the Council; Sweden and Uruguay, however, expressed reservations about the compatibility of such use of force with the Covenant undertakings for peaceful settlement of disputes.[35] Eventually, a number of other Members, too, registered their similar doubts, and the Council declared the commission's opinion not to be the final word on the matter.[36]

It would then appear that not only war but other measures of coercion as well, which had no legal justification and were directed against the territorial integrity and existing political independence of the Members, were taken by some States to have been proscribed under Art. 10. Aggression did not mean only illegal war.[37] Moreover, Art. 10 had also classified as legally impermissible the threat or danger of aggression. Consequently, the neutrality of the law, which States had traditionally enjoyed when resorting to force, was in some measure denied to the Members of the League.[38] And despite its "gaps",[39] the spirit of the Covenant notably appeared to be against the resort to unjustified war or other measures of force.

Elaboration and implementation of the Covenant provisions on resort to force were undertaken by certain instruments. The abortive Treaty of Mutual Assistance,[40] drafted under the auspices of the League, had in view the reduction or limitation of armaments and the application of Articles 10 and 16 of the Covenant. Art. 1 of the draft treaty made aggressive war an international crime; and Art. 10 sought to burden the aggressor State, to the extent of its financial limits, with repairing the

[34] *LNOJ*, 1924, p. 524. Cf. J. Ray, *Commentaire du Pacte de la Société des Nations*, 1930, pp. 357–8, and for the distinction between aggression and war, pp. 362–4; M. Gonsiorowski, "The Legal Meaning of the Pact for the Renunciation of War", 30 *APSR*, 1936, p. 669.

[35] *LNOJ*, 1924, p. 526; J. Ray, *supra* n. 34, p. 359. See also J.L. Brierly, *The Law of Nations*, 6th ed., 1963, pp. 411–2.

[36] See *LNOJ*, Spec. Suppl., No. 44, 1926, pp. 156–7; E. Kaufmann, *supra* n. 24, pp. 582–3; C.H.M. Waldock, *supra* n. 31, pp. 475–6.

[37] See *LNOJ*, Spec. Suppl., No. 112, 1933 (Report adopted by the Assembly on 24 February 1933 – the Sino-Japanese Dispute), pp. 65, 72–3; B. Broms, *The Definition of Aggression in the United Nations*, 1968, p. 12; J. Ray, *supra* n. 34, pp. 362–3.

[38] Cf. Art. 16 of the Covenant.

[39] See T.P. Conwell-Evans, *The League Council in Action*, 1929, pp. 229–40; C. Parry, "League of Nations", 5 *EPIL*, 1983, p. 193.

[40] See *LNOJ*, Spec. Suppl., No. 16, 1923, p. 203; J. Ray, *supra* n. 34, pp. 304–5.

damage to property that it caused and indemnifying the cost of the military operation that it necessitated.

Similarly, the abortive Protocol on the Pacific Settlement of International Disputes – The Geneva Protocol of 1924[41] – which in one of its preambular paragraphs asserted war of aggression to be an international crime, aimed to make the signatory States undertake in Art. 2 "in no case to resort to war" except when resisting aggression or when authorized by the League. The Protocol furhter sought to make an aggressor of any State that resorted to war in violaton of its undertakings under that instrument or the Covenant.[42] And unless it was otherwise declared by the unanimous decision of the Council, Art. 10 established a presumption of aggression against any State which refused to submit to the peaceful process of the Covenant amplified by the Protocol, or to the provisional measures enjoined by the Council. This presumption of aggression was an innovative approach,[43] which at least demonstrated the hostile climate of opinion regarding the traditional liberty of States to resort to force.

Though itself defunct, the Geneva Protocol seemed to have been a source of inspiration for the Convention on Conciliation and Arbitration between Estonia, Finland, Latvia and Poland signed at Helsingfors on 17 January 1925.[44] The Protocol might also have influenced the drafting of the Locarno treaties of 16 October 1925.[45]

The failure of general mutual assistance schemes to gain force of law gave impetus to, and was partially rectified by, regional guarantee treaty arrangements. The Locarno Treaties of 16 October 1925 belong to this category.[46] In Art. 1 of the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, the parties guaranteed "the maintenance of the territorial *status quo*" between Germany

41 See *op. cit*, M.O. Hudson ed., *supra* n. 23, Vol. 2, p. 1378; F. von der Heydte, "Geneva Protocol for the Pacific Settlement of International Disputes (1924)", 1 *EPIL*, 1981, pp. 65–6.

42 Art. 10 of the Protocol.

43 The UN Definition of Aggression annexed to GA resol. 3314 (XXIX), 14 Dec. 1974, has adopted a presumption of aggression in case of the first use of armed force in contravention of the Charter. See, J. Zourek, "Enfin une définition de l'agression", *AFDI*, 1974, pp. 25–6.

44 *LNTS*, Vol. 38, p. 358, see especially Arts. 1 and 25.

45 See *op. cit.*, M.O. Hudson ed., *supra* n. 23, Vol. 2, p. 1379.

46 *LNTS*, Vol. 54, p. 289. Arbitration agreements were concluded at the same time between Germany and Belgium; Germany and France; Germany and Poland; Germany and Czechoslovakia; and treaties of mutual guarantee were concluded between France and Poland; and between France and Czechoslovakia. – Ibid., p. 303 *et seq*. Cf. C.G. Fenwick, "The Legal Significance of the Locarno Agreements", 20 *AJIL*, 1926, p. 110; W. Morvay, "Locarno Treaties (1925)", 7 *EPIL*, 1984, pp. 330–1.

and Belgium, and between Germany and France, and the observance of the stipulations of Articles 42 and 43[47] of the Treaty of Versailles. Germany and Belgium, and Germany and France further undertook specifically not to attack or invade each other or resort to war against each other. But measures of "legitimate defence" including resistance to a "flagrant" violation of Articles 42 and 43 of the Treaty of Versailles, and measures under the authority of the League were excepted from the undertaking.[48]

Nonetheless, the unilateral resort to force in execution of the obligation to assist a victim of a breach of the treaty undertaking was predicated on whether or not the alleged violation of the treaty undertaking was flagrant. In cases considered not flagrant, measures of assistance had to await the League Council's finding and notification of a violation of the treaty, whereas such prior finding and notification was not postulated for flagrant cases. Even in the latter instances, the Council was authorized to issue its findings and recommendations, which, if concurred in by all of its members other than those engaged in the conflict, became binding on the concerned parties.[49] It is noteworthy that in the development of the law regulating the use of force in international relations, the ground that served to justify the unilateral use of force was made subject to the Council's reviewing and recommendatory authority. Within the limits of the treaty subject-matter, the parties to the conflict did not possess the final word. This authority of the Council would seem to anticipate the Security Council's authority under Art. 51 of the UN Charter.

Further, inasmuch as the treaty recognized the exercise of self-defence not only in case of attack or invasion or resort to war, but also in case of flagrant breach of Articles 42 and 43 of the Treaty of Versailles, anticipatory measures of self-defence in a situation that posed an imminent military threat were also included within the ambit of the treaty provisions.

Apart from the foregoing abortive treaties and those others which entered into legal force, the League Assembly's unanimous resolution of

[47] Art. 42 provides that "Germany is forbidden to maintain or construct any fortifications either on the left bank of the Rhine or on the right bank to the west of a line drawn 50 kilometers to the East of the Rhine." And Art. 43 provides that "[i]n the area defined above the maintenance and the assembly of armed forces, either permanently or temporarily, and military manoeuvres of any kind, as well as the upkeep of all permanent works for mobilization, are in the same way forbidden." – *Op. cit.*, K. Strupp ed., *supra* n. 22, pp. 188–9.

[48] Art. 2 of the Locarno Treaty.

[49] Ibid., Art. 4.

25 September 1927[50] – Declaration Concerning Wars of Aggression – should be mentioned for the moral authority it bore and the general attitude towards wars of aggression it manifested.[51] After reciting the conviction of its adherents

> that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime;

the resolution declared

(1) That all wars of aggression are, and shall always be prohibited;

(2) That every pacific means must be employed to settle disputes, of every description, which may arise between States.

But, hortatory as it was, it neither filled the "gaps" of the Covenant nor tangibly strengthened the peace enforcement machinery of the League.[52] Still, it could be viewed as one of the stepping-stones in the path of the legal prohibition of illegal wars,[53] which was effected by the Pact of Paris.

2.3 Under the Pact of Paris

The General Treaty for Renunciation of War as an Instrument of National Policy, variously known as the Pact of Paris, the Kellogg-Briand Pact, pacte Briand-Kellogg, the Kellogg Pact, was signed by fifteen States at Paris on 27 August 1928, and has continued in force since 24 July 1929.[54] Of the original signatories, nine States[55] were specified in the first preambular paragraph as being "deeply sensible of their solemn duty to promote the welfare of mankind". After having declared "that the time has come when a frank renunciation of war as an instrument of national

50 *LNOJ*, Spec. Suppl., No. 54, 1927, pp.155–6; see also p. 22 for the Resolutions and Recommendations adopted by the Assembly during its Eighth Ordinary Session (September 5th to 27th, 1927).

51 Cf. D.P. Myers, *Origin and Conclusion of the Paris Pact*, *World Peace Foundation Pamphlets*, Vol. XII, No. 2, 1929, pp. 26–7; the Judgment of the International Military Tribunal (Nuremberg), 41 *AJIL*, 1947, pp. 219–20.

52 In this regard, the delegate of Poland stated at the Assembly: "Tout en étant d'accord pour estimer que le projet de résolution ne constitue pas un instrument juridique proprement dit, augmentant de façon concrète la sécurié et se suffisant à lui-même, la troisième Commission a été unanime à en apprécier la grande portée morale et éducative." – *LNOJ*, Spec. Suppl., No. 54, 1927, p. 155.

53 See 2 Oppenheim, p. 180.

54 *LNTS*, Vol. 94, p. 57. (Ratifications by all signatories are reported to have been deposited at Washington on 25 July. But see D.P. Myers, *supra* n. 51, pp. 77–80 for the date of 24 July.) Re the permanency of the Pact, see, e.g. 2 Oppenheim, pp. 193–4; H. Wehberg, *supra* n. 6, pp. 44, 51.

55 Germany, USA., Belgium, France, Great Britain, Italy, Japan, Poland, Czechoslovakia. – *LNTS*, Vol. 94, p. 59.

policy should be made", and that violators of the treaty should be denied its benefits, the signatories undertook the obligations set out in Articles I and II of the Pact. The Articles provide thus:

> Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Though condemned and renounced, the term war was not defined.[56] Acts of force not declared by any party to an armed conflict to constitute war, and hence to bring forth a state of war,[57] could have legally escaped from the provisions of Art. I. Nevertheless, the compatibility of such acts with the Pact was in certain instances made the subject of third-party determination.[58]

The Pact did not apply to non-signatories either in their *inter se* relations or in those with the signatories.[59] The signatories that violated their obligations under the Pact forfeited its protection and exposed themselves to a legally unhindered war. And defensive war was implicitly acknowledged. The Pact did not therefore abolish the institution of war, but circumscribed its permitted applicability.[60] Opinion varied, however, regarding the right of resorting to war to compel the execution of an

56 Cf. H. Wehberg, *supra* n. 6, pp. 56–7.

57 Cf. Q. Wright, "When Does War Exist?", 26 *AJIL*, 1932, p. 363; M. Gonsiorowski, *supra*, n. 34, p. 673; F. Grob, *The Relativity of War and Peace*, 1949, pp. 177, 181–2 where the impossibility of defining "war in the legal sense" or "state of war" is discussed.

58 See the Report of the League Assembly's Far East Advisory Committee adopted by the Assembly on 6 October 1937, finding the military action by Japan against China to be, *inter alia*, in contravention of Japan's obligation under the Pact – *LNOJ*, Spec. Suppl. No. 177, 1937, pp. 40, 42. See, further, *LNOJ*, No. 11, 1935, pp. 1223–26 re the Council's Committee Report and the finding by the Council of Italy's engagement in war against Ethiopia as contrary to Art. 12 of the Covenant (the Pact was also specifically referred to; and it was also stated that where Art. 16 of the Covenant was invoked by a party, the applicability of that Article was not dependent on the formal declaration of war – p. 1225); and ibid., Nos. 11–12 (2nd Part), 1939, pp. 539–40 re USSR's invasion of Finland, which, *inter alia*, was found to be incompatible with the Pact. Cf. 2 Oppenheim, p. 186; J. Stone, *supra* n. 4, p. 314; Q. Wright *supra*, n. 57, p. 367; and M. Gonsiorowski's critical views of third-party determination of a state of war, *supra* n. 34, pp. 673–5, n. 32.

59 See P. Guggenheim, *supra* n. 3, p. 299. But see *infra* p. 35.

60 See M. Gonsiorowski, *supra* n. 34, p. 668; 2 Oppenheim, pp.182–3. But see Q. Wright, "The Meaning of the Pact of Paris", 27 *AJIL*, 1933, pp. 51–2. Cf. G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 2, 1968, pp. 45–6; *ILA, 38th Report* (Budapest), 1934, pp. 15, 17, for quoted statements by Stimson and Briand declaring the illegality of war. The statements appear to give the impression that all war was made illegal.

arbitral award or a judicial decision; and those who denied the right appeared to assume the proper functioning of the League of Nations.[61]

In other respects, the Pact did not formally provide for sanctions against its violation. And though the right of self-defence was left intact,[62] the question of the prohibition of measures of force short of war was controverted.[63] The latter, which constituted acts of reprisals such as armed intervention or blockades,[64] were generally considered "peaceful" means so long as they were allowed to retain that particular designation in a "status of peace";[65] and the rules governing the conditions of their employment were likewise recognized as settled, even if State practice might not have appeared consistently faithful to them.[66] The implied renunciation, then, of measures of force short of war in an instrument that had not established a substitute enforcement machinery would not seem to have been seriously entertained. Also, if such measures were as formally condemned and renounced as was unlawful war, any resort to them might probably have come to be considered an international crime, as unlawful war came to be.[67]

61 See, e.g. M. Gonsiorowski, *supra* n. 34, pp. 671–2.

62 See 22 *AJIL*, 1928, OD, pp. 109–10 for USA's identic Note of 23 June 1928 relating to the Pact. The Note stated thus: "There 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."

63 See *supra* n. 36; further, e.g. M. Gonsiorowski, *supra* n. 34, pp. 676–7; 2 Oppenheim, pp. 184–5; H. Wehberg, *supra* n. 6, pp. 49–50.

64 See P. Guggenheim, *supra* n. 3, pp. 86–8; ibid. pp. 92–3, regarding the legal difference between war and reprisals; 2 Oppenheim, pp. 132–3.

65 See M. Gonsiorowski, *supra* n. 34, p. 676.

66 The rules of customary international law for regulating the valid exercise of reprisals have been stated in the arbitral award of 31 July 1928 between Portugal and Germany concerning the *Naulilaa* incident. The rules identified by the award are (1) an act alleged to justify a reprisal should have violated international law, (2) there should have been no alternative means for obtaining satisfaction, (3) the wronged party should have addressed to the party alleged to be at fault an unavailing demand for redress, and (4) the reprisal should be proportional to the injury occasioned by the sanctionable act. – *RIAA*, Vol. II, pp. 1019–28. See also P. Guggenheim, *supra* n. 3, pp. 84–86; Ch. Rousseau, *supra* n. 5, p. 13.

The *Naulilaa* case, on one authority, is deemed to represent "the most adequate analysis of reprisals which international judicial practice has as yet offered". – G. Schawrzenberger, "Report on Some Aspects of the Principle of Self-Defence in the Charter of the United Nations", *ILA, 48th Report*, 1958, p. 582. See also 2 Oppenheim, pp. 141–2; K.J. Partsch, "Reprisals", 9 *EPIL*, 1986, pp. 331–2. But see E. Colbert, *Retaliation in International Law*, 1948, p. 76 where it is stated that the view in the *Naulilaa* case, "although reflecting the opinions of international lawyers, has little to support it in the practice of states". Cf. P. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility", in *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma eds., 1987, pp. 214–5.

67 Measures of force short of war were not included in the category of crimes agaisnt peace. See Principle VI of Principles of International Law Recognized in the Charter of the Nürenberg Tribunal and in the Judgment of the Tribunal, *YILC*, 1950, Vol. II, p. 376.

But the ILA maintained otherwise in the Budapest Articles of Interpretation. It was argued that whereas the parties to the Pact had

> abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and [had] also renounced any recourse to armed force for the solution of international disputes or conflicts,[68]

any party "which threaten[ed] to resort to armed force...[was] guilty of a violation of the Pact".[69] This, however, would appear to constitute a *de lege ferenda* construction of the scope of the Pact.[70] The reference to "any recourse to armed force" would appear to be at variance with the term "war", which figures in the preamble as the sole controlling element.

Despite the fact that acts of force short of war avoided the stigma of war without avoiding the disruption to international peace and security which they entailed, their permissibility could be mainly ascribed to the absence of an effective law enforcement machinery. And in such circumstances, lawful reprisals sought to protect rights and chastise unlawful acts. Even though susceptible to abuse,[71] these unilateral acts and those of self-defence fulfilled the unavoidable self-help task in a world without a properly functioning central authority.

Whatever its shortcomings, the Pact of Paris served the International Military Tribunal at Nuremberg to found the criminality of wars of

68 See *ILA, 38th Report* (Budapest), 1934, p. 67.

69 Ibid. But not all the participants of the conference agreed with the conclusion, which was adopted by voting. – See ibid., pp. 49–52.

70 During the discussion of the subject, M.O. Hudson, e.g. said, "I suggest to you it is up to us to draw the legal consequences from the departures which are being made and which have been made in our time...Somehow we must find a law, we must build a law which is to be based, not on eighteenth century ideals, but on twentieth century necessities." – Ibid., p. 14. Equally elucidating, Å. Hammarskjold said, "To my mind, it has been abundantly clear from the outset that the central point in the engagement undertaken by the signatories of the Kellogg Pact is the undertaking not to solve or attempt to solve any international conflict or dispute otherwise than by pacific means. It is from this undertaking that the renunciation contained in the first paragraph flows as a natural consequence, although...in the public mind the so-called outlawry of war...is the central point of the Pact." – Ibid., pp. 25–6. And of those who had reservations, e.g. F.H. Aldrich stated, "I doubt the propriety of calling for a majority vote of our members upon a controverted legal question. This is not a judicial body capable of rendering decisions by way of construing doubtful terms of treaties." – Ibid., p. 42.

71 See E. Colbert, *supra* n. 66, pp. 102–3 about reprisals. Discussing the state of international law that regulated the resort to reprisals but did not adversely affect resort to war, H. Kelsen likens it "to a social order according to which petty thievery is punished while armed robbery goes free". – *General Theory of Law and State*, 1949, p. 340. The contrasted similes starkly show the reversed values of the law, and make appropriate the strictures intended by the remark. Nevertheless, since in terms of comparative frequency measures of force short of war would probably have been the ones resorted to the more, their regulation would appear preferable than no regulation at all. Cf. P.C. Jessup, *A Modern Law of Nations*, 1952, pp. 157–8.

aggression under international law. After inquiring whether a war illegal under the Pact was also a crime, the Tribunal concluded thus:

> All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.[72]

Further, the Pact of Paris is appraised in terms essentially similar to those used by H. Wehberg, who observes as follows:

> Le Pact Kellogg est assurément l'une des Conventions les plus importantes qui aient jamais été conclues. Les contemporains, et cela est assez naturel, n'ont pas pleinement pris conscience de ce fait.[73]

In addition to the Covenant, the Pact of Paris was instrumental in causing customary international law to adopt eventually a differentiating perspective towards war. J.L. Brierly, for instance, indicates in this respect that

> there can be no question that the general obligations contained in them, prohibiting recourse to war for the settlement of disputes and requiring disputes to be settled by pacific means, reflected and recorded a fundamental change in customary law in regard to the legality of war. These obligations had become part of general international law binding on states whether or not they were parties to the Covenant or the Pact.[74]

The Pact of Paris also occasioned attempts to formally illegalize the use of some other types of force. Those attempts were undertaken by the Committee on Security Questions, which was set up by the Political Commission of the League of Nations' Conference for the Reduction and Limitation of Armaments, and charged with the definition of aggression – an exercise championed by the USSR.[75] In introducing to the Conference the report of the Committee (Politis Report of 24 May 1933),[76]

72 Judgment and Sentences, October 1, 1946, 41 *AJIL*, 1947, p. 220.

73 *Supra* n. 6, p. 48.

74 *Supra* n. 35, p. 410. See *supra* p. 32 re non-signatories.

75 See B.B. Ferencz, *Defining International Aggression*, Vol. 1, 1975, pp. 29–34.

76 Ibid., p. 215 *et seq.* Art. 1 of Annex I prescribed that the State which was the first to commit any of the acts enumerated hereafter was the aggressor: "1) declaration of war upon another State; 2) invasion by its armed forces, with or without a declaration of war, of the territory of another State; 3) attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State; 4) naval blockade of the coasts or ports of another State; 5) provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection."

Politis remarked on what he took to be one of the causes that had thitherto hindered a definition. He said that

> until the Conference had set to work, all arguments in connection with the term "aggressor" had referred solely to the definite case of war, and that was another difficulty, since the term "war" itself was difficult to define.
>
> Since the Pact of Paris had come into force...it was no longer possible...to make a really practical distinction between what had previously been regarded as war and what modern men regarded as resort to force or the use of violence – ever since that time it had been seen that it was easier to arrive at a definition of the agressor, because one of the difficulties...had been jettisoned.[77]

However, as the definition of "the aggressor" did not become law, it is doubtful that the distinction between war and other types of use of force was taken, as apparently claimed, to have been abandoned. Nonetheless, the Politis Report was incorporated by reference in the Conventions for the Definition of Aggression signed at London on 3, 4, and 5 July 1933, by the USSR and a number of other States,[78] and the explanatory views of Politis would appear to have been reflected in the particular contractual practice of those States.

In the Western Hemisphere, the Anti-War Treaty on Non-Aggression and Conciliation (otherwise known as the Saavedra Lamas Treaty – after the Argentinian Minister of Foreign Relations and Worship) was signed on 10 October 1933.[79] However, inasmuch as six European States had adhered to it, the treaty was not exclusively inter-American.[80] Under Art. I, the parties

> declare that they condemn wars of aggression in their mutual relations or in those with other states,

and under Art. II,

> declare...territorial questions must not be settled by resort to violence and that they shall recognize no territorial arrangement not obtained through pacific means, nor the validity of an occupation or acquisition of territory brought about by armed force.

[77] Ibid., pp. 240–1.

[78] See, respectively, *LNTS*, Vol. 147, p. 67 – Convention for the Definition of Aggression between Afghanistan, Estonia, Latvia, Persia, Poland, Roumania, Union of Soviet Socialist Republics; ibid. Vol. 148, p. 211 – Convention for the Definition of Aggression between Roumania, Union of Soviet Socialist Republics, Czechoslovakia, Turkey, Yugoslavia; ibid., p. 79 – Convention for the Definition of Aggression between Lithuania and Union of Soviet Socialist Republics.

[79] *LNTS*, Vol. 163, p. 393.

[80] See *The Inter-American System*, F.V. Garcia-Amador ed., Vol. I, Part II, 1983, p. 204, n. 15.

The treaty was intended to supplement and strengthen the Pact of Paris.[81] It explicitly denied legal title to territory which was the fruit of violence, and thus formally embodied Stimson's doctrine of non-recognition.[82]

In the Act of Chapultepec of 3 March 1945, which was the result of the Inter-American Conference on War and Peace,[83] the Third Declaration stated that

> every attack on a state against the integrity or the inviolability of territory, or against the sovereignty or political independence of an American state...[and] invasion by armed forces of one state into the territory of another, trespassing boundaries established by treaty and marked in accordance therewith, shall constitute an act of aggression.

And as indicated in the Fifth and Sixth Declarations of Part I and the Recommendation of Part II, the Act envisaged the use of collective armed force as one of the means of preventing or repelling threats or acts of aggression both during the Second World War and after the restoration of peace. These provisions were not shackled by the term war, and admitted anticipatory defensive measures of force against the threat of aggression. Coming as it did in the immediate preparatory atmosphere of the United Nations Conference of International Organization at San Francisco, the Act of Chapultepec appeared to reflect the trend of discarding the term war.

The foregoing various efforts at regulating the international use of force came to be crystallized in Art. 2(4) of the United Nations Charter. The Article interdicts not only war but also the illegal unilateral threat and use of force by States in their relations. We shall deal with the principal elements and implied exceptions of the Article in the subsequent chapters.

81 See P.C. Jessup, "The Saavedra Lamas Anti-War Draft Treaty", 27 *AJIL*, 1933, p. 110.

82 See P.C. Jessup, "The Argentine Anti-War Pact", 28 *AJIL*, 1934, p. 540; H. Wehberg, *supra* n. 6, pp. 94–7; R. Langer, *Seizure of Territory*, 1947, pp. 58–61 re the Stimson doctrine.

83 39 *AJIL*, 1945, Suppl., p. 108. See R.B. Russell and J.E. Muther, *A History of the United Nations Charter*, 1958, pp. 564–66.

Chapter 3

The Attributes of Art. 2(4)

The threat or use of force prohibited in Art. 2(4) of the United Nations Charter is one of the fundamental principles that govern the Organization and its Members.[1] We shall consider in this chapter the main characteristics of the Article and the need to hold it serviceable for the exigencies of varying circumstances. We shall also consider in connection with the latter event the role that interpretation should have. To help set the Article in perspective, however, we shall begin with a brief discussion of its genesis at the UNCIO and of views relating to its position vis-à-vis the Charter's provisions on collective security.

3.1 The UNCIO

In the Dumbarton Oaks Proposals,[2] which constituted the framework of the United Nations Conference on International Organization in San Francisco in 1945, the prohibition was formulated in the following terms:

> 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.[3]

However, with the aim of reputedly securing to smaller States a "more specific guarantee that force could not be used by the more powerful states",[4] Australia submitted at the Conference an amendment which inserted the phrase "against the territorial integrity or political independ-

1 Introductory para. of Art. 2 of the Charter.

2 The Dumbarton Oaks Proposals did not constitute a formal agreement between China, UK, USA and USSR but "were officially only recommendations to their respective governments". – See R.B. Russell and J.E. Muther, *A History of the United Nations Charter, 1958*, p. 411.

3 6 *UNCIOD*, p. 556.

4 L.M. Goodrich and E. Hambro, *Charter of the United Nations*, 2nd rev. ed., 1949, p. 103.

ence of any member or State".[5] The amendment was accepted;[6] and after the wording of the draft received final touches at the hand of the Co-ordinating Committee, the text came to be the present Art. 2(4), which reads thus:

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

The two principal features of the debate during the drafting and adoption of the Article that need to be considered here are the scope of the prohibited force, and the scheme of the distribution of the international use of legal force between the United Nations and its Members.

3.1.1 The Type of Force Apparently Prohibited

As regards the scope of the prohibited force, reference may be made to the proposed amendments of Bolivia, Brazil, Ecuador, Iran, Norway and Panama. Whereas Norway's amendment related to "any use of force not approved by the Security Council",[7] and that of Panama related to "any use of force...except as authorized by this Charter",[8] these two amendemnts did not specify or otherwise distinguish – apart from the qualifying word "any" – the type of force they referred to. On the other hand, Ecuador's amendment related to the "repudiation...of the exercise of moral or physical force",[9] Bolivia's seemed to use the terms force and violence either interchangeably or differently,[10] and Brazil's related to intervention as well as to "the threat or use of force and from the threat or use of economic measures".[11] Iran's amendment related to prohibition of direct or indirect intervention in addition to that of threat or use of force.[12] These amendments, save those of Ecuador and Panama, seem to have gone before the drafting subcommittee I/1/A,[13] which apparently

5 *Op.cit. supra* n. 3, p. 557.
6 Ibid., p. 342.
7 Ibid., p. 564.
8 Ibid., p. 565, para. 7.
9 Ibid., p. 561.
10 Ibid., p. 558.
11 Ibid., pp. 558–9.
12 Ibid., p. 563.
13 Ibid., p. 666.

rejected them.[14] Brazil took up the question of its amendment during the discussion of the draft Article in Committee I/1, but again the amendment was not accepted.[15] The record states merely that the Belgian delegate

> recalled that the subcommittee had given the point about "economic measures" careful consideration and for good reasons decided against.[16]

And we are left with no further clarification as to what those reasons were.[17]

Though the foregoing proposed amendments[18] were not adopted, they are nonetheless indicative of the proposing delegations' attitude about the type and scope of force they desired to see prohibited. The force, however, that eventually was generally understood to be prohibited, and from which the exercise of self-defence was excepted, appears to be armed force. Considering the mode of force prevailing in 1945, it would seem normal for armed force to figure principally in the minds of delegations.

All the same, the Report of Rapporteur of Committee 1 to Commission I states that

> in view of the Norwegian amendment...the unilateral use of force or similar coercive measures is not authorized or admitted.[19]

And this creates the distinct impression that the notion of force was perhaps deliberately or unconsciously left open to accommodate more than armed force where that became necessary. There might not have been a crystallized general wish to exclude completely from the prohibition other modes of force or coercion.[20] In any event, this at least

14 Ibid., p. 720.

15 Ibid., p. 335.

16 Ibid., p. 334.

17 See, e.g. A. Cassese, *International Law in a Divided World*, 1986, p. 137; *infra* chapter 5, n. 170.

18 In the general discussion of Chapter II (Principles) in Committee I/1, the Rapporteur of the Committee had suggested at the meeting of 17 May 1945 "that there should be some addition to provide that any change in the *status quo* resulting from violence, force or undue pressure should not be recognized by the other members and should be considered incompatible with membership in the Organization". – *Op.cit. supra* n. 3, pp. 311–2.

19 Ibid., p. 459. The words "similar coercive measures" appeared first in the draft Report of Rapporteur of Committee 1 to Commission I, were carried through in Committee I/1, and adopted by Commission I when it approved the Committee's Report – Ibid., pp. 400 and 245. Cf. A. Jacewicz, "The Concept of Force in the United Nations Charter", 9 *PYIL*, 1977–1978, pp. 156–58.

20 The Rapporteur of subcommittee I/1/A, for instance, observed in his introductory general remarks that "[g]iven international conditions on the one hand, and the fluctuant nature of the evolving substance we have in Preamble, Purposes, and Principles, we cannot in our present situation seek to attain a

demonstrates the difficulty attaching to the *travaux préparatoires* when relied upon to ascertain the scope of the prohibited force. As E. Lauterpacht puts it, it appears true that "preparatory work is frequently incomplete, inaccurate, ambivalent and even intentionally vague".[21]

3.1.2 Lawful Use of Force on the International Plane: Allocation

As regards the distribution of the lawful use of force on the international plane between the Organization and its Members, the proposed amendments of Costa Rica, New Zealand and Norway brought certain lines of demarcation in relief. The Norwegian amendment intended to have the prohibition relate to "force not approved by the Security Council as a means of implementing the purposes of the Organization".[22] New Zealand wanted to insert a new paragraph which would make

> [a]ll members of the Organisation undertake collectively to resist every act of aggression against any member.[23]

These amendments and that of Costa Rica, which omitted the last part of the draft Article "in order that the principle of abstention from the use of force may be absolute",[24] were rejected. Nonetheless, it emerged that the Article's prohibition was not absolute. In particular, the drafting subcommittee I/1/A stated in connection with the Norwegian amendment that

> [t]he sense of approval was considered ambiguous, because it might mean 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.[25]

The subcommittee further stated, *inter alia,* in connection with its rejection of New Zealand's amendment that

complete amplification, clarification, and precision which may lead to undue rigidity. General terms do sometimes mean more than other terms, which, though tending to be more ample and precise, lead in fact by further enumeration of things to leave unmentioned elements of the substance that, on account of their omission, seem to be waived away at the very time when they ought to be included". – *Op. cit. supra* n. 3, p. 700. Cf. J.A. Delanis, "'Force" Under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion', 12 *VJTL*, 1979, p. 114 where the author indicates that the framers of the Charter appear to have "contemplated further interpretation of this term [force]".

21 E. Lauterpacht, "The Development of the Law of International Organization by Decisions of International Tribunals", 152 *RCADI*, 1976-IV, p. 440.

22 *Op. cit. supra* n. 3, p. 564.

23 Ibid.

24 Ibid., p. 560.

25 Ibid., p. 721.

> [t]he amendment limits itself to the collective resistance of every act of *aggression*, aggression not being defined.[26]

These statements assured (1) the right of self-defence and (2) the absence of an obligation to assist which devolved on Members immediately upon the occurrence of aggression. Such obligation was to be established and made executory in particular cases via the authority of the Organization.

Further elucidation of the proposed distribution of the lawful use of force between the Organization and its Members was made during the discussion in Committee I/1 of the draft paragraph 4 of the Principles in which Australia's amendment was incorporated. It was stressed that unilateral use of force was not permitted save in self-defence or as authorized by the Security Council. The views of the Brazilian and Norwegian delegates, for instance, were expressed along this line.[27] And in the Report of the Rapporteur of Committee I/1 to Commission I, it was clearly stated that

> [t]he use of force, therefore, remains legitimate only to back up the decisions of the Organization...in the way that the Organization itself ordains.[28]

When New Zealand took up its amendment in the Committee,[29] more was stated about the envisaged distribution of the legal use of force on the international plane. The Australian delegate remarked that the draft, as submitted by the subcommittee,

> was consistent with the Dumbarton Oaks plan for it placed the obligation for collective action on the Organization through the Security Council rather than directly on the members and thus carried out the spirit intended at Dumbarton Oaks.[30]

And the delegate of the United Kingdom indicated that the

> question was whether the amendment was intended to be an important modification of the Charter or not...If it was intended to be important...it altered the whole basis of the Organization [which was] the identification by the Security Council of threats to the peace, followed by action by the member states in accordance with the Security Council's plans and requests.[31]

26 Ibid.

27 Ibid., p. 334.

28 Ibid., p. 459. This is apart from the right of self-defence and Arts. 53(1) and 107 relating to enemy States.

29 The proposed amendment received at the Committee 26 votes in favour and 18 against but failed to be carried because of the lack of the required two-thirds majority. – Ibid., p. 346.

30 Ibid., p. 345.

31 Ibid., p. 356.

These statements and the votes against the proposed amendment indicate that "the minimum obligation which would guarantee the success of the Organization in the maintenance of peace and security" – an argument advanced by New Zealand's delegate[32] – was understood and taken to be already embraced in the collective security plan of the Organization. The surrender of unilateral initiative – singly or in groups – that was impedimental for the success of the plan was accordingly agreed to.[33]

The foregoing brief genesis of Art. 2(4) shows that the new pattern of allocation of the lawful use of force in international relations was successfully finalized at San Francisco because the framers of the Charter were willing to undertake a double burden: They consented not only to give up rights but also to assume obligations. And in light of the realities of international relations, this double burden could not be plausibly viewed as arising altruistically. Obligations were obviously consented to in anticipation of benefit from an organized and lawfully functioning system. It would hence be scarcely possible not to acknowledge the governing role of the *quid pro quo* factor.

3.1.2.1 Unilateral Abstention and Collective Security: Contingent Relationship

Some contend that the *travaux préparatoires* do not warrant the belief that there exists a contingent relationship between the unilateral abstention from the use of force and the collective security scheme of the Charter; they also deny the dependence of the validty of Art. 2(4) on the functioning of the collective security system.[34] The ICJ, too, has stated in the *Nicaragua v. USA* case that

> [t]he principle of non-use of force...may be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter.[35]

[32] Ibid., p. 343.

[33] See J. Stone, *Aggression and World Order*, 1958, p. 96; but see the criticism of this view in H. Kelsen, *Principles of Public International Law*, 2nd rev. ed., by R.W. Tucker, 1966, p. 85, n. 76. Cf. I.L. Claude Jr., *Swords into Plowshares*, 4th ed., 1984, p. 253 where the effectiveness of an international authority is predicated on its mastery "of all situations involving the use of coercive instruments".

[34] E.g. N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, 1985, p. 9; A. Randelzhofer, "Use of Force", 4 *EPIL*, 1982, p. 274. But see J. Combacau, "The Exception of Self-Defence in U.N. Practice", in *The Current Legal Regulation of the Use of Force*, A. Cassese ed., 1986, p. 30 re the logic behind the Charter's policy on the use of force.

[35] *Military and Paramilitary Activities in and against Nicaragua*, Merits, *ICJ Reports* 1986, para. 188. See also *infra* chapter 5, pp. 124–6 for further discussion of the case.

However, as could be perceived from the genesis of Art. 2(4) outlined above, the *travaux préparatoires* do not militate against the conditional relationship between the prohibition and the designed scheme of collective security. The absence of an express postulate covering the *quid pro quo* factor should be no serious argument for denying the pervasively expectative, and hence conditional, nature of the atmosphere that animated the whole exercise of setting up the Organization.

Further, as the norm of Art. 2(4) is taken to have attained the status of *jus cogens*,[36] it would appear that the norm could not be satisfactorily portrayed as existing or capable of existing without the active support of other normative infrastructures. This would be so even if the norm did not possess that status.[37] A *jus cognes* norm would essentially be the product of a community's hierarchically graded values that are operative at any particular time.[38] The norm's functional validity would depend on its functional inseparability from public policy, as in municipal law,[39] or from what might be considered as public order of the international community (ordre public international).[40] Such functional inseparability would imply the effective functioning of the supporting infrastructures, for otherwise the *jus cogens* norm would cease to command the respect that is inherently necessary for the continued maintenance of its privileged status.[41] The lack of supportive and effectively functioning norms would, as it were, deprive the *jus cogens* norm of its sustenance and cause its loss of grade. The *jus cogens* quality of a norm may be transcribed as an attribute endowed on a deserving norm so long as the norm commands respect and

36 See *Nicaragua v. USA*, *supra* n. 35, para. 190.

37 Jennings, for instance, has indicated in his Dissenting Opinion in the *Nicaragua v. USA* case that "[t]he original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VII, has never come into effect. Therefore an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawlful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent". – Ibid., pp. 543–4. See also *Repertory*, Suppl. No. 2, Vol. 1, 1964, p. 71, para. 4 where it is stated that "Article 24 of the Charter explicitly established a connexion between the injunction in paragraph 4 of Article 2, and the functions and powers of the Security Council".

38 Cf. D. Nguyen Quoc, P. Daillier, A. Pellet, *Droit international public*, 3e éd., 1987, pp. 190–1; R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, 1986, p. 155.

39 See J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, 1974, p. 8.

40 Cf. ibid., pp. 10, 165–6; H. Mosler, *The International Society as a Legal Community*, 1980, pp. 17–20; A.G. Robledo, "Le *jus cogens* international: sa genèse, sa nature, ses fonctions", 172 *RCADI*, 1981-III, pp. 32–4; L. Alexidze, "Legal Nature of *Jus Cogens* in Contemporary International Law", ibid., pp. 246, 252–3, 258.

41 Cf. G.A. Christenson, "The World Court and *Jus Cogens*", 81 *AJIL*, 1987, p. 93 re the fundamental importance of public order for the concept of *jus cogens*.

so long as the societal hierarchy of values remains unaltered as concerns the norm. It would not therefore appear feasible to deny the existence of a conditional relationship between the effective functioning of the collective measures under Chapter VII of the Charter and the continued validity of Art. 2(4) with correspondingly adjusting content and scope. And certain authors who do not subscribe to this view of conditional relationship have nonetheless gone some way to concede the point.[42]

With regard to the ICJ opinion quoted above, the existence of the principle of non-use of force as a principle of customary international law, which was unconditioned by the Charter provisions relating to collective security, could run the risk of being understood as freed from the restraints of the Charter. And this might be taken as recognizing the availability of the customary international law means of unilaterally safeguarding against the violation of the principle. But unless such customary international law principle is to be considered as unrestrained by the Charter[43] – a conventional instrument in which it is embodied – it would not appear capable of remaining unaffected by the degree of effectiveness with which the conventional provisions on collective security are implemented.[44]

The conditional relationship between Art. 2(4) and the collective security provisions of Chapter VII would hence result, it is submitted, from the new allocation of the legal use of force in international relations. This allocation assigned a near monopoly of force to the Organization[45] for obviating the legal necessity of employing unilateral force, permitted cases excepted.[46] As between the collective and unilateral poles of the Organization, that allocation would apparently be

42 See, e.g. A. Randelzhofer, *op. cit., supra* n. 34, pp. 274–5; p. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility", in *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma eds., 1987, p. 223. The said author recognizes the difficulty of countering the conclusions advocated by the adherents of "conditional relationship". – See ibid., p. 217. Cf. J.N. Singh, *Use of Force Under International Law*, 1984, p. 90; K.J. Partsch, "Reprisals", 9 *EPIL*, 1986, pp. 332–3 re the availability of non-armed unilateral enforcement measures when there is default of community action.

43 Cf. G.A. Christenson, *supra* n. 41, p. 100.

44 See *infra* pp. 46–7

45 See *supra* pp. 42–3. Further, the US delegate, e.g., declared in Committee I/1 that "the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition". – *Op. cit. supra* n. 3, p. 335. And the seventh preambular para. of the Charter declares "that armed force shall not be used, save in the common interest".

46 See, e.g. J. Combacau, *supra* n. 34, pp. 30, 32; R. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives", in *Law & Civil War in the Modern World*, J.N. Moore ed., 1974, p. 238 re the assumption of States when they relinquished their traditional liberty of self-help.

maintained so long as it is not disturbed by a default at the collective pole. When the collective machinery fails to fulfil its assigned tasks, a lacuna in the legal use of force would necessarily ensue. When this lacuna persists unrectified in face of disputes or other situations demanding action, the *raison d'être* of the prohibition of force formulated at the UNCIO would be affected, which in turn would inevitably cause the unilateral pole to retrieve, as it were, the liberty of the use of force it had surrendered.[47]

It may be noted in this regard that international law, in contradistinction to municipal law, does not have the benefit of a legislative, judicial and an executive authority sufficiently equipped and versatile to remedy occurring lacunas and redress wrongs.When conventional norms fail in effectiveness, the operation of law would bring forth the legal *status quo ante*, where that is the case, and revive the customary international law norms that had been replaced but remained in abeyance.[48] This may be explained by the notion of desuetude.[49] It would in this respect seem practically impossible to conceive of a legal vacuum. Similarly, if the Charter norms become and continue inoperative without otherwise being replaced by treaty or new customary law norms, the Members would be left with the sole alternative of reverting to the *status quo ante* and the norms thereunder. The reversion would probably take place gradually and in response to demanding situations and the corresponding absence of effective remedial action by the UN. Though such reversion will normally be accompanied by condemnations, which would witness the measure of strength of the majority's protest, the continued indulgence in the process of reversion will have the assured tendency of making con-

[47] See A. Cassese, *supra* n. 17, p. 229; D.P. O'Connell, *International Law*, Vol. 1, 2nd ed., 1970, p. 315; G. Schwarzenberger, "The Fundamental Principles of International Law", 87 *RCADI*, 1955-I, p. 338. Cf. M. Reisman, "Coercion and Self-Determination: Constructing Charter Article 2(4)", 78 *AJIL*, 1984, p. 642; but see O. Schachter, "The Legality of Pro-Democratic Invasion", ibid., pp. 645–50 for the criticism of Reisman's view that foreign States should be legally entitled to intervene for effecting "ongoing self-determination".

[48] See D.W. Greig, *International Law*, 2nd ed., 1976, p. 893; 54th *ILA Report*, 1970, p. 639, n. 34. Cf. R. Falk, "The Beirut Raid and the International Law of Retaliation", 63 *AJIL*, 1969, p. 430, n. 39; B.V.A. Roling, "Aspects of the Ban on Force", 24 *NILR*, Special Issue 1/2, 1977, p. 242 where the author holds as incorrect a distinction between international law proper and the law of the United Nations; he considers that such distinction implies the inferiority of the UN law.

[49] McNair, *The Law of Treaties*, 1961, p. 516. See also W. Friedmann, *The Changing Structure of International Law* 1964, p. 132.

tinued condemnations of no more value than harmless rituals: Verbal protests alone will not affect the reversion.[50]

3.2 Main Characteristics of the Article

3.2.1 Fundamental and Interdependent With the Obligation in Art. 2(3)

Under the terms of Art. 2(4), the distinction between war and other acts of force has disappeared. The prohibition covers every unlawful threat and use of force under whatever guise they figure.[51] This is a distinct break with past practice of regulating the use of force in international relations where, as could be seen in the Covenant of the League of Nations and the Pact of Paris, the prohibition of the use of force was not so embracing and clear-cut.[52]

Art. 2(4) enjoins the Members of the UN to refrain from the threat or use of force against values specifically protected by the Charter: territorial integrity or political independence of States, or other values whose subjection to unlawful means of force would be inconsistent with the purposes of the UN. Non-Members also come under the rule of the Article.[53] The obligation is negatively formulated and directly applicable.[54] And as there may be justified or excusable incursions by force against the

50 See, e.g. McNair, *supra* n. 49, p. 518. Cf. H. Kelsen, *General Theory of Law and State*, 1949, p. 119.

51 See D. Nguyen Quoc, P. Daillier, A. Pellet, *supra* n. 38, p. 812.

52 See *supra* chapter 2, pp. 27, 32. As H. Waldock observes, " [t]he illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war was not established beyond all doubt by the law of the League...". – "General Course on Public International Law", 106 *RCADI*, 1962-II, p. 231. But see T.O. Elias, "Problems Concerning the Validity of Treaties", 134 *RCADI*, 1971-III, p. 387. Discussing Art. 52 of the Vienna Convention on the Law of Treaties, the author approvingly refers to Bulgaria, Czechoslovakia and Ecuador, which had "pointed out that the prohibition of the threat or use of force was alreadly *lex lata* before the San Francisco Conference and that all that the United Nations Charter has done in its Article 2(4) is no more than to emphasise the obvious fact that the principles codified in the article are not those of the Charter *per se*, but also those of the customary international law on which the Charter itself is based". However, as will be observed subsequently, the scope of the prohibiton does not appear to be identical. Cf. G. Scelle, "Quelques réflexions sur l'abolition de la compétence de guerre", 58 *RGDIP*, 1954, p. 5.

53 See, e.g. sect. I(2) of GA resol. 42/22, 18 Nov. 1987, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, where the universal character of the prohibition is stated; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, 1988, p. 333; *infra* chapter 4, p. 86 *et seq.*

54 See G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 3, 1976, p. 220.

territorial integrity of States, the obligation is not absolute.[55] Art. 2(4) is, moreover, the other side of the obligation for the peaceful settlement of international disputes prescribed in Art. 2(3) of the Charter.[56] However, this latter obligation is not necessarily one that is immediately executory. Though parties to disputes are obligated to resort to peaceful procedures, the precise time for the commencement of the procedures does not ordinarily coincide in an intrinsic manner with the inception, maturation or any stage of the dispute. Some consider it to be "too general...to amount to more than a *pactum de contrahendo*".[57] But still, it is an obligation that has to be fulfilled in good faith.[58]

The peaceful process necessarily precludes the threat or use of force;[59] and the obligation to refrain from the threat or use of force would presume the existence and efficacy of peaceful procedures for dealing with international controversies.[60] International disputes which, if left unresolved, would be capable of entailing a breach of the peace of the States party to them or of others, will necessarily call for some mode of settlement, priority being accorded *bona fide* to the peace process. Such disputes would not in the nature of things appear susceptible of reigning unresolved in a legal no man's land.

The obligations in Art. 2(3) and Art. 2(4), hence, are not only fundamental but also interdependent.[61] This fundamental and interdependent nature of the obligations makes their continued validity responsive to the degree of satisfactory functioning of the United Naitons Organization in accordance with the terms of its Charter. As fundamental obligations, they provide the basis for, and rationale of, both the exclusiveness of the pacific settlement of disputes and the collective security scheme of the Charter; and as such they would not remain unaffected by the manner the

55 See *supra* pp. 41–2. Cf. D.W. Bowett, *Self-Defence in International Law*, 1958, p. 152.

56 See, e.g., the *Nicaragua v.USA* case, Merits, *supra*, n. 35, para. 290; *infra* n. 61.

57 G. Schwarzenberger, *supra* n. 54, *lo. cit.*

58 See, e.g. J. Charpentier, "Article 2, Paragraphe 3", in *La Charter des Nations Unies*, J.-P. Cot and A. Pellet eds., 1985, p. 106.

59 See L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations*, 3rd rev. ed. 1969, pp. 41–2; J. Stone, *Legal Controls of International Conflict*, 2nd rev. ed., 1959, pp. 286–7; M. Virally, "Article 2, Paragraphe 4", in *op. cit*, J.-P. Cot and A. Pellet eds. *supra* n. 58, p. 114.

60 See M. Virally, *supra* n. 59, pp. 114–5. Cf. R.Y. Jennings, "General Course on Principles of International Law", 121 *RCADI*, 1967-II, pp. 586–7.

61 H. Kelsen, *The Law of the United Nations*, 1950. pp. 90, 781–2; K. Obradovic, "Prohibition of the Threat or Use of Force", in *Principles of International Law Concerning Friendly Relations and Cooperation*, M. Sahovic ed., 1972, p. 57; J. Zourek, *L'interdiction de l'emploi de la force en droit international*, 1974, p. 44. Cf. R.B. Russell and J.E. Muther, *supra* n. 2, pp. 234, 279, 456–7.

relevant Charter provisions are implemented. As interdependent obligations, where threat to the peace results from the disregard of the duty under Art. 2(3) or failure of the peace process, the prohibition of force would appear nugatory unless the UN exercises effective authority within the field of its legal competence under Chapter VII. Unless it authoritatively makes due factual determinations or other assessments, followed by recommendations or, where appropriate, by enforcement meaures, a lacuna of remedy will result.

The fundamental and interdependent nature of the obligations would then indicate that the alignment of the lawful use of force on the international plane discussed in the preceding section would be affected if the UN were to fail in its assigned task; if such were not the case, States would appear to have renounced their traditional right of resort to force without substituting a functioning alternative. The latter eventuality, however, would apparently go against the rationale of the Organization's collective security system envisaged in Art. 1(1) of the Charter, the inauguration of which constricted the justified unilateral use of force by States to that required for self-defence.[62]

Reference may also be made to the seventh preambular paragraph of the Charter,[63] which purports

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

It would appear from this wording that the object of restricting the use of armed force to the service of the United Nations' interest can be effected only where the elements of "accepted principles" and "instituted methods" are present together. The inexistence or failure of "instituted methods" would indicate the frustration of the said object as to have the effect of releasing the use of armed force from the restriction.[64] Similarly, where the effective collective measures of Art. 1(1) – mandatory for the

[62] See Report of the Rapporteur of Subcommittee I/1/A, *supra* n. 3, p. 721; H. Kelsen, "Collective Security and Collective Self-Defense under the Charter of the United Nations", 42 *AJIL*, 1948, pp. 784–5; R. AGO, "State Responsibility", *YILC*, 1980, Vol. II, Part One, p. 41 where the author argues that the explicit safeguarding of the right of self-defence did not necessarily mean that other exonerating circumstances were precluded; G. Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed., 1976, p. 152; *infra* chapter 7, p. 231 *et seq.* about necessity as a possible excuse.

[63] This paragraph is used by a number of authors to argue that Art. 2(4) is concerned only with armed force – See, e.g. E.J. de Aréchaga "International Law in the Past Third of a Century", 159 *RCADI*, 1978-I, p. 88; M. Lachs, "The Development and General Trends of International Law in Our Time". 169 *RCADI*, 1980-IV, p. 160; *infra* chapter 5, pp. 114–5.

[64] Cf., e.g. J.-P. Cot and A. Pellet, "Preambule", in *op. cit.* J.-P. Cot and A. Pellet eds., *supra* n. 58, p. 7.

maintenance of international peace and security – were inexistent or ineffective, States would lose the motive that induced them to relinquish their liberty of resorting to unilateral force.

3.2.2 Customary International Law Status

Another characteristic of Art. 2(4) is its customary international law status. It will be recalled that force constituting measures that were short of war was governed by the customary international rules of self-defence and reprisals;[65] and force constituting illegal war was proscribed by the Pact of Paris, which apparently had become part of the pre-Charter customary international law.[66] That law, then, had prohibited what under its régime was taken to be an unlawful resort to force. The prohibition of the use of force under the terms of Art. 2(4) also is a norm of customary international law;[67] this has been confirmed in the *Nicaragua v. USA* case where the ICJ held that

> on the question of the use of force...so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter... .[68]

But, as will be submitted next, this would not mean that the pre-Charter customary international law on the prohibition of force had a scope identical with that of contemporary customary international law.[69]

[65] See *supra*. Chapter 2, p. 33.

[66] Ibid., p. 35.

[67] See, e.g. K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", in *Manual of Public International Law*, M. Sørensen ed., 1968, p. 745. But see G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", 137 *RCADI*, 1972-III, p. 477, n. 18.

[68] Merits, *supra* n. 35, para. 181. See M.H. Mendelson, "The *Nicaragua Case* and Customary International Law", in *The Non-Use of Force in International Law*, W.E. Butler ed., 1989, pp. 90–1 where the Court's dealing with the issue of whether the customary law on the use of force has been subsumed in the Charter is found wanting.

[69] See, e.g. E.V. Rostow, "Disputes Involving the Inherent Right of Self-Defense", in *The International Court of Justice at a Crossroads*, L.F. Damrosch ed., 1987, pp. 282–3. The author indicates the contemporary international law prohibition of force against the territorial integrity or political independence of States to be the adoption of the Charter.

3.2.2.1 Jus Cogens Status

A further characteristic of Art. 2(4), discussed above in another context, is the *jus cogens* character generally ascribed to its norm;[70] and it may be asked whether or not the *jus cogens* character of the Article is dependent on the Charter. It should be observed that inasmuch as the legal exception to the prohibition of force of the pre-Charter customary international law included, apart from self-defence, forcible reprisals[71] and certain legitimate humanitarian intervention,[72] the law of that period had a wider base for permitted forms of self-help than contemporary customary international law.[73] Permitted self-help is now limited to self-defence and cases of strict necessity. This narrower base of permitted self-help would appear to be due to the UN Charter, which, in the first place, provides for a collective security system; secondly, it ordains in Art. 2(6) that non-Members would be required to observe the Charter principles "so far as may be necessary for the maintenance of international peace and security";[74] thirdly, it opens for non-Members by Art. 35(2) the possibility of bringing to the attention of the Security Council or the General Assembly any dispute to which they may be parties; and fourthly, it decrees in Art. 103 its precedence in case of conflict between the obligations of Members under its terms and under other international

[70] *Supra* pp. 44–5; the *Nicaragua v. USA* case, Merits, *supra* n. 35, para. 190; L. Hannikainen, *supra* n. 53, p. 356; B.V.A. Röling, "The 1974 U.N. Definition of Aggression", in *op. cit.*, A. Cassese ed., *supra* n. 34, p. 415; J.G. Starke, *Introduction to International Law*, 9th ed., 1984, p. 54; D. Nguyen Quoc, P. Daillier, A. Pellet, *supra* n. 38, p. 713. Cf. N. Ronzitti, "Use of Force, Jus Cogens and State Consent", in *op. cit*, A. Cassese ed., *supra* n. 34, pp. 150, 159.

[71] See *supra* chapter 2, p. 33.

[72] See E.C. Stowell, *Intervention in International Law*, 1921, pp. 55, 62; R. Lillich, *op. cit.*, *supra* n. 46, pp. 231–35; S. Kloepfer, "The Syrian Crisis, 1860–61: A Case Study in Classic Humantarian Intervention", 23 *CYIL*, 1985, pp. 255–9.

[73] Cf. A. D'Amato, "Trashing Customary International Law", 81 *AJIL*, 1987, p. 104 on the impact of Art. 2(4) on customary international law.

[74] See, e.g. SC resols. 82 (1950), 25 June 1950, and 83 (1950), 27 June 1950 relating to the conflict in the Korean peninsula, which the Council determined to constitute a breach of the peace, and called upon North Korea to withdraw forthwith its force to the 38th parallel; and GA resolution 498(V), 1 Feb. 1951, which condemned the intervention of the People's Republic of China in Korea as aggressive and called "upon all States and authorities to refrain from giving assistance to the aggressors in Korea". These resolutions are outstanding examples of authoritative pronouncements against non-Members. See, further, *Repertory*, Vol. 1, 1955, pp. 40–7 concerning "recommendations to, or in respect of, specific non-member States" (e.g. GA resols. 39 (I), which recommended the disbarring of the Franco régime in Spain from membership in UN-related organizations; 109 (II), which was addressed to Albania and Bulgaria in the Greek frontier incidents question); ibid., Supplement No. 3, Vol. 1, 1972, pp. 175–6 concerning SC resol. 189 (1964), 4 June 1964, which requested that a "just and fair compensation should be offered" by South Viet-Nam to Cambodia for acts committed against the territory and civilian population of the latter. Cf. A.G. Robledo, *supra* n. 40, pp. 98–9 where the *jus cogens* character of Art. 2(4) is affirmed and the prohibition of force is stated to be the creation of the Charter.

agreements. It would then appear that it was the Charter that was instrumental in giving the prohibition of force – within its Charter context – a general and peremptory application as to raise it to a *jus cogens* status. And contemporary customary international law would in this respect appear to be inseparable from Art. 2(4) as concerns the main elements of the prohibition of force. Without the Charter as a base and as a frame, it would be hard to envisage contemporary customary international law on the prohibition of force as continuing to possess the characteristics of Art. 2(4).

Though aggressive war was renounced under the terms of the Pact of Paris and penalized in the post-Charter period, other types of unilateral use and threat of force, save those resorted to in self-defence, came fully within the prohibition of force only under the Charter. Further, as the *jus cogens* character of Art. 2(4) and the corresponding customary international law norm would appear to possess a uniform and an indivisible quality, the bond between the two norms would be very close; this would deny the feasibility of any disjunction between them for purposes of separate application. It therefore becomes difficult to see how the ICJ in the *Nicaragua v. USA* case could claim not to apply Art. 2(4) but only the *alter ego*, as it were, of the Article without in fact applying the Article.[75] Were Art. 2(4) to lose its present status, i.e. its rule to be degraded on the scale of the international hierarchy of norms, it would hardly be possible to envisage the prohibition of threat or use of force retaining its universally imperative quality as a norm of contemporary customary international law.

3.2.2.2 Separate Existence and Applicability? Nicaragua v. USA's Holding

Since Art. 2(4) and the corresponding customary international law norm possess a fundamental identity,[76] an application of the customary norm, in the view of the present writer, would necessarily be an application of

[75] See T.O. Elias, "Scope and Meaning of Article 2(4) of the United Nations Charter", in *Contemporary Problems of International Law*, B. Cheng and E.D. Brown eds., 1988, p. 79 where Section III of the author's article is entitled "Article 2(4) as Applied in the Merits Stage of *Nicaragua v. United States of America*". This indicates that it was Art. 2(4) that in fact was being applied. And the author, who was a judge in the case, further indicates that "[a]t the merits stage of the case...the Court had occasion to specifically analyse and establish the scope and meaning of Article 2(4)...The main question was to determine, under Article 2(4), the scope of the permissible use of force by States in the conduct of their international relations." – Ibid. See also pp. 84–5.

[76] See, e.g. G.A. Christenson, *supra* n. 41, p. 100.

Art. 2(4). The latter, as submitted above, has extended itself by the operation of the Charter to become a universally imperative norm of contemporary customary international law. So long as the customary norm bears the indelible imprint of the Charter, it would in its essentials appear to have no separate applicability that would not be an application of the Charter norm.[77] The United States would in this regard appear to have been basically right when it argued in the *Nicaragua v. USA* case that

> the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law.[78]

The separate applicability proper of a customary norm on non-use of force will take place by the operation of law when the Charter ceases to have a force of law; its content and special attributes at that time might not be exactly those that it had under the Charter, but those that the international community would be willing to give it.

For all practical and legal purposes, therefore, the application of the contemporary customary norm prohibiting the threat or use of force in international relations could not be essentially different from the application of Art. 2(4); and giving effect to the United States reservation in the *Nicaragua v. USA* case would mean, it is submitted, the exclusion not only of the relevant multilateral treaty provisions on the non-use of force but also of the corresponding customary international law norm.[79] In this respect, the dissenting remarks of Jennings that

> the multilateral treaty reservation qualifies the jurisdiction of this Court, it does not qualify the substantive law governing the behaviour of the Parties at the material times,[80]

[77] A. D'Amato indicates that "the Court was right that the underlying customary law exists in the absence of the Charter". – *Supra* n. 73, p. 103. However, if as regards Art. 2(4) "the absence of the Charter" means the Article's loss of legal force, the underlying customary law on the non-use of force that then surfaces might not be essentially identical in scope with that which is present under a legally valid Art. 2(4): the surfacing customary law norm would be without the Charter's constraints. On the other hand, the customary law that exists alongside Art. 2(4) might be identifiable as a separate law, but it would be coterminous with the Article insofar as both sources have identical content. And in other respects, so long as it will be consistent with the Charter, this customary law will supplement and help implement the provisions of that instrument. – See, e.g. Merits, *supra* n. 35, para. 194 regarding rules governing the exercise of self-defence, and para. 202 where, regarding the principle of non-intervention, the Court has stated that "it was never intended that the Charter should embody written confirmation of every essential principle of international law in force".

[78] Merits, *supra* n. 35, para. 173.

[79] The US reservation excluded from the jurisdiction of the Court "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction". – Ibid., para. 42. Cf. G.A. Christenson, *supra* n. 41, p. 96.

[80] Merits, *supra* n. 35, p. 533.

would appear cogent.

The Court's ruling in that case on the inapplicability of multilateral provisions might also have the effect of setting the applicable customary international law norm of the non-use of force on a course independent of the Charter. And such an independent course might cause more uncertainty, which, depsite the positive intentions of Singh, the Court's president, might well make the law less suitable "to serve the best interests of the community".[81] Additionally, the Court's reference to the Charter when seeking to establish the relevant rules of customary law,[82] gives the distinct impression that the Charter was being applied under another name.[83]

Further, it is submitted that any decision by the ICJ and other international judicial or quasi-judicial bodies on the legal merits of present-day international use of force cannot but be an application and construction in some ways of Art. 2(4). Even when not specifically mentioned, as in the *Corfu Channel* Judgment,[84] or when formally declared inapplicable, as in the *Nicaragua v. USA* Judgment, the Article would still be relevant.[85] It will bear repeating the submission that this is due to the Charter as a legal instrument still in force, whatever be the story of its implementation. Despite the declared inapplicability of the Article, therefore, the *Nicaragua v. USA* case amounts also to a construction and application of that Article. And this can be illustrated by some examples: judicially confirming the prohibition of Art. 2(4) to be a principle of customary international law is giving the Article a certain construction;[86] distinguishing between different types of force as grave – that which constitutes armed

[81] Ibid., p. 153. Cf. G.A.Christenson, *supra* n. 41, pp. 94–5, 100 where the Court's decision outside the Charter's constraints is said to be potentially destabilizing and capable of entailing unforeseen consequences.

[82] E.g., Merits, *supra* n. 35, paras. 188 and 190.

[83] In this regard, the dissenting views of Jennings and Schwebel appear to be justified. – See Merits, *supra* n. 35, pp. 304, para. 96, and 529 *et seq.* respectively; *supra*, n. 75. Cf. P.M. Eisemann, "L'arrêt de la C.I.J. du 27 juin 1986 (fond) dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci", *AFDI*, 1986, p. 174 re the weakness of the Court's use of the Charter to establish a rule of customary international law and the reference back and forth to the two sources.

[84] Merits, *ICJ Reports* 1949, p. 4. See also *infra* chapter 5, pp. 121–4 for the discussion of the case. Reference to Art. 2(4) is made, e.g., in the Individual Opinion of Alvarez – ibid., p. 42; in the Dissenting Opinions of Krylov and Ecer – ibid., pp. 77 and 130 respectively. Cf. I.Y. Chung, *Legal Problems Involved in the Corfu Channel Incident*, 1959, p. 250. The authors's view on the content of force in Art. 2(4), restricted as it is to physical force, is at variance with that maintained in this study. Cf. also G. Schwarzenberger, *op. cit.*, *supra* n. 54, Vol. II, 1968, pp. 34–6, 54–8.

[85] See *infra* chapter 5, pp. 123, 125.

[86] Merits, *supra* n. 35, para. 190.

attack – and less grave is construing the term force;[87] characterizing the laying of mines in internal and territorial waters of a State as a use of force is a construction of the term force applied to a concrete situation;[88] declaring that "the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua",[89] is another concrete application of the construed phrase "threat or use of force"; and considering "mere supply of funds to the *contras*...not [to] amount to a use of force",[90] is applying a negatively construed "force".

Moreover, to demonstrate the difficulty attaching to the separate existence and applicability of customary international law on the prohibition of force, a few words may also be said about the manner in which the Court proceeded to ascertain the content of that law. Having stated that "it can and must take"[91] the Charters of the United Nations and the Organization of American States as evidence of the content of the relevant customary law, the Court found thus:

> The Parties take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4 of the United Nations Charter. They therefore accept a treaty-law obligation,[92]

in accordance with the terms of that Article. The Court then went on to inquire if, in customary international law, "there exists...an *opinio juris* as to the binding character of such abstention".[93] It accordingly considered General Assembly resolution 2625 (XXV);[94] the United States' support of the resolution of American States condemning aggression, that country's ratification of the Montevideo Convention on the Rights and Duties of States, and its acceptance of the prohibition of the use of force contained in the declaration of principles of the Conference on Security and Co-operation in Europe;[95] the views of the International Law Commis-

87 Ibid., para. 191.
88 Ibid., para. 213.
89 Ibid., para. 228.
90 Ibid.
91 Ibid., para.183.
92 Ibid., para.188.
93 Ibid.
94 Ibid., para. 191.
95 Ibid., para. 189.

sion on the *jus cogens* character of the provisions of Art. 2(4);[96] and affirmed the existence of the necessary *opinio juris.*[97]

Using the terms of Art. 2(4) as evidence of the customary international law on the prohibition of the use of force and then applying those same terms under the heading of customary international law is tantamount, to all intents and purposes, to making the Charter prove against its own competence. But the particular issues in the case did not relate to the inapplicability of the Charter provisions because of any special defect attaching to the latter: the issues concerned rather the exclusion of those provisions on account of the operation of an extraneous factor. This being so, it is hard to grasp the justice of the reasoning that made the Charter an instrument of its own abdication. In view of this fact, it is possible to assess as warranted the criticism of the Court's manner of proceeding which Jennings expressed in his Dissenting Opinion. He wrote thus:

> It seems, therefore, eccentric, if not perverse, to attempt to determine the central issues of the present case, after having first abstracted from the Charter these principal elements of the law applicable to the case, and which still obligate both the Parties.[98]

Moreover, at the material time, the parties to the case were bound by the terms of Art. 2(4) as such and as customary international law. It would appear that this was not because they declared and reaffirmed at various instances to be bound by the prohibition of the threat or use of force in international relations, but because they were then, as they are now, Members of the UN under a currently valid Charter. There could hardly be an *opinio juris* that does not acknowledge the binding force of Art. 2(4) so long as the Charter remains in force with its present

[96] Ibid., para. 190.

