INTERNATIONAL LAW AND THE USE OF FORCE BY STATES

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PREFACE

THIS work was completed in November 1960 and was submitted in the Hilary Term 1961 as a doctorate thesis. The text as now offered was completed in September 1961 and is, in substance, that of the thesis, though some alterations and emendations have been made and some additional references inserted to bring it up to date.

The choice of subject was motivated partly by a feeling that it has not received that attention from public international lawyers which is its due and partly by a conviction that recent changes in technology and strategy have given a new significance to the legal regulation of the use of force. The problem has been simply put by Lord Avon, when (as Sir Anthony Eden) he said: 'Science has placed us several laps ahead of the present phase of international political development, and unless we catch up politically . . . we are all going to be blown to smithereens.'[1] Estimates from a diversity of sources of present dangers show a general awareness of the contradictions inherent in regarding force as an instrument of national policy. On 15 July 1955, certain eminent scientists from Western countries who shared the distinction of being Nobel prizemen met on the island of Mainau and signed a statement, the decisive passages of which read:

> By total war and the use of now available weapons the world may become so infested with radio-activity that war would result in the destruction of whole nations, annihilating both neutrals and belligerents.
>
> Should the Big Powers engage in war, who can guarantee that it will not develop into such a deadly struggle? Thus any nation engaging in total war invites its own destruction and endangers the whole world.
>
> We do not deny it is the fear of these destructive weapons by which Peace is maintained at present in this world. Yet we think it extremely deceptive for any Government to believe that fear of such weapons will, in the long run, prevent wars. On the contrary, fear and tensions have only too often led to the outbreak of wars. Likewise it also seems to us self-deception to imagine that minor conflicts could still be settled by employing the traditional weapons. No warring nation will, in times of extreme danger, deny itself the use of any weapons that scientific techniques can supply.

A statement emanating from a meeting of representatives of eighty-one Communist and Workers' Parties held in Moscow in

[1] *Parl. Deb., H. of C.*, vol. ccccxvi, col. 611, 22 Nov. 1945.

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CHAPTER VI

NEW FOUNDATIONS: THE UNITED NATIONS CHARTER AND THE BASES OF THE LAW AFTER 1945

1. *Introduction*

It is useful at this point to assess the juridical bases existing since 1945 for the assertions that the use of force or threat of force otherwise than in self-defence or with the authority of an organ of the United Nations is illegal,[1] and that there is a presumption that this illegality can be given specific content in the ways discussed in Chapters VII and VIII. The foundation for this statement of the law is the customary rule which is considered to have existed in 1939 and which rests on state practice and, in particular, the Kellogg–Briand Pact. More recent developments support and maintain the customary rule.

2. *The United Nations Charter*

The customary norm is restated and reinforced by Article 2, paragraph 4, of the United Nations Charter:[2]

> 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.

[1] The general problem of the justification of the use of force will be examined in Chapters XI to XVIII. It is possible that certain customary rights to use force still exist beyond the category of self-defence: see Chapters XIV–XVI, and XVIII.

[2] For General Assembly resolutions reaffirming the obligations of art. 2, para. 4: Resolutions 298 (IV) (Essentials of Peace); 291 (IV) (Promotion of the stability of international relations in the Far East); 383B (V) (Threats to the political independence and territorial integrity of China); 378A (V) (Duties of States in the event of the outbreak of hostilities); 380 (V) (Peace through deeds); 704 (VII) (Regulation . . . of all armed forces and armaments); 707 (VII) (Complaint by the Union of Burma regarding aggression against it by the Government of the Republic of China). On these resolutions and more general references to the Principles of the United Nations, see *Repertory of Practice of United Nations Organs*, i, 14–33 (para. 25 and Annexes I and II). And see App. B to this chapter. It is not considered that para. 7 of art. 2 has any direct relevance for the law relating to the use of force. The paragraph refers to a question of competence only: 'domestic jurisdiction' is the technical term and 'intervention' is used in a loose sense. See Kelsen, *Law of the United Nations* (1951), p. 770; Goodrich and Hambro, *Charter of the United Nations* (2nd ed.), pp. 110–21; and the *Asylum* case, I.C.J. Reports, 1950, pp. 285, 286. Lauterpacht, however, takes the view that 'intervention' here bears the narrow meaning of 'dictatorial interference'; *The Development of International Law by the International Court* (1958), p. 60. Cf. Oppenheim, i. 415. Provisions based on paras. 3 and 4 of Article 2 of the Charter appear in the I.L.C. draft decl. on the rights and duties of states, 1949, Articles 8 and 9, on which, *infra*, p. 254, n. 5.

This paragraph is comprehensive in its reference to 'threat or use of force' and it will be suggested subsequently that one of the principal exceptions—the reservation of the right of individual and collective defence in Article 51—should be given a narrow interpretation.[1] The other principal exception, action authorized by an organ of the United Nations, will be considered in Chapter XVII, section 3. The obligation of Article 2, paragraph 4, is complemented by paragraph 3 of the same article which provides that members shall settle their disputes by peaceful means, and Chapter VI of the Charter on 'Pacific Settlement of Disputes', particularly Article 33. By reason of the universality of the Organization[2] it is probable that the principles of Article 2 constitute general international law.[3] In any case the difference between Article 2, paragraph 4, and 'general international law' is the merest technicality.[4] The Charter stands with the Kellogg–Briand Pact and the two instruments though independent of each other form the essential juridical basis of the world legal order and of world peace.[5]

3. *Possible Sources of Weakness in the Legal Régime*

Some possible sources of weakness in the legal régime based on the Pact and the Charter must be noticed. The degree to which justifications for the use of force in the customary law or classical law of the period before the League and the Kellogg–Briand Pact have survived the developments since 1920 presents problems of some delicacy which are considered in Part III. A feature of the years since 1946 has been the absence of references to the Kellogg–Briand Pact in state practice. Obviously the prosecutions and the International Military Tribunals at Nuremberg and

[1] The problems of interpretation relating to art. 2, para. 4, and art. 51 are discussed *infra*, pp. 264 seq.

[2] Switzerland, Western Samoa, Laos, Kuwait, the two German states, the two Korean states, the two Viet-Namese Republics, and the Chinese P.R. remain outside the Organization. New states are admitted regularly: total membership in the session 1961–2 was 104.

[3] For this view: Kelsen, *The Law of the United Nations* (1951), pp. 109–10; and essay in: *The United Nations: Ten Years' Legal Progress* (1956); Tunkin, 95 Hague *Recueil* (1958, III), pp. 65–66, and Lord McNair, *The Law of Treaties* (1961), pp. 216–18. See the Charter, art. 2, para. 6. The view expressed in the text is not generally accepted by writers, e.g. Castrén, *The Present Law of War and Neutrality*, p. 56. See further, *infra*, pp. 279–80.

[4] Cf. Jessup, *A Modern Law of Nations* (1956), pp. 135, 168; Drost, *The Crime of State*, i. 46; Sørensen, 101 Hague *Recueil* (1960, III), p. 236.

[5] Oppenheim, ii. 196–7; Lord McNair, *Parl. Deb., H. of L.*, 5th ser., cxcix, cols. 660–1, 12 Sept. 1956, and in *The Law of Treaties* (1961), pp. 209–10, 216–18, 576–8, 591, 600. There is virtually no conflict between the Charter and the Pact: see Kelsen, *The Law of the United Nations* (1951), pp. 119–21. Some problems occur in relation to arts. 53, 103, and 107 of the Charter. See *infra*, Chapter XVII, sect. 4. See also I.L.C. draft decl. on the rights and duties of states, 1949, Article 9 and comment thereon; and *infra*, p. 254, n. 5.

Tokyo considered the Pact to be still in force.[1] However, the general absence of references since then raises the questions of desuetude, and of termination by tacit mutual consent.[2] It is submitted that it is very doubtful if desuetude has occurred. The absence of references may be explained by the fact that the United Nations Charter exists as an instrument which is not only legally the equal of the Pact but politically more important and vital.[3] During the life of the League references to the Pact were common, *inter alia*, because it was the complement of the Covenant, which without the Pact had only a limited effect on the law relating to the use of force, and because the Pact was politically significant since the United States[4] and some other states were bound by the Pact but not the Covenant. In the case of an instrument like the Pact in strong terms, and of great legal significance, it is reasonable to expect much more evidence of desuetude than exists at present. Developments in the law since 1928 have tended to confirm the principles of the Pact. The absence of references in state practice, though general, is by no means complete. During the Suez crisis Lord Kilmuir, replying to the debate on the action in Egypt, on behalf of the government, made explicit references to the Pact which assumed its continuing force.[5] Lord McNair[6] and Sir Lionel Heald[7] have made statements which assume the validity of the Pact. Jurists writing in the post-war period do not even consider the possibility of the operation of desuetude in relation to the Pact.[8]

Moreover, it is not plausible to suggest that the behaviour of states during the Second World War showed that most states considered the Pact to have lost its effectiveness as a result of the conflict.[9] In effect a majority of states vindicated the Pact by taking action against a minority of aggressor states.[10] Two further comments are called for on the application of the Pact since 1945.

[1] *Infra*, pp. 167–9, 170, seq.

[2] Though immune from denunciation the Pact is almost certainly susceptible to desuetude. See *supra*, p. 92, n. 1.

[3] The same explanation applies to non-adherence to the Pact of new states appearing in the post-war years. See, however, *infra*, p. 115.

[4] And for a period the U.S.S.R.

[5] *Parl. Deb., H. of L.* 5th ser. cxcix, cols. 1353, 1354; 1355, 1356, and 1359; 1 Nov. 1956.

[6] Ibid., cols. 660–1, 12 Sept. 1956; and in *The Law of Treaties* (1961), pp. 209–10, 216, 576–8, 591, 600.

[7] Letter in *The Times*, 27 Oct. 1956.

[8] See: Oppenheim, ii. 193–7; Hudson, *Cases on International Law* (3rd ed., 1951), pp. 49, 70; Guggenheim, *Traité*, ii. 296–300; Redslob, *Traité*, pp. 268 seq., Castrén, *The Present Law and Neutrality*, pp. 45, 54, 56; Żourek, 92 Hague *Recueil* (1957, II), p. 767; Kelsen, *The Law of the United Nations* (1951), p. 120; Brierly, *The Law of Nations* (5th ed.), pp. 324–5. Cf. the I.L.C. draft. decl. on the rights and duties of states, 1949, Article 9 and comment thereon; see *infra*, p. 254, n. 5; and *Legal Aspects of Neutrality*, Proceedings of the Third Commission of the VIIth Congress of the I.A.D.L., Brussels, pp. 20–21, 35, 42–43, 49, 89, 125.

[9] Cf. Kelsen, op. cit., p. 121, n.

[10] *Supra*, pp. 107–10.

If the view is taken that violation of the Pact implies cancellation by the violator then the ex-enemy states are no longer bound by it. However, this view is probably not sound.[1] The effect of the preamble, which deprives the violator of the benefits of the treaty as against other contracting parties, raises more difficult questions.[2] It does not follow that the provision means that the treaty ceases to bind contracting parties *vis-à-vis* the violator henceforth and for all purposes: in all probability it provides for collective defence in reaction to the particular act of violation.[3] Lastly, it is possible to argue that the instrument is no longer universal since the appearance of new states which have not adhered to it and which have not in all cases succeeded to the treaty obligations of the former territorial sovereign by special agreement or declaration.[4] This argument can probably be met by assuming that it is a criterion of statehood that the putative state is to observe general international law, and, in particular, fundamental obligations of the sort created by the Kellogg–Briand Pact and Article 2 of the United Nations Charter.[5]

One other possible source of weakness in the legal régime remains to be noticed. Under what conditions would the obligations of the United Nations Charter cease to bind all members? The viability of the Charter depends on the functioning of the Organization and its organs and this depends on the existence of membership of a certain size. Thus apart from mutual consent as the most obvious method of terminating the Organization, mass

[1] See Kelsen, p. 120, n. 2.

[2] See *infra*, pp. 336–7.

[3] See Kelsen, loc. cit., and *infra*, pp. 229–30, 332, 336.

[4] Examples: Israel, Mongolian P.R., Tunisia, Morocco. No special agreement is needed for succession in the case of multilateral treaties in the opinion of O'Connell, *The Law of State Succession*, p. 64, but there is little authority to support such a view: see Rosenne, 77 *J.D.I.* (1950), p. 1142, *contra*. In several cases succession occurred by treaty: for example, India, Pakistan, Burma, and Ceylon. See Mervyn Jones, 24 *B.Y.I.L.* (1947), pp. 369 seq., O'Connell, 26 *B.Y.I.L.* (1949), p. 454, and Lord McNair, *The Law of Treaties* (1961), Chapter XXXVIII. In any case India had signed the Pact in her own right. Ethiopia and Austria present cases of special difficulty: it is very probable that they were extinguished in 1936 and 1938 respectively, and that continuity does not exist in the matter of treaty obligations. For a general survey of the sources and a conclusion that the law is still in a fluid state: Jenks, 29 *B.Y.I.L.* (1952), p. 105: 'State succession *in* respect of law-making treaties.' Cf. *Treaty Series* No. 48 (1960).

The Governments of the People's Republic of China and the Republic of China (the Nationalist Government of Taiwan) also create some interesting problems. The Peking Government is as a matter of general principle bound by the Pact to which China adhered.

[5] See Briggs, *The Law of Nations* (2nd ed.), p. 115 and sources cited therein and Webster, U.S. Secretary of State, to Thompson, Minister in Mexico, 15 Apr. 1842, quoted in Moore, *Digest*, i. 5–6. It must be noted that many textbooks and authorities do not contain this proposition but it is supported by state practice. Conversely, pre-existing states cannot act on the assumption that they are not bound by legal duties in regard to new states: see Sørensen, 101 Hague *Recueil* (1960, III), p. 46.

withdrawal of membership or extensive conquest by non-members could result in collapse of the Organization and the extinction of the obligations of the Charter by supervening impossibility of performance.[1] It might, however, be argued that such impossibility would only affect the functioning of organs and not the principles embodied in Article 2.

