THE UNILATERAL USE OF FORCE BY STATES IN INTERNATIONAL LAW

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ABBREVIATIONS .

A.F.D.I.	Annuaire Française de Droit International
A.J.I.L.	American Journal of International Law
A.S.I.L.	American Society of International Law
A.S.I.L.S. I.L.J.	A.S.I.L.S. International Law Journal
African J. Int'l & Comp. L.	African Journal of International and Comparative Law
Ann. I.D.I.	Annuaire de l' Institut de Droit International
Austrian J.I.L.	Austrian Journal of International Law
B.Y.I.L.	British Yearbook of International Law
Boston Coll. I.C.L.R.	Boston College International and Comparative Law Review
C. de D.	Cahiers de Droit
Cal. W.I.L.J.	California Western International Law Journal
Camb. L.J.	Cambridge Law Journal
Can. Y.I.L.	Canadian Yearbook of International Law
Case West. Res. J.I.L.	Case Western Reserve Journal of International Law
Col. J. Trans. L.	Columbia Journal of Transnational Law
Col. L.R.	Columbia Law Review
G.A.	General Assembly
G.Y.I.L.	German Yearbook of International Law
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Grot. Soc. Proceedings	Grotius Society Proceedings
H.R.C.	Hague Receuille de Cours (Receuille de Cours de l' Académie de Droit International)
Hague Y.I.L.	Hague Yearbook of International Law
Harv. L.R.	Harvard Law Review
Hous. J.I.L.	Houston Journal of International Law
I.C.L.Q.	International and Comparative Law Quarterly
I.J.I.L.	Indian Journal of International Law
I.Y.I.L.	Italian Yearbook of International Law

Int. Aff.	International Affairs
Intern Rel.	International Relations
Intern. Lawyer	International Lawyer
Iowa L.R.	Iowa Law Review
Israel L.R.	Israel Law Review
Journal of Intern. Aff.	Journal of International Affairs
L.N.O.J.	League of Nations Official Journal
L.Q.R.	Law Quarterly Review
Liverpool L.R.	Liverpool Law Review
Miami U. Inter-Am. L.R.	Miami University Inter-American Law Review
Mich. L.R.	Michigan Law Review
Military L.R.	Military Law Review
Modern L.R.	Modern Law Review
N.I.L.R.	Netherlands International Law Review
N.Y.I.L.	Netherlands Yearbook of International Law
N.Y. Sch. J. Int'l & Comp. L.	New York Law School Journal of International and Comparative Law
N.Y.U.J.I.L.D.	New York University Journal of International Law and Diplomacy
O.A.S.	Organisation of American States
R.G.D.I.P.	Révue Générale de Droit International Public
Res.	Resolution
Rev. Int. Com. Jurists	Review of the International Commission of Jurists
Révue Belge D.I.	Révue Belge de Droit International
S.A.J.I.L.	South Africa Journal of International Law
S.A.Y.I.L.	South Africa Yearbook of International Law
S.C.	Security Council
Stanford J.I.L.	Stanford Journal of International Law
Syracuse J.I.L. and Commerce	Syracuse Journal of International Law and Commerce
Texas I.L.J.	Texas International Law Journal
Tusla L.J.	Tusla Law Journal
U. Pa. L.R.	University of Pensylvannia Law Review
U.A.R.	United Arab Republic

U.K.	United Kingdom of Great Britain and Northern Ireland
U.N.	United Nations
U.S.A.	United States of America
U.S.S.R.	Union of Soviet Socialist Republics
Univ. of Chicago L.R.	University of Chicago Law Review
Va. J.I.L.	Virginia Journal of International Law
Vand. J. Trans. L.	Vanderbilt Journal Transnational Law
Vill. L.R.	Villanova Law Review
Wash. and Lee L.R.	Washington and Lee Law Review
West Va. L.R.	Western Virginia Law Review
Whittier L.R.	Whittier Law Review
Yale J.I.L.	Yale Journal of International Law
Yale L.J.	Yale Law Journal
Ybk. World Affairs	Yearbook of World Affairs
Z.a.ö.R.V.	Zeitschtift für Ausländisches öffentliche Recht und Völkerrecht

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ABSTRACT

The purpose of this study is an inquiry into the present state of customary international law on the use of armed force by individual States.

It deals with the historical evolution of the law towards the current rule of the prohibition of the use of force, the content of this prohibition and the purported exceptions to it that are invoked in the practice of States as justifications of lawful resort to force. The present author does not deal with the use of force under the authority of competent organs of the United Nations and regional organisations, as well as questions of individual criminal responsibility for resort to armed force.

The present author has adopted an analytical and empirical approach towards the phenomenon of the use of armed force by States. The study is based on an examination of the practice of individual States, both within and outside the framework of United Nations organs. More specifically it concentrates on the practice of States that perpetrated the use of force, the States that were the targets of this force and the reactions of third States (in the sense of not those directly involved) to instances of use of force. Moreover, the present author considers certain resolutions adopted by the Security Council and the General Assembly as part of the practice of States and evidence of *opinio juris* of this practice. By this it is meant that the adoption (or not) of resolutions, especially in the Security Council, is not insulated from statements by individual members of these U.N. organs. Hence, in the case of the Security Council the lack of condemnation is not automatically considered as approval of the action that is the object of debate at the Council, beyond and apart from the attitude of individual Members. At the same time the adoption of a resolution is treated as a projection of the position advocated by individual States, while account is taken of the voting pattern and dissent or reservations expressed upon adoption[1].

The study of State practice is compared with the ruling of the International Court of Justice in the *Nicaragua Case (Merits)* [2] (the issues

[1] Cf . E. Lauterpacht, *Aspects of the Administration of International Justice, 1991*, pp. 45-6.
[2] *Case Concerning Military and Paramilitary Activities in and against Nicaragua. Nicaragua v. U.S.A.* , I.C.J. Rep. 1986, p. 14. Problems with respect to questions of jurisdiction and admissibility (with the exception of the justiciability of claims of self-defence) in the course of the proceedings are not dealt with in the present study. On this see generally, P.W. Kahn, From Nuremberg to the Hague: The United States Position in

of use of armed force dealt with by the Court) with the aim of proving that the restrictive interpretation of the law on the use of force upheld by the Court corresponds to the actual practice of States as a component of general customary law. The position of the law of the use of force rests on a twofold basis. First, the rule of the prohibition of resort to armed force that constitutes the foundation and the starting point of the legal regulation of unilateral resort to armed force, and secondly, the purported exceptions to the rule. It is undoubtedly the case that the legal force of the rule of non-use of armed violence is not diminished. The numerous resorts to armed force by individual States have been justified either on the basis of restrictive interpretation of the content of the prohibition itself or of the purported exceptions to it. In the subsequent sections it is shown that State practice does not admit a restrictive interpretation of components of the rule and is unanimous only with regard to one of the purported exceptions to it : the right of defensive action. With regard to other exceptions, there exists extreme controversy as to their existence and scope.

The content of the prohibition of the use of force, the scope of the "universally admitted" exception of defensive action, and, finally, the controversial exceptions to the rule of non-use of force constitute the three main thematic issues that are dealt with in this study. Hence the structure of the present thesis reflects this contingency.

The present study considers the evolution of the law on the regulation of the use of force as marked by continuity from the period of the League of Nations to the present, and it is divided in three parts.

Part One deals with the rule of the prohibition of the use of armed force by individual States. It considers the historical evolution of the rule and focuses greatly on the important developments in the practice of

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Nicaragua v. United States and the Development of International Law, *12 Yale J.I.L. 1 (1987)* ; A. Chayes, Nicaragua, The United States, and the World Court, *85 Col. L.R. 1445 (1985)* ; W.M. Reisman, Has the International Court Exceeded its Jurisdiction?, *80 A.J.I.L. 128 (1986)* ; Briggs, Nicaragua v. United States: Jurisdiction and Admissibility, *79 A.J.I.L. 373 (1985)* ; Malloy, Developments at the International Court of Justice: Provisional Measures and Jurisdiction in the Nicaragua Case, *6 N.Y.L. Sch. J. Int'l & Comp. L. 55 (1984)* ; B.S. Chimni, The International Court and Maintenance of International Peace and Security, *35 I.C.L.Q. 960 (1986)* ; K. Highet, Between a Rock and a Hard Place - The U.S. , the International Court and the Nicaragua Case, *21 Internat. Lawyer 1083 (1987)* ; H. Hohmann & P. Wart, Compulsory Jurisdiction and the Use of Force as a Legal Issue, *34 N.I.L.R. 162 (1987)* ; J.N. Moore, The Secret War in Central America and the Future of World Order, *80 A.J.I.L. 43 (1986)*, pp. 92-102 ; id. The *Nicaragua Case* and the Deterioration of World Order, *81 A.J.I.L. 151 (1987)*, p. 155 ; E. Gordon, Discretion to Decline to Exercise Jurisdiction, *81 A.J.I.L. 129 (1987)* ; R. Falk, The World Court's Achievement, *81 A.J.I.L. 106 (1987)* .

States during the period of the League of Nations that culminated in the total prohibition of armed force as a result of the Conclusion of the Pact of Paris (1928) and the establishment of the United Nations Organisation (Chapter 1). The remainder of Part One deals with the content of the prohibition of the threat or use of force by focusing, mainly, on the practice of States in the period 1945 - 1991[3]. The issues that are dealt with are related to the phenomena of indirect use of force by way of armed bands (Chapter 2); armed reprisals (Chapter 3); the concepts of threat of force (Chapter 4); economic coercion (Chapter 5); anti-colonial armed struggles in relation to the rule of non-use of force (Chapter 6); and territorial integrity and political independence as the object of forcible action.

Part Two examines the historical evolution (Chapter 8) and the content of the right of self-defence (Chapters 9 & 10), as the only universally accepted ground for lawful unilateral resort to armed force. Chapter 9 deals with the content of individual defensive action and Chapter 10 concerns the concept of collective self-defence.

Finally, in *Part Three* the present author considers justifications for lawful resort to armed force that are surrounded by controversy: Namely, the use of force by States for the protection of the lives and property of nationals or under the doctrine of "humanitarian intervention" (Chapter 11) and the concept of military intervention on the basis of the consent of the State on whose territory military action is taking place (Chapter 12).

By way of last word it must be pointed out that in this study the term "intervention" is considered as wider than the concept of "armed force" - the latter is included in the former but not *vice-versa* . A study of intervention necessarily includes, in this writer's view, instances of non-forcible State activity detailed consideration of which was beyond the scope of this thesis[4].

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[3] The present study examines issues of *jus ad bellum* by individual States that arose out of the major international crisis that erupted on 2 August 1990 as a result of the invasion of Kuwait by Iraq.

[4] Reference to such activity is made in the context of economic coercion and financial assistance to armed bands, not as an autonomous object of study but in connection with the use of armed force.

INTRODUCTION.

The phenomenon of armed force in international relations has been the subject of a voluminous literature since the early writings on the subject of international law.

The onerous consequences of violence that are evinced in the destruction of human life, property and natural environment constitute an understatement of the grim result of resort to arms by States. Its effects are felt at every level of social life, both within and beyond the boundaries of individual States.

To a student of international law unilateral resort to armed force represents an extreme assertion of individualism at the expense of the international society. It represents a case of repudiating the rule of law that regulates relations among the members of the community in favour of the promotion of individual interests. As such, it is too obvious that unilateral resort to force is destructive of any idea of international society.

This underlying truth has generated the need for regulating resort to force on the international plane in the same way and with the same aim as it had been the case with domestic communities. In the case of the latter this was achieved in an organised and integrated fashion by way of instituting elaborate and centralised legislative and enforcement machinery. Individual members of domestic societies have been deprived of violence as a means of furthering their interests and redressing their grievances. Instead, the centralised authorities therein have the monopoly of the use of force in order to enforce individual claims. This has the twofold purpose, on the one hand, to satisfy the interests of the individual and , on the other, to strike a balance between those interests and the community as a whole. The guidelines for this task are provided by the law. Individual members are, nevertheless, conceded the right to resort to violence unilaterally in very exceptional circumstances strictly defined and delimited by the law - namely, self-defence and necessity.