[97] A. D'Amato is of the opinion that the Court misunderstood customary law and failed to consider State practice and give an "independent, ascertainable meaning to the concept of *opinio juris*". – *Supra* n. 73, pp. 102–3. See also P.M. Eisemann, *supra* n. 83, p. 173.

General State practice, however, appears to abide by the prohibition of force as perceived in light of the circumstances of particular cases. Apparent breaches are variously justified as self-defence, protection of nationals abroad, humanitarian intervention (see infra, chapters 5 and 6) thereby confirming the prohibition. An *opinio juris* might then show not only a mental attitude about the binding force of a rule but also the practice of States (in the instance, claim of justified resort to force) according to that *opinio juris.*

[98] Merits, *supra* n. 35, p. 533.

purposes. Any contrary *opinio juris* would certify the demise of the Article and probably also that of the Charter.[99]

Some, however, appear to hold the view "that an eventual dissonance between Article 2(4) and customary international law can be anticipated".[100] But, so long as Art. 2(4) remains in force, it is submitted that the corresponding content of the customary international law norm, as evidenced by the practice of States, would have to be reflected in the content of the Article. This would be necessary in order not to impair the oneness of the prohibition of the use of force under contemporary international law.[101] It would then follow, it is submitted, that the *opinio juris* which the Court identified would serve as an affirmation of the universality of Art. 2(4) rather than as an exclusive proof of an independently binding and separately applicable customary law principle of identical content. As indicated earlier,[102] the identity of object of the two sources of the prohibition would not appear to admit of separate application.

Before closing our consideration of the main characteristics of the Article, it should be mentioned that, despite the recognized universal validity and general respect of Art. 2(4), some have searchingly questioned its functional status. It has been stated, for instance, that "the high-minded resolve of Article 2(4) mocks us from its grave",[103] and that "[t]he prohibition against the use of force in relations between states has been eroded beyond recognition".[104] While acknowledging the lack of the desirable degree of respect for the provisions of the Article that motivated the remarks, it should be observed that the Article has never been abandoned altogether. A fundamental principle as that of Art. 2(4), having a content sensitive to slight changes of international relations, can

99 Cf. R.St.J. MacDonald, "The Charter of the United Nations and the Development of Fundamental Principles of International Law", in *op. cit.*, B. Cheng and E.D. Brown eds., *supra* n. 75, p. 201 where it is stated "that if the Charter suddenly ceased to exist its *jus cogens* provisions would still be binding on States because those provisions could only be modified by subsequent norms of general international law having the same character". But in the case of the prohibition of the threat or use of force, unless that provision can be demonstrated to have been kept universally valid by a legal instrument that replaces the Charter, or otherwise consecrated in customary international law, the very demise of the Charter would undermine the *jus cogens* character of the prohibition.

100 Y. Dinstein, *War, Aggression and Self-Defence*, 1988, p. 97.

101 See *infra* chapter 5, p. 125; Art. 31(2)(b) of the Vienna Convention on the Law of Treaties. Cf. R. Sadurska, "Threats of Force", 82 *AJIL*, 1987, p. 249.

102 *Supra* p. 53

103 T. Franck, "Who Killed Article 2(4)?", 64 *AJIL*, 1970, p. 809.

104 Ibid., p. 835. See J. Combacau, *supra* n. 34, p. 30; E. Giraud, "L'interdiction du recours à la force. La théorie et la pratique des Nations Unies", 67 *RGDIP*, 1963, pp. 543–4.

hardly be expected to remain recognizable in its original form; and the Article has not remained static.[105] Since it is embedded in a constitutional instrument, which, it is submitted, the UN Charter is,[106] the Article would need to undergo accommodative alteration of content and scope necessary for its continued serviceability within the Charter's purposes and designed scheme of collective security. It will accordingly continue to be recognized as a principle of the Charter for any particular period of international relations which it is suited to serve.

Art. 2(4) is far from dead.[107] That there are frequent breaches of the Article is, however, no conclusive proof against its continued validity and general respect; such breaches may instead indicate the search for, and emergence of, a changed content and scope which reflect the efficiency and effectiveness of the UN. The principle of the Article is constantly referred to and has reiteratedly been affirmed over the years in various General Assembly and Security Council resolutions.[108] Art. 2(4) has not been so disregared in practice as to have fallen into desuetude; rather its apparent breaches are consistently sought to be legally justified.[109] It would then neither mock nor rule from its grave.[110]

The means by which the Article would keep a countenance properly recognizable for each appropriate season of international relations is

105 See, e.g. A. D'Amato, *supra* n. 73, p. 104.

106 Cf. the statute/constitution dichotomy in E. McWhinney, *Conflict and Compromise, International Law and World Order in a Revolutionary Age*, 1981, pp. 55–7. See further *infra* section 3.3.

107 See L. Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated", 65 *AJIL*, 1971, p. 544; "The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?", *ASILP*, 78th Annual Meeting (1984), pp. 68, 74, 86, 106. Cf. A.R. Coll, "Philosophical and Legal Dimensions of the Use of Force in the Falklands War", in *The Falklands War*, A.R. Coll and A.C. Arends eds., 1985, p. 47; T. Franck, "The Strategic Role of Legal Principles", ibid., pp. 25, 32.

108 See, e.g. GA resols. 290(IV), 1 Dec. 1949, Essentials of Peace; 378(V) A, 17 Nov. 1950, Duties of States in the Event of the Outbreak of Hostilities; 380(V), 17 Nov. 1950, Peace Through Deeds; 1127(XI), 21 Nov. 1956, about the situation in Hungary; 2625(XXV), 24 Oct. 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations; 3314(XXIX), 14 Dec. 1974, Definition of Aggression; 40/9, 8 Nov. 1985, Solemn appeal to States in conflict to cease armed action forthwith and to settle disputes...; 42/22, 18 Nov. 1987, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations; S.C. resolution 588(1986), 8 Oct. 1986, the situation between Iran and Iraq. See, further, extracts of similar resolutions in *Repertory*, Vol. 1, 1955, pp. 23, 25–8, 32; ibid., Suppl. 2, Vol. 1, 1964, pp. 73–4; ibid., Suppl. 3, Vol. 1, 1972, pp. 135–39; ibid., Suppl. 4, Vol. 1, 1982, pp. 39–45; ibid., Suppl. 5, Vol. 1, 1987, pp. 31–3. Cf. G. de Lacharrière, "La réglementation du recours à la force: les mots et les conduites", *Mélanges Charles Chaumont*, 1984, pp. 351–4.

109 See, e.g. P. Malanczuk, *supra* n. 42, pp. 216–7.

110 See L. Henkin, *supra* n. 107 (65 AJIL), p. 547.

interpretation; and so far as it would be relevant to the scope of our study, we shall consider that subject under the next section.

3.3 Continued Serviceability of the Article

3.3.1 The Charter – A Sui Generis Constitutional Instrument

As universally applicable within the Charter's scheme of collective security, the norm of Art. 2(4) would need to respond to new circumstances: It should be made to maintain normative effectiveness by adjusted prohibition. Such adjustment, it is submitted, should be made by accommodative interpretation. This type of interpretation would be justified by different factors which make the Charter a unique international instrument.

The first paragraph of the Charter's preamble reveals the apparently principal motive[111] for the establishment of the United Nations Organization. In the context in which it is employed, the expression "succeeding generations" does not merely indicate an indeterminate period but projects for the Organization a long-lasting term. Together with the universality aspired to by the Organization, and the censorial attitude attending the question of withdrawal from membership,[112] the Charter evinces an in-built permanence. An instrument, which is the basis of an Organization that sets out to strive for the service of world peace, human dignity and prosperity in unpredictable interaction of events, cannot reasonably be expected to remain fixed within its 1945 frame.[113] The task envisaged by the Charter can hardly be accomplished through the instrumentality of an ordinary multilateral treaty, which, insofar as the technical rules of treaty are concerned, the Charter is.[114] Such task would rather appear to be the

111 The Report of Rapporteur of Committee 1 to Commission I describes the preamble as setting "forth the declared common intentions which brought us together in this Conference and moved us to unite our will and efforts, and made us harmonize, regulate, and organize our international action to achieve our common ends". – *Op. cit., supra* n. 3, pp. 387–8.

112 See 1 *UNCIOD*, p. 619 for USSR's objection to the clause "and leave the burden of maintaining international peace and security on other Members", in the Report of the Rapporteur of Committee I/2 on Chapter XI.

113 See the need for a constant adjustment of such instruments in, e.g. W. Friedmann, *supra* n. 49, p. 153; H.G. Schermers, *International Institutional Law*, 1980, p. 564.

114 See L.M. Goodrich and E. Hambro, *supra* n. 4, pp 20–1. Cf. Arts. 4 and 5, Vienna Convention on the Law of Treaties – *UNTS*, Vol. 1153, p. 331; *Conditions of Admission of a State to Membership in the United Nations, (Art. 4 of the Charter)*, Ad. Op., *ICJ Reports* 1947–1948, p. 61.

proper domain for a constitution of a world body purposing to order the universe and its constituents.[115]

The Charter has been recognized to possess "certain special characteristics";[116] and it does not purport to cover every field of international activity,[117] nor to preempt the whole field of international law but only that which explicitly or by necessary intendment comes within its normative compass. Apart from the few amendments, the Charter has remained intact.[118] Though the meaning of its provisions, especially those relevant to this study, have been and continue to be debated, they have nevertheless been unfailingly retained in various resolutions of significance. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations – General Assembly resolution 2625 (XXV), 24 October 1970 – is one example in point. In the first principle – the prohibition of the threat or use of force – the resolution incorporates almost verbatim the wording of Art. 2(4) and concludes with the declaration that nothing is to "be construed as enlarging or diminishing...the scope of the provisions of the Charter concerning cases in which the use of force is lawful". Another example is Article 6 of the General Assembly resolution 3314 (XXIX), 14 December 1974, on the Definition of Aggression, which prescribes that

> [n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

115 See, e.g. G.A. resols. 2222(XXI), 19 Dec. 1966, Annex, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; 34/68, 5 Dec. 1979, Annex, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; 37/92, 10 Dec. 1982, Annex, Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting; Arts. 136–149 of the UNCLS, (UN publication, Sales No. E.83.V.5), regarding "the sea-bed and ocean floor and subsoil thereof".

116 *Certain Expenses of the United Nations,* Ad. Op., *ICJ Reports* 1962, p. 157. As to the characterization of the Charter as a *sui generis* treaty, see, e.g. D. Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, 1970, pp. 34–5.

117 See, e.g. the *Nicaragua v. USA* case, supra n. 35, paras. 176, 202; the report of subcommittee I/1/A in 6 *UNCIOD*, p. 700.

118 Arts. 23, 27 and 61 were amended in accordance with GA resol. 1991 (XVIII) A and B, 17 Dec. 1963, respectively increasing the membership of the Security Council from 11 to 15, the required number of affirmative votes at the Council from 7 to 9, and the membership of the Economic and Social Council from 18 to 27. The latter was again increased to 54 in accordance with GA resol. 2847 (XXVI), 20 Dec. 1971. Art. 109(1) was amended in line wth GA resol. 2101 (XX), 20 Dec. 1965, increasing the number of affirmative Security Council votes from 7 to 9. See, further, e.g. H.G. Schermers, *supra* n. 113, p. 564; I. Seidl-Hohenveldern, "International Economic Law. General Course on Public International Law", 198 *RCADI*, 1986-III, p. 62 re the *de facto* amendment of Art. 27(3); J. Castaneda, *Legal Effects of United Nations Resolutions* (A. Amoia trans.), 1969, pp. 104–5.

Along the same lines, Section 2 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations – General Assembly resolution 42/22, 18 November 1987 – may be taken as a third example.

In other respects, despite their misgivings and seemingly irreconcilable views about its provisions, the Members have not been able, and appear unwilling, to change the Charter; nor have they sought to neutralize it by sheer default in the payment of their financial contributions or by otherwise withholding their customary participation. The UN continues to function within the type of framework that the membership has been willing to set for it. Issues of varied magnitude are habitually addressed to, and as habitually dealt with by the Organization within such a framework.

All this is indicative of a unique aggregate of factors that could weigh to warrant a special approach in the consideration of the principal Charter provisions. And if such a *sui generis* constitutional instrument is to be kept functional, its construction would have to show more latitutde than that accorded to other international agreements. A prominent feature of a constitutional instrument would normally appear to be the elasticity of its norms whose contents are made to expand or contract in various shapes in response to the demnads of circumstnaces.[119] This dynamism would maintain the norms legally relevant and of continued serviceability;[120] and it would help keep the effectiveness of the UN, which "is at present the supreme type of international organization",[121] with adjusted scope of activities that should reflect the necessities of any particular period.[122] The adjustment of the scope of activities would appear even more necessary concerning the allocation of the legal use of force between the Organization and its Members.

119 Referring to the Charter, Spender wrote in his Separate Opinion in *Certain Expenses of the United Nations*, that "[i]ts provisions were intended to adjust themselves to the ever changing pattern of international existence". – *Supra* n. 116, p. 185. See also, e.g. R.B. Lillich, *supra* n. 46, p. 242, n. 86; G. Schwarzenberger *Supra* n. 54, p. 26. Cf. H.G. Schermers, *supra* n. 113, p. 565 regarding the disappearance of the contractual element and the taking over of the institutional one in a living constitution; F.A. Vallat, "The Competence of the United Nations General Assembly", 97 *RCADI*, 1959-II, p. 249.

120 Cf., e.g. M. Bos, "Theory and Practice of Treaty Interpretation", 27 *NILR*, 1980 pp. 160, 163; E. Giraud, "La revision de la Charte des Nations Unies", 90 *RCADI*, 1956-II, pp. 393–4; H. Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 161; G.I. Tunkin, *Theory of International Law* (W.E.Butler trans.), 1974, pp. 325–6.

121 *Reparation for Injuries* case, *ICJ Reports* 1949, p. 179.

122 Cf. T.O. Elias, *supra* n. 75, p. 79.

3.3.2 Accommodative Interpretation

According to Art. 31(1) of the Vienna Convention on the Law of Treaties, which is taken to be declaratory of customary international law,[123] interpretation of an international instrument has to be done "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[124] Since the meaning of a term is ordinary only in relation to a particular context,[125] the term would maintain that ordinary meaning so long as it correspondingly adapts iself to the varying configuration of the context. And given changing circumstances, the context cannot be expected to be static in scope. It may, in response to the requirements of circumstances, expand, contract, be general or strictly technical or assume other characteristics, and thereby impress with its particularities the treaty term to which it relates. The object and purpose of an instrument, too, as a factor that conditions the context of a particular provision in which a certain term figures, would not remain with a static scope; but, given changing circumstances, it would appropriate the scope suitable for meeting the new requirements.

It is interpretative realization of such changes that accounts in part for the development of the law and gives to legal instruments continued serviceability. As the ICJ remarked in the *Reparation for Injuries* case, "[t]hroughout its history, the development of international law has been influenced by the requirements of international life".[126] Hence, the object and purpose of an instrument, a particular context and a particular term would each have a variable scope. "In many cases judicial legislation amounts, in fact, not to a change of the law, but to the fulfilment of its purposes", writes H. Lauterpacht.[127] This might be taken as a good way of describing the reflection in a legal system of a specific period of elements in any changed scope of legal rules that get to be authoritatively articulated.

In other respects, I. Sinclair, for instance, remarks that the parties acceding to general multilateral conventions "must be assumed to have joined not on the basis of what the original negotiators intended but

123 See, e.g. I. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, p. 19.

124 See, e.g. H.G. Schermers, *supra* n. 113, p. 661 re the dynamic nature of such interpretation. Cf. D.W. Bowett, *The Law of International Institutions*, 4th ed., 1982, p. 338.

125 See McNair, *supra* n. 49, p. 367; I. Sinclair, *supra* n. 123, p. 121.

126 *Supra* n. 121, p. 178.

127 *Supra* n. 120, p. 161.

rather on the basis of what the text actually says and means".[128] This could be taken as an acknowledgment of the changing scope of the purposes of conventions and the realization of the necessity of giving effect to the changed scope as determined at a specific period. "What the text actually says and means" would obviously be relative to a certain period with all its interacting circumstances. In this regard, though not undisputed, the rule relating to the effect of subsequent practice on treaty and incorporated in Art. 31(3)(b) of the Vienna Convention on the Law of Treaties appears to have gained ascendance over the original intention of signatories.[129] And as concerns the ICJ, despite its reference to the intention of the authors of the Charter in its Advisory Opinion on the *Conditions of Admission*,[130] it is reputed by some to show a "substantive unconcern with intention".[131] It would then appear that the original intention in a multilateral treaty has come to be regarded as subordinated to what may subsequently develop in the practice or claim of States. And it is submitted that this would be so even if such practice or claim were not unanimous, for the steadfast adherence to different positions regarding the implementation of the original intention would evidence the disintegration of the frame encasing that intention. Similarly, terms of provisions, too, would not possess fixed meanings.

Bringing now the foregoing analysis to bear on the terms – especially on the term "force" – in Art. 2(4), the terms' ordinary meaning will be that which is considered ordinary in the circumstances of any relevant time. The prohibition in Art. 2(4) is designed to implement partially the UN purpose of preventing the threat to and breach of the peace;[132] and as this purpose could at any particular time be effectively frustrated, not only by the physical/military type of force, but by the use of other modes of coercion as well,[133] such modes would have the effect of correspondingly enlarging the context of the prohibition. This would be necessary if a

128 *Supra* n. 123, pp. 130–1. See also A. D'Amato, *supra* n. 73, pp. 104–5; E. Lauterpacht, *supra* n. 21, p. 440.

129 See, e.g. R. Bernhardt, "Interpretation in International Law", 7 *EPIL*, 1984, pp. 321–2.

130 *Supra* n. 114, pp. 62, 63.

131 E. Lauterpacht, *supra* n. 21, p. 438.

132 See the tenor of the discussion of the draft Article in Committee I/1 at San Francisco in 6 *UNCIOD*, pp. 334–5, 342–6.

133 See, e.g. S.C. Neff, "Boycott and the Law of Nations: Economic Warfare and Modern International Law in Historical Perspective", 59 *BYIL*, 1988, p. 140 re economic measures' functional equivalence to the use of force. Cf. J.A. Delanis, *supra* n. 20, pp. 125–6; W.M. Reisman, "Criteria for the Lawful Use of Force in International Law", 10 *YJIL*, 1985, p. 283 re the changed context of Art. 2(4).

non-variegated legal prohibition is to be maintained. In order to maintain an ordinary meaning, the term "force" then would have to be adjusted in content to reflect the enlarged context.

The need for adjustment would appear to hold true even where the term "force" could be demonstrated to have originally been intended to mean only physical or armed force. The more than two hundred per cent increase[134] in the UN membership since the signing of the Charter – each joining with its own understanding of the term "force" and appreciation of the *travaux préparatoires* – and the emergence of effective new modes of coercion together with the continued validity of the Charter would necessitate and justify such an adjustment. The type of the mode of coercion[135] would, however, have to be of a degree that is grave enough to threaten or actually affect the security and existence of a State and leave it with no choice but that of resorting to measures of defence.[136] Nonetheless, it should be remarked that to argue for the accommodation of non-armed means of coercion within the prohibition of force is not to deny the validity of pressure normally exerted in international relations, for such pressure has its useful function in an imperfectly organized world.[137] But what constitutes normal pressure is again an issue that will vary with circumstances.

To establish whether a mode of coercion amounts to a prohibited force, the standard of good faith would appear to demand that the mode employed be appraised not only from the perspective of the State employing it but also from that of the target State. An absent or tinted good faith in the use of coercion that is hurtful to the territorial integrity or political independence of a particular State would be a telling sign of illegality. Even if an act of coercion be defined and presented by the State using it as non-constitutive of the prohibited physical force, it is submitted that the act cannot but be presumed contrary to the Charter policy of maintaining international peace and security where it gravely affects without legal cause the basic values of a target State and places it in a

134 The UN membership has grown from the original 51 States to 159 States. – *Basic Facts About the United Nations*, 1987, p. 167 *et seq.* – (UN publication) Sales No. E.88.I.3.

135 For reasons given in chapter 5, the term "force" and "coercion" are used interchangeably. – See, *infra* pp. 94–5.

136 See M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, 1961, pp. 200–2, especially n. 182 at 202. See further *infra* chapter 5, pp. 130–1.

137 Cf. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 175.

situation that calls for effective countermeasures. An act, the illegality of which is denied in face of its injurious and unjustified consequences, could well be adjudged to be deficient in good faith and inconsistent with the implementation of the object and purpose of the Charter.[138] And the State employing that act could be found not to have interpreted in good faith the term "force" of the Charter, i.e. as provided in Art. 31(1) of the Vienna Convention on the Law of Treaties, while the victim's characterization of the act as an illegal force could comparatively appear consistent with the principle of good faith.[139] The lack of good faith in interpreting an essential element of an obligation will also entail the lack of good faith in the performance of that obligation.

In respect to the performance of obligations, Art. 2(2) of the Charter provides that "[a]ll Members...shall fulfil in good faith the obligations assumed by them in accordance with the present Charter",[140] and Art. 26 of the Vienna Convention states the principle of *pacta sunt servanda* by declaring that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"; both these provisions would *a fortiori* deny legal benefit to acts done contrary to good faith. A State which acts without good faith should not therefore be given legal assistance to eschew its legal responsibility by sheltering itself behind a definition of force contracted to physical force; and the victim State should not thereby be deprived of the legal use of physical force where it appears the only effective and proportional means available for checking other hurtful modes of coercion. It should be observed in this connection that the effective means possessed by States for restraining unlawful modes of force varies with their natural wealth, geographic location, level of material development and other factors peculiar to particular States.

138 Cf. Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, UN Doc. A/5476, pp. 31, 34, paras. 48, 57 respectively.

139 The principle of good faith is recognized as one of the fundamental principles of international law. – See, e.g. the Joint Dissenting Opinion of Basdevant, Winiarski, McNair and Read in the *Conditions of Admission,* Ad. Op., *supra* n. 114, p. 93; *Nuclear Test* case (Australia v. France), *ICJ Reports* 1974, p. 268, para. 46; *Interpretation of the Agreement of 25 March Between WHO and Egypt*, Ad. Op., *ICJ Reports* 1980, p. 95, para. 48; G. Schwarzenberger and E.D. Brown, *supra* n. 62, pp. 36, 118–9; M. Virally, "Review Essay: Good Faith in Public International Law", 77 *AJIL*, 1983, p. 133. The latter author explains that, "[t]hat a legal obligation must be interpreted and performed in good faith means that it prescribes all that good faith implies, but only what good faith implies" (at 132). Cf. A. D'Amato, "Good Faith", 7 *EPIL*, 1984, p. 109.

140 See, further, the penultimate para. of the first principle in the Annex to GA resol. 2625 (XXV), 24 Oct. 1970.

Interpretation of the provisions of a multilateral constitutional instrument in a manner that is accommodative of new situations might not necessarily amount to an amendment of the instrument so long as the interpretation is kept within the frame of the object and purpose of the instrument.[141] It is of course open to the Members to agree formally on terms that clarify better their intention whenever doubts about new situations arise.[142] But where this is not feasible,[143] or until it becomes so, the legal tool of interpretation would need to be employed to construe the suitable accommodation. And this would appear to be specially called for in case of Art. 2(4) regarding the scope of which views remain at loggerheads.[144]

Irrespective of their modality, acts of coercion which are attended by injurious consequences would not ordinarily be left for long in a limbo; and this would mean that States will eventually gravitate towards adjusting the scope of the prohibited force, as already appears to be taking place.[145] The term force, for instance, in General Assembly resolutions 2131 (XX), 21 December 1965; 2625 (XXV), 24 October 1970; 3171 (XXVII), 17 December 1973; 3281 (XXIX), 12 December 1974; and 36/103, 9 December 1981, appear to include modes of coercion over and above military force.[146] But those who do not agree with such a construction appear to derive support for their position particularly from resolution 2625 (XXV).[147]

It should be mentioned in this connection that the adherents of the narrow meaning of the term force assemble non-physical forms of force

141 Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Ad. Op., *ICJ Reports* 1971, para. 53. In connection with the phrases "the strenuous conditions of the modern world" and "the well-being and development" found in Art. 22 of the Covenant of the League of Nations, the ICJ observed that they 'were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such.' Cf., further, *Western Sahara*, Ad. Op., *ICJ Reports* 1975, para. 52; L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 59, p. 13; G. de Lacharrière, *supra* n. 108, p. 360; McNair, *supra* n. 49, p. 385; I. Sinclair, *supra* n. 123, p.140 re evolutionary interpretation.

142 Cf. 13 *UNCIOD*, p. 710 where the Report of the Rapporteur of Committee IV/2 suggested that it may be necessary to embody authoritative interpretation in an amendment to the charter.

143 Cf., e.g. H. Kelsen, *Recent Trends in the Law of the United Nations*, 1951, (Supplement to *The Law of the United Nations*), p. 911.

144 See *infra* chapter 5, p. 113 *et seq.*

145 See, further, ibid. pp. 117–8.

146 See, e.g. C. Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", *AFDI*, 1982, pp. 63–4.

147 See R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 *AJIL*, 1971, pp. 724–5; *infra* chapter 5, pp. 118–9.

under the rubric of non-intervention. However, as a certain extent of overlapping between the principle of Art. 2(4) and that of non-intervention is inevitable, the distinction would be of little significance for the purposes of the prohibition of force.[148] Insofar therefore as it covers the same ground, non-intervention would appear to be subsumed under Art. 2(4).

In sum, the discrepancy of views about what constitutes force under the terms of Art. 2(4) could be attributed to the following factors. First, there is no definition of the term in the Charter. Secondly, though the *travaux préparatoires* indicate the general intention of the framers of the Charter as denoting armed force, they do not appear conclusive. Thirdly, unless legally accommodated within the prohibited force, non-physical means of coercion that can gravely affect the legally protected basic values of States would be less restrained than armed force, and might run amok with impunity until the community's intervention – if ever realized. Fourthly, the Charter, which has deprived States of their traditional liberty of resorting to unilateral force – saving cases of self-defence – but whose provisions on collective peace enforcement have not been effectively implemented, would be feared to leave States vulnerable to various non-physical modes of coercion, which traditionally might probably have been answerable by the use of armed force. Fifthly, the interdependence of States, which has now become pronounced, would appear to make such vulnerability of States more conspicuous as to bring into the legal limelight non-physical modes of force.[149] Sixthly, the desire to keep forcible/coercive action within the terms and governance of the Chrater seems to persist, for otherwise there would hardly be any valuable purpose in being so concerned with a term of the Charter. The amenability of the term "force" to interpretation would hence appear to legally

[148] See, e.g. G. Arangio-Ruiz, *The UN Declaration on Friednly Relations and the System of the Sources of International Law*, 1979, p. 120; T. Mitrovic, "Non-intervention in Internal Affairs of States", in *op. cit.*, M. Sahovic ed., *supra* n. 61, p. 233; K. Obradovic, *supra* n. 61, p. 108; *infra* chapter 5, p. 118.

[149] See, the fourth principle – the duty of States to co-operate with one another – in GA resol. 2625 (XXV). J. Perez de Cuellar reports, as Secretary-General of the UN, of the increasing economic interdependence and warns that the failure to manage "it can have results in terms of economic and social decline and chaos, which...can be just as serious and debilitating as a failure to evolve a collective system of international peace and security in a nuclear age". – *Report of the Secretary-General on the Work of the Organization for 1985*, (UN publication) *DPI/862*, 1985, p. 13. See, further, e.g. J.J. Paust and A.P. Blaustein, "The Arab Oil Weapon, – A Threat to International Peace", in *The Arab Oil Weapon*, J.J. Paust and A.P. Blaustein eds., 1977, pp. 72–9; F.I. Shihata, "Destination Embargo of Arab Oil: Its Legality Under International Law", ibid., pp. 122–5; R.B. Lillich, "Economic Coercion and the International Legal Order", ibid., pp. 154–6. Cf. J.L. Brierly, *The Law of Nations*, 6th ed., 1963, pp. 415–6; I. Brownlie, *Principles of Public International Law*, 3rd ed., 1979, p. 465.

warrant a construction capable of accommodating non-physical modes of coercion where such accommodation becomes necessary.

Finally, it needs to be observed that it is not only the term "force" that would require accommodative interpretation but also the other constitutents of the principle of Art. 2(4). Unless the operative frames of the Article and the values it seeks to protect are construed in a way that fortify it, the effectiveness of the prohibition of force, i.e. the continued serviceability of the Article, would not follow from the adjustment alone of the scope of the prohibited force. These elements of Art. 2(4) will be the subjects of the following three chapters.

Chapter 4

Operational Frames of Art. 2(4)

The threat or use of force prohibited in Art. 2(4) takes legal effect when resorted to without a valid ground against any State; it thereby becomes an unlawful threat or use of force in international relations. The elements of "international relations" and "any State" are the operational frames of the Article; they constitute the indexes of the Charter's aspiration to universal applicability within a prescribed jurisdictional competence. We shall deal in this chapter with each of these frames.

4.1 The Frame of "International Relations"

The prohibition in Art. 2(4) refers to the legally unsanctioned unilateral use or threat of force in the relations of subjects of international law. But it will be submitted in the present section that for purposes of the prohibition of force, the frame of international relations need not be restricted to States or other recognized subjects of international law.

Force used domestically in cases considered to be within the internal jurisdiction of States will not as a general rule afford ground for the application of the Article. Varied grades of internal disturbances, from minor riots to sustained armed conflicts of an advanced nature, against which a State deploys its coercive machinery – be it designated an ordinary police action, or a paramilitary or military operation – belong to this domain. And so long as the domestic use of force does not affect the rights of other States[1] nor violate other international obligations,[2] it re-

1 E.g. the obligation of protection owed by States to foreigners and their property: See, for instance, D. Nguyen Quoc, P. Daillier, A. Pellet, *Droit international public*, 3e éd., 1987, pp. 448, 451; D.P. O'Connell, *International Law*, Vol. 1, 2nd ed., 1970, pp. 303–4; 1 Oppenheim, pp. 687–8; Ch. Rousseau, *Droit international public*, Tome V, 1983, pp. 38, 46.

mains within the competence of the exercising State. But when it is undertaken unjustifiably in contravention of specific international legal obligations, a nexus is created between the contravening State and those others that are wronged by the unlawful act or are entitled to lodge a complaint. This nexus will furnish the legal ground for setting in motion the appropriate machinery envisaged in any relevant instrument, or for making legitimate diplomatic protests against the breach of obligation, or for demanding reparation and other action felt necessary in face of a particular type of an alleged wrong.[3] If satisfaction could not be obtained, that legal ground would appear to justify the application of unilateral measures which are proportional to the loss, damage or injury caused or threatened by the culpable breach of obligation. In the event of such breaches, the apparent intrastate exercise of force would not continue to enjoy the protection of domestic jurisdiction.

But some do not consider that this type of use of force could come under the rubric of use of force in international relations, even where it is employed against foreign nationals.[4] And many adherents of such a view go to the extent of denying the right of forcible protection of nationals abroad. However, as will be discussed later,[5] such a position would not appear tenable. It suffices to observe here that the violation of the rules of human rights alone could in the final analysis, and where the legal nexus exists, justify the protecting State's resort to force. The balance between the values that might be preserved and destroyed in such events appears to have obliged some authors to concede the validity of the protective use of force.[6]

In other respects, the internal use of force will cease to be exclusively domestic where the internal authority is condemned by the UN as usurpatory, and the situation created by that internal authority is

2 E.g. Arts. I and II of the Convention on the Prevention and Punishment of the Crime of Genocide. – *UNTS*, Vol.78, p. 277. See, too, Art. VIII of the same Convention which entitles the Parties to the Convention to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide"; Art. VIII of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* – ibid., Vol. 1015, p. 244; Art. 8 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavey. – Ibid., Vol. 266, p. 3.

3 See, e.g. 1 Oppenheim, pp. 353–4; Ch. Rousseau, *supra* n. 1, p. 210.

4 E.g. K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", in *Manual of Public International Law,* M. Sørensen ed., 1968, pp. 748–9.

5 *Infra* chapter 6, p. 177 *et seq.*

6 See, e.g. T. Schweisfurth, "Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights", 23 *GYIL*, 1980, pp. 175–9.

declared to constitute a threat to international peace and security, as was done in the instance of the régime in Southern Rhodesia.[7] It will be the same where there exists a denial and violation of fundamental human rights, as is recognized in the instance of South Africa.[8] As will be discussed presently, these situations could be seen to bring about, for the purpose of Art. 2(4), a special kind of international relations between the offending régimes and the oppressed peoples.

Such kind of instances entail the right of self-determination;[9] and when a particular group of people within a State gets international recognition as being entitled to that right, an internal use of force in respect of the right would not remain an exclusive exercise of domestic jurisdiction.[10] In this respect paragraph 7 of the fisrt principle of General Assembly resolution 2625 (XXV) states that

> [e]very State has the duty to refrain from any forcicble action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

This same formula, except for the words "in the elaboration of the principle of equal rights and self-determination", is repeated under the fifth principle where it is additionally stated that

> [i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right of self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

These declarations raise the question of the status of the relation between the peoples entitled to self-determination and the State against

7 See, e.g. SC resols. 217 (1965), 20 Nov. 1965; 232 (1966), 16 Nov. 1966.

8 *Infra* p. 73 *et seq.* See J.N. Singh, *Use of Force under International Law*, 1984, pp. 226–9 for the claim of the applicability of Art. 2(4) to Pakistan's action in East Pakistan, now Bangladesh, on the ground of violations of human rights and fundamental freedoms.

9 As seems to be the prevailing view, it is due to the UN that self-determination has become a principle of contemporary international law: It has been changed from a political notion to a fundamnental legal notion with properties of a *jus cogens* principle. See, e.g. A. Cassese, "Article 1, Paragraphe 2", in *La Charte des Nations Unies*, J.-P. Cot and A. Pellet eds., 1985, p. 54; A. Cristescu, *The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments*, 1981, (UN publication), Sales No. 80.XIV.3, pp. 22–3, 31; A.G. Robledo, "Le *jus cogens* international: sa genèse, sa nature, ses fonctions", 172 *RCADI*, 1981-III, p. 98. But see R.A. Friedlander, "Self-Determination: A Legal-Political Inquiry", in *Self-Determination: National, Regional and Global Dimensions*, Y. Alexander and R.A. Friedlander eds., 1980, p. 314 where the question whether self-determination has evolved into an international legal right is claimed to be "a matter of considerable debate"; S.M. Finger and G. Singh, "Self-Determination: A United Nations Perspective", ibid., pp. 333, 343.

10 Cf. M. Shaw, "The International Status of National Liberation Movements", in *Third World Attitudes Toward International Law*, F.E. Snyder and S. Sathirathai eds., 1987, pp. 146–8, 151–4; J. Charpentier, "Article 2, Paragraphe 3", in *op. cit.*, J.- P. Cot and A. Pellet eds, *supra* n. 9, p. 109.

which they are struggling. Whether, for purposes of the prohibited force, the relation amounted to an international relation was one of the many matters on which there was no unanimity at the Special Committee charged with the task of drawing up the principles declared in the resolution.[11] Since, however, the use of force to deprive peoples of their self-determination was accepted as impermissible, any use of force in contravention of the declared principle would withdraw the forcible action from the fold of internal matters and bring it under international law as a matter of recognized international concern;[12] and this would have the effect of practically making certain groups of persons subjects of international law. As has been rightly observed, under contemporary international law

> droits et pouvoirs ne reviennent plus seulement à des Etats souverains mais aussi à certaines catégories de peuples opprimés.[13]

Further indication of the juridically non-internal nature of the armed struggle for self-determination, or in other words, the particular international status accorded to peoples engaged in such struggle, can be found in Art. 1(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949. The Protocol (Protocol I) relates to the Protection of Victims of International Armed Conflicts, and it was adopted at Geneva on 8 June 1977. Its Art. 1(4) provides for the application of the Protocol in situations of

> armed conflicts in which peoples are fighting against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[14]

Eleven liberation movements had taken part in the Diplomatic Conference without the right to vote; the PLO and SWAPO attended all four sessions.[15] Under a compromise formula, liberation movements signed the Final Act on a separate paper entitled "National Liberation Move-

11 See Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, 1969, UN Doc. A/7619, pp. 59–61, paras. 164–5, 167–8, 174.

12 See, K. Obradovic, "Prohibition of the Threat or Use of Force", in *Principles of International Law Concerning Friendly Relations and Cooperation*, M. Sahovic ed., 1972, p. 111; O. Sukovic, "Principles of Equal Rights and Self-Determination of Peoples", ibid., pp. 367–8.

13 A. Cassese, *op. cit.*, *supra* n. 9, pp. 53–4. See also , K. Obradovic, *supra* n. 12, p. 123. Cf. B.V.A. Röling, "Aspects of the Ban on Force", 24 *NILR*, Special Issue 1/2, 1977, p. 243.

14 *The Laws of Armed Conflicts*, D. Schindler and J. Toman eds., 3rd rev. ed., 1988, p. 628.

15 M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts*, 1982, p. 8.

ments Recognized by the Regional Intergovernmental Organizations Concerned and Invited by the Conference to Participate in Its Work"; and the participating States safeguarded themselves in a footnote against setting up a precedent.[16] Nonetheless, as concerns the purposes of the Protocol, the liberation movements' participation in the conference and the signature of the Final Act would go to indicate the formal recognition of their international status. And the international character of armed struggle for self-determination argued for by some States[17] would thus appear to have gained a certain qualified acceptance.

South Africa has primarily provided the UN with concrete situations for issuing resolutions against the policy and practices of *apartheid* and for affirming the legitimacy of the struggle of the people of South Africa against such policy and practices. The racial discrimination practised by the South African régime has been repeatedly declared to be inconsistent with the principles of the Charter and the obligations of membership.[18] It has been described as "abhorrent to the conscience of mankind";[19] branded and condemned as a crime against humanity,[20] and as "a crime against the conscience and dignity of mankind";[21] and generally condemned as a policy.[22] The legitimacy of the struggle of the people of South Africa against the condemned racial policy and practices of the South African Government has been recognized by both the General Assembly[23] and the Security Council.[24] Further, the liberation movements in South Africa have been recognized as the authentic representatives of the overwhelming majority of the South African people.[25] States and

16 Ibid.

17 Ibid., p. 40.

18 See, e.g. para. 2, GA resol. 2142 (XXI), 26 Oct. 1966; para. 1, SC resol. 181 (1963), 7 Aug. 1963; para. 2, SC resol. 182 (1963), 4 Dec. 1963.

19 See, e.g. preambular para. 11, SC resol. 182 (1963), 4 Dec. 1963.

20 See, e.g. the first paras. of GA resols. 2202 (XXI), 16 Dec. 1966; 2307 (XXII), 13 Dec. 1967; 3324 (XXIX) E, 16 Dec. 1974; para. 3, GA resol. 40/64 B, 10 Dec. 1985.

21 Para. 3, SC resol. 392 (1976), 19 June 1976.

22 See, e.g. GA resols. 2142 (XXI), 26 Oct. 1966; 3324 (XXIX) E, 16 Dec. 1974; 41/35 A, 10 Nov. 1986; paras. 1, 3, 1 respectively; paras. 1, SC resols.191 (1964), 18 June 1964; 569 (1985), 26 July 1985.

23 See, e.g. GA resols. 2307 (XXII), 13 Dec. 1967; 2396 (XXIII), 2 Dec. 1968; 3324 (XXIX) E, 16 Dec. 1974; 41/35 A, 10 Nov. 1986; paras. 2, 6, 2 and preambular para. 3 respectively.

24 See, e.g. paras. 4, SC resols. 392 (1976), 19 June 1976; 473 (1980), 13 June 1980.

25 See, e.g. GA resols. 3411 (XXX) G, 10 Dec. 1975; 40/64 B, 10 Dec. 1985; paras. 6 and 1 respectively. The latter resol. has in para. 14 further decided to continue UN budgetary allocations to the African National Congress and the Pan Africanist Congress of Azania to enable those liberation movements "to maintain offices in New York in order to participate effectively in the deliberations of the Special Committee against *Apartheid* and other appropriate bodies".

organizations have been requested to provide moral, political and material assistance to the liberation movements,[26] which may struggle "by all available means" or "by all means possible".[27] On the other hand, those States "which give assistance to the racist and colonial régimes" have been declared "accomplices of those régimes".[28] And the Security Council has unanimously determined "that the acquisition by South Africa of arms and related *matériel* constitutes a threat to the maintenance of international peace and security"; it has accordingly decided on a mandatory prohibition of the supply of those materials to South Africa.[29]

The resolutions referred to in the foregoing paragraph have been sampled to show the repeatedly confirmed attitude of the two principal organs of the UN towards the policy of *apartheid* and its consequences; it will therefore be unnecessary to inquire here into the legally binding nature of General Assembly resolutions. The points noted from the resolutions of the two organs are indicative of a situation in South Africa which is not exclusively internal as to legally withstand interference by the UN and others. It is submitted that condemning the policy and practice of racial discrimination as criminal, recognizing liberation movements as authentic representatives of a people whose struggle is acknowledged as legitimate, appealing for and providing assistance to such movements, and declaring that the freedom fighters should be treated as prisoners of war[30] has totally the effect of bringing the struggle conducted by the liberation movements against the Government of South Africa within the category of international relations. In the context of *apartheid*,[31] the reaffirmation of the right of self-determination and of the legitimacy of the struggle aimed at the achievement of that right appear to be nothing

[26] See, e.g. GA resols. 2307 (XXII), 13 Dec. 1967; 2396 (XXIII), 2 Dec. 1968; 3324 (XXIX) C, 16 Dec. 1974; 3411 (XXX) G, 10 Dec. 1975; 40/64 B, 10 Dec. 1985; paras. 8, 7, 2, 9, 12 respectively.

[27] GA resols. 3324 (XXIX) E, 16 Dec. 1974; 3411 (XXX) G, 10 Dec. 1975; paras. 2 and 5 respectively.

[28] See, e.g. GA resols. 3383 (XXX), 10 Nov. 1975; 39/15, 23 Nov. 1984; para. 1 and preambular para. 7 respectively.

[29] SC resol. 418 (1977), 4 Nov. 1977.

[30] See, e.g. GA resols. 2396 (XXII), 2 Dec. 1968; 3103 (XXVIII), 12 Dec. 1973; 40/64 B, 10 Dec. 1985; paras. 8(c), 3 and 4, 6 respectively.

[31] See H. Santa Cruz, *Racial Discrimination*, rev. ed., (1976), 1977 (UN publication), Sales No. E.76.XIV.2, pp. 204–9 for a survey of GA and SC resols. relating to apartheid; "Legal Aspects of Unilateral Sanctions Against South Africa, Comments from the Netherlands university lecturers in international law", in *Notes and Documents, United Nations Centre Against Apartheid*, No. 16/84, p. 11, para. 40 where it is concluded that "[a]partheid has been described by the international community as a flagrant violation of the principles and aims of the Charter of the United Nations. Each Member State has the right to take action against this situation and the duty to co-operate with other States in order to combat apartheid."

other than an assertive confirmation of an acknowledged fundamental human right.

The right of self-determination might have been denied in the past, but in contemporary international law under the Charter and practice of the UN, its denial would be tantamount to a deliberate disregard of the law in force.[32] The people whose right of struggle against a system abhorrent to fundamental values of the world community has been recognized by the UN, hence, do not appear to be at the legal mercy of their oppressors. They could seek and receive assistance from other States, which, it is submitted, would not be infringing the prohibition of the use of force in international relations if they responded with assistance. It would not appear that the recognized right of struggle of an oppressed people could be denied the means helpful for its realization; and external assistance for causes supported by the UN is one of such means. On the other hand, any force used by the Government of South Africa against States assisting the people struggling for their self-determination would lack justification and come within the prohibited use of force in international relations. And States as well as organizations which assist the Government of South Africa in sustaining its condemned system of *apartheid* would make themselves accomplices of that government and be accordingly condemnable.[33]

In Namibia, where the South African mandate was terminated by General Assembly resolution 2145 (XXI), 27 October 1966, and where

[32] See, e.g. Arts. 1(2) & (3), 13(1)(b), and 55 of the UN Charter; Art. 21, Universal Declaration of Human Rights, where the right to take part in the government of one's country is acknowledged, and the will of the people is declared to constitute the basis of governmental authority – *Human Rights: A Compilation of International Instruments*, (UN publication) 1988, Sales No. E.88.XIV.I, p.1; Arts. 2(1) and 3, International Convention on the Elimination of All Forms of Racial Discrimination, where racial discrimination and *apartheid* are condemned – *UNTS*, Vol. 660, p. 195; the common Art. 1(1), International Covenant on Economic, Social and Cultural Rights, and International Covenant on Civil and Political Rights, where it stands agreed that "all peoples have the right of self-determination" – ibid., Vol. 993, p. 3 and Vol. 999, p. 171 respectively; Arts. 1(1), II(c) and (d), the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, where it is declared "that *apartheid* is a crime against humanity" and that "any legislative measures and other measures calculated to prevent a social group or groups from participation in the political, social, economic and cultural life..." and "any measures, including legislative measures, designed to divide the population along social lines..." constitute "the crime of *apartheid*" – ibid., Vol. 1015, p. 244. See, further, e.g. para. 1, GA resol. 3103 (XXVIII), 12 Dec. 1973, where it is stated that "[t]he struggle of peoples under colonial and alien dominaiton and racist régimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law". This paragraph at least evidences the *opinio juris* of the majority of the UN Members as to the contemporary state of international law in regard to self-determination. See also R. Ago, "State Responsibility", *YILC*, Vol. II, Part One, 1976, pp. 37–8; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, pp. 120–3.

[33] See, e.g. GA resols. 3151 (XXVIII) G, 14 Dec. 1973; 33/183 L, 24 Jan. 1979; 38/39 A, 5 Dec. 1983; 40/64 A, 10 Dec. 1985; paras. 7, 8, 12, and 5 respectively.

the continued illegal occupation of the Territory was repeatedly condemned by the General Assembly and the Security Council,[34] South Africa's exercise of authority was usurpatory. Accordingly, force used to maintain such authority constituted an illegal exercise of force outside the sphere of domestic jurisdiction.[35] As the resolution terminating the mandate reaffirmed Namibia to be a "territory having international status",[36] South Africa's forcible exercise of authority in and against that Territory could have been assimilated with the prohibited use of force in international relations.[37] This could have been justified on the ground that South Africa had lost any legal title to the Territory and that its forcible occupation[38] did not relate to *terra nullius*[39] but to a particular entity, which by its special circumstances was more a subject than an object of international law.[40]

34 See, e.g. GA resols. 31/146, 20 Dec. 1976; 41/39 A, 20 Nov. 1986; paras. 8 and 6 respectively; paras. 1 SC resols. 385 (1976), 30 Jan. 1976; 566 (1985), 19 June 1985.

35 South Africa agreed to Namibia's independence in the tripartite agreement it signed with Angola and Cuba on 22 December 1988. – See 28 *ILM*, 1989, pp. 957–8 for the text of the agreement. And South Africa accepted "the right of peoples of the southwestern region of Africa to self-determination, independence, and equality of rights", which was reaffirmed in the 9th preambular para. of the agreement.

36 Cf. *International Status of South-West Africa*, Ad. Op., *ICJ Reports* 1950, pp. 141–3.

37 Para. 7, for instance, of GA resol. 41/39 A, 20 Nov. 1986, which was passed without a negative vote, "[d]eclares that South Africa's illegal occupation of Namibia constitutes an act of aggression against the Namibian people in terms of the Definition of Aggression" annexed in GA resol. 3314 (XXIX), 14 Dec. 1974. And as aggression is, according to Art. 1 of that definition, and subject to the decision of the Security Council, "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State...", GA resol. 41/39 would be a collective factual appraisal of the Namibian situation; and that would have the effect of bringing South Africa's forcible occupation of that Territory within the frame of an unlawful use of force in international relations.

38 As the ICJ unanimously held in its Advisory Opinion on the *International Status of South-West Africa*, "the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa...". – *Supra* n. 36, p. 144.

39 See the *Western Sahara* Ad. Op., *ICJ Reports* 1975, pp. 38–9 for the contemporary appreciation of the term *terra nullius*.

40 See, e.g. SC resols. 269 (1969), 12 Aug. 1969, where para. 3 states "that the continued occupation of the Territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and denial of the political sovereignty of the people of Namibia"; 276 (1970), 30 Jan. 1970, where preambular para. 4 reaffirms the extension of South African laws, etc., to "constitute illegal acts and flagrant violations...of the international status of the Territory"; 385 (1976), 30 Jan. 1976, where para. 4 " [d]emands that South Africa put an end forthwith to its policy of bantustans and the so-called homelands aimed at violating the national unity and territorial integrity of Namibia". See also para. 34, GA resol. 40/97 A, 13 Dec. 1985.

Cf. views on the status of non-State entities in W.W. Bishop, "General Course of Public International Law," 115 *RCADI*, 1965-II, p. 255; P. Guggenheim, "Les principes de droit international public", 80 *RCADI*, 1952-I, pp. 92, 94, 96; H. Kelsen, *Principles of International Law*, 2nd rev. ed., by R.W. Tucker, 1966, p. 192.

Additionally, irrespective of the legal nature of the Territory's occupation by South Africa, the Namibians, like the people of South Africa, were entitled to an independent right of self-determination and struggle against the internationally condemned system of *apartheid*.[41] Pertinent in this regard, the General Assembly had recognized the South West Africa People's Organization (SWAPO) – the national liberation movement of Namibia – as "the sole and authentic representative of the Namibian people"; it had supported the armed struggle led by SWAPO for self-determination; and it had appealed to the Members "to grant all necessary support and assistance", including military, to SWAPO in its legitimate struggle.[42]

Moreover, since Namibia was "under direct United Nations responsibility",[43] South Africa's continued forcible occupation[44] of that Territory amounted to an illegal exercise of force against "interests of which [the UN] is the guardian" – terms used by the ICJ in the *Reparation* case to explain the damage that may be caused to the UN.[45] Now, since the UN as an international organization is a judicially confirmed subject of inter-

41 Re *apartheid* in Namibia, see *Issues on Namibia, Decolonization*, No. 9, 1977, (UN publication) Sales No. E.78.I.II.), pp. 8–11; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Ad. Op., *ICJ Reports* 1971, p. 57.

Re justified use of force by people struggling for self-determination, cf. *The Right to Self-determination – Implementation of United Nations Resolutions*, (H. G. Espiell, Special Rapporteur), (UN publication) Sales No. E.79.XIV.5., p. 14, para. 93.

42 See paras. 2, 3 and 4, GA resol. 31/146, 20 Dec. 1976; paras. 12 and 13, GA resol. 41/39 A, 20 Nov. 1986; Art. 7, the Definition of Aggression, GA resol. 3314 (XXIX), 14 Dec. 1974.

The resort to "armed action or repressive measures of all kinds directed against dependent peoples" has been declared impermissible in para. 4 of GA resol 1514 (XV), 14 Dec. 1960; and the struggle of such peoples for self-determination and independence has been proclaimed in para. 1 of GA resol. 3103 (XXVIII), 12 Dec. 1973, to be "legitimate and in full accordance with the principles of international law". Liberation movements leading the struggle would therefore necessarily possess the international personality that would be commensurate with the object of the resolutions; otherwise, the struggle would be unable to legally extricate itself from the full governance of domestic law. – See J.A. Barberis, "Nouvelles questions concernant la personalité juridique internationale", 179 *RCADI*, 1983-I, pp. 240–4; H.G. Espiell, *supra* n. 41, p. 14, para. 96; H. Mosler, "Subjects of International Law", 7 *EPIL*, 1984, p. 456 where liberation movements are referred to as "partial subjects of international law". See, further, *Legal Consequences...*, *supra* n. 41, p. 31, para. 52. Cf. *Repertory*, Suppl. No. 5, Vol. 1, 1987, p. 31, para. 16 re the implication of legitimized liberation struggles.

43 See, e.g. para. 8, GA resol. 41/39 A, 20 Nov. 1986; para. 2, SC resol. 601 (1987), 30 Oct. 1987, where "the legal and direct responsibility" of the UN is reaffirmed.

44 Para. 57, for instance, of GA resol. 41/39 A, 20 Nov. 1986, "*[s]trongly condemns* the illegal occupation régime of South Africa for its massive repression of the people of Namibia and their liberation movement, the South West Africa People's Organizaiton, in an attempt to intimidate and terrorize them into submission".

45 *Reparation for Injuries Suffered in the Service of the United Nations*, Ad. Op., *ICJ Reports* 1949, p. 180.

national law,[46] its relation with South Africa regarding Namibia was on the international plane and under international law. And since the UN had recognized SWAPO as representative of Namibians in matters of self-determination, the Organization would thereby appear to have delegated, as it were, the guardianship of its interests in Namibia to that liberation movement and bestowed on it the international personality necessary for that purpose. In the context of its struggle for self-determinaiton, SWAPO's relations with South Africa and others would then appear to have attained an international status.[47]

The question may be raised in this connection as to whether South Africa's relation with the UN on the Namibian issue could have brought forth a situation of unlawful use of force in international relations. Given the international personality of the UN with attributes necessary for effecting the purposes prescribed in its Charter,[48] it is as much a bearer of rights and duties, including those provided in Art. 2(4), as other subjects of international law. Force used by the Government of South Africa in Namibia might then conceivably be argued to have constituted an illegal use of force against fundamental rights of which the UN was guardian, and to have thereby come within the prohibited use of force in international relations. However, the attendant question of whether the UN would have had the right of resort to forcible measures of protection and other countermeasures,[49] which ordinary States would have, would probably be academic. The possibilities available to the UN under its peace enforcement authority would have appeared sufficient. Nonetheless, in strict appreciation of the legal elements involved, namely, the international personality of the UN and the rights and interests under its care and protection, there would have appeared no serious obstacle of principle to the Organization's exercise of unilateral measures of defence and

[46] Ibid., p. 179.

[47] Cf. para. 23, GA resol. 41/39 A, 20 Nov. 1986, where South Africa and SWAPO are indicated to be the only two parties in the Namibian conflict.

[48] See the *Reparation* case, *supra* n. 45, p. 180; D.W. Bowett, *The Law of International Institutions*, 4th ed., 1982, pp. 339–41.

[49] Cf. F. Seyersted, "United Nations Forces: Some Legal Problems", 37 *BYIL*, 1961, p. 454 where e.g. regarding creation of armies and conduct of military operations, the difference between States and international organizations is stated to be one "of fact, not of inherent legal capacity". See also by the same author, *Objective International Personality of International Organizations*, 1963, p. 13. *Contra*, see M. Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations", 44 *BYIL*, 1970, p. 143, n. 1.

protection allowed to subjects of international law.[50] A right need not and might not be exercised, for its exercise is generally conditioned by extraneous considerations and weighing of probable results; but this would not necessarily detract from its legal value.

South Africa's continued administration of Namibia after the termination of its mandate by General Assembly resoslution 2145 (XXI),[51] which was reaffirmed by the Security Council[52] and to all intents and purposes legally confirmed by the ICJ,[53] amounted to an illegal exercise of authority by an occupying State. Since it is in the nature of such occupation that force outside domestic or other entitling jurisdiction be employed for its continued maintenance, the employment of such force constituted illegal use of force; and it is submitted that for purposes of the prohibition of Art. 2(4), such force came within the frame of international relations.

The foregoing legal aspects drawn from the interaction of the notions of "international relations" and "domestic jurisdiction" manifested in the illustrative situations of South Africa and Namibia would also have relevance to similar situations in other parts of the world.[54] For instance, the

50 See, e.g. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Ad. Op., *ICJ Reports* 1980, pp. 89–90 where it is held that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties". And this may validly be taken to imply that they are also beneficiaries under the named titles. See, further, *infra* pp. 90–1. Re UN's self-defence, cf. P. de Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", *AIDI*, Vol. 54-I, 1971, p. 35; H. Waldock, "General Course on Public International Law", 106 *RCADI*, 1962-II, p. 245.

51 See *Legal Consequences...*, Ad. Op., *supra* n. 41, p. 47, para. 95.

52 See ibid., p. 51, para. 108.

53 See ibid., pp. 53, 56, paras. 115, 126 respectively.

54 See generally the various elements that would constitute international relations in GA resols. 1514 (XV), 14 Dec. 1960; 2105 (XX), 20 Dec. 1965 , especially para. 10 where "the legitimacy of the struggle by peoples under colonial rule to exercise their right of self-determination and independence" is recognized, and where States are invited "to provide material and moral assistance to the national liberation movements in colonial Territories"; 2621 (XV), 12 Oct. 1970, especially paras. 3(2), 3(6)(a) and (c) as indicative of the international status conferred on freedom fighters; 2625 (XV), 24 Oct. 1970, 5th principle, especially para. 6 about the separate and distinct status of a colony or another non-self-governing Territory; 3103 (XXVIII), 12 Dec. 1973. See also *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, C.L. Sandoz, C. Swinarski, B. Zimmermann eds., 1987, pp. 50–6.

When considering the Indonesian situation in 1947, which was brought about by the armed conflict between the forces of the Netherlands and Indonesia, R. Higgins states that had "the situation been put before the Security Council in terms of Article 2(4), it could equally well have been argued that the action of the Netherlands was not a use of force in international relations". – *Supra* n. 32, p. 221. But it appears doubtful that such an argument would have been upheld. The controlling factors do not seem to be the formally structured traditional divisions between States proper and other entities. As will be submitted in the next section, "The Frame of Any State", the prohibition of the use of force in international relations appears to be impervious to the question of the existence or not of recognition of an entity as a subject of international law; and as concerns the Security Council's authority under Art. 39,

Indonesian armed intervention in East Timor would constitute an illegal use of force against a Territory inhabited by people with a recognized right of struggle for the achievement of self-determination and independence.[55] Had Portugal been found to have discharged fully its responsibilites as the administering power, the Indonesian armed intervention might also have been conceived as an illegal use of force in the relations of the two States. But as Portugal was considered not to have acquitted itself of those responsibilities,[56] and as fighting between contending factions had taken place and a *de facto* situation of independence had occurred,[57] such a view would probably appear far-fetched.

The occupation of Western Sahara by Morocco could be taken as another instance. The right of the people of Western Sahara to self-determination and independence has been repeatedly affirmed by the General Assembly,[58] as has the legitimacy of their struggle towards that end;[59] the POLISARIO Front has been acknowledged as "the representative of the people of Western Sahara"[60] and put on a legal level not subordinate to Morocco,[61] which has been urged to terminate its occupation of the Territory.[62] These factors would indicate that the situation of Western Sahara falls within the frame of international relations as concerns

domestic jurisdiction, according to Art. 2(7) of the Charter, is no bar. See, further, L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations*, 3rd rev. ed., 1969, pp. 50–1. Cf. W.M. Reisman, "Criteria for the Lawful Use of Force in International Law", 10 *YJIL*, 1985, p. 282 where the basic policy of the Charter is indicated to be the maintenance of "the political independence of territorial communities" and that the "application of Article 2(4) must enhance opportunities for ongoing self-determination". See also p. 284. *Contra*, O. Schachter, "The Lawful Resort to Unilateral Use of Force", ibid., pp. 293–4.

55 After referring in its 5th preambular para. to the terms of Art. 2(4), GA resol. 3485 (XXX), 12 Dec. 1975, calls in its para. 1 on "all States to respect the inalienable right of the people of Portuguese Timor to self-determination, freedom and independence and to determine their future political status in accordance with the principles of the Charter...". The same resolution in its para. 5 calls on Indonesia "to desist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the Territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence". Similarly, the unanimous SC resol. 384 (1975), 22 Dec. 1975, calls, *inter alia*, for the withdrawal of the Indonesian forces.

56 See the 9th preambular para. of SC resol. 384 (1975), 22 Dec. 1975; *Repertoire*, Suppl. 1975–1980, p. 250, for Portugal's objection to this assessment of its performance.

57 See, the *Repertoire*, *supra* n. 56, pp. 248–9.

58 See, e.g. paras. 1 of GA resols. 2229 (XXI), 20 Dec. 1966; 41/16, 31 Oct. 1986; *Western Sahara*, Ad. Op., *supra* n. 39, p. 36, para. 70.

59 See, e.g. para 2, GA resol. 2983 (XXVII), 14 Dec. 1972; para. 1, GA resol. 34/37, 21 Nov. 1979.

60 See para. 7, GA resol. 34/37, 21 Nov. 1979.

61 See, e.g. para. 3, GA resol. 41/16, 31 Oct. 1986.

62 See para. 6, GA resol. 34/37, 21 Nov. 1979.

the prohibition of the use of force under Art. 2(4).[63] Futhermore, though the bulk of Western Sahara is in Moroccan hands,[64] the fact that the Territory has already been given recognition as the Saharan Arab Democratic Republic by more than sixty countries[65] would be an added reason for putting the conflict between Morocco and the POLISARIO front within the frame of "international relations".

In sum, the construction of the term "international relations" to accommodate the relations between entities other than States proper and States against which they contend by force, and that between the entites themselves, would take the force so used out of the exclusive sphere of domestic jurisdiction. This would have the effect of either exposing them to appropriate third-party sanctions, or of entitling victims of recognized unlawful use of force to third-party assistance. Nonetheless, it would not mean that outside interference in a struggle for internal self-determination, i.e. internecine armed conflict for the pure and simple mastery of state authority, is lawful. The internal conflict for power and that for self-determination under contemporary human rights norms might not always dovetail. In the case of what would be an internal conflict for changing the internal social or political order of a State, others may find it necessary for their own purposes[66] to recognize rebels as belligerents where the latter are organized under a responsible leadership and control effectively part of the State's territory.[67] The recognizing

63 Cf. A. Tanca, "The Prohibition of Force in the U.N. Declaration on Friendly Relations", in *The Current Legal Regulation of the Use of Force*, A. Cassese ed., 1986, p. 407 where after considering the 5th principle of the Declaration (GA resol. 2625 (XXV)) and the right of self-defence, the author concludes that "[t]he juridical status of peoples fighting for self-determination remains uncertain, therefore. Their struggle is recognized to be of international significance, even though they are not placed on the plane as other subjects of international law." It is however this same recognition of the international significance of the struggle that would assimilate it to one with international dimensions and bring it within the frame of international relations for the purposes of the prohibition of Art. 2(4). The particular status of the freedom fighters is not and need not be the same in all aspects as that of other subjects of international law. However, the freedom fighters' acknowledged right to struggle even by military means, their right to receive outside assistance (which in such cases necessarily includes military assistance), and the assisting States' entitlement to exoneration from legal responsibility for the intervention that such assistance would otherwise entail cannot but function on the international plane, i.e. via international relations of a scope circumscribed by the context of the struggle for self-determination. See also ibid., p. 404. Cf. D. Thürer, "Self-determination", 8 *EPIL*, 1985, pp. 473–4.

64 See 33 *Keesing's Record of World Events*, 1987, p. 35216.

65 Ibid., p. 35218.

66 Cf. W. Friedmann, "General Course in Public International Law", 127 *RCADI*, 1969-II, pp. 207–11.

67 See, e.g. 2 Oppenheim, p. 249 re the four conditions of fact stated to be necessary for the recognition of belligerency; 12 *Digest of International Law*, M.M. Whiteman ed., 1971, pp. 234–5 (excerpt from Novogrod's "Internal Strife, Self-determination and World Order").

States thereby assume the role of neutrality towards the belligerents.[68] But it will be a different matter where the internal struggle constitutes the kind of self-determination indicated above.

It needs to be underlined, however, that the international relation envisaged in regard to the exercise of self-determination is a special relation which, it is submitted, would be assimilated to international relations for purposes of the prohibition in Art. 2(4). This qualified assimilation would be achieved by accommodative interpretation of the term "international relations"; and such interpretation would not affect the full significance of the notion of international relations for other appropriate matters.

In concluding this section, it may be obseved that international relations may be active in that they may either constitute relations that are free from destructive coercion or ones that are forcible and destructive. The relations may also be near passive or factually inexistent in that a minimum degree or no relations may be maintained due to either the absence of inducing factors or the implementation of a policy of sanctions. The international relations constituting destructive coercion would be "forcible" relations which, lacking legal justification, fall under the prohibition of the use or threat of force in Art. 2(4). A denial of relations, especially when orchestrated as sanctions, could create the seemingly paradoxical situation where the absence of factual relations would, in producing its desired effect, amount to some form of relations. If breaking off economic, trade and other ties with a State were to isolate it in a way that affected its existence and security, such effect could indicate the presence of a serious coercion that comes within the frame of international relations.[69] And where the denial of relations was designed to cause the kind of injury that could be caused by the use of physical force, and was not attended by exonerating legal grounds, it would not appear valid to exclude such "negative" use of coercion from the scope of the prohibited use of force in international relations. Put another way, if a victim party left in a state of either submitting to the will of others or

[68] See, e.g. H. Kelsen, *supra* n. 40, p. 413; R.H. Hull and J.C. Novogrod, *Law and Vietnam*, 1968, pp. 75–7, 84.