However, the significance of these sources of weakness in the Kellogg–Briand Pact and the United Nations Charter, regarded in isolation and as instruments affecting parties only, is diminished considerably if they are considered as part of a customary rule established by 1939 and consolidated since then.[2]

4. *Other Legal Instruments Relating to the Use of Force of the Period Since 1945*

The London Agreement and Charter of 8 August 1945, the adherence of nineteen states, and subsequent affirmation by the General Assembly of the principles of that Charter and of the Judgment of the International Military Tribunal[3] must be assumed to have had the effect of underscoring the essential illegality of the use of force as an instrument of national policy, although the particular legal context was that of criminal responsibility of individuals. Less explicit but none the less valuable evidence of the illegality of the use of force for the acquisition of territory or the settlement of disputes is to be found in the recitals and declaration of the Act of Chapultepec of 3 March 1945,[4] and in Article 5 of the Pact of the Arab League[5] which

[1] See *Second Report on the Law of Treaties*, by Fitzmaurice, Doc. A/CN. 4/107; *Yrbk. of I.L.C.* 1957, ii; art. 16. Cf. *supra*, p. 91. For the argument that the obligations of members are conditional on the 'effectiveness' of the function of an organ of the Organization, the Security Council, see *infra*, pp. 345–6. In the Advisory Opinion on the *International Status of South-West Africa*, I.C.J. Reports, 1950, p. 128, at pp. 131–6, the International Court took the view that mandate continued in spite of the demise of the League. The Opinion emphasizes the special nature of the mandate, being an international *status* created as a 'sacred trust of civilisation'. The Opinion rests on a variety of special considerations and the application of the principle of effectiveness; it does not seem to warrant any conclusion that, in general, obligations of members of organizations like the League and U.N.O. survive if the organization is wound up. See Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 277–8. The analogy would seem to be with the law of state succession in the matter of treaties creating real rights: O'Connell, *The Law of State Succession*, p. 49. But see further Oppenheim, i. 880.

[2] *Supra*, pp. 107–11.

[3] See *infra*, pp. 161–4, 170–1, 188–92.

[4] By the governments represented at the Inter-American Conference on War and Peace. Text: 12 *Dept. of St. Bull.*, p. 339; 39 *A.J.I.L.* (1945), Suppl., p. 108; Hudson, *Int. Legis.* ix, no. 647.

[5] Signed 22 Mar. 1945. Translation: 39 *A.J.I.L.* (1945), Suppl., p. 266; Hudson, *Int. Legis.* ix, no. 650; 70 *U.N.T.S.*, no. 241. Original parties: Syria, Transjordan, Iraq, Saudi Arabia, Lebanon, Egypt, and Yemen.

states that 'recourse to force for the settlement of disputes arising between two or more member states of the League is prohibited'. In the years after the Second World War large numbers of states participated in treaties and other official acts which support the norm of illegality. The peace treaties with the ex-enemy states assume obligations which could only arise from the illegality of the resort to force by the Axis Powers and their allies.[1] The Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947,[2] reaffirmed in its preamble the principles set forth in the preamble and declarations of the Act of Chapultepec, and provided as follows in Article 1:

> The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty.

The Charter of the Organization of American States of 1948,[3] known as the Bogotá Charter, contained these provisions:

> Article 5. The American States reaffirm the following principles: . . .
> (*e*) the American States condemn war of aggression: victory does not give rights.
>
> Article 15. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.
>
> Article 18. The American States bind themselves in their international relations not to have recourse to the use of force, save in the case of self-defence in accordance with existing treaties or in fulfilment thereof.

5. *The Five Principles of Peaceful Co-Existence*

In the period since 1954 a considerable number of states have adhered to agreements embodying or otherwise approving principles which were known subsequently as the *Panch Shila* or Five Principles of Peaceful Co-existence and which were first formu-

[1] See *infra*, pp. 142–4 seq., 182–4.

[2] In force 3 Dec. 1948. Text: 21 *U.N.T.S.*, no. 324; 43 *A.J.I.L.* (1949), Suppl., p. 53. See also *infra*, p. 253.

[3] Text: 30 *U.N.T.S.*, no. 449; 46 *A.J.I.L.* (1952), Suppl., p. 43. See also *infra*, p. 253, on the right of individual and collective self-defence in the Charter. Cf. the Declaration of Caracas, 28 Mar. 1954: 48 *A.J.I.L.* (1954), Suppl., p. 123 at p. 124; and resolutions of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 12–18 Aug. 1959, *Final Act*, pp. 4, 7; 55 *A.J.I.L.* (1961), p. 537.

lated in an agreement of 29 April 1954 between India and the People's Republic of China.[1] The Five Principles are:

1. Mutual respect for each other's territorial integrity and sovereignty,
2. Non-aggression,
3. Non-interference in each other's internal affairs for any reasons of an economic, political, or ideological character,
4. Equality and mutual benefit, and
5. Peaceful co-existence.

These principles are similar to those found in the various inter-American treaties and declarations. They are often linked with an undertaking to observe the principles of the United Nations Charter and in relation to existing obligations both under the Charter and under general international law[2] they are declaratory. Their value is decreased by their character of 'principles' which may be difficult to relate to other norms and by the lack of pre-

[1] See App. I. The name *Panch Shila* (or *Panchasheel*) was applied to the Five Principles *ex post facto* by the Indian Prime Minister on the analogy of the title given to the basic principles of the Indonesian Constitution. Their substance is related to Buddhist precepts of conduct. See Fifield, *Diplomacy of Southeast Asia: 1945–1958* (New York, 1958), pp. 510–11 (letter from Nehru); *Panch Sheela*, Lok Sabha Secretariat, New Delhi, 1955 (85 pp.); *Panchsheel*, Ministry of Information and Broadcasting, New Delhi, 1957 (64 pp.). Soviet writers trace the principle and concept of peaceful co-existence to the Decree on Peace adopted by the All-Russian Congress of the Soviets on 8 Nov. 1917: Degras, *Soviet Docs. on Foreign Policy*, i. 1. See further: Lyon-Caen, 79 *J.D.I.* (1952), p. 48; Fifield, 52 *A.J.I.L.* (1958), p. 504; Triska and Slusser, ibid., pp. 718–20; Vishinskii, (ed.) *Diplomaticheskii slovar'*, ii (Moscow, 1950), cols. 124–5; Modzhorian and Sobakin, (editors) *Mezhdunarodnoe pravo v izbrannykh dokumentakh* (Moscow, 1957), i. 5–21; Tunkin, 95 Hague *Recueil* (1958, III), pp. 62–69, and id., *Soviet Year Book* (1958), p. 15; von der Heydte, Strupp-Schlochauer, *Wörterbuch*, ii. 237–8; Int. Law Assoc., *Report of the Forty-Eighth Conference, New York* (1958), pp. 417 seq.; Krushchov, *For. Affairs* (1959), and also in *Sov. News*, 10 Sept. 1959; editorial in *Kommunist*, Moscow, no. 16, 1959 (translation in *Sov. News*, 8 Dec. 1959); Korowicz, *Introduction to International Law*, pp. 149–52. Recent important documents on the principle of peaceful co-existence are: Declaration of the Communist and Workers' Parties of Socialist Countries, Moscow, 16 Nov. 1957; World Peace Appeal by 64 Communist Parties, Moscow, 18 Nov. 1957; Communiqué and Statement, Meeting of Representatives of Communist and Workers' Parties, Moscow, 1960 (text in *World Marxist Review*, English ed. of *Problems of Peace and Socialism*, iii, no. 12, p. 3; note sect. iii of the Statement, which was subscribed to by 81 parties); and Draft Programme of the Communist Party of the U.S.S.R., 30 July 1961 (text in *Pravda* of that date, English text, Moscow, 1961, summary in *The Times*, 31 July 1961). See also Enver Hoxha, *Report . . . to the Fourth Congress of the Party of Labour of Albania, 13 Feb. 1961* (Tirana, 1961), pp. 25, 32, 34. Agreements and joint statements between Communist and Socialist States sometimes refer to 'principles of Socialist (or proletarian) internationalism' instead of, or additional to, those of peaceful co-existence. There is no distinction between the two in their content regarding the subject-matter under discussion. See Soviet-Czechoslovak Communiqué 12 July 1958, *Sov. News*, no. 3877, 15 July 1958; Soviet-Albanian Joint Statement, 30 May 1959, *Sov. News*, no. 4071, 4 June 1959; U.S.S.R. and German Democratic Republic, Joint Statement, 13 Aug. 1957, *Sov. News*, no. 3679, 14 Aug. 1957; and Kuusinen, (ed.) *Fundamentals of Marxism-Leninism* (in English, Moscow, 1961), pp. 767–76.

[2] Assuming the distinction exists; for practical purposes it has little importance.

cision in the terms used.[1] However, they are usually expressed as solemn obligations, often in the body of a treaty, and they have particular significance in so far as political entities not admitted as members of the United Nations have been able to express adherence to principles similar to those of the Charter by accepting the Five Principles. Numerous states accept these Principles[2] and it is probable that they now rank with and supplement the United Nations Charter and the Kellogg–Briand Pact. At the twelfth session of the General Assembly of the United Nations the Soviet representative proposed a draft resolution which contained a statement of the Five Principles of peaceful co-existence and urged states 'to be guided in their mutual relations by the above principles and to settle any disputes arising between them exclusively by peaceful means'. The Western Powers and their associates objected to the formula based on the Five Principles on political grounds, although their representatives did not dispute the substance of the principles. Thus in the General Committee on 30 September 1957, the American representative, Henry Cabot Lodge, observed that 'these principles, stated in another way, are what we are all committed to by our adherence to the Charter of the United Nations'. Eventually, on 14 December, a resolution submitted by India, Yugoslavia, and Sweden was adopted which called, *inter alia*, for 'peaceful and tolerant relations' and 'friendly and co-operative relations' between states.[3] The Final Communiqué of the Afro-Asian Conference at Bandung,[4] of 24 April 1955, gave approval to ten principles as a

[1] The need to place the principles within the context of other rules of law is indicated by the exchanges between the Indian and Chinese Governments on the frontier question: see the Chinese Note of 11 May 1962 (*New China News Agency*) and the report of officials extracted in *Indian Journal of Int. Law*, April, 1961, p. 538.

[2] See Appendix I to this Chapter.

[3] Resolution adopted by 77 votes to none, Nationalist China abstaining; text: U.N. Doc. A/3802, 14 Dec. 1957. See Fifield, 52 *A.J.I.L.* (1958), pp. 509–10. Soviet proposal: *Sov. News*, 23 and 25 Sept. 1957.

[4] Text published by Indonesian Embassy in London, 18 Apr. 1956; also in *Docs. on International Affairs*, 1955, p. 429, and *Sov. News*, no. 3157, 4 May 1955. The principles approved by the Bandung Conference were affirmed in the following: Joint Communiqué on Soviet-Lebanese talks, *Sov. News*, no. 3421, 29 June 1956; Soviet-Yemen Communiqué, Moscow, 23 June 1956, *Sov. News*, no. 3418, 26 June 1956; Soviet-Egyptian Joint Communiqué, ibid.; Joint Statement by Prime Minister of India and Emperor of Ethiopia, 8 Nov. 1956, *The Times*, 9 Nov. 1956; Joint Soviet-Syrian Communiqué, *Sov. News*, no. 3505, 5 Nov. 1956; Soviet-Afghanistan Communiqué, Moscow, 30 Oct. 1956, *Sov. News*, no. 3503, 1 Nov. 1956; Joint Statement by Prime Ministers of P.R. of China and Pakistan, Peking, 23 Oct. 1956, *People's China*, 1956, no. 22, Suppl.; Joint Statement by Chairman of the Council of Ministers of the U.S.S.R. and the Prime Minister of India, 22 June 1955, *News* (Moscow), 1955, no. 13, 1 July 1955, *Sov. News*, no. 3192, 23 June 1955; Joint Statement of Governments of U.S.S.R. and United Arab Republic, 15 May 1958, *Sov. News*, no. 3839, 16 May 1958; Joint Communiqué, U.S.S.R. and Afghanistan, 6 Oct. 1958,

basis for the promotion of world peace and co-operation, *inter alia*:

1. Respect . . . for the purposes and principles of the Charter of the United Nations.

2. Respect for the sovereignty and territorial integrity of all nations.

5. Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations.

7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country.

8. Settlement of all international disputes by peaceful means . . . in conformity with the Charter of the United Nations.

6. *Some Characteristics of the Legal Developments since 1945*

In any assessment of the legal developments after 1945 the increasing universality and influence of the obligations of the United Nations Charter must be emphasized. Nearly all significant mutual assistance agreements and all regional security arrangements are expressed to be in accordance with the principles of the United Nations Charter. On other occasions states have affirmed their adherence to the principles of the Charter.[1] Several multilateral treaties contain articles corresponding to the obligations set forth in article 2, paragraph 4, of the Charter.[2] In some cases the instrument concerned contains an obligation to observe the principles or principles and obligations of the Charter by a state which has not been admitted to membership of the United Nations Organization.[3]

In conclusion two relatively minor characteristics of the period since 1945 may be noticed briefly. First, the basic norm of the

Sov. News, no. 3927, 8 Oct. 1958; Soviet-Syrian Joint Communiqué, 25 June 1956, *Sov. News*, no. 3419, 27 June 1956; Soviet-Ethiopian Joint Communiqué, 13 July 1959, *Sov. News*, no. 4085, 14 July 1959; Soviet-Indonesian Joint Communiqué, 28 Feb. 1960, *Sov. News*, no. 4222, 29 Feb. 1960; President Nasser of U.A.R. and Ayub of Pakistan, Joint Statement, 16 Apr. 1960, *The Times*, 18 Apr. 1960; Sino-Ceylonese Joint Statement, 5 Feb. 1957, Keesing, 1957–8, 15463A; Polish-Afghan Declaration, 19 Sept., 1960, *Polish Facts and Figures*, 1 Oct. 1960; Presidents of Indonesia and Pakistan, Joint Communiqué, 10 Dec. 1960, Keesing, 1961–2, 18434A. Twenty-nine states participated in the Conference, including the People's Republic of China and North and South Vietnam.

[1] See App. II to this Chapter for a list of treaties and declarations reaffirming or expressing adherence to the principles of obligations of the United Nations Charter.

[2] The North Atlantic Treaty, 1949, art. 1; and the Warsaw Treaty (Treaty of Friendship, Co-operation and Mutual Assistance, signed on 14 May 1955), art. 1, provide two important examples. References in App. II.