The problem with the international society is the lack of a centralised legislative and executive authority identical to the one of domestic

communities. Despite this reality, however, the need for regulation of individual resort to force has been acknowledged and pursued. This very significant contingency seems to be underlined by common sense: If unilateral violence is destructive of organised community, it is both destructive of less organised entities, and, furthermore, constitutes an impediment towards further organisation and integration.

An initial attempt in the Middle Ages and Renaissance period at regulating resort to force on the basis of the "justice" of its cause became redundant after the 17th century because of the image projected by the international community as a result of the emergence of nation-States. This event had as its concomitant the formulation and development of the concepts of State sovereignty and the sovereign equality of States. These concepts emerged as a result of and reflected precisely the situation of lack of centralised authority in the international community. There was no superior authority to that of the individual State which was bound by no rule of law unless it had expressly consented or tacitly acquiesced to it. Resort to violence was, therefore, a contingency lying with the sovereign prerogative of every State.

The outcome of resort to force, namely, a situation of armed conflict with all its consequences in the relations between the warring parties and its interference with States other than the belligerents created a practical need for legal regulation. Furthermore, the commercial interdependence of States and the ever increasing destruction potential of the means of warfare because of the advance in technology led, in the aftermath of the First World War, to a voluntary limitation of the hitherto unlimited sovereign right to resort to force. Mere regulation of armed conflict was now complemented with the regulation of *initiating* force that led to it.

This process was set in train in a manner analogous, but not identical, to the pattern of domestic societies. The practice of States by way of treaty-making (of which the establishment of the League of Nations and the United Nations Organisation are part) and individual claims as to how the law requires States to act or desist from acting has generated the following development: A *balance* was struck between the individualism represented by sovereignty (that has been far from forfeited) and the common interest for a condition of international peace within which "sovereignty" could be exercised. It has been acknowledged that force constitutes not only an exercise

of sovereign will of its author but also the means of the destruction of the sovereignty of its target. Therefore, an uncontrolled freedom to use force unilaterally could lead to a process that would substitute the entirety of the law, as a means of conducting international relations, with individual power.

A situation similar to *Pax Romana* was incompatible with the concept of nation-State, as the Napoleonic adventure manifested. Moreover, the concept of the Balance of Power, that was developed in the aftermath of the Treaty of Westphalia (1648), aspired to accommodating the interests of individual States by guarding against individual policies pursued in manner similar to France under Napoleon I. The Balance of Power, however, although consensual in nature and of lasting duration, was a reciprocal arrangement that did not depend on considerations of community interest reflected in legal norms of universal application that prescribed in advance the conduct of individual States. It was, rather, an arrangement based on individualism and which could be derogated at will whenever a State felt its interests were encroached upon and it was powerful enough to assert itself at the expense of other States. Such an arrangement was not a condition for lasting peace. It was, rather, a temporary concealment of rampant unilateralism that could be released at will without any *a priori* constraint.

By contrast, a normative regulation of resort to force aspired to subjecting considerations of Balance of Power to higher community interests. The domestic analogy to this effect was manifested through a twofold prescription: First, unilateral resort to force is subject to strict regulation (Covenant of the League of Nations) or total prohibition (Pact of Paris, U.N. Charter) by being as a rule delegated to community machinery (U.N. Charter), and, secondly, it is allowed only in exceptional well-defined circumstances (self-defence)[1].

This balance between "sovereignty" and "community interests" is one that has been repeatedly broken ever since the establishment of the League of Nations. The reason is that the individual interests of States that create the motives for resort to armed force have always been present and have frequently prevailed over considerations of law and "community" interests.

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[1] See Kahn, From Nuremberg to the Hague: The United States Position in *Nicaragua v. United States* and the Development of International Law, *12 Yale J.I.L. 1 (1987)* .

The numerous resorts to force in the aftermath of the Second World War, including the most recent Kuwait crisis, manifest that unilateral use of force is a very topical subject in international affairs. Furthermore, the Judgment of the International Court of Justice in the *Nicaragua Case (Merits)* [2] has provided an opportunity for authoritative pronouncement on the subject of use of armed force by way of international adjudication. This Judgment as well as the earlier Judgment of the International Military Tribunal at Nuremberg have firmly placed the regulation of the use of force by States on the domestic society analogy, namely, that community interests of peace are superior to considerations of individual sovereignty. This is illustrated by the fact that in both cases attempts were made by the respondent parties[3] at excluding judicial competence for the acts for which they were indicted on the basis of the argument of non-justiciability of claims of self-defence. This amounted in effect that State sovereignty in relation to a use of force which is in principle admissible in law would prevail over community considerations. In other words, the exception to the rule of the non-use of force was invoked as a vehicle to assert the sovereign freedom that had been surrendered when the prohibition of force was acceded to.

All in all, the balance that has been created by the prohibition of the use of force on the basis of the domestic analogy is a precarious one. The invasion of Kuwait on 2 August 1990 is the latest in a long series of cases of unilateral resort to force which reveal that the eventuality of use of armed force remains a grim prospect. It also provides evidence of the need for scholarly study and research. This writer hopes that the present study will contribute to the long effort of elucidating this complex and unfortunate phenomenon of international relations. Finally, the criticism that this study may generate on the part of other researchers cannot but promote knowledge in the field of Public International Law.

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[2] I.C.J. Rep. 1986, p. 14.

[3] The German defendants in Nuremberg and the U.S.A. (albeit in a rather subtle manner).

PART ONE

THE RULE OF THE PROHIBITION OF THE THREAT OR USE OF FORCE .

CHAPTER 1
HISTORICAL EVOLUTION OF THE RULE OF NON-USE OF FORCE .

1. *Introduction* .

The phenomenon of the use of armed force is traced back to antiquity and precedes the emergence of nation States as they are perceived in contemporary historic and political thought. A variety of factors such as cultural, political and economic differences among ancient societies would lead to violent confrontation with each other resort to which was subject to a degree of regulation[1] .

During the Middle Ages, the adoption of Christianity as the official religion in the Eastern Roman (Byzantine) Empire and Western Europe, and its link with secular power, led to the development in theological writings of a theory pertinent to resort to force. The old Roman concept of *bellum justum* (just war) was developed and invested with authority in the Christian world by St.Augustine. He was of the opinion that just wars were those (i) that avenged injuries commited by the nation against which they were resorted to, when the said nation had neglected either to punish wrongs commited by its own citizens or to restore what had been unjustly taken by it and (ii) those which God Himself ordained [2].

St.Thomas Acquinas was influenced by the teaching of St.Augustine on peace and war and according to his own theory there were three prerequisites of a just war: (i) The authority of the sovereign by whose command war was waged; (ii) a just cause was required (on this point he quoted St.Augustine); and (iii) the belligerents had to have a rightful

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[1] See Brownlie, *International Law and the Use of Force by States, 1963*, pp. 3-4; Y. Garlan, *War in the Ancient World, translated by J. Lloyd, 1975* ; id. *Guerre et Economie en Grèce ancienne, 1989* ; C. Phillipson, *International Law and Custom of Ancient Greece and Rome, 1979* .

[2] *Questiones in Heptateuchum, vi,* 10 b. For a contemporary consideration of Just War issues see Melzer, *Concepts of Just War, 1975* .

intention, so that they intended the advancement of good or the avoidance of evil[3] .

The "just war" doctrine was espoused by scholarly opinion[4] until the 17th century but was abandoned by the positivist writers in the 18th and 19th centuries[5]. The new trend reflected the emergence of nation-States and the formulation of the concepts of State sovereignty and the Balance of Power[6] in the period after the conclusion of the Treaty of Westphalia (1648).

During this period, State sovereignty was attributed an absolute and exhaustive character. The society of European States was subject to no legal superior and sovereign States were only bound by the law which they could make themselves. Consequently, resort to war was a matter lying with the sovereign prerogative of each State and was effected whenever it seemed expedient to do so. A further consequence of this contingency was that war was considered "just" and, hence, lawful on both sides. The emergence and development of the law of Neutrality in the practice of States illustrates this trend.

The above developments have set the pattern for the state of the law in relation to resort to force until the end of the First World War in 1918. The European Balance of Power collapsed on two occasions during the period 1648 - 1918, as a result of the Napoleonic Wars of 1792-1815 and the First World War of 1914-1918.

The period of 1815-1914 is characterised by the attempt at restoring the Balance of Power in Europe. By contrast, the post 1918 era is marked by the novelty of preserving international peace and security through the establishment of permanently centralised machinery to deal with

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[3] *Summa Theologica, II, ii,* 40 .

[4] E.g. Grotius, *De Jure Belli ac Pacis Libri Tres,* in *The Classics of International Law No 3, London 1923, vols. i, ii.* See also Brownlie op. cit. *supra* n. 1, pp. 5-13.

[5] *Cf* . Vattel, *Le Droit des Gens (The Classics of International Law, Washington 1916), Book III,* Chapters iii and xii.

[6] The term means that no State will attempt to further or expand its political interests at the expense of the interests of other States. During the period after the end pf the Second World War, the so-called "Cold War", considerations of Balance of Power or Peaceful Coexistence were thought to form a guarantee of international peace. Under the geopolitical, strategic and ideological concerns of the period, this was translated into the abstention by either the U.S.A. or the U.S.S.R. from encroaching by way of force into the spheres of influence of each other. See generally, Rostow, Peace in the Balance: *The Future of American Foreign Policy, 1972* ; Vagts & Vagts, The Balance of Power in International Law: A History of an Idea, *73 A.J.I.L. 555 (1979)* ; Tunkin, *Theory of International Law, translation by Butler, 1974,* pp. 35 et seq. , 69-75; Perkins, The Right of Counterintervention, *17 Ga. J. Int'l & Comp. L. 171 (1987),* pp. 180-3.

situations of international crises and unilateral resort to force. This trend is embodied in the establishment of the League of Nations (1919-1945) and the United Nations Organisation. The developments in the state of the law throughout the period 1815-1945 are of considerable significance for the understanding of the current state of customary international law on the use of armed force.

2. *The Period 1815-1914* .

2. (i) *General Consideration* .

The European Settlement of1814 and the Final Act of the Congress of Vienna of 1815 re-established the concept of Public Law and Balance of Power in Europe and the new state of affairs that emerged after the Napoleonic wars was marked by a presumption against unilateral changes in the *status quo* of Europe emanating either from national revolutionary movements within the European States or from the unilateral policy of a European Power[7] . The intervention undertaken by the Holy Alliance to suppress a revolution in the kingdom of the Two Sicilies is a pertinent illustration of the former presumption whereas the Treaty of Paris (1856) which was signed not merely by the belligerents, and the Treaty of Berlin of 1878,which revised the Treaty of San Stefano of the same year, are two illustration of the latter.

Furthermore, another characteristic of this period was the unlimited right of States to resort to war and the total abandonment of the theory of just and unjust wars. The creation of nation States and the concept of State sovereignty had the result that there was no international authority similar to the Pope or Holy Roman Emperor to apply it[8] . Hall, in his celebrated quotation, maintained that:

"International law has no alternative but to accept war,independently of the justice of its origin,as a relation which the parties to it may set up,if they choose,and to busy itself only in regulating the effects of the

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[7] See H. Nicolson, *The Congress of Vienna, 1946* ; L.C.B. Seaman, *From Vienna to Versailles, 1955* ; Ch. Webster, *The Congress of Vienna 1814-1815, 2nd ed. 1963* .

[8] See Waldock, The Regulation of the Use of Force by Individual States in International Law *81 H.R.C. 455 (1952 II)*, p. 457; Brierly, *The Law of Nations, 6th ed. by Waldock, 1963*, p. 398.

relation"[9] .