[69] T. Farer, e.g. defines economic coercion as "efforts to project influence across frontiers by denying or conditioning access to a country's resources, raw materials, semi-finished products, capital, technology, services, or consumers". – "Political and Economic Aggression in Contemporary International Law", in *op. cit.*, A. Cassese ed., *supra* n. 63, p. 124. The author also says that he "would be willing to go no further than treating economic coercion as aggression when, and only when, the *objective* of the coercion is to liquidate an existing State or to reduce that State to the position of a satellite". – Ibid., p. 129. Cf. M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, 1961, pp. 196, 200.

resorting to proportionate measures of self-defence chose the latter course, which after the appreciation of the relevant factors was not generally condemned, the "negative" use of coercion that prompted those measures would appear to have been viewed as unjustified and as constitutive of the prohibited use of force in international relations.[70] A deliberate and unjustified omission in these circumstances could be no less injurious and, it is submitted, unlawful than a commission of illegal acts.[71]

The progress of the world towards greater cooperation through general and regional organizations does not only evince the attainment of a high degree of interdependence but also the expectations of continuance and improvment of the interdependence created and nourished by this same interdependence. Modern global and other structures and national achievements owe their status and viability to realized and realizable expectations. The expectations have become an important element of the foundation of modern life as to have thereby entered willy-nilly the preserve of fundamental community values and come to command respect.[72] The UN, itself as much the outcome as the source of expectations, proclaims in Art. 1 of its Charter the maintenance of international peace and security as well as social progress and better life; these constitute its purposes, i.e. its fundamental values: its legalized expectations. And the Charter cannot fail to reflect the means, too, that are essential for the fulfilment of its purposes without affecting its own efficacy.

In a world sought to be governed by law and peaceful processes for dealing with conflict-prone situations, unjustified denial and frustration

[70] T. Farer, after having admitted that *"under some circumstances, economic coercion can be a violation of international law"* (the author's own italics), postulates that "an enormously heavy burden of proof must lie on the State claiming that economic coercion constitutes aggression, and therefore justifies a violent response". – *Op. cit., supra* n. 63, p. 127. But later, he agrees with the position of A. Cassese, which seeks to restrict to peaceful sanctions the available defensive measures against economic aggression. – Ibid., pp. 130–1. However, if in a certain situation economic coercion would be violative of international law, and if that violation would be of such a grade as to affect the political independence or territorial integrity – values protected by Art. 2(4) – of a victim State, the economic coercion would then be violative of that Article as well. To deny in such a case the proportionate exercise of self-defence would be to leave the protected rights without the necessary safeguard afforded by self-defence. – See *infra* chapter 7, p. 207.

[71] Cf. e.g. the 4th principle of GA resol. 2625 (XXV), 24 Oct. 1970, especially sub-para. (c).

[72] See, e.g. Arts. 4, 6, 9, 17, Charter of Economic Rights and Duties of States, GA resol. 3281 (XXIX), 12 Dec. 1974; *The History of UNCTAD, 1964–1984*, (UN Publication) Sales No. E.85.II.D.6, pp. 48–9; *From Marshall Plan to Global Interdependence*, (OECD), 1978, pp. 59–62. Cf. S.C. Neff, "Boycott and the Law of Nations: Economic Warfare and Modern International Law in Historical Perspective", 59 *BYIL*, 1988, p. 114 *et seq.* for the analysis in the political and economic context of the positions of the Western, Socialist and Third-World States.

of these means of attainment of basic expectations – whatever the designation of the mode by which they are denied or frustrated – would constitute international relations gone awry and offend against the purposes of the Charter. Such relations, therefore, would have to be brought within the operational frame of "international relations" of Art. 2(4) and subjected to the discipline of that Article. Otherwise, the imperative alternative would appear to be a retrogression to the disavowed era of the rule of force.

4.2 The Frame of "Any State"

Art. 2(4) prohibits the threat or use of force against any State irrespective of UN membership. The Dumbarton Oaks Proposals referred to "members...in their international relations",[73] which phrasing could have been interpreted as either referring solely to the relations of the Members *inter se* or as comprehending additionally the relations of Members and non-Members. With the acceptance of the Australian amendment,[74] the envisaged relations came to be clearly seen as concerning the relations of the Members with any State – Members and non-Members. This is a significant improvement on both the Covenant of the League of Nations and the Pact of Paris; it constitutes a bold step towards encompassing the globe and putting it under a uniform régime as regards the threat or use of force on the international plane. The Covenant governed the resort to force between or against Members but did not appear to proscribe explicitly such resort by Members against non-Members, at least not against those declining to accept the obligations of membership.[75] Under the terms of Article 11 of the Covenant, any war or threat of war was declared to be a matter of concern to the League, which was obligated to "take any action that may be deemed wise and effectual to safeguard the peace of nations"; but the unanimity required in the Article for a decision on non-procedural matters would have frustrated any action against a Member going to war with a non-Member as to show the Member's practical immunity from a duly pronounced community

[73] 6 *UNCIOD*, p. 556. Cf. R.B. Russell and J.E. Muther, *A History of the United Nations Charter*, 1958, p. 228.

[74] See *supra* chapter 3, pp. 38–9.

[75] See Arts. 10, 12(1), 13(1) and (4), 15(1) and (6), 16(1), 17(3) of the Covenant, *International Legislation*, Vol. 1, M.O. Hudson ed., 1931, p. 1; J. Ray, *Commentaire du Pacte de la Société des Nations*, 1930, pp. 542–3.

censure.[76] The terms of the Pact of Paris also govern only the relations of the signatory States thereto, which were "not legally bound to refrain from war against a non-signatory".[77]

A State, generally, is an organized juristic entity which has an independent existence under international law.[78] It is, *par excellence*, the subject of that law. Where the accepted basic ingredients of statehood – people, territory, independent and effective government – are present, an entity, irrespective of recognition, would come to possess, for purposes of international peace and security, the attributes of statehood.[79] Inasmuch as the entity could have the capability of inflicting injury on the protected values of States proper or other subjects of international law, and of disrupting international peace and security, or could itself be the object of an exercise of force by others, the duty of not resorting to illegal force incumbent upon States would also fall upon it; and by the same token, the protection from illegal resort to force would extend to its benefit.[80] Under the régime of a norm prohibiting the use of force in

[76] See J. Ray, *supra* n. 75, pp. 385–6, 389–90; G. Scelle, *Manuel de droit international public*, 1948, p. 754. But see H. Wehberg, "L'interdiction du recours à la force. Le principe et les problèmes qui se posent", 78 *RCADI*, 1951-I, pp. 33–4 for the League's authority in cases of wars violative of the Covenant; H. Lauterpacht, *The Development of International Law by the International Court*, 1958, pp. 160–1 about the possibility of the non-applicability of the unanimity rule.

[77] M. Gonsiorowski, "The Legal Meaning of the Pact for the Renunciation of War", *APSR*, Vol. XXX, 1936, p. 668. See *supra* chapter 2, p. 32.

[78] See, e.g. J. Crawford, *The Creation of States in International Law*, 1979, pp. 32–3; D.W. Greig, *International Law*, 2nd ed., 1976, p. 93; H. Kelsen, *supra* n. 40, pp. 182–4. Cf. R. Quadri, "Cours général de droit international public", 113 *RCADI*, 1964-III, pp. 433–45. See the classification of States in J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. II, 1969, pp. 60–1.

[79] See, e.g. J. Crawford, *supra* n. 78, p. 36 *et seq.*; H. Kelsen, *supra* n. 40, p. 307; 1 Oppenheim, p. 118; P. de Visscher, "Cours général de droit international public", 136 *RCADI*, 1972-II, p. 46. Cf. R.H. Hull and J.C. Novogrod, *supra* n. 68, pp. 55–8; L. Henkin, *How Nations Behave*, 2nd ed., 1979, pp. 309–12.

As concerns recognition, see, e.g. the discussion in H.W. Briggs, *The Law of Nations*, 1952, pp. 113–17; I. Brownlie, *Principles of Public International Law*, 3rd ed., 1979, pp. 94–5; G. Morelli, "Cours général de droit international public", 89 *RCADI*, 1956-I, pp. 502–3, 519–20; G. Scelle, "Règles générales du droit de la paix", 46 *RCADI*, 1933-IV, pp. 373–4, 413. But see J.H.W. Verzijl, *supra* n. 78, pp. 587–90. Cf. Art. 1(a) of the Definition of Aggression, GA resol. 3314 (XXIX), 14 Dec. 1974, where 'the term "State" is used without prejudice to questions of recognition'; B. Broms, "The Definition of Aggression", 154 *RCADI*, 1977-I, p. 343; H. Mosler, "The International Society as a Legal Community", 140 *RCADI*, 1974-IV, 285. Similarly, as regards peaceful settlement of disputes and Arts. 32 and 35(2) of the UN Charter, the term State may not have the same meaning as in other parts of that instrument.

[80] In its Advisory Opinion in the *Reparation* case, the ICJ has stated that "[t]hroughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States". – *Supra* n. 45, p. 178. This statement is valuable for its analogical relevance. See, further, e.g. O. Bring, *Folkrätten och världspolitiken*, 1974, p. 47; D.P. O'Connell, *supra* n. 1, pp. 283–4; K. Doehring, "State", 10 *EPIL*, 1987, p. 427. As regards the corporate status of a people legitimately struggling for self-determination, see the previous section of this

international relations, neither States proper nor unrecognized entities can with impunity use unlawful force. The withholding or withdrawal of recognition cannot, therefore, have the effect of avoiding the legal policy of the UN Charter that purports to assert the maintenance of international peace and security by minimizing the legally permitted unilateral resort to force on the international plane. The Charter rule that implements this policy by prohibiting in Art. 2(4) the illegal resort to force cannot thus be evaded.[81] As an acknowledgement of the existence of certain untainted facts,[82] which would not necesarily disappear by being ignored, the legal value of recognition would appear to lie not so much in its approbation of the new entity as in its effect of formally establishing the application of international law in the relations of the recognizing and recognized States.[83]

Hence, though Member States appear as the obvious addressees of the duty prescribed in Art. 2(4), non-Members, too, which meet the classical formula of statehood would be obligated under the Article. The protection from an illegal resort to force, which the term "any State" extends to non-Members, would place upon them on grounds of reciprocity the duty of refraining from illegal resort to force against Members. And this duty has not been prescribed without at the same time opening to non-Members possibilities for alternative modes of settlement of disputed issues: The duty is seconded by the opportunity the Charter affords them for bringing to the attention of the Security Council or the General Assembly any dispute to which they may be parties.[84] And under Art. 99, the Secretary-General could bring to the attention of the Security Council "any matter which in his opinion may threaten the maintenance of international peace and security".

Even though the non-Members have not formally consented to the Charter, they could not successfully be in the contradictory position of

chapter. Cf. L.M. Goodrich, E. Hambro and A. P. Simons, *supra* n. 54, pp. 249–52 re debates at the Security Council about the meaning of State. Further, cf. I.D. De Lupis, *The Law of War*, 1987, p. 105.

[81] See, e.g. M. Akehurst, *A Modern Introduction to International Law*, 6th ed., 1987, p. 62 where withdrawal of recognition in premature instances is indicated to be rare and to serve no useful purpose; I. Brownlie, *supra* n. 79, pp. 96–7. Cf. M.S. McDougal and F.P. Feliciano, *supra* n. 69, p. 221.

[82] They must not be the result of illegal acts against which the principle of non-recognition as a mode of sanctions is applicable. GA resol. 2625 (XXV), e.g. states that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal". – Para. 10 of the first principle.

[83] See, e.g. I. Brownlie, *supra* n. 79, pp. 93–4; 1 Oppenheim, pp. 125–8; M. Sørensen, "Principes de droit international public", 101 *RCADI*, 1960-III, p. 132.

[84] Art. 35(2) of the Charter.

benefiting from, but defiant of, one of its fundamental principles formulated in Art. 2(4).[85] If they violate the prohibition of the use of force, they run the risk of being subjected to measures of individual or collective self-defence and eventually to UN sanctions in application of Articles 2(6) and 39 *et seq.* of the Charter. The principle of "treaties are neither of benefit nor of detriment to third parties"[86] – *pacta tertiis nec nocent nec prosunt* – is held, with good reason, to be excepted from "treaties to which the overwhelming majority of States are contracting parties, and which aim at an international order of the world".[87] This principle would not hence detract from the validity of the obligation which Art. 2(4) has placed on non-Members, and which the gradual and sustained development of the international regulation of the use of force has consecrated in customary international law.[88]

The obligation of non-use of force, for instance, is explicitly stated as falling on "every State" in Article 9 of the Draft Declaration on Rights and Duties of States,[89] and in the pertinent principles of General Assembly resolution 2625 (XXV). In the Draft Code of Offences against the Peace and Security of Mankind[90] and in the Definition of Aggression – General Assembly resolution 3314 (XXIX) – the reference is to "State" *simpliciter*.[91] From the practice of the UN in varied cases, the same undifferentiated reference can be noticed. The Security Council resolutions,

85 Cf. The Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/5746, 16 Nov. 1964, para. 39.

86 H. Kelsen, *supra* n. 40, p. 484.

87 Ibid. p. 486. See, further, E.J. de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI*, 1978-I, pp. 87–8 re the "indivisibility of peace which inspired the Charter"; A. Mahiou, "Article 2, Paragraphe 6", in *op. cit.*, J.-P. Cot and A. Pellet eds., *supra* n. 9, p. 138 re the acknowledged authority of the Security Council to maintain international peace and security; D. Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, 1970, pp. 301, 319 re the growing universalism of the UN, and pp. 307–21 where different appreciations of Art. 2(6) are discussed.

88 See, 1 Oppenheim, pp. 928–9; *supra* chapter 3, section 3.2.

89 Annex, GA resol. 375 (IV), 6 Dec. 1949.

90 *YILC*, Vol. II, 1954, pp. 151–2. The title has been changed to that of Draft Code of Crimes against the Peace and Security of Mankind. – GA resol. 42/151, 7 Dec. 1987.

91 See, further, e.g. GA resols. 2160 (XXI), 30 Nov. 1966 (Strict observance of the prohibition of the threat or use of force in international relations...); 2734 (XXV), 16 Dec. 1970 (Declaration on strengthening of international security); 32/150, 19 Dec. 1977 (Conclusion of world treaty on the non-use of force in international relations); 37/10, 15 Nov. 1982 (Manila declaration on the peaceful settlement of international disputes); 41/53, 3 Dec. 1986 (Prevention of an arms race in outer space); 42/22, 18 Nov. 1987 (Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations).

for example, in the Indonesian question,[92] the Corfu Channel incidents between the United Kingdom and Albania,[93] the Palestine question,[94] and the Korea case[95] did not distinguish, when the use of force was in issue, between Members and non-Members, nor between recognized and unrecognized States or States and other entities.[96]

Further, where the use of force between non-Members is of such a nature as to be inconsistent with the UN purpose of maintaining international peace and security, that use of force could give rise to the exercise of the Organization's authority under Art. 2(6) of the Charter.[97] An armed conflict between non-Members that, for instance, affects the rights of other States and makes it necessary for them to take protective meas-

92 Despite the Netherlands' objection that Indonesia was not a sovereign State and that the conflict there came essentially within its (Netherlands') domestic jurisdiciton, the SC called upon both parties to cease hostilities and settle their disputes peacefully. – See SC resols. 27 (1947), 1 Aug. 1947; 30 (1947), 25 Aug. 1947; 63 (1948), 24 Dec. 1948; *Repertory,* Vol II, 1955, pp. 176–7, paras. 22–8, and pp. 343, 345, paras. 27, 32–34. (Indonesia was admitted to UN membership by GA resol. 491 (V), 28 Sept. 1950.)

93 SC resol. 22 (1947), 9 April 1947. (Albania was admitted to UN membership by GA resol. 995 (X), 14 Dec. 1955.)

94 See e.g. SC resols. 43 (1948), 1 April 1948; 46 (1948), 17 April 1948; 49 (1948), 22 May 1948; *Repertory, supra* n. 92, pp. 347–8. (Israel was admitted to UN membership by GA resol. 273 (III), 11 May 1949).

95 See, e.g. SC resols. 82 (1950), 25 June 1950; 83 (1950), 27 June 1950; *Repertory, supra* n. 92, pp. 340–1, paras 20–2, and pp. 351–2, paras 50–2 for the discussion of the competence of the SC to intervene in situations of alleged civil war, and for the majority's view in support of such competence; GA resol. 498 (V), 1 Feb. 1951, which found the People's Republic of China to have engaged in aggression in Korea. See, furher, D.W. Bowett, *United Nations Forces*, 1964, pp. 29, 35.

96 See, e.g. SC resol. 43 (1948), 1 April 1948, which called on both "the Jewish Agency for Palestine and the Arab Higher Committee to make representation available to the Security Council for the purpose of arranging a truce...".

The Hyderabad question may be taken as another example. – See *Repertory, supra* n. 92, pp. 252–3, paras. 27, 30 about the question of Hyderbadad, which was inscribed on the agenda of the Security Council despite raised issues regarding its juridical status and its competence under Art. 35(2). The SC also decided at its 357th meeting, on 16 Sept. 1948, to invite the representatives of both India and Hyderabad. – See Resolutions and Decisions of the Security Council, 1948, *SCOR*: Third Year (S/INF/2/REV.1(III)), p. 32; further, R. Higgins, *supra* n. 32, pp. 51–2.

97 Specific mention of Art. 2(6) has, e.g. been made in SC resolutions relating to Southern Rhodesia. The resolutions urged or called upon, *inter alia*, non-Members to act in accordance with Art. 2(6). See SC resols. 277 (1970), 18 March 1970; 314 (1972), 28 Feb. 1972; 320 (1972), 29 Sept. 1972; 409 (1977), 27 May 1977. See also *Repertory*, Suppl. 3, Vol. I, 1972, p. 175, para. 5 re the duties of a non-Member (South Vietnam in this instance) under Art. 2(6) to abide by the principle of the Charter; SC resol. 189 (1964), 4 June 1964, which, *inter alia*, deplored the penetration of South Vietnamese army units into Cambodia and requested a just and fair compensation to the latter; GA resols. 2224 (XXI), 19 Dec. 1966 and 2516 (XXV), 25 Nov.1969, relating to the Korean question, where the GA recalled that it "is fully and rightfully empowered to take collective action to maintain peace and security and to extend its good offices in seeking a peaceful settlement in Korea in accordance with the purposes and principles of the Charter" (4th preambular para. of the resolutions). Cf. L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 54, pp. 59–60. Cf. P. de Visscher, *supra* n. 79, pp. 96–7, 156–8. But see G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", 137 *RCADI*, 1972-III, pp. 536–40.

ures[98] would augur ill for the maintenance of international peace and security. Together with the obligation devolving on non-Members as beneficiaries of the prohibition of illegal use of force by Members, the applicability of the prohibition to the relations between non-Members would hence confirm the universally binding character of Art. 2(4).[99]

In respect of entities which may or may not fulfil the classical requirements of statehood, they could well be victims or authors of illegal use of force on the international plane and be accountable for particular threats to the peace.[100] This would demand that they, too, be brought within the rule of Art. 2(4).[101] In order, therefore, to serve fully the ends of the Article, the notion of State would need to be construed as embracing such entities. This manner of construing the term State could not derogate

98 In connection with the Iran-Iraq conflict, for instance, the SC has affirmed in para. 3 of its resolution 540 (1983), 31 Oct. 1983, "the right of free navigation and commerce in international waters" and called on "the belligerents to cease immediately all hostilities in the region of the Gulf, including all sea-lanes, navigable waterways..."; and in its resolution 582 (1986), 24 Feb. 1986, the Council has deplored attacks on neutral shipping (para. 2). Even if these resolutions concern Members, there appears no reason why the same terms could not be addressed to non-Members. Hence, relating the pertinent content of the resolutions to similar conflicts between non-Members, injured third parties would have a right of self-defence (in any event, permitted by law) against attacks on neutral shipping; and generally, as regards forcibly obstructed navigation and commerce in international waters, injured States could resort to measures of force aimed at safeguarding those hampered or denied rights. This would be in line with the ICJ dictum in the *Corfu Channel* case, which stated that "[t]he Government of the United Kingdom was not bound to abstain from exercising its right of pasage, which the Albanian Government had illegally denied". – Merits, *ICJ Reports* 1949, p. 30. (But it need hardly be said that before resorting to unilateral force in such cases, all alternative peaceful means should be exhausted or should prove unavailable or unavailing.)

99 See *supra* chapter 3, p. 50 *et seq.* It may additionally be noted that one of the purposes of the UN as formulated in Art. 1(2) of the Charter is to develop friendly relations among nations, and not among Members only; this factor would account in part for prohibiting Members not to use illegal force against non-Members as well; the benefit that accrues thus to non-Members brings them within the Charter's allocation of the legal use of force on the international plane between the UN and States; that allocation in turn places upon non-Members the obligation of not resorting to an illegal use or threat of force against Members, and neither against each other where it is of a nature to threaten or disturb international peace and security.

100 See *supra*, p. 72 *et seq.* re liberation movements; A. Cassese, "La guerre civile et le droit international", 90 *RGDIP*, 1986, p. 558; H. Fujita, "La guerre de libération nationale et le droit international humanitaire", 53 *RDI* (Sottile), 1975, pp. 84–90. S.M. Schwebel indicates in particular that "it would...be dangerous...to suggest that entities whose statehood is in dispute are not covered by a definition of aggression...The two largest armed conflicts of the time have involved violation of internationally agreed lines of demarcation...Other actual and potential conflicts have involved entities not recognized as States by all concerned; sometimes, by any concerned." – "Aggression, Intervention and Self-Defence in Modern International Law", 136 *RCADI*, 1972-II, p. 472.

101 In connection with the status of Taiwan vis-à-vis People's Republic of China, J. Crawford observes rightly that 'while there is no strict "juridical boundary" between the parties, there does appear to be a frontier for the purposes of the use of force'. – *Supra* n. 78, p. 152. Cf. P. de Visscher, *supra* n. 79, p. 49; H.G. Schermers, *International Institutional Law*, 1980, p. 777 re the distinction between States and international organizations.

from the legal criteria for statehood, which would remain valid for other purposes of international law.

Likewise, so far as they may be used to inflict injury and damage on the international plane, or they may themselves be the object of the international use of force, international organizations could conceivably be assimilated with States for the purposes of the prohibition of force.[102] In what could be taken as applicable to the international personality of other similar organizations, the ICJ has said in reference to the UN

> that it is a subject of international law...capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[103]

The international rights and duties so recognized would not appear to relate only to those that arise from agreements or breaches thereof, or from responsibility incurred for other wrongful acts or omissions. But, if an unjustified disjunction is not to be made, they should also be viewed as including those rights and duties that result from the prohibition of force in situations assimilated with, or qualified as, international relations; this, for instance, was indicated to have been possible between the UN and South Africa in the case of Namibia.[104] Where force is used illegally against an international organization, the breached law is the same law that applies to other subjects of international law in similar situations and that entails the responsibility of the wrongdoer.[105] The injury suffered by an international organization, like that suffered by States proper, it is submitted, would make it the subject of rights. On the other hand, an international organization that uses illegal force against subjects of international law would incur responsibility and be made liable for reparation; in addition, appropriate measures of sanctions could feasibly be ordered by an authorized international organ.[106] Such rights and

102 See W. Friedmann, *The Changing Structure of International Law*, 1964, pp. 374–5. Cf. D.W. Bowett, *supra* n. 48, pp. 339–40 where, in reference to the UN, the capacity to maintain an armed force is indicated to be an attribute of international personality; F. Seyersted, *supra* n. 49 (37 *BYIL*), p. 472 where it is argued that enforcement action or collective self-defence by the UN would not be valid without the legal capacity of conducting military operations; P. de Visscher, *supra* n. 79, p. 55.

103 The *Reparation* case, *supra* n. 45, p. 179.

104 *Supra* p. 78.

105 F. Seyersted indicates rightly in connection with the UN that "if States under general international law have the right to exercise their inherent capacity in individual or collective self-defence, then in the absence of any special rules or considerations it must be assumed that the United Nations can exercise its capacity in the same circumstances against the forces of the aggressor". – *Supra* n. 49 (37 *BYIL*), p. 472.

106 See H. Atlam, "National Liberation Movements and International Responsibility", in *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma eds., 1987, pp. 46–7; D.W. Bowett, *supra*

duties of international organizations would portray them to be on the same level with States in regard to the prohibition of the international use of force.

In his Dissenting Opinion in the *Reparation* case, Hackworth has used the phrase "inherent right of self-preservation"[107] as one of the grounds justifying implied powers. Though illegal use of force against the UN was not directly at issue, the use of the term "self-preservation" could well betray the judge's underlying assumption that implied powers embraced attributes wider than those held to exist in the Advisory Opinion: the means of effecting self-preservation could be pacific or coercive.

In sum, the prohibition of the unilateral use of force on the international plane is a condition *sine qua non* for the Charter's purpose of maintaining international peace and security. And the term State, in the present submission, would have to be viewed as including entities of various descriptions, which fulfil the test of the capability of using force as an organized body or of being vulnerable to such use of force. Otherwise, relying merely on the formal criteria required for an independent State when seeking to identify the subject/object of the use of force on the international plane would result in frustrating the Charter's purpose of maintaining international peace and security and the other values protected by Art. 2(4). Since the extension of the term State by accommodative interpretation is necessary to help achieve and safeguard these values protected by Art. 2(4), such extension should not affect the criteria of

n. 95, pp. 57, 150–1, 242, 246–7; I. Brownlie, *supra* n. 79, pp. 685–6; C. Eagleton, "International Organization and the Law of Responsibility", 76 *RCADI*, 1950-I, pp. 385, 403; P. de Visscher, *supra* n. 79, pp. 46–60.

As a legitimate exercise of authority, forces under the UN auspices had been engaged in the Korean conflict in what was to all intents and purposes an enforcement action (Some would rather consider that action in terms of collective self-defence or the right of Members to resort to force for maintaining international peace and security where the SC became unable to take a decision under Chapter VII of the Charter – see J. Stone, *Legal Controls of International Conflict*, 2nd rev. ed., 1959, pp. 234–5), and in the Congo, in what may generally come under the maintenance of international peace and security. – See D.W. Bowett, *supra* n. 95, pp. 34, 36, 267, and 154–7, 180 for the respective military measures.

Even when not deployed in an enforcement context under Chapter VII of the Charter, forces properly under the UN auspices would still constitute an instrument for the implementation of the purposes of the Charter and entail the financial obligations of the UN, which the GA can legitimately authorize to be met from the budget of the Organization. – See *Certain Expenses of the United Nations*, Ad. Op., *ICJ Reports* 1962, pp. 175, 177, 179–80.

Were a measure of force undertaken in the name of the Organization to become *ultra vires*, the action would obviously lose legitimacy; but this would not affect the liability the Organization might incur for acts of its agents, which the forces under the UN auspices would be. As the ICJ has observed, "national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent". – Ibid., p. 168.

107 *Supra* n. 45, p. 196.

statehood valid for, and usable in, other instances. For the indicated limited purpose, therefore, the term State would need to comprehend entities irrespective of size, possession of territory, membership in the UN, or recognition as subjects of international law.[108] Along this line, it would appear to be irrelevant whether or not an entity is a divided State, for it should be the situation obtaining from a *de facto* set of circumstances that guide the construction of the term State in the context of international peace and security.[109] The term State thus regarded, and qualified in Art. 2(4) as "any State", would accordingly widen the operational frames of that Article to comprehend non-Members and other deserving entities.

The almost total prohibition of the unilateral use or threat of force agreed to in Art. 2(4) at San Francisco in 1945 was a principal factor in projecting a world under some degree of order, which the UN was to police.[110] Such an undertaking was a sequel of the historical development of regulations to circumscribe the use of force on the international plane and curb aggressive war.[111] The venture seemed to have been assisted by the euphoria of the allied victory and the rejuvenated hope of a tired world of 1945.[112] The task the UN thus set for itself without much supportive fabric for dependable execution necessarily stretched its resources and put to a severe test the acumen and resolve of its Members.

108 See, e.g. J. Crawford, *supra* n. 78, pp. 154–7; H.F. Köck, "Holy See", 10 *EPIL*, 1987, pp. 230–2. The Holy See is a non-territorial subject of international law; and J. Crawford describes the Vatican City as "the smallest area in the world which claims to be a State". (*Op. cit.* at 154). Cf. R. Monaco, "Cours général de droit international public", 125 *RCADI* 1968-III, pp. 277–8.

109 See, e.g. J. Crawford, *supra* n. 78, pp. 272, 273; M. Hilf, "Divided States", 10 *EPIL*, 1987, p. 128. For the purpose of our study, the *de facto* frontier, acknowledged as such, would be the controlling element: As, e.g. the 5th para. of the first principle of GA. resol. 2625 (XXV) declares, "[e]very State...has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect". See, further, *infra* chapter 6, pp. 154–7.

110 See 6 *UNCIOD*, pp. 334–5; L. Henkin, "International Law and the Behavior of Nations", 114 *RCADI*, 1965-I, p. 225 where Art. 2(4) is referred to as "the principal norm of contemporary international law"; H. Waldock, *supra* n. 50, p. 232 where the Art. is referred to as "the corner-stone of the Charter system". See, further, H. Blix, *Sovereignty, Aggression and Neutrality*, 1970, p. 32; C. Parry, "The Function of Law in the International Community", in *op. cit.*, M Sørensen ed., *supra* n. 4, p. 34; R.B. Russell and J.E. Muther, *supra* n. 73, p. 959. Though the prohibition of the use of force appears to have become part of the pre-Charter customary international law, the greater latitude tolerated for unilateral use of force under that law made the prohibition less encompassing than under the Charter. – See *supra*, chapter 3, p. 51–2.

111 See *supra* chapter 3, p. 50; L.M. Goodrich and E. Hambro, *Charter of the United Nations*, 2nd rev. ed., 1949, pp. 569–72 for the Declaration of Principles, Known as the Atlantic Charter, the Declaration by the United Nations (1 Jan. 1942), and the Declaration of Four Nations on General Security (Moscow, 30 Oct. 143).

112 Cf. R.B. Russell and J.E. Muther *supra* n. 73, p. 777.

Though legally still available, the undertaking is defectively implemented. And insofar as this situation persists, a legal vacuum in the remedial use of lawful force will be created; but the vacuum will not persist for long, and neither should it. In such situations, one would like to believe that the function of law should not be the abandonment of the Charter's policy on the use or threat of force in international relations to the fate of rigid textual interpretation.[113] It should rather be of a kind that employs the legal tools of construction to make the elements of Art. 2(4) accommodate matters that, at any particular time, would need to be comprehended within the terms of the Article. Such an interpretation would also assign to lawful unilateral use of force a field of competence contingent on the scale of effectiveness of the authorized community action. This manner of adjusting the content of Art. 2(4) and the contingent relationship between the Article and the collective security scheme of the Charter would constitute an attempt which would make and keep that instrument dynamically functional.

[113] See *supra* chapter 3, section 3.3.

Chapter 5

The Prohibited Force

The prohibition of Art. 2(4) covers both the threat and the use of force. But the Article neither defines nor otherwise qualifies the term force, which makes that term susceptible of different interpretations.[1] Although, in contemporary international law literature, terms like aggression,[2] armed or physical force,[3] coercion,[4] and violence[5] generally appear to be used interchangeably with the term force – reflecting in certain instances views on the content of force – in its historical context, the term was commonly understood to signify armed force and was principally employed in reference to wars and reprisals.[6] However, in the view main-

1 Cf. L.C. Buchheit, "The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations", in *Economic Coercion and the New International Economic Order*, R.B. Lillich ed., 1976, pp. 45.

2 E.g. GA resols. 380 (V), 17 Nov. 1950; 3314 (XXIX), 14 Dec. 1974; H. Blix, *Sovereignty, Aggression and Neutrality*, 1970, p. 13.

3 E.g. H. Kelsen, *Recent Trends in the Law of the United Nations*, 1951 (*Supplement to The Law of the United Nations,*) p. 951; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *RCADI*, 1952-II, p. 493; 2 Oppenheim, p. 197; H. Wehberg, "L'interdiction du recours à la force. Le principe et les problèmes qui se posent", 78 *RCADI*, 1951-I, p. 69.

4 E.g. ICJ, *Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 7, para. (k); E.J. de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI*, 1978-I, p. 87; T.O. Elias, "Problems Concerning the Validity of Treaties", 134 *RCADI*, 1971-III, pp. 380–2; E. Gross, "International Organization and Collective Security: Changing Values and Priorities", 138 *RCADI*, 1973-I, pp. 428–9; L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations*, 3rd rev. ed., 1969, pp. 48–9 (in connection with views on "force"); P. Guggenheim, *Traité de droit international public*, Tome II, 1954, p. 83; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, pp. 175–8; M. Reisman, *Nullity and Revision*, 1971, pp. 603, 604, n. 68; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, 1961, pp. 11–2; G. Scelle, *Manuel de droit international*, 1948, pp. 84–3; J. Stone, *Aggression and World Order*, 1958, p. 15; G. I. Tunkin, *Theory of International Law*, (W. W. Butler transl.), 1974, p. 54; W.D. Verwey, "Humanitarian Intervention", in *The Current Legal Regulation of the Use of Force*, A. Cassese ed., 1986, p. 58; Arts. 51 and 52, Vienna Convention on the Law of Treaties, *UNTS*, Vol. 1155, p. 331.

5 E.g. R. Falk, "The New States and International Legal Order", 118 *RCADI*, 1966-II, pp. 46–7.

6 See, e.g. J.L. Brierly, *The Basis of Obligation in International Law*, 1958, p. 230 *et seq.* Cf. C.H.M. Waldock, *supra* n. 3, p. 492. There still appears some lingering preference to use the term force only in reference to armed or physical force and to reserve the term coercion or pressure to non-intervention. –

tained by this study, the effect of a particular mode of force or coercion, rather than semantics, should be given relevance to indicate what is prohibited. No differentiation between force and coercion will therefore be made unless specifically required in a certain context.

In this chapter, we shall consider the prohibited force from the standpoint of the form it might take and the substance it might constitute. We shall accordingly visualize the prohibited force as a pyramid: "force" taken as the base upon which on the next higher level is placed "aggression", and on top are placed "war and other armed conflicts". But for purposes of better study we shall proceed inversely: We shall first consider "war and other armed conflicts" – the most obvious forms of force – and then pass on to "aggression", which constitutes a wider concept than armed attack, and finally discuss how the content of the prohibited force is variously understood, and how variable it would appear.

5.1 War and Other Armed Conflicts

Force manifested as war between States is the highest form of destructive violence organized and coordinated with other modes of coercion and executed on a scale corresponding to set objectives.[7] In the contemporary international legal order under the combined régimes of the Pact of Paris and the Charter of the UN, however, war as a freely undertaken international venture that produced consequences depending on the nature of the outcome of the undertaking is no longer permitted.[8] Nonetheless, the term war is still extant;[9] but there is a tendency to refer to present-day

See, e.g. Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/6799, p. 40, paras 52–3.

7 See J.L. Brierly, *supra*, n. 6, p. 230; 2 Oppenheim, pp, 202, 225; Ch. Rousseau, *Le droit des conflits armés*, 1983, pp. 3–5; G. Schwarzenberger, *Power Politics*, 1951, pp. 198–200; Q. Wright, *A Study of War*, Vol. 2, 1942, pp. 699–700. Blockades and other economic measures are usually put into effect as ancillary modes of force to deny an enemy access to the means essential for sustenance and strength. – See, e.g. P. Guggenheim, *supra* n. 4, pp. 357, 467–73, 413–24; 2 Oppenheim, pp. 208, 768–71; Ch. Rousseau, *op. cit.* in this note, pp. 258–60, 504–8; J. Stone, *Legal Controls of International Conflict*, 2nd rev. ed., 1959, p. 457.

8 *Supra* chapter 3, p. 47. The prohibition of the Charter is not limited to war. – See C.H.M. Waldock, *supra* n. 3, p., 487; and a declaration of war would appear to have no *raison d'être* as "le recours à la guerre est toujours une action délictueuse". – G. Scelle, "Quelques réflexions sur l'abolition de la compétence de guerre", 58 *RGDIP*, 1954, p. 17. See also the 1st para. of Art. 3 of the Definition of Aggression, GA resol. 3314 (XXIX), 14 Dec. 1974; B.B. Ferencz, *Defining International Aggression*, Vol. 2, 1975, p. 33.

military action between States as armed conflict rather than war;[10] and the generally accepted designation for UN enforcement measures appears to be

> "opérations militaires" par préférence aux expressions "guerre" ou "conflit armé" dont plusieurs auteurs estiment qu'elles conviennent mal aux mesures de contrainte armée ou de police internationale que l'Organisation des Nations Unies est habilitée à prendre.[11]

Some authors are not even willing to accord the term war a place in contemporary international law. J. Zourek, for instance, writes that

> [à] dater du Pacte Briand-Kellogg, la guerre cesse d'être une notion juridique. Le terme "guerre" ne sert plus qu'à désigner un fait social, qui peut certes trouver sa place dans certaines sciences sociales, comme la sociologie. En dehors des cas de guerre civile, où les insursgés ont été reconnus comme partie belligérante, le terme n'a plus de place en droit international.[12]

Whatever the name by which an armed conflict is identified, so long as it is recognized that its legality and the legality of its consequences are under the régime of Art. 2(4), the question of nomenclature would probably not appear to be of great significance: "Article 2(4) applies to all force, regardless of whether or not it constitutes a technical state of war."[13] But in other respects, even if it be granted that "under contemporary international law, no State can legally declare war and conduct it",[14] a State bent on the extensive use of military force for effecting a settlement of issues would, nevertheless, be factually engaging in war whenever it resorted to such force. The clear intention of imposing terms

9 See, e.g. the 2nd para. of the 1st principle of GA resol. 2625 (XXV), 24 Oct. 1970; 2nd para. of Art. 5 of the Definition of Aggression, GA resol. 3314 (XXIX); B.B. Ferencz, *supra* n. 8, pp. 43–5.

10 See, e.g. S.D. Bailey, 1 *How Wars End*, 1982, p. 19; H.S. Levie, 1 *The Code of International Armed Conflict*, 1986, p. xxi; L.C. Green, "Canada's Role in the Development of the Law of Armed Conflict", 18 *CYIL*, 1980, p. 92. Cf. I.D. De Lupis, *The Law of War*, 1987, pp. 16–8 where the different terms are critically viewed.

11 P. de Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies" [Rapport], 54-I *AIDI*, 1971, p. 124. See the distinction between war and police action in G. Scelle, *supra* n. 8, pp. 873–4. Cf. L.C. Green, "Armed Conflict, War, and Self-Defence", 6 *AV* 1956/1957, pp. 417–9; Ch. Rousseau, *supra* n. 7, p. 594.

12 J. Zourek, *L'interdiction de l'emploi de la force en droit international*, 1974, p. 41. Art. 1 of the Institut de Droit International's Resolution on the effects of armed conflicts on treaties includes "state of war" within the term "armed conflict". – See *AIDI*, Vol. 61-II, 1986, p. 278, and pp. 204–6, for views regarding the term "state of war" in contemporary international law.

13 M. Akehurst, *A Modern Introduction to International Law*, 6th ed., 1987, p. 259. Cf. G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", 137 *RCADI*, 1972-III, pp. 536–7.

14 F. Przetacznik, "The Illegality of War", 64 *RDI*, 1986, p. 148. See also *Dalmia Cement Ltd. v. National Bank of Pakistan*, 67 *ILR*, 1984, pp. 619–25.

based on force, which might well materialize if the resort to force became successful, would indicate the presence of war,[15] which in that instance would be aggressive. It thus could not appear possible to ignore *de facto* wars when they occur.

As regards civil war, international law neither prohibits internal armed conflicts nor the proper recognition of insurgents as belligerents;[16] and the subjection of internal differences to the arbitration of successful arms might well indicate the term war as still carrying, in situations of civil war, the vestiges of its traditional connotation and significance.[17]

As a consequence of the prohibition of the threat or use of force in international relations, armed conflicts, whether designated war or otherwise, that now take place outside the scope of authorized UN action, or the provisions of Articles 53 and 107[18] of the Charter relating to measures against "enemy States", are classifiable as either lawful unilateral acts of individual or collective self-defence or unlawful use of armed force.[19] And in the scheme of the Charter's distribution of lawful use of force on the international plane, "intermediate state" or "*status mixtus*" between a state of peace and a state of war would not appear to

15 Cf. P. Guggenheim, *supra* n. 4, pp. 96–7; Ch. Rousseau, *supra* n. 7, p. 7.

16 See, e.g. W.W. Bishop, "General Course of Public International Law", 115 *RCADI*, 1965-II, pp. 258–9; R.H. Hull and J.C. Novogrod, *Law and Vietnam*, 1968, pp. 75–7; E.H. Riedel, "Recognition of Belligerency", 4 *EPIL*, 1982, pp. 167, 169–70.

17 See H. Kelsen, *Principles of International Law*, 2nd rev. ed., by R. W. Tucker, 1966, p. 28; P. Guggenheim, "Les principes de droit international public", 80 *RCADI*, 1952-I, p. 175; J. Zourek, *loc. cit.*, *supra* n. 12.

18 In view of the UN membership of the ex-enemy States, and so long as the Charter in its other aspects continues to be functional, these provisions would probably be largely anachronistic. The signing of the non-aggression treaty betweeen the Federal Republic of Germany and the USSR on 12 Aug. 1970 is an indication to this effect. – See 9 *ILM*, 1970, p. 1026 for the text of the treaty. See also, e.g. the Treaty of Friendship, Cooperation and Mutual Assistance between the German Democratic Republic and the Czechoslovak Socialist Republic (17 March 1967) – 6 *ILM*, 1967, p. 497; that of 15 March 1967 between the German Democratic Republic and People's Republic of Poland – ibid., p. 514; the treaty Concerning Basis for Normalizing Relations – Federal Republic of Germany and Poland (18 Nov. 1970) – 10 *ILM*, 1971, p. 127. But the continued legality of action independent of the Charter in situations, e.g. Berlin, that resulted from the Allied victory in the Second World War relates to Art. 107, and the scope of that Article has been the cause of debates at the UN. – See L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 4, pp 634–7; B.B. Ferencz, *supra* n. 8, p. 25, re US military occupation of West Berlin. Cf. H. Kelsen, *The Law of the United Nations*, 1950, pp. 805–15; E. Kodjo,"Article 53", in *La Charte des Nations Unies*, J.-P. Cot and A. Pellet eds., 1985, p. 827; V.Y. Ghebali, "Article 107", ibid., pp. 1414–5; A. Randelzhofer, "Use of Force", 4 *EPIL*, 1982, p. 270.

19 See D.W. Bowett, *Self-Defence in International Law*, 1958, p. 119 and *passim*; H. Kelsen, *supra* n. 18, p. 708; C.A. Pompe, *Aggressive War - An International Crime*, 1953, pp. 37–8; M. Virally, "Article 2, Paragraphe 4", in *op. cit.*, J.-P. Cot and Pellet eds., *supra* n. 18, pp. 115–6; J. Zourek, "La définition de l'agression et le droit international", 92 *RCADI*, 1957-II, p. 767; Art. 2(1) of the Draft Code of Offences Against the Peace and Security of Mankind, *YILC*, 1954, Vol. II, p. 151. Cf. J. Combacau, "The Exception of Self-Defence in U.N. Practice ", in *op. cit.*, A. Cassese ed., *supra n.* 4, pp. 14, 29–32.

have a place so long as the UN functions properly.[20] Whatever its degree or intensity, any unlawful use of force would remain such and amenable to UN sanctions, which the Security Council might consider fit to impose or authorize.[21]

Regarding regional organizations' use of armed force as enforcement action in cases not related to ex-enemy States, Art. 53(1) of the Charter unequivocally provides that

> no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.[22]

Any regional enforcement action which is not authorized and falls outside the scope of self-defence would therefore be unlawful. It may be mentioned here in passing that the term "enforcement action" appears to be included in the term "enforcement measures", for Art. 39 of the Charter uses the term "measures" in relation to both Articles 41 and 42 of the Charter. And since these Articles refer to military and non-military measures, the scope of the "enforcement action" would not appear to relate solely to military measures. Additionally, it should be linked to the meaning the term "force" in Art. 2(4) would be made to bear, so as not to frustrate the full extent of the prohibition of the use of force. It would not therefore appear justifiable to consider enforcement action under regional organizations as having only a restricted sense and as excluding economic measures from its scope.[23]

Inasmuch as the use of armed force on the international plane falls either into the legal or illegal category, the legality of any use of armed

[20] See, e.g. P.C. Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?" 48 *AJIL*, 1954, pp. 98–103; G.I. Tunkin, *supra* n. 4, pp. 265–70. Cf. G. Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed., 1976, pp. 152, 155.

[21] See *infra* p. 100 *et seq.*, regarding the applicability of the laws of war and possible sanctions against unlawful use of force.

[22] Cf. UN Doc. A/7619, p. 22, where Argentina, Chile, Guatemala, Mexico and Venezuela had submitted to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States that "[t]he use of force by regional agencies, except in the case of self-defence, requires the express authorization of the Security Council..." (A/AC.125/L.49/Rev.1).

[23] In order to show that regional organizations are denied only enforcement action without the prior approval of the SC, W.O. Miller, e.g. seeks to analytically draw a distinction between "action" and "measures" (action" said to relate to armed force) insofar as they are "enforcement" or "preventive". – "Collective Intervention and the Law of the Charter", 62 *USNWCILS*, Vol. II, 1980, pp. 87–8. Cf. T. Franck, "Who Killed Article 2(4)?", 64 *AJIL*, 1970, pp. 822–7; L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 4, pp. 365–7; E. Kodjo, *supra* n. 18, pp. 822–5; L. Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated", 65 *AJIL*, 1971, p. 546.

force is judicially determinable[24] where the matter is properly submitted to adjudication – as was done in the *Corfu Channel* and the *Nicaragua v. USA* cases [25] – and is ruled to be justiciable.[26] The legality of the use of armed force could also figure in ICJ's Advisory Opinion if, in the exercise of its discretion under Art. 65 of its Statute, the Court does not decline to accede to the request for an opinion.[27] The General Assembly and the Security Council, too, can pass on the permissibility or otherwise of any use of armed force by determining whether or not such force constitutes a threat to the peace, a breach of the peace or an act of aggression;[28] but

[24] Cf. O. Schachter, "Self-Defense and the Rule of Law", 83 *AJIL*, 1989, pp. 276–7 where the author suggests that "[w]e must reconcile ourselves to the fact that, at best, judicial regulation of armed conflicts will remain peripheral, most likely limited to cases arising out of specific incidents of limited scope and duration".

[25] Merits, *ICJ Reports* 1949, p. 4; Merits, *ICJ Reports* 1986, p. 14 respectively.

[26] In his Separate Opinion in the *Nicaragua v. USA* case (*supra* n. 25), Lachs states at p. 166, that '[i]n principle, a case may be justiciable *only* if the jurisdiction of the Court has a basis in law and the merits of the case can be decided in accordance with law, which however "shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto"...'. He admits, however, "that the dividing line between justiciable and non-justiciable disputes is one that can be drawn only with great difficulty". – p. 168. See also the views of Schwebel and the more restricted views of Oda in their respective Dissenting Opinions on pp. 293–5, paras. 69–74, and pp. 238–46, paras. 55–72.

Some consider the Charter as vesting exclusive jurisdiction in such matters in the Security Council and find the US refusal to submit to the jurisdiction of the ICJ to be correct. See, e.g. E.V. Rostow, "The Legality of the International Use of Force by and from States", 10 *YJIL*, 1985, p. 289. Others find it difficult that legal disputes in ongoing armed conflicts could be properly separated from other disputes and decided with finality. – See, e.g. H.H. Almond, "The Nicaraguan Military Activities Case (Nicaragua v. United States of America)", 17 *CWILJ*, 1987, pp. 149–56. But there appears to be no obstacle of legal principle nor deficiency of legal techniques that could hinder the identification of discrete issues comprising contested matters of fact and law suitable for proper judicial determination (see para. 35 of the *Nicaragua v. USA* Judgment (Merits)). The initial stages at least of an ongoing armed conflict might not be any more different than other legal disputes (see *infra* n. 31, re the Iran-Iraq conflict). The problem would appear to lie not so much with the justiciability of issues as with the unwillingness of States to abide by international judicial decisions; and such unwillingness should not be mistaken for non-justiciability. As concerns the *Nicaragua v. USA* Judgment, whatever its merits, it is now a *res judicata* in due form.

[27] See, e.g. *Certain Expenses of the United Nations*, Ad. Op., *ICJ Reports* 1962, p. 155.

[28] Under its Uniting for Peace resol. 377 (V), 3 Nov. 1950, the GA has established its authority for dealing with, and making recommendations in, matters of international peace and security where the SC is disabled by lack of unanimity of its permanent Members. The resolution was voted against by USSR, Ukranian SSR, Poland, Czechoslovakia and Byelorussian SSR (See *GAOR*, A/PV.302, p. 347, para. 73); it was contested as unconstitutional (See, e.g. G. I Tunkin, *supra* n. 4, pp. 340–3). However, during the Suez crisis of 1956, the USSR voted for SC resol. 119 (1956), 31 Oct. 1956, in which it was decided "to call an emergency special session of the General Assembly, as provided in General Assembly resolution 377 (V) A"; and this would amount to an acceptance of the validity – whether as a Charter amendment or not – of the contested resolution. – See *Repertory*, Suppl. No. 2, Vol. 1, 1964, p. 99, para. 106; SC resol. 500 (1982), 28 Jan. 1982, for another instance of USSR's affirmative vote in regard to calling an emergency special session of the General Assembly.

Re General Assembly resolutions concerning aggression, see 498 (V), 1 Feb. 1951, where the People's Republic of China's military action in Korea was characterized as aggression (North Korea's military action, too, appeared to have been incidentally designated as aggression); 3061 (XXVIII), 2 Nov. 1973, where Portugal was condemned for repeated acts of aggression against the people of Guinea-Bissau and

such a determination will have a binding force on the Members only when effected by the Security Council.[29] However, the inability of the Security Council under the partisan grip of the veto-wielding powers to determine the nature of armed conflicts whenever they occur, or the incapacity of the ICJ, which lacks *ex officio* compulsory jurisdiction,[30] to decide on the legal merits of those armed conflicts would not affect the initial and subsequent legal positions of the belligerents: The legal issues remain determinable if and when the proper occasion arises.[31]

Nonetheless, whatever the legal position of belligerents or the designated status of their conflict, they could not act beyond the pale of the international laws of war. The applicability of the laws of war brings to the fore the controversial question of the equality of the belligerents.[32] Though the legal prohibition of war and other types of armed conflict implies a legal discrimination against an aggressor, the same cannot be said of the applicability of the humanitarian laws of war: These seek to tame the unbridled use of armed force and mitigate its desolating effects.[33] The validity of the laws of war would not mean the legalization of war.[34]

The legal discrimination implied in the prohibition of the use of force would find its proper application by means of authorized community

Cape Verde; 36/27, 13 Nov. 1981, where the Israeli attack on the Iraqi nuclear installations was condemned as a "premeditated and unprecedented act of aggression".

As concerns the SC, that organ has, e.g. determined the situation in Palestine as threat to the peace in its resol. 54 (1948), 15 July 1948, and has determined the breach of the peace in its resols. 82 (1950), 25 June 1950 (re Korea); 502 (1982), 3 April 1982 (re Falkland/Malvinas); 598 (1987), 20 July 1987 (re Iran-Iraq); 660 (1990), 2 Aug. 1990 (re Iraq-Kuwait).

As resort to armed force which was not illegal could be determined by the Security Council to be a threat to the peace or breach of the peace, R. Higgins' suggestion of using the terms "permissible and impermissible" instead of "legal and illegal" use of force would appear helpful. – *Supra* n. 4, p. 174.

29 Art. 25 of the Charter.

30 Art. 36 of the Statute of the Court.

31 For the allocation of legal responsibility in an armed conflict, see, e.g. E. David, "La guerre du Golfe et le droit international", 20 *RBDI*, 1987, pp. 155–6; I.F. Dekker and H.H.G. Post "The Gulf War from the Point of View of International Law", 17 *NYIL*, 1986, pp. 99–100. Iraq is held in both articles to be in breach, at least initially, of the obligation not to resort to armed force.

32 See Ch. Rousseau, *supra* n. 7, p. 2. Cf. G .I. Tunkin, *supra* n. 4, pp. 247–8.

33 See, e.g. GA resols. 35/122, 11 Dec. 1980; 36/226 B, 17 Dec. 1981; ES-9/1, 5 Feb. 1982; SC resols. 497 (1981), 17 Dec. 1981; 540 (1983), 31 Oct. 1983; 582 (1986), 24 Feb. 1986; 605 (1987), 22 Dec. 1987; J. Golden, "Force and International Law", in *The Use of Force in International Relations*, F.S. Northedge ed., 1974, p. 199; C. Greenwood, "The Concept of War in Modern International Law", 36 *ICLQ*, 1987, pp. 289, 295; P. Guggenheim, *supra* n. 4, pp. 303–4.; H. Meyrowitz, *Le principe de légalité des belligérants devant le droit de la guerre*, 1970, pp. 87–80; P. de Visscher, *supra* n. 11, pp. 70, 73, 144; Cf. G. Scelle, *supra* n. 8, p. 16.

34 See, e.g. W. Meng, "War", 4 *EPIL*, 1982, p. 285; H. Meyrowitz, *supra* n. 33, p. 119.

sanctions implemented either during the progress or after the termination of the war or hostilities. Damages and, in appropriate cases, unjustified enrichment could be assessed against the party authoritatively determined to be the aggressor;[35] criminal proceedings could be instituted against individuals, where such is the case;[36] and the fruit of aggression could be denied recognition.[37] In connection with the latter instance, peace treaties which impose terms on a victim of aggression would be void as having an object prohibited by a norm of a *jus cogens* standard.[38]

In a war or another type of an armed conflict where the legal nature of the use of force has not been authoritatively determined by the UN, States would be at liberty to adopt a status of neutrality vis-à-vis the belligerents.[39] Third States, however, would not appear to be prevented from making a unilateral determination of the legality of an armed conflict and of intervening at their own risk on the side they deem to be the victim of an illegal use of force. This would be an aspect of collective self-defence exercised on an *ad hoc* basis.

Nonetheless, it should be observed that such a unilateral determination and resultant increment of the number of belligerents could aggravate the disturbance of international peace and security as to defeat the purpose of Art. 2(4), which, by their intervention, the third parties apparently sought to have respected. It would be more in line with the Charter's policy of maintaining international peace and security to confine such resort to a unilateral mode of determination and sanction –

35 See Art. 5(2) of the Definition of Aggression, GA resol. 3314 (XXIX), 14 Dec. 1974; I. Brownlie, *International Law and the Use of Force by States*, 1963, pp. 146, 149; K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", in *Manual of Public International Law*, M. Sørensen ed., 1968, p. 811.

36 See, e.g. para. 2 of Art. 5 of the Definition of Aggression, GA resol. 3314 (XXIX); Arts. 3 and 4 of the Draft Code of Offences against the Peace and Security of Mankind (see GA resol. 42/151, 7 Dec. 1987, for the change of the title to Draft Code of Crimes...), *supra*, n. 19; I. Brownlie, *supra*, n. 35, pp. 164–5; C.A. Pompe, *supra* n. 19, pp. 287, 320. Cf. H. Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", 1 *ILQ*, 1947, pp. 154, 162, 170.

37 See para. 3 of Art. 5 of the Definition of Aggression, GA resol. 3314 (XXIX); C.L. Brown-John, "The 1974 Definition of Aggression: A Query", 15 *CYIL*, 1977, pp. 302–5 re the possible interpretation and consequences of the paragraph's phrase "recognized as lawful"; H.M. Blix, "Contemporary Aspects of Recognition", 130 *RCADI*, 1970-II, pp. 657–65; 2 Oppenheim, p. 219; H. Wehberg, *supra* n. 3, p. 77; statements of the inadmissibility of territorial acquisition by military means in , e.g. SC resols. 242 (1967), 22 Nov. 1967; 298 (1971), 25 Sept. 1971; 497 (1981), 17 Dec. 1981.

38 See *supra* chapter 3, p. 51 *et seq.*; 2 Oppenheim, p. 219; Art. 53, Vienna Convention on the Law of Treaties, *supra* n. 4.

39 Cf. C. Greenwood, *supra* n. 33, p. 301; 2 Oppenheim, p. 221. As was seen in the Iran-Iraq war, neutrality did not seem to hinder the neutral States from supplying arms to both belligerents or to a particular client. – See E. David, *supra* n. 31, pp. 170–1.

in the instance, a discriminatory recourse to force against an alleged culprit – to conflicts where the illegality of the use of force by one party is reasonably manifest; and even then it would appear necessary that such intervention be sparingly practised. But the same cannot be urged with equal force where the UN is ineffective, or where the matter of assistance is a legal obligation which arises from defence pacts and is made executory once the occurrence of the *casus foederis* is determined as provided in the pacts.[40] In the latter event, and until the UN intervenes with effective measures, it would be for the bounds of proportionality to temper the zeal of the exercise of collective self-defence.[41]

Where the UN has determined the party responsible for an illegal use of force but has not decided on measures of enforcement, assisting such a party in its condemned venture would obviously run counter to the determination and might eventually entail sanctions. But assistance rendered to the acknowledged victim would have a better legal cover than assistance afforded as a result of a unilateral determination of the legality of a particular resort to force.[42] Where, however, the Security Council has decided on enforcement measures, any assistance to the party against which the enforcement measures are ordered would go against the Members' obligation under Article 25 of the Charter and contravene Art. 2(5) thereof, which provides thus:

> All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to

[40] See, e.g. Arts. 6 and 7 of the Pact of the League of Arab States (*UNTS*, Vol. 70, p. 237), where aggression and threat of aggression give rise to collective action as may be determined by the League's Council; Art. IV of the Treaty for collaboration in economic, social and cultural matters and for collective self-defence (Brussels Treaty – *UNTS*, Vol. 19, p. 51), where an armed attack on one of the signatories gives rise to aid and assistance by the others; Arts. 5 and 9 of the North Atlantic Treaty (*UNTS*, Vol. 334, p. 243), where the collective action is predicated on an armed attack against one or more of the signatories, and the establishment of a Council for the implementation of the Treaty is envisaged; Arts. 4 and 6 of the Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact – *UNTS*, Vol. 219, p. 3), where armed attack is predicated as the *casus foederis*, and the establishment of a Consultative Committee is envisaged; Arts. 3 and 6 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty – *UNTS*, Vol. 21, p. 77), re armed attack and aggression not constituting armed attack affording ground for collective action; Art. 5 of the African and Malagasy Union for Defense (2 *Basic Documents of African Regional Organizations*, L.B. Sohn ed., 1972, p. 395), re aggression as the ground for collective action; Art. IV of the Southeast Asia Collective Defense Treaty (*UNTS*, Vol. 209, p. 24), re aggression by means of armed attack, or other modes which threaten "the inviolability or the integrity of the territory or sovereignty or political independence" of the States to which the Treaty would apply, as grounds for consultation and action.

[41] See *infra* chapter 7, p. 201 *et seq.* re Art. 51 of the Charter.

[42] Cf. *supra* chapter 4, p. 75 re self-determination; H.G. Schermers, *International Institutional Law*, 1980, pp. 607–8.

any State against which the United Nations is taking preventive or enforcement action.[43]

In sum, international war as a pre-Charter concept that produced legal effects beholden to the fortune of arms is clearly abolished by Art. 2(4):[44] this concerns the *jus ad bellum*. Since a legal norm is no guarantor of good behaviour, any war that still erupts despite its prohibition would of necessity have to be governed by the *jus in bello*, for the lapse of those rules would be harmful to innocent and guilty alike, and bettter alternatives would be unavailable. Once, however, an armed conflict has been halted, say by an armistice agreement, the régime of the UN Charter would make it difficult to consider the continuation of the state of war. And any fresh unlawful recourse to unilateral armed force would constitute a new breach of Art. 2(4).[45] This, in part, would appear to be the significance of the respect for armistice lines demanded in the fifth paragraph of the first principle in General Assembly resolution 2625 (XXV). Additionally, taking as instance the armistice agreements between Israel and the neighbouring Arab States, reference may be made to the fifth paragraph of Security Council resolution 95 (1951), 1 September 1951, where it is stated

> that since the armistice régime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence... .[46]

The mention of self-defence, it is submitted, would indicate the continued need of differentiating on the basis of the Charter, i.e. the law of peace, the legal nature of every new resort to armed force.[47]

The *jus in bello* would also apply to UN enforcement actions which are met with armed resistance. In such cases, the rule of proportionality

43 See L.M. Goodrich, E Hambro and A.P. Simons, *supra* n. 4, pp. 56–7.

44 See *supra* chapter 2, pp. 21, 25–6; L. Henkin, *How Nations Behave*, 1979, pp. 139–40; M. Virally, *supra* n. 19, p. 114.

45 Cf. O. Bring, *Folkrätten och världspolitiken*, 1974, pp. 55–6.

46 See also GA resol. 997 (ES-I), 2 Nov. 1956, where "armistice line" continued to figure as the controlling factor in the appreciation of the Israeli armed penetration into Egyptian territory.

47 In the instance, the SC called "upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself...". It would have been otherwise had a state of war been recognized to persist. Cf. R. Falk, "The Beirut Raid and the International Law of Retaliation", 63 *AJIL*, 1969, p. 434 where the Middle East situation is characterized as one of quasi-belligerency; Y.Z. Blum, "The Beirut Raid and the International Double Standard", 64 *AJIL*, 1970, pp. 77, n. 18, 78.

might need to accommodate the objective of the enforcement and allow the measures to be pushed to the extent necessary for the satisfactory attainment of the objective.[48] In sanctions, as J. Combacau observes, an

> organization does not primarily wish to "punish" the State for a wrongful act already completed but to coerce it into putting an end to the continuing situation resulting from this initial action...The sanction is thus a technique of compulsory enforcement in which the State voluntarily though not freely of course, decides to return to the proper course of conduct.[49]

Present-day international wars and other armed conflicts that come and go unsanctioned by the UN erode the authority of the Charter; but because they also provide the stark occasion for the reaffirmation of the principle of the prohibition of force,[50] they are in a way instrumental for its confirmation. However feeble the resolutions or defective their implementation, the steadfast UN practice of condemning breaches of Art. 2(4) could at least keep alive the principle of that Article in the legal consciousness of the world community, help mould it to meet the requirements of any particular period, and save it from complete desuetude.[51]

5.2 Aggression

The term aggression does not figure in Art. 2(4); but as constitutive of the prohibited force, it is implicit in the Article. Furthermore, the Article prohibits also the use or threat of force "in any manner inconsistent with the Purposes of the United Nations"; and as one of the purposes under Art. 1(1) of the Charter is the maintenance of international peace and security by effective collective measures for, *inter alia*, the suppression of acts of aggression or other breaches of the peace, the term aggression is brought within Art. 2(4).

[48] See I. Brownlie, *supra* n. 35, p. 332; J. Castaneda, *Legal Effects of United Nations Resolutions*, (A. Amoia translation), 1969, pp. 91–2 re the Korean campaign where the GA authorized action "beyond the point of repelling attack to militarily occupying additional territory".

[49] J. Combacau, "Sanctions", 9 *EPIL*, 1986, p. 339. See also *supra* n. 11. Cf. M. Reisman, *supra* n. 4., pp. 647–8.

[50] See, e.g. G. de Lacharrière, "La réglementation du recours à la force: les mots et les conduites", in *Mélanges Charles Chaumont*, 1984, pp. 352, 355; M. Virally, *supra* n. 19, p. 117.

[51] Cf. T. Franck, "The Strategic Role of Legal Principles", in *The Falklands War*, A.R. Coll and A.C. Arend eds., 1985, p. 32.

In its historical context, aggression was taken to occur when armed force was used in breach of an international obligation not to use force.[52] As such breach might or might not have culminated in war, aggression was not restricted to illegal wars.[53] Aggressive war was considered an international crime,[54] which received some legal recognition in Art. 227 of the Treaty of Versailles.[55] The effective formulation of aggressive war as an international crime was, however, brought about by the Charter of the International Militay Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.[56] Art. 6 of the Tribunal's Charter enumerates the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances..." as constituting a crime against peace. The same formulation was substantially followed in Art. 5 of the Charter of the International Military Tribunal for the Far East.[57]

In its present-day context, the concept of aggression will essentially depend on what is settled to be the content of the force prohibited by Art. 2(4).[58] And, as will be elaborated later,[59] inasmuch as that content is capable of incorporating modes of coercion other than physical or armed force, the concept of aggression, too, would incorporate non-physical or non-armed modes of coercion. But in Article 1 of the Definition of Aggression – annex to General Assembly resolution 3314 (XXIX) – the use of armed force in contravention of the United Nations Charter figures ostensibly as the sole factor that constitutes aggression.

Before, however, turning to the discussion of its provisions insofar as they may be relevant to our study, it should be noted that the Definition of Aggression is the result of a consensus. In the words of paragraph 4 of

52 See Art. 1(c) of the Harvard Draft Convention on Rights and Duties of States in Case of Aggression, 33 *AJIL*, 1939, Section Two, Documents, p. 827; Q. Wright, "The Concept of Aggression in International Law", 29 *AJIL*, 1935, p. 376, and "The Prevention of Aggression", 50 *AJIL*, 1956, p. 526. Cf. W. Komarnicki, "La définition de l'agresseur dans le droit international moderne", 75 *RCADI*, 1949-II, p. 19.

53 See *supra* chapter 2, p. 27 *et seq.*

54 See *supra* chapter 2, pp. 33–5; 2 Oppenheim, p. 192; J. Zourek, *supra*, n. 19, p. 805.

55 See K. Strupp, *Documents pour servir à l'histoire du droit des gens*, Tome IV, pp. 329–30 for the text of the Art.; W. Komarnicki, *supra* n. 52, p. 14.

56 *UNTS*, Vol. 82, p. 279.

57 14 *DSB*, 1946, p. 361. The Art. qualifies war of aggression with the words "declared or undeclared" and introduces the "violation of international law" as a ground for the criminality of war resorted to in breach of that law.