[3] e.g. Republic of Korea (Treaty with United States, signed 1 Oct. 1953, see App. II); the German Federal Republic (Final Act of the London Conference, 3 Oct. 1954, part v, see App. II); and the German Democratic Republic (Treaty with U.S.S.R., signed 20 Sept. 1955, see App. II).

illegality of force as a means of self-help has been accepted so generally that it has affected the jurisprudence of both international and municipal courts. Thus in the *Corfu Channel Case* (*Merits*)[1] the International Court of Justice condemned in general terms 'the manifestation of a policy of force . . . such as cannot, whatever be the present defects in international organization, find a place in international law'. Courts[2] in a number of countries have accepted the illegality of wars and invasions conducted by the Axis Powers and have considered the legal consequences of this quality of illegality.[3] Secondly, the non-aggression pact is no longer prominent in international relations.[4] This development

[1] I.C.J. Reports, 1949, p. 4 at p. 35. See also the Individual Opinion of Judge Alvarez, ibid., pp. 42, 47; and the Dissenting Opinions of Judge Krylov, ibid., pp. 76–77; Judge Azevedo, ibid., pp. 108–9, 111–13; and Dr. Ečer (Judge *ad hoc*) ibid., p. 130. The case is considered at length, *infra*, pp. 283–9.

[2] Courts, that is, other than military tribunals or special war crimes courts bound by a special law such as Control Council Law no. 10, for which, *infra*, p. 174.

[3] See *infra*, pp. 406–7.

[4] For exceptions: P.R. of China and the Union of Burma, Treaty of Friendship and Mutual Non-Aggression signed on 28 Jan. 1960; *A Victory for the Five Principles of Peaceful Co-existence* (Peking, 1960), p. 30; art. i, ii, and iii; P.R. of China and Afghanistan, Treaty of Friendship and Non-Aggression signed on 27 Aug. 1960; Keesing, 1959–60, 17638C; P.R. of China and Cambodia, Treaty of Friendship and Non-Aggression, 19 Dec. 1961, ibid. 18013A. These treaties are explicable politically by the exclusion of the People's Republic from the United Nations. See also the Treaty of Friendship and Mutual Assistance with Mongolia, 31 May 1960, Keesing, 1959–60, 17476C; the Treaty of Friendship, Alliance and Mutual Assistance with the U.S.S.R., 14 Feb. 1950, 44 *A.J.I.L.* (1950), Suppl., p. 84; and the Treaty of Peace and Friendship with Nepal, 28 Apr. 1960, Keesing, 1959–60, 17743A. A Chinese offer of a non-aggression pact with Nepal was rejected on the ground that the 1955 agreement on the five principles of peaceful co-existence made the pact unnecessary. See also pp. 123–6. Cf. Ghana and P.R. of China, Treaty of Friendship, 19 Aug. 1961 (text not available.) The U.S.S.R. has on several occasions made proposals for the conclusion of treaties of non-aggression. Thus on 20 May 1958 the Soviet government proposed to the Italian government the conclusion of a twenty-year Treaty of Friendship and Non-Aggression and presented a draft of the text: *Sov. News*, no. 3843, 23 May 1958. Art. 1 refers to the principles of peaceful co-existence, arts. 2 and 3 to the United Nations Charter. Early in 1959 the U.S.S.R. offered to negotiate a Treaty of Friendship and Non-Aggression with Iran but negotiations were abortive: *Sov. News*, no. 4006, 13 Feb. 1959. Other offers to conclude non-aggression pacts: letter from Chairman of U.S.S.R. Council of Ministers to the British Prime Minister, 8 Jan. 1958, *Sov. News*, no. 3760, 10 Jan. 1958; Declaration of the States Parties to the Warsaw Treaty, 24 May 1958, *Sov. News*, no. 3845, 28 May 1958; letter from Chairman of U.S.S.R. Council of Ministers to the British Prime Minister, 11 June 1958, *Sov. News*, no. 3858, 17 June 1958; Soviet draft treaty and proposal, Feb. 1959, *Sov. News*, no. 4016, 4 Mar. 1959. Art. 1 of the Draft provides: 'Recognizing that the use of force or the threat of force in international relations is prohibited by the Charter of the United Nations Organization, the High Contracting Parties solemnly declare that they shall forbear from aggression and shall not resort to the use of armed force or the threat of force against each other.' The parties to the Warsaw Treaty have on various occasions proposed a non-aggression pact with the members of N.A.T.O.: see e.g. Declaration of the Political Consultative Committee of the Warsaw Treaty, 28 Jan. 1956; *Sov. News*, 1 Feb. 1956. A Protocol prolonging the Soviet-Afghan Treaty of Neutrality and Non-Aggression of 1931 was signed on 18 Dec. 1955; see *Sov. News*, 20 Dec. 1955 and *supra*, p. 102, n. 2.

has positive rather than negative results. Some pre-war non-aggression treaties were essentially political and did not have a close relation to the legal structure of the Covenant and Kellogg–Briand Pact. Post-war bilateral treaties relating to peaceful settlement of disputes commonly refer to the principles of the United Nations Charter.[1] Moreover, in view of the strength of the legal prohibitions of resort to force they have become legally, though not politically, superfluous.[2]

[1] See App. II to the present chapter.

[2] See the Soviet proposal of 5 Feb. 1949, for a non-aggression pact with Norway and the Norwegian reply: *Docs. on Int. Affairs*, 1949–50, pp. 248–9.

are referring unless there was a clear, glaring case of the kind of aggression to which the retention of these weapons is still in some measure a deterrent.[1]

When Mr. Warbey asked the Minister of Defence to what extent it was the policy of the government 'to use nuclear weapons, of any or all types, in reply to an act of aggression committed with conventional arms', the minister in a written answer stated that 'it would be wrong to define publicly in advance the circumstances in which these weapons would be used'.[2]

It remains to comment on the element of danger in the doctrine of proportionality. If a state is faced with a small-scale attack across its frontier at a time of tension, in circumstances which do not clearly indicate whether the attack is the result of a mistake or unauthorized act of a subordinate officer, or is the herald of an offensive, its reaction might be proportionate to the threat even if it was slightly more forceful than the actual attack, the extra force being a guarantee of decisiveness. If the putative aggressor counter-attacked in fear of a genuine aggressive move by the state which regarded itself as the victim of an attack the situation could develop into a major conflict if each state relied on the 'guarantee of decisiveness' in riposte.[3] Such a situation can be prevented only by having a call to withdraw behind frontiers or *de facto* frontiers by an international organ, and possibly some machinery either always available or created *ad hoc* to supervise a phased withdrawal. If both parties ignored an authoritative order or request to withdraw they might both be considered to this extent unlawful belligerents.

6. *The Right of Self-Defence under the Charter of the United Nations*

Article 51 of the Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. 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 authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[1] Cmd. 9205 of 1954, p. 264. See also Defence, Outline of Future Policy, Cmnd. 124, Presented by the Minister of Defence to Parliament, Apr. 1957, para. 14 (p. 3): '. . . pending international agreement, the only existing safeguard against major aggression is the power to threaten retaliation with nuclear weapons.' And compare Report on Defence, Cmnd. 363, 1958, para. 38.

[2] *Parl. Deb., H. of C.*, dlxxix (written answers), col. 103, 9 Dec. 1957.

[3] See also the discussion by Robert W. Tucker, *The Just War, A Study in Contemporary American Doctrine* (Baltimore, 1960), pp. 128–30.

It is necessary to determine the meaning of Article 51 in the context of the Charter and its relation to the customary law regarding self-defence and the use of force. There is a general assumption by jurists that the Charter prohibited self-help and armed reprisals.[1] The combined effect of paragraph 4 of Article 2 and Article 51 is represented as rendering all use of force illegal except in the exercise of the right of self-defence 'if an armed attack occurs'. This view has been challenged by some governments and by certain jurists. The British government did not accept the view that the military operations against Egypt, which it explained primarily as action for the protection of British nationals, were a violation of the Charter; the British argument was that the Charter and in particular Article 51 did not restrict the customary right of self-defence and that the customary right included action to protect nationals provided the tests of exigency laid down in the *Caroline* case were satisfied.[2] Some jurists have relied on the phrase 'territorial integrity or political independence' in paragraph 4 of Article 2, asserting that it has a restrictive meaning, or on the last part of the paragraph 'or in any other manner inconsistent with the Purposes of the United Nations', in the course of justifying various forcible measures to protect interests and, especially the lives and property of nationals.[3]

7. '*Against the territorial integrity or political independence of any State*'

It may be argued that these words in paragraph 4 of Article 2 must have some substance and that the use of force which is not

[1] Jessup, *A Modern Law of Nations* (1956), p. 172; Goodrich and Hambro, *Charter of the United Nations* (2nd ed.), p. 104; Briggs, *The Law of Nations* (2nd ed.), p. 964; Kelsen, *The Law of the United Nations*, p. 269; Oppenheim, ii. 153–4; Wright, 51 *A.J.I.L.* (1957), p. 272; id., 47 *A.J.I.L.* (1953), p. 370; Kunz, 45 *A.J.I.L.* (1951), p. 533; Judge Alvarez, Individual Opinion, *Corfu Channel Case* (*Merits*), I.C.J. Reports, 1949, p. 42; Judge Krylov, Dissenting Opinion, ibid., pp. 76–77; Judge Azevedo, Dissenting Opinion, ibid., pp. 108, 112; Alfaro, 29 *R.D.I.* (Sottile) (1951), p. 374; Scelle, 58 *R.G.D.I.P.* (1954), p. 5. See also a cautious formulation in Lauterpacht, *The Development of International Law by the International Court*, p. 317; cf. ibid., p. 90.

[2] Lord Kilmuir, *Parl. Deb., H. of L.* cxcix, cols. 1353–6, 1359, 1 Nov. 1956; Selwyn Lloyd, *Parl. Deb., H. of C.* dlviii, cols. 1566–7, 31 Oct. 1956. Cf. Waldock, 81 Hague *Recueil* (1952, II), pp. 496–7.

[3] Bowett, *Self-Defence in International Law*, pp. 12–13, 152; Stone, *Aggression and World Order* (1958), pp. 43, 95–96; Colbert, *Retaliation in International Law*, pp. 202–3; Goodhart, 79 Hague *Recueil* (1951, II), p. 202. *Contra:* Verdross, 83 Hague *Recueil* (1953, II), p. 14; (but cf. his *Völkerrecht* (1st ed.), p. 479); Report of the Secretary-General on the Question of Defining Aggression (A/2211), p. 23; Kelsen, *Principles of International Law* (1952), p. 45;

accompanied by an intent to violate territorial integrity or political independence is not contrary to the obligations of Article 2.[1] To support the British argument in the *Corfu Channel Case* that 'Operation Retail' was not in violation of paragraph 4 the United Kingdom agent, Sir Eric Beckett, stated that the action on 12 and 13 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'.[2]

In Chapter II of the Dumbarton Oaks Proposals the fourth principle provided simply: '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] At San Francisco an Australian amendment introduced phraseology substantially identical with the final text of paragraph 4.[4] A Brazilian amendment would have provided:

> All members of the Organization shall refrain in their international relations from any intervention in the foreign or domestic affairs of any other member of the Organization, and from resorting to threats or use of force, if they are not in accord with the methods and decisions of the Organization. In the prohibition against intervention there shall be understood to be included any interference that threatens the national security of another member of the Organization, directly or indirectly threatens its territorial integrity, or involves the exercise of any excessively foreign influences on its destinies.[5]

Ecuador wished to add a paragraph to Chapter II in these terms:

> The declaration that an attempt by a State against the territorial integrity or inviolability, against the sovereignty or political independence of another State, shall be considered as an act of aggression against all the States which constitute the International Community.[6]

In the first Committee of Commission I several delegates referred to the necessity of incorporating in Chapter II an express undertaking that the world Organization should insure the territorial integrity and political independence of member states.[7] The Committee rejected the Brazilian amendment but adopted

Oppenheim, ii. 154; Wehberg, 78 Hague *Recueil* (1951, I), p. 72; McDougal and Feliciano, 68 *Yale L.F.* (1958–9), pp. 1100–1.

1 Bowett, pp. 152, 186.

2 I.C.J., Pleadings, *Corfu Channel Case*, iii. 295–6. The Judgment of the Court does not encourage such lines of thought: see *infra*, p. 288.

3 Goodrich and Hambro, p. 573.

4 *U.N.C.I.O.*, iii. 543; vi. 557.

5 Ibid., vi. 558. See also amendments of Costa Rica, and Czechoslovakia, ibid., p. 560. See also ibid., iii. 233, 237 (Brazilian comment on the Dumbarton Oaks Proposals), iii. 554 (Iranian amendment); ibid., p. 467 (observations of Czechoslovak Government).

6 Ibid., vi. 562.

7 Meeting of 16 May 1945, ibid., p. 304. See also 5 June ibid., p. 346.

the Australian amendment which had been accepted by the drafting subcommittee.[1] In the discussion the Norwegian Delegate expressed an opinion that 'it should be made clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defense. He was himself in favour of omitting the specific phrase relating to "territorial integrity and political independence" since this was, on the one hand, a permanent obligation under international law and, on the other hand, could be said to be covered by the phrase "sovereign equality" as suggested in the commentary by the *Rapporteur*.'[2] There is no indication in the records that the phrase was intended to have a restrictive effect.[3]

In the Commission Belaunde of Peru pointed out that paragraph one of Chapter II lacked any reference to the idea of personality but that the elements of personality had been incidentally inserted in paragraph 4 and that this did not establish absolute respect for sovereignty and territorial integrity.[4] The *Rapporteur* of Committee I explained that paragraphs 1 and 4 protected the personality of the state as well as its territorial integrity and political independence.[5] The Commission adopted paragraph 4 in the form proposed by Committee I.[6]

The conclusion warranted by the *travaux préparatoires* is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect.[7] If it is asserted that the phrase may have a qualifying effect then writers making this assertion face the difficulty that it involves an admission that there is an ambiguity,[8] and in such a case recourse may be had to *travaux préparatoires*,[9] which reveal a meaning contrary to that asserted.

Nor is it possible to argue that the phrase must be given its 'plain meaning' which 'coincides with the limitations on the

1 4 and 5 June; ibid., pp. 334, 342. (Virtually identical with final text in the Charter.) The Delegate of Norway abstained. See also Report of *Rapporteur* of Committee 1, 9 June, ibid., pp. 400, 404; and Report of 13 June, ibid., p. 459. Drafting Committee text: ibid., p. 687.