Consequently, the right to resort to war was based either on morality and policy outside the sphere of law or on its being a means of change aiding the evolution of international society or on the lack of a central authority on the international plane for the enforcement of rights, the obtaining redress for wrongs done and the infliction of sanctions[10] .

However, according to Oppenheim[11] the two latter reasons justifying resort to war were open to juridical objections due to the fact that they were satisfactorily met only by the denial of the legal nature of International law or by an assertion of its weakness as a system of law. He elaborated on the above contradiction by arguing that (a) "as an instrument for the vindication of the law,war signified a legally inadmissible identification of victorious power wielded by the interested State with a legal right" and (b) "as a means of changing the law it constituted a radical break in the continuity of the system of International law since by waging war a State would release itself from all the obligations of international law except those appertaining to the conduct of war".

A new development of the period under consideration was an attempt to eliminate resort to war by the use of the institution of arbitration for the pacific settlement of disputes between States and the conclusion of various treaties providing for the peaceful settlement of disputes. More significant was the fact that disputes involving Great Powers were in some instances successfully settled by arbitration[12] .

The Hague Conference for the Pacific Settlement of Disputes of 1899 resulted in the establishment of the Permanent Court of Arbitration. The first International Court, the short-lived Central American Court of Justice, was established in 1907. A great number of bilateral treaties were concluded of which the "Treaties for the Advancement of Peace" or, as they are better known "The Bryan

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[9] Hall, *International Law 8th ed. by P. Higgins, 1924,* p. 82.

[10] Brownlie op. cit. *supra* n. 1, pp. 20 n. 4, 21 notes 1-2 ; cf . Q. Wright, The Outlawry of War, *19 A.J.I.L.76 (1925),* p. 76 .

[11] Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht 1952,* pp. 178-9.

[12] See the *Alabama Claims Award,* in J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party, vol. 1, 1898* ,pp. 495-682; the *Bhering Sea Fisheries Award, 6 A.J.I.L. 233 (1912)* and Moore op. cit. *supra,* pp. 755-961.

Treaties" concluded by the United States government in 1913-14, are a celebrated illustration [13] . However, the movement towards arbitration must not be over-estimated because of the fact that disputes concerning "power" or political antagonism between States were rarely submitted to arbitration. Arbitration treaties were qualified by the doctrine of the non-justiciability of certain categories of disputes, for instance, those concerning "vital interests"and "national honour" of States . Moreover, proposals made for obligatory arbitration in the course of the Second Hague Peace Conference in 1907 were rejected. Still, the said Conference marked a progressive development with regard to the right of States to resort to force: Article 1 of the Hague Convention II (1907) provided for the limitation of the employment of armed force for the recovery of Contract Debts[14] . In the period prior to the First World War the terms "aggression" and "provocation" made their appearance in the practice of States, mainly in treaties of alliance, where they were regarded as *casus foederis* for resort to war[15]. The meaning of aggression started to attract consideration and was generally assumed to be a military attack involving frontier crossing but this concept was often qualified by "provocation". The latter was extremely vague, because "any act or omission by the authorities of a State could be regarded as provocation if it displeased a powerful opponent"[16] . Furthermore, the idea of the legal regulation of the use of force started being fostered in rather rudimentary ways[17] . Still, however,the more successful attempts in this period were limited to the regulation of the conduct of hostilities by codifying the laws of war.

2. (ii) *The State of War Doctrine* .

We have so far seen that resort to war by States was considered to be a prerogative deriving from the concept of sovereignty. However, in the 19th century governments began to concern themselves more with the justifications of resort to war. This tendency was dictated by various reasons such as, the increasingly influential power of public opinion in

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[13] See The Bryan Peace Treaties, *7 A.J.I.L. 823 (1913), 8 A.J.I.L. 876 (1914)* .
[14] See Oppenheim op. cit. *supra* n. 11, p. 179; Brownlie op. cit. *supra* n. 1, pp. 23-4; Waldock loc. cit. *supra* n. 8, p. 468; Bowett, *Self-Defence in International Law, 1958*, p. 120.
[15] Brownlie op. cit. *supra* n. 1, p. 24.
[16] Ibid. p. 227; Giraud, La Théorie de la Légitime Défense, *49 H.R.C. 691 (1934 III)*, pp. 756-9.
[17] *Viz* . the concept of neutral State or Territory. See Brownlie op. cit. *supra* n. 1, pp. 24-5.

the management of the State's policy, the extension of constitutional and democratic control over the policies of the executive, the modernisation of the means of warfare which brought a heavier burden on the population and the economic resources of a State and the odium inherent in the notion of war. Moreover, in addition to the above moral and political reasons it is pertinent to refer to a legal
one, namely, that the commencement of war triggered off the application of the laws of war, as between the belligerent parties on one hand, and the laws of Neutrality, as between the belligerents and third States, on the other. As far as the belligerent States were concerned when war "enters on the scene all law that was previously concerned with the dispute retires and a new law steps in directed only to secure fair and not too inhuman fighting"[18] .

Moreover, the relations hitherto between the contending parties were significantly affected: diplomatic relations would be broken off, bilateral treaties between them would be suspended or abrogated, property of the belligerents' nationals existing in either of their territories would be confiscated, the doctrine of Non-Intercourse would be applied, that is the prohibition of trade or any other intercourse based on existing contracts with the enemy subjects[19] . Furthermore, the exceptional character attached to the situation of war between two or more States was reflected by the structure of Public International Law as such, namely, that the latter was deemed to be divided into two strictly and absolutely distinct parts: "The law of Peace", that is the body of rules governing the inter-State relations at a time of peace as opposed to "The law of War and Neutrality" dealing with the inter-State relations whenever resort to arms was had. The theory of International law maintained that there was no intermediate stage between Peace and War: *inter bellum et pacem nihil est medium* [20] .

For all the above reasons State practice devised a legal doctrine, namely, the state of war or *de jure* war or war in the legal sense .War since the time of Grotius was considered to be a state of affairs and not

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[18] Westlake, *International Law, Part II, 2nd ed. 1913*, p. 4.

[19] Ibid. pp. 33-5; Oppenheim op. cit. *supra* n. 11, 300-335; Hall op. cit. *supra* n. 9, pp. 453-468.

[20] Grotius, *De Jure Belli ac Pacis, iii*, xxi, 1.1; see also McNair, The Legal meaning of War and the Relation of War to Reprisals, *11 Grot. Soc. Proc. 29 (1925)*, p. 33; Hindmarsh, *Force in Peace, 1933*, p. 90.

mere acts of force: *non actio sed status eo nomine indicatur* [21] and what the state of war doctrine purported to do was an attempt to limit the coming into being of this state of affairs by depending for its very existence on the intention of the contending parties.

State practice in the period under discussion emphasized that by the term war was meant not the mere use of force but the existence of a legal situation in which rights were or might be prosecuted by force[22].

The doctrine had the practical effect that instances of large-scale hostilities resulting in considerable loss of life and destruction of property would not result in war, so far as International law was concerned, simply because the parties to the conflict opted not to characterize their armed contention as "war"[23]. Governments were thus in a position to exercise forcible measures against another State without incurring the moral responsibility of declaring war, without observing the stipulations of the constitutional law of their States with regard to a declaration of war and by dispensing with the rights of Neutrality which third States would assert[24].

Thus, States possessed a very ample discretion to apply force, to restrict it to a certain locality and at the same time to avoid any rupture of their peaceful relations with the State against which the forcible action was directed[25]. This practice gave rise to a whole body of legal doctrine with regard to acts of force such as reprisals, pacific blockade, armed intervention for the protection of life and property of nationals abroad which came under the rubric "Measures of force short of war" and which will be dealt with in the next section.

The subjectivity which constituted the basis of the legal dualism of "state of war" and "measures of force short of war", was also its main weakness. A state of war was deemed to be brought about if the intention

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[21] Grotius op. cit. *supra* n. 30, 1.1, 2.1; Oppenheim op. cit. *supra* n. 11, pp. 202-3. For more definitions of War see McNair loc. cit. *supra* n. 20, pp. 31-2.

[22] Moore, Digest of International Law, vol. vii, p. 153. A state of war could exist without hostilities. *Cf*. Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 11-13.

[23] J.B. Moore, The New Isolation, *27 A.J.I.L. 607 (1933)*, p. 622; Giraud loc. cit. *supra* n. 16, p. 699; Q. Wright, The Test of Aggression in the Italo-Ethiopian War, *30 A.J.I.L. 45 (1936)*, p. 51; Sir J. Fischer-Williams, The Covenant of the League and War, *5 Camb. L.J. 1 (1933)*, p. 2; Waldock, 81 H.R.C. *455 (1952 II)*, p. 457; Baty, Abuse of Terms: "Recognition"- "War", *30 A.J.I.L. 377 (1936)*, p. 381; Hindmarsh op. cit. *supra* n. 20, p. 57; N. Politis, Les Représailles Armées entre les Membres de la Société des Nations, *31 R.G.D.I.P. 5 (1924)*, p. 9.

[24] McNair loc. cit. *supra* n. 20, p. 33; Politis loc. cit. *supra* n. 23, p. 28.

[25] McNair loc. cit. *supra* n.20, p. 45; Hindmarsh op. cit. *supra* n. 20, 93; Q. Wright, When Does War Exist ?, *26 A.J.I.L. 362 (1932)*, pp. 365-6.

of at least one of the parties was expressed to that extent, either in the form of a declaration of war or an ultimatum conditional upon a declaration of war, or upon the commission of an act of force done *animo belligerendi* or without *animo belligerendi* and the other State elected to regard as creating a state of war, either repelling force by force or in some other way[26]. Thus, measures of force which were considered not to initiate "war" in the legal sense could constitute *casus belli* if the State against which they were directed chose to repel them by force[27]. This in practical terms meant that if the States were of similar power then a state of war would most likely arise. By contrast, if the author of the measures short of war was a Great Power- as it mostly was the case- and the victim of the use of force a weak State the latter would be unlikely to convert those measures to a state of war for, mainly, two reasons:
(a) A state of war would result to an unlimited use of force both in quantitative and geographical terms and (b) the application of the duties of Neutrality on the part of third States would economically throttle the weak Power. For, unlike its powerful opponent, it would not be economically wealthy with self-sufficiency of resources, but it would depend on commerce with third States. On the other hand, if the use of force without the recognition of a state of war took such proportions as to affect third States and give rise to protests on their part, the "inconvenience" created thereby could be easily dispensed with either by a recognition that a state of war existed or by the fact that the protesting third State was powerful enough to assert its rights as a neutral[28]. An illustration with regard to the latter is the French blockade of Formosa in 1884. The blockade was exercised without a state of war existing between France and China and it was applied to the shipping of third States.This fact was contested by Great Britain and in 1885 the French Prime Minister asserted that war existed and called France a "belligerent"[29]. The admission of the existence of a state of war by the State-author of force arose in the course of the blockade of Venezuela by Great Britain, Germany and Italy in 1902. The German government at first intended to

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[26] MacNair loc. cit. *supra* n. 20, pp. 33-5; Politis loc. cit. *supra* n. 23, p. 10.
[27] Ch. de Visscher, L' Interprétation du Pacte au lendemain du differend Italo-Grec, *5 Révue de Droit International et de législation comparée, 3rd series,* p. 380; Brierly, International Law and Resort to Armed Force, *4 Camb. L.J. 308 (1932),* pp. 308-9.
[28] Hindmarsh op. cit. *supra* n.20, p. 93; Q. Wright, *26 A.J.I.L. 362 (1932),* p. 364; id. *30 A.J.I.L. 45 (1936),* p. 51; Brownlie op. cit. *supra* n. 1, p. 28.
[29] Brownlie op. cit. *supra* n. 1, pp. 32-3.

call the blockade "pacific" (see *infra*) but eventually described it as a "belligerent blockade" due to a U.S. note that it would not recognize any interference with its shipping by the blockading Powers[30] .