58 See H. Kelsen, "Collective Security under International Law", 49 *USNWCILS*, 1957, p. 55.

59 See *infra* p. 109 *et seq.*

the resolution, the General Assembly recommended that the Security Council

> should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggresssion.

The Definition is acknowledged to be fragile and delicately balanced.[60] And it has been remarked that

> [t]he technique employed was one, which had almost become customary, of leaving the text so vague that the opposing parties might each interpret it to their own advantage should the need arise. In the words of one of the delegates: "The definition had reached a sufficient level of abstraction to be acceptable."[61]

Though probably bearing a great authority[62] as a touchstone for a ready appreciation of a particular use of force on the international plane, the Definition *per se* is not an instrument that legally binds the Security Council: It constitutes a "guide" recommended to the Security Council and *ipso facto* lacks binding attributes. Besides, that organ has legal freedom to determine as it sees fit matters within its field of competence,[63] and the determination of the existence of an act of aggression would usually depend on political considerations. Furthermore, the Definition in the main stands for a definition of armed aggression and not for all other forms of aggression.[64] At any rate, its contents

60 See B. Broms, "The Definition of Aggression", p. 334.

61 B.B. Ferencz, *supra* n. 8, p. 49.

62 See E. Suy, "Consensus", 7 *EPIL*, 1984, p. 51 about the degree of authority that resolutions adopted by consensus are considered to possess; K. Skubiszewski, "The elaborations of general multilateral conventions and of non-contractual instruments having a normative function or objective" (Report), *AIDI*, Vol. 61-I, 1985, p. 325.

63 But some hold otherwise. J. Zourek, e.g. states: 'La définition ayant été acceptée sans opposition par l'Assemblée générale des Nations Unies s'impose à tout organe des Nations Unies qui sera appelé à décider dans cas concret si un Etat s'est rendu coupable d'une agression. Il s'agit là d'une interprétation authentique de la Charte des Nations Unies et on voit mal comment le Conseil de sécurité pourrait ne pas en tenir compte. A ce sujet, it faut réfuter une opinion erronée qui se maintient depuis le début au sujet "pouvoir discrétionnaire" du Conseil de sécurité sous l'influence des idées du XIX^{e} siècle où les questions concernant le maintien de la paix internationale n'étaient pas réglée par le droit international et constituaient la chasse gardée des grandes puissances.' – "Enfin une définition de l'agression", *AFDI*, 1974, p. 28. However, this view does not appear to reflect the present state of the law as regards the discretionary authority of the Council nor the legal standing of GA resolutions. The General Assembly has no legislative authority over matters which are outside the scope of its internal jurisdiction. – See Report of Committee IV/2, 13 *UNCIOD*, pp. 709–10 about the interpretation of the Charter; O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, 1966, pp. 236–8; J. Castaneda, *supra* n. 48, p. 22 *et seq.*; K. Skubiszewski, *supra* n. 62, pp. 310–11.

64 See Report of the GA's Sixth Committee, UN Doc. A/9411, 10 Dec. 1973, pp. 7, 12, paras. 12, 25 respectively; B.B. Ferencz, *supra* n. 8, p. 30; J. Combacau, *supra*, n. 19, p. 22.

will retain whatever independently binding force each may have under conventional or customary international law.[65]

Coming now to have a closer look at the provisions of the Definition, it will be noticed from the interplay of Articles 1, 2 and 4 that, first, not every unlawful use of armed force amounts to aggression and that, secondly, the Security Council can also, where appropriate, determine other grounds to constitute aggression. After Art. 1, which reproduces almost verbatim the values protected by Art. 2(4) of the Charter, anchors the illegal use of armed force as the force constituting aggression, Art. 2 relegates the first use of such force to the status of a rebuttable presumption of aggression. Art. 2 further acknowledges the authority of the Security Council to "conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances". The elements of priority and *animus* were thus provided for.

It would then be seen, first, that the use of armed force in contravention of the Charter, i.e. unjustified or unexcused breach of the prohibtion of Art. 2(4), is always an illegal use of force and, secondly, that an illegal use of force which is not assessed to qualify as an act of aggression would not thereby be cleansed of illegality. Although not an act of aggression for purposes of international peace and security under the terms of Art. 39, such use of force would remain illegal under Art. 2(4) of the Charter.[66] A determination of aggression in the context of international peace and security, and a determination of the existence of an illegal use of force in the context of allocating legal responsibility might not involve the same set of factors.[67] And cases of illegal use of force which the Security Council is either reluctant for reasons of policy to characterize as acts of aggression, or considers in terms of Art. 2 of the Definition to be

[65] See, e.g. the *Nicaragua v. USA* case (Merits), *supra* n. 25, para. 195 where Art. 3(g) of the Definition is "taken to reflect customary international law". Cf. O. Schachter, "International Law in Theory and Practice. General Course in Public International Law", 178 *RCADI*, 1982-V, pp. 116–7, 122 where the author suggests that declaratory resolutions of GA should be considered as rebuttable evidence of *opinio juris* and practice.

[66] Cf. I.D. De Lupis, *supra* n. 10, p. 61 where the author indicates that "the first use of armed force by a State may be legitimised by the opinion of the Security Council, a method which surely undermines even the general prohibition of force in article 2(4) of the Charter". But such manner of "legitimization" would rather construe than undermine the prohibition of force: where the first use of armed force is not declared to constitute aggresssion, it would still constitute a breach of the prohibition if it is not taken as a valid exception; where, on the other hand, it is declared to be a justified use of force, it will construe the *exception* of the prohibition, and the scope of the latter will correspondingly be adjusted.

[67] Cf. D.W. Bowett, *supra* n. 19, p. 254; B. Broms, *supra* n. 60, pp. 356–7.

"not of sufficient gravity" to amount to aggression, would still justify any proportional measures of self-defence that their victims might have undertaken, or entitle them to make other due claims.[68]

A resort to force which is in contravention of the Charter is in breach of that law; and a resort to force which is apparently in contravention of the Charter, but is legally justified or excused,[69] is by definition not one in contravention of the Charter.[70] No wonder, therefore, that the inclusion of the phrase "in contravention of the Charter" in Art. 2 of the Definition caused concern among some States.[71] However, as already noted, the acceptance of the first use of armed force that is in contravention of the Charter as a presumption of aggression does not detract from the basic prohibition of Art. 2(4).[72]

The presumption of agression raised by the first use of armed force in contravention of the Charter is either confirmed by the Security Council or discarded in the light of "other relevant circumstances". These circumstances have not been spelled out,[73] and probably neither could

[68] The *de minimis* clause of Art. 2 of the Definition saves acts, which in themselves or in their consequences are not of sufficient gravity, from being determined as acts of aggression; but such acts would nonetheless be illegal for other purposes. – Cf. Report of the Special Committee on the Question of Defining Aggression, UN Doc. A/9619, p. 23 where the American delegate is reported to have indicated that "not all illegal uses of armed force could be denominated acts of aggression"; B. Broms, *supra* n. 60, p. 346; S.M. Schwebel, "Aggression, Intervention and Self-Defence in Modern International Law", 136 *RCADI*, 1972-II, p. 470.

[69] See *infra* chapter 7, pp. 199, 231, 234.

[70] Cf. the commentary on Art. 2(1) of the Draft Code of Offences Against the Peace and Security of Mankind in the Third Report of J. Spiropoulos, *YILC*, Vol. II, 1954, p. 115.

[71] See the Report of the Special Committee, UN Doc. 9619, pp. 15, 19, 25 for the respective views of the delegates of Madagascar, Syria, Yugoslavia; B.B. Ferencz, *supra* n. 8, p. 31. The remarks of the Syrian delegate are particularly enlightening in this respect. "He considered that the first use of armed force in contravention of the Charter always constituted an act of agggression. No organ, even the Security Council, could justify the use of armed force in violation of the charter, although the Security Council, in conformity with the provisions of the charter, was fully competent to determine whether or not an act of aggression had been committed." The distinction here would lie between the definition of aggression and its political determination.

[72] Cf., e.g. B. Broms, *supra* n. 60, p. 347; P. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility", in *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma eds., 1987, pp. 248–9.

Art. 2 of the Definition has many unsettled meanings. As B.B. Ferencz notes, '[w]ho decided whether an act was "in contravention" and what was included among the "other relevant circumstances" to be considered, and exactly what was the significance of considering the first strike to have *prima facie* evidentiary value, were all subject to different interpretations. The delegates were eager to reach a consensus regarding the phrases in the text, but the debate, published and unpublished, made it clear that they were far from agreed regarding the meaning of the words accepted.' – *Supra* n. 8, pp. 32–3.

[73] They were recognized to be "sufficiently broad, and vague, so that [they] could be construed to include the purposes and intent of the parties". – B.B. Ferencz, *supra* n. 8, p. 31. Cf. J. Stone, *Conflict Through Consensus*, 1977, pp. 49, 96, 100–1.

they have been, for they will need to be of a variable texture to meet the requirements of individual cases. But it may be generally assumed that acts or omissions, which in the *bona fide* view of a party are of such a nature as to induce in the mind of that party the necessity of resorting to armed force, would constitute "other relevant circumstances".

In the *Corfu Channel* case, for instance, the Agent for the UK contended that

> our action on the 12th/13th November threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence.[74]

This plea could possibly have come within "other relevant circumstances" had the matter been under consideration by the Security Council for a determination of the existence of aggression, and had the Definition of Aggression been available then. Likewise, the ICJ's recognition of Albania's "complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, [as] extenuating circumstances"[75] for the British minesweeping operation in Albanian waters, could also have been taken as elements of "other relevant circumstances" had the particular evaluation been made by the Security Council under the Definition. Additionally, the affinity of certain people with those struggling for their independence and self-determination against colonial and racist régimes, the reluctance of a debtor State to execute a valid international judgment or award relating to territory, etc., could be hypothesized as instances of "other relevant circumstances". Similarly, even when they are considered not to come within the scope of force prohibited in Art. 2(4), the broadcasting of a highly inciting propaganda to an area fraught with tension and easily combustible, and the employment of different forms of economic coercion could also constitute "other relevant circumstances".

Further, Art. 3 of the Definition enumerates acts that "qualify as an act of aggression" subject to Art. 2, but Art. 4 cautions that the enumeration is not exhaustive and acknowledges the authority of the Security Council to "determine that other acts constitute aggression under the provisions of the Charter".[76] These "other acts" could well

[74] *Pleadings*, Vol. III, 1950, p. 269.

[75] Merits, *supra* n. 25, p. 35.

[76] As chairman of the Special Committee, B. Broms had explained at the Sixth Committee of the GA that the Definition was the result of a carefully balanced consensus, and that the "[s]pecial Committee had concluded that its task was to limit the draft to armed aggression...[and that] the Security Council

comprehend modes of economic and ideological coercion in addition to physical types of force. Moreover, as Art. 6 makes it clear that the Definition neither enlarges nor diminishes the scope of the Charter, the various possible interpretations of the use of force under the Charter would thereby appear to be kept open.[77]

Art. 3 of the Definition lists seven instances of direct and indirect modes of aggression. That the prohibition of force under Art. 2(4) of the Charter includes also indirect modes of use of force is confirmed by paragraph (g), which qualifies as an act of aggression

> [t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[78]

And in other regards, where the mode of force constitutes physical force, such mode of force – as can be seen in Art. 3(b), which refers to "the use of any weapons" – would not be restricted to particular types of weapon, but would comprehend any weapon, i.e. any explosive, chemical, bacteriological, and other physical means of damage and destruction.

Art. 7 of the Definition not only preserves the right of self-determination, freedom and independence "of peoples forcibly deprived of that right", but also their right to seek and receive assistance in their struggle for such self-determination. Though in this Article, too, the terms are vague and susceptible of varied interpretations,[79] the Definition is in line with the development of contemporary international law under the auspices of the Charter.[80] And practice will have to clear more the hazy contours surrounding the subjects entitled to struggle under the banner of self-determination, and the kind of legitimate assistance that others may render to such subjects.[81] In the meantime, however, military

might determine what other acts constituted aggression under the provisions of the Charter". – A/C 6/SR 1471, para. 7; see also ibid., paras. 5 and 6; B.B. Ferencz, *supra* n. 8, p. 30; D. Nguyen Quoc, P. Daillier, A. Pellet, *Droit international public*, 3e éd., 1987, p. 815.

77 See, J. Stone, *supra* n. 73, p. 26 and *passim*.

78 Cf. paras. 8 and 9 of the first principle in GA resol. 2625 (XXV); B.B. Ferencz, *supra* n. 8, pp. 39–41; A.M. Rifaat, *International Aggression*, 1979, pp. 273–4; S.M. Schwebel, *supra* n. 68, p. 482.

79 See B.B. Ferencz, *supra* n. 8, pp. 47–9.

80 See *supra* chapter 4, Self-Determination, p. 71 *et seq.*

81 Peoples under colonial and racist régimes are at present the clearly envisaged beneficiaries of the right of self-determination. And their right to seek and receive assistance in their struggle would have "as its consequence the acceptance of the legitimacy of the support and assistance furnished to them" subject to the conditions and limitation of the Charter. – H.G. Espiell, *The Right to Self-Determination. Implementation of United Nations Resolutions* (Report), 1980, (UN Publication) Sales No. E.79.XIV.5,

and non-military assistance to people recognized by the assisting States as struggling for their self-determination would not now appear to be automatically seen as falling under illegal intervention.

Being the result of compromises, the Definition must suffer the fate of other compromises and fall short of raised expectations. But the fact that the General Assembly perceived the wisdom of not suggesting to the Security Council an exhaustive list of acts of aggression would appear to indicate that not only other modes of armed force but also non-armed modes of coercion are capable of constituting aggression.[82] In this regard, Articles 2 and 4 appear to redeem the Definition from what otherwise would probably have been an attempt at a mechanical application of a set of rules, which might have rendered an unsatisfactory service to international peace and security. Though conflicting inter-State ambitions could hardly be expected to be tamed by drawing up definitions,[83] especially in a non-binding General Assembly resolution, the UN exercise in defining aggression would appear to have helped clarify, if not settle, issues of the use of force on the international plane.

Aggression, when duly determined to exist, carries with it the stigma of the world community's official condemnation;[84] and where characterized as war of aggression, it entails penal sanctions.[85] In other cases, it may be attended by other sanctions, whatever the degree of their successful implementation. These may be some reasons why the Security Council has not generally been too eager to resort to the determination of the existence of an act of aggression under Article 39.[86]

p. 15, para. 102. But the right of self-determination does not appear to be exclusively assigned to these categories of peoples.

82 Cf. B.B. Ferencz, *supra* n. 8, p. 42.

83 Cf. preambular para. 9 of the Definition; the Report of the Special Commmttee, UN Doc. A/9619, p. 31 where the delegate of the UK is reported to have expressed "scepticism and apprehension with regard to the formulation of a formal definition of aggression".

84 Cf., e.g. GA resol. 380 (V), 17 Nov. 1950, which in para. 1 states that "whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world"; the statement of the delegate of the USSR designating aggression as "a grave international crime" in the Report of the Special Committee, UN Doc. A/9619, p. 36.

85 See Art. 5, para. 2, Definition of Aggression; Art. 2(1), Draft Code of Offences Against the Peace and Security of Mankind, *supra*, n. 19; B. Broms, *supra* n. 60, p. 357.

86 In the case, for instance, of the Iraqi invasion of Kuwait on 2 Aug. 1990 and the full-scale violation of Kuwait's territorial integrity and political independence, SC resol. 660 (1990) determined only the existence of a breach of international peace and security. See also, e.g. R.-J. Dupy, "L'impossible agression: les Malouines entre l'O.N.U. et l'O.E.A.", *AFDI*, 1982, p. 342; M. Virally, "Le maintien de la paix et de la sécurité internationales", in *Manuel sur les organisations internationales*, R.-J. Dupuy ed.,

Even if the practice of the Security Council inclines normally to condemning illegal resorts to force without making any particular reference to aggression,[87] in a number of cases where armed force was used by South Africa and Southern Rhodesia, as it then was, the Council has, nontheless, employed the term aggression.[88] This might well have been encouraged by the confirmed recalcitrance of South Africa, the general disapprobation of Southern Rhodesia's régime, the absence in the circumstances of a protecting permanent Member of the Security Council,[89] the clear-cut issues in a colonial and racist context, and probably the influence of the Definition of Aggression.

In sum, the content of aggression is fluid; and this fluidity is reflected not only in the Definition of Aggression but in other instruments as well. Art. 2(1) of the Draft Code of Offences Against the Peace and Security of Mankind makes aggression more than "the employment by the authorities of a State of armed force";[90] Articles 6 and 9 of the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty),[91] and Art. 28 of the Charter of the Organization of American States[92] likewise make the content of aggression include more than armed attack. Art. 8 of the African and Malagasy Union for Defence (UAMD) of 1961[93] appears to go even further in that it makes "not only armed attacks of a nuclear or conventional type but also such action of a subversive nature, whether armed or not, as may be directed, actively encouraged or sustained from abroad", constitute aggression.

1988 (Hague Academy of International Law), p. 402. Cf. P. Rambaud, "La définition de l'agression par l'Organisation des Nations Unies", 80 *RGDIP*, 1976, pp. 847–8.

87 See, e.g. SC resols. 290 (1970), 8 December 1970, regarding the invasion of the Republic of Guinea by Portugal; 487 (1981), 19 June 1981, regarding Israel's military attack on the Iraqi nuclear installations; 502 (1982), 3 April 1982, relating to the Falkland Islands (Islas Malvinas).

88 See e.g. SC resols. 386 (1976), 17 March 1976 and 411 (1977), 30 June 1977, concerning Southern Rhodesia's acts of force against Mozambique; 455 (1979), 23 Nov. 1979, concerning Southern Rhodesia's use of force against Zambia; 387 (1976), 31 March 1976 and 602 (1987), 25 Nov. 1987, concerning South Africa's use of force against Angola; 527 (1982), 15 Dec. 1982, concerning South Africa's use of force against Lesotho; 496 (1981), 15 Dec. 1981, concerning mercenary aggression against the Seychelles.

As regards another part of the world, in its resol. 667 (1990), 16 Sept., 1990, the Security Council has characterized and condemned the Iraqi violations of diplomatic immunity as aggressive acts .

89 Cf. E. Giraud, "L'interdiction du recours à la force. La théorie et la pratique des Nations Unies", 67 *RGDIP*, 1963, p. 542.

90 See *YILC*, Vol. II, 1951, p. 135, and ibid., Vol. I, 1954, pp. 125–6.

91 *OASTS*, No. 61, p. 57. See also A.V.W. Thomas and A.J. Thomas, *Non-Intervention. The Law and Its Import in the Americas,* 1956, p. 211 re types of aggression under the Rio Treaty.

92 *OASTS* , No. 61, p. 1.

93 2 *Basic Documents of African Regional Organizations*, L.B. Sohn ed., 1972, p. 395.

The fluid content of aggression would necessarily be reflected in, and affected by, the fluid content of the force prohibited in Art. 2(4). But as indicated earlier, not every unlawful violation of Art. 2(4) would constitute aggression;[94] and the consensus Definition does not even explicity mention unlawful threat of force, which is illegal under Article 2(4), as capable of constituting an act of aggression. This is not to say, however, that illegal threat of force could never be declared aggressive; whenever such declaration becomes necessary, the Security Council can resort to the enabling provision of Article 4 of the Definition. On the other hand, every inter-State use of force determined to be an act of aggression would *ipso facto* be also an illegal use of force under Art. 2(4), and construe the term force prohibited in that Article.[95]

Aggression, whether or not under the consensus Definition, is a concept of a comparatively narrower scope than the force prohibited in Art. 2(4), which constitutes the base of aggression, illegal war and other types of illegal armed conflict.[96] We shall next discuss how the content of that prohibited force is viewed and assess its variability.

5.3 The Content and Variability of the Prohibited Force

5.3.1 Unsettled Debate on the Content

What the prohibited force comprises is an issue that has brought a division of views among States as well as among writers on public international law.[97] And we will need to quote at some length to show the grounds of their different positions. States like Argentina, Australia, France, Guatemala, Italy, Lebanon, the Netherlands, Sweden, the United Kingdom, the USA, Venezuela, for instance, maintained at the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States that the prohibited force was

[94] See, e.g. *infra* chapter 6, p. 150 re the British minesweeping operation in Albanian waters in the *Corfu Channel* case.

[95] See *Repertory*, Suppl. No. 5, Vol. 1, 1987, p. 43, para. 104. Cf. A. Randelzhofer, *supra* n. 18, p. 268.

[96] Cf. K. Skubiszewski, *supra*, n. 35, p. 741; C.W. Jenks, *The Common Law of Mankind*, 1958, p. 139.

[97] See, e.g. Y.Z. Blum, "Economic Boycotts in International Law", 12 *TILJ*, 1977, pp. 10–2; H. Brosche, "The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations", in *op. cit.*, R.B. Lillich ed., *supra* n. 1, pp 300–12; the references in J. Zourek, *supra* n. 12, p. 73, n. 83.

confined to armed force.[98] The reasons advanced in support of this position relate principally to the defeated Brazilian amendment at the UNCIO, which had sought to include economic measures within the prohibition,[99] and to the seventh preambular paragraph as well as Art. 51 of the Charter. These grounds are rehearsed whenever the content of the prohibited force is raised. A typical example in this respect may be found in the 1969 Report of the Special Committee, where it is summarized thus:

> It was their view that the drafting history and the logic of the text of the Charter would not support such an interpretation [i.e. a broad interpretation]. To extend that term in Article 2, paragraph 4, of the Charter beyond "armed force" would be incompatible with the seventh paragraph of the Preamble of the Charter, which proclaimed the determination of the signatories of the Charter "to ensure, by...the institution of methods, that armed force shall not be used, save in the common interest." It would also be incompatible with the wording of Article 51, which provided for the right of self-defence if an armed attack occurred.[100]

On the other hand, a number of Socialist and Third-World States, like Burma, Czechoslovakia, Egypt, India, Ghana, Madagascar, Nigeria, Poland, Romania, the USSR, Yugoslavia, for instance, indicated at the same Special Committee that the prohibition included economic, political and other forms of pressure or coercion. Their familiar arguments, also indicated in the 1969 Report of the Special Committee, maintain that

> Article 2, paragraph 4, must be interpreted in the light of the Preamble and of Articles 41 and 42 of the Charter which referred to the employment of measures not involving the use of armed force. Furthermore, the term "force" was used in the broadest sense in the Declaration of Bandung, Belgrade, and Cairo, and by the General Assembly in its resolutions 2131 (XX), 2160 (XXI)...Prohibition of undue pressure was also sanctioned in other international instruments, such as article 51 of the Vienna Convention on the Law of Treaties and in the Declaration on the Prohibition of Military, Political or Economic Coercion adopted by the Vienna Conference on the Law of Treaties. The Charter must be interpreted in the light of articles 31 and 32 of the Vienna Convention...The word "force" could hardly be given a restrictive meaning merely because the word "armed force" appeared in some of the provisions of the Charter.[101]

98 See the Report of the Special Committee...UN Doc. A/5746, p. 61; ibid. UN Doc. A/8018, p. 78, para. 114 for Venezuela's apparent change of position to the wider scope of force.

99 See *supra* chapter 3, p. 39.

100 UN Doc. A/7619, pp. 32–3, para. 92. See also UN Doc. A/8018, pp. 75, 112, 120, paras. 106, 227, 256 respectively.

101 UN Doc. A/7619, p. 32, para. 91. See, further, UN Doc. A/8018, pp. 81, 94, 100, 102–3, paras. 120, 160, 183, 194 respectively.

Further, though at the same Special Committee some States, like Mexico, recognized the absence of a legal reason for the non-inclusion of economic, political and other types of pressure in the term force,[102] they were concerned that such inclusion might enlarge the scope of self-defence under Art. 51 of the Charter. It was maintained that the concept of "armed attack" was more limited than that of the "use of force" and that the two expressions were not synonymous.[103]

The authors who interpret the prohibited force as concerning solely armed or physical force consider that

> "force" is used in its ordinary connotation as referring to *armed* force as distinguished from economic or political pressure.[104]

Apart from relying on the Brazilian amendment, rejected at the UNCIO, their arguments are essentially reflected, for instance, in the following excerpt:

> It must be admitted that the wording of Art. 2(4) of the Charter alone gives no clear answer to this dispute. But para. 7 of the Preamble of the Charter states one of the aims of the United Nations to be "that armed force shall not be used, save in the common interest", and Art. 44 supports the view that the Charter also uses the notion of "force" in cases where it apparently means "armed force". The prevailing view is further supported by the teleological interpretation of Art. 2(4). Were this provision extended to other forms of force, this interpretation would deprive States of every possibility of coercion against other States violating the law...
>
> That armed force is exclusively the preoccupation of the prohibition of the use of force is demonstrated finally by the genetic history of the Charter.[105]

Among the authors who interpret the prohibited force as embracing more than armed or physical force, H. Kelsen, for instance, argues on the basis of textual analysis and maintains thus:

102 See UN Doc. A/5746, p. 61.

103 See UN Doc. A/8018, pp. 107, 117, paras. 210, 247 respectively.

104 2 Oppenheim, p. 153.

105 A. Randelzhofer, *supra n.* 18, p. 268. See also, e.g. E.J. de Aréchaga, *supra* n. 4, pp. 88–9; W.W. Bishop, *supra* n. 16, p. 428; D.W. Bowett, *supra* n. 19, p. 148; J. L. Brierly, *The Law of Nations*, 6th ed., 1963, pp. 415–6; I. Brownlie, *supra* n. 35, p. 361; A. Cassese, *International Law in a Divided World*, 1986, p. 137; L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 4, p. 49; Y. Dinstein, *War, Aggression and Self-defence*, 1988, p. 84; M. Lachs, "The Development and General Trends of International Law in Our Time", 169 *RCADI*, 1980-IV, p. 160; B.V.A. Röling, "Aspects of the Ban on Force", 24 *NILR*, Special Issue 1/2 1977, p. 246; Ch. Rousseau, *supra* n. 7, p. 535; M. Sørensen, "Principes de droit international public", 101 *RCADI*, 1960-III, p. 236; A. von Verdross, "Idées directrices de l'Organisation des Nations Unies", 83 *RCADI*, 1953-II, pp. 12–5; H. Waldock, "General Course on Public International Law", 106 *RCADI*, 1962-II, pp. 232–3; H. Wehberg, *supra* n. 3, p. 68. Cf. R.B. Lillich, 'Economic Coercion and the "New International Economic Order": A Second Look at Some First Impressions', in *op. cit.*, R.B. Lillich ed., *supra*, n. 1, p. 110.

A distinction between armed force and other kinds of force necessarily follows from the provisions of Articles 39, 41, 42 and 50, concerning the measures to be taken by the Security Council for the maintenance of international peace and security. According to the provisions of Articles 41 and 42, two kinds of measures are to be distinguished, and according to Article 50 both are to be considered as "enforcement measures": measures "not involving the use of armed force" (Article 41), and measures involving the use of armed force (Article 42). If there are "enforcement" measures involving the use of armed force and "enforcement" measures not involving the use of armed force, armed force – that is, force exercised by the use of arms – must be distinguished from force exercised in another way – that is, force not exercised by the use of arms. There are two kinds of force not exercised by the use of arms: (1) an action of a state directed against another state which constitutes a violation of international law but which is not performed by the use of arms; (2) a reprisal which does not involve the use of armed force. Article 2, paragraph 4, refers to the "use of force." It therefore prohibits both kinds of force.[106]

M.S. McDougal and F.P. Feliciano, to take another example, argue that the

employment of nonmilitary types of coercion was never meant to be prohibited, is subject to serious reservations. The authority of the Security Council to characterize particular coercion as a "threat to the peace," "breach of the peace," or "act of aggression," and to call for appropriate sanctioning measures is not restricted, by the Charter at least, as to the modality of coercion that may be so characterized.[107]

J. Zourek, to take a third example, contends thus:

Si l'on acceptait l'interprétation restrictive réduisant la portée du mot "force" en le ramenant au sens de "force armée", il y aurait une différence considérable entre le paragraphe 3 et le paragraphe 4 de l'article de la Charte. Selon cette interprétation, les Etats auraient le droit, aux termes du paragraphe 4, d'utiliser toutes les formes de la force, à l'exception de la force armée, alors que le paragraphe 3 et les articles 33 et suivants de la Charte leur imposent clairement *l'obligation de n'utiliser que des moyens pacifiques pour le règlement de leurs différends internationaux*. Il y a là une contradiction évidente, dont les défenseurs de la thèse en question ne semblent pas tenir compte.[108]

106 H. Kelsen, "Collective Security Under International Law", 49 *USNWCILS*, 1957, p. 57, n. 5; see also ibid. p. 55. See, further, e.g. G. Arangio-Ruiz, *The U. N. Declaration on Friendly Relations and the System of the Sources of International Law*, 1979, pp. 104, 120; A. Jacewicz, "The Concept of Force in the United Nations Charter", 9 *PYIL*, 1977–1978, pp. 149–50; T. Mitrovic, "Non-Intervention in the Internal Affairs of States", in *Principles of International Law Concerning Friendly Relations and Cooperation*, M. Sahovic ed., 1972, p. 253; D. Nincic, *The Problems of Sovereignty in the Charter and in the Practice of the United Nations*, 1970, pp. 64–6; M. Reisman, "Sanctions and Enforcement", in *The Future of the International Legal Order*, C.E. Black and R.A. Falk eds., Vol. III, 1971, pp. 332–3; J. Stone, *supra* n. 73, pp. 94–100; G. Tunkin, *supra* n. 4, p. 54.

107 *Supra* n. 4, p. 125. See also ibid. p. 200. Cf. L.C. Buchheit, *supra* n. 1, pp. 51–69 where the broad view of the content of force is argued for.

108 *Supra* n. 12, p. 74, (the author's own italics). Immediately bearing on non-military modes of coercion, P. Malanczuk, like A. Randelzhofer and others of similar views, states that "[a]n interpretation of art. 2(4) extending the provision to other forms of force would deprive States of responding by coercion other

The above quotations from authors who support the broad interpretation of the term force have been made comparatively extensive; this is because it seemed necessary to show their main arguments against the greater number of authors who subscribe to the restrictive interpretation.[109]

In the practice of the UN, the term force generally appears to be taken as bearing a sense more than armed force.[110] This can be seen in General Assembly resolution 2625 (XXV), which in its annex constitutes an elaboration and codification of the seven principles of international law concerning friendly relations and cooperation that it embodies, and which is accordingly an important interpretive act of those principles.[111] Although, as will be observed later, the resolution could also be used to support the restricted view of the content of force, it would appear on balance to be more suitable for the broad view of that content.[112] The ninth preambular paragraph of the resolution's annex, for example, recalls

> the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State.

The tenth preambular paragraph of the annex considers

> it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

than armed force to an international offence committed by another State which is not acceptable in the present international law." – *Supra* n. 72, pp. 224–5; see also *supra* n. 105. But, as will be submitted at various junctures, and especially during the discussion of the exception of self-defence, States would not appear to be precluded from resorting to *proportional* countermeasures in response to a wrongful act. – See, *infra* chapter 7, p. 203 *et seq.*

109 See, e.g. R.B. Lillich, "The Status of Economic Coercion Under International Law: United Nations Norms", 12 *TILJ*, 1977, pp. 18–9.

110 See, e.g. J.J. Paust and A.P. Blaustein, "The Arab Oil Weapon. A Threat to International Peace", 68 *AJIL*, 1974, pp. 415–7. Cf. R. Higgins, *supra* n. 4, p. 177.

111 Cf. M. Sahovic, "Codification of the Legal Principles of Coexistence and the Development of Contemporary International Law", in *op. cit.*, M. Sahovic ed., *supra* n. 106, pp. 48–9. See, e.g., GA resols. 290 (IV), 1 Dec. 1949; 380 (V), 17 Nov. 1950; 2131 (XX), 21 dec. 1965, which in substance are reflected in GA resol. 2625 (XXV); and, e.g. GA resols. 3171 (XXVIII), 17 Dec. 1973; Art. 32 of 3281 (XXIX), 12 Dec. 1974; 41/165, 5 Dec. 1986; SC resol. 330 (1973), 21 March 1973, all of which appear to reflect the broad view of the content of "force" in GA resol. 2625 (XXV). See, further, GA resol. 3314 (XXIX), 14 Dec. 1974; *supra* p. 109 *et seq.*

112 For a summary of the arguments advanced in favour of the restricted and broad content of force, see Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/6799, pp. 38–43, paras, 47–57; *infra* p. 119.

Though such separation of the illegal factors that affect the same protected basic values of States might presumably have been made to differentiate between physical and other modes of coercion, the ninth preambular paragraph has signified to some the broad content of force. For instance, Venezuela indicated at the 1970 session of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States that it had

> always supported the inclusion in the principle [of non-use of force] of a ban on economic, political and other kinds of pressure...[which] did appear in one of the preambular paragraphs with the same wording as had been suggested by the Drafting Committee... .[113]

Moreover, even though the reference to force under the first principle [non-use of force] of the resolution might appear to relate to armed or physical force, the third principle [non-intervention] also relates, in part, to

> armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements...in violation of international law.[114]

It is further declared under this same principle that

> [n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.[115]

Such references to armed force and other modes of coercion as legally undifferentiated[116] and as illegal acts when used against the protected values of States conveys the notion that more than armed force was intended by the term force under the declaration of principles resolution.

However, the declaration is sufficiently vague to serve as a justifying ground for both the adherents of the broad and the restricted view of the content of the prohibited force. R. Rosenstock, for instance, explains that

113 UN Doc. A/8018, p. 78, para. 114.

114 Para. 1.

115 Para. 2.

116 As G. Arangio-Ruiz says, "[t]here would be a difference...if illegal recourse to *armed* force met sanctions or measures different from those attached to the illegal recourse to *economic* or *political force*. But such is not the case in the Charter; and it is not the case in the declaration." (the author's own italics) – *Supra* n. 106, p. 100.

the text on "force" does not answer this point. It was tacitly agreed to "paper over" this difference by elevating the text to a sufficient level of abstraction to hide the difference; it is therefore possible to read many of the paragraphs on the principle as consistent with either view. The nature of the specific acts included in the text and the fact that such matters as coercion by other means are dealt with elsewhere in the text provide support for the view that a restrictive interpretation of the scope of the term "force" is called for. This, however, does not affect the fact that those who stressed the importance of the need to protect states against economic pressures of a certain magnitude accomplished their goals as well. Evidence of this is found in the Preamble and the text on the principle of non-intervention.[117]

To illustrate the declaration's use in support of either the restricted or broad view of the content of the prohibited force, reference may be made by way of example to two authors. H. Mosler writes that

> [t]he detailed comment on the first principle, that States shall refrain from force, does not mention the use of economic means and it may be deduced from this that economic pressure lies outside the prohibition of force or at least that it was not possible to reach agreement on including that kind of coercion within the notion of "force" embodied in the general principle set out in Article 2, paragraph 4.[118]

K. Obradovic, on the other hand, writes that

> [b]oth of these provisions [the ninth preambular paragraph and the second paragraph of non-intervention] have been combined with the principle of the non-use of force, particularly with the general formulation of the prohibition under paragraph 1 of this principle, and clearly show that there are no grounds whatever for the concept of force in the Declaration to be interpreted as applicable only to armed force.[119]

The declaration of principles adopted by consensus – a result of compromises – is not as such a legally binding instrument;[120] but the provisions it embodies preserve the legal validity each may possess independently. The declaration suffers from overlapping provisions,[121]

117 R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 *AJIL*, pp. 724–5.

118 H. Mosler, "The International Society as a Legal Community", 140 *RCADI*, 1974-IV, p. 286. See also E.J. de Aréchaga, *supra* n. 4, pp.88–9.

119 K. Obradovic, "Prohibition of the Threat or Use of Force", in *op.cit.*, M. Sahovic ed., *supra* n. 106, p. 88. See also G. Arangio-Ruiz, *supra*, n. 106, p. 99.

120 See, e.g. the statement of the Australian delegate at the Special Committee, UN Doc. A/8018, p. 104, para. 200; G. Arangio-Ruiz, *supra* n. 106, p. 93.

121 See *supra* chapter 3, p. 66 *et seq.* Cf. the statement of the delegate of the Netherlands at the Special Committee, UN Doc. A/8018, p. 95, para. 164; G. Arangio-Ruiz, *supra* n. 106, p. 120; K. Obradovic, *supra* n. 119, p. 108. The principle of non-intervention and that of non-use of force appear to overlap inevitably. The ICJ has remarked in the *Nicaragua v. USA* case "that acts constituting a breach of the customary principle of non-interveniton will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations". – Merits, *supra* n. 25, para. 209.

which may partly account for its suitability as a base for both the restrictive and broad views of the content of the prohibited force. The declaration is to be seen as an integrated whole, for it provides in its General Part that the "principles are interrelated and each principle should be construed in the context of the other principles". As concerns the prohibition of force, it provides in a saving clause that

> [n]othing...shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

This clause preserves the existing different interpretations of what constitutes lawful force – in other words, of what amounts to prohibited force both as regards modality and the party exercising it – under the Charter. In sum, because of its structure, the great number of States advocating a wider scope of the prohibited force, and the practice of the UN along the same line, the declaration appears to be more amenable to the construction that gives a broad content to the prohibited force. Otherwise, the declaration stands as a notable frame of reference at the UN and other international fora, and has served the ICJ in the *Nicargua v. USA* case as evidence of the *opinio juris* of States regarding the declared principles.[122]

The broad view of the content of the prohibited force can also be seen in the Final Act of the Conference on the Law of Treaties, where a declaration was incorporated as a compromise for the withdrawal of the 19-State amendment to Art. 52 of the Convention on the Law of Treaties.[123] Inasmuch as the amendment had sought to include economic or political pressure as treaty-invalidating ground, the declaration

> [*s*]*olemnly condemn*[*ed*] the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.[124]

The withdrawal of the amendment and the substitution of the declaration does not appear to signify the abandonment of the broad content of force. Had the amendment been pursued to the vote, it would have

122 See Merits, *supra* n. 25, para. 188.

123 See Y.Z. Blum, *supra* n. 97, p. 12, n. 31; R.D. Kearney and R.E. Dalton, "The Treaty on Treaties", 64 *AJIL*, 1970, pp. 534–5.

124 *UNJY*, 1969, p. 164. Cf. Principles II and VI, and section (1) under the rubric "Matters related to giving effect to certain of the above Principles of the Final Act of the Conference on Security and Co-operation in Europe", 14 *ILM*, 1975, p. 1292.

reputedly commanded a substantial majority.[125] The compromise formula was agreed to by the States sponsoring the amendment presumably because they understood it not to disturb the broad interpretation they placed on the term force:[126] The meaning of the term force or coercion was apparently a matter that was not satisfactorily settled. The ILC, for instance, found it necessary to state in its commentary on the draft Article on "Coercion of a State by the threat or use of force", which came to be Art. 52 of the Vienna Convention on the Law of Treaties, that it

> decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter", and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.[127]

Insofar as the ICJ is concerned, the two occasions on which it pronounced on the international use of force, namely, the *Corfu Channel*[128] and the *Nicaragua v. USA*[129] cases, related to armed force. The *Corfu Channel* Judgment (Merits) was framed within the terms of the Special Agreement between Albania and the United Kingdom, signed on 25 March 1948, in which the issues to be adjudicated were posed as two questions:

> (1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?
>
> (2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?[130]

Though not mentioned in the Special Agreement, an earlier incident of 15 May 1946, where two British warships passing through the Albanian waters of the North Corfu Channel were fired at by Albanian coastal battery, had a bearing on the case.[131]

125 See R.D. Kearney and R.E. Dalton, *supra* n. 123, p. 534.

126 Cf. G. Ténékides, "Les effets de la contrainte sur les traités à la lumière de la convention de vienne du 23 mai 1969", *AFDI*, 1974, pp. 91–3; H.G. de Jong, "Coercion in the conclusion of treaties", 15 *NYIL*, 1984, pp. 246–7.

127 *YILC*, 1966, Vol. II, p. 246.

128 Merits, *supra* n. 25.

129 Merits, *supra n.* 25.

130 Merits, *supra* n. 25, p. 6.

131 See *Pleadings*, *supra*, n. 74, p. 282 where the Agent of the UK is reported to have stated that "[t]he incident in May is not the subject of any claim by either side in this case, but both sides consider it

The incident of 22 October concerned two British destroyers which struck mines and sustained damage[132] while passing through the North Corfu Channel, previously swept for mines;[133] the explosions resulted in the death of 44 persons and injury of 42 others.[134] Three weeks after this incident, the UK unilaterally undertook a minesweeping operation in the channel. The operation, named Operation Retail, was carried out on November 13

> under the protection of an important covering force composed of an aircraft carrier, cruisers and other war vessels. This covering force remained throughout the operation at a certain distance to the west of the Channel, except for the frigate *St. Bride's Bay*, which was stationed in the Channel...The area swept was in Albanian territorial waters, and within the limits of the channel previously swept.[135]

Regarding the incident of 22 October, the Court imputed knowledge of the minelaying in the channel to Albania and held that State responsible for failing to notify the existence of the minefield, and in particular, for not warning the approaching British ships.[136] On the other hand, having found the North Corfu Channel to belong "to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace",[137] the Court held the passing on the fateful day of four British warships one after another, "with crews at action stations, ready to retaliate quickly if fired upon",[138] did not violate Albania's sovereignty. Though the intention of effecting such manner of passage through the channel "must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships",[139] the Court recognized the passage to have been "designed to affirm a right which had been unjustly denied",[140] and held that "the United Kingdom was not bound to abstain

relevant to the incident of 22nd October...The Albanian attack upon our two cruisers was absolutely inexcusable". Cf., further, ibid., p. 312.

132 See Merits, *supra* n. 25, pp. 12–3.

133 Ibid., p. 13.

134 *Pleadings*, Vol. I, pp. 93–4, 99.

135 Merits, *supra* n. 25, p. 33.

136 Ibid., pp. 18–23.

137 Ibid., p. 29.

138 Ibid., p. 31.

139 Ibid.

140 Ibid., p. 30.

from exercising its right of passage, which the Albanian Government had illegally denied".[141]

Regarding Operation Retail, however, the Court unanimously declared that it

> can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[142]

It should first be observed that though the Court passed upon the legality of the use of force which had taken place at a time when the Charter's legal order was in effect, the Judgment did not make a specific reference to Art. 2(4). Nevertheless, in view of the universal validity and applicability of the Article,[143] every international judgment on inter-State use of force during the Charter's continued legality will necessarily amount to some construction of the provisions of that Article.[144] The absence of reference to the Article in a judgment would not detract either from the relevance of the Article or from the inherent authority and interpretive value of the judgment, where the latter is otherwise valid.[145] As an application of the international law norm prohibiting the threat or use of force in international relations, the Judgment in the *Corfu Channel* case then, it is submitted, was also a construction of Art. 2(4).[146] The Judgment differentiated beween what in the instance was a legal and an illegal use of force. The firing at passing British ships on 15 May 1946 by Albanian coastal batteries was an illegal use of armed force; the passing of four British warshsips through the channel on 22 October in the manner indicated above was not an illegal demonstration of force; the British minesweeping operation within Albanian territorial waters was an illegal use of force; but the force that covered the minesweeping operation was not held to amount to an illegal threat of force.[147] Such

141 Ibid.

142 Ibid., p. 35.

143 See *supra* chapter 3, p. 50 *et seq.*, and *infra* p. 125.

144 Cf. H. Kelsen, *General Theory of Law and State*, 1949, pp. 133–5, 143, 155 re the individualization and concretization of general norms resulting from the judicial function.

145 Cf. the Dissenting Opinion of Ecer, Merits, *supra* n. 25, pp. 130–1.

146 See *supra* chapter 3, p. 54.

147 Merits, *supra* n. 25, p. 35.

appreciation of the legality of the different facets of force used in the *Corfu Channel* case would not have been valid had it been contrary to Art. 2(4); but, as the Judgment amounted to a construction of the Article, it could not have been inconsistent wth it; and this, it is suggested, would account for the Judgment's interpretive relevance.

It should further be observed that as the issue before the Court related to the threat and use of armed force, the Judgment had no need of addressing other aspects of the content of the prohibited force, and should not therefore be viewed as authority for the restricted content of force under the provisions of Art. 2(4).

As regards the *Nicaragua v. USA* case, the principal issue before the Court concerned also the use of armed force. Nicaragua had alleged that by using different modes of armed force in and against it, the United States had violated the prohibition of the use of force both under general and conventional international law.[148] The Court, however, gave effect to the United States reservation, which excluded from the jurisdiction of the Court "disputes arising under a multilateral treaty, unless...all parties to the treaty affected by the decision are also parties to the case":[149] As provisions of multilteral treaties, Art. 2(4) of the UN Charter as well as Articles 18, 20 and 21 of the Charter of the Organization of American States[150] were accordingly ruled inapplicable. In their stead, the dispute was adjudicated on the basis of customary international law.

The exclusion of Art. 2(4) from the case might give the impression that the Article was irrelevant to the dispute and that the Judgment in the

148 Nicaragua had, e.g. alleged, *inter alia*, in its Application as follows:

"(a) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under:

- Article 2(4) of the United Nations Charter;...

(b) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:

- armed attacks against Nicaragua by air, land and sea;...

(c) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua." - Merits, *supra* n. 25, para. 15. See also para. 23.

Further, Nicaragua had explained at the jurisdictional phase of the case that "the provisions of the United Nations Charter relating to the use of force by States, while they may still rank as provisions of a treaty for certain purposes, are now within the realm of general international law and their application is not a question of interpreting a multilateral treaty". - Jurisdiction and Admissibility, *ICJ Reports* 1984, para. 71. This explanation would subsume Art. 2(4) under general international law.

149 Merits, *supra* n. 25, para. 42.

150 Ibid., para. 56.

case did not construe it. But as indicated in connection with the *Corfu Channel* case, in the *Nicaragua v. USA* case, too, the Article was relevant. As argued earlier, the imperative and universal character of the prohibition would not permit an application and construction of the customary international law norm on the non-use of force without simultaneously and correspondingly reflecting the norm of Art. 2(4) and being reflected by it.[151] This would seem to be implicitly acknowledged when the Court declared that

> so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.[152]

Further, however extended or restricted the content of the customary or conventional norm on the non-use of force might be held to be, the maintenance of international peace and security would appear to require that the two sources of the prohibition preserve a fundamental uniformity. Hence, for instance, the Court's construction of armed attack;[153] the distinction it drew between grave forms of use of force, held to constitute armed attack, and less grave ones, as border incursions, reprisals, forcible action that deprives peoples of their right of self-determination, organizing or encouraging the organization of armed groups for incursion into another State;[154] its appreciation of the arming and training of groups opposing the régime of a particular State as possibly amounting to a threat or use of force rather than an armed attack; its holding the mere supply of funds to such groups not to amount to a use of force,[155] would all be equally valid for both Charter and customary norms on the prohibition of force.

151 See chapter 3, p. 52 *et seq.*

152 Merits, *supra* n. 25, para. 181.

153 See ibid. paras. 195, 230 respectively. Cf. G.A. Christenson, "The World Court and *Jus Cogens*", 81 *AJIL*, 1987, pp. 99–100.

154 See Merits, *supra* n. 25, para. 191.

155 See ibid., paras. 228, 247 respectively.

In other respects, concerning Nicaragua's complaint of US economic measures – cessation of aid, reduction of the import quota of Nicaraguan sugar, declaration of total embargo[156] – the Court has stated "that it is unable to regard such action...as breach of the customary-law principle of non-intervention".[157] This might indicate the view of the Court as inclining towards the restricted content of force.[158] But as it appears peripheral to the issues related to armed force before the Court, the statement would hardly qualify as a construction of force; and even as a construction of non-intervention, it would appear too much of an assertion.

The *Nicaragua v. USA* case was not contested at the merits stage. The Judgment on the merits, arrived at without the benefit of the argued views of one of the parties might be felt to be deficient. Even where the Court properly exerted itself – as it appeared to have done – in an attempt to ascertain the legal position of the absent party, the lack of essential assistance in a matter of fundamental importance for contemporary international law has left a conspicuous void in the case.[159] In contrast to the *Corfu Channel* case, this absence of contestation might cast some shadow on the authoritativeness of the Judgment.[160] In any event, whatever authority that Judgment might command regarding the use of force would concern the construction of the particular matters framed as issues cognate to armed force.

Before closing this review of the different categories of views relating to, or having a bearing on, the content of the prohibited force, mention may also be made of certain post-Charter defence pacts. These pacts have in the main instituted "armed attack" as ground for collective self-defence.[161] The practice may evidence the prevalence of subjecting the exercise of collective self-defence to what is the most evident and

156 Ibid., paras. 123–125, 244.

157 Ibid., para. 245.

158 See further *infra* chapter 7, p. 203 re the Court's construction of the right of self-defence, which generally seems to restrict that right to cases of armed attack.

159 Cf. Merits, *supra* n. 25, e.g. pp. 24–6, 33. See, e.g. J.N. Moore, "The *Nicaragua* Case and the Deterioration of World Order", 81 *AJIL*, 1987, pp. 153–9 for what would probably have been some of the US arguments.

160 But to some, as e.g. G.M. Danilenko, the Judgment "is a highly authoritative ruling on the principle of non-use of force in international relations". – "The Principle of Non-Use of Force in the Practice of the International Court of Justice", in *The Non-Use of Force in International Law*, W.E. Butler ed., 1989, p. 102.

161 See *supra* n. 40 for some such pacts.

uncontroversial form of force, but it would not establish armed force to be the exclusive content of the prohibited force. Unless the practice is seen to have crystallized into a rule of customary international law establishing armed force as the only type of the prohibited force, which does not yet appear to be the case, the fact that other types of force do not figure in such pacts would not be ground enough for denying place in the prohibition to those types of force.

From the views of States, international judicial decisions and doctrine, then, the content of the force prohibited under the terms of Art. 2(4) does not appear settled with certainty. Historically, it seems most probable that the delegates at the 1945 UNCIO in San Francisco generally had armed force in mind when they agreed on the draft formula prohibiting the threat or use of force in international relations. But, as indicated earlier,[162] some proposed amendments, which for no recorded explicit or clear reason failed to be accepted,[163] and the phrase "force or similar coercive measures", which was inserted in the report of Committee I/1, could be viewed as inroads into the exclusiveness of armed force. In this respect, even though we consider it unnecessary for the submission of this study to rehearse all the pros and cons about the type of the prohibited force gleaned from the text of the Chater,[164] particular reference may nevertheless be made to Articles 41 and 42 of the Charter. These Articles incorporate and thereby acknowledge both armed force and other modes of coercion as enforcement measures.[165]

5.3.2 Variability of the Content

Even if it be granted that the prohibition at the UNCIO related solely to armed force, it would not necessarily mean that in the views of States and in doctrinal appreciation the content remained or should remain unvaried.[166] The increased membership in the UN, for instance, would account in part for the differing positions, which were noted above, on

162 See chapter 3, p. 40.

163 Cf. *Legal Consequences for States of the continued Presence of South Africa in Namibia...*, Ad. Op., *ICJ Reports* 1971, para. 69 where the Court has indicated that "[t]he fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval." This statement would appear to have general applicability.

164 See the account by A. Jacewicz, *supra* n. 106, p. 139 *et seq.* Cf. S.C. Khare, *Use of Force under U.N. Charter*, 1985, pp. 14-29.

165 See H. Kelsen, *loc. cit, supra* n. 106.

166 Cf. M. Reisman, *supra* n. 4, pp. 848-50.

the content of the prohibited force maintained at the UN special committees and the ILC.[167] As indicated, e.g. in the 1964 Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, one of the arguments for a broader content of the prohibited force advanced by some States was that

> [h]ad it [the Charter] been drafted with the participation of all the present Members of the United Nations the fate of the Brazilian amendment[168] might well have been different.[169]

This argument could be validly taken for an affirmation of the broad content of the prohibited force, which some States espouse to be the rule under the Charter; but it would not necessarily affirm, as it superficially appears to do, that the Brazilian amendment was rejected with the clear intention of confining the prohibition to armed force.[170] Additionally, the expectations of development and concomitant international cooperation that are the offshoots of the greater interdependence of States recognized as a contemporary fact – underscored even more by the shared fate, which weapons of mass destruction and ecological disturbances threaten – would appear to condition attitudes towards the content of the prohibited force.[171]

The special nature of the Charter as a legal instrument, the sufficiency and efficiency of the mechanism instituted for maintaining international peace and security, and the vulnerability of States to non-armed or non-physical modes of coercion of manifested effectiveness would also have a bearing on the appreciation of the content of the prohibited force. Despite changing conditions, the Charter, a *sui generis* legal instrument, is sought to be preserved without substantial formal amendment; and whenever their activities involve questions of threat or use of force, the

167 See *supra* pp. 115, 120–1.

168 See chapter 3, p. 39.

169 UN Doc. A/5746, p. 34, para. 57.

170 The *travaux préparatoires* do not convey satisfactorily the reasons for the rejection of the Brazilian amendment. *Travaux préparatoires* in general do not comprise every detail that might be deemed important for a judgment on a particular matter. I. Sinclair explains that they "are unlikely to reveal accurately and in detail what happened during negotiations", and advises prudence in their use. – *The Vienna Convention on the Law of Treaties*, 2nd ed., 1984, p. 142.

171 See *supra* chapter 4 p. 83. Cf. M. Nincic and P. Wallensteen, "Economic Coercion and Foreign Policy", in *Dilemmas of Economic Coercion*, M. Nincic and P. Wallensteen eds., 1983, p. 2. Cf. A. D'Amato, "Trashing Customary International Law", 81 *AJIL*, 1987, pp. 104–5; but the author's concern in the article relates to alleged cases of humanitarian intervention, reprisals, enforcement measures, "preventive" actions (at 103).

Members claim their actions to be compatible with pertinent Charter provisions.[172] These are valid considerations that indicate the desirability of making the Charter maintain relevance and serviceability. This could be done by appropriate interpretation.[173] The alternative of strict textual adherence will risk creating a persisting gap between practice and law, which would be inimical to the advancement of the rule of law in international relations. To remain legally relevant, therefore, the Charter would need to live up to its uniqueness and expand or contract its pertinent norms in response to changing conditions.

As regards the Charter's allocation of the legal use of force between the UN and its Members, it was apparently devised with the expectation of a functioning mechanism for maintaining international peace and security, which, *a fortiori*, would curtail to the unavoidable legal minimum the unilateral resort to force.[174] This contingent relationship would affect the ratio of the allocation of the legal use of force between the UN and States by withdrawing from, or increasing the scope of, unilateral use of legal force to the extent of the expanded or diminished effectiveness of the UN. Where the UN is effective in maintaining international peace and security – whatever the mode of force or coercion that threatens or disturbs the same[175] – the field of the lawful unilateral resort to force will be narrower.[176] In the opposite case, the scope of the lawful unilateral use

172 See *supra* chapter 3, p. 58. Cf. L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 4, p. 17; G. de Lacharrière, supra n. 50, p. 352 where the author rightly observes, "Et comme la règle est violée très fréquement, elle est réaffirmée de même." And on pp. 353–4, he further observes, 'Non contents de réaffirmer la norme, [les gouvernements] s'attachent à en durcir les termes, à en dégager certaines implications, à en augmenter la valeur juridique...reforcement de la portée juridique de la règle (dont le contenu n'est pas modifié) est recherché par les Etats qui voudraient que les principes en question fassent partie du "*jus cogens*".' The author's claim of the unmodified content of the rule would appear to relate only to the restricted view of the content of the prohibted force.

173 Cf. H. Lauterpacht, *The Development of International Law by the International Court*, 1958, pp. 267–8 re interpretation designed to make the International Labour Organization effective, and pp. 274–7 re the implied powers of the UN; McNair, *The Law of Treaties*, 1961, p. 385.

Though the maxim *clausula rebus sic stantibus* is not applicable here, as a generally recognized rule of interpretation of agreements, it could serve as a comparative point of reference. – Cf. G. Schwarzenberger, "Clausula Rebus Sic Stantibus", 7 *EPIL*, 1984, p. 26..

174 See *supra* chapter 3, p. 44 *et seq.*

175 See, e.g. SC resol. 330 (1973), 21 March 1973, which, in connection with the exercise of permanent sovereignty over natural resources by Latin American countries, recognizes in its 5th preambular para. "that the use or encouragement of the use of coercive measures may create situations likely to endanger peace and security in Latin America". And from the 2nd preambular para. of the same resolution, the coercive measures appear to relate to "economic, political or any other type of measures [employed] to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights...".

176 Cf. A.R. Coll, "Philosophical and Legal Dimensions of the Use of Force in the Falklands War", in *op. cit.*, A.R. Coll and A.C. Arends eds., *supra* n. 51, pp. 48–9; R. Falk, supra n. 5, pp. 60–1; R.Y.

of force as an exception of the prohibition of force should be wider. But those who do not subscribe to such consequential relationship,[177] and would rather keep to the textual appreciation of the prohibited force as generally envisaged to have been agreed at the UNCIO in 1945,[178] would be hard pressed to offer a workable alternative in face of outstripping events.[179] It would appear doubtful that their genuine intention for peace and order based on strict law could be realized by denying unilateral resort to force the necessary extension of legality in a defectively policed international arena. Unhappily, the universally understood and respected arbiter in that arena is still force used in various degrees and modalities.

As regards the credible vulnerability of some States to modes of coercion other than armed or physical force,[180] the coercive potential of

Jennings, "General Course on Principles of International Law", 121 *RCADI*, 1967-II, p. 584; H. Waldock, *supra* n. 105, p. 244.

177 See *supra* chapter 3, p. 43; e.g. A. Randelzhofer, *supra* n. 18, p. 274; M. Lachs, *supra*, n. 105, p. 165. The latter author, having shown sympathy for the broad view of the content of the prohibited force in Art. 2(4), "perhaps not exactly within its own terms but within the wider notion provided by the Charter", (ibid., p. 160), nevertheless, assumes a position that denies a contingent relationship between an effective UN machinery and the Members' obligation under Art. 2(4). Cf. W. Friedmann, *The Changing Structure of International Law*, 1964, p. 259; D.P. O'Connell, *International Law*, 2nd ed., Vol. 1, 1970, pp. 303–4; M. Reisman, *supra* n. 106, p. 332, and in *ASILP*, 78th Annual Meeting, 1984, p. 76; R. Falk, *supra* n. 47, p. 430, n. 39 where the author suggests that "the inability of the United Nations to impose its views of legal limitation upon states leads to a kind of second-order level of legal inquiry that is guided by the more permissive attitudes toward the use of force to uphold national interests that is contained in customary international law".

178 Partial support for the strict construction of the prohibited force has been sought in the statement of the ICJ in the *Corfu Channel* case, which characterized the British minesweeping operation in the Albanian territorial waters "as the manifestation of a policy of force...such as cannot, whatever be the present defects in international organization, find a place in internaitonal law". – Merits, *supra* n. 25, p. 35. See, e.g. P. Malanczuk, *supra* n. 72, p. 217. But, cf. D.P. O'Connell, for example, who, as regards the protection of nationals and their property on foreign soil, takes this judicial statement as "not sufficiently comprehensive or precise to warrant the conclusion that such protection...is in all cirumstances illegal". – *Supra* n. 177, p. 303. Besides, the content of the prohibited forced was not particularly in issue and non-intervention was not denied by UK as a principle of international law but was sought to be justified. (See *Pleadings*, Vol. III, p. 296).

179 Some, faced with the dilemma, suggest a kind of a legal limbo. P. Malanczuk, for instance, proposes that "it seems wiser to hope that the international community will tolerate illegal armed action in exceptional cases because of the distressing situation of the acting State by refusing to condemn that State expressly and by not imposing any sanctions rather than to lower the standards of a fundamental principle of international law such as the prohibition of the use of force in order to do justice to extreme cases". – *Supra* n. 72, p. 223. But, as the constant abstention from condemnation and sanctions is certain to establish custom, the suggestion would have the effect of only biding time.

180 As concerns economic modes of coercion, J. Galtung indicates "concentration" to be the key factor in vulnerability and notes correctly that "the more a country's economy depends on one product, and the more its exports consist of one product, and the more its exports and imports are concentrated on one trade-partner, the more vulnerable is the country". – "On the Effects of International Economic Sanctions", in *op. cit.*, M. Nincic and P. Wallensteen eds., *supra* n. 171, p. 23. As an example, see the effect of the US economic measures against Cuba in J.D. Green, "Strategies for Evading Economic Sanctions", ibid., p. 69 where it is noted that "Knorr suggests, correctly, given Cuba's prior dependence

such other modes would warrant their inclusion within the content of the prohibited force. Territorial integrity, political independence and the purposes of the Charter are values protected by the prohibition of force under the terms of Art. 2(4). Were such protected values to be gravely affected by modes of coercion other than armed or physical force, and such other modes of coercion were kept out of the content of the prohibited force, the full significance of the legal protection would appear illusory and negated.[181] It would appear doubtful that such exclusive prohibition would stand up to the test of applicability.[182]

5.3.2.1 Coercion

A few words may be said here about coercion. That term is capacious.[183] The Vienna Convention on the Law of Treaties, for instance, accepts coercion in two contexts as one of the causes vitiating consent, which would appear to be a proper consequence of the prohibition of the illegal use of force in international relations.[184] Art. 51 of the Convention, captioned "Coercion of a representative of a State", declares

> a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

These acts and threats are deemed

on the United States, that without Soviet or other external aid the Cuban economy would have collapsed." Further, P.A. Shneyer and V. Barta, "The Legality of the U.S. Economic Blockade of Cuba Under International Law", 15 *CWRJIL*, 1981, p. 476.

As concerns a broader aspect of vulnerability, see D.A. Deese, "The Vulnerability of Modern Nations: Economic Diplomacy in East-West Relations", in *op. cit.*, M. Nincic and P. Wallensteen eds., *supra* n. 171, p. 157 where a distinction is made between "dependence" and "vulnerability". Dependence is described as "the degree of actual physical reliance of a country on external sources of trade, aid, or finance, vulnerability represents the liability to political, economic, or military damage as a result of its dependence".

181 Cf. *Comprehensive Study on Nuclear Weapons, Study Series 1, Disarmament*, 1981, (UN publication) Sales No. E.81.I.11, p. 110 where it is observed that "[t]he national security of a State may be threatened not only by military force but also by political and economic measures". Similarly, M. Reisman indicates validly that "[i]n a world in which the ambit of free choice of participants may be drastically curtailed by the use of economic, diplomatic, and ideological methods, the assumption that the exclusive modality of coercion is military force can be an invitation to abuse". – *Supra* n. 4, pp. 603–4. See also K. Obradovic, *supra* n. 119, p. 85. Cf. T.J. Farer, "Political and Economic Aggression in Contemporary International Law", in *op. cit.*, A. Cassese ed., *supra* n. 4, p. 129.

182 Cf. S. Rosenne, "International Law and the Use of Force", 62 *USNWCILS*, Vol. II, 1980, p. 7.

183 See *supra* n. 4; the *Nicaragua v. USA* case, Merits, *supra* n. 25, para. 205 where the ICJ has stated in connection with non-intervention that the "element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities within another State".

184 See *YILC*, 1966, Vol. II, p. 246.

> to cover any form of constraint or threat...not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as also a threat to injure a member of [his] family with a view to coercing the representative.[185]

Art. 52 of the Convention, captioned "Coercion of a State by the threat or use of force", renders void a treaty

> if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Both these Articles use in their headings the term coercion, which in Art. 51 is considered to have a broader content but in Art. 52 is considered to refer to physical or armed force.[186] Coercion there would be more than armed or physical force.

A description of coercion given by M. Reisman may be taken as a workable one. Coercion, accordingly,

> can be understood as the international restriction by one party of the choices of another; the costs or deprivations facing the coerced party in pursuing a choice it might otherwise prefer are raised to the point where compliance to the will of the coercing party becomes the only feasible alternative.[187]

Such coercion would obviously be disruptive of the political independence[188] of a target State and be inconsistent with the purposes of the United Nations. Its disruptive effect would in practical terms be indistinguishable from that brought about by the use of armed or physical force; and unless justified as a measure of self-defence[189] or legitimate reprisals,[190] the legal coloration of such coercion could hardly be different

185 I. Sinclair, *supra* n. 170, p. 177.

186 Ibid., p. 179.

187 *Supra* n. 4, p. 839. See ibid., pp. 854–5 for some examples; K.J. Partsch, "Retorsion", 9 *EPIL*, 1986, p. 336. Cf. R. Higgins, *supra* n. 4, p. 175; J. Galtung, *supra* n. 180, p. 19; J.D. Green, *supra* n. 180, p. 67; M. Nincic and P. Wallensteen, *supra* n. 171, p. 3; M.S. McDougal and F.P. Feliciano, *supra* n. 4, p. 198.

188 See *infra* chapter 6, n. 72 re political integrity.

189 Cf. D. Alland, "International Responsibility and Sanctions: Self-defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in *op. cit.*, M. Spinedi and B. Simma eds., *supra* n. 72, p. 177. The author maintains, apparently with justice, that '[c]ommon sense, illustrated by the adage "qui peut le plus peut le moins" leads one...to consider an unarmed measure of self-defence perfectly admissible". See D.W. Bowett, "Economic Coercion and Reprisals by States", in *op. cit.*, R.B. Lillich ed., *supra* n. 1, pp. 13–4.

190 See K. Obradovic, *supra* n. 119, p. 104. Cf. I.F.I. Shihata, "Destination Embargo of Arab Oil: Its Legality Under International Law", 68 *AJIL*, 1974, p. 617 where the author contends that "[i]t will be necessary...to characterize unlawful economic measures by their objective not merely by their effect, and to limit this characterization to measures involving the subordinating of sovereign rights of other states, and not merely seeking some advantage from them". The contention does not appear to deny the unlawfulness of economic coercion in certain cases; the distinction it seeks to draw between the "objective" and the "effect" of economic coercion is presumably intended to point out legitimate reprisals. Those who hold a restricted view of the content of the prohibited force have no difficulty in accepting economic and other reprisals not involving the use of armed force as not precluded by Art.

from that of an illegally employed armed or physical force. It would then appear that excluding such coercion from the prohibition of force would amount to leaving ajar the door of the prohibition.