2 Ibid., pp. 334–5.

3 Cf. ibid., p. 335, delegates of United Kingdom and United States.

4 15 June, ibid., p. 68.

5 Ibid., p. 69.

6 15 June, ibid., p. 82. See also Report of *Rapporteur* of Commission I, ibid., p. 231 (21 June).

7 Goodrich and Hambro, pp. 103, 104–5; Oppenheim, ii. 154; Waldock, 81 Hague *Recueil* (1952, II), p. 493; Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (Madrid, 1958), pp. 85–88.

8 See Goodrich and Hambro, p. 105; Bowett, pp. 146, 151–2, 186.

9 Hambro, *The Case Law of the International Court*, i. 43–51.

obligations of non-intervention which traditional international law recognises'.[1] The reference to 'plain meaning' has little value and begs many questions[2] but, be that as it may, the phrase 'political independence and territorial integrity' has been used on many occasions to epitomize the *total* of legal rights which a state has. Moreover, it is difficult to accept a 'plain meaning' which permits evasion of obligations by means of a verbal profession that there is no intention to infringe territorial integrity[3] and which was not intended by the many delegations which approved the text. Lastly, if there is an ambiguity the principle of effectiveness should be applied.[4]

8. '*Or in any other manner inconsistent with the Purposes of the United Nations*'

The phrase has been relied upon in like manner to provide a basis for the argument that the Charter does not affect the legality of various forms of self-help, for example, protection of nationals and their property, which existed in the customary law.[5] The protection of certain essential rights, it is argued, is consistent with the purposes of Article 1. This view ignores the presumption against self-help which lies behind the Charter as a whole and, once again, the principle of effectiveness. The phrase was not intended by the draftsmen to have a restrictive effect on paragraph 4 or on Article 51, and indeed it was probably meant to reinforce the prohibition of paragraph 4[6] and, perhaps, to refer to the legality of force when this took the form of enforcement action sanctioned by the Security Council.[7]

[1] Bowett, p. 152.

[2] Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 49–60.

[3] Historical examples: the Pershing expedition, 1916; Hackworth, *Digest*, ii. 292; Japanese Note to President of League Council, 21 Feb. 1932; 26 *A.J.I.L.* (1932), p. 343; Sir Pierson Dixon, Off. Recs., Gen. Ass., First Emergency Special Session, 561st Plen. Meeting, para. 102, 1 Nov. 1956. Note also art. 2, para. 2, of the Charter. See, however, on art. 10 of the League Covenant: *supra*, pp. 62–64.

[4] See Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 227–30, 292–3; *Acquisition of Polish Nationality*, P.C.I.J. ser. B, no. 7, pp. 16–17. See *supra*, p. 87.

[5] Bowett, pp. 17, 186; Stone, pp. 43, 95–96.

[6] *U.N.C.I.O.*, vi. 334–5 (Committee 1, Commission 1). The delegate of Brazil adverted to the possibility of a restricted interpretation of the phrase. The United States delegate 'made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to insure that there should be no loopholes'. See also pp. 342, 557 (Australian amendment), 558 (Bolivian and Brazilian amendments), 560 (Costa Rican amendment), 561 (Ecuador amendment), 563 (Iranian amendment), 564 (Norwegian amendment).

[7] Ibid., pp. 335, 400, 459.

9. *Article 2, paragraph 4, Article 51, and the Right of Self-Defence in the Customary Law*

Apart from reference to phrases in paragraph 4 to which it is sought to give a restricted meaning, it can be argued that Article 51 and paragraph 4 of Article 2 were not intended to, and do not, restrict the right of member states to use force in self-defence within the meaning of that concept to be found in the customary law. Article 51, it is said, refers merely to 'armed attack' because it was inserted for the particular purpose of clarifying the position of collective defence treaties which are concerned only with external attack, and being in this way specific it leaves the broader customary right, which is always implicitly reserved, intact.[1]

Dr. Bowett holds the view that Article 2, paragraph 4, left the right of self-defence unimpaired and that the right implicitly excepted was not confined to reaction to 'armed attack' within Article 51 but permitted the protection of certain substantive rights:

> Action undertaken for the purpose of, and limited to, the defence of a State's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other state.[2]

The prohibition in paragraph 4 of Chapter II of the Dumbarton Oaks Proposals and in the final text of paragraph 4 in the Charter contains no reference to self-defence. Amendments proposed at San Francisco contained no reference to it either[3] with the exception of that of Panama:

> Each State has a legal duty to refrain from any use of force and from any threat to use force in its relations with another State except as authorized by this Charter; but subject to immediate reference to and approval by the competent agency of the (Organization), a State may oppose by force an unauthorized use of force made against it by another State.[4]

[1] Waldock, p. 497; Bowett, pp. 182 seq.; Stone, pp. 43–44, 97–98; Piotrowski, 35 *R.D.I.* (Sottile) (1957), p. 300; Goodhart, pp. 231–3; Fitzmaurice, 3 *Sydney L.R.* (1959), p. 71; Green, 6 *Archiv* (1957), p. 432.

[2] Op. cit., pp. 185–6. See also Goodhart, p. 202.

[3] *U.N.C.I.O.* vi, 557 (Australia); 558 (Bolivia); 558 (Brazil); 560 (Costa Rica); 563 (Iran). A Norwegian amendment (p. 564) provided that: 'All members of the Organization shall refrain in their international relations from the threat of force and from any use of force not approved by the Security Council as a means of implementing the purposes of the Organization.' See ibid., pp. 720–1, for rejection of the amendment by the Drafting Committee: *Norwegian amendment* also *in iii. 366.*

[4] Ibid., p. 565 (para. 7 of a new version of Chapter II). See also ibid. iii. 265 at p. 270.

In the discussions in Committee I of Commission[1] I and the report of its *Rapporteur*[2] it was stated that paragraph 4 left the use of force 'in legitimate self-defense' unimpaired. There is no indication that this right was to be equated with that referred to in Article 51. On the other hand, the general tendency was towards a restrictive interpretation of any permission in relation to the use of force. Delegations were concerned that the Organization should have a near monopoly of the use of force and the wide terms of paragraph 4 reflect the emphasis on prohibition rather than permission.[3] There is not the slightest hint that legitimate self-defence comprehended action otherwise than against the use or threat of force.

10. *The Purpose and Meaning of Article 51*

The Dumbarton Oaks Proposals provided in Chapter VIII (C) (1) that 'nothing in the Charter should preclude the existence of regional arrangements or agencies' and in the same Chapter paragraph C (2) provided that 'no enforcement action should be taken under regional arrangements . . . without the authorization of the Security Council'.[4] Following agreement on voting procedure in the Security Council a statement by the delegations of the four sponsoring governments[5] on voting procedure stated that the veto would apply to this authorization. This gave rise to concern as to the status of regional arrangements, in particular the Act of Chapultepec[6] and the Pact of the Arab League.[7] An Australian amendment to avoid the effects of the veto in this respect was rejected in Committee 4 of Commission 3 at San Francisco.[8] However, the Committee approved a decision to insert a new paragraph in the Dumbarton Oaks text identical in all material respects with Article 51 of the final text of the Charter, and delegates explained the significance of the new article in relation to the principle of collective self-defence, regional arrangements, and mutual assistance against aggression.[9]

[1] *U.N.C.I.O.* vi. 334. See also Drafting Committee, report, at p. 721.

[2] Ibid., pp. 400, 459.

[3] Ibid., p. 304. Several delegates wanted the Organization to authorize any use of force before it would be lawful; ibid., and see the Norwegian amendment, *supra*, p. 269, n. 3, See *U.N.C.I.O.*, vi, *passim*, discussion of the preamble and, especially, para. 3 of art. 2. See also Goodrich and Hambro, pp. 106–7. Note further: *U.N.C.I.O.* iii. 292, 293 (Venezuelan proposals); ibid., p. 278 (Costa Rican comment); ibid., p. 328 (Neths. amendments); ibid., p. 399 (Ecuador); Panamanian amendment, *supra*, p. 269, n. 4; and *supra*, p. 268, n. 6.

[4] Goodrich and Hambro, p. 580.

[5] Ibid., p. 216; 7 June 1945.

[6] Hudson, *Int. Legis.* ix, no. 647.

[7] Ibid., no. 650.

[8] *U.N.C.I.O.* xii. 668, 766.

[9] Ibid., pp. 680–2. Senator Vandenberg was primarily responsible for the new text

It is worthy of notice that amendments were suggested to Chapter VIII (C) (2) of the Dumbarton Oaks Proposals even before the appearance of the agreement of the sponsoring governments on voting procedure in the Security Council. Thus the Czechoslovak government considered that the authorization of the Security Council should be given in advance and as a general rule for 'cases of immediate danger'.[1] Amendments of this type might suggest that any proviso to the text would be understood to apply to cases other than actual armed attack. On the other hand, amendments suggested by France, the United Kingdom, the United States, and the U.S.S.R. contemplated action without the authorization of the Security Council only in the case of measures against the renewal of a policy of aggression by the ex-enemy states and emphasize the general tendency to deny any resort to force independently of the Security Council.[2]

There is no indication in the discussions that the right of self-defence in the Article was in contrast with any other right of self-defence permitted by the Charter or that the phrase 'if an armed attack occurs' was anything other than a characterization of the right of self-defence. Delegates referred to the content of the paragraph as 'the right of self-defence'.[3] The Colombian delegate stated:

> . . . if at any time an armed attack should ensue, that is, an aggression against a state which is a member of the regional group, self-defence, whether individual or collective, exercised as an inherent right, shall operate automatically within the provisions of the Charter, until such time as the Security Council may take the appropriate punitive measures against the aggressor state.[4]

The very terms of Article 51 might be thought to preclude any view that its content is special and not general since it refers to 'the inherent right'; it is not incongruous to regard Article 51 as containing the only right of self-defence permitted by the Charter.[5] Its narrow and precise terms are explicable against the

(p. 682). See also the Draft Report and Report of Wellington Koo, *Rapporteur*, ibid., pp. 723, 739; and Report by Subcommittee III/4/A, pp. 848–9. See also *U.N.C.I.O.*, ii. 50, 51; xv. 87, 188.

[1] Observations on Dumbarton Oaks Proposals, 25 Apr. 1945; *U.N.C.I.O.*, iii. 470. Cf. ibid., p. 387 (French amendment); ibid., p. 483 (Turkish suggestions, 1 May 1945: 'cases of emergency'); ibid., p. 216 (Venezuelan proposals). See also ibid. xii. 773, 777, 781, 784.

[2] Ibid. iii. 392, 575, 598, 601. See also ibid., ii. 50; xii. 765; xv. 87.

[3] Ibid. xii. 702, 703 (delegates of the United States and Mexico). See also Evatt, *The United Nations*, p. 27.

[4] *U.N.C.I.O.* xii. 687.

[5] See Kelsen, pp. 791–2, 797–8, 914; Goodrich and Hambro, p. 107; Charter of the United Nations, Report to the President. . ., Dept. of St. Public. 2349, *Conference Series*, lxxi. 38, quoted in Goodrich and Hambro, pp. 106–7; Kunz, 41 *A.J.I.L.* (1947), p. 877;

background of the general prohibition in Article 2, paragraph 4, and the general assumption made at San Francisco and evident in the text of Article 51, that the Organization was to have a near monopoly of the use of armed force. Moreover, the proviso as to self-defence qualified a text which originally had regarded the authorization of the Security Council as necessary in all cases. It is significant that in the Japanese Peace Treaty and the Declaration of the Rights and Duties of States drawn up by the International Law Commission the right of self-defence is defined in the terms of Article 51 or in similar terms.[1]

11. *The Relationship of Article 51 and the Right of Self-Defence in Customary Law*

Even if it is accepted that Article 51 contains the sole content of self-defence within the Charter, it may be argued that the right of self-defence formerly existing in general international law is still available to members of the United Nations, this right being considerably broader than that stated in Article 51. This involves an attitude to the Charter exemplified by the following statement:

> We must presuppose that rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter. . . . It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter.[2]

Briggs, *The Law of Nations* (2nd ed.), p. 986; Jessup, *A Modern Law of Nations* (1956), pp. 166–8; Bebr, 49 *A.J.I.L.* (1955), pp. 172–3; Nguyen Quoc Dinh, 52 *R.G.D.I.P.* (1948), p. 244; Wehberg, 78 Hague *Recueil* (1951), p. 71; Sloan, 25 *B.Y.I.L.* (1948), p. 30; Zourek, Hague *Recueil* (1957, II), p. 816; Nasim Hasan Shah, 53 *A.J.I.L.* (1959), pp. 605–12; Skubiszewski, 53 *A.J.I.L.* (1959), pp. 618–26; Ninčić, Int. Law Association, N.Y. Univ. Conference, 1958, Committee on the Charter of the U.N., *Report on Some Aspects of the Principle of Self-Defence*, by Schwarzenberger, p. 68; Calogeropoulos-Stratis, 6 *Rev. Hell. de D.I.* (1953), pp. 226–7; Al Chalabi, *La Légitime défense en droit international*, pp. 56–58; Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (Madrid, 1958), pp. 80, 401–2, 407. See also the Report of the 1956 Special Committee on the Question of Defining Aggression, Gen. Ass., 12th Sess., Suppl. no. 16 (A/3574), paras. 39, 203–17; *Yrbk., I.L.C.* 1949, p. 108–11, 145–7, 163–4, 171, 179; Sixth Committee, Gen. Ass., Off. Recs., 12th Sess., 514th Meeting, paras. 26–31, 517th Meeting, paras. 5, 12. There is a general assumption on the part of representatives of these bodies that art. 51 defined the content of self-defence in the Charter.

[1] See *infra*, p. 280. In the proceedings of organs of the United Nations, art. 51 is commonly referred to as stating the criteria for self-defence under the Charter: see Off. Recs., Gen. Ass., First Emergency Special Session, 1–10 Nov. 1956, 562nd meeting, paras. 31, 45, 105, 145, 319; S.C., 11th Year, 749th meeting, para. 33; and *Repertory of Practice of U.N. Organs* (1955), ii. 429–35. For the arguments of the United Kingdom government during the Suez crisis: *supra*, p. 255; *infra*, p. 299. See also the letter from that government to the U.N. Secretary-General stating that action in bombing and strafing Yemeni gun positions was taken under art. 51: *N.Y. Times*, 8 May 1958, p. 13, col. 5; p. 34, col. 5.