The state of war doctrine was characterized as an absurdity unworthy of any discussion; however, this was not to be realized until the period of the League of Nations , for in the 19th and the first two decades of the 20th century war was permissible and constituted a matter of concern of the contending States only and not of the entire international community[31] .

Furthermore, if a state of war was asserted by a weak Power against a Great Power in response to the use of force short of war by the latter , that assertion could easily be ignored by the Great Power. This is precisely what happened in the case of the U.S. landing and occupation of the Mexican port of Vera Cruz[32] .

The state of war doctrine can be said to have created a climate of uncertainty in international relations. Although it can be argued that it had some advantages such as the limited application of force and the fact that third States did not have to observe the duties of Neutrality, in real practical terms armed force could be used under the extremely convenient assertion of peace and it would be basically advantageous only to the author of the measures short of war[33] . Moreover, the said advantage was highly dependent on the actual power of the State against which force was exercised and most of all on the uncertainty of whether the victim State would initiate a state of war which was a matter that depended on purely political factors such as a treaty of alliance with a Great Power. So the possibility of war in the legal sense was not , at least theoretically, dispensed with. But the practice of States during the 19th and the early 20th century indicates that measures short of war were accepted as permissible under international law and since war was deemed to be

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[30] See Westlake op. cit. *supra* n. 18, p. 19; Ch. de Visscher loc. cit. *supra* n. 27, p. 380. It must be noted that the said blockade became the object of controversy with regard to its nature. Holland characterised it as "war *sub modo* " and "anomalous", *19 L.Q.R. 133 (1903)*, p. 133; Oppenheim op. cit. *supra* n. 11, p. 146, took the view that the blockade was essentially a pacific blockade. Westlake, *25 L.Q.R. 13 (1909)*, p. 21, considered the situation arising out of the blockade of Venezuela, as being "war". The same view was held in the *Venezuelan Preferential Claims Award* (1904), 9 R.I.A.A. 99-110 (1960).

[31] *Cf*. the two illustrations of pacific blockade. Also see Brownlie op. cit. *supra* n. 1, pp. 26, 36-7, 39.

[32] See Hindmarsh op. cit. *supra* n. 20, p. 94; Grob, *The Relativity of War and Peace, 1949*, pp. 94, 169; Brownlie op. cit. *supra* n. 1, p. 40.

[33] Brierly loc. cit. *supra* n. 27, p. 308 n. 28.

lawful it would be unrealistic to doubt the legality or illegality of lesser forms of armed force. According to Brownlie[34] :

> "... states had to pay for the luxury of avoiding the consequences of a state of war by submitting to some measure of legal regulation of the lesser means of coercion as a reprisal, pacific blockade, or justified intervention ..."

2. (iii) *Coercive Measures Short of War* .

Under this rubric the present author shall deal with forcible measures exercised by States and which according to State practice did not initiate a state of war. At the outset this writer deems it pertinent to make some preliminary observations.

Whenever a dispute arose between two States it could be settled by three means:
(a) Either by recourse to peaceful methods of dispute settlement such as conciliation[35] , diplomatic negotiations, mediation by a third party , and arbitration, (b) or by recourse to measures of non-amicable character directed against the defaulting party, or (c) lastly, by waging war against the respondent State[36] . War having been invested with the subjective technicality of the state of war doctrine and, moreover, the reluctance of governments to characterize recourse to force as war, inevitably, led States to use the former two means of settling their disputes.

Furthermore, non-amicable measures of redress were distinguished into those involving and those not involving the use of armed force[37] . The latter comprised (a) the withdrawal of diplomatic relations, (b) retorsion, (c) military and naval demonstrations[38] and (d) embargo[39] .

Retorsion is the technical term for retaliation for discourteous and inequitable acts by acts of the same or similar kind[40] . The act against

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34 Op. cit. *supra* n. 1, p. 28.

35 As in the case of the *Dogger Bank Incident* (1904) between the U.K. and Russia. See Merrills, *International Dispute Settlement, 2nd ed. 1990* , pp. 35-7.

36 Hall op. cit. *supra* n. 9, p. 81; *cf* . Oppenheim op. cit. *supra* n. 11, p. 132.

37 Y. de la Brière, Evolution de la Doctrine et de la Pratique des Représailles, *22 H.R.C. 241 (1928 II)*, pp. 273-4.

38 Moore op. cit. *supra* n. 22, pp. 103-9; Oppenheim op. cit. *supra* n. 11, p. 133.

39 Hall op. cit. *supra* n. 9, p. 435; Hindmarsh op. cit. *supra* n. 20, p. 64; Waldock, *81 H.R.C. 455 (1952 II)*, p. 458.

40 Oppenheim op. cit. *supra* n. 11, p. 134.

which retorsion is directed is not an illegal act but one which is within the competence of its author (i.e., a legislative or administrative act)[41] . It has been suggested that it is a retaliation in kind[42] or that it is a mode of self-help,the widest form of reprisals, to cover action taken to redress a wrong[43] . The question in what circumstances retorsion is justified is not one of law and it depends on each individual case whether a State would retaliate or not by way of retorsion [44]. In *The Nereide Case* , Mr Marshall CJ disputed the very character of retorsion as a legal institution by ruling that retorsion was a political and not a legal measure which, consequently, could not be brought for consideration before a State's Courts[45] . An illustration of an act of retorsion is the action of Japan in 1907 when she imposed differential duties upon Russian imports as a counter-measure to Russia's exclusion of Japanese fishermen from the territorial waters of Saghalien where they had long been accustomed to fish[46] .

Embargo[47] means the detention or sequestration of the ships of another State in the ports of the embargoing State. Embargo was merely a particular kind of reprisal aiming at obtaining redress from the State whose shipping was detained. It could also be imposed on the plaintiff State's vessels- this was the so-called civil embargo[48] .

We come now to discuss the compulsive or coercive measures short of war which were applied for the redress for committed wrongs. We propose to deal with those measures under the general rubric of reprisals , although several writers of the second half of the 19th and the beginning of the present century have referred to reprisals and pacific blockade as two distinct institutions of International law[49] .

On the other hand, some authors took the view that the term reprisals had been generally used to refer to coercive measures taken by a State against another[50] , the terms "pacific blockade", "reprisals",

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[41] Ibid.; also see Hall op. cit. *supra* n. 9, p. 433; Brierly op. cit. *supra* n. 8, p. 399.
[42] Moore op. cit. *supra* n. 22, p. 106.
[43] Westlake op. cit. *supra* n. 18, p. 6; Waldock, *81 H.R.C. 455 (1952 II)*, p. 458.
[44] See Oppenheim op. cit. *supra* n. 11, p. 134.
[45] 9 Cranch, 388, 422.
[46] Waldock loc. cit. *supra* n. 43
[47] Oppenheim op. cit. *supra* n. 11, pp. 141-2; Westlake op. cit. *supra* n. 18, p. 8; Hall op. cit. *supra* n. 9, p. 435; Hindmarsh op. cit. *supra* n. 20, p. 64.
[48] Oppenheim op. cit. *supra* n. 11, p. 142; Hindmarsh op. cit. *supra* n. 47.
[49] See Westlake op. cit. *supra* n. 18, pp. 11-8; id. Pacific Blockade, *25 L.Q.R. 13 (1909)*, p. 13; Oppenheim op. cit. *supra* n. 11, pp. 132, 144-9; Hall op. cit. *supra* n. 9, pp. 437-441.
[50] Hindmarsh op. cit. *supra* n. 20, p. 58.

"embargo", "retorsion" and "intervention" being only "descriptive labels and did not represent a scientific division of forcible measures short of war"[51] or that the words "retorsion", "reprisals", "intervention" were not used by all jurists with the same meaning[52] . Moreover, we intend to discuss intervention under a different rubric due to the broadness of the concept and the relationship attributed to some of its forms with the right of self-defence.

Reprisals. According to Oppenheim[53]:

> "Reprisals are such injurious and otherwise internationally illegal acts of one state against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency"

Reprisals are coercive measures undertaken without belligerent intent[54] and they are distinct from *belligerent reprisals* exercised during the process of hostilities in a state of war by one belligerent against another with the purpose of compelling him and his subjects and members of his armed forces to abandon illegitimate acts of warfare and to comply in the future with the rules of legitimate warfare[55] .

The *raison d' être* of reprisals in time of peace was to obtain redress for wrongs committed by the State against which they were taken and the institution itself goes back to Medieval times having its roots in a system of private reprisals which was recognized from the 14th to 18th century. An individual who had suffered injustice abroad and been unable to obtain redress in the State concerned would obtain his own sovereign's authority (by a *letter of marque*) to take reprisals against the nationals of the foreign sovereign[56] .

By the 19th century all reprisals had been *public* reprisals taken by the State itself and any international wrong done to the State or its nationals was a just cause for reprisals, which could take the form of

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[51] Waldock, *81 H.R.C. 455 (1952 II)*, p. 457.

[52] Ibid. p. 458.

[53] Oppenheim op. cit. *supra* n. 11, p. 136.

[54] Hindmarsh op. cit. *supra* n. 20, p. 58.

[55] Oppenheim op. cit. *supra* n. 11, p. 561.

[56] Waldock , *81 H.R.C. 455 (1952 II)*, p. 458. For further information about the history of reprisals in international law see, Westlake op. cit. *supra* n. 28, pp. 7-11; Maccoby, Reprisals as a Measure of Redress Short of War, *2 Camb. L.J. 60 (1924)*, pp. 60-70; E. Speyer-Colbert, *Retaliation in International Law, 1948* ; Hindmarsh op. cit. *supra* n. 20, pp. 43-56.

bombardment, occupation of territory or pacific blockade. Armed action by way of reprisals was a lawful mode of self-help; in other words the State-author of reprisals was acting like a judge and like the authority for the execution of the judgment in its own case[57] .

The customary law on reprisals has been stated in the *Naulilaa Case* (1928). This was an arbitration between Portugal and Germany which arose out of forcible reprisals conducted by the German armed forces based in South West Africa (present Namibia) in the territory of Angola, then a Portuguese colony, in October 1914. Portugal was then a neutral Power for it did not take part in the First World War until March 1916. After a frontier incident which resulted in the killing of three German soldiers, the German army conducted a military expedition inside Angola which also incited an uprising of the native population with the result of considerable loss of life and property.

The tribunal held that Germany was responsible and then it laid down the conditions required for the legitimacy of reprisals:

> (a) Reprisals were justified by the violation of a rule of international law by the state against which the reprisals were directed.
>
> (b) Reprisals were illegal if they are not preceded by a request to remedy the alleged wrong.
>
> (c) Reprisals which were altogether out of proportion with the act that prompted them were excessive and therefore illegal[58] .

Although reprisals appeared as institutions of customary international law their legality was disputed by some jurists while there was some agreement for the danger they entailed for international peace. We have pointed out when discussing the state of war doctrine that the subjectivity surrounding its application by governments as well as its technical nature enabled States to resort to force without incurring any responsibility of initiating war in the legal sense and to avoid observing the duties of neutrality towards third States. Thus the use of force by way of reprisals was not considered a rupture of peace.

Charles de Visscher[59] , took the view that the theory of coercive measures short of war had never had solid foundations in customary law and being imprecise it appeared fraught with political opportunism. He

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[57] Waldock loc. cit. *supra* n. 56, p. 459; J. Stone, *Legal Controls of International Conflict*, 1954, p. 287; Brownlie op. cit. *supra* n. 1, p. 220.

[58] 4 I.L.R. 1927-8, pp. 526-7.

[59] Loc. cit. *supra* n. 27, p. 377.

challenged the "peaceful" character of those measures by referring to two instances of pacific blockade, namely, the French blockade of Formosa and the joint British-German-Italian blockade of Venezuela. He argued that the character "pacific" was attainable only when a disproportionality of power between the disputant States existed. By contrast if the interests of a powerful State were affected and the latter asserted its rights the illusory etiquettes would disappear and thus reprisals would constitute as such hostile acts, sufficient by themselves to justify the existence of a state of war.