The fear of some about the inclusion of non-armed/non-physical modes of coercion in the prohibition relates to questions of self-defence. S. Neff, for instance, writes that

> [i]f one extends the meaning of Article 2(4) so as to prohibit measures, such as boycotts and embargoes, which do not involve an armed attack, one is left to conclude that there are some measures which violate Article 2(4) of the Charter but against which the Charter does not preserve the "inherent right of self-defense." Such a conclusion appears intellectually unsatisfactory. Even worse, it appears positively unjust.[191]

This of course assumes a literal and restricted construction of Articles 2(4) and 51 of the Charter, and would have been fair if that was all there was to it. But, as will be observed later,[192] it is far from certain that self-defence is so circumscribed.

Concerning political and ideological coercion,[193] those types of force, too, would not validly appear to elude the clutches of the prohibition when defensibly appraised by the target State as entailing or likely to entail grievous effects on its basic values. Inasmuch as this assessment will be under the influence of particular circumstances existing in the target State, the danger and the gravity of the consequences envisaged to be posed by such modes of coercion will necessarily be subjective.[194]

A well-organized and tenaciously implemented broadcasting programme that, for instance, urges violent religious uprising in the name of a particular religion, would seemingly receive greater attention in situations where there is a high sensitivity to religious incitement than in dissimilar situations. Analogy could in this regard be made with propaganda for wars of aggression, which is declared prohibited in paragraph 3

2(4). – See, e.g. Ch. Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", *AFDI*, 1982, p. 66; H. Waldock, *supra*, n. 105, p. 233; but see I. Brownlie, *Principles of Public International Law*, 3rd ed., 1979, p. 465 as to the unsettled nature of the matter.

191 S. Neff, "The Law of Economic Coercion: Lessons from the Past and Indications of the Future", 20 *CJTL*, 1981, p. 433. Cf. D.W. Greig, *International Law*, 2nd ed., 1976, p. 879.

192 See *infra* chapter 7, p. 204 *et seq.*

193 See, e.g. H. Blix, *supra* n. 2, p. 16; M.S. McDougal and F.P. Feliciano, *supra* n. 4, pp. 28–9.

194 See, e.g. R. Sadurska, "Threats of Force", 82 *AJIL*, 1988, p. 245 where it is similarly explained that "[t]he threat is effective when the target perceives it as being so grave as to leave no reasonable option but compliance. This perception, in turn, depends on the target's rational or irrational belief system: on the relative importance of threatened values to the target audience and on the credibility of the threat in the target's eyes."

of the first principle of General Assembly resolution 2625 (XXV), and which is likely to be regarded differently in one politically tense area than in another.[195] In any event, the test of the permissibility of a certain political and ideological coercion will, in the final analysis, hinge on the appraisal of the legality, or on the tolerance, that is accorded by other States to the countermeasures taken by the target State.

5.3.3 Summation

In concluding our discussion of the content and variability of the prohibited force, it may be recapitulated that armed or physical force obviously comes witihin the prohibition. This type of force could comprise acts currently taken as properly military and others akin to them.[196] Explosives, biological- and chemical-class weapons as exist at present would not exhaust the possible means of destruction where other modes of damage and injury are as comparable in basic lethality.[197] Such other modes could result, for instance, from weather manipulation and induced large-scale fire and flooding. The possibility of weather manipulation may be sensed in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.[198] The Convention recognizes in its preamble "that scientific and technical advances may open new possibilities with respect to modification of the environment", and obligates its signatories in Art. I(1)

> not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.[199]

The reading of this Article would indicate that whether or not "having wide-spread, long-lasting or severe effects", a purposefully modified

195 Cf. K. Ioannou, "Propaganda", 9 *EPIL*, 1986, pp. 313–4. The author suggests that "it would be safe to acknowledge the emergence of a standard whereby propaganda tending to incite and foment violation of the fundamental principles of international law enshrined in the UN Charter is unacceptable. However, even this standard must be applied within the limitations of constitutional provisions concerning freedom of expression, to which the majority of the relevant international instruments make explicit reference". This opinion would need to be seen in light of the international law principle that denies validity to domestic norms that seek to prevail over fundamental principles of international law, such as those enshrined in the UN Charter.

196 Cf. *Nicaragua v. USA*, Merits, *supra* n. 25, para. 195.

197 See *supra* p. 131.

198 *UNTS*, Vol. 1108, p. 151.

199 Cf. I. Brownlie, *supra* n. 35, p. 362.

environment is recognizable as a means of "destruction, damage or injury". In view of the universally imperative nature of the prohibition in Art. 2(4), and the logical extension of the prohibition to cover the means that could be utilized to frustate the prohibition, non-signatories, too, it is submitted, will be under the obligation of refraining from such means.

As constituting use of the prohibited force, armed reprisals are clearly prohibited, and have been regularly condemned by the Security Council.[200] But how long they will remain prohibited is, in view of the ineffectiveness of the UN, an open issue.[201] Reverting to more unilateral use of force[202] within a broadened scope of self-defence[203] or within some "framework that is able to deal with a situation of prolonged quasi-belligerency",[204] or some other conjured up title would appear inevitable in an international arena without a properly functioning collective security.

Whatever the mode of physical force, it can be effected directly by the public forces of a State or by others under the instructions of State authorities, or indirectly through the instrumentality of covert agents, be they the employing State's own nationals or nationals of the target or another State.[205] Where public forces are used, barring mutiny and unauthorized adventure, their act is directly imputable to the State whose forces they constitute.[206] Where, in other cases, a State is the hidden

200 See, e.g. SC resols. 171 (1962), 9 April 1962; 188 (1964), 9 April 1964; 228 (1966), 25 Nov. 1966; 248 (1968), 24 March 1968; 270 (1969), 26 Aug. 1969. Some reprisals were probably condemned as being too disproportionate: e.g. SC resol. 228 (1966), which censured Israel for its large-scale military action in Jordan; SC resol. 262 (1968), which observed "that the military action by the armed forces of Israel against the civil International Airport of Beirut was premeditated and of a large scale and carefully planned nature".

201 See, e.g. Ch. de Visscher, *Théories et réalités en droit international public*, 1970, p. 334.

202 See *supra* pp. 129–30; K.J. Partsch, "Reprisals", 9 *EPIL*, 1986, pp. 332–3. Cf. D. Nincic, *supra* n 106, p. 68.

203 See, e.g. D.W. Greig, *supra* n. 191, p. 891.

204 R. Falk, *supra* n. 47, p. 435.

205 In the *United States Diplomatic and Consular Staff in Tehran* case – *ICJ Reports* 1980, p. 3 – for instance, the US alleged, *inter alia*, in its application instituting proceedings against Iran that "[t]he Government of Iran, or persons acting with its support and approval, are holding United States citizens as hostages and are threatening the lives of these hostages in order to coerce the United States into taking actions which the United States has no international legal obligation to take. This exercise of coercion is in violation of Iran's obligations under the Charter of the United Nations, particularly Article 2, paragraphs 3 and 4, and Article 33." – *Pleadings*, pp. 7. 157. See the eighth para. of the first principle of GA resol. 2625 (XXV); Art. 3(g) of the Definition of Aggression – GA resol. 3314 (XXIX); the *Corfu Channel* case, Merits, *supra* n. 25, p. 22 where the ICJ has pronounced it to be "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". Cf. G. Arangio-Ruiz, *supra* n. 106, p. 104.

206 See, e.g. 1 Oppenheim, pp. 337, 341, 362.

initiator or perpetrator of an act of force or acquiesces in it, imputability would have to be established by direct or circumstantial evidence.[207] Further, an act of force thus imputed to a State would have to lack legal justification or excuse in order to become an illegal use of force engaging the responsibility of the State.

Regarding non-armed reprisals, the prevailing view holds them as permissible; and it has been confirmed in the arbitral award in the Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France that

> [i]f a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".[208]

Such reprisals are also undertaken individually and collectively as sanctions against breaches of *erga omnes* duties.[209] The *erga omnes* nature of an obligation would appear to make its breach extendible to States not directly and immediately affected as to legitimize their measures of reprisals. Some suggest that a prior decision by an authorized international body may be required to legitimize such third-party reprisals. A. Cassese, for instance, indicates that

> the basic assumption on which such measures must rest for them to be considered legitimate, is that an international representative body must have pronounced authoritatively on the illegal acts which originally provoked them.[210]

A prior characterization by an international body of a particular action of a State as illegal would no doubt serve as a better legal cover for third-party reprisals than a unilaterral characterization; also, it would probably

[207] See the *Corfu Channel* case, Merits, *supra* n. 25, p. 18 for the admissibility of indirect evidence.

[208] 18 *RIAA*, p. 443. See also, e.g. O.Y. Elagab, *The Legality of Non-forcible Counter-measures in International Law*, 1988, pp. 37–41, and 201 for a restricted view of Art. 2(4); P. Malanczuk, *supra*, n. 72, p. 208; K. Obradovic, *supra* n. 119, p. 104; D.P. O'Connell, *International Law*, Vol. 1, 1965, p. 328; K. Partsch, *supra* n. 202, pp. 331–2. The term "countermeasures" appears to include more than reprisals. – See, e.g. K. Zemanek, "The Unilateral Enforcement of International Obligations", 47 *ZaÖRV*, p. 34, n. 8, and pp. 35–6 for the appreciation of the term.

Cf. the *Nicaragua v. USA* case, Merits, *supra* n. 25 paras. 123–5 for the measures of an economic nature complained by Nicaragua as constituting an indirect intervention in its affairs; para. 276 for the Court's view of the legality of certain of these measures; para. 279 for the Court's holding of the USA's general trade embargo against Nicaragua as breach of the Treaty of Friendship, Commerce and Navigation existing between the two countries; p. 541, for Jennings' Dissenting Opinion on the particular point.

[209] See A. Cassese, *supra* n. 105, pp. 244–5. Cf. M. Akehurst, "Reprisals by Third States", 44 *BYIL*, 1970, pp. 15–8.

[210] *Supra*, n. 105, p. 244.

be less open to abuse. This would be so even where the authoritative international body had not ordered enforcement measures, as was the case, for example, in General Assembly resolution ES-6/2, 14 January 1980, concerning the situation in Afghanistan, and Security Council resolution 502 (1982), concerning the conflict in the Falkland (Malvinas) Islands, to both of which A. Cassese has referred. If, however, an unlawful action were not to be so characterized by a competent international body, States might conceivably make their own separate or group appraisal of the action and follow it up with sanctions. In this regard, the European Economic Community, for instance, would probably have pursued its sanctions against Argentina in the Falklands/Malvinas conflict had the Security Council been unable to pass a resolution.[211]

It may also be recapitulated that no clear consensus exists as to the inclusion of non-armed/non-physical modes of coercion within the prohibited force; but it would appear incompatible with the rationale of Art. 2(4), which seeks to protect the basic values of States and of the UN, to view that Article as being insensitive to the effectivness of such means, and hence selective in its prohibtion.

Finally, the term force appears capable of supporting any content that it is constructively assigned and that is compatible with the purposes of the Charter perceived in the light of the circumstances of a particular period. As discussed in chapter 3, the purposes are unlikely to remain static in scope; and it is submitted that changes affecting the purposes would be necessarily reflected in Art. 2(4) [212] and made explict by interpretation seeking the effectiveness of the Charter. For instance, the scope of the maintenance of international peace and security at a specific period might have as its principal element the prevention of the clash of arms by the public forces of opposing States; and this might be due to the assumption of the inexistence or negligibility of other modes of coercion capable of disturbing international peace and security. But the growing effectiveness of such other modes in another specific period would necessitate their prevention and, hence, the widening of the said scope,

211 Cf. *Thirtieth Review of the Council's Work*, 1983, p. 164, (Publications of the European Communities) where it is stated that "[t]he desire for solidarity which characterizes the Community's external relations policy was reflected on this occasion in the support given to the United Kingdom by the adoption of common measures against Argentina."

212 See, e.g. the *Reparation for Injuries Suffered in the Service of the United Nations*, Ad. Op., *ICJ Reports* 1949, pp. 179–80.

which in turn would necessarily bear on the appreciation of the scope of the term force of Art. 2(4).[213]

5.4 Threat of Force

The prohibition of force in Art. 2(4) also carries the prohibition of the threat of force, which I. Brownlie, for instance, describes as consisting "in an express or implied promise by a Government of a resort to force conditional on non-acceptance of certain demands of that Government".[214] Another author suggests that "[t]he relevant feature of threat as a form of coercion is not so much the kind of force applied, but rather the purpose and outcome or the threat: a genuine reduction in the range of choices otherwise available to states".[215]

Prohibition of the threat of force, as that of the use of force, is a rule of conventional and customary international law. R. Sadurska, however, indicates that if the ICJ's holding in the *Nicaragua v. USA* case making Art. 2(4) declaratory of customary international law "seems somewhat dubious with respect to the use of force, it is even more so where a threat is concerned".[216] But anticipatory self-defence is admitted in customary international law;[217] and the validity of this type of defence would evidence the customary law's prohibition of illegal threat of force.

Threat as a means of coercion capable of producing grave consequences is, for instance, acknowledged in General Assembly resolution 2625 (XXV), where it is declared that "[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force"; and the resolution further declares the prohibition of propaganda of wars of aggression, which essentially constitutes prohibition of an unlawful threat of force, especially so where there is a discernible element of immediacy.[218] If the independence or territorial integrity of a particular State were to be violated as a result of a threat of force – which would be even more credible in a nuclear-weapons context

213 See, e.g. T.O. Elias, "Scope and Meaning of Article 2(4) of the United Nations Charter", in *Contemporary Problems of International Law*, B. Cheng and E.D. Brown eds., 1988, p. 79.

214 *Supra* n. 35, p. 364. See also Report by the Secretary-General (on the Question of Defining Aggression), UN Doc. A/2211 of 3 Oct. 1952, p. 52; K. Skubiszewski, *supra* n. 35, pp. 779–80.

215 R. Sadurska, *supra* n. 194, p. 242. Cf. para. 3 of GA resol. 290 (IV), 1 Dec. 1949.

216 *Supra* n. 194, p. 246.

217 See *infra* chapter 7, p. 211.

218 Cf. B.S. Murty, *The International Law of Propaganda*, 1989, pp. 238–9, 241.

– the threat would come under the the prohibiton of Art. 2(4) and might also be determined to constitute an act of aggression under Art. 39 of the Charter.[219] As regards other instruments, Art. 2(2) of the Draft Code of Offences Against the Peace and Security of Mankind, too, makes an offence of the "threat by the authorities of a State to resort to an act of aggression against another State".[220] Articles 51 and 52 of the Vienna Convention on the Law of Treaties make the threat of force a factor that vitiates consent and entails the nullity of treaties. Even though the threat of force is not specifically mentioned in the Definition of Aggression,[221] that would not preclude the operation of Art. 4 of the Definition under which the Security Council could determine certain threats as acts of aggression.[222]

In other respects, along the lines taken regarding propaganda for wars of agression, it would seem necessary that ideological and religious incitements, which from the *bona fide* perspective of a target State[223] are taken to be effective, should also be held to constitute an illegal threat of force. Similarly, palpable threat of economic measures that could cause a serious disruption of the trade of a certain country, and scare away, for instance, indispensable investors, should also be held to constitute an illegal threat of force.

219 Cf. Art. 7 of the Treaty of Friendship, Cooperation and Mutual Assistance between the German Democratic Republic and the Czechoslovak Socialist Republic, 6 *ILM*, 1967, p. 497. The parties there agreed "that the Munich Agreement of September 29th 1938 was signed under threat of an invasion of Czechoslovakia by armed forces. It was part of Nazi Germany's despicable conspiracy against peace and constitutes a ruthless infringement of elementary provisions of international law in force at that time wherefore that agreement was invalid from the very first with all the consequences arising therefrom". Cf., further, *In re Weizsaecker and Others* (Ministries Trial), *ADRPILC*, 1949, p. 347. The United States Military Tribunal held there *inter alia* that "[i]t is not reasonable to assume that an act of war, in the nature of an invasion, whereby conquest and plunder are achieved without resistance, is to be given more favourable consideration than a similar invasion, which may have met with some military resistance. The fact that the aggressor was here able to so overawe the invaded countries [Austria and Czechoslovakia], does not detract in the slightest from the enormity of the aggression, in reality perpetrated." And in line with this judgment, I. Brownlie, for instance, observes that "[i]nvasion and unopposed military occupation following a threat of force...are usually regarded as a case of actual resort to force". – *Supra* n. 35, p. 365.

220 *YILC*, Vol II, 1954, p. 151.

221 See B. Broms, *supra* n. 60, p. 342; B.B. Ferencz, *supra* n. 8, p. 29.

222 See *supra* p. 113. Not every illegal threat or use of force under Art. 2(4) would necessarily be characterized a threat to the peace, breach of the peace or an act of aggression under Art. 39. – See, e.g. *Repertoire*, Suppl. 1964–1965, pp. 201–2 and Suppl. 1966–1968, pp. 108–9, where the apparent threat of force in Cyprus was not declared a threat to the peace. SC resol. 186 (1964), 4 March 1964, merely indicated the situation as "likely to threaten international peace and security". But determination under Art. 39 is not constrained by any findings under Art. 2(4), and may be made in consideration of extraneous matters deemed necessary for the maintenance of international peace and security. Cf. Y. Dinstein, *supra* n. 105, p. 173.

223 See *supra* n. 194. Cf. B.S. Murty, *supra* n. 218, p. 220.

In order to be identifiable as a threat that would come within the frame of the prohibition of force, it would seem necessary that there be a particularized threat of force possessing some degree of immediacy.[224] Threats having general addressees and issued as realizable in some indeterminate future period would be too nebulous, and too much imbued with a remote, albeit potential, danger to fall under the prohibition of Art. 2(4). Otherwise, the overcrowding of the scope of the threat of force under Art. 2(4) by all manner of rhetoric might confuse the threat that is recognizable as illegal. On the basis of the criterion of immediacy, it would seem that the Cuban missiles crisis,[225] which brought the USA and the USSR into a dangerous confrontation, did not amount to a threat of force. The missiles had not yet reached the completed and credible stage that could have made them usable for, hence capable of, manifesting immediate hostility to one or more States of the Americas. Likewise, the case of the Iraqi nuclear installations[226] did not amount to a proximate threat of force against Israel or other States. But this would not mean that such normal criteria would be taken as applicable to situations involving nuclear weapons.

In regard to other instances, the Anglo-French twenty-four hour ultimatum of 30 October 1956 to Egypt and Israel, which demanded the latter States to "call a cease-fire, withraw their forces from the Suez Canal area and allow British and French troops to be stationed along the Canal ", amounted to a threat of force against Egypt,[227] but not equally so against Israel.[228] Exercises of military manoeuvres, too, held near the borders of a State by other States not on friendly terms with the first State might amount to a threat of force. Such kind of exercises by the USA and Honduras near the Nicaraguan borders were alleged by Nicaragua, in its case against the USA, to constitute a threat of force; but the ICJ did not uphold the allegation. This apparently was not because such exercises would not come within the legal frame of the threat of force, but because "in the circumstances in which they were held", the

224 Cf. the examples mentioned in R. Sadurska, *supra* n. 194, pp. 242–3.

225 See *infra* chapter, 6, p. 188 *et seq.* for the discussion of the case.

226 See *infra* chapter 7, p. 227 *et seq.* for the discussion of the case.

227 See D.J. Harris, *Cases and Materials on International Law*, 3rd ed., 1983, pp. 642, 667. Military threats, where established, could be condemned by the Security Council. – See, e.g. SC resol. 326 (1973), 2 Feb. 1973, re military threats against Zambia.

228 See *infra* chapter 6, p. 161 where the 1956 Anglo-French armed intervention in Egypt is briefly appraised.

Court was not satisfied that they amounted to a threat of force.[229] Further, as was observed by the Court in connection with the arming and training of the *contras*, arming and training of groups opposing a State might constitute a threat of force against that State.[230]

Among certain illustrations of the threat of force that R. Sadurska gives, one relates to the Swedish Ordinance Containing Instructions for the Armed Forces in Times of Peace and in State of Neutrality.[231] Section 15 of the Ordinance provides, *inter alia*, for the use of arms with or without warning, depending on special circumstances, against foreign submarines found submerged in Swedish waters.[232] Taking this provision as a threat of force would appear to stretch the legal sense of that term.[233]The Ordinance appears to be no more than an exercise of domestic authority; and as any public act of a like nature anywhere else, it is a communication to one and all of measures decreed for maintaining territorial integrity, and a warning for potential violators of that territory. There may be a lot in common between a threat and a warning, but a threat would appear to be the more proximately action-oriented that conveys the more cause for concern. As regards the measures involving the use of arms, whether or not they are necessary would be a matter of domestic policy. They would be legitimate so long as their exercise is free from an abuse of rights;[234] and their legal status would not require the particular approval of other States.[235] When, however, this general communication contained in the Ordinance is concretized in a particular instance, and a submarine is ordered to surface or leave the territory under pain of damage or destruction, a legally identifiable threat of force could be seen to have emerged. The legality of such a threat could be verified on the basis of the presence or absence of an abuse of rights. A

229 Merits, *supra* n. 25, paras. 92, 227.

230 Ibid., para. 228. See further examples in E.J. de Aréchaga, *supra* n. 4, p. 88; GA. resol. 193 (III) A, 27 Nov. 1948. Cf. *supra* chapter 2, p. 30 re the Locarno Treaties which provided for forcible measures in cases of flagrant violation of Art. 42 or 43 of the Treaty of Versailles.

231 *Supra* n. 194, p. 255.

232 *SFS*, 1982:756.

233 The author was exploring various avenues in search of emerging criteria for the legal appraisal of the term. See *supra* n. 194, e.g. pp. 257 (anticipatory self-defence), 261 (maintaining credibility of the policy of neutrality), 265 ("a right to control access to its territory by submarines").

234 See, e.g. Art. 300 of the UNCLS – (UN publication) Sales No. E.83.V.5; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, pp. 122–3, 130; A.C. Kiss, "Abuse of Rights", 7 *EPIL*, 1984, pp. 1–3; 1 Oppenheim, pp.345–7.

235 Cf. R. Sadurska *supra* n. 194, pp. 261, 265–6.

threat of force, like the actual use of force, would be illegal where there is no legal justification.

As an illustration of a justifiable threat of force, reference may be made to the *Corfu Channel* case.[236] The passing of four British warships on 22 October 1946, which the Court described to have been effected "with crews at action stations, ready to retaliate quickly if fired upon...one after another through this narrow channel, close to the Albanian coast, at a time of political tension in this region",[237] was obviously a threat of force; but in view of the previous firing from the Albanian coast on two passing British ships, and the right of passage through the channel, the threat appeared justified; and the ICJ did not regard the British action as unreasonable.[238]

In another aspect of the case, the Court held that the covering force for Operation Retail did not amount to "a demonstration of force for the purpose of exercising political pressure on Albania".[239] The covering force comprised "an aircraft carrier, cruisers and other war vessels", and was in the vicinity of the channel throughout the operation.[240] Viewing the size of the force, and the distance to the Albanian territory that could be traversed in a short time, it is submitted that the force, unless justified, amounted to an illegal threat of force. And in view of the Court's pronouncement on the illegality of the minesweeping carried out under the name of Operation Retail, the threat of force that the protecting force constituted could hardly be spared from the illegality attached to the operation it protected.[241] The protecting force was for all practical purposes a demonstration of force – a threat of force – designed to forcibly dissuade Albania from resorting to armed force in order to protect its territory from what the Court found was an illegal British intervention. The protecting force, therefore, would as such be an illegal threat of force, possibly mitigated as Operation Retail itself was held to be.[242]

As regards the question of a threat of force constituting a ground for unilateral countermeasures, it may be observed that a threat might not

236 Merits, *supra n.* 25, p. 4.

237 Ibid., p. 31.

238 Ibid. Cf. H. Waldock, *supra* n. 105, pp. 238–9.

239 Merits, *supra* n. 25, p. 35.

240 Ibid., p. 33.

241 Cf. *infra* chapter 7, p. 222.

242 Merits, *supra* n. 25, p. 35.

possess the degree of certainty present in an actual use of force, and reliance on a threat alone would call for greater caution. As in other situations easily prone to abuse or imprudent use, it would appear proper to place a stringent onus on the party pleading threat of force in defence of employed countermeasures.

Finally, special mention should be made of threats posed by nuclear weapons. Their mere presence and stockpiling is a threat to all;[243] they furnish the base for the policy of nuclear deterrence, which sustains itself by an unrelenting and credible threat of mutual destruction of the cities, industrial infrastructures and populations of the nuclear powers, more particularly, of the USA and the USSR.[244] It has been reported that

> most of the nuclear weapons of the United States [presumably also those of the USSR] were aimed against military targets: industrial facilities of military significance, military bases, and communications and transport centres. This in principle was a 'counterforce' targeting doctrine, but its implementation was so massive that it would be difficult to distinguish it from an all-out attack.[245]

Such targeting and awareness of same would make the threat thereby communicated both concrete and not remote, and translatable into defensive as well as offensive uses.[246] The threat would then appear to comprise the ingredients of a prohibited threat of force against the targeted State. But since such threat is reciprocally employed in the name of deterrence, it is taken as normal, and hence lawful – presumably as something whose illegality has been cancelled out – by those States which practice it; and those others which do not belong to the nuclear

243 The Delhi Declaration on Nuclear Arms Race may be taken as a good illustration. It is there stated that "[f]or all of us, it is a small gorup of men and machines in cities far away who can decide our fate. Every day we remain alive is a day of grace, as if mankind as a whole were a prisoner in the death cell awaiting the uncertain moment of execution." (28 Jan. 1985, Heads of State and Government of Argentina, Greece, India, Mexico, Sweden and Tanzania) – 22 *UN Chronicle*, 1985, No. 1, p. 47. And the UN Secretary-General has remarked that "[l]ike supreme arbiters, with our disputes of the moment we threaten to cut off the future and extinguish the lives of the innocent millions as yet unborn. There can be no greater arrogance". Ibid., p. 2. Indeed! It is further stated that 'nuclear weapons have now become a "perpetual menace to human society"'. – *Comprehensive Study on Nuclear Weapons*, *supra* n. 181, p. 145, para. 490. See also 8 *UNDY*, 1983, p. 127.

244 Re what constitutes deterrence, see *SIPRI Yearbook* 1981, p. 33; ibid., 1984, pp. 379–80. Cf. *UN Chronicle*, *supra* n. 243, p. 2 where J.P. de Cuéllar epitomized the general feeling by observing "that to rely on nuclear deterrence is to accept a perpetual community of fear".

245 *SIPRI Yearbook* 1984, p. 380.

246 See ibid., 1981, p. 33.

club appear to have no alternative but accept as lawful the threat posed by and practised under deterrence.[247]

Even if nuclear weapons are held by some to be illegal, as their use was declared to be, for instance, in General Assembly resolution 1653 (XVI), 24 November 1961,[248] their presence and deployment would negate the very law that pretends to illegalize them; their persistence on the world scene and their possible use would bring about, it appears inevitable, the kind of law suitable for the type of weapons they are and the destruction they can wreak.[249] In this respect, the Cuban missiles and the Iraqi nuclear installations cases appear to be forerunners of the special legal standards of appraisal that would be claimed or established in regard to those weapons.

247 It has been observed that "[t]he super-Powers' reliance on nuclear weapons for their security confers legitimacy on these weapons as instruments of power". – *Comprehensive Study on Nuclear Weapons*, *supra* n. 181, p. 121, para. 401.

248 Para. 1(d) of the resol. is stated in the following terms: "Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."

249 Cf. R. Falk, *Legal Order in a Violent World*, 1968, p. 412; Ch. de Visscher, *supra* n. 201, p. 338 where the author says that "[i]l faut abandonner l'illusion que leur emploi se puisse prêter à une réglementation ordonnée". Though not the kind of regulation one would like to see, there is bound to be some regulation responsive to the kind of weapons they are and the consequences that their use will entail.

Chapter 6

The Protected Values

Art. 2(4) of the Charter prohibits "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations", thereby extending legal protection[1] both to the basic rights of States and the purposes of the UN. Culpable breach of this protective prohibition may be envisaged as simultaneously causing the guilty State to lose the protection afforded it by the prohibition and releasing the victim State, subject to the criteria of necessity and proportionality, from the obligation of respecting the protection. This temporary and permitted lapse of the protection and attendant obligation indicates that the protection is to be appraised in relative rather than absolute terms.[2] On account of its relative characater, the protection necessarily admits of exceptions, for otherwise any serious and illegal violation of the protected values might go unsanctioned by unilateral forcible measures of the victim State or its allies pursued until the authoritative intervention of the UN.[3] The relative character of the protection can also be perceived from breaches of the protected values occasioned by instances of necessity; such breaches would be excusable as lacking in culpable intention.[4]

The phrase territorial integrity and political independence generally appears to be taken and to have been used as comprehending "the *total*

1 This is not to say that the territory and independence of States do not have legal protection independently of Art. 2(4). – Cf. 1 Oppenheim, pp. 286–88. But in the era preceding the UN Charter, when the use or threat of force was not prohibited in terms similar to those of Art. 2(4), the legal possibility of resorting to force and committing extensive incursions into these basic State rights made their protection incomplete: more apparent than real. – See *supra* chapter 2, p. 32 *et seq.*

2 See *supra* chapter 3, p. 47 *et seq.*

3 See *infra* chapter 7, p. 199 *et seq*; D.W. Bowett, *Self-Defence in International Law*, 1958, pp. 331, 152; H. Kelsen, *Principles of International Law*, rev. ed., by R.W. Tucker, 1966, p. 60.

4 See *infra* chapter 7, p. 230 *et seq.*

of legal rights which a state has".[5] Of the fourteen-point Wilsonian programme for peace, the fourteenth concerned the formation of an association of nations "under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike".[6] This objective found expression in Art. 10 of the Covenant of the League of Nations, which obligated the Members "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members".[7] In what may be taken as a fair description of territorial integrity and political independence, M.S. McDougal and F.P. Feliciano explain these terms as

> embracing in summary reference the most important bases of state power, the values or interests whose impairment and destruction are sought to be prohibited and, correlatively, whose necessary protection by coercion is permitted.[8]

In practice, however, the phrase "territorial integrity and political independence" is reinforced often with the addition of terms such as "sovereignty" and "inviolability". Thus, for instance, Art. 1 of the UN Definition of Aggression – General Assembly resolution 3314 (XXIX) – refers to "sovereignty, territorial integrity or political independence",[9] and except for the unqualified term "independence", Art. II(1)(c) of the Charter of the OAU[10] is similarly phrased. Another example is Art. 27 of the Charter of the OAS,[11] which refers to "territorial integrity or the inviolability of the territory or against the sovereignty or political independence".

The phrase territorial integrity or political independence resulted from the adoption of Australia's amendment at the UNCIO; the amendment

5 I. Brownlie, *International Law and the Use of Force by States*, 1963, p. 268. See also the sixth principle of GA resol. 2625 (XXV), 24 Oct. 1970, which declares that "[e]ach State enjoys the rights inherent in full sovereignty". Cf. P. de Visscher, "Cours général de droit international public", 136 *RCADI*, 1972-II, pp. 19–20.

6 5 *Digest of International Law*, M M. Whiteman ed., (1974), p. 43.

7 *International Legislation*, Vol. 1, M.O. Hudson ed., 1931, p. 1. The Article is said to have been considered as the heart of the Covenant. – See J. Ray, *Commentaire du Pacte de la Société des Nations*, 1930, p. 343.

8 M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, 1961, p. 177. See also C.A. Pompe, *Aggressive War - An International Crime*, 1953, p. 103.

9 The three attributes in one context appear to some to be superfluous. See B. Broms, "The Definition of Aggression", 154 *RCADI*, 1977-I, pp. 342–3. See also Arts. 19(2)(a) and 39 (1)(b), *UNCLS*, (UN publication) Sales No. E.83.V.5.

10 *UNTS*, Vol. 479, p. 70.

11 As amended by the Protocols of 1967 and 1985: *OASTS*, No. 61, p. 1 and No. 66, p. 23.

sought to safeguard better the basic rights of smaller and weaker States against violation by more powerful States.[12] The phrase thus inserted in addition to the Dumbarton Oaks formula underscored by specific particularization the inclusion of the basic State values of territorial integrity and political independence in the legal protection of Art. 2(4). The phrase did not, however, diminish the protection accorded by the Article to the purposes of the UN: The legal protection of these basic State values is merely an important aspect of the lawful implementation of the purposes.[13] Had the phrase territorial integrity or political independence not figured in the Article, and had an unlawful violation of these basic rights taken place, such violation would doubtless have come within the Dumbarton Oaks Proposals' phrase "in any manner inconsistent with the purposes of the Organization".[14] The phrase "territorial integrity or political independence" was hence meant to strengthen rather than restrict the prohibition of the threat or use of force, and it would not serve as a valid ground for getting out of the impasse created by the general prohibition of unilateral threat or use of force, which has failed to be seconded by an efficient central authority.[15] In the view followed by the present writer, the search for that ground would have to be directed towards the contingent relationship underlying the prohibition of unilateral force and the postulated UN peace enforcement machinery.

In other respects, "territorial integrity" and "political independence" stand alternately joined in Art. 2(4), wherefore each serves as an independent title.

12 See *supra* chapter 3, p. 38 *et seq.*; I. Brownlie, *supra* n. 5, p. 267; L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations*, 3rd rev. ed., 1969, pp. 46–7.

13 For instance, regarding the foreign aid given to Greek guerrillas, GA resol. 193 (III), 27 Nov. 1948, which noted in para. 3 the Special Committee's conclusions to the effect that the aid given by Albania, Bulgaria and Yugoslavia to the guerrillas constituted "a threat to the political independence and territorial integrity of Greece", considered in para. 5 the continuation of the aid to be inconsistent with the Purposes and Principles of the Charter. This would indicate the view of the UN in the early years following the inauguration of the Charter that every manner of force, whether direct or indirect, against the territorial integrity or political independence of a State was, in the absence of legal justification, inconsistent with the Purposes of the Charter. See also GA resol. 288 (IV), 18 Nov. 1949.

14 6 *UNCIOD*, p. 556. See ibid., p. 335 for the clarification given by the delegate of the USA at Committee I/1 to the effect "that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition". Cf. the Norwegian delegate's statement, ibid., pp. 334–5; D.W. Bowett, *supra*, n. 3, p.152; I. Brownlie, *supra* n. 5, pp. 265–8; H. Kelsen, *supra* n. 3, p. 55.

15 Cf. M.S. McDougal and F.P. Feliciano, *supra* n. 8, p. 178, n. 140.

We shall subsequently consider each protected value so far as is necessary for the present study.

6.1 Territorial Integrity

The territory of a State comprises a certain more or less delimited land, internal waters and territorial waters – where such is the case – the subsoil and the superjacent airspace of such territory, and at unappropriated placles, artificial islands, installations and structures.[16] To the extent that the coastal State can rightfully explore and exploit it,[17] the continental shelf, too, may be considered for the purposes of the prohibition of Art. 2(4) as territory of that State. Men-of-war and other vessels are assimilated with the territory of the State whose flag they fly.[18] Aircraft have the nationality of the registering State;[19] objects and vehicles launched into outer space are under the jurisdiction of the State whose registration they bear.[20]

6.1.1 Territorial Integrity and Territorial Inviolability

The territory of a State is its legally protected preserve over which it enjoys an exclusive right to exercise authority where this is not limited by a valid international obligation.[21] Other States have the correlative duty of respecting this base of State authority, which is one of the important

16 See, e.g. 1 Oppenheim, pp. 460–2; Ch. Rousseau, *Droit international public*, Tome III, 1977, pp. 8–9; Arts. 2–16, 60, *UNCLS*, supra n. 9; Art. 1, Convention on International Civil Aviation, *UNTS*, Vol. 15, p. 296; D.W. Greig, *International Law*, 2nd ed., 1976, pp. 360–1; D.J. Harris, *Cases and Materials on International Law*, 3rd rev. ed., 1983, pp. 194–5. Cf. P. Huet, "La frontière aérienne, limite des compétences de l'Etat dans l'espace atmosphérique", 75 *RGDIP*, 1971, pp. 122–133.

17 See the *North Sea Continental Shelf* Judgment, *ICJ Reports* 1969, p. 22; Arts. 76, 77, *UNCLS*, *supra*, n. 9.

18 See Arts. 92(1) and 95, *UNCLS*, *supra* n. 9. Cf. the *Lotus* case, *PCIJ*, Series A No. 10, 1927, p. 25.

19 Art. 17, Convention on International Civil Aviation, supra, n. 16.

20 Art. VIII, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, *UNTS*, Vol. 610, p. 205; Art. II(2), Convention on Registration of Objects Launched into Outer Space, ibid., Vol. 1023, p. 15. According to Art. II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, etc., however, "outer space, including the moon and other celestial bodies is not subject to national appropriation".

21 See, e.g. the *Asylum* case, *ICJ Reports* 1950, p. 275; D. Nguyen Quoc, P. Daillier, A. Pellet, *Droit international public*, 3e éd., 1987, pp. 376–8; Ch. de Visscher, *Théories et réalités en droit international public*, 4e éd., 1970, pp. 221–2, 227. Cf. J. Ray, *supra* n. 7, p. 344 re the meaning of territorial integrity in Art. 10 of the Covenant of the League of Nations.

elements constituting statehood.[22] Breach of this duty violates the integrity of the territory, and where no legal justification or excuse is established, it causes the encroaching State to incur liability regardless of the degree or duration of the breach.[23] As, for instance, G. Fischer maintains, "[l]'expression intégrité territoriale signifie inviolabilité du territoire".[24] And as V.-Y. Ghebali, to take another example, explains, "l'inviolabilité des frontières n'est, pourrait-on dire, que l'application du non-recours à la force au plan de l'intégrité territoriale".[25] Further, General Assembly resolution 2625 (XXV) declares under the sixth principle that "[e]ach State has the duty to respect the personality of other States"; and under the third principle, the resolution declares that "armed intervention and all other forms of interference or attempted threats against the personality of the State...are in violation of international law".[26]

This being so, a breach of the duty of respecting territorial integrity can be no less a breach because of a pretended absence of designs on the territory or political independence of a State. In the *Corfu Channel* case, after having confirmed his government's "whole-hearted acceptance" of Art. 2(4), the Agent of the UK, strove to defend the British mine-sweeping operation in Albanian waters by pleading thus:

22 See, *supra* chapter 4, p. 85 *et seq.* re States; the *Corfu Channel* case, Merits, *ICJ Reports* 1949, p. 35 where the Court has stated that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations".

23 Outright attacks and assimilable acts have been condemned by the GA and the SC where this was deemed necessary. See e.g. preambular para. 4, GA resol. 1004 (ES-II), 4 Nov. 1956, concerning the USSR's military action in Hungary; para. 1, GA resol. 41/38, 20 Nov. 1986, concerning the US military action in Libya; para. 1, SC resol 262 (1968), 31 Dec. 1968, concerning Israel's military action at Beirut airport; para. 1, SC resol. 487 (1981), 19 June 1981, concerning Israel's military action against the Iraqi nuclear installations. In other respects, the SC, for instance, has referred to the Portuguese bombing on 30 June 1969 of the Zambian village Lote as violative of the territorial integrity of Zambia. – Para. 2, resol. 268 (1969), 28 July 1969. See also para. 2 of SC resols. 273 (1969), 9 Dec. 1969, and of 275 (1969), 22 Dec. 1969, that called upon Portugal, which had shelled villages in Senegal and Guinea, "to desist...from violating the sovereignty and territorial integrity", respectively, of those two States; SC resol. 393 (1976), 30 July 1976, which condemned, *inter alia*, South Africa's armed attack against Zambia as violative of the sovereignty and territorial integrity of the latter State; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 183 where the author indicates that "it would seem that even temporary incursion without permission into another State's air space constitutes a violation of its territorial integrity"; *loc. cit.*, n. 64, about Austria's protest to the UK for transporting through its air space British forces on their way to participate in the Anglo-French military intervention in Egypt; *infra*, n. 29.

24 G. Fischer, "Quelques problèmes juridiques découlant de l'affaire Tchécoslovaque", *AFDI*, 1968, p. 18.

25 V.-Y. Ghebali, "L'Acte final de la conférence sur la sécurité et la coopération en Europe et les Nations Unies", *AFDI*, 1975, p. 104.

26 See *infra* n. 29.

> But our action on the 12th/13th November threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence.[27]

Although the ICJ did not particularly pronounce on the plea, the unanimous adjudication of the minesweeping operation as violative of Albania's sovereignty[28] had the effect of embracing the rejection of the plea. The unauthorized minesweeping carried out by the British naval force in Albanian territorial waters was not a threat to, but an actual breach of, Albanian territorial integrity; and to come within the prohibition of Art. 2(4), the breach need not have occasioned territorial loss, because the scope of the Article is not so circumscribed and does not therefore afford a valid support for such a contention. The culpable intention relates primarily to the violation of territorial integrity, whatever the motive, and cannot be made contingent on short- or long-term objectives of the unlawful action without defeating the rationale of the prohibition in the Article.[29] It could well be, however, that the purpose of the unlawful resort to force might weigh as an extenuating or aggravating factor. In this regard, the Court held in the *Corfu Channel* case that "the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, [constituted]

27 *Pleadings,* Vol. III, 1950, p. 296.

28 Merits, *supra* n. 22, p. 35.

29 Para. ten of the first principle of GA resol. 2625 (XXV) declares that "[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force." It will be observed that as regards their legal effect the terms "occupation" and "acquisition" seem to be used in an undifferentiated manner. Whereas the term "occupation" generally signifies a duration which is indeterminate and a status which might have varied facets (see, e.g. *Dictionnaire de la terminologie du droit international*, Sirey, 1960, pp. 424–7), the term "acquisition" denotes an intention to appropriate. It is the infringement of the territory that the prohibition of the use of force is concerned with. As the ICJ indicated in the *Nicaragua v. USA* case, "[s]tate sovereignty...is...closely linked with the principles of the prohibition of the use of force and of non-intervention" (Merits, *ICJ Reports* 1986,para. 212); and every State has the duty of respecting the territorial sovereignty of others. – Ibid., para. 213. The Court accordingly held that the laying of mines in Nicaraguan internal or territorial waters, attacks on Nicaraguan ports, oil installations, etc., "not only amount[ed] to an unlawful use of force, but also constitut[ed] infringements of the territorial sovereignty of Nicaragua" (ibid., paras. 227, 251); and that the unauthorized flights over the territory of that State constituted an infringement of territorial sovereignty. -Ibid., para. 251. Unless legally justified, therefore, the forcible infringement of territorial sovereignty is an unlawful use of force against, *inter alia*, the territorial integrity of a State. See also, para. 3(a), GA resol. 38/10, 11 Nov. 1983, re the condemnation by the GA of attacks on Nicaraguan airports, seaports and other targets. See, further, E. Gordon, "Article 2(4) in Historical Context", 10 *YJIL*, 1985, pp. 275–6 about the non-restrictive nature of the prohibition in Art. 2(4). Cf. C.A. Pompe, *supra*, n. 8, p. 106.

extenuating circumstances for the action of the United Kingdom Govermnment".[30]

It is necessary to consider here the basis and implications of this judicial opinion. The finding of extenuating circumstances, together with the use in evidence of the mines procured by the operation judicially declared unlawful, might practically appear to vindicate the British submission and endorse in a backhanded manner the armed intervention: Without the mines as evidence, the Court would not have been able to establish Albania's responsibility in the terms of the Judgment. But it should be noted, first, that the admissibility of the mines in evidence was not formally contested. Secondly, even if Albania had objected to the evidence, it would have appeared patently unjust, in view of the death of 44 persons and injury of 42 others caused by the explosions of 22 October 1946,[31] for the Court to refuse to accept the evidence. Besides, by the time the case reached the Court, the British possession of the mines was a *fait accompli*, and the probative value of the mines was such that they could not have been ruled inadmissible without seemingly causing the alienation of States from the international judicial process. And thirdly, lacking as it did – and still does – the supportive machinery necessary for the proper administration of justice, which is available to national courts, the search for the truth in such circumstances justifiably endowed the ICJ with great latitude in regard to the admission of evidence.[32]

It would then appear that although the evidentiary use made of the mines would cast the British armed intervention in a less reprehensible light, such use did not essentially affect the judicial affirmation and application of the rule against a policy of force; what it did was apparently recognize a gradation of responsibility, which depended on the presence or absence of extenuating factors.[33] The British action might not have amounted to an act of aggression under the UN Definition of Aggression – had General Assembly resolution 3314 (XXIX) been available then – but it was an unlawful use of force under Art. 2(4). The

[30] Merits, *supra* n. 22, p. 35.

[31] See *supra* chapter 5, p. 122.

[32] See IL Y. Chung, *Legal Problems Involved in the Corfu Channel Incident*, 1959, pp. 121–4, 134–51. Cf., e.g. Art. 62 of ICJ's Rules of Court.

[33] See I. Fabela, *Intervention*, 1961, pp. 224–7. The author, who was one of the judges in the case, writes, "Il est vrai que le Royaume-Uni avait attaqué la souveraineté d'un Etat indépendant par ses actes d'intervention, mais il existe en sa faveur des circonstances atténuantes qui réduisent considérablement sa responsabilité internationale." (at 226).

Judgment cannot, therefore, be taken as authority for self-help to secure evidence; the Judgment has plainly rejected the British argument in regard to securing evidence and its discretionary self-help implications.[34]

Despite the *Corfu Channel* Judgment, the plea of the absence of designs on the territorial integrity or political independence of a victim State has continued to be advanced at the debates of the UN General Assembly and the Security Council. Thus, for instance, France and the UK contended at the first emergency special session of the General Assembly in 1956 that their military intervention in Egypt was not aimed at the sovereignty nor territorial integrity of Egypt and did not jeopardize Egyptian sovereignty.[35] Similarly, Belgium defended its armed intervention in the Congo in 1960 by arguing at the Security Council that its actions had no political objectives and did not constitute aggression.[36]

[34] According to J.N. Singh, "[t]he British action was totally justified. The weakness or the defects of the international organisation do not mean that the states have to be patient observers to the illegalities being committed against them." – *Use of Force Under International Law*, 1984, p. 106. But such claim of justification would probably be too extensive a licence for unilateral forcible action, especially when one sees the author's views on the Argentinian occupation of the Falkland Islands, which he considers not to be "illegal under Article 2, paragraph 4 of the UN Charter". – Ibid., p. 113.

The minesweeping operation took place three weeks after the 22 October explosions. The three-week period permitted to elapse after the explosions appears to indicate an absence of a categorical immediacy as concerns the disappearance of, or interference with, the mines; during that time, the UK could have pushed the peaceful process beyond the stage of bilateral negotiations and submitted its complaint to the UN, and given that Organizaion a chance to act – the first refusal, as it were – instead of unilaterally undertaking the minesweeping of the channel. Even if no effective remedy might have issued from the UN, a permanent Member of the SC would nevertheless have made an attempt to help vitalize the then new Organization, and still preserved the opportunity of falling back on unilateral action subsequent to the failure of the UN machinery. Instead, the UK reversed the process and appealed to the UN by its letter of 10 Jan. 1947, i.e. after the unilateral and forcible minesweeping operation. – See, e.g. *Repertory*, Vol. 1, 1955, p. 45, para. 29.

As regards the incident of 15 May 1946, Albania was the one which resorted to illegal use of force by firing on British ships passing through the channel; it was thereby attempting to change by force the status of the channel and the manner of its navigational use. The UK could have taken the incident and the issue of the passage through the channel to the UN; but in view of Albania's attempt to change by unlawful use of force what was taken to be the *status quo* of the channel, it appears doubtful that the UK should have been required to forego the exercise of its right of passage and confirm as a consequence Albania in its illegal position. – Cf. J.L. Brierly, *The Law of Nations*, 6th ed., 1963, pp. 428–30.

[35] See *Repertory*, Suppl. No. 2, Vol. 1, 1964, pp. 102–3. paras. 116–7.

[36] See ibid., Suppl. No. 3, Vol. 1, 1972, p. 142, para. 66. See also SC resol. 145 (1960), 22 July 1960, which unanimously called for the speedy withdrawal of the Belgian troops. Defence of nationals could well have been pleaded as a legitimate act. – See *infra* p. 177 *et seq.* But, as to the right of humanitarian intervention for the protection of persons other than nationals of the intervening State, the existence of such right, or at least the probability of such intervention inviting less legal stigma, will, as with other acts of self-help, and in line with the view held in this study, depend on the efficient functioning of the UN.

The USA, too, used analogous arguments to defend at the Security Council its military intervention in the Dominican Republic in 1965.[37]

The legal protection accorded to State territory is designed to safeguard it from legally unwarranted acts. It is not to guarantee that in practice territorial integrity will not be culpably interfered with, but to give notice of the legal duty of respecting territorial integrity in the hope of dissuading prospective violators. The protection legally entitles victims to take unilateral countermeasures[38] and claim adequate reparation;[39] it also provides legal support for UN action.

Once the territorial integrity of a State is forcibly interfered with, the "integrity" is that much deprived of its previous *status quo*; a breach is effected and the wholeness violated. Territorial integrity will be maintained where territorial inviolability is maintained, and vice versa; but because territory is declared to be inviolable would not necessarily mean that it is free from legitimate acts of violation.[40] Whether the prohibited threat or use of force is directed against the "integrity" or "inviolability" of the territory, the legal effect would not appear to be different. Hence, in view especially of the discussion about the content of the prohibited force in the preceding chapter, it is submitted that no useful purpose would appear to be served by differentiating between "integrity" and "inviolability".[41] Equally, it might appear misleading to state that '[t]erritorial integrity, especially where coupled with "political independence," is synonymous with territorial inviolability'.[42] No territory would be legally safeguarded from legitimate forcible action undertaken unilaterally or authorized by the UN.

37 See *Repertory*, Suppl. No. 3, Vol. 1, p. 161, para. 201. Cf. ibid. Suppl. No. 5 Vol. 1, p. 37, para. 73 re Turkish intervention in Cyprus in 1974. Turkey alleged at the SC that the intervention did not "constitute a violation of Charter principles, but an effort to solve the Cyprus problem in justice and with equity".

38 The Report of Rapporteur of Committee 1 to Commision I, at San Francisco, in 1945, e.g. stated in connection with the draft of the present Art. 2(4) that "[t]he use of arms in legitimate self-defence remains admitted and unimpaired". – 6 *UNCIOD*, p. 459.

39 See, e.g. I Brownlie, *Principles of Public International Law*, 3rd ed., 1979, pp. 431–5, 457–64.

40 See *supra* p. 145. Cf. L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 12, pp. 51–2.

41 See *supra* p. 149. Cf. D.W. Bowett, *supra* n. 3, p. 31 where the author maintains that "'territorial integrity"...is not identical with "territorial inviolability"', and p. 152 where he says that "'integrity" has always been a more accurate term than "inviolability"'.

42 2 Oppenheim, p. 154.

6.1.2 Protection of De Facto Possession

State territory whose integrity is protected from violation is ordinarily that which is under the uncontested authority of a particular State.[43] Where title to territory is contested, the criterion of effective possession[44] would appear to be in line with the Charter's policy of substituting pacific settlement of disputes for the unilateral use of force in international relations; and the State having *de facto* possession would then enjoy protection from illegal forcible interference with its possession. The *de facto* possession in this regard would have to be of a kind that has certain qualities of permanence; it should not be of a kind brought about and maintained by an illegal use of force, which, so long as the possession is held to be illegal, would negate the establishment of such qualities. Occupation of territory by illegal forcible acts would clothe the occupation with uninterrupted illegality as to justify the deprived State's continous forcible exertion – through the exercise of its right of self-defence – to retrieve the territory until the UN intervenes with interim measures or effective decision.[45] Failure to regard the illegal occupation as being continuously illegal would amount to assisting a usurpatory act gain time and consolidate itself into a recognized *de facto* situation, which would not be lawfully disturbed by a unilateral resort to force.[46]

Reference may be made here to the Goa and the Falkland/Malvinas Islands incidents. Goa, which had been a Portuguese colony since 1510, was militarily taken over together with the enclaves Damao and Din by India on 18 December 1961.[47] And because of the USSR's veto, the Security Council failed to pass a resolution that would have called on

43 See *supra* chapter 4, p. 75 *et seq.*, re the protection of Non-Self-Governing Territories.

44 See, e.g. Ch. de Visscher, *supra* n. 21, pp. 223, 227–8.

45 The uninterrupted illegality, it is suggested, would exist where a continuous and serious effort is exerted against it within a space of time that may be deemed reasonable. As O. Schachter indicates, "[t]he element of time cannot be ignored". – See "The Lawful Resort to Unilateral Use of Force", 10 *YJIL*, 1985, p. 292.

46 Cf., e.g. Art. 3(e) of the UN Definition of Aggression, GA resol. 3314 (XXIX). The extension of the presence "of armed forces of one State, which are within the territory of another State with the agreement of the receiving State...beyond the termination of the agreement", qualifies as an act of aggression. And so long as this breach of territorial integrity persists, the illegality, too, will persist. As B.B. Ferencz says, this may well be a "rather extreme application of the concept of territorial sanctity". – *Defining International Aggression*, Vol. 2, 1975, p. 37. But it goes to show the high sensitivity of States as regards territorial integrity. – Cf., further, e.g. GA resol. 707 (VII), 23 April 1953, where the "presence, hostile activities and depredations of foreign forces in a territory of the Union of Burma" (and by the same token, of any other State), was considered to "constitute a violation of the territory and sovereignty of the Union of Burma".

47 See Q. Wright, "The Goa Incident", 56 *AJIL*, 1962, pp. 617, 622.

India to withdraw its troops.[48] It should be observed, however, that although contemporary international law espouses the legitimate right of self-determination of peoples under colonial status, the initial and continued occupation of Goa by Portugal was sanctioned by the international law of the relevant period.[49] As Portugal was not deprived of that territory by a valid UN act, nor by the exercise of the inhabitants' right of self-determination, it continued to have lawful authority over the territory within the terms of the Charter. It would then appear that Portugal's possession of Goa was not unconsolidated enough as to justify India's forcible retrieving of the territory; and this would be so irrespective of the validity of India's claim.

As concerns the Falkland/Malvinas Islands, sovereignty over them was contested between the UK and Spain from 1770s until the outbreak of the Latin American wars of independence in 1806 when Spain is said to have abandoned them.[50] Later, the contest continued between Argentina and the UK until 1832 when the British flag began flying over the islands.[51] Argentina has not ceased to protest against the British occupation.[52] Despite this protest, however, the continued British authority over the islands for over a century would so consolidate the occupation as to bestow upon it at least the status of *de facto* possession.[53] This is borne

48 The GA and the SC normally call for the withdrawal of foreign troops, i.e. for leaving a particular territory intact and putting an end to further violations of territorial integrity, in situations considered to constitute unlawful armed interventions. E.g., GA resols. 1002 (ES-1), 7 Nov. 1956 (Israel, France and the UK from Egypt); 1004 (ES-II), 4 Nov. 1956 (the USSR from Hungary); 2793 (XXVI), 7 Dec. 1971 (India and Pakistan to withdraw to their own side of the India-Pakistan borders); 34/22, 14 Nov. 1979 (foreign forces from Kampuchea); ES-6/2, 14 Jan. 1980 (foreign forces from Afghanistan); 38/7, 2 Nov. 1983 (foreign forces from Grenada). E.g. SC resols. 82 (1959), 25 June 1950 (North Korea from South Korea); 143 (1960), 14 July 1960 (Belgium from the Congo); 384 (1975), 22 Dec. 1975 (Indonesia from East Timor). See also Q. Wright, "Intervention, 1956", 51 *AJIL*, 1957, pp. 266–70 for the legal analysis of the Hungarian case; D.E. Acevedo, "Collective Self-Defence and the Use of Regional or Subregional Authority as Justification for the Use of Force", *ASILP*, (1984), 1986, p. 74 re the illegality of the invasion of Grenada.

49 Cf. A. Appadorai, *The Use of Force in International Relations*, 1958, pp. 42–3 where the validity of Portugal's title is questioned.

50 See O. Bring, "The Falkland Crsis and International Law", 51 *NTIR*, 1982, pp. 131–6; A.P. Rubin, "Historical and Legal Background of the Falkland/Malvinas Dispute", in *The Falklands War*, A.R. Coll and A.C. Arends eds., 1985, pp. 12–3; J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. III, 1970, p. 355.

51 A.P. Rubin, *supra* n. 50, p. 15. See also D. Kinney, "Anglo-Argentine Diplomacy and the Falklands Crisis", in *op. cit.* A.R. Coll and A.C. Arends eds., *supra* n. 50, pp. 81–7, 89 for a short account of the diplomatic negotiations between the two States.

52 See E. David, "Aspects juridiques du conflit des Malouines", in *Le conflit des Malouines*, 9 *SIS* (Vienna), 1984, p. 28; A.P. Rubin, *supra* n. 50, p. 15.

53 Cf., e.g. Ch. de Visscher, *supra* n. 21, p. 228 re the inadequacy of verbal protests against long-established effective authority.

out by the Security Council's demand for the immediate withdrawal of the Argentine forces which had moved into the islands on 2 April 1982.[54] And so long as Argentina failed to comply with the Security Council's demand, it persisted in an unconsolidated illegal occupation of territory, which the British had the right to retrieve by force.[55]

Further supportive ground for the legal protection of *de facto* possession, may be adduced from General Assembly resolution 2625 (XXV). Paragraph four of the first principle - prohibiton of force - of the resolution declares that

> [e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

This is practical sense that would obviate self-help in a legal régime which offers alternative means of resolving differences. The wisdom of protecting *de facto* possession is confirmed by the tendency of territorial claims, especially those manifested as boundary disputes, to incite armed conflicts.[56] Additionally, in paragraph five under the same rubric, the resolution brings within the sphere of the protected *de facto* possession "international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement".[57] The protection of the *de facto* possession is without prejudice to the pretensions of title seekers.

[54] SC resol. 502 (1982), 3 April 1982.

[55] Cf. E. David, *supra* n. 52, pp. 65–9. The author's estimation of the situation, and of the SC resol. 502 (1982), appears to give an undue leeway to pacific settlement of disputes by disfavouring the forcible disturbance of the *status quo*, even when such *status quo* is acknowledged to be the yet unconsolidated result of an illegal use of force. Such a position would be indefensible in the present state of international relations under a malfunctioning machinery for the maintenance of international peace and security, and would be an encouragement for an illegal preemptive action. The SC resolution had the effect of putting Argentina at fault and exposing it to the unilateral action of the UK; unless the Council determined otherwise, which it did not, the UK remained in possession of the right of forcible unilateral recovery. The author's reference to SC resol. 242 (1967), 22 Nov. 1967, might not be an apt analogy in this regard, for that resolution affirmed the application of both the withdrawal of Israeli forces from occupied territories and the "termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area...". There is here a simultaneity of actions and undertakings that would give no place for unilateral forcible action: It is not only the cessation of belligerency that the resolution requires. It is hard to read such kind of simultaneity in the Falklands/Malvinas resolution. Cf. D.E. Acevedo, *supra* n. 48, p. 71; O. Bring, *supra* n. 50, pp. 142–4.

[56] See J.H.W. Verzijl, *supra* n. 50, pp. 620–1 for some outstanding territorial disputes to appreciate the good sense of protecting *de facto* possession.

[57] See, e.g. GA resol. 997 (ES-1), 2 Nov. 1956, which in para. 2 urged "the parties to the armistice agreemnts [Egypt and Israel] promptly to withdraw all forces behind the armistice lines, to desist from raids across the armistice lines into neighbouring territory, and to observe scrupulously the provisons of the armistice agreements".

The protection of *de facto* possession is also generally suppported by authors. Thus, for instance, D.W. Bowett, submits "peaceful possession or de facto authority as a sufficient" base for self-defence;[58] R. Higgins states that "'territorial integrity" must be taken to refer to well-established de facto possession';[59] M.S. McDougal and F.P. Feliciano consider "effective control or possession rather than...formal recognized title" as the factor deserving emphasis in a system whose policy is the peaceful settlement of disputes;[60] and Ch. de Visscher indicates in connection with Art. 10 of the Covenant of the League of Nations that

> [c]ette même idée d'une protection "au possesoire" de la souveraineté territoriale est à la base des critères territoriaux de la définition de l'agression, les seuls qui soient d'une application pratique, encore que trop automatique.[61]

In sum, territorial integrity devolves from territorial sovereignty,[62] and is accorded protection from unlawful violation when territory is at least under *de facto* possession. However, it should at any rate be observed that even in the case of *de facto* possession unilateral forcible action would not appear foreclosed when a peaceful solution becomes definitely unattainable; this would signal the ineffectiveness of the UN machinery and leave States to their own means. As a régime of force then gets substituted for peaceful means, the only restraint on States will probably be calculated, though perhaps not always enlightened, self-interest in terms of the consequences of armed conflicts.

6.2 Political Independence

The terms independence and sovereignty[63] are usually employed interchangeably.[64] Independence is a legal status;[65] and reduced to its

58 *Supra* n. 3, p. 35.

59 *Supra* n. 23, p. 187. See also Q. Wright, *supra* n. 47, p. 623.

60 *Supra* n. 8, p. 177. Cf. W. Komarnicki, "La définition de l'agresseur dans le droit international moderne", 75 *RCADI*, 1949-II, pp. 59-60.

61 *Supra* n. 21, p. 223.

62 See, e.g. D. Nguyen Quoc, P. Daillier, A. Pellet, *supra* n. 21, p. 420 re the derivation of territorial integrity and prohibition of intervention from the negative aspects of territorial sovereignty. Cf. the *Nicaragua v. USA* Judgment, Merits, *supra*, n. 29, paras. 202, 213.

63 See, e.g. I. Brownlie, *supra n.* 39, p. 290; H. Kelsen, *supra* n. 3, p. 192; 1 Oppenheim, pp. 286-97; Ch. Rousseau, *Droit international public*, Tome II, 1974, pp. 69-99.

64 See, e.g. the Individual Opinion of Anzilotti in the *Austro-German Customs Régime* case, *PCIJ*, Series A/B No. 41, p. 57; M. Akehurst, *A Modern Introduction to International Law*, 6th ed., 1987, p. 16; I. Brownlie, *supra* n. 39, p. 80; M.S. Korowicz, "Some Present Aspects of Sovereignty in International Law",

essentials, it is the legal capacity of States freely to formulate and execute policies for the conduct of their internal and external affairs, subject only to obligations arising under general international law[66] and valid international instruments.[67] The expression "political independence", as, for instance, M.S. McDougal and F.P. Feliciano explain

> is commonly taken most comprehensively to refer to the freedom of decision-making or self-direction customarily demanded by state officials.[68]

Political independence would be present when a State is not deprived of its organic powers that are necessary for the exercise and manifestation of its competence.[69]

6.2.1 Internal and External Manifestations

States, as independent entities, are not wholly under the overriding authority of another juristic entity.[70] In the conduct of their internal affairs, they have the right to demand the non-intervention[71] of others, and to protect and forcibly defend their territorial integrity and political independence.[72] In the conduct of their external affairs, they have the right to enter into agreements and engage in activities as they see fit;[73] they are entitled to demand the respect of their own and their nationals'

102 *RCADI*, 1961-I, p. 12; J.E.S. Fawcett, "General Course on Public International Law", 132 *RCADI*, 1971-I, p. 381.

65 See H. Kelsen, *supra*, n. 3, p. 193, n. 10.

66 The ICJ has held in the *Nicaragua v. USA* Judgment (Merits) that "adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonesense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State". *Supra*, n. *29*, para. 263; see also ibid., para. 265; and e.g., D.P. O'Connell, *International Law*, Vol. 1, 2nd ed., 1970, p. 298; 1 Oppenheim, pp. 288, 343 – 52.

67 Cf., e.g. Arts. 2(2), 4(1) of the UN Charter; Art. 26, Vienna Convention on the Law of Treaties, *UNTS* Vol. 1155, p. 331.

68 *Supra* n. 8, p. 177.

69 Cf. the Joint Dissenting Opinion in the *Austro-German Customs Régime* case, *supra* n. 64, p. 77; L.M. Goodrich, E. Hambro and A.P. Simons, *supra*, n. 12, p. 51.

70 Cf. the *Austro-German Customs Régime* case, *supra* n. 64, p. 52; the *U.S. Nationals in Morocco* case (France v. USA), *ICJ Reports* 1952, pp. 185, 188; H. Kelsen, *supra* n. 3, p. 193.

71 See the *Nicaragua v. USA* Judgment, *supra*, n. 29, para. 202; D.P. O'Connell, *supra* n. 66, pp. 299 – 300, 304 – 6; 1 Oppenheim, pp. 319 – 20.

72 See the self-defence provisions of Art. 51 of the UN Charter. The ICJ in the *Nicragua v. USA* case has used the term "integrity" in reference to "political integrity". The Court says there that "international law requires political integrity also to be respected". – *Supra* n. 29, para. 202.

73 The law in this respect has been declared by the PCIJ in the *Wimbledon* case, where it stands stated that "the right of entering into international engagements is an attribute of State sovereignty". – Series A, No. 1, p. 25.

rights and lawful interests under the jurisdiction of others,[74] and to seek through peaceful means the reinstatement of denied rights as well as satisfaction for unlawful and unremedied acts committed against such rights,[75] or resort, in exceptional cases, to the forcible defence of their nationals.[76] Their independence entitles them also to the use of the high seas[77] and the exploration of outer space,[78] and it enables them to retain authority over vessels, aircraft and space vehicles of their registry while at these unappropriated places.[79]

An independent State comprises three basic elements: population, territory and government.[80] The competence flowing from its independence entitles it, subject to international obligations, to effectuate its policies through its government. And in the context of the prohibition of force, it can accordingly provide for the protection of its basic constituent elements by preparing and readying its unilateral means of defence, or seek better security by entering additionally into bilateral and multilateral defence arragements.[81] Upon the occurrence of circumstances that result from an unlawful use of force in international relations and that warrant the protection of these basic elements, a State would be entitled to

[74] In the *Island of Palmas* arbitral award, for instance, it has been declared that "[t]erritorial sovereignty...has a corollary duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." – 2 *RIAA*, p. 839. Cf. the *Barcelona Traction, Light and Power Company, Limited,* Judgment, *ICJ Reports* 1970, p. 32.