[2] Bowett, pp. 184–5, also quoting Goodhart, 79 Hague *Recueil* (1951, II), p. 192. See also Schwarzenberger, 87 Hague *Recueil* (1955, I), pp. 327 seq.; McDougal and Feliciano, *Law and Minimum World Public Order*, pp. 232–41. Criticisms of this attitude: Gen. Ass., 12th Sess., 6th Committee, 527th Meeting, paras. 25, 26 (Röling); 531st Meeting, paras. 9–11 (Castañeda). Curiously elsewhere (32 *B.Y.I.L.* (1955–6), p. 139), Bowett states that any exception to art. 2, para. 4, must be strictly construed.

If this statement means, for example, that the members of the United Nations have not surrendered the right to prevent even the innocent passage of commercial aircraft through their airspace, since there is no provision for such surrender in the Charter, then it is stating the obvious. However, where the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?

This approach ignores the principle of effectiveness. Further, it ignores the generality of Article 51 in its reference to 'the inherent right', although the text does not of itself state that the inherent right has only the application specified. It is submitted that a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and that even as a matter of 'plain' interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence. Against this it can be argued that Article 51 is expressed in the form of a reservation of an existing customary right in the same way as Article 2, paragraph 7, in the matter of domestic jurisdiction. If this view is accepted the question then arises as to whether the Article not only reserves but also defines the customary right in a restrictive manner. Whichever approach is adopted the decisive consideration would seem to be that the prohibition in Article 2, paragraph 4, is in absolute terms and the delegations at San Francisco regarded it in this light: any use of force was to be authorized by the Organization and any proviso, implied or express, as to self-defence, was understood to be an exceptional right, a privilege.[1] The whole object of the Charter was to render unilateral use of force, even in self-defence, subject to control by the Organization; thus under Article 51 the right of self-defence can only be exercised 'until the Security Council has taken measures necessary to maintain international peace and security' and measures taken in its exercise 'shall be immediately reported to the Security Council and shall not in

[1] See *U.N.C.I.O.* vi. *passim*. See also Goodrich and Hambro, pp. 106–7; Ninčić, 2 *Jugoslovenska revija za medunarodno pravo* (1955), p. 180 (6 *Int. Pol. Sc. Abstracts* (1956), p. 242); Wehberg, 78 Hague *Recueil* (1951, I), pp. 84–85; Drost, *The Crime of State*, i. 271; Skubiszewski, 53 *A.J.I.L.* (1959), pp. 618–26; Sorensen, 101 Hague *Recueil* (1960, III), p. 240.

any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'.

One other matter which may be relevant is the placing of Article 51 in Chapter VII, although initially it was in Chapter VIII on Regional Arrangements. The change resulted from a Soviet proposal supported by the argument that if left in Chapter VIII the reservation would have too narrow a scope as it would be limited to self-defence in connexion with Regional Arrangements.[1] This perhaps suggests a wide interpretation. The position of the Article in Chapter VII rather than Chapters II or VIII may also provide the basis for an argument that the reference to 'armed attack' was natural and not exclusive in intention since Chapter VII was concerned with grave breaches of the peace and the phrase was appropriate to decide such a situation.[2] Though suggestive the arguments from the position of the Article do not seem in any way to be decisive.

It is possible that the terms in which the right of self-defence is defined in Article 51 are much closer to the customary law *as it existed in 1945* than is commonly admitted. The use of force in riposte to force was the only generally accepted view as to the justified use of force in self-defence[3] and the delegations at San Francisco naturally did not regard the phrasing of the Article as in any sense an innovation in its reference to self-defence. Those writers who assert that Article 51 does not deny members 'the customary right of self-defence' assume that the customary law became static by 1920 or earlier, and ignore the possibility that the customary right may have received some more precise delimitation in the period between 1920 and 1945. It seems to the present writer that to regard any form of action formerly held to be self-defence, at a time when self-defence was a phrase regarded as interchangeable with 'self-preservation' and 'necessity', as within a surviving 'customary right', is a very arbitrary process. To go further, and assert that the Charter obligations are qualified by this vague customary right, is indefensible. By what logical process can the protection of certain essential rights, for example those listed by Bowett,[4] be selected from the various rights

[1] This information was supplied by Professor Sir Humphrey Waldock. For other materials: *U.N.C.I.O.* xii. 682–3, 693–4; xv. 52, 84.

[2] See Waldock, 81 Hague *Recueil* (1952, II), p. 497; and speech of Lord Kilmuir, L.C., *Parl. Deb., H. of L.* cxcix, col. 1352, 1 Nov. 1956. See criticism in Bowett, p. 184 note.

[3] *Supra*, p. 256, n. 1.

[4] Op. cit., pp. 185–6, 270. And see Waldock, pp. 495 seq.

enumerated by Westlake in 1904[1] as aspects of 'self-defence'? Such selection can have little relation to state practice. It is submitted that Article 51 is not subject to the customary law and that, even if it were, this customary right must be regarded in the light of state practice up to 1945.

12. *Does Article 51 Permit Anticipatory Self-Defence?*

The Article states that the right of self-defence remains unimpaired 'if an armed attack occurs against a Member of the United Nations'. It is believed that the ordinary meaning of the phrase precludes action which is preventive in character.[2] In this respect the French text is less equivocal than the English since its literal translation would read 'in a case where a United Nations Member is the object of an armed aggression'. The Spanish text simply reads 'en caso de ataque armado'. There is no further clarification of the phrase to be gained from study of the *travaux préparatoires*. However, the discussions at San Francisco assumed that any permission for the unilateral use of force would be exceptional and would be secondary to the general prohibition in Article 2, paragraph 4. There was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council. In these circumstances the precision of Article 51 is explicable. The comments of governments on Chapter VIII, section C, of the Dumbarton Oaks Proposals give no real assistance. A Turkish comment referred to 'cases of emergency' but later spoke of 'the country being

[1] *International Law* (1904), i. 299.

[2] Kelsen, *The Law of the United Nations*, pp. 269, 797–8; and in 42 *A.J.I.L.* (1948), pp. 791–2; Beckett, *The North Atlantic Treaty*, p. 13; Wehberg, 78 Hague *Recueil* (1951, I), pp. 70, 81; Pompe, *Aggressive War: an International Crime*, pp. 98, 100; Tucker, 4 *I.L.Q.* (1951), p. 29 (*semble*); Nguyen Quoc Dinh, 52 *R.G.D.I.P.* (1948), pp. 240–4; Bebr, 49 *A.J.I.L.* (1955), 173–4 (*semble*); Goodrich and Hambro (2nd ed.), pp. 107, 300; Kunz, 41 *A.J.I.L.* (1947), pp. 877–8; Jessup, *A Modern Law of Nations* (1956), pp. 166–7; Oppenheim, ii. 156; Al Chalabi, *La Légitime défense en droit international*, pp. 78–82; Calogeropoulos-Stratis, 6 *Rev. Hell. de D.I.* (1953), pp. 227–8; Kulski, 44 *A.J.I.L.* (1950), p. 461; Skubiszewski, 53 *A.J.I.L.* (1959), p. 622 (citing also Bramson, 3 *Annales Universitatis Mariae-Sklodowska, Sectio* G, 63, 81–82); Bentwich and Martin, *A Commentary on the Charter of the United Nations*, p. 107; Sørensen, 101 Hague *Recueil* (1960, III), p. 240; Jiménez de Aréchaga, pp. 402–6. For an instance of preventive action justified in terms of art. 51, *supra*, p. 272, n. 1. See also *Yrbk., I.L.C.* 1949, pp. 108–11, 14th Meeting, paras. 61–112, particularly paras. 68, 69, 81, 85, 86, 89, 91–95, 98–104. (Some difference of opinion: see views of Sandström, Brierly and Hsu); and Gen. Ass., 9th Sess., 6th Committee, 408th Meeting, para. 32, and 415th Meeting, para. 39 (Castañeda); 408th Meeting, para. 42 (Sapozhnikov); 411th Meeting, para. 15 (Abushkevich); 413th Meeting, para. 11 (Petrzelka); Gen. Ass., 12th Sess., 6th Committee, 514th Meeting, para. 28 (Rolin); 519th Meeting, para. 10 (Alfonsin); 531st Meeting, para. 8 (Castañeda); 532nd Meeting, para. 30 (Morozov). Also Report of 1953 Special Committee on the Question of Defining Aggression, Gen. Ass., Off. Recs., 9th Sess., Suppl. no. 11 (A/2638), paras. 63, 65.

attacked';[1] and a comment by the Czechoslovak delegation referred to 'cases of immediate danger'.[2]

Certain jurists do not accept the view that the Article was intended to restrict action in case of immediate danger.[3] In maintaining this position the following arguments have been advanced:

1. Where there is evidence that an attack is being mounted it may be said to have begun to occur though it has not passed the frontier.[4] This is ingenious but rather casuistic. It involves delicate questions of unequivocal intention to attack and an assumption that an attack can occur, as it were, constructively.

2. To read Article 51 restrictively is to protect the aggressor's right to the first stroke.[5] The argument *ab inconvenienti* cannot affect clear words and such an argument would apply with equal, if not greater force, to a text which might be said to justify preventive action in vaguely defined situations.

3. That Article 51 is subject to the customary law, which permitted anticipatory action.[6] The relationship of the Article to the customary law has been examined above.[7] If the customary right is still available to members of the United Nations there is, of course, no need to consider the interpretation of the precise words of Article 51.

4. Reliance is placed on a passage in the First Report of the United Nations Atomic Energy Commission in 1946:

> In 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 recognised in Article 51.[8]

This passage can hardly be regarded as an authoritative interpretation of the Charter or as an amendment of the Charter by

[1] *U.N.C.I.O.* xii. 781.

[2] Ibid., p. 773.

[3] See Wright, 98 Hague *Recueil* (1959, III), pp. 167–8 (clear and immediate danger of attack suffices); Stone, *Legal Controls of International Conflict*, p. 244, note 8 (but see his text); Hsu, Gen. Ass., Off. Recs., 7th Sess., 6th Committee, 337th Meeting, para. 43; Waldock, 81 Hague *Recueil* (1952, II), pp. 497–8; Röling, Gen. Ass., 9th Sess., 6th Committee, 410th Meeting, para. 43; 417th Meeting, para. 16; Piotrowski, 35 *R.D.I.* (Sottile) (1957), p. 297. See also Fawcett, 103 Hague *Recueil* (1961, II), pp. 361–3.

[4] Waldock, loc. cit., and cf. Nagendra Singh, *Nuclear Weapons and International Law* (London, 1959), pp. 126–7.

[5] Waldock, loc. cit.

[6] Bowett, *Self-Defence in International Law*, pp. 188–9; Schwarzenberger, 87 Hague *Recueil* (1955, I), pp. 327 seq.

[7] *Supra*, pp. 272 seq.

[8] U.N. Doc. AEC/18/Rev. 1, p. 24. Referred to by Bowett, p. 189. See also Report of the 1956 Special Committee on the Question of Defining Aggression, Gen. Ass., 12th Sess., Suppl. no. 16 (A/3574), para. 56.

the incidental expression of views by a subsidiary organ of the Security Council.[1]

There is some substance in the view that the action foreseen against the state violating the control convention was in the nature of a sanction and that it did not have any quality of self-defence. This being so, the Report of the Atomic Energy Commission has no direct bearing on self-defence. The British representative on the Commission stated that:

> His Majesty's Government fully endorse the emphasis laid in the United States statement on the need for condign, immediate and effective penalties against violation of the future international scheme of control. The greatest deterrent value against any such violation will be the knowledge that punishment will be inevitable and overwhelming.[2]

5. Waldock has stated that in so far as the International Court of Justice in the *Corfu Channel Case* (*Merits*) considered the precautions taken by the British warships on 22 October, in case of attack by Albanian shore batteries, as lawful, the Court did not take a narrow view of the inherent right reserved by Article 51.[3] There is no firm support for this view in the Judgment.[4] The Court was considering the general question of delictual responsibility and had regard to all the circumstances of the case;[5] it was concerned with the dominant character of the passage, which was not affected by the precautions; and in fact there was no preventive self-defence but merely the taking of precautions to defend the ships in case of attack.

6. A number of Eastern European treaties of friendship and mutual assistance[6] provide for immediate aid in the case of a renewal of a 'policy of aggression' by Germany, and it has been suggested that they indicate a readiness to resort to anticipatory self-defence. The suggestion cannot be met by the argument that these treaties are connected with Article 107 of the Charter since the argument is probably unsound.[7] However, the evidential value of the treaties is not very considerable. Their texts are too vague

[1] Cf. Goodrich and Hambro, p. 300 ('If Article 51 were clearly open to this interpretation . . .'); and Oppenheim, ii. 156, note. The passage appeared, however, in General Assembly Resolution 191 (III) of 4 Nov. 1948.

[2] Quoted by Blackett, *Atomic Weapons and East-West Relations*, p. 91. See also id., *Military and Economic Consequences of Atomic Energy* (London, 1948), p. 135.

[3] Op. cit., p. 501.

[4] Cf. Bowett, p. 190. See also Skubiszewski, 53 *A.J.I.L.* (1959), pp. 622–3, 623, n. 28.

[5] *Infra*, pp. 283 seq.

[6] Example: Treaty of Friendship and Mutual Aid, Poland and Czechoslovakia, signed 10 Mar. 1947; 25 *U.N.T.S.*, p. 231, art. 3.

[7] Skubiszewski, 53 *A.J.I.L.* (1959), pp. 632–3; Bowett, 32 *B.Y.I.L.* (1955–6), p. 144 and *Self-Defence in International Law*, p. 227. On art. 107: *infra*, pp. 336–7.

and it is common for military aid to be given under mutual assistance pacts in case of a threat of attack but this aid does not necessarily involve direct invasion of the potential aggressor.[1]

It can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence. Some difficult though somewhat academic cases in which preventive action on a small scale might be justified are reserved for discussion later.[2] It must also be observed that to object to anticipatory action does not avoid the difficulty of deciding when resort to force has occurred.[3]

13. *What is an Armed Attack?*

There is no explanation of the phrase 'armed attack' in the records of the San Francisco Conference, perhaps because the words were regarded as sufficiently clear. Since 1945, however, some jurists have suggested glosses on the article. Thus it has been stated that 'armed attack' may include support for revolutionary groups.[4] The Foreign Relations Committee of the United States Senate commented as follows on the phrase 'armed attack' in Article 5 of the North Atlantic Treaty:

> Experience has shown that armed attack is ordinarily self-evident . . . it should be pointed out that the words 'armed attack' clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another. Obviously, purely internal disorders or revolutions would not be considered 'armed attack' within the meaning of Article 5. However, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack.[5]

Since the phrase 'armed attack' strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of 'armed

[1] For various views: Skubiszewski, pp. 614–15, 624–6; Kulski, 44 *A.J.I.L.* (1950), pp. 460–1; Bowett, 32 *B.Y.I.L.* (1955–6), pp. 143–4, and *Self-Defence in International Law*, pp. 226–7.