Fauchille[61], argued that reprisals were frequently a pure brutal act and not the exercise of a right.

Waldock[62], pointed out that reprisals would definitely develop into war if they were resorted to against an evenly-matched State.

Wright[63], cast off the distinction between war and acts short of war as unimportant due to the possibility of the victim State to interpret these acts as the inauguration of a state of war.

Westlake[64], though he *prima facie* accepted reprisals as part of International law, pointed out that they tended to obscure the line between peace and war. He took as starting point Article 1 of the Hague Convention III of 1907 on the Opening of Hostilities and by maintaining that the term "hostilities" was free from subjective criteria, he concluded that reprisals in time of peace endangered the security aimed at by the rule as to the declaration of war. He, lastly, recognized the conspicuous reality that "no government dealing with another of strength even approximately equal to its own, certainly no Great Power dealing with another Great Power, would use force by way of reprisal" because war would definitely follow.

Politis[65], took the view that the requirement of proportionality as well as the arbitration provisions in various treaties tended to render reprisals less and less justifiable. Even if a dispute was not of the character to be submitted to arbitration, he maintained that diplomatic channels should be used rather than resort to violence. He rejected the view that reprisals did not constitute a breach of the state of peace as illogical, due to

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[61] Fauchille, *Traité de Droit International Public, t. 1, 3me partie*, ref. in Brierly loc. cit. *supra* n. 27, p. 309 n. 7.
[62] *81 H.R.C. 455 (1952 II)*, p. 459.
[63] *19 A.J.I.L. 76 (1925)*, p. 94.
[64] *25 L.Q.R. 13 (1909)*, pp. 128, 134.
[65] *31 R.G.D.I.P. 5 (1924)*, p. 5.

the fact that reprisals did constitute acts of war which were by fact completed without a prior declaration of war; moreover, the disruption of peace was always dependent on the possibility of resistance on the part of the victim State.

Y. de la Brière[66], pointed out the deficiency of the system of law admitting reprisals due to the presumption they entailed of a state of anarchy in international society and of the possibility of their abuse; the peril they constituted for international peace and the fact that they were virtually directed against weak States. Some other jurists considering the possibility of abuse of reprisals were quite doubtful of their utility[67].

The potential for abuse in using force by way of reprisals finds many illustrations in the practice of the 19th and 20th century[68].
With regard to the prior attempt to obtain redress from the wrongdoing State, the blockade exercised by Great Britain against Greece in 1850 (the *Don Pacifico* case), was universally criticized since the above requirement had not been met[69]. Don Pacifico, a British national who had suffered loss of property during a riot in Athens, had not sought redress in the Greek Courts. The requirement of proportionality was hardly observed in the cases of the bombardment of Greytown in 1853 and the U.S. occupation of Vera Cruz in 1914[70]. Finally, the frail distinction between reprisals and war did not materialise in the cases of the French blockade of Formosa and the blockade of Venezuela.

At this point the present author thinks it is pertinent to give closer consideration to a particular form of reprisal, namely, that of *pacific blockade* due to its extremely controversial nature and the fact that it was indicative that the distinction between war and reprisals was so fragile that it appeared illusory[71].

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[66] *22 H.R.C. 241 (1928 II)*, p. 278.
[67] See quotations by Calvo and Despagnet in Maccoby loc. cit. supra n. 65, p. 70; Francois, *66 H.R.C. 5 (1938 IV)*, p. 248; Brierly op. cit. *supra* n. 8, p. 400; McNair loc. cot. *supra* n. 20, p. 45; Oppenheim op. cit. *supra* n. 11, p. 143.
[68] For a compehensive account of State practice see Hindmarsh op. cit. *supra* n. 30, pp. 72-3 (notes) and p. 77 n.2; Brownlie op. cit. *supra* n. 1, pp. 28-37.
[69] Moore op. cit. *supra* n. 32, 119-151; Waldock, *81 H.R.C. 455 (1952 II)*, p. 459; Brownlie op. cit. *supra* n. 1, p. 220.
[70] Brownlie op. cit. *supra* n. 1, pp. 36-7, 220.
[71] Ch. de Visscher loc. cit. *supra* n. 27, p. 380.

Naval blockade which means preventing all access to the coasts of a certain State is a measure that one belligerent may adopt with regard to another belligerent and that he may even apply subject to certain conditions to neutrals[71] . Thus naval blockade is a measure which in international law has been *a priori* associated with a state of war. This was the case until the second quarter of the 19th century[72] , when instances in State practice occurred of naval blockades applied in time of peace as a means of securing the settlement of disputes, and the institution seems to have acquired a large measure of recognition in State practice[73] .

The first case of pacific blockade took place in 1827 when England, Russia and France blockaded the coasts of Turkey[74] , and since then pacific blockades had been enforced on twenty two occasions[75] .

Two main issues arise from the practice of pacific blockade, namely, (a) how a given blockade could be determined as being pacific and, if so, (b) whether it could be applied to third State shipping.

(a) It has been suggested that the nature of a naval blockade is to be established by reference to the intention of the participating States and if the latter was not manifest the legal status of the blockade had to be inferred from "indefinite criteria"[76] . The best view on that question seems to be that taken by Hogan[77] , and acceded to by McNair[78] , namely, that it depended wholly on the action of the blockaded State whether a blockade should be considered as pacific or belligerent. Indeed, as we have already seen, if the State-target of any form of armed reprisals resisted by repelling force by force a state of war would be brought about; moreover, the legal nature of naval blockade could be determined by the reaction of third States affected by it. The French blockade of Formosa in 1884 was

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[71] Memorandum on Pacific Blockade up to the time of the Foundation of the League of Nations by Giraud, L.N.O.J. 1927, p. 841.

[72] Oppenheim op. cit. *supra* n. 11, p. 144.

[73] The term *pacific blockade* was primarily a creation of publicists. It was invented by Hautefeuille, *Des droits et des devoirs de nations neutres en temps de la guerre maritime, Paris, 1848-49, iii,* p. 176; also see Wheaton, *International Law, 5th ed. 1916,* p. 409; Hyde, *International Law, vol.* 2, 1951, p. 55.

[74] See L.N.O.J. 1927, p. 841; Oppenheim op. cit. *supra* n. 11, p. 145; Hindmarsh op. cit. *supra* n. 20, p. 72, cites as the first instance of pacific blockade the British blockade of Norway in 1814.

[75] For an account of State practice see L.N.O.J. 1927, p. 841 n.1; Hindmarsh op. cit. *supra* n. 20, pp. 72-3; Westlake, *25 L.Q.R. 13 (1909),* p. 15 et seq.

[76] Hindmarsh op. cit. *supra* n. 20, p. 71.

[77] Hogan, *Pacific Blockade, Oxford 1908* .

[78] Loc. cit. *supra* n. 20, p. 38.

initially applied as a pacific blockade but it was eventually converted into a belligerent blockade due to protests on behalf of Great Britain in the light of its application to British shipping. The controversial blockade of Venezuela in 1902 was at the outset justified by Germany, one of the blockading Powers, as pacific and it was later recognized as belligerent after the U.S. Government had issued a note whereby she refused to acquiesce to "any extension of the doctrine of pacific blockade which may adversely affect the rights of States not parties to the controversy or discriminate against the commerce of neutral nations"[80] .

(b) A naval blockade could be applied to third State shipping only in the case of a state of war. With regard to pacific blockade , however, the practice of States was somewhat unclear on this point. Up to 1850 pacific blockades were enforced against third States and this seemed to have been met with acquiescence on the part of the latter[81] . In 1850 Great Britain blockaded the coasts of Greece (Don Pacifico case), but she did not enforce the blockade against the vessels of third States[82]. Moreover, the joint blockades of Greece and of the island of Crete in 1886 and 1897 respectively were applied only to Greek vessels[83] .

By contrast the French blockade of Formosa of 1884, the joint blockade of Venezuela of 1902, the joint blockade of Montenegro in 1913, the blockade of Greece by the Allied Powers in 1916 and the Italian blockade of Fiume in 1920, were all applied on third States[84] .

The above seem to indicate that France had always favoured the enforcement of pacific blockade on third States , whereas, the British Government seemed not to be in favour of such enforcement[85] .

In 1887 the Institute of International law suggested a number of regulations for the application of the pacific blockade, namely,that (a) ships under a foreign flag could enter the blockaded State's ports freely; (b) the pacific blockade had to be officially declared and notified and maintained by a sufficient force; (c) the ships of the blockaded State which did not respect the blockade would be sequestrated. When the blockade was raised they had to be restored with their cargoes to the owners but without

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80 Moore op. cit. *supra* n. 32, p. 140.
81 Westlake, *25 L.Q.R. 13 (1909)*, pp. 15-8.
82 L.N.O.J. 1927, p. 844.
83 Ibid.
84 Ibid
85 Ibid. ; Westlake, *25 L.Q.R. 13 (1909)*, p. 22.

indemnity on any account[85] . Moreover, it was suggested that pacific blockade being a form of reprisal it should not affect third States since reprisals were not meant to have such an effect[86] .

The reasoning behind pacific blockade was the same with any other form of reprisals, namely, to obtain redress without resort to war, exercising instead a limited use of force . However, certain publicists were opposed to the institution arguing that pacific blockade was more than an ordinary reprisal, since its application by means of warships influenced the whole life of the blockaded State[87] and its effect was not limited as in the case of other forms of reprisals. Moreover, speeches by statesmen whose Governments had carried out pacific blockades revealed that they considered it difficult, if not impossible, to reconcile a blockade of this kind with the continuance of a state of peace[88] . As Parry pointed out the institution of pacific blockade was an "historical accident, arising from the application to one form of reprisals of injudicious analogies from the law of war"[89] .

Furthermore, pacific blockade entailed an inner contradiction, namely, that if it was to be applied effectively it had to be enforced against third States. This was in conspicuous contradiction with the rule that a blockade would be applied on third State shipping only in a state of war. It may, lastly, be attributed to this inherent inconsistency that the institution was virtually abandoned after the end of the First World War[90] .

3. *The Regulation of the Use of Force During the Period of the League of Nations (1920-1945)* .

The League of Nations was established in 1919 by the conclusion of its constitution, the Covenant[91], which was incorporated in the peace treaties of 1919-1920 between the victorious Allied and the defeated Central Powers and the Ottoman Empire. The establishment of the League

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85 See Westlake loc. cit. *supra* n. 84, pp. 19-20.

86 See Fauchille op. cit. *supra* n. 60, p. 709.

87 Calvo, *Le Droit International Théorique et Pratique, 1888*, t. iii, p. 554.

88 L.N.O.J. 1927, p. 843 n. 7

89 Parry, British Practice in some 19th century Pacific Blockades, *8 Z.a.ö.R.V. 672 (1938)*, pp. 685-6.

90 Westlake loc. cit . *supra* n. 93, pp. 19, 22.

91 Text of the Covenant of the League of Nations in *U.K. Treaty Series 1919, No 4* ; M.O. Hudson (ed.), *International Legislation, vol. i, 1931*, pp. 1-18.

reflected a sentiment of revulsion against all war because the World War of 1914-18 was the first total war involving not only the armed forces of the belligerents but the entire populations and economic resources of their countries as well. Moreover, the unprecedented loss of human life created the strong desire to ensure that a disaster of such scale would never recur[92] . Thus it is not surprising that one of the two purposes of the League of Nations according to the preamble of the Covenant was to "... achieve international peace and security" by way of "... the acceptance of obligations not to resort to war".

The stipulations of the Covenant relevant to international peace and security were embodied in Articles 10-17 thereof.