[75] E.g. the right of the UK [and of other States] to send warships through straits in time of peace, where there was no agreement to the contrary and where the passage was innocent, was affirmed in the *Corfu Channel* Judgment. Albania was found responsible for the explosions in the channel, the resultant death and injury to British nationals, and the damage to property. – *Supra* n. 22, pp. 23, 28–9. The UK in turn was found responsible for its breach of Albanian sovereignty. – Ibid., p. 35. In the *Right of Passage Over Indian Territory*, Portugal had its right of passage over Indian territory partially affirmed "in respect of private persons, civil officials and goods in general, to the extent necessary...for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India". – Merits, *ICJ Reports* 1960, p. 40. In the *Mavrommatis Palestine Concessions* case, it has been declared to be "an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels". – *PCIJ*, Series A, No. 2, p. 12. And in the *United States Diplomatic and Consular Staff in Tehran* case, the US has succeeded in having the responsibility of Iran judicially determined. – See *ICJ Reports* 1980, paras. 47, 90–2.

[76] See *infra* p. 178 *et seq.*

[77] See, e.g. Art. 87, *UNCLS*, *supra* n. 9.

[78] See Arts. 1 and 4 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. – Annex to GA resol. 34/68, 5 Dec. 1979.

[79] See *supra* ns. 18–20.

[80] See *supra* chapter 4, p. 85 *et seq.*; D.P. O'Connell, *supra*, n. 66, p. 284; Ch. Rousseau, *supra* n. 63, pp. 15–7; G. Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed., 1976, p. 44.

[81] See *supra* chapter 5, n. 40.

undertake their defence, i.e. its own self-defence.[82] As a necessary and protective means available to States for purposes of legitimate unilateral recourse to force, the right of self-defence is inseparable from independence; without this essential attribute, the practical significance of the legal concept of independence would be negated and an incongruity introduced between the legal concept and its implementation.

As regards the protected constituent elements of statehood, an unlawful use of force against an independent State may affect these elements discretely or altogether. Where a State is illegally attacked and occupied, the forcible acts at once violate the State's territorial integrity, negate its political independence and subjugate its population to alien domination. Where an uninhabited territory of a State – say, an island, a space station – is illegally attacked for whatever reason, the use of force may primarily and mainly be viewed as a violation of the State's territory, and subsidiarily as that of its political independence. Where the progress of an activity undertaken by a State – say, lawful fishing on the high seas, promoting trading relations with certain States, exploring outer space – is prevented by the use of illegal force, that force would principally appear to be a violation of the political independence of the State in its external manifestations. Where a certain number of nationals of a State are illegally attacked or have their freedom illegally interfered with while on the territory under the jurisdiction of another State, which is manifestly responsible for the misdeed, the illegal use of force against those persons would appear to be a violation of their State's political independence in its external manifestations; the nexus of nationality, it is submitted, would transcribe the violation of the nationals' rights to a violation of the political independence of their home State.[83]

We shall subsequently consider certain armed interventions handled by the UN to perceive how in the main they could be seen to have affected the political independence of the concerned States.

[82] See *infra* chapter 7, p. 199.

[83] See *supra* chapter 4 , p. 70.

6.2.2 Illustrative Armed Interventions.

6.2.2.1 Egypt

The French, British and Israeli use of armed force against Egypt in 1956 was an unlawful use of force.[84] France and the UK were neither entitled to supplant the UN[85] nor side-step its machinery for peaceful settlement of disputes, adjustment of situations[86] and peace enforcement, and arrogate to themselves unilateral measures of self-help to protect their interests in the Suez Canal. And Israel's invasion of Egyptian territory on 29 October 1956, which set in motion the Anglo-French recourse to force, was a violation of the Armistice Agreement between Egypt and Israel, and was also apparently too disproportionate as a measure of self-defence.[87] The unlawful use of force by these three States mainly affected the territorial integrity of Egypt, which can be seen, for instance, in General Assembly resolutions 992 (ES-I), 2 November 1956, and 1002 (ES-I), 7 November 1956, where the thrust in both was on territory. But this does not mean that Egypt's political independence was not affected. Inasmuch as certain parts of Egyptian territory were violated and held under the forcible authority of other States, the integrity of Egyptian political independence,[88] it is submitted, was that much impinged. Further, as indicated earlier,[89] the twelve-hour ultimatum by France and the UK to Egypt and Israel to cease armed hostilities, withdraw their forces ten miles from the Suez Canal, and accept Anglo-French occupation of Port Said, Ismailia and Suez, was an unlawful threat of force against Egypt.[90] As an act designed to coerce the exercise of Egyptian will into complying with the Anglo-French demand, the legally unjustified ultimatum constituted an unlawful infringement of Egypt's political independence.

[84] *See Repertory,* Suppl. No. 2, Vol. 1, 1964, pp. 101–2, paras. 113–4; L. Henkin, *How Nations Behave*, 1979, pp. 258–68; Q. Wright, *supra* n. 48, pp. 257–9, 271–4.

[85] See the substance of the arguments of the two countries in *Repertory*, *supra* n. 84, pp. 102–3, paras. 116, 117.

[86] See Art. 1(1) of the UN Charter.

[87] See *Repertory*, *supra*, n. 84, pp. 103, 112, paras. 118, 156–7.

[88] See *supra* n. 72, about the ICJ's view regarding "political integrity".

[89] See *supra* chapter 5, p. 140.

[90] The ultimatum technically constituted a threat of force against Israel as well. But in view of the probable collusion between France, Israel and the UK, it rather appeared a dissimulation as regards Israel. – See L. Henkin, *supra* n. 84, p. 261 and n. 24.

6.2.2.2 Hungary

While the Anglo-French-Israeli armed intervention was still progressing in Egypt, events that had been brewing in Hungary entailed the unlawful armed intervention of the USSR in that country. In his cablegram dated 1 November 1956, Imre Nagy, the Hungarian President of the Council of Ministers and Acting Minister for Foreign Affairs, notified the UN Secreary-General that further Soviet troops were entering into Hungary and that he had strongly protested to the Soviet Ambassador in Hungary against such entry. He also notified in the following terms:

> He demanded the instant and immediate withdrawal of these Soviet forces. He informed the Soviet Ambassador that the Hungarian Government immediately repudiates the Warsaw Treaty and at the same time declares Hungary's neutrality, and turns to the United Nations and requests the help of the four great Powers in defending the country's neutrality. The Government of the Hungarian People's Republic made the declaration of neutrality on 1 November 1956. Therefore I request Your Excellency promptly to put on the agenda of the forthcoming General Assembly of the United Nations the question of Hungary's neutrality and the defence of this neutrality by the four great Powers.[91]

In his letter of 2 November 1956, Imre Nagy further communicated to the Secretray-General that

> large Soviet military units crossed the border of the country, marching towards Budapest. They occupy railway lines, railway stations and railway safety equipment.[92]

And he requested that the Security Council instruct both the USSR and Hungary to start negotiations immediately for the withdrawal of the Soviet troops.[93]

At the Security Council, the USSR argued in essence that its action was in response to an appeal for assistance made by the Hungarian Govenment, which it claimed was defending "the people's democratic order by employing its armed forces to liquidate a counter-revolutionary uprising supported and directed from outside";[94] it alleged that the matter came within Hungary's internal affairs and was according to Art. 2(7) of the Charter beyond the jurisdiction of the Organization. Because of the USSR's veto, the Security Council was barred from making any

[91] Documents on International Affairs, 1956, *RIIA*, 1959, p. 475. See also *Repertory, supra*, n. 84, p. 79, para. 36(a).

[92] *RIIA, supra* n. 91,p. 480.

[93] See *Repertory supra*, n. 84, p. 79, para. 36(b).

[94] Ibid., p. 81, para. 42.

substantive decision, but passed a resolution to call an emergency special session of the General Assembly.[95]

The General Assembly took over the consideration of the situation and on 4 November 1956 passed resolution 1004 (ES-II), which, *inter alia*, condemned the Soviet military action and called upon the USSR to desist from attacking the people of Hungary and intervening in the internal affairs of Hungary.[96] Subsequent resolutions[97] reiterated the USSR's violation of the Charter and the political independence of Hungary, and found that the government which replaced that of Imre Nagy had "been imposed on the Hungarian people by the armed intervention of the Union of Soviet Socialist Republics".[98]

In the Hungarian situation, then, what appears to have been mainly affected by the illegal armed intervention of the USSR was the political independence of Hungary to which the territorial violation of that country was incidental. Soviet troops were introduced into Hungary without the consent of, and in face of protest by, the Hungarian Government. This breach of territorial integrity was compounded by the forcible change of State authorities and attack on Hungarians who were engaged in what to all appearances was an exercise of self-determination: Hungary was forcibly denied the legal right of adopting freely the policy it deemed suitable for the conduct of its internal and external affairs.

6.2.2.3 Dominican Republic

In the Dominican Republic, where a military revolt on 24 April 1965 had been followed by the overthrow of the existing government and by an armed conflict between opposing factions, the US intervened militarily on 28 April.[99] In his statement on the same day giving the reasons for his order to send 400 Marines to the Dominican Republic, the US President, L.B. Johnson explained thus:

> The United States Government has been informed by military authorities in the Dominican Republic that American lives are in danger. These authorities are no longer able to guarantee their safety, and they have reported that the assistance of military personnel is now needed for that purpose.

[95] Ibid., p. 80, para. 38.

[96] See ibid., pp. 88–9, paras. 69–71; L. Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government", 56 *BYIL*, 1985, pp. 222–6; Q. Wright, *supra* n. 48, pp. 259–60.

[97] 1005 (ES-II), 9 Nov. 1956; 1127 (XI), 21 Nov. 1956; 1131 (XI), 12 Dec. 1956.

[98] GA resol. 1133 (XI), 14 Sept. 1957.

[99] See L. Doswald-Beck, *supra* n. 96, pp. 226–30.

> I have ordered the Secretary of Defense to put the necessary American troops ashore in order to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to the country. This same assistance will be available to the nationals of other countries, some of whom have already asked for our help.[100]

Thereafter, within two days, over 2 400 Americans and other nationals were reported to have been evacuated.[101] Still, more troops were sent in; and the US President explained further:

> What began as a popular democratic revolution that was committed to democracy and social justice moved into the hands of a band of Communist conspirators. Many of the original leaders of the rebellion, the followers of President Bosh, took refuge in foreign embassies and they are there tonight.
>
> The American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere. This was the unanimous view of all the American nations when, in January 1962, they declared, and I quote: "The principles of communism are incompatible with the principles of the Inter-American system."[102]

During the Security Council debate, the US defended its intervention – which it claimed to have undertaken upon the "request for assistance from those Dominican authorities still struggling to maintain order"[103] – as necessary for safeguarding the lives of its citizens in a situation of emergency created by the absence of governmental authority. The US delegate stated further:

> First, the United States Government has no intention of seeking to dictate the political future of the Dominican Republic...It is not our intention to impose a military junta or any other government. Our interest lies in the reestablishment of constitutional government and to that end to assist in maintaining the stability essential to the expression of the free choice of the Dominican people.[104]

The Security Council, however, did not issue a resolution that either condemned the US armed intervention or called on the withdrawal of foreign forces.

100 52 *DSB*, 1965, p. 738.

101 Ibid., p. 742.

102 Ibid., p. 746. See also W.O. Miller, "Collective Intervention and the Law of the Charter", 62 *USNWCILS*, Vol. 2, 1980, pp. 94–5; T.K. Woods, "U.S. Navy Regulation, International Law, and the Organization of American States", ibid., p. 24. Regarding the statement opposing the establishment of a Communist government in the Western Hemisphere, cf. the *Nicaragua v. USA* Judgment, *supra*, n. 29, para. 265 where the ICJ held that "it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State".

103 *Op. cit., supra*, n. 100, p. 871. See also *Repertory*, Suppl. No. 3, Vol. 1, p. 161, para. 201.

104 *Op. cit., supra* n. 100, p. 874.

Among the US grounds contended to justify the armed intervention, protection of nationals would appear to be properly defensible[105] despite the controversy that surrounds it.[106] Where an internal armed struggle of some scale was in progress – as appeared to have been the case in the Dominican Republic – evidencing the disintegration of law and order, there might well have occurred a definite threat to the lives of foreigners. The US as well as other States would have been entitled then to rescue their nationals; and no special request for assistance needed to have come from any group engaged in the internal armed struggle.[107] But if such a request had been made when the effective exercise of State authority remained unsettled, it would only have confirmed the magnitude of the internal disturbance and could not have served as a competent invitation.

After the mission of protecting nationals had been accomplished, however, to extend the US intervention, which later became part of the OAS Inter-American Force,[108] amounted to a forcible intervention in the exercise of the political will of the people of the Dominican Republic.[109] The Inter-American Force was to

> have as its sole purpose, in a spirit of democratic impartiality, that of cooperating in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishment of an atmosphere of peace and conciliation that will permit the functioning of the democratic institutions.[110]

This stated purpose projected the OAS criteria and actually meant to supervise their implementation by force. As such, it would be the imposition of OAS' will on the Dominican Republic. The legal order under the UN Charter does not empower unilateral armed intervention, either singly or in groups, to right an internal situation of a State or bring about a particular system of government within that State. And the fact

105 *See infra* p. 177 *et seq.*

106 See *Repertory*, Suppl. No. 3, Vol. 1, pp. 161–2, paras. 202–3.

107 Protection of nationals is a right belonging to States, and is as such an independent title. Its implementation does not require an invitation; the latter is another title.

108 See 12 *Digest of International Law*, M.M. Whiteman ed., 1971, p. 831.

109 See ibid. p. 840 where, at the US Senate, Fullbright is reported to have characterized the US intervention as designed to prevent "the victory of a revolutionary force which was judged to be Communist dominated". And T. Mann, who was Under-Secretary of State, is reported to have said that "[a]ll those in our Government who had full access to official information were convinced that the landing of additional troops was necessary in view of the clear and present danger of the forcible seizure of power by the Communists". – Ibid.

110 Ibid., p. 828.

that the UN did not condemn the Inter-American Force as interventionist did not necessarily mean that the intervention of the Force was basically legal. The intervention seemed to have been tolerated[111] probably because, first, the UN lacked the willingness and readiness to involve itself in such situations by means more concrete than mere resolutions; secondly, the purpose of the intervention by the Force did not appear essentially too irreconcilable with the purposes of the UN; and thirdly, there was regional machinery willing to undertake the interventionist task.

6.2.2.4 Czechoslovakia

On the night of 20–21 August 1968, troops of the USSR, Bulgaria, the German Democratic Republic, Hungary and Poland entered Czechoslovakia[112] without the knowledge of that country's authorities;[113] and by the morning of 21 August they had succeeded in putting under their control all key centres and many of the Czechoslovak leaders.[114] On the same day, the Czechoslovakian Foreign Minister made a declaration in which it was reported that "a resolute protest with the requirement that the illegal occupation...be stopped without delay and all armed troops be withdrawn",[115] was lodged with the ambassadors of the intervening States in Prague for transmittal to their respective governments.[116] The declarations issuing from the officials in Prague were read into the record of the Security Council by the Deputy Permanent Representative of Czechoslovakia to the UN; as his authority was not revoked, he thereby confirmed the constitutionality and authenticity of the declarations.

Unless legally justified, this armed intervention in, and occupation of, Czechoslovakia clearly constituted a violation of the country's territorial integrity; and the internment of officials, the prevention of the free

111 Cf. W.O. Miller, *supra* n. 102, pp. 95–7; *Digest, supra* n.108, pp. 733–49.

112 See *The Czechoslovak Crisis 1968*, R.R. James ed., 1969, pp. 12–30 for the events leading up to the armed intervention.

113 See *SCOR*, 23rd Year, 1441st Meeting, 21 Aug. 1968, para. 137.

114 See *op. cit., supra* n. 112, p. 30. From the declaration of the Presidium of the National Assembly, which was read to the Security Council, the interned leaders were the President of Czechoslovakia, the Prime Minister, the Chairman of the National Assembly, the First Secretary, the Chairman of the Central Committee of the National Front, the Chairman of the Czech National Council. – See *SCOR, supra* n. 113, para. 140.

115 *SCOR, supra* n. 113, para. 138.

116 See ibid., para. 141 for a report on a session of the Czechoslovak Government where it was noted with approval that the request for the withdrawal of troops had been transmitted to the governments of the intervening States by the Czechoslovak ambassadors accredited to those States.

exercise of their constitutional functions, the forcible interference with the attempt of the people to protest by means of demonstrations[117] against the foreign intervention, and the resultant frustration of Czechoslovakia's wish to liberalize its political system constituted a breach of the political independence of that country.

From the USSR's arguments during the Security Council debate on the five-State armed intervention, four grounds of justification could be identified.[118] First, the matter was "a purely internal affair of the Czechoslovak Socialist Republic";[119] secondly, "a group of members of the Central Committee of the Communist Party of Czechoslovakia, of the Government, and of the National Assembly" had appealed for "immediate assistance to the Czechoslovak people, including assistance by armed forces";[120] thirdly, the matter was the common business of Czechoslovakia's socialist allies:[121] "[t]he events in Czechoslovakia concern[ed] the Czechoslovak people and the States of the socialist sphere of collaboration, which [were] mutually bound by appropriate reciprocal obligations, and them alone";[122] fourthly, "the threat to the socialist system in Czechoslovakia also constitute[d] a threat to the foundations of European peace",[123] and the intervention by invitation was consistent with the right of individual and collective self-defence "provided for in the treaties of alliance concluded between the fraternal socialist countries"[124] and conformed with the provisions of the Charter.

In view of the strenuous and official protest of the constituted Czechoslovakian authorities against the invasion, however, the ground of "internal affairs" could hardly stand as a proper support for the armed intervention. That ground would rather serve as an argument against the validity of the intervention. Besides, Czechoslovakia, the State most entitled to plead that ground, had not done so through its legally empowered officials. As to the ground of "invitation", Czechoslovakia

117 See ibid., para. 240.

118 Cf. *op. cit., supra* n. 112, pp. 185–88.

119 See *SCOR, supra* n. 113, para. 197.

120 Ibid., para. 209. See also paras. 75, 211, 216 where the request was attributed to Czechoslovakia.

121 Ibib., para. 197.

122 Ibid., para. 102. Cf. W.E. Butler, "Soviet Attitudes Towards Intervention", in *Law & Civil War in the Modern World*, J.N. Moore ed., 1974, pp. 393–4 re the introduction of socialist internationalism in Soviet international legal doctrine; S.M. Schwebel, "The Brezhnev Doctrine Repealed and Peaceful Co-Existence Enacted", 66 *AJIL*, 1972, pp. 816–9.

123 *SCOR, supra* n. 113, para. 87.

124 Ibid., para. 212. See also para. 209.

could not have requested the armed intervention and at the same time protested against it. If an invitation had indeed been issued, it must have been done by persons not invested with the legal competence to so invite;[125] and to commit an armed intervention on the strength of such a base would evidently undermine the contemporary legal norm of non-intervention.[126] As to the ground that claimed to the socialist allies of Czechoslovakia an exclusive competence to deal with the situation in that country, it may be seen as a political rather than legal argument. Even if States can undertake valid legal obligations to submit to the process and decisions of regional or other collective bodies in cases relating to their internal and external affairs, they cannot validly be parties to an agreement the object of which would have the effect of contracting out of the obligation under Art. 2(4).[127] Nor can they validly agree to deny the competence of the Security Council in cases of complaints of unlawful use of force in international relations.[128] As to the ground relating to the right of self-defence, if the right was claimed against Czechoslovakia because of the latter's alleged deviation from the socialist system, the deviation, which in the instance would be a lawful exercise of political independence, could not *per se* entitle other States to consider themselves to be in a position of self-defence vis-à-vis the deviating State.[129] If the self-defence was against other States, Czechoslovakia probably would not have protested in the first place against the intervention;[130] and the reliance placed on "a direct threat of upsetting the established balance of forces in Europe in favour of imperialism, which would inevitably...undermine European peace",[131] was apparently too remote a ground even for anticipatory self-defence.

The arguments justifying the armed intervention did not therefore amount to good legal grounds; but, in the political arena in which the debate took place, it might well be that these grounds were advanced more for their political connotation rather than their strength as legal arguments. And the political message seemed to have been effective, for

125 See *SCOR,* 23rd Year, 1445th Meeting, 24 Aug. 1968, para. 161.

126 See, e.g. GA resols. 380 (V), 17 Nov. 1950; 2131 (XX), 21 Dec. 1965.

127 See *supra* chapter 3, p. 51 *et seq.*; Art. 103 of the Charter.

128 See Arts. 24(1) and 25 of the Charter.

129 See *SCOR, supra* n. 125, para. 163.

130 See ibid., para. 162.

131 See *SCOR, supra* n. 113, para. 209.

after the failure of the Security Council[132] to adopt a resolution, no emergency special session of the General Assembly was called, and neither was the unlawful armed intervention inscribed on the agenda of the 23rd Session of the General Assembly.[133]

6.2.2.5 Cambodia (Kampuchea)

The Security Council was seized of Vietnam's armed intervention in Kampuchea, now Cambodia, by a telegram, dated 3 January 1979, from the Deputy Prime Minister in Charge of Foreign Affairs of Democratic Kampuchea.[134] At the Council, Vietnam argued that it was determined to exercise its right of self-defence in view of Kampuchea's rejection of a peaceful settlement of their border conflict, and stated that the Kampuchean People's Revolutionary Government was the sole legitimate government of Kampuchea.[135] A resolution that would have called for an immediate cease-fire and the withdrawal of all foreign forces involved in Kampuchea, and that would have demanded a strict adherence to the principle of non-interference in the internal affairs of States, received 13 votes in favour, but was defeated by the veto of the USSR.[136]

The General Assembly, on the other hand, called for the immediate withdrawal of all foreign forces from Kampuchea, and appealed

> to all States to refrain from any interference in the internal affairs of Kampuchea in order to enable its people to decide their own future and destiny free from outside interference, subversion or coercion, and to respect scrupulously the so sovereignty, territorial integrity and independence of Kampuchea.[137]

132 A draft resolution that would have affirmed, *inter alia*, "the sovereignty, political independence and territorial integriy" of Czechoslovakia, and condemned the armed intervention, and called on the withdrawal of the intervening forces was defeated by the veto of the USSR. – See *SCOR*, 23rd Year, 1442nd Meeting, para. 30 and 1443rd Meeting, para. 284.

133 See *op. cit.*, *supra* n. 112, pp. 103–4.

134 See *Repertoire*, Suppl. 1975–1980, p. 337. The Pol Pot régime was overthrown by the joint offensive of the National United Front for National Salvation of Kampuchea and Vietnamese forces, and the People's Revolutionary Council was established on 8 Jan. 1979. – See *Keesing's Contemporary Archives* 1979, p. 29613; 83 *RGDIP*, 1979, p. 757.

135 See *Repertoire*, *supra* n. 134, p. 338.

136 Ibid., p. 340.

137 Para. 9, GA resol. 34/22, 14 Nov. 1979. The GA has reiterated in subsequent resolutions its conviction of the need of non-intervention in order to bring about a "just and lasting resolution of the Kampuchean problem". – GA resol. 41/6, 21 Oct. 1986.

But Vietnam kept its forces in Cambodia.[138] Vietnam had forcibly intervened in the struggle that the Cambodians were conducting between themselves to settle their internal affairs; it had thereby used force unlawfully against the political independence of Cambodia. And in view of the duration of Vietnam's military presence in Cambodia, a plea of self-defence was hardly supportable. Keeping the Vietnamese forces in Cambodia with the consent of the *de facto* government they had helped set up in that country simply revealed the dependency of the *de facto* government's continued authority on the Vietnamese forces: and the fact that the *de facto* government persisted in consenting to the presence of the foreign troops on Cambodian territory merely indicated that government's lack of legitimacy in the sense of not being the result of Cambodia's own exercise of its political independence. Consequently, that government's invitation of the foreign forces, or its consent to their remaining on Cambodian territory, would hardly be competent to constitute a valid ground for absolving Vietnam from the illegality of its use of force against the political independence of Cambodia.

The Pol Pot régime has been notorious for its large-scale and brutal violations of fundamental human rights. Over one million persons were reportedly killed by the régime.[139] Still, this offence against human rights would not justify or excuse the non-altruistic and unauthorized Vietnamese military intervention in Cambodia.[140]

6.2.2.6 Afghanistan

The situation in Afghanistan, which concerned the USSR's armed intervention in that country, was brought to the urgent attention of the

138 The withdrawal of all Vietnamese "volunteer troops" from Kampuchea by 30 Sept. 1989 was announced in a joint statement of Kampuchea, Laos and Vientnam on 5 April 1989. – See *Keesing's Record of World Events*, 1989, p. 36558.

139 See Kampuchea, *Amnesty International (Report)*, 1987, pp. 16–8; *The Macmillan Encyclopedia*, 1988, p. 662.

140 Cf. *infra*, p. 184 *et seq*. The Vietnamese military intervention in Cambodia may be roughly contrasted with the military intervention of Tanzania in Uganda. The overthrow of Idi Amin in Uganda on 11 April 1979 was to a large extent brought about by the Tanzanian intervention. [See 11 *ACR*, 1978–1979, pp B421, B433–4]. Although basically a breach of Art. 2(4), the intervention was justified as a measure of self-defence insofar as it sought to expel the Ugandan forces that had invaded and occupied the Tanzanian territory of Kagera in Oct. 1978 [ibid., p. B393], and to prevent their reincursion [see, e.g. ibid., pp. B426–7]. The toppling of the Amin régime – notorious for its human rights' abuses – with the help of the Tanzanian forces might be conceived as an over-extended exercise of Tanzania's self-defence. Even if seemingly disproportionate in this regard, the apparent active participation in, and general welcome of, the operation by the Ugandans would indicate the presence of valid extenuating circumstnaces. [See ibid., pp. B394–7].

Security Council by 52 Member States and considered at the Council's meetings between 6 and 9 January 1980.[141] Afghanistan protested against the convening of the Council and objected to the discussion of a matter that it claimed belonged to its internal affairs;[142] and the USSR invoked Afghanistan's invitation to justify its deployment of forces in that country.[143] A resolution that would have deplored the armed intervention and called for an immediate withdrawal of all foreign troops was supported by 13 votes but vetoed by the USSR,[144] whereupon the Council decided by a vote of 12 in favour, 2 against, and 1 abstention, to call an emergency special session of the General Assembly to examine the matter.[145]

The General Assembly met in emergency special session and adopted resolution ES-6/2, 14 January 1980. In the paragraphs pertinent to our purpose here, the resolution

> 1. *[r]eaffirm[ed]* that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which on any pretext whatsoever [is] contrary to its aims and purposes; ...
>
> 4. *[c]all[ed]* for the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever;... .

And the substance of these paragraphs continued to be reaffirmed and reiterated in subsequent General Assembly resolutions by an overwhelming majority of votes.[146]

Apparently, then, the USSR's attempt to justify its intervention on the ground of invitation did not convince the great majority of the Member States both at the Security Council and the General Assembly. By fighting the Afghans who were forcibly opposing the government at Kabul, the forces of the USSR, which by the end of January, 1980, were estimated to have been 85,000 strong,[147] helped that government

141 See *Repertoire, supra*, n. 134, p. 349.

142 Ibid.

143 Ibid., p. 350.

144 Ibid.

145 Ibid., p. 351.

146 See, e.g. GA resol. 40/12, 13 Nov. 1985, which obtained 122 votes in favour, 19 against, and 12 abstentions. – *GAOR* 40th Session, Suppl. No. 53 (Doc. A/40/53), p. 365.

147 See *Keesing's, supra* n. 134, p. 30229. The withdrawal of the Soviet forces was based on the Agreement on the Interrelationships for the Settlement of the Situation Relating to Afghanistan, signed

maintain its contested authority. The large-scale armed intervention on the side of the government that faced serious internal challenges to its authority constituted a forcible denial of the free exercise of the Afghans' right to establish a government of their choice. The deployment of the Soviet forces in Afghanistan consequently amounted to an unlawful armed intervention in the internal affairs of that State. The political independence of a State could hardly remain unaffected when its government owes its continued authority to the presence of foreign forces on its territory, and when its nationals are impeded by those forces from exercising their self-determination, which their independence entitles them vis-à-vis other States.[148]

6.2.2.7 Grenada

On 25 October 1983, the US commenced its military intervention in Grenada; and on 28 October, 300 Commonwealth Caribbean troops were brought in reportedly "to undertake a policing role only when US troops had overcome all major resistance".[149] Upon the written request of Nicaragua, dated 25 October 1983, the Security Council met on the same day and debated the matter until 28 October, during which some 65 States participated and made their views known.[150] In justification of its intervention, the US argued thus:

> It was, indeed, a unique combination of circumstances prevailing in Grenada that led the United States to respond positively to the OECS request that we assist them in their decision to undertake collective action to secure peace and stability in the Caribbean region. Those circumstances included danger to innocent U.S. nationals, the absence of a minimally responsible government, and the danger posed to the OECS by the relatively awesome military might those responsible for the murder of the Bishop government now had at their disposal.[151]

The interventionist Caribbean States relied on the request of Grenada's Governor-General, and Art. 8 of the OECS Treaty.[152]

A Security Council resolution, which in part would have sharply condemned the armed intervention and called for the immediate with-

on 14 April 1988 by Afghanistan, Pakistan, the USA and the USSR, and in force as of 15 May 1988. – See 27 *ILM*, 1988, p. 587 *et seq.*

148 Cf. the *Nicaragua v. USA* Judgment, *supra* n. 29, para. 205.

149 S. Davidson, *Grenada*, 1987, p. 85.

150 Ibid., p. 139.

151 83 *DSB*, No. 2081, 1983, p. 75.

152 See L. Doswald-Beck, *supra* n. 96, pp. 236–7.

drawal of the invading troops, was vetoed by the US. But the General Assembly adopted resolution 38/7, 2 November 1983, which, *inter alia*,

> 1. *[d]eeply deplore[d]* the armed intervention in Grenada, which constitute[d] a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State;...
>
> 4. *call[ed]* for an immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops in Grenada... .

Protection of nationals, as indicated at various junctures in this study, can be a valid ground for breaching the territorial integrity of a State where the facts justify an assessment of imminent threat to their lives. Whether or not such was the case with the US nationals in Grenada has, however, occasioned different views.[153] On the other hand, the justification based on the request for assistance by the Govenor-General was a dubious proposition, and was not given serious attention during the debates at the Security Council and the General Assembly.[154] The function of the Governor-General was ceremonial rather than executive;[155] and irrespective of the kind of measures it employed, the Revolutionary Military Council appeared to have been in control of Grenada.[156] Thus, there was no vacuum of authority that arguably might have given a semblance of legality to the transformation of the Governor-General's ceremonial position to one capable of serving as a valid source for his State's invasion.

Further, Art. 8 of the OECS Treaty,[157] which in part provides the base for the arrangement and implementation of collective defence and security against external aggression, would not be a solid ground for an armed intervention in the internal affairs of a State party to the treaty.[158] Taking Grenada's internal struggle for the establishment of a new authority as a situation that brought forth valid grounds for the exercise of self-defence does not appear to have been substantiated both in law

153 See S. Davidson, *supra* n. 149, p. 147; L. Doswald-Beck, *supra* n. 96, p. 237; W.C. Gilmore, "The Grenada Intervention", *SIS*, Band 9, 1984 (Berlin), p. 63.

154 See L. Doswald-Beck., *supra* n. 96, p. 237.

155 See S. Davidson, *supra* n. 149, pp. 95–6, 99; W.C. Gilmore, *supra* n. 153, pp. 65–6.

156 See S. Davidson, *supra* n. 149, pp. 98, 101.

157 20 *ILM*, 1981, p. 1166.

158 See S. Davidson, *supra* n. 149, pp. 90–1; C.C. Joyner, "The United States Action in Grenada: Reflections on the Lawfulness of Invasion", in *Third World Attitudes Toward International Law*, F.E. Snyder and S. Sathirathai eds., 1987, pp. 60–2; W.C. Gilmore, *supra* n. 153, pp. 43–4.

and fact; it was apparently too speculative even as anticipatory self-defence.

The Grenada case is of particular interest since the Caribbean States, which, like other small States, have more to benefit from the greater respect for Art. 2(4), unfortunately set a precedent against themselves by their unlawful breach of that Article.

6.2.2.8 Concluding Remarks

In concluding this review of cases relating principally to the political independence of States, it can be seen that they illustrate the unlawfulness of foreign armed intervention when effected to thwart an exercise of domestic authority or a genuine internal struggle seeking to establish a particular order. An alleged invitation would not suffice here as a justification. It would, of course, be another matter if the incursion is based on Art. 51 of the Charter, as it was alleged in the case of Jordan and Lebanon where in July, 1958, the UK and the US, respectively, sent in their military forces.[159] The relevance of Art. 51 will in such cases depend on the genuineness of the facts which are pertinent for validating the allegation of collective self-defence. Art. 51 was not meant to afford a ground for frustrating the exercise of the political independence of States, but to make explicit the validity of individual and collective forcible protection of that value. In this regard, L. Doswald-Beck rightly observes in connection with the situation in Afghanistan that

> [t]he reliance of the Soviet Union on alleged outside interference and the arguments used by States in condemning the intervention do clearly further indicate a general norm of non-intervention prohibiting the repression of a rebellion genuinely stemming from popular discontent within the country.[160]

A State's political independence could hardly remain unaffected when its government owes its tenure of office to foreign forces, and when its nationals are impeded by those forces from exercising their proper self-determination, which is their right by virtue of their independence.[161]

In other respects, as indicated earlier,[162] Art. 2(4) joins alternately the concepts of territorial integrity and political independence on the same

159 See L. Doswald-Beck, *supra* n. 96, pp. 214–7.

160 *Supra* n. 96, p. 234. Cf. the *Nicaragua v. USA* Judgment, *supra* n. 29, para. 246.

161 Cf., e.g. *Keesing's*, 1981, pp. 31159–60 re the "full unity" between Chad and Libya envisaged by their annoucement of 6 January 1981. Libya was to send military personnel to help Chad preserve security and peace.

162 *Supra* p. 147.

plane and thereby equates them in legal value; jointly put, the two concepts denote the totality of a State's rights.[163] To differentiate qualitatively and consequentially between these concepts, therefore, would not appear to be supported by the text and purpose of Art. 2(4). J. Zourek writes, however, that

> une opinion a été avancée, selon laquelle l'indépendance politique se trouve protégée également par la légitime défense...Mais on ne saurait mettre l'indépendance politique sous ce rapport, sur pied d'égalité avec l'intégrité territoriale. Une mesure dirigée contre l'indépendance politique d'un Etat fait naître l'état de légitime défense seulement dans le cas où elle viole en même temps l'intégrité territoriale de l'Etat dont il s'agit. L'indépendance politique se trouve donc protégée à travers la protection de l'intégrité territoriale. En effet, dans les autres cas, des mesures affectant l'indépendance politique d'un Etat sont dépourvues du caractère d'urgence nécessitant le recours *immédiat* à l'emploi de la force.[164]

To begin with, this manner of appraisal of the concepts of territorial integrity and political independence would create between them a legal hierarchy, which, in the view of the present writer, would not appear conducive to the advancement of the prohibition of the use of force. It would instead whittle down the external aspects of political independence by placing emphasis on its internal aspects, and thus reduce the restraints to which those contemplating the unlawful use of force against the external manifestations of political independence might have paid due attention. Further, though the two concepts would go together for the most part, they would not appear exclusively interdependent for the purposes of the prohibition of force.[165] Political independence in its external manifestations could well be the object of an illegal use of force without at the same time engaging territorial integrity; and it is submitted that such illegal use of force would not be different in its legal characteristics from that used against political independence in its internal aspects, i.e. violation of territorial integrity and simultaneous violation of other rights; and like other violations of the prohibition of Art. 2(4), it would bring forth the right of self-defence. Lastly, the statement that in other instances measures affecting political independence are devoid of the character of urgency that would necessitate the immediate use of force, also appears to ignore that a State's political will – its political independence – could be the object of coercion without

163 *Supra* p. 145 *et seq.*

164 J. Zourek, "La notion de légitime défense en droit international", 56 *AIDI*, 1975, p. 54.

165 See, *supra* chapater 4, p. 89 *et seq.* re entities which are not States proper.

directly involving its territory. The question of the urgent protection and defence of nationals under the jurisdiction of another State is the principal test in this respect.[166] Another important test is indicated in the *Corfu Channel* Judgment where the ICJ has held that

> [t]he "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.[167]

J. Zourek's grounds for self-defence would therefore appear selectively restrictive.

Political independence manifests the legal capacity of States and projects it beyond the principal and immovable territorial base to as far as outer space.[168] The more the horizon of the world extends, the longer the arm of such manifestation becomes; the more the growth of international activity, the greater the frequency of the manifestation; the more expanded and frequent the manifestation, the higher the numerical possibility of exposure to foreign illegal use of force. To have the external manifestation of political independence without the immediate and interim protection afforded by self-defence would hence appear legally untenable. What is to be legitimately protected with force in terms of the external manifestation of political independence will ultimately depend on the value the international legal order places, or is understood to place, at any material time on an object of an illegal use of force.

We shall subsequently undertake the consideration of the protection of nationals, property and other rights as indicators of the external manifestation of political independence.

6.2.3 Protection of Nationals

The nationals of a State are the most important of its constitutive elements.[169] Irrespective of whether the system of the community to which they belong benefits, exploits or tyrannizes them, that community is legally a society of human beings. International rules have been and are

166 See *infra* p. 178 *et seq.*

167 *Supra* n. 22, p. 30. Cf. *infra* p. 188 *et seq.*

168 See *supra* p. 159.

169 See H. Lauterpacht, "The Grotian Tradition in International Law", 23 *BYIL*, 1946, p. 27 where it is stated in the following terms: "The individual is the ultimate unit of all law, international and municipal...the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law." Cf. D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in *The Current Legal Regulation of the Use of Force*, A. Cassese ed., 1986, pp. 40–1.

legislated in the name of, and generally for, such societies of peoples of the world. In the particular field of the present study, mention by way of illustration may be made to the Pact of Paris[170] and the Charter of the UN. The Pact, having recorded in its opening preambular paragraph the signatories' announcement "of their solemn duty to promote the welfare of mankind", proceeds in its fourth preambular pragraph to state their hope that

> encouraged by their example, all the other nations of the world will join in this humane endeavour and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficient provisions... .

And the Charter opens its preamble with "We, the peoples of the United Nations", and goes on to recite their determination "to save succeeding generations from the scourge of war...and to reaffirm faith in fundamental human rights...". It might therefore appear anomalous that States as a rule are the subjects of international law with access to international political fora and various other bodies, while individuals, in whose name and for whose account international transactions are negotiated and finalized, are mainly assigned the status of objects[171] of international law. Nonetheless, individuals are in the limelight of international law. As objects go, they have the pride of place, which is evidenced by the contemporary international law concern for human rights.[172]

Individuals as a rule possess nationality.[173] The nationals of one State who are within a territory under the jurisdiction of another State are entitled to treatment which accords with the minimum standard required by international law.[174] This entitlement flows from their possession of

170 94 *LNTS*, p. 58.

171 See, e.g. 1 Oppenheim, p. 639.

172 See, e.g. the table of contents of *Human Rights, A Compilation of International Instruments*, (UN publication) Sales No. E.88.XIV.1; the table of contents of *Human Rights in International Law, Basic Documents*, Strasbourg, 1985; T.C. van Boven, "Survey of the Positive International Law of Human Rights", in *The International Dimensions of Human Rights*, K. Vasak ed., rev. ed., by P. Alston, Vol. 1, 1982, pp. 87–110; T.C. van Boven, "Distinguishing Criteria of Human Rights", ibid., pp. 45–8 re fundamental and other rights. The author rightly indicates "that in a number of comprehensive human rights instruments at worldwide and regional level, certain rights are specifically safeguarded and are intended to retain their full strength and validity notably in serious emergency situations, is a strong argument in favour of the contention that there is at least a minimum catalogue of fundamental or elementary human rights". – At p. 46. And he concludes that the "fundamental rights are considered to be valid under all circumstances, irrespective of time and place, and no derogation is allowed". – At p. 48.

173 As R.E.H. Mellor justifiably indicates, "every individual has both an ethnic nationalty and a legal nationality, which usually but not necessarily coincide". – *Nation, State, and Territory*, 1989, p. 3.

174 See,e.g. I. Brownlie, *supra* n. 39, pp. 524–5; 1 Oppenheim, p. 350. Cf. F.V. Garcia-Amador, "State Responsibility in the Light of the New Trends of International Law", 49 *AJIL*, 1955, pp. 343–4.

nationality, which attaches them to a subject of international law whose basic component they partly constitute.[175] Where the minimum standard is observed in a deficient manner or is altogether disregarded, the State of the affected nationals has the right to afford them diplomatic protection.[176] In extending its diplomatic protection, the State of nationality is asserting its own right, i.e. undertaking the necessary action to redress past unremedied violations and protect itself from future hurt. Diplomatic protection is a well-settled matter, which has been declared by the PCIJ to be

> an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.[177]

The exercise of diplomatic protection is a resort to a peaceful process of settling international issues. But under the pre-Charter international law, the protecting State had also the acknowledged right of resort to force when the breach of the legal duty owed by a State to foreign nationals resulted or was likely to result in a grave and imminent threat to their lives or physical well-being and normal diplomatic means became unavailing.[178] Whether, however, such forcible protection of nationals has survived under the Charter has been presented as "a delicate question"[179] "without a ready-made solution",[180] and opinions are divided as to its legality.

It is generally considered that "[a]lmost all the States which believe that a State is entitled to use force to protect its nationals abroad are

175 Cf. D.W. Bowett, "The Use of Force in the Protection of Nationals", 43 *GS*, 1959, p. 119; Ch. Rousseau, *Droit international public*, Tome V, 1983, p. 101.

176 See, e.g. E.M. Bochard, *The Diplomatic Protection of Citizens Abroad*, 1915, pp. 448–50; D.W. Bowett, *supra* n. 3, p. 96; 54th *ILA Report*, 1970, pp. 351, 635; 1 Oppenheim, p. 686.

177 The *Mavrommatis Palestine Concessions*, *supra* n. 75, p. 12. See also the *Panevezys - Saldutiski Railway* case, *PCIJ, Series A/B*, No. 76, p. 16; the *Barcelona Traction, Light and Power Company, Limited* case, supra n. 74, para. 79. As to the theoretical basis of diplomatic protection, see, e.g. R. Quadri, "Cours général de droit international public", 113 *RCADI*, 1964-III, pp. 394–5; G. Scelle, "Règles générales du droit de la paix", 46 *RCADI*, 1933-IV, p. 656. Cf. J. Stone, *Aggression and World Order*, 1958, pp. 97–8.

178 See, e.g. P.C. Jessup, *A Modern Law of Nations*, 1952, p. 169; H.F. van Panhuys, *The Rôle of Nationality in International Law*, 1959, p. 113; G. Scelle, *supra* n. 177, p. 670.

179 J.L. Brierly, *supra* n. 34, p. 427.

180 W.K. Geck, "Diplomatic Protection", 10 *EPIL*, 1987, p. 117.

Western States".[181] In this regard, reference may be made to the case of the American hostages in Tehran. This case went through the process of the UN[182] and that of the ICJ,[183] and the US eventually sought to resolve it partially through recourse to unilateral force.[184] A Whitehouse statement of 20 November 1979, for instance, made in connection with the case clearly indicated thus:

> The United States is seeking peaceful solution to this problem through the United Nations and every other available channel. This is far preferable to other remedies available to the United States. Such remedies are explicitly recognized in the Charter of the United Nations.[185]

The remedies claimed to be available and recognized in the Charter were put into effect on 24/25 April 1980 when the US undertook a forcible attempt to rescue its hostage nationals from Tehran. This forcible act, which in the absence of justification violated Art. 2(4), was alleged to be based on Art. 51 of the Charter, as the US President made clear to the US Congress in his message of 26 April. He stated therein thus:

> In carrying out this operation, the United States was acting wholly within its right in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them.[186]

The reliance on the right of self-defence reserved in Art. 51 had the effect of making the protection and defence of nationals abroad an exercise of self-defence of their home State; and it assimilated an attack

[181] M. Akehurst, "Humantarian Intervention", in *Intervention in World Politics*, H. Bull ed., 1984, p. 104. See also, e.g. *Repertoire*, Suppl. 1959–1963, pp. 283–4 re the Belgian defence of its armed intervention in the Congo in 1960, and the concurring positions of France, Italy and the UK; J.E.S. Fawcett, *supra* n. 64, pp. 400–1 re the UK's claim of protection of its nationals in Egypt in 1956. Among States of other categories, India, for instance, had maintained in the Goa case that "force could be used for the protection of the people of Goa who were as much Indian as the people of any other part of India". – *Repertory*, Suppl. 3, Vol. 1, 1972, p. 147, para. 105. See, further, *infra* chapter 7, pp. 235, 237–8 re Israel's forcible action at the Entebe airport of Uganda, and that of Egypt at the Larnaca airport of Cyprus; R. Higgins, *supra*, n. 23, pp. 208, 221; N. Ronzitti, *Rescuing Nationals Abroad Through Militrary Coercion and Intervention on Grounds of Humanity*, 1985, pp. 26–52; W.D. Verwey, "Humanitarian Interventon", in *op. cit.*, A. Cassese ed., *supra* n. 169, pp. 61–5.

[182] See SC resols. 459 (1979), 4 Dec. 1979 and 461 (1979), 31 Dec. 1979.

[183] *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports* 1980, p. 3.

[184] See, e.g. 80 *DSB*, No. 2039, 1980, pp. 38–9.

[185] Ibid., No. 2034, p. 43. See also the reiteration of the position at the Security Council, e.g. ibid., No. 2035, p. 67.

[186] Ibid., No. 2039, pp. 42–3. See also the US letter of 25 April 1980 to the SC, which reported and justified the action on the basis of Art. 51. – *Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 486.

on them with an attack on their home State.[187] But as the territory of the home State was not actually attacked, the attack on the nationals may be viewed as directed against the external manifestation of their State's political independence, which is protected by Art. 2(4),[188] and hence by the right of self-defence.[189]

The ICJ, however, felt it necessary to remark that

> in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran...the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations... .[190]

But this obiter remark obviously neither confirmed nor denied the legality of the US action.[191] The Court merely appeared to make known its disapprobation of a unilateral forcible act that sought to bring a partial solution to a *sub judice* dispute. The disapproved US action did not affect the Judgment of the Court, which found Iran responsible for violations of its international obligations and decided, *inter alia*, that the unlawful detention of the US nationals must be terminated.[192]

In further respect of the position of States regarding forcible protection of nationals abroad, there are those which oppose, for instance, during UN debates the existence of such an asserted right.[193] But it would appear quite unlikely that they would adhere to the same position if the lives or physical well-being of their nationals were endangered in other States.[194] Besides, the partisan coloration and other

187 See the *SS Mayaguez* incident, 69 AJIL, 1975, pp. 877–8 for earlier US reliance on Art. 51 for the protection and rescue of nationals and their property.

188 The ICJ has not made a specific reference to Art. 2(4) in the *United States Diplomatic and Consular Staff in Tehran* Judgment, but it has declared that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights". – *Supra* n. 183, para. 91. Since Art. 2(4) is one of the principles of the Charter referred to, and one that is most proximately related to the censured use of force against the US diplomatic staff, it may be permissible to view this judicial pronouncement as assuming the relevance of Art. 2(4) to the case before the Court.

189 Cf. J.R. D'Angelo, 21 *VJIL*, 1980/81, p. 513.

190 *Supra* n. 183, para. 93.

191 Cf. N. Ronzitti, *supra* n. 181, pp. 61–2.

192 Se *supra* n. 183, pp. 44–5.

193 Cf. R. Ronzitti, *supra* n. 181, pp. 58–60.

194 Cf. H. Waldock, "General Course on Public International Law", 106 RCADI, 1962-II, p. 241.

political considerations inevitable in such debates would hardly qualify the opinions those States express there as convincing proof of their determined legal views on the issue.

Among authors, while many consider the right of forcible protection of nationals to have lapsed under the Charter,[195] others take the view that the right is available under the rubric of self-defence.[196]

In regard to self-defence, it would appear that the acknowledgement of diplomatic protection as an assertion of a right belonging to States, the exercise of which lies in their discretion,[197] is translatable as the protection of an aspect of the external manifestations of their political independence, and it would, as such, constitute an act of self-defence.[198] And where diplomatic protection fails or appears inopportune and foreign nationals are confronted with grave and imminent threats to their lives or physical well-being, their States would appear entitled to pursue the right of protection by the use of force. A forcible intervention in such cases for the limited purpose of protection and rescue of nationals would properly have no different legal facet and ground than force used to protect nationals within the jurisdiction of their own State in instances of actual or imminent attack.[199] Otherwise, an unwarranted qualitative differentiation would be made between nationals who are within and those outside the territorial jurisdiction of their State; and the external

195 See, e.g. M. Akehurst, *supra* n. 64, p. 264; U. Beyerlin, "Mayaguez Incident", 3 *EPIL*, 1982, p. 255; R.L. Bindschedler, "La délimitation des compétences des Nations Unies", 108 *RCADI*, 1963-I, pp. 400–1; A. Cassese, *International Law in a Divided World*, 1986, pp. 238–9; T. Farer, "Law and War", in *The Future of the International Legal Order*, C.E. Black and R.A. Falk eds., Vol. III, 1971, p. 54; M. Lachs, "The Development and General Trends of International Law in Our Time", 169 *RCADI*, 1980-IV, p. 161; H.F. van Panhuys, *supra* n. 178, p. 114; N. Ronzitti, *supra* n. 181, 1985, pp. 65, 69; T. Schweisfurth, "Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights", 23 *GYIL*, 1980, pp. 164–6; D.F. Vagts, "International Law Under Time Pressure: Grading the Grenada Take-Home Examination", 78 *AJIL*, 1984, pp. 169–70; H. Wehberg, "L'interdiction du recours à la force. Le principe et les problèmes qui se posent", 78 *RCADI*, 1951-I, p. 71. Cf. I. Brownlie, *supra* n. 5, p. 301; O. Schachter, "International Law in Theory and Practice", 178 *RCADI*, 1982-V, 145–6.

196 See, e.g. D.W. Bowett, *supra* n. 3, pp. 95–105; J.E.S. Fawcett, "Intervention in International Law", 103 *RCADI*, 1961-II, p. 405; C.G. Fenwick, "The Dominican Republic: Intervention or Collective Self-Defense", 60 *AJIL*, 1966, p. 64; G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 *RCADI*, 1957-II, p. 172; D.W. Greig, *supra* n. 16, pp. 879–80; D.P. O'Connell, *supra* n. 66, pp. 303–4; J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. 1, 1968, p. 242; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 *RCADI*, 1952-II, p. 503. Cf. P.C. Jessup *supra*, n. 178, pp. 169–70 for whom the rationale for the legality of the pre-Charter forcible protection rested not on self-defence but the absence of an "international organization competent to act in emergency".

197 See the *Barcelona Traction* case, *supra* n. 74, p. 44. Cf. Ch. Rousseau, *supra* n. 175, pp. 196–7.

198 Cf. D.W. Greig, *loc. cit.*, *supra* n. 16.

199 See *infra* chapter 7, p. 222 *et seq.* re anticipatory self-defence.

manifestations of political independence would be defective as lacking an *ipso jure* unilateral protection, which self-defence affords. The exercise of this right of protection of nationals can, as the exercise of other rights, be subject to abuse. It can also be fraught with the danger of aggravating the situation created by the illegal acts sought to be countered.[200] The possibility of abuse and aggravation demands good faith and counsels prudence when the exercise of the right is contemplated and undertaken. These factors of good faith and prudence might be pertinent elements in the appraisement of the proportionality of the action undertaken, but they would not affect the basic legality of the exercise when the enabling conditions are present.

Protection of nationals as an aspect of self-defence troubles a number of authors, because they interpret Art. 51 of the Charter as confining self-defence to cases of armed attack, and hence find it difficult to equate attack on nationals abroad with attack on their State.[201] But, as will be indicated in the following chapter, the right of self-defence does not appear so restricted;[202] additionally, its scope could be seen as expanding when the scope of the unilateral resort to force expands in commensurate value to the default of the UN collective measures.

Some, faced with the dilemma of the unwillingness to acknowledge the protection of nationals abroad as a right, but reluctant to condemn outright the exercise of forcible protection in patently deserving cases, seem to have opted for some form of compromise. U. Beyerlin, for instance, after analysing the Security Council's attitude towards such forcible operations, says that

> the rescuing State will escape at least any severe sanctions by the Security Council in a case where its intervention proves inevitable, proportionate and limited to the necessities of liberating its own nationals from extreme danger. Such a tacit political toleration of a specific rescue operation in the particular case is preferable to a solution where the resort to such armed interventions is, in principle, a right at the disposal of any State.[203]

200 Cf. R. Higgins, *supra* n. 23, p. 220.

201 See, e.g. M. Akehurst, *supra* n. 181, p. 107; H.F. van Panhuys, *supra* n. 178, p. 114; T. Schweisfurth, *supra* n. 195, p. 164.

202 See *infra* p. 219 *et seq.*

203 U. Beyerlin, "Humanitarian Intervention". 3 *EPIL*, 1982, p. 214. See also N. Ronzitti, *supra* n. 181, p. 96 where the author suggests viewing the right of protection "as a special plea...or as a kind of self-help". But it is not clear what practical improvement such multiplication of titles is expected to bring to the state of the law: the forcible intervention to protect nationals would remain a unilateral action undertaken without any prior authorization by the UN, and accordingly be the self-help that the pleas of self-defence and necessity are.

"Political toleration" itself, however, is a telling mark, which reflects upon the state of the law as regards the allocation of the lawful use of force on the international plane between the UN and its Members.[204] In the final analysis, "political toleration" as a phenomenon that demonstrates the Security Council's unwillingness or inability to take action, is a confirmation of the right of unilateral use of force for the protection of nationals abroad. Even where the unilateral use of force is alleged to be unlawful, the "political toleration" with which it is met would create a precedent for its legality. Moreover, a right at the disposal of States would not necessarily mean that the right is always exercisable each time the conditions required for its exercise arise, for it may be subject to various extraneous considerations.

However rationalized, protection of nationals abroad, as with their protection within their own State, appears to be an intrinsic element of State sovereignty, which, in H. Waldock's words, "every responsible government would feel bound to take, if it had the means to do so".[205]

Another aspect of protection of nationals abroad presents itself when responsibility for an illegal use of force against them is not imputable to the State where the act takes place. The government of that State may, for instance, lack timely and crucial information, or it may have been deprived of effective control over an area, or it may have been unable to exercise control over a situation.[206] If in such cases individuals, whether or not in organized groups or as a mob, were to endanger unlawfully the lives or physical well-being of foreign nationals, the latter's State, it is submitted, would still have a right of self-defence which would now be exercisable against the offending individuals.[207] I. Brownlie indicates that the assertion of the existence of this right "must be made on the basis of principle and policy since the legal materials relating to self-defence in international law contemplate action against states only".[208] But the *Caroline* case could arguably be taken as an acknowledgment of such a right,[209] and the existence of a situation of self-defence should be

[204] See *supra* chapter 3, p. 42 *et seq.*

[205] *Supra* n. 194, p. 241.

[206] See, e.g. Ch. de Visscher, "Cours général de principes de droit international public", 86 *RCADI*, 1954-II, p. 512.

[207] See D.W. Bowett, *supra* n. 3, p. 56; G. Schwarzenberger, "The Fundamental Principles of International Law", 87 *RCADI* 1955-I, pp. 332, 334.

[208] *Supra* n. 5, p. 375.

[209] See *infra* chapter 7, p. 232.

governed by the hurtful effect rather than the legal appellation of physical person or international juristic person. Additionally, no useful legal purpose would appear to be served by viewing self-defence as having only one course, i.e. a unilateral forcible action by State against State.

The grounds of self-defence and necessity would here be intertwined: as the State where the offending individuals are found did not incur international responsibility for violating the prohibition of Art. 2(4), the breach of its territorial integrity by the State exercising its right of self-defence against the individuals would be grounded on necessity.[210] The territorial State could not in such circumstances object in good faith to the exercise of the self-defence without giving cause for charges of complicity and consequently exposing itself to measures of self-defence.[211] The ground of necessity would be even more obvious in cases of a complete breakdown of law and order, for then there would be no real authority to assume legal responsibility for the protection of foreign nationals. So long as this absence of authority persists, the State would suffer from fundamental structural deficiency, which would appear to make it incapable of either consenting or objecting to foreign intervention, which has a valid state of necessity as a base. This does not, however, mean that it thereby becomes *terra nullius*; it remains an entity which continues to benefit from the protective provisions of Art. 2(4).

6.2.3.1 Humanitarian Intervention

Protection of nationals abroad is considered by some as part of the rubric of humanitarian intervention.[212] Though primarily a humanitarian act,

210 See ibid.

211 Cf. the *Corfu Channel* Judgment, *supra* n. 22, p. 22 where it is stated that the territorial sovereign has the "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". Cf., further, e.g. SC resol. 226 (1966), 14 Oct. 1966, where the Council, *inter alia*, urged Portugal not to allow Angola to be used by foreign mercenaries as a base of operation against the Democratic Republic of the Congo; SC resol. 241 (1967), 15 Nov. 1967.

212 E. Gordon indicates that humanitarian intervention "is employed to describe three very different situations: first, where a state uses force to protect the lives or property of its own nationals abroad...second, where the use of force serves to prevent a foreign government from initiating or perpetuating a massive and gross violation of the human rights of its own or a third state's nationals; third, where a state intervenes in a foreign state's civil war or so-called war of national liberation". – *Supra* n. 29, p. 277. See, e.g. *Humanitarian Intervention and the United Nations*, R.B. Lillich ed., 1973, pp. 53, 63; R.B. Lillich, "Forcible Self-Help under International Law", 62 *USNWCILS*, Vol. 2, 1980, p. 134 where the author states that "the doctrine of humanitarian intervention goes beyond the protection of nationals and actually protects not only foreigners without a country, but also the citizens of the country itself"; N. Ronzitti, *supra* n. 181, p. 6.

the legal base of protection of nationals, in the view of the present writer, is traceable to the political independence of States; and it would therefore appear proper not to lump it together with other types of humanitarian intervention.[213]

Unauthorized humanitarian intervention proper, i.e. the unilateral forcible violation of the territorial integrity of a State to protect its nationals or stateless persons within its territory from harsh and brutal acts perpetrated widely by its government, would not appear to have a valid ground in contemporary international law.[214] This is not to say, however, that individually or in groups, States have no legal possibility of coercing that government into good behaviour. They would be entitled to resort to non-violent reprisals, because respect for fundamental human rights has been held to be "the concern of all States"[215] and to constitute an obligation *erga omnes*. As the ICJ has indicated in the *Barcelona Traction* case, obligations of this type

> derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[216]

And as indicated in the preceding chapter,[217] States seem capable of undertaking unilateral measures of non-forcible reprisals in obvious cases of default in *erga omnes* obligations, even without such default being characterized illegal by a competent international body. It is difficult to conceive States as being under a legal obligation of trading and maintaining relations, other than those of a humanitarian type, with the State that engages in acts repugnant to fundamental legal norms. Violation of *erga omnes* obligations not rebuked by sanctions would manifest indifference to such violation, which in turn would erode the value of the obligations, confirm a government in its unlawful practices, and make accomplices of the indifferent States. States, therefore, would have no obli-

213 Cf. *Humanitarian Intervention...*, R.B. Lillich ed., *supra* n. 212, pp. 22–3, 42–3; J.N. Moore, "Grenada and the International Double Standard", 78 *AJIL*, 1984, p. 154.

214 See T. Oppermann, "Intervention", 3 *EPIL*, 1982, pp. 235–6; N. Ronzitti, *supra* n. 181, pp. 108–10; W.D. Verwey, *supra* n. 181, p. 66. Cf. E. Giraud, "L'interdiction du recours à la force. La théorie et la pratique des Nations Unies", 67 *RGDIP*, 1963, pp. 512–3; O. Schachter, *supra* n. 195, p. 144.

215 The *Barcelona Traction* Judgment, *supra* n. 74, para. 33. See in this regard *AIDI*, Vol. 63–1, 1989, p. 398 *et seq.* for draft Articles, especially Art. 2, about the protection of human rights and the principle of non-intervention, by G. Sperduti.

216 *Supra* n. 74, para. 34.

217 See, *supra* chapter 5, pp. 136–7.

gation of besmirching themselves with the illegality of such violation, which would occur if they do not withhold their active relations with the offending State; but they do not have a clear right of enforcing the law by force of arms.

If unilateral armed intervention is nonetheless attempted in cases of such violation,[218] it would appear that the target State will not incur liability if it uses armed force to repel the intervention. M. Virally, for instance, poses the question and gives the reply thus:

> Le principle de l'inviolabilité des frontiers fait-it obstacle à la réalisation d'une opération "humanitaire"? C'est un point qui reste encore obscur - controversé. Mais un Etat qui s'opposerait par la force à une telle opération sur son territoire ne pourrait certainement pas être considéré comme commetant un acte illicite, dans l'état actuel du droit.[219]

It should be noted, however, that if the author's "humanitarian operation" is intended also to include necessary and proportional measures taken for the protection of nationals abroad, a counter use of force in that case by the target State would lack legal justification.

The higher value attached to territorial integrity in such cases could be analysed, in the first place, on grounds of policy. Licensing unilateral humanitarian intervention by means of arms could result in more criss-cross interventions, and consequently, in greater risk for an all-round increased loss of life and severe injury. In the second place, such intervention would normally be the *de facto* prerogative of States possessing adequate human and material resources;[220] its exercise would necessarily be discretionary, and most probably would not be undertaken against powerful States. These factors would make it discriminatory and hence unsatisfactory as a legally sanctioned remedy. Despite these defects, however, were a forcible humanitarian intervention to be undertaken in the proper instances, the breach of the target State's territorial integrity would probably be considered to deserve extenuation.

218 See, e.g. B. de Schutter, "Humanitarian Intervention: A United Nations Task", 3 *CWILJ*, 1972, pp. 27–9.

219 M. Virally, "Article 2, Paragraphe 4", in *La Charter des Nations Unies*, J.-P. Cot et A. Pellet eds., 1985, p. 124. Here, as elsewhere, the differentiation between humanitarian intervention proper and protection of nationals abroad needs to be maintained. See also J. de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI*, 1978-I, p. 92. Cf. I. Brownlie, "Humanitarian Intervention", in *op. cit.*, J.N. Moore ed., *supra* n. 122, p. 224; B.B. Ferencz, *supra* n. 46, p. 37.

220 Cf. the *Corfu Channel* Judgment, *supra* n. 22, p. 35; T.M. Franck and N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", 67 *AJIL*, 1973, pp. 303–4.

Humanitarian intervention might be less open to abuse if undertaken by the UN. But there, too, the likelihood of its impartial exercise would be doubtful enough as to make it appear a tool against weaker States. And the same might be said of humanitarian intervention by regional organizations. Nonetheless, even an imperfect mode of protecting fundamental human rights would be preferable than none at all; and this is a factor which international law of the partially organized and defectively policed contemporary world community should take into account.

6.2.4 Protection of Property and Other Rights

Property belonging to a State or its nationals and found outside the jurisdiction of that State is protected from other States' unlawful interference. The proprietary State could take measures necessary to protect such property while at a place under the jurisdiction of no other State, and demand normal protection from any State that has jurisdiction over the property.[221]

6.2.4.1 Protection at Unappropriated Places

A forcible defence of property while at an unappropriated place appears to be uncontested.[222] A State, which for purposes of marine scientific research,[223] for instance, temporarily places on a certain part of the high seas a fairly well-sized construction of some technical sophistication that embodies a great amount of capital outlay, would be entitled to use force in defence of the construction where resort to force becomes necessary.[224] This forcible defence of property could be regarded as an aspect and exercise of the external manifestations of the State's political independence.[225]

Similarly, where a State, for instance, is prevented from exercising its right of navigation on the high seas,[226] it would appear entitled to remove forcibly the obstruction. Support for such forcible defence of the right to

221 Cf. the *Panevezys-Saldutiskis Railway* case, supra n. 177, p. 16; *Anglo-Iranian Oil Co.* case, *ICJ Reports* 1951, p. 92; 1 Oppenheim, p. 352.

222 See, e.g. the *SS Mayaguez* case – 72 *DSB*, 1975, p. 720. The US claimed the ship to have been in international waters. Cf. U. Beyerlin, *supra* n. 195, p. 254 where the US claim regarding the location of the ship is considered doubtful.

223 See Art. 238, *UNCLS*, *supra* n. 9.

224 Cf. I. Brownlie, *supra* n. 39, pp. 464–6; G. Fitzmaurice, *supra* n. 196, p. 172.

225 Cf. 1 Oppenheim, pp. 286–7.

226 See Art. 90, *UNCLS*, *supra* n. 9.

navigate could be drawn from the *Corfu Channel* Judgment, where the ICJ held that

> [t]he Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.[227]

The forcible denial of the exercise of the right of passage through the Corfu Channel gave rise in that case to the forcible assertion and implementation of that right, which the Court confirmed as legal. Although this judicial confirmation has to be viewed in the light of the circumstances particular to the case, it would nonetheless be relevant to the cognate right of freedom of navigation on the high seas.

Nonetheless, the Charter's policy of minimizing the use of unilateral force requires both the State that denies the exercise of the right of navigation and the State that asserts it, to resort first to the machinery for peaceful settlement of disputes.[228] But if force were to be used by both States to back their respective claims, the State asserting its right of navigation would be in a better legal position as the one seeking to assert the maintenance of the *status quo*, which the other was seeking to alter by force. As a consequence, the right of self-defence against unlawful use of force would belong to the State asserting the *status quo*.[229] The forcible exercise of the right of navigation would be even more justified where it is undertaken in instances of immediate necessity.