[2] *Infra*, pp. 314, 366–8.

[3] *Infra*, pp. 361 seq.

[4] Kelsen, U.S. Naval War College, *International Law Studies* (1954), xlix (Washington, 1957), 88; and in 42 *A.J.I.L.* (1948), pp. 791–2; Heindel, Kalijarvi and Wilcox, 43 *A.J.I.L.* (1949), p. 645; Tucker, 4 *I.L.Q.* (1951), p. 31; Stone, *Legal Controls of International Conflict*, p. 244, n. 8.

[5] U.S. Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty, Exec. Report no. 8, p. 13; and see Heindel *et al.*, loc. cit.

attack'.[1] However, it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an 'armed attack', more especially if the object were the forcible settlement of a dispute or the acquisition of territory.

Assuming for the purposes of argument that the phrase 'armed attack' is capable of such extensive interpretation, a right to resort to force against various forms of indirect aggression cannot be derived from Article 51 if the requirement of proportionality is strictly observed.[2] Indirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers. The same approach renders superfluous speculation as to the application of the Article to border incidents and minor attacks.[3] Again, if State A complains of the complicity of State C in the armed attack against it by State B, its correct course is to repel the immediate physical attack, directing operations against State C only if and when this becomes necessary by reason of the scale of the attack and the immediacy and volume of the aid given to State B.

14. *The Relations of the Customary Law and the United Nations Charter*

If the correctness of the view that for members of the United Nations Article 51 of the Charter defines the right of self-defence and is not qualified or supplemented by the customary law is accepted, then states not bound by the obligations of the Charter have less extensive obligations than member states. It is very probable, however, that the usual distinction between general and particular international law is not valid in this context. As it has been suggested above,[4] the customary law which is to be

[1] Wright, 51 *A.J.I.L.* (1957), p. 271. Cf. on departure of volunteers, Brownlie, 5 *I.C.L.Q.* (1956), p. 578. Piotrowski, 35 *R.D.I.* (Sottile) (1957), pp. 299–300, would apply art. 51 to activities of armed bands and the use of forces of third states, i.e. as agents, but not to naval blockade or unarmed indirect aggression. For the Israeli view that *fedayeen* raids constituted an armed attack: Off. Recs., Gen. Ass., First Emergency Special Session, 561st Plen. Meeting, para. 105 (1 Nov. 1956). See further *infra*, pp. 361–2, 369–72.

[2] Whether art. 51 contains the whole content of the right of self-defence for U.N. members or merely an aspect of it, proportionality must be a requirement for the exercise of the right to which it refers. It is of the essence of self-defence. See Jiménez de Aréchaga, pp. 410–12. Another view: Kunz, 41 *A.J.I.L.* (1947), p. 878.

[3] For the view that it only applies to a grave breach of the peace or invasion by a large organized force acting on the orders of a government: Waldock, p. 497, criticized by Bowett, p. 184 note.

[4] *Supra*, p. 274.

compared with the Charter is that of 1945 and not that of 1920 or an earlier period. The phrasing of Article 51 was almost certainly not regarded as a novel development of the law by the delegations at San Francisco, and generally speaking by 1945 self-defence was understood to be justified only in case of an attack by the forces of a state. And quite apart from this consideration, the Charter may be regarded as objective or general international law. It has received the adherence of nearly ever state, and most of the states which are not members of the United Nations have expressly accepted the principles and obligations of the Charter.[1]

Moreover, the provisions of the Charter have had strong influence on state practice since 1945 and the terms of Article 51, or very similar terms, have appeared in several important multilateral treaties and draft instruments.[2] Thus Article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947[3] provided for individual or collective self-defence in case of an 'armed attack', and the Japanese Peace Treaty refers to Article 51 expressly.[4] The Draft Declaration on Rights and Duties of States adopted by the International Law Commission in 1949 provided in Article 12 that 'every State has the right of individual or collective self-defence against armed attack'.[5]

It is submitted that there is considerable justification for the conclusion that the right of self-defence, individual or collective, which has received general acceptance in the most recent period has a content identical with the right expressed in Article 51 of the Charter.

[1] *Supra*, pp. 120, 127–9. The character of the Charter as objective law may also be supported by reference to art. 2, para. 6, and art. 103 of the Charter. Compare also the acceptance of the Hague Regulations on Land Warfare as customary law, e.g. by the I.M.T. at Nuremberg: Judgment, Cmd. 6964, p. 65. See also Jessup, *A Modern Law of Nations* (1956), pp. 166–8; Tucker, 4 *I.L.Q.* (1951), p. 26, note; Oppenheim, i. 828–9; Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 176 seq., 311; Soder, *Die Vereinten Nationen und die Nichtmitglieder* (1956), pp. 148–9; Verdross, 'Le Nazioni Unite e i terzi Stati', in *La Comunità internazionale*, ii (1947); Lord McNair, *The Law of Treaties* (1961), pp. 216–18. Further references: *supra*, p. 113. Cf. *Int. Law Assoc., Report of the Forty-Eighth Conference, New York* (1958), pp. 507 seq.

[2] *Supra*, pp. 253–4.

[3] 21 *U.N.T.S.*, no. 324.

[4] 136 *U.N.T.S.*, no. 1832, art. 5.

[5] Report of I.L.C., First Sess., para. 46; Gen. Ass., Off. Recs., 4th Sess., Suppl. no. 10 (A/925); 44 *A.J.I.L.* (1950), Suppl., pp. 15, 18. See also *Yrbk., I.L.C.* 1949, pp. 108–11, 145–7, 163–4, 171, 179. See also Treaty of Alliance, United Kingdom and Jordan, 22 Mar. 1946, 6 *U.N.T.S.*, no. 74, art. 5; Treaty of Alliance and Mutual Assistance, United Kingdom and France, 4 Mar. 1947, 9 *U.N.T.S.*, no. 132, art. 2; and treaties listed *supra*, pp. 127–9.

many respects and its generality in referring to the 'right of intervention' does not help matters. It may refer to the specific right alleged to exist by the United Kingdom government or to a general right of intervention which can no longer be countenanced. The weight of the dictum is, in the submission of the writer, considerably qualified by the actual decision of the Court on the legality of the passage of 22 October which on one view may have countenanced a policy of force. In any case the value of the pronouncement is decreased by its generality and ambiguity, its character as *obiter dictum*, and the absence of any reference to the provisions of the United Nations Charter.[1]

3. *The Protection of the Lives and Property of Nationals: The Nineteenth-Century Doctrine and Practice*

In Vattel the following passage occurs:

> Quiconque offense l'État, blesse ses droits, trouble sa tranquillité, ou lui fait injure en quelque manière que ce soit, se déclare son Ennemi, et se met dans le cas d'en être justement puni. Quiconque maltraite un Citoyen offense indirectement l'État, qui doit protéger ce Citoyen. Le Souverain de celui-ci doit venger son injure, obliger, s'il le peut, l'aggresseur à une entière réparation, ou le punir; puis qu'autrement le Citoyen n'obtiendroit point la grande fin de l'association Civile, qui est la sûreté.[2]

The jurists of the nineteenth century universally considered as lawful the use of force to protect the lives and property of nationals. The generous doctrines of the time accommodated such a right. Thus it could be regarded as the exercise of the right of self-preservation,[3] the right of self-defence,[4] as one of several justifiable forms of intervention,[5] or as action justified in terms of necessity.[6] The theory behind this seems to be that the nationals of a state are an extension of the state itself, a part as vital as the state territory, and that the *raison d'être* of the state is the protection of its citizens.[7]

[1] See Fitzmaurice, *supra*, p. 288, n. 2; Nasim Hasan Shah, p. 612; Bowett, *Self-Defence in International Law*, pp. 14–15; and Sørensen, 101 Hague *Recueil* (1960, III), pp. 244–5. Albania was not a member of the United Nations and this may explain the absence of references. But cf. *supra*, pp. 279–80; Azevedo (*supra*, p. 285); Wilhelm, pp. 104–5, 124. See further Il Yung Chung, pp. 232–52 (there are some inconsistencies in the writer's comments).

[2] *Le Droit des gens*, Bk. II, ch. vi. 71.

[3] Hall, *International Law* (8th ed.), p. 331; *Regulations for the Government of the Navy of the United States* (1913), para. 1647, cited in Hindmarsh, *Force in Peace*, p. 76; Wheaton, *Elements, The Classics of International Law No. 19* (1866), p. 106.

[4] Westlake, *International Law* (1904), i. 299.

[5] Cf. Oppenheim, i. 309.

[6] Of which self-preservation is merely an aspect. See generally *supra*, p. 42. Of interest is the Opinion in McNair, *International Law Opinions*, ii. 274 (*contra*, the earlier Opinion, ibid., p. 237).

[7] Vattel, loc. cit.; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 31, 448–53; Redslob, *Traité* (1950), pp. 255–7. These and other writers seem to repeat the reasoning of Vattel.

Intervention by armed forces to protect nationals was a common occurrence in the period before 1914. Milton Offutt records at least seventy occasions on which American forces were employed in this way between 1813 and 1927.[1] Some of the more important instances may be considered. One of the four grounds offered by President McKinley for the American intervention in Cuba in 1898 was that 'we owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection'.[2]

The outbreak of the Boxer troubles in China in 1900 led to collective intervention in north China which lasted many months and involved considerable military action and loss of civilian life. Hay, Secretary of State, stated in a telegram to American Ambassadors on 3 July 1900, that his government was prepared to use the necessary force to protect the lives and property of Americans in China.[3] The French Minister of Foreign Affairs, Delcassé, in a speech in the Chamber of Deputies on the same day referred to the duty of France 'of protecting her citizens and of obtaining for her merchants the guarantees obtained by others'.[4] Lord Salisbury concurred in United States policy as set forth in the circular telegram of 3 July.[5] Reasons advanced for American and Japanese intervention in eastern Siberia in December 1917, included the protection of foreigners, war measures against the Germans, and the protection of war material at Vladivostock.[6]

What is characteristic of these and other examples of intervention is that protection of the lives and property of nationals is one of several justifications offered and the justifications are framed so widely that their legal content is obscured by general considerations of national policy. Thus President McKinley in his apology for intervention in Cuba in 1898 refers also to 'the cause of humanity' and the need 'to put an end to the barbarities

[1] *Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore, 1928), chs. ii, iii, iv. See also Clark, *Right to Protect Citizens in Foreign Countries by landing Forces* (Dept. of State, 1912; new edition in 1929); McCain, *The United States and the Republic of Panama* (Durham, N.C., 1937), pp. 9, 10, 11, 86–89; Montague, *Haiti and the United States, 1714–1938* (Durham, N.C., 1940), pp. 209–77; Cox, *Nicaragua and the United States, 1909–1927* (Boston, 1927), pp. 710 seq.; Hindmarsh, *Force in Peace*, pp. 75–81.

[2] Special Message of 11 Apr. 1898; Hyde, i. 259.

[3] *U.S. For. Rel.* 1900, p. 299; Moore, *Digest*, v. 481–2. And see *supra*, pp. 33–34.

[4] *U.S. For. Rel.* 1900, p. 313; Moore, loc. cit., p. 483.

[5] *U.S. For. Rel.* 1900, p. 345.

[6] See *Docs. on British Foreign Policy, 1919–1939*, First Series, iii. 711 seq., p. 767 *in fine*. See further on Japanese and American intervention in Siberia; Unterberger, *America's Siberian Expedition, 1918–1920* (Durham, N.C., 1956); Kennan, *The Decition to Intervene* (London, 1958); *Hitotsubashi Journal of Law and Politics*, i (Tokyo, 1960), p. 30.

. . . now existing there', 'the very serious injury to commerce, trade, and business of our people', and the 'constant menace to our peace'.[1] Similarly the telegram of the American Secretary of State on the policy of his government in the matter of the anti-foreign rising in China[2] refers to the guarding and protection of 'all legitimate American interests'. The American intervention in and occupation of Haiti in 1915 was an assertion of a protectorate and a severe and prolonged curtailment of sovereignty and it is obvious that the protection of foreign life and property was neither the only nor the principal reason for the occupation.[3] The custom of establishing extensive neutral zones in states torn by civil war involved the United States in the internal affairs of certain states and amounted to intervention in the civil war.[4] Some interventions had as their purpose not the protection of nationals from immediate danger but the establishment of guarantees of the security of nationals for the future, if necessary by effecting a change of government in the state concerned. This was the object of the intervention by Great Britain, France, and Spain in Mexico as provided for in a Convention signed in London on 31 October 1861.[5] Some of the instances of intervention though justified, *inter alia*, in terms of the protection of nationals, had the character of reprisals, as, for example, the bombardment of Greytown by a United States war vessel in 1853,[6] and the British occupation of Corinto in Nicaragua in 1895.[7] Moreover, it is particularly significant that one of the leading cases of this form of intervention, as presented by the writers, was very variously characterized by contemporary statesmen and by lawyers, viz. the occupation of Cuba by the United States in 1898.[8] The British blockade of Greece in 1850 can hardly be accepted as an instance of protection of nationals.[9] It must be regarded as a reprisal, although it did not satisfy the conditions for resort to reprisal,[10] or as an anomalous and unlawful attempt to coerce the Greek government into acceptance of British demands. It must, however, be admitted that even if the motives are mixed some humanitarian content remains.

[1] See p. 290, n. 2, *supra*.

[2] See p. 290, n. 3, *supra*.

[3] See Hyde, p. 261; Montague, pp. 209–77.

[4] Hyde, pp. 271–2, 649.

[5] See Wheaton, p. 105, n. 41.

[6] See Hindmarsh, pp. 78–79.

[7] *U.S. For. Rel.* 1895, ii. 1030–4. To these might be added the intervention in China in 1900–1, and the landing of British and French forces in Mexico in 1861. Cf. Hyde, p. 648. On reprisals generally: *supra*, pp. 219–23, 281–2.