Article 10 stipulated that:

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

What really lay, in political terms, behind Article 10 was an attempt to guarantee the territorial *status quo* in the post-world war period but the eventual defection of the U.S.A. from the League rendered the materialization of this purpose virtually impossible. However, as a matter of law Article 10 has been interpreted as having imposed a legal obligation on Member States:The terminology used was established in political treaties and did not merely reflect a moral principle[93] . Moreover, by its wording the said Article seemed to launch a total prohibition of war except in self-defence and as such to be a dynamic development introduced by the Covenant[94] .

But the Article was attacked on grounds of constituting a moral obligation and its terms of being vague- particularly, the definition of "territorial integrity" and "political independence"[95] . Furthermore, the criticism of Article 10 was focused on its relation with the rest of the provisions of the Covenant regarding the settlement of disputes and the maintenance of international peace and security: Article 10 was linked with neither

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92 Northedge, *The League of Nations, 1986*, pp. 1-2; Giraud, La Théorie de la Légitime Défense, *49 H.R.C. 691 (1934 III)*, p. 693.

93 See Brownlie, *International Law and the Use of Force by States, 1963*, p. 62.

94 Ibid. pp. 63, 65.

95 Ibid. p. 62.

Articles 11-15 nor Article 16 of the Covenant[96] . More specifically the provision of Article 10 was said to contradict Article 15(7) which permitted resort to war in certain circumstances[97] in order to enforce claims. The problem of Article 10 gave rise to the development of various views attempting to reconcile it with the subsequent provisions of the Covenant. It has been suggested, and the preparatory works of the Covenant seem to reflect that view, that Article 10 was subordinate to the Articles on the pacific settlement of disputes and that it operated only in relation to wars that were unlawful under Article 15[98]. Another view maintained that wars under Article 15(7) would not contravene Article 10 so long as the lawful belligerent did not take steps which would permanently affect the territorial integrity and political independence of its adversary[99] . Lastly the 4th Assembly of the League in interpreting Article 10 held that Member States were absolutely free in deciding the matter of taking measures to implement the guarantee contained therein and by this interpretation the ambit of Article 10 was greatly diminished[100] .

However, Article 10 was referred to in communications by States having recourse to the League of Nations when a dispute arose. Thus it was invoked by Bulgaria following the invasion of Bulgarian territory by the Greek army in 1925 (Graeco-Bulgarian dispute)[101] . China appealed to the Council of the League under Articles 10 and 11 after the Mukden incident of Sept. 18, 1931 (Sino-Japanese conflict)[102] . When Italy invaded and subsequently annexed Albania in 1939, the latter appealed to the League of Nations under Article 10 of the Covenant[103] . Nevertheless Article 10 was not constantly referred to by either the Council or the Assembly of the League of Nations with the exceptions of the appeal addressed on Feb. 16, 1932 by the Members of the Council, other than China and Japan, to the Japanese Government under Article 10 [104] ,and of

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96 See Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 469.

97 Namely, in the event of the Council of the League failing to reach a unanimous report in respect of a dispute between two Member States. See also Brownlie op. cit. *supra* n.93, pp. 62-3.

98 See Giraud, *49 H.R.C. 691 (1934 III)*, p. 695; Komarnicki, *La Question de l' Integrité Territoriale, 1923*, pp. 157, 202; Hunter-Miller, *The Drafting of the Covenant, vol. i*, p. 170.

99 See references in Brownlie op. cit. *supra* n.93 , p. 63 n. 2.

100 Referred to in Ibid. p. 64 n.1.

101 L.N.O.J. 1925 II, p. 1696.

102 L.N.O.J. 1931, p. 2453.

103 L.N.O.J. 1939, p. 246

104 Text in *27 A.J.I.L. Suppl. 131 (1933)* .

the resolutions of the League Council concerning foreign intervention in the Spanish civil war[105] . The League Council and the Member States were more eager to use Article 11 concerning preventive action by the Council, mainly in the context of cessation of hostilities. It is interesting, however, that the progressive and dynamic nature of Article 10 did not pass completely unobserved. The said stipulation was used as the legal basis of the adoption by the League of the Stimson doctrine of non-recognition[106] and this fact was interpreted by some jurists as indicative of Article 10 involving mutual guarantees only against ultimate loss of territory or independence[107] .

The controversy surrounding Article 10 is not met when dealing with *Article 11* , which provided that:

> 1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any Member of the League summon a meeting of the Council.
>
> 2. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

The above provision constituted another development brought about by the League Covenant in that any war or threat thereof was considered for the first time to be a matter of concern to the entire Membership, whether affecting immediately any of the individual Members or not. Moreover, the League would take any action that might be deemed wise and effectual to safeguard the peace of nations[108] .

Article 11 owes its frequent application by the Member States in their appeals to the Council and by the Council itself when dealing with a dispute, to the ample discretion it offered to the latter not to settle the dispute as such but to take preventive and preliminary steps, such as a request for the cessation of hostilities or the setting-up of a commission to

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[105] L.N.O.J. 1937, pp. 18 et seq. , 333 et seq.

[106] See Waldock, *81 H.R.C. 455 (1952 II)*, p. 470.

[107] Ibid. p. 469; Sir J. Fischer-Williams, *Some Aspects of the Covenant, 1934*, pp. 103-125; Q. Wright, The Outlawry of War, *19 A.J.I.L. 76 (1925)*, p. 92; *cf*. Brownlie op. cit. *supra* n. 93, p. 65.

[108] Article 11 of the Covenant is very reminiscent of the provisions of Articles 39 and 40 of the U.N. Charter.

observe the execution of the former, in order to prevent any aggravation of the dispute.

Action taken thereunder was a measure of "policing the peace"[109] and there was no attempt whatsoever to determine the legality or illegality of recourse to force by individual States[110] . An illustration of this is the action which was taken by the League Council in the Graeco-Bulgarian dispute of 1925, which arose out of the invasion of the Bulgarian territory by the Greek army following a frontier incident between the armed forces of the two States. The Council of the League was convened in an extraordinary session and the Acting President thereof urged both parties to cease military action and to withdraw their troops back in their respective territories pending the consideration of the dispute by the Council[111] . It was also made clear by A.Briand, the President of the Council, that the latter was interested-at least in the first instance- in the cessation of the hostilities rather than the merits of the dispute[112] . The appeal of the Council was successful and its recommendations were carried out by both Greece and Bulgaria, but it was not so at the early stages of the Sino-Japanese conflict in Manchuria where the appeal of the Council for cessation of hostilities and withdrawal of the Japanese troops was virtually evaded and ultimately ignored by Japan[113] . The importance of Article 11 was stressed by some jurists to the point of arguing that it excluded *per se* resort to war[114] . The present author thinks that is sufficient to conclude that Article 11 offered to the Council a great flexibility to achieve a temporary halt of a recently started armed contention before it degenerated into a major conflict.

The triplet of *Articles 12, 13,* and *15* dealt with the *ad hoc* structure of the pacific settlement of disputes advocated in the Covenant of the League of Nations[115].

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109 Stone, *Legal Controls of International Conflict, 1954,* pp. 168-9.

110 Kopelmanas, The Problem of Aggression and of Prevention of War, *31 A.J.I.L. 244 (1937)* ; Waldock, *81 H.R.C. 455 (1952 II),* p. 470.

111 L.N.O.J. 1925 II, p. 1696 et seq.

112 Ibid. p. 1698.

113 L.N.O.J. 1931, p. 2265 et seq.

114 See de Brouckère, Prévention de la Guerre, *50 H.R.C. 5 (1934 IV),* pp. 25-8.

115 Article 12(1) provided general procedural guidance to the Members of the League in the event of a dispute " ... likely to lead to a rupture ...". The undertaking consisted of submitting the matter either to arbitration or adjudication or enquiry by the Council of the League. Moreover, Member States undertook not to resort to war " ... until three months ..." after the award by the arbitrators or the judicial decision or the report of the Council. Article 13 dealt with the case a dispute was submitted to arbitration or judicial settlement.

When reviewing the above provisions of the Covenant it becomes absolutely conspicuous that it did not prohibit all war but that it only attempted to regulate resort thereto[116]. Indeed, resort to war was permissible (a) if the other State failed to carry out an award, judicial decision or a unanimous report of the Council; (b) if the Council failed to arrive at a unanimous report; (c) if the plea of domestic jurisdiction was upheld[117]. With the possible exception of the plea of domestic jurisdiction, the provisions of the Covenant left few *lacunae* for lawful resort to war and there was no indication in the several serious disputes that came before the League that these "gaps" in the Covenant would be responsible for any case of unlawful resort to war[118]. Finally, in terms of application of the mechanism provided in the Covenant for the maintenance of international peace there was a marked preference for the application of Articles 11 and 15 to the disputes brought before the Council of the League rather than Article 16[119]. In other words the Council seemed to have considered its task to be primarily focused on preventive action so that a dispute did not escalate into a major conflict, leaving the question of the determination of the violation of Articles 12, 13 and 15 until the irreparable effects of such violation had been prevented[120].

3. (i) *The meaning of the phrase "resort to war" in the Covenant. Measures of force short of war and the Covenant of the League of Nations*

The structure of the process of the pacific settlement of disputes as it was laid down in Article 12(1) of the Covenant as well as the realization of the sanctions mechanism of Article 16 were dependent on the

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Article 15 laid down the procedure for the conduct of an enquiry by the Council of the League. Finally, Article 16 provided for the measures to be taken by the Membership of the League in case of resort to war in violation of Articles 12, 13 and 15 of the Covenant.

116 See Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht 1952*, p. 180; Brownlie op. cit. *supra* n. 93, p. 56; Kopelmanas, *31 A.J.I.L. 244 (1937)*, p. 245; de Brouckère, *50 H.R.C. 5 (1934 IV)*, p. 24; Stone op. cit. *supra* n. 109, p. 175; id. *Aggression and World Order, 1958*, p. 27; Hindmarsh, *Force in Peace, 1931*, p. 126; Wehberg, *The Outlawry of War, 1931*, p. 9; Zourek, *L' Interdiction de l' Emploi de la Force en Droit International, 1974*, p. 28; *cf*. Brierly, International Law and Resort to Armed Force, *4 Camb. L.J. 308 (1932)*, p. 310.

117 *Cf. Infra* Ch. 6.

118 See Waldock, *81 H.R.C. 455 (1952 II)*, p. 471.

119 Article 16 was applied quite late in the life of the League on two occasions: The Italo-Ethiopian conflict in 1935 and the Russo-Finnish conflict in 1939.

120 See Bowett, *Self-Defence in International Law, 1958*, p. 131.

undertaking not to resort to war, in the case of the former, and on the violation of the said undertaking in the case of the latter.

The phrase "resort to war", that appeared in the text of Articles 12 and 16, was proved to be the most dangerous *lacuna* in the Covenant structure for the maintenance of international peace and security, because State practice had attributed to the term "war" a meaning of legalistic technicality by making its existence in law dependent upon the subjective determination of one of the parties to the dispute or at least of third parties and by ignoring at the same time any objective and factual situations of occurrence of acts of force[121] .

The practice of some States resulted in the most disingenuous interpretation of the term war in the Covenant, namely that the latter did not prohibit the exercise of reprisals short of war. This interpretation was asserted despite the very clear stipulation of Article 12(1) that any dispute likely to lead to a rupture should be submitted to one of the three methods of pacific settlement provided thereby , which scarcely rendered any resort to hostilities compatible with the execution of this Article in good faith[122] and notwithstanding the fact that in the dispute between Albania and Yugoslavia in 1921 the threat of application of Article 16 which was suggested by the British Government eventually led to the withdrawal of the Yugoslav army from Albanian territory[123] .