6.2.4.1.1 The Cuban Missiles Crisis: Legal Implication

Freedom of navigation together with the right of a State freely to establish and promote varied relations with those States it chooses was put to a severe test by the Cuban missiles crisis.[230] The "quarantine" was formally instituted by the US President's Proclamation of 23 October 1962 ordering the forcible interdiction of "the delivery of offensive weapons and associated materiel to Cuba".[231] This interdiction, accompanied as it was by a force ready to be employed, was opting for a unilat-

227 *Supra* n. 22, p. 30.

228 See Arts. 2(3), 33(1), 35 of the Charter.

229 See, e. g. 81 *DSB*, 1981, Oct. No. 2055, pp. 57–60 about the shooting down of two Libyan fighter aircraft by US aircraft on 19 Aug. 1981. The US alleged that the Libyan aircraft had attacked the American naval aircraft, which were operating in an international airspace and participating in a naval exercise in international waters.

230 See 47 *DSB*, 1962, p. 715 *et seq.* Cf. *Nicaragua v. USA* case, *supra* n. 29, paras. 214, 253.

231 47 *DSB*, p. 717.

eral resort to force against the Soviet Union's right of navigation as well as the right of both Cuba and the USSR to engage in relations of their choice, and constituted, in the absence of justification, a violation of Art. 2(4).[232] Following the guidance of the *Corfu Channel* case referred to in the preceding section, the USSR[233] could have been entitled to exercise the defence of its impeded right had this not been claimed to have come into conflict with the rights of other States. But it got confirmed that the USSR was in preparation of medium- and intermediate-range missile sites in Cuba and had delivered to that country jet bombers that could carry nuclear weapons,[234] and the US took the long-range bombers and the designed introduction of the missiles in the hemisphere as "an explicit threat to the peace and security of all the Americas"[235] that called for the defence of the threatened security.[236] The US measures were taken and presented as legitimate, but views differed regarding the applicable legal basis.[237] The apparently legitimate exercise of a right by the USSR was hence opposed by the US measures claimed to be legitimate.

The US measures might have constituted an unlawful threat of force if appraised by standards arguably applicable to the prohibition of the threat or use of force relating to conventional arms. The cargo shipped by the USSR to Cuba, which at the time of the proclamation of the "quarantine" was still heading towards its destination, would not have amounted then to a prohibited threat of force;[238] even anticipatory self-defence, in the circumstances, would have been too remote to serve as

232 Cf. Q. Wright, "The Cuban Quarantine", 57 *AJIL*, 1963, pp. 556–7.

233 As regards Cuba, see ibid., p. 558 about the possible validity of the OAS resolution of 23 Oct. 1962.

234 DSB, *supra* n. 230, p.715; see also pp. 722–3 for the resolution of the Council of the OAS.

235 Ibid., p. 715.

236 See ibid. p. 716.

237 The US did not specifically base its action on Art. 51 of the Charter nor on self-defence in general, but apparently on Art. 6 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty of 1947, – *UNTS* Vol. 21, p. 77). The terms of that Art. are not confined to armed attack. – See A. Chayes, "The Legal Case for U.S. Action on Cuba", DSB, *supra* n. 230, pp. 764–5; L.C. Meeker, "Defensive Quarantine and the Law", 57 *AJIL*, 1963, p. 523. The "quarantine" has been described as a permissible new legal rule (C.Q. Christol and C.R. Davis, "Maritime Quarantine : The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962", 57 *AJIL*, 531, 543), as an "intermediate" situation between aggression and defence (W. Friedmann, "United States Policy and the Crisis of International Law", 59 *AJIL*, 1965, pp. 864–5), and as a measure of self-defence (C.G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal?" 57 *AJIL*, 1963, p. 592; B. MacChesney, "Some Comments on the "Quarantine" of Cuba", ibid., pp. 596–7; R. Tucker, "Reprisals and Self-Defense: The Customary Law", 66 *AJIL*, 1972, p. 588.)

238 See *supra* chapter 5, p. 140.

justification.[239] And the *de facto* blockade of Cuba would probably have been unlawful.[240] It is, however, doubtful that these standards of appraising the presence or absence of an unlawful threat by, or use of, conventional force would be fully valid in regard to a suspected consignment of constituents of weapons of mass destruction, and to the build-up of such weapons on Cuban territory.[241] These type of weapons do not appear to have been actively envisaged at the drafting, debate and adoption of the Charter rules on the prohibition of force, and to apply to their alleged threat or use standards of appraisal suitable to conventional weapons – the weapons envisaged by the Charter – might prove to be inconsistent with their destructive potential as well as the scope of the Charter's prohibition of force. What might be appraised as constituting an unlawful threat by these weapons might not be similarly appraised as regards conventional weapons. Likewise, the time when an actual use of these weapons could be said to have occurred might be different from that of conventional weapons.[242]

The manufacture and stockpiling of weapons of mass destruction is not prohibited;[243] so long as the existence of these weapons is legally unhindered, the standard that may be suitable for the appraisal of a threat by, and use of, conventional weapons would appear to be unsatisfactory for the assessment of an alleged threat by, and use of, weapons of mass destruction. This would mean that the latter weapons would necessarily have a particular niche in international law that would be responsive to the destructive potential they possess. Contemporary

239 See *infra* chapter 7, p 222 *et seq.*

240 Cf. Q. Wright, *supra* n. 232, pp. 554–6.

241 Regarding the destructive potentials of the weapons in question, N. Khrushchev had said, *inter alia*, in his message of 28 Oct. 1962 to J.F. Kennedy that "I regard with great understanding your concern and the concern of the United States people in connection with the fact that the weapons you describe as offensive are formidable weapons indeed. Both you and we understand what kind of weapons these are." – DSB, *supra* n. 230, p. 743.

242 Cf. *Repertory*, Vol. II, 1955, pp. 434–5, paras. 12–4 re the First Report of the Atomic Energy Commission, 31 Dec. 1946. The Commission had recommended that "an international system of control and inspection should be established...by a treaty or convention" – [ibid., para. 14] – and that "[i]n consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations". – Ibid.

243 Under the terms of Art. II of the Treaty on the Non-proliferation of Nuclear Weapons, which came into force on 5 March 1970, it is the non-nuclear-weapon States that have undertaken as signatories "not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices". And according to the terms Art. X, each party has a right of withdrawal by alleging "extraordinary events, related to the subject matter of this Treaty, [to] have jeopardized the supreme interests of its country". – *UNTS* Vol. 729, p. 161. See also *SIPRI Yearbook* 1988, pp. 554–68 for the parties to the treaty.

international law would thus comprise two tiers of standards: one for assessing the occurrence of a threat or use of force in situations involving conventional weapons, and another for a similar assessment in cases of weapons of mass destruction.[244] This seems to be discernible in the US action in the Cuban missiles incident and in the attitude of other States towards that action.

Finding itself in a situation involving weapons of mass destruction, the US did not appear to have considered itself to be required to meet the standards appropriate for determining the existence of an unlawful threat or use of force in situations involving conventional weapons. Its attitude thus amounted in effect to a particular construction of the prohibition of force as it related to weapons of mass destruction. The other States, too, which aligned themselves with the US position, appeared to have subscribed to such a special standard of assessment.

It should be observed here additionally that in view of the universal alarm caused by weapons of mass destruction,[245] the USSR's attempt to introduce such weapons into Cuba – a State not on friendly terms with many of its neighbours – would appear to have been pernicious to international peace, which all Members of the UN have the duty to keep, or assist in keeping, in good faith. This would appear to be particularly called for as regards the veto-possessing Members on whom the maintenance of international peace and security has been primarily placed.[246] The USSR's alleged right would thus appear to have been inconsistent with the purposes of the UN so as to strengthen the US position.

244 So long as weapons of mass destruction exist and keep being improved, the question of whether or not they are legal would serve no practical purpose in the consideration of the contemporary rules on the non-use of force. See *SIPRI Yearbook 1988*, pp. 24, 33, 36–59 about the recorded arsenal of nuclear weapons in the world.

245 See, e.g. GA resol. 1653 (XVI), 24 Nov. 1961, as an indication of the general attitude of States towards weapons of mass destruction in the few months preceding the Cuban missiles crisis. The fourth preambular para. says "that the use of nuclear and thermo-nuclear weapons would bring about indiscriminate suffering and destruction to mankind and civilization to an even greater extent than the use of those weapons declared by the aforementioned international declarations and agreements [Declarations of St. Petersburg of 1868 and of the Brussels Conference of 1874, the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925] to be contrary to the laws of humanity and a crime under international law". And according to para. 1(a), "[t]he use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations." Cf. the technical description of nuclear-weapons' effects, in *Comprehensive Study on Nuclear Weapons, Study Series* 1, *Disarmamenmt*, 1981, (UN publication) Sales, No. E.81.I.11, pp. 153–170.

246 See Arts. 23(1), 24(1), 27(3), 106 of the Charter.

The support for the US position, the USSR's reluctance to contest by force that position, and the fact that the crisis was peacefully defused to the great relief of the protagonists and the rest of the world, would therefore set a precedent[247] and indicate an emerging acknowledgement of a different standard of assessment for the threat or use of force posed by weapons of mass destruction.

Whatever other designation they may be given, in the specially construed context of the threat of nuclear weapons in which they figured, the legal base of the US measures would properly appear to be self-defence, which was implemented by a threat of force.

6.2.4.2 Protection Within the Jurisdiction of Other States

Thus far, the study of the protection of property and other rights has related to their forcible defence and assertion, respectively, at a place under the jurisdiction of no other State, or in a strait constituting the territorial waters of a State. Apart from the latter instance, the situation would be different where State jurisdiction is involved, for then the protection might necessitate the forcible infringement of the territorial integrity of the particular State. But the probable consequences of such forcible intervention on life and property in the target State might not be commensurate with the property sought to be protected and the right asserted;[248] and this fact would speak against the lawfulness of the intervention. Nonetheless, some extreme cases could probably justify forcible intervention. If an appreciable quantity of gold, vital, for instance, for the foreign financial transactions of an economically weak State, were highjacked and taken to another State which was unwilling to return the valuable property, it would be difficult to deny the proprietor State the right of forcible recovery where other alternatives became unfeasible. Similarly, if the only batch of food and medicaments destined to a disaster area in a particular State were forcibly diverted to another State, the first State, in the absence of other prompt alternatives, would appear justified if it forcibly retrieved those necessities of life from the jurisdiction of the second State. It could be possible to envisage other examples, but suffice it to observe that the lawfulness of both the forcible

[247] Israel was to make its own particular construction of the prohibition of Art. 2(4) in the *Osiraq* case, but it was met with general disprobation. – See *infra* chapter 7, p. 227 *et seq.*

[248] Cf. D.W. Bowett, in *op. cit.*, A. Cassese ed., *supra* n. 169, p. 48.

defence of property and assertion of right in another State will depend on the value they will be generally acknowledged to possess at any one time.

In sum, the political independence of States is protected in its internal and external manifestations by Art. 2(4). In the circumstances indicated in the preceding paragraphs, such protection would consequently legitimize the forcible defence of nationals and property – whether at home or abroad, when subjected to an unlawful threat or use of force – and the assertion of unlawfully denied rights. The unilateral forcible acts of defence so legitimized would constitute self-defence as either concerning the "self" in its entirety or its components. As will be elaborated in the next chapter, self-defence thus viewed will indicate the scope of that concept not to be restricted to actual cases of armed attack.

6.3 The Purposes of the UN

The unlawful acts of force against a State's territorial integrity or political independence or both, thus far considered, would be *ipso facto* inconsistent primarily with the purposes of maintaining international peace and security, and of developing friendly relations among nations. This section will be limited to underscoring the principal points of the purposes relating to the prohibition of force; it will hence be brief.

Art. 2(4) protects the purposes of the Charter from the threat or use of force which is inconsistent with them. The purposes "constitute the *raison d'être* of the Organization",[249] and stand enumerated under the four paragraphs of Art. 1. Although no hierarchy is indicated clearly, the maintenance of international peace and security appears the more basic amongst them[250] and the nearest to the international use of force; it also comprises both ends and means.

The Charter seeks to maintain international peace and security by means of collective measures that would prevent or remove threats to the peace, and suppress aggression or other breaches of the peace.[251]

249 6 *UNCIOD*, p. 447.

250 In *Certain Expenses of the United Nations*, the ICJ has stated thus: "The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition." – *ICJ Reports* 1962, p. 168. See also L.M. Goodrich, E. Hambro and A.P. Simons, *supra* n. 12, pp. 25–6; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. III, 1976, p. 139.

251 H. Kelsen holds breaches of the peace to embrace acts of aggresssion, and the express reference to aggression to be superfluous. – *The Law of the United Nations*, 1950, p. 14. This would be so if aggression was reserved to cases of the use of armed force. But in instances of other types of coercion

Prevention would here assume a foresighted action that would provide for the non-occurrence of a threat to the peace; and removal would normally relate to a materialized threat. The satisfactory prevention or removal of threats to the peace and suppression of breaches of the peace would evidence the effectiveness of the collective measures, which would consequently obviate unilateral action.[252]

The prevention of the threat to the peace is aided by the collective effort to adjust peacefully or settle situations or disputes that might lead to a breach of the peace,[253] and by the various endeavours of the Organization to strengthen universal peace. These peaceful processes are legally required to be accomplished in accordance with the principles of justice and international law. The principles would be those having valid existence at any one time, and serving the needs of that period.[254] They thus speak of and confirm the adaptability of the Charter – an instrument of indefinite duration – to the demands of different situations, and their inclusion within the provisions of the purposes testifies against the rigidity of the Charter.[255]

A threat to the peace or breach of the peace might not be occasioned solely by physical force. Non-physical means of coercion, discussed in the previous chapter, which might seriously affect the protected basic values of States, could also cause a threat to the peace or occasion its breach. This phenomenon would further suggest that the term "force" in Art. 2(4) should not be rstricted to armed or physical force.[256]

Even where an illegal threat or use of force involves only two States and has no extended effect that practically interferes with the general peace and enjoyment of rights by other States, the violation of the norm in Art. 2(4) would in fact constitute, depending on the nature of the illegal act, a threat to the peace, breach of the peace or act of aggression as between the involved States. That the Security Council might not

that may be determined to constitute an act of aggression, it would appear that the peace may be threatened but not breached if armed countermeasures are not undertaken. See *supra* chapter 5, p. 106 *et seq.*

252 See *supra* chapter 3, p. 45 *et seq.*

253 Not all disputes apparently are legally required to be settled. See Art. 2(3) of the Charter.

254 New principles might emerge from time to time. See, e.g. Arts. 53 and 64 of the Vienna Convention on the Law of Treaties, *supra* n. 67.

255 See *supra* chapter 3, p. 59 *et seq.*

256 E.g. para. 1 of GA resol.110 (II), 3 Nov. 1947, "*condemns* all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression". See, further, GA resols. 381 (V), 17 Nov. 1950; 819 (IX), 11 Dec. 1954.

consider such isolated occurrences as justifying a determination under Art. 39 of the Charter of the existence of a threat to, or breach of, the peace affecting other States[257] would not make these occurrences any less threats to, or breaches of, international peace vis-à-vis the antagonists. And in the event of claims and counter-claims, the Security Council, where appropriate, might make a determination of the existence of aggression and allocate legal responsibility.

The illegal threat or use of force in international relations, whatever may be considered the scope of the basic State values of territorial integrity and political independence, would obviously be inconsistent in the first place with the purpose of maintaining international peace and security and of strengthening universal peace. If, for instance, in the Cuban missiles crisis, the USSR could have been viewed as engaged in a legitimate act, the US "quarantine" would have been an illegal use of force against the exercise of a right flowing from the USSR's political independence, and would have also been inconsistent with the UN purpose of maintaining international peace and security. The very exercise of the USSR's right, however, was flawed by the dubious legality of that State's objective of supplying Cuba with nuclear arms, which created a sense of a particularly construed threat within the membership of the OAS, and hence a threat to the peace of the region and beyond, as to make the venture inconsistent with the purpose of maintaining international peace and security.[258] Further, in cases where the plea of absence of designs on a State's territory or independence is advanced after an unlawful forcible violation of its territorial integrity,[259] the forcible act – even if the plea may be factually correct – would still come within the prohibition of Art. 2(4) as being primarily inconsistent with the purpose of maintaining international peace and security.

The forcible maintenance of international peace and security, i.e. peace enforcement, is the legal responsibility of the UN. Unless authorized by the Security Council, States, singly or organized in groups, would not be entitled to undertake on their own, and outside the scope of individual or collective self-defence, forcible measures for an alleged maintenance of peace and security. In this regard, unauthorized forcible measrues undertaken by regional organizations would constitute a use of

257 Cf. H. Kelsen, *supra* n. 251, pp. 727–8.

258 See *supra* p. 188 *et seq.* for the discussion of the missiles crisis.

259 See *supra* p. 149 *et seq.*

force that is inconsistent with the UN purpose of maintaining international peace and security and that is consequently violative of Art. 2 (4). Art. 53(1) of the Charter is specific in this respect; it provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy State...".[260] Members of the UN and other States cannot encroach on the domain specially reserved for the UN before the purposed maintenance of international peace and security becomes ineffective, and thereby causes decentralization by default in place of the centralization originally conceived at the San Francisco Conference.[261]

As regards self-determination, which under the legal régime of the Charter has made a notable development as a right,[262] the use of force to deprive peoples of that right, or to affect the integrity of their territorial base, would be inconsistent with the purposes of the UN.[263] The expression "international relations" should in such cases be viewed as accommodating within its scope such use of force against a particular people who would be assimilated to subjects of international law for purposes of the prohibition of force.[264]

The purposes of the Charter are the guiding light of the UN; and since an illegal threat or use of force by States in their relations is *ipso facto* inconsistent with these purposes,[265] it would in effect amount to a threat or use of force against the UN, and cause the implementation of the Organization's remedying authority. Until the UN intervenes

260 Cf. *supra* chapter 5, n. 18.

261 See, e.g. 6 *UNCIOD*, p. 459; 11 *UNCIOD*, pp. 233–5.

262 See *supra* chapter 4, pp. 71, 75. K. Obradovic, "Prohibition of the Threat or Use of Force", in *Principles of International Law Concerning Friendly Relations and Cooperation*, 1972, M. Sahovic ed., p. 123

263 See, e.g. the following GA resols. which declare the activities they relate to as being, *inter alia*, incompatible with the purposes of the UN: 1514 (XV), 14 Dec. 1960 (Declaration on the granting of independence to colonial countries and peoples), re any attempt at the partial or total disruption of the national unity and the territorial integrity of a country; for essentially similar lines, 2709 (XXV), 14 Dec. 1970; 2646 (XXV), 30 Nov. 1970 (Eliminaiton of all forms of racial discrimination), re the characterization of racism and *apartheid* as the total negation of the purposes of the Charter; along similar lines, 2784 (XXVI), 6 Dec. 1971; 3117 (XXVIII), 12 Dec. 1973, re economic or another activity which impedes the implementation of resol. 1514 (XV); 2949 (XXVII), 8 Dec. 1972, re changes effected in the physical character or demographic composition of occupied territories.

264 See *supra* chapter 3, p. 68; chapter 4, pp. 72–3, 81–2.

265 See, e.g. para. 5 of GA resol.193 (III) A, 27 Nov. 1948 where aid given by Greece's neighbouring States to Greek guerrillas was declared inconsistent with the Charter purposes; similarly, para. 1, 288 (IV) A, 18 Nov. 1949.

authoritatively in such cases, however, or upon its failure to do so, unilateral use of force exercised as a measure of self-defence, and inevitably permitted a scope that is adjusted to reflect the Organization's degree of effectiveness, will take place.

We shall consider in the next chapter self-defence and necessity as exceptions to the prohibited unilateral threat or use of force.

Chapter 7

The Exceptions

Recurring reference has been made to the exceptions of self-defence and necessity during the discussion of the various aspects of the prohibited threat or use of force undertaken in the preceding chapters. As already indicated, the prohibition of Art. 2(4) is not, and cannot, be absolute:[1] a certain degree of self-help, primarily in the form of self-defence, would be inevitable until the remedial action envisaged in the Charter can be executed;[2] and a state of necessity would *ipso facto* negate the grounds requisite for the normal observance of the prohibition as to excuse its deliberate breaches.[3] Inasmuch as these exceptions affect the scope of the prohibited unilateral threat or use of force, they need to be given due consideration. Moreover, since under contemporary international law on non-use of force self-defence is posited as the only justifiable resort to unilateral force, it assumes great significance in the appreciation of the scope of the prohibition.[4]

The provisions of the Charter relating to action and measures against ex-enemy States, too, are exceptions to the prohibition.[5] But as they constitute a special category and are probably anachronistic, it will not be necessary for the purpose of this chapter to dwell on them.

1 See the Judgment of the International Military Tribunal for the Far East (Tokyo), *ADRPILC*, 1948, p. 364 where it is stated that "any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defence". See also the *Nicaragua v. USA* case, Merits, *ICJ Reports* 1986, para. 193; *supra* chapter 6, p. 145.

2 See, e.g. 11 *UNCIOD*, pp. 53 and 59 for the respective statements of Vandenberg and Paul-Boncour at Commission III in connection with the draft self-defence provisions of the present Art. 51 of the Charter.

3 See *infra* p. 230 *et seq.*

4 Cf. H. Kelsen, *Principles of International Law*, 2nd rev. ed., by R.W. Tucker, 1966, p. 65.

5 See Arts. 53, 107; *supra* chapter 5, n. 18.

7.1 Self-Defence Under the Charter and Art. 51

As a viable legal concept, self-defence, which is one of the fundamental principles of international law,[6] is intrinsically linked to the legal prohibition of the use of force. The prohibition of force preserves *per se*,[7] it is submitted, the exception of self-defence. The latter emerges simultaneously with the distinction between legal and illegal force; its existence is not affected by the time factor of its exercise, which can be immediate or delayed depending on the compelling nature of the circumstances giving rise to its exercise; its scope can be legally restricted and the manner of its exercise regulated to reflect the degree of the effective implementation of the organized world's attempt at centralizing the international use of force, but it cannot be feasibly eliminated. As a right brought forth by the same prohibition of an illegal use of force, it does not need any special provision for its existence.[8] Just as the interdiction of the resort to war in the manner provided by the Covenant of the League of Nations and the Pact of Paris took self-defence to be an implicit right, and left it not only unimpaired, but established it more firmly as a legal notion,[9] so, too, might it have been assumed unnecessary

6 See, e.g. D. Nguyen Quoc, P. Daillier, A Pellet, *Droit international public*, 3e éd., 1987, p. 814; G. Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed., 1976, p. 36; N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, 1989, p. 86. Cf. A. Cassese, *International Law in a Divided World*, 1986, p. 230; D.P. O'Connell, *International Law*, Vol. 1, 2nd ed., 1970, p. 315.

Moreover, according to R.Y. Jennings, "[i]t was in the *Caroline* case that self-defence was changed from a political excuse to a legal doctrine". – "The *Caroline* and McLeod Cases", 32 *AJIL*, 1938, p. 82.

7 See, e.g. Report of Rapporteur of Committee 1 to Commission I, 6 *UNCIOD*, p. 459 where it stands stated that "[t]he use of arms in legitimate self-defense remains admitted and unimpaired"; Ch. Rousseau, *Le droit des conflits armés*, 1983, pp. 577–9; J. Combacau, "The Exception of Self-Defence in U.N. Practice", in *The Current Legal Regulation of the Use of Force*, A. Cassese ed., 1986, p. 11; J.L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations", 41 *AJIL*, 1947, p. 876; D.W. Greig, *International Law*, 2nd ed., 1976, p. 895.

8 To maintain in this regard that "[a]n express provision permitting the use of force in self-defense is necessary only within a legal order which generally prohibits the use of force in self-help" – H. Kelsen, *supra* n. 4, p. 61 – would appear to be at variance with the legal phenomenon that engenders the right of self-defence. Were self-defence to be considered as legally denied unless expressly permitted under a legal régime prohibting force, the resultant situation would be anomalous, for the absence of protection by self-defence – whatever its worth – would mock the rights that the prohibition of force intended to protect.

9 See *supra* chapter 2, p. 33. E.g. in the US Note of 23 June 1928 covering the revised draft of a multilateral treaty for the renunciation of war (a Note recognized "as correctly expressing the views of all the original signatories", – M Gonsiorowski, "The Legal Meaning of the Pact for the Renunciation of War", XXX *APSR*, 1936, p. 661), it has been stated "that the right of self-defense is inherent in every sovereign state and implicit in every treaty. No specific reference to that inalienable attribute of sovereignty is therefore necessary or desirable." – 22 *AJIL*, 1928, OD, p. 111. See, further, e.g. M. Gonsiorowski, *op. cit.*, pp. 664–5; J. Ray, *Commentaire du Pacte de la Société des Nations*, 1930, p. 370; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81

to provide expressly for it in the Dumbarton Oaks Proposals,[10] which constituted the working paper at the UNCIO at San Francisco.

Nonetheless, a draft text on self-defence[11] was later introduced at the Conference as an amendment agreed to by China, France, the UK, the US and the USSR and dealt with by Committee III/4, whose assigned task was the preparation of draft provisions on regional arrangements. The Committee approved a draft passed by Subcommittee III/4/A,[12] which was later unanimously adopted by Commission III.[13] The place of the new draft text in the Charter caused a difference of views at the Committee debates. The delegate of the USSR, in particular, felt that inasmuch as the new Article dealt not only with Members' right of self-defence but also with their duties, its proper place should be under Section B – Determination of Threats to the Peace or Acts of Aggression and Action With Respect Thereto, Chapter VIII – of the Dumbarton Oaks Proposals;[14] and after some verbal adjustments,[15] the text was inserted at the end of Chapter VII as Art. 51.

Art. 51 is formulated in the following terms:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authortity 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.

We shall first consider the Article as a whole.

RCADI, 1952-II, pp. 476–7. Cf. E. Giraud, "La théorie de la légitime défense", 49 *RCADI*, 1934-III, p. 715; J. Zourek, "La notion de légitime défense en droit international", 56 *AIDI*, 1975, p. 53.

10 See R.B. Russell and J.E. Muther, *A History of the United Nations Charter*, 1958, p. 696 where J.F. Dulles is reported to have argued that there was nothing in the Dumbarton Oaks Proposals that prohibited self-defence.

11 See A. Cassese, "Article 51", in *La Charte des Nations Unies*, J.-P. Cot and A. Pellet eds., 1985, p. 772; L.M. Goodrich, E. Hambro, A.P. Simons, *Charter of the United Nations*, 3rd rev. ed., 1969, pp. 343–4; R.B. Russell and J.E. Muther, *supra* n. 10, pp. 693–704 for the background of Art. 51.

12 See 12 *UNCIOD*, p. 680.

13 See 11 *UNCIOD*, p. 60.

14 See 12 *UNCIOD*, p. 683.

15 See the texts in ibid., p. 680 and 15 *UNCIOD*, p. 188.

7.1.1 An Overview of Art. 51

Whatever may be viewed as a valid ground for its exercise, self-defence under the Charter is an interim measure of unilateral use of force, which States resort to at their own risk.[16] Art. 51 formally curtails the right of any State to be the sole judge of the cause giving rise to its claimed self-defence and subjects Members to the obligation of reporting immediately measures taken in self-defence. The duty of reporting may be taken as a procedural necessity that would enable a functioning Security Council to be seized of a threat to or breach of the peace in order to take timely action for the maintenance of international peace and security.[17] The duty falls on the party claiming to act in self-defence, and if each of the antagonists to a conflict pleads self-defence, then each, if a Member of the UN, would clearly be under the duty. This obligation unveils the process that legally makes self-defence an interim unilateral measure subject to the authority of the UN; once the Security Council decides on the claimed self-defence and takes or authorizes effective action, community measures substitute those of the unilateral self-defence and cause the latter to exhaust its legality. How effectively the decision of the Security Council has been implemented, i.e. how effectively international peace and security has been restored or maintained, will have to rest with that organ if the issue is not to revert to unilateral assessement and resolution.

The interim status of self-defence, in the present writer's view, would still have been recognizable even if the provisions of Art. 51 were absent.[18] The Security Council's competence under Art. 39 to take cognizance of instances of threat to or breach of the peace caused by any unilateral threat or use of force would not have been diminished by the absence of an explicit provision that required the reporting of measures taken as self-defence. That organ would still have been able to exercise valid jurisdiction and determinative authority over such instances; and that exercise of authority would have affirmed the interim status of those instances of unilateral resort to force pleaded as self-defence.

16 D. Nguyen Quoc, P. Daillier, A. Pellet, *supra* n. 6, p. 816; G. Schwarzenberger, "The Fundamental Principles of International Law", 87 *RCADI*, 1955-I, pp. 342–3.

17 Cf. the *Nicaragua v. USA* case, *supra* n. 1, para. 200.

18 See also *infra* pp. 229–30.

In other respects, whether Art. 51 reserves or declares the customary right of self-defence,[19] or confers the right of self-defence,[20] and whether the Article restricts the scope of self-defence to cases of armed attack,[21] or encompasses also imminent cases of attack and other forms of coercion,[22] are debated issues.[23] The advocates of the declaratory character of the Article normally assign to self-defence a scope wider than that advocated by those who subscribe to the literal construction of the Article. On account of its provision on collective self-defence, some consider the Article to enlarge the right of self-defence,[24] while others take it both to restrict and extend the right because of the limiting effect of the specified armed attack and the extending effect of the permitted collective self-defence.[25] As indicated earlier, the reason for such seemingly irreconcilable views can be found in the fact that self-defence is the only justified use of unilateral force under the legal order of the Charter. The adherents of the restrictive interpretation would hope to

[19] See, e.g. the *Nicaragua v. USA* case, *supra* n. 1, para. 176; Report of the Special Committee on the Question of Defining Aggression, UN Doc. A/8019, para. 71; R.L. Bindschedler, "La délimitation des compétences des Nations Unies", 108 *RCADI*, 1963-I, p. 397; J.E.S. Fawcett, "Intervention in International Law", 103 *RCADI*, 1961-II, p. 360; J. Stone, *Aggression and World Order*, 1958, p. 195; C.H.M. Waldock, *supra* n. 9, p. 501.

[20] See, e.g. H. Kelsen, *The Law of the United Nations*, 1950, pp. 792, 914; E.J. de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI*, 1978-I, p. 96.

[21] See, e.g. I. Brownlie, *International Law and the Use of Force by States*, 1963, pp. 271, 275; B-O Bryde, "Self-Defence", 4 *EPIL*, 1982, p. 214; A. Cassese, *supra* n. 6, p. 230; H. Hohmann and P.J.I.M. de Waart, "Compulsory Jurisdiction and the Use of Force as a Legal Issue: The Epoch-Making Judgment of the International Court of Justice in Nicaragua v. United States of America", 34 *NILR*, 1987, p. 184; H. Kelsen, *supra* n. 20, pp. 269, 797–8; S.B. Krylov, in 48th *Report of ILA*, 1958, p. 512; 2 Oppenheim, p. 156; K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", in *Manual of Public International Law*, M. Sørensen ed., 1968, p. 767; N. Singh and E. McWhinney, *supra* n. 6, pp. 87–92; G.I. Tunkin, *Theory of International Law*, (W.E. Butler's trans.), 1974, p. 523; B. Johnson Theutenberg, *Folkrätt och säkerhetspolitik*, 1986, pp. 391–3; A. Verdross, "Idées directrices de l'organisation des Nations Unies", 83 *RCADI*, 1953-II, p. 59; J. Zourek, *L'interdiction de l'emploi de la force en droit international*, 1974, p. 98.

[22] See, e.g. D.W. Bowett, *Self-Defence in International Law*, 1958, pp. 188, 191–2; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 203; D.W. Greig, *supra* n. 7, p. 893; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, 1961, pp. 126, 235, 236, n. 260; J. Stone, *Conflict Through Consensus*, 1977, p. 48; C.H.M. Waldock, *supra* n. 9, pp. 497–8. Cf. M. Reisman, *Nullity and Revision*, 1971, pp. 838–9, 841 re contemporary self-help and self-defence; J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. 1, 1968, p. 242 re instances of self-defence, other than those based on armed attack, said to be licit.

[23] See, e.g. R. Ago, "State Responsibility", *YILC*, 1980, Vol. II, Part One, pp. 65–6, para. 113; K. Skubiszewski, "The Postwar Alliances of Poland and the United Nations Charter", 53 *AJIL*, 1959, pp. 627–8; A.V.W. Thomas and A.J. Thomas, *Non-Intervention. The Law and Its Import in the Americas*, 1956, pp. 123–5; 12 *Digest of International Law*, M.M. Whiteman ed., 1971, pp. 44–55, 77–84, 117–128.

[24] See, e.g. 2 Oppenheim, pp. 155–6.

[25] See, e.g. R.W. Tucker, "The Interpretation of War under Present International Law", *4 ILQ*, 1951, p. 29.

minimize the international use of force by their strict textual construction,[26] while the others would presume the continued effectiveness of the traditional right of self-defence in the absence of clearly superseding treaty stipulations.[27]

As regards the ICJ, although it did not treat fully the question of self-defence under Art. 51 in the *Nicaragua v. USA* case – it did not, for instance, find that it was called upon to express an opinion on "the issue of the lawfulness of a response to the imminent threat of armed attack"[28] – it nonetheless seemed to confine the exercise of that right to cases of armed attack.[29] Concerning other cases of use of force, which it characterized as being of lesser gravity than armed attack, as for instance, assistance given to rebels,[30] it allowed that they, too, might breach both principles of non-intervention and non-use of force[31] and justify not the exercise of collective self-defence but the resort to proportionate countermeasures by the victim State alone.[32] Nevertheless, it did not consider the scope of the countermeasures to be in issue and left undetermined the range of the means available under that title to the victim State. This would appear to indicate that the Court did not wish to discard the use of physical force as one of the legitimate means available to the victim State.[33]

These views of the Court, which were expressed in connection with customary international law, but which also necessarily reflected on the construction of Articles 2(4) and 51 of the Charter,[34] have been met with certain reservations,[35] and it seems unlikely that they will help settle the controversy surrounding the ascertainment of the scope of self-defence under the Charter.

26 See, e.g. O. Bring, *Folkrätten och världspolitiken*, 1974, p. 75; L. Henkin, *How Nations Behave*, 1979, p. 143.

27 See, e.g. D.W. Bowett, *supra* n. 22, pp. 184–5.

28 *Supra* n. 1, para. 194.

29 See, e.g. ibid., paras. 193–5, 211, 2332, 249.

30 See ibid., para. 195.

31 See ibid., paras. 205, 209.

32 See ibid., para. 249.

33 See ibid., para. 210.

34 *See supra* chapter 5, p. 125.

35 See, e.g. T.M. Franck, "Some Observations on the ICJ's Procedural and Substantive Innovations", 81 *AJIL*, 1987, pp. 119–121: the author considers the Court's opinion "most troubling" (at p. 119); J.L. Hargrove, "The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defense", ibid., pp. 139–143: the author considers that "the law of force and self-defense as it emerges from the Court has become highly arbitrary, intricate and technical, but at the same time more uncertain" (at p. 143).

As to whether Art. 51 is the sole source of the right of self-defence under the Charter, it appears necessary to indicate the existence of implicit and explicit sources of the right under that instrument. In the present writer's view, the legality of self-defence is implicit in the prohibition of Art. 2(4),[36] and Art. 51 might be considered as making explicit an aspect of that right and providing certain procedural constraints relating to its exercise.[37] In this regard, the ICJ seems to have acknowledged in the *Nicaragua v. USA* case two sources of unilateral reaction to an unlawful use of force. It has allowed proportionate countermeasures for a State victim of an unlawful forcible intervention, which the Court interpreted not to constitute an armed attack, and self-defence for a State victim of an armed attack. The countermeasures were presumably based on the customary international law rule that corresponds to Art. 2(4), and the self-defence was based on the customary international law rule that corresponds to Art. 51.[38] But as the victim entitled to take proportionate countermeasures could possibly use physical force,[39] it would be difficult to perceive why an unlawful use of force not amounting to an armed attack could be said to entitle only countermeasures and not self-defence.[40] Moreover, the value of such conceptual differentiation is not clear, because, whatever the degree of its intensity, a forcible unilateral act, can be justified only if it constitutes a legitimate exception to the prohibition of force and is exercised within the confines of necessity and proportionality.[41] Since the countermeasures as propounded would be deprived of the kind of collective action permitted for self-defence, and since they have yet to be satisfactorily charted, they would appear to afford victim States less protection than self-defence. They would not constitute an adequate base for the satisfactory exercise of unilateral forcible reaction against an

36 See *supra* p. 199.

37 See *infra* p. 209 *et seq.*

38 See, Merits, *supra* n. 1, paras 195, 211, 249.

39 See ibid., para. 210.

40 See ibid., p. 349, paras. 175–7 for the Dissenting Opinion of Schwebel where it is indicated that there was no plea of counter-intervention before the Court and the opinion on countermeasures was therefore an *obiter dictum*, and that it was erroneous to hold that counter-intervention was applicable where that measure was less efficacious than self-defence.

41 See ibid., (Merits), para. 194 concerning the criteria for the exercise of self-defence; D.W. Bowett, *supra* n. 22, p. 269. Cf. *supra* chapter 2, p. 33, and the *Case Concerning the Air Service Agreement of 27 March 1946 Between The United States of America and France*, 18 *RIAA*, p. 443, para. 83 re the criteria for reprisals and countermeasures.

unlawful use of force considered not to amount to armed attack. It would then rather appear to be consistent with the prohibition of force in international relations to take Art. 2(4) as making legal the exercise of the right of self-defence, which, unless expressly circumscribed, would be available to States in proportion to the degree of any unlawful use of force.[42]

Mention should be made here of the difficulty that would be encountered by construing Art. 2(4) as relating solely to physical force while maintaining that Art. 51 does not limit the exercise of the customary right of self-defence. For instance, D.W. Bowett, who construes the term "force" in Art. 2(4) to apply to physical or armed force, writes thus:

> This does not imply that the independence of a state may not be imperilled by means other than the use or threat of force. In so far as this may be the case, the threatened state may still have the right of self-defence, but the preceding breach of an obligation will be not the breach of Art. 2(4), but of some other duty imposed by international law – in all probability the duty of non-intervention. Against such a breach of duty, given the requirements of the right of self-defence, that right may still be exercised, but the requirement of proportionality, coupled with the obligation of Art. 2(4) and Art. 2(3), would suggest that the defending state should, as a general rule, exercise force only against threats which are delictual under Art. 2(4).[43]

It may be observed, in the first place, that where other modes of coercion are admitted to give rise to self-defence, denying the use of arms when such use might well be proportional to the peril being faced would be to deprive self-defence of effectiveness. Since, however, the author himself states his interpretation to be applicable as a general rule, which would leave sufficient room for exceptions, his view might not in fact disqualify entirely forcible self-defence in those cases of non-physical modes of coercion. It may further be observed that where non-physical modes of coercion – held not to be prohibited by the terms of Art. 2(4) – are sought to be countered by proportionate measures of forcible self-defence, a breach of the prohibition of the use of force would follow. The

[42] Cf. D.W. Bowett, *supra* n. 22, p. 188; M.S. McDougal and F.P. Feliciano, *supra* n. 22, p. 236, esp. n. 260.

[43] *Supra* n. 22, pp. 148–9. See also ibid., pp. 261, 270; R.B. Bilder, who holds the prohibition of Art. 2(4) not to extend to economic coercion, suggests that the use of such coercion to destroy a state or its people may come within Art. 51. – "Comments on the Legality of the Arab Oil Boycott", 12 *TILJ*, 1977, pp. 41–4. But see H. Kelsen, *supra* n. 4, p. 75 and n. 68. Acknowledging the independence of States – a basic value specifically protected by Art. 2(4) – as capable of being imperilled by unilateral and deliberate means other than physical force would signify, in the present view, the inclusion of those other means within the terms of Art. 2(4).

exception that enables the use of armed force in self-defence against physical force – held to be the only type prohibited in Art. 2(4) – could not, without reducing the prohibition to absurdity, be extended to the exercise of self-defence against non-physical modes of coercion held to be excluded from the prohibition of the Article.[44] Otherwise, armed force could be made validly employable under the banner of self-defence against all manner of different types of coercion which the term "force" is interpreted not to comprise, and the State against which an alleged right of self-defence is exercised would be at a loss to discover the prohibited type of force.

Another aspect of Art. 51 that needs to be mentioned relates to the States that appear to come under its provisions. Providing as it does for the self-defence of Members alone, the Article would leave non-Members unaffected by its substantive constraints. This would have the effect of introducing two categories of self-defence: one exercisable by Members only in cases of armed attack against themselves, and another exercisable by non-Members in virtue of the customary right of self-defence against illegal use of force. Unfettered by the substantive and procedural restrictions of Art. 51,[45] and in justified cases, the non-Members' exercise of self-defence might then also involve forcible measures in situations that are anticipatory of armed attack or that constitute non-physical modes of coercion. Lawful measures of forcible self-defence taken by non-Members against Members which had not committed an illegl armed attack under the terms of the Article might be taken by the Members to be an illegal attack. There could then follow a legal conflict between the two different bases of self-defence,[46] which would augur ill for the proper maintenance of international peace and security as formulated in the purposes of the Charter. Besides, the narrower base of self-defence that the restrictive textual interpretation makes available to Members would have the appearance of putting them at a legal disadvantage vis-à-vis non-Members, which was not of course the object of their setting up or joining the UN.

44 Cf. H. Kelsen, *supra* n. 4, pp. 67–8.

45 The ICJ has found the requirement of reporting measures taken in self-defence not to be "a condition of the lawfulness of the use of force in self-defence" under customary international law. – The *Nicaragua v. USA* case, *supra* n. 1, para. 200. In other respects, by saying "Article 51...requires that measures taken by States in...self-defence" [ibid.], the Court seemed to relate the procedural requirement of Art. 51 to all States, whereas the Article's reference is solely to "measures taken by Members". See also A. Cassese, *supra* n. 6, p. 230 where Art. 51 is said to be a general international law.

46 See *infra* n. 65 about the inexistence of a right of self-defence against a lawful exercise of self-defence.

Before closing this general discussion of Art. 51, it is necessary to indicate that the scope of self-defence under the Charter and the construction of Art. 51 should be guided by the Charter's policy on the international use of force.[47] That policy is manifestly the implementation of the UN purpose of effectively maintaining international peace and security by providing, among other things, for the regulation of the unilateral use of force. That regulation was presumed to give States more security. If an interpretation of Art. 51 would result in putting States in a more vulnerable situation vis-à-vis different types of illegal use of force, and hence less secure in their international relations, it would be a disservice to the Charter's policy on the international use of force.[48] The policy, furthermore, would not be fulfilled only by preventing and removing illegal armed attack; other forms of coercion, whose effect on the security of States might be comparable to that of armed attack, would also need to be prevented and removed. Providing for armed attack and leaving other destructive means without the check afforded by self-defence would be an obviously incongruous implementation of the policy; and a strict textual interpretation that fails to reflect fully the policy would necessarily be partially in context. Further still, the fact that there are regular references to armed attack in connection with self-defence in international instruments[49] should not lead to the conclusion that armed attack has thereby preempted other grounds, for had State practice been consolidated enough to confirm armed attack as the sole ground of forcible self-defence, opinions would not have been so freely divided.[50]

It would therefore appear that the foregoing considerations relating to the Charter source of the right of self-defence would militate against taking Art. 51 as the sole source of the exercise of that right.[51] This view will be fruther substantiated when we take a closer look below at the provisions of the Article.

Nevertheless, even though defective in its substantive aspects, the Article is a Charter provision that otherwise retains its validity, and to which effect must be given within the Charter's scheme of the

47 See *supra* chapter 3, p. 42 *et seq.*; McNair, *The Law of Treaties*, 1961, pp. 380–1. The policy of an instrument would be what the author calls in that work "the overall aim and purpose of the treaty" (at p. 380).

48 See *supra* chapter 3, p. 64 *et seq.*

49 See *infra* n. 112.

50 See *supra* chapter 6, p. 178 *et seq.*

51 Cf. 2 Oppenheim, p. 155, n. 2.

apportionment of the lawful use of force on the international plane between the UN and States.

7.1.2 Certain Elements of Art. 51

7.1.2.1 Inherent Right

The characterization of the right of self-defence in Art. 51 as inherent manifests that right's inseparable attachment to States without which statehood, lacking in tangible legal protection, would suffer from a fundamental defect. In its ordinary usage,[52] the term "inherent" conveys the sense of beginning with and existing in someone or some entity. As made explicit in the US Note of 23 June 1928,[53] such appears to be the sense of the term in the practice of that State, which was a leading party in drafting the final text of Art. 51.[54] As can be observed from the absence in the records of the San Francisco Conference of remarks qualifying the term, such also would appear to be the sense accepted by the delegates. The term "inherent" would hence signify and confirm the right of self-defence as part and parcel of statehood: it projects self-defence both as a right that emerges as soon as the constitutive elements of statehood emerge in a legally recognizable format,[55] and as one that is coterminous with statehood. Thus viewed, self-defence would be the product of and beholden to positive law as other attributes of States; and its incorporation in statehood as an integral part thereof by the operation of law would stamp it with the insignia of that law.[56]

52 *The Oxford English Dictionary*, Vol. V, 1933, defines the term inherent, in what would be relevant here, as "[e]xisting in something as a permanent attribute or quality; forming an element, esp. a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of;...". And Webster's *New Twentieth Century Dictionary, Unabridged*, 2nd ed., 1977, defines the term as "existing in someone or something as a natural and inseparable quality, characteristic, or right...".

53 *Supra* n 9. See R.B. Russell and J.E. Muther, *supra* n. 10, p. 965.

54 See 11 *UNCIOD*, p. 58, 12 *UNCIOD*, p. 682 for the tribute paid in this regard to the American delegation.

55 See *supra* chapter 4, p. 85.

56 Cf. the *Nicaragua v. USA* case, *supra* n. 1, para. 176 where the ICJ found "natural" or "inherent" to be of a customary nature; R.L. Bindschedler, *supra* n. 19, p. 397; H. Kelsen, *supra* n. 20, p. 792. To the latter author, "'inherent' right of self-defence...implies that this right exists independently from positive law and hence cannot be altered by it". Cf., further, K. Skubiszewski *supra* n. 23, p. 619; A.V.W. Thomas and A.J. Thomas, *supra* n. 23, p. 123.

The right of self-defence under customary international law was affirmed in the *Caroline* case[57] where the US did not contest in principle the British allegation of self-defence.[58] The case defined the scope and content of self-defence; and the formulation of the classic rules on the necessity of self-defence that it occasioned was in effect a delimitation of the wide and vague notion of self-preservation and a curtailment of self-help.[59] Still, the exact content of the right of self-defence under customary international law appeared unsettled.[60]

Self-defence under an international legal order that did not prohibit resort to war was defective as a legal right. This is because an exercise of lawful self-defence under that legal régime could have been negated by changing the status of the conflict to one of war and bringing about the application of the law of war.[61] But after the resort to war as a national policy was prohibited by the Pact of Paris, the right of self-defence became more secure as a legal right; it now retained its legitimacy even where exercised as war.[62] Under the UN Charter's prohibition of the threat or use of force, which proscribed not only declared or undeclared war but also armed reprisals and other types of unlawful use of force,[63] self-defence as a legal right became even more secure; the field of its exercise became wider in relation to the enlarged prohibition of force.

In the view maintained in this study, the conditioning of the scope of self-defence under the legal régime of the Charter is due to the all-embracing prohibition of Art. 2(4). This Article, which, within the Charter's distribution of the lawful use of force in international relations, affords legal protection to the basic State values of territorial integrity and political independence,[64] necessarily implies the right and interim status of self-defence, and hence serves as a base for the strengthened

57 See *infra* p. 232; R.Y. Jennings, *supra* n. 6, p. 82. But see H. Kelsen, *supra* n. 4, p. 73 where it is maintained to be "very doubtful whether this right ever amounted to much more that a rather vague principle of political morality...". This, however, does not appear to be the prevailing view.

58 See, 3 *Diplomatic Correspondence of the United States, Canadian Relations*, Vol. III, W.R. Manning ed.,1943, p. 140. In his celebrated letter of 24 April 1841, the American Secretary of State Webster wrote to Fox, the British Minister to the US, that "[i]t is admitted that a just right of self-defence attaches always to Nations, as well as to individuals, and is equally necessary for the preservation of both".

59 See, R.Y. Jennings, *supra* n. 6, pp. 91–2.

60 See, e.g. H. Kelsen, *supra* n. 4, p. 74, n.67.

61 See *supra* chapter 2, p. 25.

62 See ibid., pp. 32–3.

63 See *supra* chapter 3, p. 47.

64 See chapter 6, p. 145 *et seq.*

legality of that right. Such strengthened legality could further be observed from the fact that the prohibition of the Article would protect the valid exercise of self-defence against unlawful unilateral use of force: there would be no right of self-defence against valid self-defence.[65]

The right of self-defence, which is thus implicit and better perfected in the prohibition of Art. 2(4), is explicitly recognized in Art. 51 as an inherent right exercisable "if an armed attack occurs". This would be due to the formal proscription by Art. 2(4) of armed attack, irrespective of whether it occurs as a factual war, an armed reprisal, or other categories of the use of arms. But since armed attack is not the only forcible act proscribed by Art. 2(4), that act alone would not comprise the whole content of the prohibited force and exhaust the ground for the lawful exercise of self-defence.[66] It then becomes difficult to see how an explicitly recognized specific ground of self-defence under Art. 51 could be divorced from Art. 2(4), which affords the basis for self-defence, so as to become the independent and exclusive source of self-defence under the Charter.[67] If effect is given to the word "inherent" in Art. 51, the latter would not appear to condition exclusively the ground that would justify self-defence, but to recognize[68] the availability of the inherent right of self-defence in those cases which violate Art. 2(4) and consequently entail the exercise of that right.

Regarding the reference to armed attack in Art. 51, J. Zourek explains in the following terms:

> La Charte des Nations Unies, en autorisant les Etats à recourir, par exception à l'interdiction générale formulée à l'article 2, par. 4, de la Charte des Nations Unies, à la force dans le cas où ils seraient l'objet d'une agression armée, a simplement décrit l'état du droit international qui selon la conviction des auteurs de la Charte existait au moment de la conclusion de la Charte.[69]

In the immediate atmosphere of the Second World War, armed attack was obviously a principal preoccupation of the drafters of the Charter;[70] but international law at that period permitted also self-defence in

[65] See D.W. Bowett, *supra* n. 22, p. 53; J.L. Kunz, *supra* n. 7, p. 877; G. Schwarzenberger, *supra* n. 16, p. 340. Cf. I. Fabela, *Intervention*, 1961, p. 66.

[66] Cf. M.S. McDougal and F.P. Feliciano, *supra* n. 22, p. 237, n. 261 where it is contended that if an armed attack occurs does not mean if, only if, an armed attack occurs.

[67] See *supra* p. 204, re what appears to be the ICJ's views as expressed in the *Nicaragua v. USA* case.

[68] Cf. 11 *UNCIOD*, p. 53.

[69] *Supra* n. 9, p. 53.

[70] See the Preamble of the Charter and Art. 1(1) thereof.

anticipatory situations.[71] This latter fact together with "an admittedly badly drafted article",[72] as Art. 51 is seen by some, would at least indicate the alleged description of the state of international law by the drafters of the Charter to be incomplete.

In sum, the employment of the term "inherent" in Art. 51 appears proper for the express recognition of a fundamental right of States. Even if that term were absent, it is submitted that the right of self-defence would still have been implied under Art. 2(4), and the manner and extent of its exercise regulated by customary international law.[73] Further, as an exercisable right, it would need to reflect the content at any relevant time of the prohibition of force under Art. 2(4) by which it is conditioned.[74] In this regard, self-defence under the Charter would preserve its customary law scope to the extent that it is not seen to be regulated otherwise.[75] Anticipatory self-defence, available under customary international law, for instance, would continue in effect under the Charter in justified cases.[76]

7.1.2.2 Collective Self-Defence

The right of self-defence is exercisable by any State individually or in combination with others. Whereas the individual exercise of the right entails no objection of principle, collective self-defence, a term

[71] See *infra* n. 129.

[72] G. Schwarzenberger, *supra* n. 16, p. 337. See also *infra* n. 160.

[73] See the *Nicaragua v. USA* case, *supra* n. 1, para. 194 re the existence of the right of self-defence "as a matter of customary international law", and para. 202 re the Charter not having been intended to embody "every essential principle of international law in force".

[74] See *supra* chapter 3, p. 63 *et seq.*

[75] See *supra* n. 42.

[76] See the Judgment of the International Military Tribunal (Nuremberg), 41 *AJIL*, 1947, p. 205. The justification for preventive action on foreign territory was rested on the authority of the *Caroline* case. (See *infra* p. 232, about the *Caroline* incident; *op.cit.*, *supra* n. 58, pp. 136–146, esp. at 145 re the stated requirements for the exercise of the necessity of self-defence; *International Law Opinions*, Vol. 2, 1956, McNair ed., p. 228 re the Law Officers' opinion that found the destruction of the *Caroline* to be "absolutely necessary as a measure of precaution *for the future* and not a measure of retaliation for the past".)

And it was stated in the Judgment of the International Military Tribunal for the Far East that "[t]he right of self-defence involves the right of the State threatened with impending attack to judge for itself in the first instance whether it is justified in resorting to force". – *Supra* n. 1, p. 364. It was also stated that "[t]he fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war against Japan on 8th December and thus officially recognized the existence of a state of war which had been begun by Japan cannot change that war from a war of aggression on the part of Japan into something other than that". – 11 *Digest of International Law*, M.M. Whiteman ed., 1968, p. 987. See, further, *infra* p. 222 *et seq.*

formalized by the Charter,[77] has occasioned differing views.[78] J. Stone, for instance, suggests that the reference of "inherent" to collective self-defence be treated as otiose and that Art. 51 be regarded "as itself conferring the liberties there described".[79]

But the drafters of the Charter did not seem to think that they were licensing the introduction of a new mode of resorting to force when they approved the term collective self-defence together with their approval of the draft text of the present Art. 51.[80] Although the Latin American States in particular greeted the approval of the text of the draft Article with felicity and complacence – apparently because they took it to secure recognition and legitimacy for their inter-American system[81] – others took it to apply "to any regional arrangement which might be established in the future",[82] to be "extended in general to cases of mutual assistance against aggression",[83] and to "extend to the League of Arab States".[84] Still others, it would appear, took the draft Article to relate more to the establishment of a procedure for harmonizing the use of force for purposes of self-defence, individual or collective, and for authorized community purposes rather than to relate to the grant of the right of collective self-defence, which seemed to have been viewed as independently available.[85] Further, the insistence by the Soviet Union to have the text placed under Section B, Chapter VIII, of the Dumbarton Oaks Proposals, because it was claimed to concern mainly the governance of rights and duties of Members, was probably due to a view of the text as a source of procedural constraints under which self-defence could be exercised rather than as a source of legitimation of collective self-

77 Cf. A.V.W. Thomas and A.J. Thomas, *supra* n. 23, p. 169.

78 Cf. *supra* ns. 24 and 25.

79 J. Stone, *Legal Controls of International Conflict,* rev. ed., 1959, p. 245.

80 The ICJ has used the terms of Art. 51 to establish "the existence of the right of collective self-defence in customary international law". – The *Nicaragua v. USA* case, *supra* n. 1, para. 193.

81 See 12 *UNCIOD*, pp. 680–1. The American States had recommended in the Inter-American Conference on War and Peace, from which the Act of Chapultepec issued, the conclusion of a treaty for using, among other things, armed force to prevent or repel aggression. – See 39 *AJIL*, 1945, OD, p. 108.

82 The delegate of Uruguay: see 12 *UNCIOD*, p. 681.

83 The delegate of France: ibid.

84 The delegate of Egypt: ibid., p. 682.

85 Ibid., pp. 681–2. The delegate of Czechoslovakia spoke of the effective reconciliation of the two sources of the legitimate use of force. And in contradistinction to the delegates of the Latin American States, he refrained from any special reference to the legitimizing or enabling effect of the approved text.

defence.[86] To the drafters of the Charter, then, collective self-defence appeared an inherent right, which they proclaimed as such. This right was exercisable upon the occurrence of an illegal use of force against one or all memebrs of an *ad hoc* or a standing pact of self-defence.

Entering pacts of mutual assistance for purposes of self-defence is a legitimate object of the exercise of a sovereign right.[87] The organization of such mutually assured undertakings may be perceived as constituting a collective "self" that seeks to bring about better protection to the individual "self". The members would in such event possess a defensible interest in their organization, for the latter might constitute just as important a component of their defence as any of their individual national components,[88] and underscore thereby the significance of the individual-collective "self" syndrome. As such organizational interrelating of the individual rights of self-defence brings forth a close connection between those rights, it could be perceived that when one member falls victim to an illegal use of force, the others, although individually not the immediate victims of the illegal force, come to possess a right of self-defence in both its actual and anticipatory aspects: actual, as regards their organization, and anticipatory, as regards each individually.[89] The more cohesive the collective undertaking is, the closer will be the interrelationship of the individual rights of self-defence.

In other respects, it also appears to follow from the inherent character of collective self-defence that the latter would not enlarge the customary right of self-defence. The explanation for the enlarging effect of Art. 51

[86] Cf. D. Ciobanu, "The Contribution of the Advisory Committee of Jurists to the Drafting of the UN Charter", 53 *Rivista*, 1970, pp. 327–8.

[87] See *supra* chapter 6, p. 157 *et seq.*

[88] See the Dissenting Opinion of Jennings in the *Nicaragua v. USA* case, *supra* n. 1, p. 545. The judge explains that a State "must by going to the victim State's assistance, be also, and in *addition* to other requirements, in some measure defending itself...By such a system of collective security, the security of each member State is meant to be involved with the security of the others; not merely as a result of a contractual arrangement but by the real consequences of the system and its organization". See also J.E.S Fawcett, *supra* n. 19, p. 369; D.W. Greig, *supra* n. 7, p. 900; R.H. Hull and J.C. Novogrod, *Law and Vietnam*, 1968, p. 129; M.S. McDougal and F.P. Feliciano, *supra* n. 22, p. 248; N. Singh and E. McWhinney, *supra* n. 6, pp. 93–4; 2 Oppenheim, p. 156. Cf. D.W. Bowett, *supra* n. 22, pp. 206, 237–8.

[89] The formula holding an attack against a member to be an attack against all members, and found in multipartite defence pacts (e.g. Art. 3 of the Inter-American Treaty of Reciprocal Assistance – *UNTS*, Vol. 21, p. 77 – Art. 5 of the North Atlantic Treaty – *Ibid.*, Vol. 34, p. 243) could be regarded in this manner. But see H. Kelsen, *supra* n. 20, p. 792 where the author, like some others, thinks that there is no "self" in collective self-defence, and takes the latter term to be a misnomer for collective defence. He maintains that '[t]he action on the part of the states which are not attacked, but only assist the attacked state against its agressor, is not exactly "self"-defence'. See also J.E.S. Fawcett, *supra* n. 19, p. 368; J.L. Kunz, *supra* n. 7, p. 875; G. Schwarzenberger and E.D. Brown, *supra* n. 6, pp. 151–2.

on "the right of self-defence as usually understood"[90] given in Oppenheim is

> that a Member of the United Nations is permitted to have recourse to action in self-defence not only when it is itself the object of armed attack, but also when such attack is directed against any other State or States whose safety and independence are deemed vital to the safety and independence of the State thus resisting – or participating in forcible resistance to – the aggressor.[91]

But if the safety and independence of a State illegally attacked are deemed vital to the safety and independence of a third State, which decides to take action against the aggressor directly or through an *ad hoc* or established collective self-defence arrangement, the third State would essentially be forcibly defending its territorial integrity and political independence against a threat of force that the illegal attack on the victim State would in the circumstances constitute. As the threat of force is prohibited under Art. 2(4), and as such threat does not enjoy immunity from the unilateral sanctioning measures that self-defence affords,[92] the threatened third State would then be exercising its legitimate right of self-defence against an illegal threat of force. The fact that the threat may not have been the immediate and direct object of the party resorting to an illegal use of force, and may not have been communicated to the third State as such, would not, it is suggested, make it any less so: it would still be the result of an illegal breach of Art. 2(4) that is indifferent to what it may entail against the protected values of other States. Further, even if the confines of self-defence under customary international law seem unsettled[93] as to make uncertain the full content of "self-defence as usually understood", the right of self-defence of States not direct victims of an illegal attack, yet victims of its consequences, would not appear to be precluded under that law. The legitimacy of anticipatory self-defence under customary international law[94] would appear to vouch for the legitimacy under that law of forcible self-defence against an illegal threat of force. Self-defence, then, does not appear to be enlarged by the express provision of collective self-defence, which would constitute a vehicle for the exercise of an existing right.

[90] 2 Oppenheim, p. 155.

[91] Ibid.

[92] See *supra* chapter 5, p. 138 *et seq.*

[93] See, e.g. R.W. Tucker, "Reprisals and Self-Defense: The Customary Law", 66 *AJIL*, 1972, pp. 587–8.

[94] See *infra* p. 223.

It would follow from the foregoing paragraphs that collective self-defence can be invoked by a State which is a party to such arrangement and which has been made the direct victim of an unlawful use of force. It can also be invoked by other parties to the arrangement which have grounds to consider the unlawful action against the direct victim as an unlawful use of force against their legally protected values, which they sought to safeguard through the collective self-defence arrangement.

This would appear even clearer in instances of an illegal armed attack where, first, the collective self-defence arrangement that constitutes an extension of its members' means of individual self-defence is breached by the illegal use of force, and second, an illegal threat of force against those not direct victims of the attack might be taken to have resulted. If in such situations the exercise of collective self-defence is to be undertaken on the territory of the attacked member, it would appear proper to conclude, as the ICJ held in the *Nicaragua v. USA* case, that "there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack".[95] But if the exercise of collective self-defence is not to take place on the territory of the attacked member, it appears doubtful that the "victim" State's assessment of the factual situation not to constitute an armed attack, and hence to deny the presence of the *casus foederis*, could possess a higher value than a contrary assessment of the same situation by others in the collective self-defence arrangement. Likewise, the assessment of the presence of an armed attack by an alleged victim State alone would not necessarily suffice for bringing about the execution of the provisions of the collective self-defence arrangement. It would therefore appear that in principle, and insofar as it concerns the implementation of the provisions of a collective self-defence instrument outside the territory of a State party to the arragement, that State's prior declaration of being a victim of an armed attack might not possess an absolute character of a condition *sine qua non*.

The ICJ, however, seemed to consider otherwise when it held

[95] Merits, *supra* n. 1, para. 199. It is not clear what form this request should follow, and whether it could not be presumed from the attitude of a victim State, which, far from manifesting an objection to the exercise of the collective self-defence, might show acquiescence in it. The object and purpose of the collective self-defence arrangement might not be better served by subjecting its exercise to certain formal preconditions which, due to various considerations that do not manifest objection, could fail to be observed. – See ibid., paras. 233 and 234 about the attitude of the alleged victims in the instance.

> that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.[96]

This view could hold true as a proposition that denies the exercise of collective self-defence on the territory of a State which has not requested such exercise. It was probably not meant to be a general proposition that fetters the implementation of all aspects of a collective self-defence arrangement to the will of an alleged victim State.

Further, since in the view of the present writer Art. 51 does not exhaust the available right of forcible self-defence implied under Art. 2(4),[97] the scope of that right will depend on the construction of the term "force" in the latter Article.[98] Where that term is taken to mean more than armed or physical force, the self-defence that correspondingly arises from the breach of the prohibition would appear capable of being exercised in grave cases not only individually but also, it is submitted, collectively. This could be accounted for by the inherent quality of self-defence, which is characteristic of both individual and collective self-defence, and which would accordingly be available also in cases that do not constitute armed attack. It might then be difficult to view as generally applicable the ICJ's pronouncement that

> the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack...under international law in force today...States do not have a right of "collective" armed response to acts which do not constitute an "armed attack".[99]

Whether or not the use of armed force in self-defence is justified – whatever the nature of the valid cause giving rise to its exercise – will have to depend on how it responds to the requirements of proportionality,[100] and should not, it is submitted, be disqualified *a priori*.

96 Ibid., para. 195. It should be observed that the collective self-defence might not be used exclusively, as the Court seems to indicate, for the benefit of an attacked State.

97 See *supra* p. 204.

98 See *supra* chapter 5, p. 128 *et seq*.

99 The *Nicaragua v. USA* case, *supra* n. 1, para. 211. See also para. 249.

100 Proportionality is a standard which is necessarily imbued with flexibility; it cannot be resolved solely on an abstract level. Elements that may be particular to a State, such as the resources at its disposal, the effective way of utilizing its means in order not to disrupt unduly their normal and peaceful use, etc., would need to figure in the assessment of proportionality. Cf. D. Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in *United Nations Codification of State Responsibility*, M. Spinedi and

Before closing this section, reference may be made to certain defence pacts and their position vis-à-vis the prohibition of force briefly assessed. Of the collective self-defence arrangements, the North Atlantic Treaty, signed at Washington on 4 April 1949, and in force since 24 August 1949,[101] and the Treaty of Friendship, Co-operation and Mutual Assistance, signed at Warsaw on 14 May 1955, and in force since 6 June 1955,[102] have established organizations which have mustered highly destructive arsenals.[103] These organizations have also assumed leadership in a polarized world, even if at present the Warsaw Pact appears to be on the wane.

Each treaty confirms in its preamble the adherence of its signatories to the purposes and principles of the Charter of the UN. Each treaty reproduces in its Art. 1 the substance of Articles 2(3) and 2(4) of the Charter. Each treaty provides for consultation in essentially similar terms when in the opinion of any of the signatories a threat of force arises. As regards self-defence, Art. 5 of the North Atlantic Treaty provides thus:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

And Art. 4 of the Warsaw Treaty provides thus:

> In the event of an armed attack in Europe on one or more of the States Parties to the Treay by any State or group of States, each State Party to the Treaty shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 of the United Nations Charter, afford the State or States so attacked immediate assistance, individually and in agreement with the other States Parties

B. Simma eds., 1987, p. 183; J. Delbrück, "Proportionality", 7 *EPIL*, 1984, p. 397; R.A. Falk, "The Beirut Raid and the International Law of Retaliation", 63 *AJIL*, 1969, p. 433.