[8] *Supra*, p. 46.

[9] Offered as 'an extremely controversial instance' by Bowett, *Self-Defence in International Law*, p. 100.

[10] There had been no resort to the local courts. See Oppenheim, ii. 138.

4. *The Protection of Nationals in the Period since 1920*

The historical excursus in the preceding section is justified by the fact that, as will be seen shortly, some modern writers take the classical or customary law of the nineteenth century as a basis for discussion of the position in the present law, and it is necessary to recall the characteristics and relations of the customary law relating to intervention. In the period of the League Covenant and the United Nations Charter a considerable number of jurists have continued to assert the existence of the right of intervention although the number has diminished in the very recent past.[1] Moreover, the various jurists concerned differ as to the legal basis for the alleged right: some regard it as an autonomous right of intervention, others as a form of legitimate defence. After the Kellogg–Briand Pact some writers either expressly denied[2] or doubted[3] the existence of the right. Yet as recently as 12 September 1956, Lord McNair, a former President of the International Court, stated that a government could lawfully use force to protect its nationals and their property from violence in a foreign country when the local authorities were unable or unwilling to protect them.[4]

Occasions on which states have purported to exercise this right of intervention have been comparatively few since 1920 but their total number is far from insignificant. However, the number

[1] Oppenheim, i. 309; Hyde, i. 258 seq., 646–9; Ross, *Textbook of International Law* (1947), p. 249; Bowett, pp. 87 seq.; Baty, *The Canons of International Law* (1930), p. 102; Séfériadès, 34 Hague *Recueil* (1930, IV), p. 389; Potter, 32 Hague *Recueil* (1930, II), p. 647; Schwarzenberger, *Curr. Leg. Problems* (1952), p. 295, at p. 320 (*semble*); Starke, *An Introduction to International Law* (4th ed.), p. 87; Rutgers, 38 Hague *Recueil* (1931, IV), p. 69; Shinobu, *International Law in the Shanghai Conflict* (1933), p. 120; Verdross, 30 Hague *Recueil* (1929, V), pp. 487–8, and in his *Völkerrecht* (2nd ed.), pp. 332, 479; Podestà Costa, *Manual de Derecho Internacional Público* (1943), p. 50; Redslob, *Traité* (1950), pp. 255–7; Fitzmaurice, 92 Hague *Recueil* (1957, II), pp. 172–4; Waldock, 81 Hague *Recueil* (1952, II), pp. 466–7, 503; Colombos, *The International Law of the Sea* (4th ed., 1961), pp. 242–3; Rousseau, *Droit international public* (1953), p. 324 (but note the caution at p. 326); Sørensen, 101 Hague *Recueil* (1960, III), 244–5. See further the jurists cited *supra*, p. 107, n. 3. See also Judge Huber, *rapporteur* to the Commission, *Claims of British Subjects and British Protected Persons against the authorities of the Spanish Protectorate in Morocco, Award of 1925*, *R.I.A.A.* ii. 616, at p. 641: 'D'autre part, il est incontestable qu'à un certain point l'intérêt d'un État de pouvoir protéger ses ressortissants et leurs biens, doit primer le respect de la souveraineté territoriale, et cela même en l'absence d'obligations conventionnelles. Ce droit d'intervention a été révendiqué par tous les États: ses limites seules peuvent être discutées. En le niant, on arriverait à des conséquences inadmissibles: on désarmerait le droit international vis-à-vis d'injustices équivalant à la négation de la personnalité humaine; car c'est à cela que revient tout déni de justice.'

[2] Accioly, *Traité*, i. 282 (but cf. pp. 289–90); Calogeropoulos-Stratis, *Le Pacte général de renonciation à la guerre* (1931), pp. 150–1, 156, 167.

[3] Basdevant, 58 Hague *Recueil* (1936, IV), p. 547.

[4] *Parl. Deb., H. of L.* 5th ser., cxcix, cols. 659–60. See also Lord McNair, *The Law of Treaties* (1961), pp. 209–10.

of states which have asserted the existence of the right in the recent period is small. The list includes the United Kingdom, the United States, Japan, France, and Belgium. The practice will now be considered.

The United States exercised the right in Nicaragua in 1926 and 1927.[1] In the same two years American naval forces were involved in thirty-seven distinct clashes with Chinese troops.[2] The operations were intended to protect foreign nationals from civil strife and British and Japanese naval forces acted in co-operation with the Americans. British naval forces intervened to protect British property at Canton, Swatow, and Wanhsien in September 1926, and in January 1927 marines landed at Hankow to protect the British concession.[3] In February 1927 the United Kingdom sent troops to Shanghai to protect British nationals.[4] In May 1927 Japanese troops were in action in Tsingtao.[5] In nearly all these cases the Chinese government in Peking protested to the governments concerned.

The views of the United States government on this right of intervention were expressed very clearly by the American delegate, Hughes, at the Havana Conference in 1928:

> What are we to do when government breaks down and American citizens are in danger of their lives? . . . . I am not speaking of sporadic acts of violence, or of the rising of mobs, or of those distressing incidents which may occur in any country however well administered. I am speaking of the occasions where [*sic*] government itself is unable to function for a time because of difficulties which confront it and which it is impossible for it to surmount.
>
> Now it is a principle of international law that in such a case a government is fully justified in taking action—I would call it interposition of a temporary character—for the purpose of protecting the lives and property of its nationals. I could say that that is not intervention. . . . Of course the United States cannot forego its right to protect its citizens.[6]

[1] Hyde, i. 271; Offutt, pp. 137–40. The latter states that the real motive was political, viz. to combat the threat to a pro-American government by a rival Liberal government which was having success in asserting its power. The Dept. of State described the action in terms of protection of nationals.

[2] 3 Sept. 1926 to 27 May 1927. See Offutt, pp. 140–9; and 22 *A.J.I.L.* (1928), pp. 393, 593.

[3] See 8 *B.Y.I.L.* (1927), pp. 235–6; 9 *B.Y.I.L.* (1928), pp. 228–9; *L. of N. Monthly Summary*, 7 Mar. 1927, p. 48.

[4] British Note to League Secretariat, 8 Feb. 1927: *L.N.O.J.* 1927, p. 292; 9 *B.Y.I.L.* (1928), p. 228. French, American, and Japanese forces also went to Shanghai. British marines landed at Funchal on 29 Apr. 1931, to protect a neutral zone during a revolution. Three days later action was taken outside the neutral zone to protect British property: Colombos, *International Law of the Sea* (4th ed.), p. 243.

[5] 9 *B.Y.I.L.* (1928), p. 229. Japanese forces also went to Tsinanfu on 6 July.

[6] Report of the Delegates of the United States of Amercia to the Sixth International Conference of American States, Washington, 1928, pp. 14–15; quoted in Hyde i. 252. See

However, the United States was soon to modify its attitude, first in the Montevideo Convention on the Rights and Duties of States in 1933, though with an ambiguous reservation,[1] and then unequivocally in the Additional Protocol relative to Non-Intervention agreed upon at Buenos Aires in 1936, to which there were no reservations.[2] So far as is known the last occasion on which United States forces were used to protect nationals without the consent of the territorial sovereign was in January 1934, when marines landed in Fukien province in South China.[3] In relation to the civil strife in Lebanon in 1958 the Secretary of State, Dulles, said in an official statement:

> Now what we would do if American life and property was endangered would depend, of course, in the first instance upon what we were requested to do by the Government of Lebanon. We do not introduce American forces into foreign countries except on the invitation of the lawful government of the State concerned.[4]

The legality of intervention to protect the lives and property of nationals was asserted by Japan during the conflict with China in Manchuria which began in 1931.[5] It is well known that eventually the Assembly of the League and also the United States government indicated the illegality of the Japanese action in the clearest manner.[6] Difficulty, however, arises when the materials are examined with a view to determining the attitude of organs of the League and the governments represented therein toward the legality of intervention of the type under discussion.

The unequivocal assertions of the illegality of Japanese action occurred rather late in the day when it was clear that there was no factual basis for intervention to protect nationals because of the evidence of a general policy of expansion and interference in Chinese affairs on the part of Japan. In the early stages of the conflict the attitude of the League Council and individual representatives was somewhat equivocal. The Chinese representative in the Council criticized the use of force to protect nationals and

also Whitton, 36 *R.G.D.I.P.* (1929), pp. 6–13. It is interesting to note that the memorandum prepared by the Solicitor of the Dept. of State, J. Reuben Clark, on the *Right to Protect Citizens in Foreign Countries by Landing Forces* was re-edited in 1929 and 1934. Its original date: 5 Oct. 1912. See also former Secretary of State Stimson, *The Far Eastern Crisis* (1936), pp. 112, 116, 137, 140.

[1] *Supra*, pp. 96–97.

[2] *Supra*, pp. 98–99.

[3] Hyde, i, p. 648.

[4] 20 May 1958. 38 *Dept. of St. Bull.*, no. 989, p. 947. On the Lebanon crisis see further *infra*, pp. 325–6. See also Wilson, *The International Law Standard in Treaties of the United States* (Cambridge, Mass., 1953), pp. 155–7.

[5] *L.N.O.J.* 1931, pp. 2267, 2289–90, 2343, 2376, 2455, 2514, 2529, 2531. See also Japanese Notes to the United States: Willoughby, *The Sino-Japanese Controversy and the League of Nations*, pp. 110, 140.

[6] *Supra*, pp. 177, 242; *infra*, pp. 385–6.

property in a foreign country but may have referred to an *excess* of force. In any case he gave an assurance that Japanese lives and property would be protected.[1] Moreover, the Council resolution of 30 September 1931 was particularly equivocal. *Inter alia*, it stated:

> The Council, . . .
>
> 3. Notes the Japanese representative's statement that his Government will continue, as rapidly as possible, the withdrawal of its troops, which has already begun, into the railway zone in proportion as the safety of the lives and property of Japanese nationals is effectively assured. . . .
>
> 4. Notes the Chinese representative's statement that his Government will assume responsibility for the safety of the lives and property of Japanese nationals outside that zone as the withdrawal of the Japanese troops continues and the Chinese local authorities and police forces are re-established.[2]

The President of the Council, Briand, and other representatives emphasized, during the meeting on 10 December, the obligation of Japan under existing treaties not to seek redress except by pacific means.[3] Several stated that the right to ensure the protection of nationals was limited by respect for the sovereignty and rights of the other state.[4]

On 28 January 1932 Japanese troops landed at Shanghai. In the Council the Japanese representative alleged that there had been no violation of the territorial integrity of China since by the resolutions of 30 September and 10 December 1931,[5] the Council had recognized the right of Japanese troops to remain in Manchuria to protect nationals.[6] He also extended the plea of the necessity to protect nationals to the Shanghai incident.[7] In reply Viscount Cecil said that it would be more accurate to say that the Council had recognized 'that the obligation to withdraw was dependent upon the safety of Japanese nationals', but had not given permission always to take action to defend its nationals

[1] 25 Sept. 1931; *L.N.O.J.* 1931, pp. 2283–4. He said (p. 2284); '. . . it is a dangerous principle to assert that, in order to protect nationals and their property in a foreign country, a large number of troops may occupy so many places, destroy so much property and kill so many innocent people. In every country in the world there are nationals of other countries. Is this principle going to be the new principle for the world ?' But see also *L.N.O.J.* 1931, pp. 2345, 2517; *L.N.O.J.* 1932, Spec. Suppl. no. 111, p. 64.

[2] *L.N.O.J.* 1931, p. 2307. The Council resolution of 24 Oct. 1931 has a similar content: ibid., pp. 2340–1, 2358. The Council resolution of 10 Dec. 1931, reaffirmed that of 30 Sept. and set up the Lytton Commission: ibid., pp. 2374 seq.

[3] *L.N.J.O.* 1931, pp. 2378, 2380.

[4] Ibid., pp. 2380, 2381–2, 2382 (representatives of Guatemala, Peru, and Panama).

[5] See *supra*, note 2.

[6] *L.N.O.J.* 1932, pp. 344, 345.

[7] Ibid., pp. 331, 345. Cf. Shinobu, *International Law in the Shanghai Conflict* (1933), pp. 119, 120, 141. See also *L.N.O.J.* 1932, pp. 363, 944.

in Manchuria.[1] The action taken by the Assembly in regard to the Shanghai incident[2] and the resolution adopted on 11 March relating generally to Japanese policy in China[3] have no decisive bearing on the legality of intervention to protect nationals.[4] However, Viscount Cecil's interpretation of the earlier Council resolutions gave some support to the view that the resolution of 30 September 1931, tacitly recognized a right to take such action. At the same time its value as a precedent is diminished by the desire of the Council for conciliation and emphasis by some representatives on the exceptional character of the situation.[5] When the Assembly discussed the Lytton Report in December 1932, the Canadian and Japanese representatives asserted the right of intervention but the resolution which was passed contained no reference to the question.[6]

It remains to record instances of this form of intervention in the period of the United Nations Charter. Israel and the Arab States have justified military operations against each other by an alleged necessity to protect the life and property of racial groups outside their respective areas of administration;[7] but this was in the context of truce violation and did not refer to nationals but to racial minorities. When in 1951 Iran passed laws nationalizing the property of the Anglo-Iranian Oil Company, the British government was concerned lest the tense situation in Abadan should result in danger to the lives of British subjects in Iran. In a reply in the House of Commons the Foreign Secretary, Morrison, stated that 'the Government certainly take the view that we have every right, and indeed the duty, to protect British lives'.[8] Warships were moved to the Shatt el-Arab in case of need.[9] On 28 September 1951 the government had issued an unfortunately vague statement as follows:

> The action of the Persian Government in arbitrarily ordering the expulsion of some 350 British technicians is contrary to the elementary principles of international usage, and has created a situation which might well be thought to justify the use of force in order to preserve the British rights and interests involved. His Majesty's Government would, however, be reluctant to take any action which might have the effect of weakening the authority of the United Nations, on whose principles their policy is based. They have, therefore, decided that the right course in present circumstances is to bring the situation urgently before the Security Council.[1]

During the Cairo riots in January 1952 the United Kingdom government was prepared to intervene to protect the lives and property of British subjects.[2]

The Franco-British intervention in Egypt on 30 October 1956 was justified by the United Kingdom government, *inter alia*, on the ground that it was necessary to protect the lives of nationals.[3] Since this justification seemed to lack any foundation in fact the rejection of British arguments in the General Assembly cannot be regarded as conclusive in regard to its validity in law. The situation was complicated by the variety of justifications offered,[4] but the protection of nationals received repeated emphasis in the official statements.