The issue arose in the *Corfu Incident* in 1923, when the Italian fleet bombarded the city and occupied the island of Corfu in reprisal for the murder of the Italian General Tellini on Greek territory when he was acting as chairman of the mixed Greek-Albanian boundary commission. Greece had recourse to the League Council under Articles 12 and 15 of the Covenant . During the debate before the Council, the Italian representative denied any belligerent intent on the part of Italy and declared that reprisals in time of peace and occupation of territory as security were measures that had often been sanctioned in international practice[124] . The dispute itself was finally settled outside the League but the legal issues that were given rise to were referred by the Council to a special Committee of jurists. The relevant question was the following:

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121 See *Supra* p.

122 Waldock, *81 H.R.C. 455 (1952 II)*, p. 472; Brownlie op. cit. *supra* n. 93, 218-9.

123 See L.N.O.J. 1921 II , pp. 474 et seq., 1194.

124 L.N.O.J. 1923 , p. 1276 et seq.; *5 B.Y.I.L. 251(1924)* ; Monthly Summary of the League of Nations, vol. 3, 1923, pp. 212-215.

" Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 - 15 of the Covenant when they are taken by one Member of the League of Nations against another Member without prior recourse to the procedure laid down in those Articles ?"

The reply was that coercive measures which were not intended to constitute acts of war " may or may not be consistent" with Articles 12 - 15 of the Covenant and it was for the Council when the dispute had been submitted to it to decide immediately having due regard to all the circumstances of the case and to the nature of the measures having been adopted , whether it should recommend the maintenance or the withdrawal of such measures[126] .

Considering the reply of the Committee of jurists more than half a century later we can think of two possible ways of dealing with the matter. If one follows a strict interpretation the issue will, from the very outset, become otiose by reason of the argument that since Article 12 mentioned "resort to war" the question becomes self-defeating. But, if, on the other hand, one views the Covenant of the League of Nations as a progressive attempt to move towards the achievement of international security through the development of international organisation and -though at a rudimentary level- the regulation of resort to force, one finds that the reply of the Committee of jurists was at least very unsatisfactory.

Indeed, it was most vehemently criticized by weak States and some jurists with Charles de Visscher (a member of the Committee himself) the most eminent among the latter[127] . He based his argument on the incompatibility of reprisals with the provision of Article 12 of the Covenant. The right to resort to reprisals, he argued, rested on the absolute right to resort to war and since Article 12 limited the right to resort to war before having recourse to certain procedure of pacific settlement of disputes, the excuse that reprisals were a more humane means of forcible redress than war was by that very fact rendered non-existent. The fact that forcible reprisals were intrinsically hostile acts which were by their nature likely to lead to a rupture and had to be considered contrary to the moratorium stipulated in Article 12. Moreover the criterion of forcible reprisals being acts likely to lead to a rupture should not be sought in the unilateral qualification given to them by their author because there was

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126 L.N.O.J. 1924 I , p. 523.

127 Ch. de Visscher, L' Interprétation du Pacte au Lendemain du Différend Italo-Grec, 5 *Révue D.I. Législ. Comp. 377 (1924)*, p. 382 et seq.

always the possibility that the victim State would forcibly oppose an act of reprisal, and that would bring about a state of war. In such a case the roles would be reversed in that the victim of the attack would be considered as the one to have initiated war and thus to be a violator of the Covenant liable to be subject to the sanctions provided in Article 16. The fact that the victim State might have been too weak to resist did not justify reprisals under Article 12 and it would be totally contrary to the most essential principles of the Covenant and profoundly immoral to allow the disproportionality of force to benefit the aggressor. By contrast, de Visscher went on, Article 12 permitted economic and financial reprisals since they were not intrinsically likely to lead to a rupture[128].

An opposite school of thought, while recognising that the use of force short of war constituted as great a danger as war in the legal sense, pointed out the inadequate and defective regulation of the use of force in the Covenant insofar the letter of the latter did not include measures of force short of war with actual resort thereto as illegal and involving a breach of the Covenant[129].

A very interesting point of view was taken by Sir H. Lauterpacht[130]. He argued that the interpretation of the Covenant of the League of Nations would rest on a compromise between the principle of effectiveness and the wording of the Covenant as evidence of the intention of its framers. The phrase "resort to war", he maintained, contemplated not only cases of express *animus belligerendi* but also cases of a "constructive state of war", that is a state of war brought about by third States as it was the case in the blockades of Formosa and Venezuela. So long as the member States of the League were the sole judges to decide

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[128] See Declarations by the representatives of Sweden and Uruguay, L.N.O.J. 1924 I, p. 526; Baty, *30 A.J.I.L. 377 (1936)*, p. 395; Stone op. cit. *supra* n. 116, p. 29; id. op. cit. *supra* n. 109, pp. 285-6; Brownlie op. cit. *supra* n. 93, p. 222; Borchard, "War" and "Peace", *27 A.J.I.L. 114 (1933)*, pp. 115-6; Y. de la Brière, Evolution de la doctrine et la pratique des représailles, *22 H.R.C. 241 (1928 II)*, pp. 283-4; Politis, Les Représailles Armées entre les Membres de la Société des Nations, *31 R.G.D.I.P. 5 (1924)*; Wehberg op. cit. *supra* n. 116, p. 49; Fischer-Williams, The Covenant of the League of Nations and War, *5 Camb. L.J. 1 (1933)*, pp. 14-7; Brierly, *58 H.R.C. 5 (1936 IV)*, p. 124; id. *The Law of Nations, 6th ed. by Waldock 1963*, p. 412; id *4 Camb. L.J. 308 (1932)*, pp. 313-4; Oppenheim op. cit. supra n. 116, p. 152.

[129] See Hindmarsh op. cit. supra n. 116, pp. 125-139; McNair, The Legal Meaning of War and the Relation of War to Reprisals, *11 Grot. Soc. Proc. 29 (1925)*, pp. 41, 43; Q. Wright, The Opinion of the Committee of Jurists on the Janina-Corfu Affair, *18 A.J.I.L. 536 (1924)*, p. 541; id. *26 A.J.I.L. 362 (1932)*, p. 365 but *cf*. pp. 367-8; Maccoby, Reprisals as a Measure of Redress short of War, *2 Camb. L.J. 60 (1924)*, p. 71; Waldock, *81 H.R.C. 455 (1952 II)*, pp. 473-4, but *cf*. p. 476.

[130] Lauterpacht, *28 A.J.I.L. 43 (1934)*.

whether a breach of the Covenant had been committed, it was upon them to deliberate whether the circumstances warranted an act of force to constitute or not "resort to war" according to the provisions of the Covenant[130] .

In the subsequent years of the League the question of whether "resort to war" had taken place arose in the Manchurian dispute between China and Japan in 1931 - 32. A special Commission of Enquiry under the chairmanship of Lord Lytton was set up by virtue of the resolution of the Council of Dec. 10, 1931 and it finally produced a report in Sept. 1932 which was subsequently adopted by the Assembly of the League on February 24, 1933. The Lytton Commission of Enquiry and later the Assembly, that *verbatim* repeated the Lytton report on this point, found that: " Undoubtedly the present case is not that of a country which has declared war on another country without previously exhausting the opportunities for conciliation provided in the Covenant of the League of Nations"[131] . Nevertheless, the Japanese action was not condoned on grounds of forcible seizure of territory from China. In fact by March 1932 the whole of Manchuria had been under Japanese military occupation and although Japan had forcefully denied any territorial ambitions with regard thereto[132] , she favourably regarded the proclamation of the independence of Manchuria under the name of *Manchukuo* on February 17,1932 which she formally recognized in September 1932 . Meanwhile on March 11,1932 the Assembly of the League adopted a resolution according to which it was "incumbent upon members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations and the Pact of Paris"[133] . An identical pronouncement had been previously made in the celebrated Note sent to both China and Japan by the U.S. Secretary of State, Mr Stimson on January 7, 1932 which was subsequently referred to in the literature of International law as the *Stimson doctrine of non - recognition* . A similar pronouncement had also been made in the appeal addressed to China and Japan by the members of the League Council - other than the disputant parties- under Article 10 of the Covenant as well

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130 Ibid. p. 51 et seq.

131 *27 A.J.I.L. Suppl. 146 (1933)* .

132 Statement by the Japanese representative in the League Council, L.N.O.J. 1931, p. 2280.

133 League of Nations Suppl. No 101-110 1932, p. 87; *27 A.J.I.L. Suppl. 133 (1933); cf*. Brierly, The Meaning and Legal Effect of the Resolution of the League Assembly of March 11, 1932, *16 B.Y.I.L. 159 (1935)* .

as in the declaration by nineteen American States of August 3rd,1932 with regard to the Chaco conflict between Bolivia and Paraguay[134] . The principle of non-recognition that was in fact an application of the maxim *ex injuria jus non oritur* had been applied in State practice and had appeared in the literature of International law before the famous Stimson Note[135] .

In 1932 - 33 hostilities broke out between Colombia and Peru as a result of Peruvian support to a band of Peruvian nationals who had occupied the Colombian district of Leticia by force[136] . Colombia appealed to the League Council and the latter adopted a report on the situation stating that the presence of Peruvian forces on Colombian territory was contrary to the Covenant of the League and the Pact of Paris but neither the parties nor the Council itself spoke of the existence of a state of war[137] .

In July 1937 hostilities occurred between China and Japan which were followed by large scale operations resulting in the occupation of a large portion of Chinese territory. Although diplomatic relations were broken in 1938 and Japan initiated a blockade on Chinese shipping in 1937 neither of the parties admitted the existence of a state of war and reference to the situation was made as the "China Incident"[138] . It was not until the Council resolution of September 30th,1938 according to which Japan was subject to the provisions of Article 16 under Article 17(3)[139] , that an implicit admission that resort to war had occurred but still this aspect was not treated as changing the situation in any way[140].

By contrast the existence of a state of war was recognized by the League Council in the Italo - Ethiopian conflict in 1935. Although Italy had invaded Ethiopia without a declaration of war the Council in its report of Oct. 7th, 1935,which was based on the report adopted by the Special Committee of Six , relied on a series of communiques of the Italian High Command and found that a state of war existed between Italy and Ethiopia[141] .

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134 *27 A.J.I.L. Suppl. 131 (1933)* ; Brownlie op. cit. *supra* n. 93 , pp. 92-3.

135 Brownlie op. cit. *supra* n. 2, 410-411.

136 Ibid. pp. 386-7.

137 L.N.O.J. 1933, pp. 523, 599-609.

138 Northedge op. cit. *supra* n.92 , p. 59.

139 Reference to Art. 17 was had because Japan had meanwhile withdrawn from the League.

140 Brownlie op. cit. *supra* n. 93 , p. 388 n. 1.

141 See *30 A.J.I.L. Suppl. 37-40 (1936)* ; Q. Wright, The Test of Aggression in the Italo-Ethiopian War, *30 A.J.I.L. 45 (1936)* .

Finally, in the Russo - Finnish dispute in 1939 the Assembly of the League in its report of Dec. 14, 1939 found that "... it is impossible to argue that the operations of the Soviet forces in Finland do not constitute resort to war within the meaning of the Pact of Paris or Article 12 of the Covenant of the League of Nations"[143]. As a result of the above report the Council of the League expelled the Soviet Union from the League of Nations under Article 16(4)[144].

If the above practice of the organs of the League of Nations is considered *vis à vis* the reply of the Special Committee of jurists in the aftermath of the Corfu Incident it may be concluded that though the latter was very ambiguous, it had virtually left the question open. Although in subsequent situations of international crises the existence of resort to war under Article 12 was not pronounced, acts of force short of war did create marked concern among the members of the League and were by no means deemed to justify the action of their authors[145]. In the Graeco - Bulgarian dispute, Mr. Briand, commenting on the plea of self - defence advanced by Greece said the following:

> " ... Under the pretext of legitimate defence, disputes might arise which,though limited in extent, were extremely unfortunate owing to the damage they entailed. These disputes, once they had broken out, might assume such proportions that the Government, which started them under a feeling of legitimate defence would be no longer able to control them. The League of Nations, through its Council, and through all the methods of conciliation which were at its disposal, offered the nations a means of avoiding such deplorable events ... "[146].