101 *UNTS*, Vol. 34, p. 243.

102 Ibid., Vol. 219, p. 3. The treaty is said to have been "concluded in response to the threat from NATO". – Fifth preambular para. of the Treaty of Friendship, Co-operation and Mutual Assistance Between the Socialist Republic of Romania and the Union of Soviet Socialist Republics, ibid., Vol. 789, p. 115.

103 See, e.g. *NATO and Warsaw Pact Force Comparison, NATO Information Service*, 1984, pp. 7–16, 26–43.

to the Treaty, by all the means it considers necessary, including the use of armed force. The States Parties to the Treaty shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security.

Measures taken under this article shall be reported to the Security Council in accordance with the provisions of the United Nations Charter. These measures shall be discontinued as soon as the Security Council takes the necessary action to restore and maintain international peace and security.

Both these Articles postulate armed attack as the *casus foederis*; they acknowledge the right of individual or collective self-defence under the terms of Art. 51; and they imperatively require measures taken in self-defence to be reported to the Security Council and not to be proceeded with once that organ takes the necessary action to restore and maintain international peace and security. The term "collective self-defence" has not been qualified in either. And since it is stated in the fourth preambular paragraph of the North Atlantic Treaty that the signatories "are resolved to unite their efforts for collective defense",[104] it would appear that no difference of meaning and consequence was intended between collective self-defence and collective defence. Likewise, since it is stated in the second preambular paragraph of the Warsaw Treaty that the signatories reaffirm "their desire to create a system of collective security", the collective self-defence being established appears to be equated with their collective security. Whether designated collective defence or collective security, the arrangement would thus be an extension of the national self-defence set-up of the members and constitute a collective "self". Outside these two treaties, Article IV of the Brussels Treaty of 17 March 1948 [105] also seems to equate collective assistance with self-defence, presumably with the collective self-defence under Art. 51.

Hence, as regards the legal aspects of collective self-defence, State practice as manifested in these treaties would generally appear not to attach any consequential differentiation between collective self-defence,

[104] The term collective defence is used, e.g. in the following instruments: The sixth preambular para. of the Security Treaty Between Australia, New Zealand and the United States of America – *UNTS*, Vol. 131, p. 83; the fifth preambular para. of the Mutual Defense Treaty Between the United States of America and the Republic of the Philippines – ibid., Vol. 177, p. 133; the title and the seventh preambular para. of the Southeast Asia Collective Defense Treaty – ibid., Vol. 209, p. 28. See, further, the seventh preambular para. of the Inter-American Treaty of Reciprocal Assistance for the term "mutual assistance and common defense" – ibid., Vol. 21, p. 77; and the interrelated mention of collective security and the right of individual and collective self-defence in the fourth preambular para. of the Security Treaty Between the United States of America and Japan – ibid., Vol. 136, p. 211.

[105] *UNTS*, Vol. 19, p. 51.

collective defence and collective security.[106] Further, even though these treaties rest the exercise of collective self-defence on the occurrence of an armed attack, it does not necessarily follow from that fact alone that States can be considered to have clearly excluded other grounds from justifying forcible self-defence.[107]

Collective self-defence is now a term and an arrangement well entrenched in the practice of States. Its proliferation portrays the ineffectiveness of the UN, and as the delegate of New Zealand at Committee III/4 at San Francisco feared, regional arrangements might "tend to produce conflict between regional groups".[108] But, until the UN attains a stature of effective authority, collective self-defence arrangements, despite their risks,[109] will continue to function as stopgaps; and the scope of their lawful unilateral use of force will inevitably reflect the degree of effective authority that the world organization will have.

7.1.2.3 Armed Attack

Taken literally, Article 51 would make armed attack the sole ground for the exercise of self-defence. But despite the warm acclaim with which the Article was received at the San Francisco Conference,[110] many authors fault its draftsmanship.[111] This should serve as a caveat for not relying exclusively on the literal interpretation of the Article. It is submitted that those who, being aware of the Article's faulty draftsmanship, still insist

106 Among those who seek to keep these notions separate, see R. Higgins, *supra* n. 22, p. 209. The author also says, "Other defence arrangements are not necessarily illegal, but are collective security – and as such, the legality depends on considerations different from those governing the legality of action in collective self-defence". But unless the domain of unilateral forcible action is made to expand through the process of reverting (see *supra* chapter 3, p. 46), the prohibition of the use of force would require such unilateral action not to be extended beyond the scope of self-defence and cases of necessity. Cf. the views of the members of the ILC in the early years of the UN in *YILC*, 1949, pp. 145–7.

107 Collective self-defence has been invoked in support of the US intervention in Lebanon in 1958, that of the UK in Yemen in 1964, that of the USSR in Czechoslovakia and Afghanistan in 1968 and 1979 respectively. – See A. Cassese, *supra* n. 11, pp. 784–5.

The US allegation of its right of collective self-defence in the *Nicaragua v. USA* case has not been accepted by the ICJ; the Court has also refrained from dealing with cases of imminent threat of armed attack. – Merits, *supra* n. 1, para. 194.

108 12 *UNCIOD*, p. 682.

109 J. Stone warns "that large-scale resort to [Art. 51] would be...the clear sign of the defeat of [Art. 1(1)], and of the death throes of the essential international functions of the United Nations". – *Supra* n. 79, p. 264.

110 See 12 *UNCIOD*, p. 680 *et seq.*

111 See, e.g. H. Kelsen, *Recent Trends in the Law of the United Nations*, 1951 (*A Supplement to The Law of the United Nations*), pp. 913–6; M.S. McDougal and F.P. Feliciano, *supra* n. 22, p. 234; G. Schwarzenberger, *supra* n. 16, p. 337; J. Stone, *supra* n. 79, p. 245; J. Zourek, *supra* n. 21, pp. 96–7.

upon its literal interpretation and hold that the right of self-defence is exercisable only "if an armed attack occurs", are relying on an insecure base for the restriction of a fundamental right of States. A legal provision in a textually deficient Article should not by itself warrant an interpretation that would alter established rights.

The term "armed attack" figures routinely in security treaties,[112] and it appears normal that practice and doctrine should concentrate on such a term that is specifically mentioned in Art. 51. The term, which has not been defined by the Charter, has received varied treatment at the hand of authors. Some consider that what constitutes an armed attack "is not at all self-evident".[113] Others take it, for instance, to imply military operation,[114] or to be realizable not only by the attacking State's armed forces "but also [by] a revolutionary movement which takes place in one state but which is initiated or supported by another state",[115] or not to be fully equivalent to aggression,[116] or not to include an imminent attack.[117] Some draw a distinction betweeen the tactical or military sense of the term and unlawful resort to force, and consider the possibility of covering certain justifiable preventive measures.[118] Special isolated matters have been suggested to amount to armed attack. For instance, J. Stone contends that

112 E.g. Art. IV of the Brussels Treaty, *supra* n. 105; Art. 5 of the North Atlantic Treaty, *supra* n. 101; Art. 4 of the Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, *supra* n. 102; Art. 3 of the Inter-American Treaty of Reciprocal Assistance, *UNTS*, Vol. 21, p. 77; Art. 6 (which appears to use interchangeably the words aggression and attack) of the Pact of the League of Arab States, ibid., Vol. 70, p. 237; Art. IV of the Security Treaty Between Australia, New Zealand and the United States of America, *supra* n. 104; Art. I of the Security Treaty Between the United States of America and Japan, *supra* n. 104; Art. IV of the Southeast Asia Collective Defense Treaty, *supra* n. 104.

113 R.W. Tucker, *supra* n. 25, p. 30. Cf. J. Combacau, *supra* n. 7, p. 23 where the notion of armed attack is said to remain indeterminate and susceptible to free construction.

114 E.g. R.L. Bindschedler, *supra* n. 19, p. 398; Q. Wright, "Legal Aspects of the Viet-Nam Situation", 60 *AJIL*, 1966, p. 765; J. Zourek, *supra* n. 9, p. 54.

115 H. Kelsen, "Collective Security Under International Law", 49 *USNWCILS*, 1957, p. 88, n. 2. See, further, I. Brownlie, *supra* n. 21, p. 373; R. Higgins, *supra* n. 22, p. 204; 5 *Digest of International Law*, (1974), M.M. Whiteman ed., p. 1108; 12 ibid., pp. 113–5 re alleged infiltration from North Vietnam to South Vietnam, and pp. 120–1 re the restrictive view of the Lawyers Committee on American Policy Towards Vietnam; Q. Wright, *supra* n. 114, p. 765.

The notions of aggression and armed attack would coincide where the latter is declared to constitute the former; otherwise, not every armed attack would, according to the Definition, amount to aggression, and vice versa. Cf. J. Combacau, *supra* n. 7, p. 22.

116 E.g. H. Kelsen, *supra* n. 20, p. 269; S.B. Krylov, *supra* n. 21, p. 512; C.A. Pompe, Aggressive War – An International Crime, 1953, p. 100; K. Skubiszewski, *supra* n. 23, p. 623; G.I. Tunkin, *supra*, n. 21, p. 52.

117 E.g. H. Kelsen, *supra* n. 20, p. 797. Cf. Y. Dinstein, *War, Aggression and Self-Defence*, 1988, p. 173.

118 E.g. I. Brownlie, *supra* n. 21, pp. 365–8.

> [a]n 'armed attack' may already exist when one side...has deliberately set up a military situation in which the only options given to the opponent are either to defend itself immediately or submit to almost certain destruction.[119]

A.V.W Thomas and A.J. Thomas, discussing the British minesweeping operation in the *Corful Channel* case state that

> [i]t would have been very difficult for the Court to deny that the destruction of lives and property through a secretly laid mine field in an international waterway constituted an armed attack.[120]

The ICJ has held in the *Nicaragua v. USA* case that indirect aggression under the terms of Art. 3(g) of the Definition of Aggression – General Assembly resolution 3314 (XXIX) – constitutes an armed attack;[121] this however, does not seem to have found favour with some writers.[122] On the other hand, there are writers who consider as unsound the Court's exclusion from the scope of armed attack material aid and logistical support given to persons opposing by force the régime of a particular State.[123]

The preoccupation with what an armed attack constitutes would partly indicate the insufficiency of that ground as the exclusive cause for the valid exercise of self-defence, and account for the interpretive attempts to escape from its confines. But whatever may be its assigned content, an armed attack, like any other use of force, has to be an illegal act in order to justify the exercise of self-defence. Measures of force therefore that have legal authority, justification or excuse would not constitute an illegal armed attack.

119 J. Stone, "The Middle East under Cease-Fire", in *The Arab-Israeli Conflict*, Vol. 2, J.N. Moore ed., 1974, p. 73. See also D.W. Bowett, *supra* n. 22, p. 191.

120 *Supra* n. 23, p. 134. Cf. C.H.M. Waldock, *supra* n. 9, p. 497 where grave breaches of the peace are assimilated with armed attack; 16 *DSB* (No. 394), 1947, p. 112 for the First Report of the Atomic Energy Commission, where it is recommended in part "that a violation [of the treaty recommended therein] 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". Cf. M.E. Bathurst, "Legal Aspects of the International Control of Atomic Energy", 24 *BYIL*, 1947, pp. 27–8 re the first report of the Atomic Energy Commission.

121 *Supra* n. 1, para. 195.

122 J.L. Hargrove, e.g. takes this to be a misreading of the Definition of Aggression; he contends that what is defined there is the concept of aggression and not armed attack. – *supra* n. 35, p. 139 and n. 15. However, there would appear no valid reason why the Court, where it felt the *opinio juris* so warranted, could not hold Art. 3(g) of the Definition of Aggression to constitute an armed attack. See also R.A. Müllerson, "The Principle of Non-Threat and Non-Use of Force in the Modern World", in *The Non-Use of Force in International Law*, W.E. Butler ed., 1989, pp. 33–4; G.M. Danilenko, "The Principle of Non-Use of Force in the Practice of the International Court of Justice", ibid., pp. 104–5.

123 See, e.g. T.D. Gill, *Litigation Strategy at the International Court - A Case Study of Nicaragua v. United States Dispute*, 1989, p. 336.

An armed attack is but one type of use of force; and it bears repeating that taking it as the sole ground permitted for the exercise of self-defence would leave other violations of Art. 2(4) unattended by the unilateral protection of self-defence, and thereby undermine the prohibition of that Article. It would not appear consistent with the maintenance of international peace and security to construe Art. 51 so restrictively. As submitted earlier, the Article should rather be seen as recognizing the inherent right of self-defence *per se* and not as setting a limit to the grounds of its exercise.[124] In this respect, forcible self-defence would constitute a valid exception rather than violation of the prohibition of Art. 2(4) where it is undertaken on a justifying ground other than an illegal armed attack.[125]

7.1.3 Anticipatory Self-Defence

As indicated in other contexts, Art. 2(4) prohibits not only the use but also the threat of force.[126] An unjustified threat of force which is of such a nature as to cause a valid concern within a target State that the threat would be translated into action, e.g. military attack, would amount to an illegal act that signifies the imminence of the illegal action.[127] Since it has been submitted that the prohibition of force in Art. 2(4) subsumes and engenders the exception of self-defence whose content is not restricted by Art. 51,[128] the target State could exercise its right of self-defence against

124 Cf. M.S. McDougal and F.P. Feliciano, *supra* n. 22, p. 237, n. 261. But see R. Ago, *supra* n. 23, p. 61 *et seq.* for the distinction between self-defence and other forms of self-help, and the restriction of self-defence under the Charter to cases of armed attack; J. Zourek, *supra* n. 21, p. 98, n. 136 where the view that Art. 51 should not be seen as saying "if and only if" an armed attack occurs is considered to be of little value, for it is claimed that treaties are not normally phrased in that manner. It should, however, be observed that the phrase "if and only if" is merely an interpretive analysis of the ground of self-defence under Art. 51 and does not relate to treaty-drafting style.

125 A point of view that would probably appear too formalistic indicates "the decisive factor [to be] not the content of [a particular] right in question, and the measure or extent of its violation, but the form in which such violation takes place: that form must be an armed attack". K. Skubiszewski, *supra* n. 21, p. 767.

126 See *supra* chapter 5, p. 138 *et seq.*

127 Cf. R.L. Bindschedler, *supra* n. 19, p. 400; J.E.S. Fawcett, *supra* n. 19, p. 36; S.M. Schwebel, "Aggression, Intervention, and Self-Defence in Modern International Law", 136 *RCADI*, 1972-II, p. 481.

128 See supra p. 209 *et seq.* But see, e.g. M. Akehurst, *A Modern Introduction to International Law*, 6th ed., 1987, p. 262. The author states 'that anticipatory self-defence is incompatible with the Charter...Article 53 of the Charter provides that parties to regional arrangements may take enforcement action against a "renewal of aggressive policy" (a term which is much wider than "aggression") on the part of former enemy states, and this provision would be unnecessary if Article 51 permitted anticipatory self-defence.' The exception in Art. 53 relates, however, in the first place, to a special class of States with demonstrated aggressiveness, whereas Art. 51 relates to all States and recognizes an existing right. Secondly, equating the exception under Art. 53 with anticipatory self-defence – as seems to be the

the illegal threat of force.[129] The proportionate exercise of the self-defence would be anticipatory in that it would aim to prevent the materialization of the threatened forcible action.

Anticipatory self-defence, as self-defence in actual cases of use of force, derives from and draws upon customary international law.[130] It can also be seen to have been incorporated in the recognized right of collective self-defence.[131] Inasmuch as the members of a collective self-defence arrangement have a right of participatory self-defence in the event, for example, of an attack upon one of them, the exercise of self-defence undertaken by those States which are not the direct objects of the attack could be regarded as partly undertaken in anticipation of an attack to which they, as members of the arrangement, could credibly be exposed. The availability of anticipatory self-defence can further be perceived from the perspective of a proper assessment of the purpose of self-defence, which is to safeguard the legally protected values of States until the UN intervenes effectively, where that is realizable. The purpose hence is not to surrender initiative of action and make the security position of a State under threat more precarious while correspondingly granting leeway to a delinquent State.[132] It would appear that international law did not demand self-sacrifice and heroism in permitting self-defence, but acknowledged unilateral acts as valid when undertaken

essential significance of the author's statement – would be extending the notion of anticipatory self-defence beyond the legal requirements of self-defence. Art. 53 apparently seeks to avert any future aggression by the ex-enemy States by permitting measures taken on the basis of a broader appreciation of the aggressive attitude of those States. In such cases, were the measures to be considered as strictly anticipatory self-defence, the exception of Art. 53 would not appear to have been granted a wider base but would have been restricted to instances of imminent aggression, which seemingly would not have satisfied the purpose of the Article. And although the measures that might be taken on the basis of the wide appreciation permitted in Art. 53 would be anticipatory in generic terms, they might be too remote to fulfil the legal criteria of self-defence, and too close to policy. Anticipatory self-defence, on the other hand, would be valid only, in the view held in this study, where an illegal threat of force is considered in good faith to entail an imminent use of illegal force.

129 If the breach of the prohibited threat of force is not primarily answerable to measures of self-defence, the prohibition would for all practical purposes be of little value. – See W.V. O'Brien, "International Law and the Outbreak of War in the Middle East", in *op. cit.* J.N. Moore ed., *supra* n. 119, p. 104. Among those who consider Art. 51 to entail the exclusion of self-defence against threats, see, e.g. I.D. De Lupis, *The Law of War*, 1987, p. 74; Y. Dinstein, *supra* n. 117, p. 173; J.L. Kunz, *supra* n. 7, p. 878; K. Skubiszewski, *supra* n. 21, pp. 778–9; Q. Wright, "The Cuban Quarantine", 57 *AJIL*, 1963, p. 560.

130 See *supra* n. 76; O. Schachter, "The Right of States to Use Armed Force", 82 *MLR*, 1984, pp. 1634–5; N. Singh and E. McWhinney, *supra* n. 6, p. 83; Q. Wright, "The Prevention of Aggression", 50 *AJIL*, 1956, p. 529; the Locarno Treaties, *supra* chapter 2, p. 29 *et seq.* Cf. J. Delbrück, *supra* n. 100, p. 397 where the British attack on the French vessels in the harbour of Oran in 1940 to prevent their take over by German forces is said to fulfil the requirements of anticipatory self-defence.

131 See *supra* p. 213.

132 Cf., e.g. D.W. Greig, *supra* n. 7, p. 894.

within the prescribed legal limits to protect legally recognized values. There would accordingly be no good ground for making contemporary international law require injury or destruction of a high degree of probability,[133] which the denial of the legality of anticipatory self-defence would imply. The legality of self-defence would by definition proceed from the negation of self-sacrifice.

The issue of anticipatory self-defence is brought into sharp focus, and its continued validity under contemporary international law better assessed, in situations that involve highly swift armed missiles. Were self-defence to retain in such situations an efficacious relation to its purpose, the national defence frontier of any illegally threatened State would perforce be extended, as it were, up to a point where the missiles could be effectively countered. But it should be observed here that it would not be the existence alone of the missiles that would constitute the illegal threat; even though every missile with an assigned target would constitute a latent threat, the prevalent resort to such practice by those State which have a good stock of missiles[134] appears to consecrate that type of threat as tolerable. On the other hand, an illegal threat would appear to come to the fore when the existence of a realistically active threat posed by armed missiles could be ascertained from the setting in motion of the technical procedures, which the practitioners of the art would assess as indicative of a definite switch from a latent threat to an active one. Such an active threat would appear to justify preventive measures; and in the absence of less violent alternatives, these measures might include the destruction of the missiles on site, their interception at any stage of their launch and at any point along their trajectories so long as the legally protected values of uninvolved third States are not violated. Insofar as the distinction between threat and attack may be concerned in such instances, an active threat continues as long as the possibility of abandoning or reversing the course of action that brought it about definitely exists. Where such a possibility disappears, the action would come within the scope of an armed attack. It may be remarked in this

133 Cf. O. Schachter, "The Lawful Resort to Unilateral Use of Force", 10 *YJIL*, 1985, p. 293 where the possibility of anticipatory self-defence is indicated, and where it is suggested that "we must acknowledge the possibility of a threat so immediate and massive as to make it absurd to demand that the target state await the actual attack before taking defensive measures".

134 See, e.g. *SIPRI Yearbook 1988*, pp. 33, 36, 37, 39, 40 for the number of ballistic missiles.

connection that assimilating an active threat with an armed attack[135] so as to avoid accepting the applicability of anticipatory self-defence would not appear to change the anticipatory character of the action which might be taken against that threat.

We shall subsequently refer to certain instances of use of force to gain an impression of the contemporary attitude towards anticipatory self-defence.

The passage on 22 October 1946 of four British warships one after the other through the Albanian territorial waters of the Corfu Channel was, as found by the ICJ, a demonstration of force.[136] In the absence of a legal justification, such a demonstration would have been illegal as a threat of force and hence inconsistent with the requirements of innocent passage. But in view of "all circumstances of the case", the Court did not find the demonstration violative of Albanian sovereignty, which in effect meant that the threat of force was legally justified on account of the previous Albanian illegal use of force, i.e. the firing on British ships passing through the Channel on 15 May 1946.[137] Since the British threat of force on 22 October was aimed at discouraging any illegal repetition of the 15 May incident, a strong element of anticipation appears to have necessitated the demonstration of force. The conclusion cannot be resisted that holding such a demonstration not to be illegal was, it is submitted, tantamount to accepting the lawfulness of the incorporated element of anticipation: the demonstration was justified because it constituted a valid act of anticipatory self-defence. And it is suggested that Waldock's statement "that the Court did not take a narrow view of the inherent right of self-defence reserved by Article 51"[138] can be understood in this sense. An otherwise illegal demonstration of force – threat of force – which is acknowledged to derive justification for its anticipatory element from a past illegal use of force would not appear to have been adjudged on the basis of a narrow construction of Art. 51.

Among later situations, the Cuban Quarantine[139] amounts for all practical purposes to the American States' individual or collective anticipatory self-defence. The nuclear weapons that might have been

135 Cf., e.g. J. de Aréchaga, *supra* n. 20, p. 98; I. Brownlie, *supra* n. 21, pp. 367–8; L. Henkin, *supra* n. 26, p. 142–3; N. Singh and E. McWhinney, *supra* n. 6, pp. 96–7.

136 The *Corfu Channel* case, Merits, *ICJ Reports* 1949, p. 31.

137 See *Pleadings,* Vol. III, p. 27.

138 *Supra* n. 9, p. 501.

139 See *supra* chapter 6, p. 188.

placed in Cuba, as discussed earlier,[140] appear to have been taken to justify a more liberal construction of the threat which such weapons would have posed to the neighbouring States.[141]

The Gulf of Tonkin incident of 4 August 1964, when US forces carried out aerial strikes against North Vietnamese territory allegedly to prevent attacks on US vessels claimed to be in international waters, may also be taken as an instance of anticipatory self-defence. To the Security Council, the US justified the incident as "limited and relevant measures to secure its naval units against further aggression".[142] Since at the material time North Vietnam was not attacking US vessels and the US argument related to alleged earlier attacks from North Vietnam,[143] the US action was anticipatory and preventive in character. The US action was, however, characterized by Czechoslovakia and the USSR as retaliatory.[144] But in view of the ground of self-defence claimed in justification of the action, it will not be necessary to consider here whether or not the facts relating to the incident warranted labelling it as defensive or retaliatory.

The 1967 armed conflict between the Arab States and Israel was, irrespective of the legal merits of the conflict, initiated in anticipatory characteristics.[145]

China's attack and occupation of certain parts of Vietnamese territory in 1979 was presented as justified by Art. 51. China argued at the Security Council that its action was

> a limited counter-attack in defence of the Chinese frontier, as a result of the wanton provocation of border conflicts on the Sino-Vietnamese border by the Vietnamese authorities. [It was] a necessary action of self-defence taken by any sovereign State in accordance with Article 51 of the Charter.[146]

140 Ibid. pp. 189–91

141 See, e.g. D.P. O'Connell, "International Law and Contemporary Naval Operation", 44 *BYIL*, 1970, p. 26, n. 4 about the magnitude of the threat that the situation might be considered to have presented to the US.

142 12 *Digest of International Law*, M.M. Whiteman ed., (1971), p. 129.

143 The US emphasized that the action taken was in self-defence; and the UK stated that the US "has a right...to take action directed to prevent the recurrence of such attack on its ships. Preventive action in accordance with that aim is an essential right which is embraced by any definition of that principle of self-defence." – Ibid., p. 130.

144 Ibid.

145 See, e.g. J. Stone, supra n. 22, p. 58 and the references in ibid., n. 3; P. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility", in *op. cit.*, M. Spinedi and B. Simma eds., *supra* n. 100, p. 249.

146 *SCOR*, 34th Year, 2114th Meeting, 23 Feb. 1979, para. 103. See also ibid., para. 120.

But Vietnam denied the provocation alleged by China.[147] The Council, however, neither condemned China nor called for the withdrawal of its forces. In the minds of the majority of the Members, the question appeared to be linked with the Vietnamese military intervention in Cambodia's internal affairs. This may be seen in the 13 affirmative votes given for a draft resolution that would have called, *inter alia*, "upon all parties to the conflicts to wthdraw their forces to their own countries".[148]

The Chinese military action in Vietnam constituted either anticipatory self-defence or a reprisal. But, as the pleaded justification was self-defence under Art. 51, it would appear that anticipatory self-defence was the ground that was relied on.[149]

The case of the US armed intervention in Grenada would be anticipatory, irrespective of merits, insofar as it concerned the rescue of US citizens. At the material time the physical security of the citizens did not appear to have been particularly endangered.[150]

Nevertheless, forcible acts not justified by illegally threatened imminent and grave peril will not be covered by anticipatory self-defence, as was made clear by the Security Council in its unanimous condemnation of the Israeli attack on Iraqi nuclear installations on 7 June 1981.[151] The Israeli representative's letter of 8 June 1981 to the Security Council[152] had sought to explain and justify to "enlightened public opinion" the freely admitted attack as a measure of self-defence. Claiming to draw from "sources whose reliability is beyond any doubt", the letter alleged that the reactor was "designed to produce atomic bombs. The target for such bombs would be Israel." It further alleged that the reactor would have been completed and operational, respectively, by the beginning of July and the beginning of September 1981, and concluded that "the Government of Israel decided to act without furher delay to ensure our people's existence". And the representative sated thus at the Council:

> In destroying Osiraq, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-

147 Ibid., 2115th Meeting, 24 Feb. 1979, para. 107.

148 See *Repertoire*, Suppl. 1975–1980, p. 341.

149 Cf. P. Malanczuk, *loc. cit.*, *supra* n. 145, where the practice of States and the UN is said to offer "more evidence for the admissibility of preventive self-defence than for the contrary view"; J. Combacau, *supra* n. 7, p. 25.

150 See *supra* chapter 6, p. 172 *et seq.*; O. Schachter, *supra* n. 130, pp. 1631–2.

151 S.C. resol. 487 (1981), 19 June 1981.

152 *SCOR*, 36th Year, Supplement for April, May and June 1981, (Doc. S/14510), p. 55.

defence as understood in general international law and as preserved in Article 51 of the United Nations Charter.[153]

The Israeli position seemed to put at legal parity self-preservation and self-defence, and to acknowledge unmistakably the validity of less stringent standards vis-à-vis threats posed by weapons of mass destruction.

But the threat that Israel must have felt by the Iraqi acquisition of a functioning nuclear reactor was not accepted to possess a realistic degree of imminence, even in the context of the precedent set by the US and its hemispheric neighbours regarding weapons of mass destruction.[154] It appeared too remote for justifiable preventive action, and too alike the notion of self-preservation, which had been discarded as a justifying ground for the use of force by States.[155] Despite the precedent of the Cuban Quarantine, the UN did not appear ready and willing to avow clearly two tiers of legal standards for appraising the threat by, or use of, weapons: one, more regulated, for conventional modes of destruction; another, less inhibited, for weapons of mass destruction.[156] For its part, however, in attacking the Iraqi nuclear installations, Israel appeared to have subscribed to less stringent standards of appraisal regarding threats emanating from weapons of mass destruction, whatever the stage of their completion and readiness. By advocating its right of forcible action in such cases, Israel can be seen as admitting the right of other States considering themselves threatened by nuclear installations they might believe it to possess, to resort to similar measures of force. In such circumstances, the two tiers of legal standards of appraisal referred to above might come to be unequivocally consecrated in contemporary international law. Such consecration will not, however, inspire much hope

153 SC Doc. S/PV. 2280, p. 37.

154 Cf. the discussion of the Cuban Quarantine, *supra* p. 188 *et seq.* Israel probably took its cue from that incident.

155 Y. Dinstein suggests that Israel's justification should have rested on the state of war between the two countries. – *Supra* n. 117, p. 176. But in view of the standing prohibition of the use of force and the required respect of established armistices, even if Iraq might not formally be a party, it will be difficult to maintain such a position. – See *supra* chapter 5, p. 103; C. Greenwood, Self-Defence and the Conduct of International Armed Conflict", in *International Law at a Time of Perplexity*, Y. Dinstein ed., 1989, p. 275.

156 Cf. A. D'Amato, "Israel's Air Strike Upon the Iraqi Nuclear Reactor", 77 *AJIL*, 1983, pp. 586, 588. But as to the author's suggestion that the Israeli action did not amount to a use of force against Iraq's territorial integrity or its political independence, which rests on the restricted view of the scope of the prohibition under Art. 2(4), see *supra* chapter 6, p. 146 *et seq.* Cf., further, G. Schwarzenberger, *The Legality of Nuclear Weapons*, 1958, p. 58 where the author doubts the non-use of such weapons in an "all-out contest".

for being left with values which contemporary standards consider worth defending and preserving.[157]

In sum, anticipatory self-defence is the explicit or implicit justification for the use of force by some States, and denying its availability would neither appear consistent with the purpose of the prohibition of force nor realistic. The use of force, therefore, in conditions which fulfil the requirements of anticipatory self-defence would constitute, it is submitted, a valid exception to the prohibition of Art. 2(4). Reference may here be made by way of example to P. de Visscher, who appears constrained to indicate the inevitability of preventive self-defence when he says,

> autant il me paraît certain que la Charte a condamné l'exercise préventif de la légitime défense, autant il me paraît évident que tout Etat qui aurait conscience d'être directement, immédiatement et mortellement menacé, n'hésiterait jamais à faire usage de la légitime défense préventive s'il estimait que cet usage présente une chance de le sauver de la destruction totale.[158]

A State which finds itself in a situation that necessitates the exercise of anticipatory self-defence is not likely to disavow such an exercise as a matter of legal principle. It is not likely, as consequence, to sacrifice its security to what would amount to an affirmation of the illegal posture of its adversary.[159]

7.1.4 Conclusion

The foregoing pages have dealt with the general and particular considerations of Art. 51 insofar as it was necessary to complement the study of the scope of the prohibition under Art. 2(4). In conclusion, it should be observed that Art. 51 may be faulted for its ambiguity and redundancy,[160] and that these same defects should be reason for cautioning against too much reliance on its literal construction. In other respects, it is an important Article which State practice makes frequent use of. It has formally placed self-defence in the Charter and established

157 Cf. L. Henkin, *supra* n. 26, pp. 142–4.

158 P. de Visscher, "Cours général de droit international public", 136 *RCADI* 1972-II, p. 148. Cf. W. Friedmann, *The Changing Structure of International Law*, 1964, p. 260 where the author concedes that the absence of an effective international machinery would cause self-defence to include defence against imminent aggression.

159 Cf. D.W. Bowett, "Reprisals Involving Recourse to Armed Force", 66 *AJIL*, 1972, p. 4.

160 In view of the provision "until the Security Council has taken measures necessary to maintain international peace and security", figuring in the first sentence, the clause "and shall not in any way affect the authority and responsibility of the Security Council..." in the second sentence appears repetitious.

its interim status, and given legal currency to the term collective self-defence. Nevertheless, even without Art. 51, the exercise of self-defence would still have been available under the Charter[161] and constituted an interim measure.

The good faith fulfilment of the Members' obligation prescribed in Art. 2(2) would appear to require them to bring to the attention of the Security Council any breach of the prohibition of force under Art. 2(4) of which they are the cause or in which they participate. This could be reasoned to be so because, first, as any unilateral use of force in international relations factually breaches the prohibition under Art. 2(4), the good faith fulfilment of the obligation laid down by that Article would appear to demand the demonstration of the grounds that necessitated the breach, and such a demonstration would comprise the necessity of reporting to the Security Council. Secondly, the chief UN purpose of maintaining international peace and security, the implementation of which Members have the implicit obligation of assisting in good faith, could not be speedily implemented without their timely reporting of breaches of Art. 2(4) in which they may be involved. The implied obligation of bringing any unilateral breach of Art. 2(4) to the attention of the Security Council would in turn serve to confirm the interim status of alleged exercises of self-defence, i.e. the overriding authority of the Council.

7.2 Necessity

Our consideration of "necessity", like that of self-defence, will be limited to complementing the study of the scope of force prohibited in Art. 2(4). We shall not therefore attempt any lengthy discussion of the subject but will advert to those main factors that make it a valid title, which under customary international law and the Charter can excuse an otherwise illegal use of force in international relations.

In the context of our study, a state of necessity that could serve as a good defence would be present where the protection of a certain value could not be effected except by the wilful breach of the prohibition of force, and where the worth of the infringed value is generally taken to rank much lower than that of the value sought to be protected. Where,

161 Cf. the *Nicaragua v. USA* case, *supra* n. 1, para. 176.

for instance, mob violence within a particular State gravely endangers the lives and well-being of foreign nationals, and the government of that State appears neither accountable for the violence nor capable of protecting the foreigners, other States which breach the territory of the State to protect their nationals would be acting under a state of necessity. The normal observance of the obligation to refrain from the use of force against the territorial integrity of States would in such circimstances be too onerous.[162] The ground of necessity would relieve a State in those circumstances, and so long as they persist, from incurring delictual liability, which the wilful breach of the obligation would have entailed, and from sustaining loss, injury or any other sacrifice, which the observance of the onerous obligation would have required.[163] The circumstances may or may not be caused by the conduct of a party seeking their exculpatory benefit; and where deliberately induced, they will, by definition, lack the rationale of necessity and afford no ground of excuse to the party inducing them.[164]

International law appears to have long recognized the ground of necessity, which meets the legal requirements governing its presence and conduct, as a valid defence for the non-observance of obligations. In the *Neptune* case,[165] Commissioners Gore[166] and Pinkney[167] stood on the

162 Necessity is a question of fact which, when demonstrated to exist, indicates breach of obligations as the only reasonably tenable outlet. See Anzilotti's observations in the *Oscar Chinn* case, quoted *infra* p. 233.

163 As B. Cheng says, "[t]he law of necessity is a means of preserving social values. It is the great disparity in the importance of the interests actually in conflict that alone justifies a reversal of the legal protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right." – *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 74. See also R. Ago *supra* n. 23, p. 18; K.J. Partsch, "Self-Preservation", 4 *EPIL*, 1982, pp. 219–20 (The author considers R. Ago's analysis of "necessity" to be "convincing because of its realism". – At p. 220). Cf., e.g. J. Basdevant, "Règles générales du droit de la paix", 58 *RCADI*, 1936-IV, pp. 553–4 about the controversial nature of the question; J.L. Brierly, *The Law of Nations*, 6th ed., 1963, p. 405 where self-preservation is declared to be "not a legal right but an instinct"; J. Combacau, *supra* n. 7, p. 26; W.D. Verwey, "Humanitarian Intervention", in *op. cit.*, A. Cassese ed., *supra* n. 7, p. 74; D.W. Greig, *supra* n. 7, p. 886; P. Guggenheim, *Traité de droit international public*, Tome II, 1954, p. 62; Ch. Rousseau, *Droit international public*, Tome V, 1983, pp. 91–2.

164 See R. Ago, *supra* n. 23, p. 20.

165 The *Neptune*, an American vessel en route from Charleston, USA, to Bordeaux, France, laden with rice, tobacco, etc., was seized in June, 1795, by a British frigate and taken to the port of London where eventually the cargo was sold to the British Government for an amount lesser than its market value. A claim for adequate compensation for the loss and damage thereby occasioned was lodged with the Anglo-American Board of Commissioners. – See J.B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. 4, 1898, pp. 3843–4, 3875–6.

166 Ibid., pp. 3852–3.

167 Ibid., pp. 3873–4.

authority of the teachings of Grotius as each upheld necessity to be an absolving ground for the non-observance of obligations, giving thereby practical confirmation to doctrine.[168] The fifth Commissioner, Trumbull, stated in no less unequivocal terms that the

> necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we can not, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others.[169]

Similarly, in the *Caroline* case,[170] which occurred some 42 years later, necessity was maintained as an absolving ground where the requisite conditions recited in Webster's letter of 24 April 1841 were met.[171] And inasmuch as the case concerned necessity and self-defence,[172] those conditions would be applicable to both.[173]

Along the same line, although certain incidents involving forcible action appear to have been assigned the covering title of necessity, whatever their merits, self-defence – anticipatory or otherwise – would seem to be the proper base for their alleged legitimacy. Such, for instance, would be the US forcible incursion in West Florida when that territory was under Spanish sovereignty. The occupation of certain parts of the territory was in fact explained not to have been made "in a spirit of

168 See B.C. Rodick, *The Doctrine of Necessity in International Law*, 1928, pp. 6–7 for the limitations and qualification which Grotius attached to necessity.

169 *Supra* n. 165, p. 3884.

170 On 29 Dec. 1837, a British force from Canada entered US territory and attacked, set aflame and left to drift over the Niagara Falls the steamship *Caroline*, which was suspected of serving the Canadian insurgents. As a result of the British action two US citizens were killed and some others wounded; two persons were forcibly carried away and property was destroyed. – See J.B. Moore, *A Digest of International Law*, Vol. 2, 1906, pp. 409–14.

171 '...a necessity of self-defence, 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...did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shewn that admonition or remonstrance to the persons on board the "Caroline" was impracticable, or would have been unavailing; that there could be no attempt at discrimination, between the innocent and the guilty, that it would not have been enough to seize and detain the vessel; but that there was a necessity present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board...and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror.' – *Op. cit.*, *supra* n. 58, p. 145.

172 The right of self-defence was not contested in principle, but the presence of the necessity for its exercise was required to be demonstrated. To some, however, the case concerned necessity rather than self-defence. See, e.g. R. Ago, *supra* n. 23, p. 44, n. 155; Ch. Rousseau, *supra* n. 163, p. 94, n. 5; J. Zourek, *supra* n. 9, p. 63.

173 See D.W. Bowett, *supra* n. 22, p. 60.

hostility to Spain, but as a necessary measure of self-defense".[174] Other instances would be Amelia Island and certain places which were said to have been sources of illegal activities

> which are presumed to have been made without proper authority from any government; and which if authorized by any government, have assumed an attitude too pernicious to the peace and prosperity of this Union and of its citizens... .[175]

The forcible incursions of the US into and occupations of these areas, again whatever their merits, would appear to have had the necessity of self-defence as their base.[176]

Conforming with the precedent on necessity set by the *Neptune* case and the practice of States, Anzilotti wrote in his Separate Opinion in the *Oscar Chinn* case that

> la nécessité peut excuser l'inobservance des obligations internationales.
>
> La question de savoir si le Gouvernement belge s'était trouvé dans ce qu'on appelle l'état de nécessité est une question de fait qui aurait dû, le cas échéant, être soulevée et prouvée par le Gouvernement belge:...la nécessité...pa définition, suppose l'impossibilité d'agir de toute autre manière que celle qui est contraire au droit.[177]

And R. Ago concluded his study of necessity with the comment that

> the concept of "state of necessity" is far too deeply rooted in the consciousness of the members of the international community and of individuals within States.[178]

Thus, as a ground for the non-observance of an obligation, necessity, like self-defence, appears to be embedded in the matrix of international

174 *Op. cit., supra* n. 170, p. 406.

175 Ibid.

176 See G.H. Hackworth, *Digest of International Law*, Vol. II, 1941, p. 296 for the pertinent excerpt of the American Note to the Mexican Foreign Minister. The Note was occasioned by the presence of American forces in Mexico, which they had entered in pursuit of persons alleged to have crossed over from that country and committed various depredations in the US. The Note apparently indicated the necessity of self-defence as the ground justifying the US action since it spoke of the Mexican "lack of cooperation in the apprehension of the Villa bands, and of the known encouragement and aid given to bandit leaders", and declared it to be "unreasonable to expect the United States to withdraw its forces from Mexican territory or to prevent their entry again when their presence is the only check upon further bandit outrages...".

In another incident, that of the bombardment of Nanking on 24 March 1927 by US ships, the justificaiton given for the forcible action was the necessity of protecting American lives. – See W.C. Dennis, "The Settlement of the Nanking Incident", 22 *AJIL*, 1928, p. 596.

Using necessity and self-defence interchangeably appears to have been prevalent. – See, e.g. D.W. Greig, *supra* n. 7, p. 883; B.C. Rodick, *supra* n. 168, pp. 33–4, 56.

177 *PCIJ, Series A/B*, No. 63 (1934), pp. 113–4.

178 *Supra* n. 23, p. 51.

law.[179] That it has not been specifically provided for in the Charter, as self-defence has been, does not, however, mean that it has ceased to be recognized in the international legal régime under the Charter. R. Ago points out rightly in this connection that

> it does not logically or necessarily follow that the intention was to exclude absolutely the elimination of the wrongfulness of conduct not in conformity with the prohibition [of force] on the ground of the existence of other circumstances.[180]

The Charter does not pretend to replace the whole field of customary international law, which remains effective where not properly superseded.[181] The exception of necessity has not been excluded explicitly, nor does it appear to have been excluded by valid implication. Just as self-defence would have been available under the Charter without the specific provisions of Art. 51,[182] the ground of necessity, too, would apparently be available to complement the proper application of the Charter without the particular need for a special provision.[183] Again, as in self-defence, resort to the exception of necessity is subject to the control of strict legal conditions.[184] Still, despite the fulfilment of the prerequisites, necessity does not relieve from the obligation of repairing the loss or damage which resort to force on that ground may cause. The basis of such obligation is considered to be "other than that of *ex delicto* responsibility".[185]

The interests for the protection of which an excusable breach of the prohibition of threat or use of force is committed are those which relate to the values protected by the prohibition itself.[186] A State which uses

179 Cf. I. Brownlie, *Principles of Public International Law*, 3rd rev. ed., 1979, p. 465; R. Falk, *Legal Order in a Violent World*, 1968, p. 407.

180 *Supra* n. 23, p. 41.

181 See, e.g. the *Nicaragua v. USA* case, *supra*, n. 1, para. 202.

182 See *supra* p. 204 *et seq.*

183 Cf. the *Nicaragua v. USA* case, *supra* n. 1, para. 176.

184 See R. Ago, *supra* n. 23, pp. 19–20; *YILC* 1980, Vol. II, Part Two, pp. 49–50; D. Nguyen Quoc, P. Daillier, A. Pellet, *supra* n. 6, pp. 691–2; B. Cheng, *supra* n. 163, p. 71. The latter author draws from the *Neptune* case six rules, which he observes "correspond to those that have been elaborated by various other international tribunals as regards the plea of necessity in relation to treaty obligations". – Cf. the conditions taken into cosideration by Commissioner Gore in that case, *supra* n. 165, p. 3856.

185 R. Ago, supra n. 23, p. 20. See also the Report by G. Schwarzenberger in 48th *ILA Report*, 1958, p. 569 where it is stated thus: "Even assuming that the German invasion of Norway had been provoked by an imminent Allied invasion, this would not have given Germany the *right* to invade Norway. Measures of self-defence may be taken only against a subject of international law to whom illegal acts or omission are imputable, but not against a third party. Necessity is not so narrowly confined. It does not, however, amount to a ground of justificaiton. At most, it constitutes an excuse."

186 See *supra* chapter 6, p. 145.

force against the protected values of another State to avert an impending loss, destruction or grave injury to its own legitimate values threatened, for instance, by causes originating in the other State, which the latter neither learns about nor is capable of managing with timely effectiveness, would be acting under a state of necessity; and the breach of the prohibition of Art. 2(4) thereby occasioned would lack a culpable intention.[187] The interest-protecting State could in such circumstances be viewed as forced to do what the territorial State should or presumably would have done were it in a position to do so. This of course would assume the territorial State to be free of any delictual responsibility, as otherwise the basis and object of the forcible action would shift to that of self-defence against the territorial State.[188]

This can be seen from the Entebe incident.[189] During the debate of the incident at the Security Council, the representative of Israel imputed to the Ugandan authorities prior knowledge of, and connivance at, the hostage taking,[190] and indicated that Israel had exercised "its inherent right of self-defence".[191] Though charges of Ugandan collaboration with the hijackers were denied,[192] the Israeli military operation at Entebe – whatever its merits – appears to have been based on self-defence; it was, as such, sought to be justified by the alleged Ugandan delictual responsibility.[193]

In other respects, necessity might not appear to be a good ground for excusing forcible measures taken within the territory of another State when the latter denies, rightly or wrongly, the presence of factors alleged to justify the recourse to those measures. If such denial is communicated

187 Cf. the *Torrey Canyon* case, 71 *RGDIP*, 1967, pp. 1092–9; *YILC*, 1980, Vol. II, Part Two, p. 39; Ch. Rousseau, *supra* n. 163, p. 91. The *Torrey Canyon* was a derelict oil tanker from which a great amount of oil escaped and polluted British and French coasts and adjacent waters. British military planes bombed and sank the vessel in an endeavour to prevent more pollution.

188 The principle that a State shall not use or permit the use of its territory to cause injury to others is a well-established norm of general international law. E.g. it has been stated in the *Trail Smelter* arbitration that "under the principles of international law...no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence...". – 35 *AJIL*, 1941, p. 716. See also the *Corfu Channel* case, supra n. 136, p. 22; the 1st and 3rd principles of GA resol. 2625 (XXV), 24 Oct. 1970.

189 See 81 *RGDIP*, 1977, pp. 286–93.

190 See *SCOR*, Thirty-First Year, 1939th Meeting, 9 July 1976, paras., 90, 92, 97, 105.

191 Ibid., para. 101. The Israeli representative in sum stated that "Israeli forces...were rescuing their nationals from...kidnappers who were being aided and abetted by the Ugandan authorities". – Ibid., para. 121.

192 Ibid., para. 34.

193 Cf. Ch. Rousseau, *supra* n. 163, p. 96.

to the State contemplating a forcible incursion into foreign territory, a dispute rather than a state of necessity appears to evolve. If the urgency of a grave situation prevents any recourse to peaceful settlement of the dispute, self-defence could probably afford a better basis for the unilateral resolution of the impasse.

As an illustration of a claim of necessity – albeit not explicitly pleaded nor apparently valid under the circumstances – reference may be made in this regard to the position that France and the UK maintained at the Security Council to justify their military intervention in Egypt in 1956.[194] When restating the grounds of the intervention, the representative of the UK said thus:

> A further consideration is the question of urgency. If we felt that the Security Council could in fact at this moment separate the parties and protect the Canal, of course we would rather proceed in that way...we feel grave doubt whether in fact action could be taken in this Council with sufficient speed.[195]

And the representative of France declared thus:

> Pour garantir que le cessez-le-feu sera effectif, le Gouvernement français et le Gouvernement britannique ont également demandé à assumer provisoirement le contrôle de certaines positions clefs du canal. Cette dernière demande est pleinement justifiée par les expériences du passé. Elle est destinée à garantir la séparation effective des combatants. Elle a également pour but de protéger la libre circulation dans le canal de Suez.[196]

These statements appear to rely on necessity. The protection of the Canal, in which the proprietary interests of the interventionists was wrapped, was presented as assuming an urgency that outweighed the mandatory deference to the authority of the UN and the flagrant violation of Egyptian territory and political independence. The UN, however, called for the withdrawal of foreign forces and thereby manifested its disagreement with the contention.[197] The UN did not appear willing to admit the justice of sacrificing these higher international values – the authority of the UN, territorial integrity and political independence – for the protection of the canal by unauthorized unilateral measures.

As another illustration, reference may be made to the debate at the Security Council relating to the Belgian intervention in the Congo in 1960. In that debate, the representative of Belgium pursued at various

194 See *Repertory*, Suppl. No. 2, Vol. 1, 1964, pp. 76–8, esp. para. 32.

195 *SCOR*, Eleventh Year, 749th Meeting, 30 October 1956, para. 140.

196 Ibid., para. 174.

197 See GA resols. 997 (ES-I), 2 Nov. 1956, and 1002 (ES-I), 7 Nov. 1956.

junctures the theme of humanitarian considerations as having made the intervention necessary. For instance, at the 873rd meeting of the Security Council, he declared in the following terms:

> La force publique cessant d'être un instrument d'ordre aux mains du nouvel Etat congolais, celui-ci ne disposait plus des moyens nécessaires pour assurer la sécurité des personnes. C'est alors que le Gouvernement belge décida d'intervernir, dans le seul souci d'assurer la sécurité...des Européens et des autres, de sauvegarder les vies humaines en général.[198]

He further declared at the 879th meeting that "nous avons amenés des troupes au Congo, contre notre désir, forcé par la nécessité".[199] The presence of any ground justifying intervention was, however, contested by the Congolese representative. He rather charged Belgium with aggression,[200] and made it known that

> nous croyons que le Gouvernement congolais est en mesure de garantir la sécurité et des biens et des personnes, non seulement des Belges, mais de tous les étrangers qui veulent investir et qui veulent rester auprès de nous et avec nous.[201]

In view of the contested presence of valid grounds of intervention, the insistence of Belgium on its sacred duty to take measures said to devolve upon it from morality and international law[202] would not *per se* bring forth a situation of necessity, but might perhaps be better described as the persistence of habits ingrained in colonial stewardship. Nonetheless, the fact that the alleged ground of necessity did not avail in the circumstances would not preclude the ground of self-defence, which could be exercised for the protection and rescue of nationals from serious danger.[203]

Before concluding this section, it should be observed that resort to unilateral measures of force on an alleged ground of necessity could well be fraught with more peril than that sought to be averted. The *Larnaca* incident[204] could in this regard be taken as a good example. In that incident, Egyptian commandos attempting to rescue hostages held by two

198 *SCOR*, Fifteenth Year, 873rd Meeting, 13/14 July 1960, para. 183. See also, ibid., para. 192 where the alleged complete inability of the Congolese Government to maintain elementary rules of law and order was advanced to justify "le devoir sacré qu'avait le Gouvernement belge de prendre les mesures que lui dictaient la morale et le droit international public"; ibid., 877th Meeting, 20/21 July 1960, para. 142(1).

199 *SCOR*, 879th Meeting, 21/22 July 1960, para. 151.

200 See *SCOR*, 877th Meeting, 20/21 July 1960, paras. 44, 51.

201 Ibid., para. 64.

202 See *supra* n. 198.

203 See *supra* chapter 6, p. 177 *et seq.*

204 See 82 *RGDIP*, 1978, pp. 1096–7.

Palestinians in a Cyprus Airways airplane on the ground of Larnaca airport in Cyprus ended up exchanging fire with Cypriot National Guards, which resulted in the death of 15 of the Egyptians and the wounding of a total 18 persons from both sides. The gravity of the incident would admonish that any contemplated resort to measures of force on grounds of necessity should be attended by a scrupulous exercise of caution. But such a caveat would not detract from the validity of a properly constituted necessity.[205]

In practical terms, the resort to the ground of necessity would lose its value if it occasioned an embarrassment to the State whose territory is the object of the exercise of force, and obliged that State to opt for face-saving countermeasures. Such a turn of events would entail a greater breach of international peace and further erosion of the Charter's prohibition of force. In such cases, acts which might not be illegal might be considered impermissible[206] for purposes of higher community values. After all, the rationale of necessity itself is the discriminatory relationship between values accepted by the world community.

In sum, necessity, which appears to be available under customary international law as a valid ground for excusing the breach of an obligation, would likewise be available under the Charter. In view, however, of the apparent absence of delictual responsibility of the State whose interests would be violated on grounds of necessity, and the compounded damage to, and destruction of, aggregate values, the content of necessity would have to be more circumscribed than that of self-defence. In other respects, as a title that is subsumed under the exception which the Charter's prohibition of the threat or use of force brings forth, necessity would complement that prohibition. It cannot, therefore, without creating a contradiction in terms, constitute a valid base for aggression, for the presence of the latter would *ipso facto*

[205] Were the allocation of legal responsibility for the Larnaca incident to be in issue before an international judicial body, it would appear that Egypt could not have successfully defended its military incursion into Cyprus with a plea of necessity: Cyprus appeared to have taken its own measures to deal with the situation of the hostages, and this would seem to militate against the presence of a proper state of necessity. Otherwise, the plea of a state of necessity might have served as a good ground for absolving from or mitigating liability. – Cf. P. Malanczuk, *supra* n. 145, p. 284 where it is rightly indicated that '[l]egally, the victim State would therefore be barred from taking protective measures to defend its rights against a State invoking, for example, the plea of "necessity"'.

[206] See R. Higgins, *supra* n. 22, p. 174.

preclude a valid necessity.[207] Nor can it entitle reversion to the notion of self-preservation so long as the Charter remains valid.

Self-defence and necessity constitute unilateral resort to force without prior UN authorization. Their tolerated scope will reflect the level of effectivness with which the UN accomplishes its purposes. That tolerated scope will in turn indicate the mode of coercion which is accepted at a particular time to constitute the prohibited force, and the established hierarchy of values of States.

[207] Cf. B. Cheng, *supra* n. 163, p. 74; *YILC*, 1980, Vol. II, Part Two, p. 49, para. 31.

Chapter 8

Points of Conclusion

The following points are submitted as recapitulative conclusions of the principal aspects of this study of Art. 2(4).

1. Art. 2(4) is not dead.[1] It is consistently reaffirmed at international fora and in bilateral relations. General Assembly resolution 42/22 of 18 November 1987 – Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations – is one such example.[2] Even if it is not specifically mentioned, Art. 2(4) is implicit in Security Council resolution 660 (1990), which condemns the Iraqi invasion of Kuwait and determines the existence of a breach of international peace and security. The Article is likewise implicit in Security Council resolution 661 (1990), which affirms the right of individual and collective self-defence and imposes economic sanctions against Iraq to bring the invasion to an end and "restore the sovereignty, independence and territorial integrity of Kuwait".

1 Some state unreservedly the death of Art. 2(4). E.V. Rostow, for example, says, "As these words are written, in 1986, Article 2(4) of the Charter is not in fact part of the living law of the world community." – "Disputes Involving the Inherent Right of Self-Defense", in *The International Court of Justice at a Crossroads*, L.R. Damrosch ed., 1987, p. 270. Some speak of the decline of the Charter's normative restraint, i.e. decline probably perceived from the perspective of an unvariable content and scope the norms might be considered to possess. – See R. Falk, "The Decline of Normative Restraint in International Relations", 10 *YJIL*, 1985, p. 263 *et seq.* But the necessary adaptability of the norms to changing requirements of times would help keep them functional.

2 See also GA resol. 44/240, 29 Dec. 1989 re the US armed intervention in Panama. The resolution, *inter alia*, recalled the provisions of Art. 2(4), deplored the intervention and demanded the withdrawal of the invading US forces. The resolution was supported by 75 Members, but 40 Members abstained. This number of abstentions may not, however, manifest an indifference to the continued validity of the principle of Art. 2(4). It may have been principally due to a censorious opinion about a notoriously corrupt and oppressive régime brought down by the intervention.

Despite the double standard that may be manifested at the UN,[3] States hardly resort to force which they do not seek to justify as legal, and hence as compatible with the provisions of Art. 2(4).[4]

2. The Article has a universal and imperative applicability. It may be identified as existing separately from the corresponding norm of customary international law, but the fundamental identity of the two norms would not admit of separate application. It is generally taken to have attained a *jus cogens* status. Any undertaking inconsistent with it would therefore be void,[5] and any fruit resulting from its contravention would suffer non-recognition.[6]

3. The prohibition of force in international relations is all-embracing. It is not restricted to the protection of territorial integrity or political independence, and where there is no justifying or excusing ground, the limited duration of the breach of, or the absence of designs on, these protected values pleaded in defence will not succeed. The prohibition does not relate only to States proper, but comprehends as well by necessary implication other entities assimilable with States. It does not relate to the actual use of force only, but also to its threat.

4. The prohibition of force in international relations, which culminated in Art. 2(4), is the corner-stone of the UN's principal purpose of maintaining international peace and security. The Article is weighted in favour of presuming the illegality of any unilateral use of force not authorized by the UN. The duty of reporting and showing valid legal cause for the breach of the prohibition therefore falls *ipso jure* on every party resorting to unilateral force.

5. The prohibition of force is not absolute: it engenders its exceptions. Measures of self-defence in their individual or collective aspects forcibly protect values protected by the prohibition when the breach of the latter

[3] See T. Franck, "Of Gnats and Camels: Is there a Double Standard at the United Nations?", 78 *AJIL*, 1984, p. 818 where it is realistically observed that "[t]he superpowers...consistently do vote not for the principle [non-use of force] but for political self-interest. As heads of alliances, they feel they cannot afford to be principled. As militarily mighty states able to look after their own security, they are not as reliant as the majority on the protection of rules and principles."

[4] See, e.g. O. Schachter, "The Right of States to Use Armed Force", 82 *MLR*, 1984, p. 1623.

[5] See, e.g. Section I(11) of GA resol. 42/22; D. Nguyen Quoc, P. Daillier, A. Pellet, *Droit international public*, 3e éd., 1987, pp. 183, 186–8, 193–4.

[6] See, e.g. Section II(10) of GA resol. 42/22.

is imminent or actual. In this regard, armed attack should not be taken as an exclusive ground for the exercise of self-defence.

Further, no distinction between territorial integrity and territorial inviolability should be necessary for the proper exercise of the appropriate self-defence. The purposes of the prohibition in the Article do not appear to justify a qualitative and consequential differentiation between the internal and external manifestations of political independence. In the instance of external manifestations, therefore, States are to be considered as entitled to use force in appropriate cases for the protection of nationals and rights in places outside their jurisdiction.

6. The content of the Article remains debated. It appears to be, in the words of Nguyen Quoc, Daillier and Pellet, a "débat sans conclusion".[7] Nevertheless, at the minimum, it is taken to cover the threat or use of physical or armed force effected directly or indirectly. Other forms of coercion are placed by some under the rubric of intervention. But, as G. Arangio-Ruiz observes with reason, "[t]here would be a difference...if illegal recourse to *armed* force met sanctions or measures different from those attached to the illegal recourse to *economic* or *political* force".[8] Besides, disregarding the possible vulnerability of the values protected by the prohibition to non-physical modes of coercion would make the prohibition partial and its implementation defective.

7. Assigning to modes of coercion classified as intervention the unilateral protection of countermeasures might entail a protection inferior to that afforded by self-defence. This would be so where the efficacy of the countermeasures is diminished by denying them the possibility of collective action and the justified use of proportionate armed force. Such qualitative disparity between unilateral measures permitted to protect the same set of values would not appear consistent with the purposes of the prohibition and the exception of self-defence that it engenders. If the mode of force is permitted to override its consequences, the prohibition would be made responsive to form rather than substance. If, however, the use of armed force is acknowledged to be within the proper scope of countermeasures, as it should be where justified as proportionate,

[7] *Op. cit., supra* n. 5, p. 803.

[8] *The UN Declaration on Friendly Relations and the System of the Sources of International Law*, 1979, p. 100.

distinguishing between such measures and self-defence would for all practical purposes of the prohibition appear unhelpful.

8. The Article has a conditional relationship with the collective security scheme of the Charter, and its scope would need to reflect the degree of that scheme's effectiveness. The more the UN is effective, the smaller will be the area left for the unilateral resort to force. Where the UN machinery becomes tangibly unresponsive to the security needs of States, to expect or require the latter not to seek correspondingly to retrieve the freedom of action they had surrendered would appear unrealistic and impracticable.

9. As the constitution of a near-universal world body, the Charter is a unique international instrument. Its provisions need to be given the interpretation which makes them relevant for the period to which they pertain. This is necessary for as long as the Charter remains legally valid. The provisions of Art. 2(4) need to be construed in a manner that accords an important consideration to good faith; this is necessary in order not to make the Article a shelter for non-armed/non-physical modes of coercion that could be deleterious to the values sought to be protected by the prohibition. The good faith principle in the construction of the Article is the means for coming to terms with what may be a'"twilight zone" between permissible and impermissible coercion'[9] at any one time. As the UN lacks the necessary infrastructure for the proper maintenance of international peace and security, more emphasis on the good faith principle appears particularly in order when considering the lawfulness or otherwise of acts alleged to contravene the prohibition of force.[10]

10. Peace cannot be maintained by legal rules alone. In this regard, R.-J. Dupuy, for instance, observes with good reason that "[l]a paix par le droit a toujours été un mythe, incapable d'agir sur l'histoire. La paix suppose la réunion de conditions économiques, politiques, psychologiques qui pourrait empêcher un conflit armé et permettre l'adoption commune de textes juridiques consacrant l'accord intervenu au préalable, mais le droit, à lui seul, est impuissant à empêcher le recours à la violence."[11] Still, as long as it remains viable in a dynamic Charter, Art. 2(4) can fulfil its part

9 D.W. Greig, *International Law*, 2nd ed., 1976, p. 871.

10 Cf. the Dissenting Opinion of Schwebel in the *Nicaragua v. USA* case, Merits, *ICJ Reports* 1986, pp. 392–4.

11 *La communauté internationale entre le mythe et l'histoire*, 1986, p. 150.

in the maintenance of international peace and security if it is made to serve due notice on prospective violators of these values. The Article could be so utilized if, in response to the degree of effectiveness of the UN machinery, its terms are construed to accommodate commissions or omissions, which at any definite time might be such as to affect seriously the values it seeks to protect.

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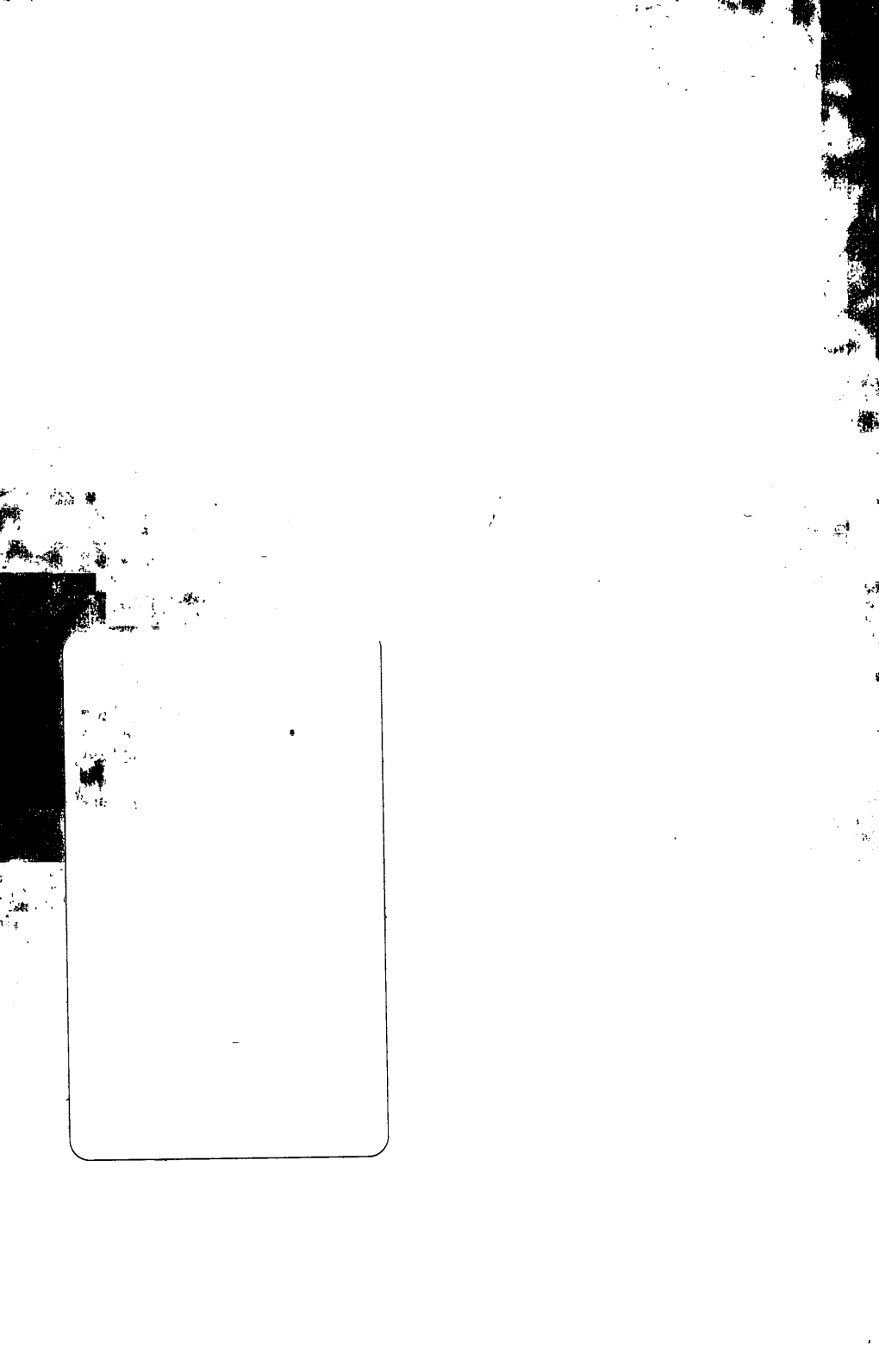

The significance of the regulation of the threat or use of force in international relations needs no special emphasis. Such regulation has been brought under the legal régime of the UN Charter by the prescript of Art. 2(4).

Against a brief historical background, and inquiry into the relationship between the abstention of States from the unlawful threat or use of force and the peace enforcement scheme of the Charter, this book analyses the explicit and implicit terms that constitute the Article.

The book maintains that the terms of the Article should be held flexible to accommodate new factors which affect seriously the protected values of States. It considers that the prohibition of the Article is dependent on how effectively the UN implements the collective security provisions of the Charter.

It subscribes to the thesis that the right of self-defence is implicit in Art. 2(4), and that Art. 51 is not the exclusive source of that right.

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