The most recent example of resort to force justified on the basis of this right of intervention is provided by Belgian military operations in the Congo in July 1960.[5] As in the case of Japanese action in Manchuria in 1931 the particular issue of the legality of such action carried out in good faith was obscured by the belief of some governments[6] that Belgian actions had broader political objectives, and the formal and neutral tone of the Security Council resolutions relating to the crisis and intervention by United

[1] *L.N.O.J.* 1932, p. 345. See also Viscount Cecil and Madariaga, *L.N.O.J.* 1931, p. 2377.
[2] Resolution of 4 Mar. 1932; Willoughby, p. 348.
[3] *Supra*, p. 77; *infra*, p. 412.
[4] *Supra*, p. 242.
[5] *L.N.O.J.* 1931, pp. 2377 seq.
[6] *L.N.O.J.* 1932, Spec. Suppl. no. 111, pp. 58, 70. Cf. ibid., p. 64 (Chinese representative). The Canadian representative seems to rely on the Nine Power Treaty, however. Politis, ibid., p. 558, also recognized the right as an aspect of self-defence: see *infra*, pp. 299–300.
[7] S.C. Off. Recs., 3rd Year, pp. 7, 10; cited by Bowett, p. 100.
[8] *Parl. Deb., H. of C.*, 5th Ser., ccccclxxxviii, col. 43 (29 May 1951).
[9] Ibid., ccccclxxxix, col. 491. On 3 Oct. in a speech to the Labour Party Conference Morrison stated that the forces ready would have been used if British life had been in danger, *The Times*, 4 Oct. 1951.

[1] Foreign Office statement, *The Times*, 29 Sept. 1951. It is worth recalling that as a consequence of tension in the oilfields at Abadan in May to July 1946, the British Admiralty ordered warships to Iraqi territorial waters in the Shatt el-Arab (as permitted under treaty) on 17 July. On 2 Aug. 1946 the government of India announced that troops had been sent to Basra to be at hand for protection of Indian, British, and Arab lives. A British F.O. Statement of 6 Aug. emphasized the responsibility which Iran bore for maintaining order: see *Survey of Int. Affairs 1939–1946, The Middle East 1945–1950* (1954), pp. 74–76.
[2] *The Eden Memoirs*; in *The Times*, 16 Jan. 1960, p. 4, col.4; and *The Memoirs of Sir Anthony Eden: Full Circle* (London, 1960), p. 532. Cf. the statement of the Prime Minister in the House of Commons in answer to a question relating to British subjects in the Congo, on 14 July 1960, *Parl. Deb., H. of C.*, 5th ser., dcxxvi, col. 121. Cf. ibid., col. 981. Cf. *The Times*, 16 July 1960, p. 6, col. 2.
[3] British Prime Minister on 30 Oct. *Parl. Deb., H. of C.*, 5th ser., dlviii, col. 1277; the Foreign Secretary, ibid., col. 1377; statement by Foreign Secretary in the House of Commons on 31 Oct. ibid., cols. 1566–7; statement by the Lord Chancellor on 1 Nov. 1956, *Parl. Deb., H. of L.*, cxcix, cols. 1353 seq. The French government did not use this justification. See the next note.
[4] Off. Recs. of Gen. Ass., First Emergency Special Session, 561st Plen. Meeting, paras. 73 seq. (Sir Pierson Dixon); paras. 220 seq. (de Guiringaud).
[5] Belgian statements reported in *The Times*, 11, 16, 19, 30 July; and 8 Aug.
[6] Statement of Lumumba, 10 July; *The Times*, 11 July 1960; Soviet Statement of 13 July; *Sov. News*, no. 4307, 14 July 1960, Czechoslovak Note to U.N., 18 July; *The Times*, 19 July 1960.

Nations forces merely indicate a general policy of restoring order and terminating a threat to the peace.[1]

Apart from the foregoing practice the British representative in the Sixth Committee of the General Assembly has asserted the right of protection.[2]

5. The Status of this Right of Intervention in the Modern Law

In spite of the important instances since 1920 of use of this justification and the views of a considerable number of jurists, it is submitted that any legal basis of the right of intervention is now extremely tenuous. The Covenant of the League had no decisive effect on 'hostile measures short of war'[3] but after the Kellogg–Briand Pact and the instruments and practice related to it, a resort to force, whether a state of war existed or not, otherwise than in defence against an attack or by virtue of Article 16 of the Covenant, was of very doubtful legality.[4] Indeed those instruments expressly prohibiting intervention both before and after 1945[5] may be considered to have rendered intervention for the protection of nationals illegal. Moreover, the United Nations Charter, Article 2, paragraph 4, together with the exceptions provided in Articles 39 and 51, prohibits this and other forms of intervention.[6] Only a minority of states have continued to assert its legality.

Attempts to provide a legal basis for the right of intervention in the modern law involve two approaches. The first is to argue that the limitation on the use of force constituted by the Kellogg–Briand Pact and the Charter is subject to the customary law of the earlier period[7] of which this right of intervention is a part. This

[1] 14 and 22 July 1960; *The Times*, 15 and 23 July 1960. See on other aspects of the Congo crisis, *infra*, pp. 334–5.

[2] Fitzmaurice, Off. Recs., Gen. Ass., 6th Sess., 6th Committee, 292nd Meeting, paras. 38, 39. Its existence was denied by Ogrodziński of Poland: ibid., 293rd Meeting, para. 25. See also Fitzmaurice, 73 Hague *Recueil* (1948, II), p. 259; 92 Hague *Recueil* (1957, II), pp. 172–4; and argument of Defence Counsel before the Tokyo Tribunal, Horwitz, *Int. Conciliation*, no. 465 (1950), p. 529.

[3] *Supra*, pp. 219 seq.

[4] *Supra*, pp. 74 seq., 235 seq.

[5] *Supra*, pp. 97–99, 101, 117. Cf. Proposals of Cuban Delegation, *U.N.C.I.O.* iii. 496–7 (Declaration of the Rights and Duties of Nations, paras. ii–v); Iranian amendment to ch. ii. para. 4, *U.N.C.I.O.* iii. 554; Mexico, Opinion of Dept. of Foreign Relations concerning the Dumbarton Oaks Proposals, pp. 65–69 (and see pp. 175–9); p. 399 (Ministry of Foreign Affairs of Ecuador).

[6] *Supra*, pp. 112–13, 264–80; *infra*, Chapter XVII. See also Jessup, *A Modern Law of Nations* (1956), p. 169; Wehberg, 78 Hague *Recueil* (1951, I), p. 71. Cf. Wright, 53 *A.J.I.L.* (1959), p. 117; Lauterpacht, *The Development of International Law by the International Court*, p. 317; Fabela, *Intervention* (Paris, 1961); de Visscher, *Theory and Reality in Public International Law* (Princeton, 1957), p. 159, note 47; van Panhuys, *The Role of Nationality in International Law* (Leiden, 1959), pp. 113–14; Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (Madrid, 1958), p. 402; Fawcett, 103 Hague *Recueil* (1961, II), p. 404 (but see p. 405). See further pp. 288–9.

[7] See Chapter II.

involves a very dubious interpretation of the relevant instruments and disregards the principle of effectiveness.[1] Moreover, it necessitates the insubstantial argument that somehow this particular right of intervention became separated from the amorphous customary law and nineteenth-century doctrine on necessity, intervention, and self-preservation.

The second approach has been adopted by Waldock[2] and Bowett,[3] and was utilized by the British Foreign Secretary in his speech in the House of Commons on 31 October 1956, and by the Lord Chancellor in his speech in the Lords on 1 November.[4] Reference is made to the fact that both the Kellogg–Briand Pact and the Charter reserve the right of self-defence and it is then argued that the content of the right must be determined by reference to the customary law. This reference must be arbitrary since, as has been shown,[5] the customary law equated self-defence with self-preservation and self-protection and these concepts covered the widest possible range of pretexts for resort to force. It ignores the possibility that the term 'self-defence' may have developed a more restricted meaning in the period since 1920.[6] However, in order to place reasonable restrictions on the customary right, it is related to the principles stated by Webster in the *Caroline* incident,[7] with some modification. The conditions for the lawful exercise of the right, as stated by Waldock, are thus:

(*a*) an imminent threat of injury to the nationals;
(*b*) a failure or inability on the part of the territorial sovereign to protect them;
(*c*) that the measures of protection should be strictly confined to the object of protecting them against injury.

If the right is to exist these conditions are admirable but they are not to be found in the state practice or in the works of jurists of the nineteenth century.[8] States merely referred to the need to protect citizens and their interests with no reference to the *Caroline* incident or the conditions suggested. Moreover, the reference to protection was usually one of several vague justifications. In

[1] *Supra*, pp. 86–87.

[2] 81 Hague *Recueil* (1952, II), p. 455 at pp. 466–7, 503. See also the writers listed *supra*, p. 272, n. 2; and cf. p. 285, n. 1.

[3] *Self-Defence in International Law*, pp. 87–105. See also Piotrowski, 35 *R.D.I.* (Sottile) (1957), p. 302; Fitzmaurice, 92 Hague *Recueil* (1957, II), pp. 172–4.

[4] *Supra*, p. 297, n. 3.

[5] *Supra*, pp. 40 seq.

[6] *Supra*, Chapters XI–XIII.

[7] *Supra*, pp. 42–43.

[8] Nor are they mentioned in more recent practice and literature prior to Sir Humphrey Waldock's lecture at The Hague. A further condition might be that a report of the action should be made immediately to the Security Council. Cf. *Collective Security* (ed. Bourquin), pp. 12, 307, 313.

every case considered above the third condition was disregarded, and in several cases the object was to guarantee safety by a military occupation although there was no imminent threat of injury. It would of course be justifiable to make reference to the *Caroline* if this right were universally regarded as an aspect of 'self-defence'; but many jurists simply refer to it as an instance of lawful intervention. The subjectivity introduced by both the view that a particular right of intervention has survived and the opinion that protection of nationals is an aspect of self-defence is indicated by the uncertainty as to whether the right applies to the protection of the property as well as the lives of nationals.[1]

In any case the operation of this form of intervention raises a number of acute problems both of a practical and of a legal nature. In many situations to mount an attack on the state which is the place of residence and the source of livelihood of a considerable number of nationals is to render their position more hazardous than before the operation.[2] At the present time a state so attacked would be justified in treating the aliens so 'protected' as enemy aliens and their legal status would suffer. It is, further, doubtful if the landing of forces can be proportionate to the danger, in the sense that the danger may be the result of negligence or external circumstance whereas the landing of forces is an official act of the most serious character, may result in a grave breach of the peace, and create suspicion and tension in third states. Admittedly this contrast would not exist if nationals were the object of organized atrocities authorized by the territorial sovereign. The right of intervention is linked to a concept—that of nationality—which has not received any definition in international law. It is assumed that some substantial link should exist between a state and an individual before the latter can be regarded as a national but there is little precision to be found in the law.[3] Finally, there is uncertainty as to the extent to which the protection of property is permitted. Is nationalization, with or without prompt and adequate compensation, a measure which justifies protection?[4]

[1] Waldock and Viscount Kilmuir would confine it to the protection of the lives of nationals: Waldock, p. 503; and p. 297, n. 3, *supra*.

[2] The experience of British nationals in Egypt in Nov. 1956 may be cited. However, this and other difficulties do not arise when action is taken to protect nationals on board a foreign vessel captured by insurgents on the high seas; cf. the *Santa Maria* incident, on which see van Zwanenberg, 10 *I.C.L.Q.* (1961), p. 798 at pp. 800, 817; and Goyard, 66 *R.G.D.I.P.* (1962), pp. 123–42.

[3] Cf. the *Nottebohm Case*, I.C.J. Reports, 1955, p. 5, at pp. 20–24.

[4] Wortley observes that counter-action to unjustifiable expropriation or confiscation 'can rarely (if ever) now be of a warlike character': *Expropriation in Public International Law* (Cambridge, 1959), p. 93.

If so, can a state protect property of nationals threatened not by nationalization but by laws restricting use of currency, discriminating export regulations, or taxation? May the right be exercised in favour of bond-holders? It is submitted that the answer must be negative in these cases since if it were otherwise any state accepting foreign investment or permitting ownership of property by aliens is severely curtailing its sovereignty as a result. Again, foreign interests are frequently in the form of large corporations, in which nationals and governments of several countries may have holdings, and the nationality of which may be controversial.[1]

For reasons advanced elsewhere in this section, it is considered that it is very doubtful if the present form of intervention has any basis in the modern law. The instances in which states have purported to exercise it, and the terms in which it is delimited, show that it provides infinite opportunities for abuse.[2] Forcible intervention is now unlawful. It is true that the protection of nationals presents particular difficulties and that a government faced with a deliberate massacre of a considerable number of nationals in a foreign state would have cogent reasons of humanity for acting,[3] and would also be under very great political pressure. The possible risks of denying the legality of action in a case of such urgency, an exceptional circumstance, must be weighed against the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in the pursuit of national rather than humanitarian interests.

6. *Self-Defence on the High Seas: Claims to Jurisdiction on the Basis of Self-Defence*

This rubric has often been the precursor of a discussion of a great multitude of problems and at the outset it will be convenient to give a brief dismissal of certain items which have relevance to the general question of exercise of jurisdiction over vessels on the high seas but little or no relevance to questions of self-defence. The legal position is of course dominated by the customary rule that vessels on the open sea remain under the jurisdiction of the flag state.[4] Certain exceptions to this rule in respect of control of fisheries[5] and trade in arms,[6] and the protection of submarine

[1] The difficulty of determining the nationality and legal status of the Suez Canal Company provides a notable example.

[2] Fitzmaurice refers to the abuse of this form of intervention and continues: 'But its humanitarian basis exists and cannot be overlooked' (92 Hague *Recueil* (1957, II), p. 173).

[3] Fitzmaurice, ibid., remarks that 'there is no remedy except prevention'.

[4] Oppenheim, i. 330.

[5] Colombos, *The International Law of the Sea* (4th ed.), pp. 349 seq.

[6] Ibid., p. 375. See also: *Yrbk., I.L.C.* 1950, i, p. 199, para. 25; *Yrbk., I.L.C.* 1950, ii, p. 42, para. 47; p. 72, para. 25.