On Dec. 10, 1931 after the adoption of a resolution by the League Council with regard to the Sino - Japanese conflict in Manchuria , the President thereof said that " ... except in the case of an express stipulation in treaties in force the Covenant of the League of Nations does not authorise a State, however well founded its grievances against another State to seek redress by methods other than the pacific methods set forth in Article 12 of the Covenant..."[147]. When the Assembly of the League

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[143] L.N.O.J. 1939, pp. 531, 539.
[144] Ibid. p. 506.
[145] See L.N.O.J. 1031, p. 2378. The President of the Council of the League stated the following after the adoption of the resolution of 10 December 1931: "Since then, though there has not been resort to war within the meaning of Article 12 of the Covenant, there have unfortunately been acts of hostility". Also see Q. Wright, *26 A.J.I.L. 362 (1932)*, p. 368.
[146] L.N.O.J. 1925 II , p. 1709.
[147] L.N.O.J. 1931, p. 2378.

adopted the Lytton report on Feb.24, 1933 it was stated that "the adoption of measures of self-defence does not exempt a State from complying with the provisions of Article 12 of the Covenant"[147] . The incompatibility of the unilateral resort to force for the settlement of disputes with Article 12 of the Covenant was also stated by the Council in its report on the Italo-Ethiopian conflict[148] and by the Assembly of the League with regard to the Russo-Finish conflict[149] .

Although all the above illustrations were connected with invasion of territory aiming at adjustments of the territorial *status quo* by the use of force and in violation of Articles 10 and 19 of the Covenant, it is submitted that the references to the recourse to the pacific settlement procedure of Articles 12, 13 and 15 as being the due process in cases of disputes between States, is not at all irrelevant to a general consideration of the state of law with regard to the compatibility of acts of force with the Covenant of the League without prior recourse to the procedure of Articles 12, 13 and 15 and as such it should not be considered strictly in connection with territorial aggrandisement alone. It is also evidence that the practice of States through their participation in the organs of the League was gradually moving from the technical distinction between *de jure war* and acts of force short of war with regard to the legality of the latter under the Covenant of the the League of Nations. Indeed, it began to be realized that the term war was not absolute in International law and that no definition thereof was universally admitted[150] . In fact as long as a state of war could be brought about either by the author of the forcible acts -through a declaration of war or an ultimatum dependent thereon- or by the victim of the said acts by repelling force by force, or by third States whose interests might be affected by an armed conflict short of war in the legal sense, a state of war was as much fiction as it was a horrific reality. It entailed the disruption of the inter-State relations, which could be brought about so very precipitately , and that possibility urged the organs of the League of Nations and the States participating therein to start focusing their attention and concern on acts of force short of war.

After the Corfu incident there has been only one clear-cut case of reprisal, namely, the bombardment of the Spanish port of Almeria by

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147 *27 A.J.I.L. Suppl. 145 (1933)*.

148 *30 A.J.I.L. Suppl. 39 (1936)*.

149 L.N.O.J. 1939 , p. 539; also see L.N.O.J. 1933, pp. 599-609 (the Leticia dispute between Colombia and Peru).

150 Waldock, *81 H.R.C. 455 (1952 II)*, p. 472.

German warships in May 1937 as a measure of reprisal for the bombing of the German cruiser *Deutschland* by the Republican Air - Force[152] . The military occupation of the Ruhr valley in 1923 by the French and Belgian armed forces was regarded mainly as a question of interpretation of treaties because it involved the interpretation of Article 428 of the Treaty of Versailles 1919[153] . Furthermore, the legality of pacific blockade was challenged in the period under discussion. There were two instances of pacific blockade in State practice: (i) the blockade of Soviet Russia by the Allied Powers in 1919, the legality of which was somehow disputed by the Allied Supreme Council and (ii) the blockade of the Chinese coast by Japan in 1937 which seemed to have been regarded as simply a part of the hostile activity of Japan in the area and not as an individual act of reprisal[154] . Moreover, if the delphic reply of the Committee of jurists is considered according to the view taken by Lauterpacht[155] it can be concluded that the members of the League of Nations were *prima facie* more sensitive towards the acquisition of territory by way of armed force- this conspicuously reflected in the course of the work of the League with reference to the disputes brought before it. However, this author's submission for the beginning of an evolution in State practice is *a fortiori* strengthened by the attempts both within and outside the League for an improvement of the regulation of the use of force and of the system of pacific settlement of disputes.

3. (ii). *Attempts towards a more elaborate regulation of the use of force* .

The Covenant of the League of Nations by introducing provisions to regulate resort to war and machinery and procedure for the peaceful settlement of disputes marked an innovation which stood against and seemed to qualify the customary law of the period which admitted an unlimited right to wage war. *Prima facie* the stipulations in the Covenant were characterized by a procedure the breach of which would owe its illegality to a violation of a treaty obligation rather than the violation of

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152 Brownlie op. cit. *supra* n. 2, p. 222 n. 1.
153 Ibid. 342-3.
154 Ibid. pp. 223-4.
155 Id. *28 A.J.I.L. 43 (1934)* .

duties laid down by general International law[156] . However, it soon became clear that acts of force by way of reprisals might escape illegality under the Covenant, as it was the case in the *Corfu incident* and at the same time it was realized that such acts could very precipitately evolve into a major conflict which was likely to bring about a state of war -e.g. the settlement of the Graeco-Bulgarian dispute. The above facts prompted the Council of the League to pursue a conciliatory function under Articles 11 and 15 rather than a "police" function under Article 16 of the Covenant. On the other hand it focused its attention on acts of force and the prevention of the aggravation of disputes rather than the determination of the existence of a state of war. Moreover, the Covenant was the source of and inspiration of the need for a more elaborate regulation of resort to armed force and thus a series of attempts was initiated in the forms of resolutions of the League Assembly , Draft treaties of Mutual Assistance, treaties for the pacific settlement of disputes[157] . The practice of States elevated self-defence, especially after the conclusion of the Pact of Paris in 1928, as the only justification for resort to force and at the same time attempts were made to illegalise all other forms of resort to armed force under the terms of aggressive war, war of aggression, acts of aggression, or simply aggression. Still the main realization, at least with regard to the conclusion of international treaties during this period, was the fact that mere limitation of the use of force would be meaningless without a parallel development of a machinery for the peaceful settlement of disputes. This development in the treaty practice will be the object of our consideration in this section. .

3.(ii).a. *The Draft Treaty of Mutual Assistance (1923)* [158] .

The Draft Treaty of Mutual Assistance aimed at the improvement of the sanctions system contemplated in Article 16 after it had become apparent by the interpretative resolutions of the 2nd Assembly[159] , that member States did not consider themselves bound to take automatic action to implement Article 16[160] .

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[156] Brownlie op. cit. *supra* n. 93, p. 66.
[157] Ibid. p. 67.
[158] Text in L.N.O.J. 1923 Spec. Suppl. No 6; A 1923 C III, pp. 203-6.
[159] Reports and Resolutions on the Subject of Article 16 of the Covenant, Doc. A 14 1927 v, p. 43.
[160] Wehberg op. cit. *supra* n. 116 , p. 15.

Article 1 of the Draft Treaty provided:

The High Contracting Parties solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission. A war shall not be considered as a war of aggression if waged by a state which is a party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice or an Arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first state does not intend to violate the political independence or the territorial integrity of the High Contracting Party.

Moreover, the question of determining the aggressor was to be left to the League Council that had to establish the aggressor within four days[160]. The provision of Article 1 was in harmony with the Covenant in that it assumed the legality of war as a method of settlement and it was more explicit than the Covenant on two matters, namely, that unlike Article 15 of the Covenant it made clear that the terms of any settlement might be enforced by war and that it attempted to stipulate the illegality of war waged in violation of the provisions for peaceful settlement such war constituting an "international crime"[161].

The treaty did not meet with approval and did not come into force its rejection being dependent on political considerations with regard to questions of security and disarmament and not on any dissent from the characterization of aggressive war[162].

3. (ii). b. *The Geneva Protocol (1924)*[163].

The object of the Protocol was again the provision of mutual guarantees against aggression but by contrast to the Draft Treaty of Mutual assistance, the security system was coupled with a system of obligatory resort to peaceful means of settlement of disputes. According to the preamble a war of aggression[164] constituted a violation of the solidarity of the members of the international community and an international crime. In *Article 2* the signatories agreed not to have resort to war in any case,

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[160] Ibid. p. 16.

[161] Brownlie op. cit. *supra* n. 93, p. 69.

[162] Ibid. n. 2.

[163] Text in L.N.O.J. Spec. Suppl. No 24 (1924), Annex 18, pp. 136-140.

[164] The term has created a great deal of controversy in relation to its content and definition. Attempts to define aggression started in the period of the League of Nations and were concluded in 1974 with the adoption by consensus of the United Nations Definition of Aggression which is appended to G.A. Res. 3314 (XXIX) of 1974.

either among themselves or against any State which in a given case would accept all the obligations set out in the Protocol, with the following exceptions: " ...in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol". *Article 8* stipulated that the signatories would abstain from any act that might constitute a threat of aggression against another State, while *Articles 4 - 7* contained detailed provisions for the pacific settlement of disputes. In *Article 10* formal criteria for the determination of the aggressor were provided; thus, every State which resorted to war in violation of the undertakings contained in the Covenant or in the Protocol was an aggressor. Moreover, a presumption of aggression in the absence of a unanimous decision of the League Council was established in the case of an outbreak of hostilities and a refusal by a State to submit the dispute to pacific settlement or to comply with an award or a Council recommendation or, lastly, in case of a refusal or violation of an armistice proposed by the Council. There was no provision for direct military assistance but in general it was more elaborate than the Covenant in that respect. The dominant idea of the Protocol was that peace should be primarily guarantied by a pact binding on all States. Unfortunately, Great Britain refused to accept these general guarantees of security beyond the obligations she had already undertaken under the Covenant. Finally, the Protocol did not receive the ratifications necessary and did not come into effect. However, its value as a precedent is not negligible for forty-eight States recommended its ratification in the Assembly, nineteen members of the League signed the Protocol and two ideas were advanced thereby, namely, the prohibition of offensive warfare and arbitration. It is worth pointing out that with regard to the latter there had been an acceleration in the movement of arbitration which was inspired by the Protocol. Lastly, it is interesting that Article 2 of the Protocol was reminiscent of the regime introduced by Article 2(4)(5) of the United Nations Charter.

3. (ii). c. *The Locarno Treaties (1925)* [166] .

The treaties concluded at the Locarno Conference constitute a special guarantee arrangement and their significance lies in their influence on the development of arbitration and conciliation in the

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[166] Text in *20 A.J.I.L. Suppl. 21 (1926)*. See also *infra* Part Two, Ch. 12, Second Title.

practice of States. The most significant instrument for our present study was the treaty of mutual guarantee between Germany, Belgium, France, Great Britain and Italy. *Article 2* provided that Germany on the one hand and France and Belgium on the other agreed not to attack, invade or resort to war against each other except in cases of (1) the exercise of the right of legitimate self-defence, that is resistance to a violation of the undertaking not to attack, invade, resort to war or to a flagrant breach of Articles 42 or 43 of the Treaty of Versailles, if such breach constituted an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action was necessary[166] ; (2) action by virtue of Article 16 of the Covenant and (3) action as a result of a decision by the Assembly or the Council of the League in pursuance of Article 15(7), provided that in the latter situation the action was directed against a State which was the first to attack. *Article 3* provided obligations for peaceful settlement of disputes. *Article 5* of the treaty of Mutual Guarantee provided for immediate military assistance to the victim of flagrant attack even if the Council of the League had not yet convened[167] .

The importance of the Locarno treaties seems to be somehow diminished by the phrase "unprovoked act of aggression" in Articles 2 and 4(3) in so far as it introduced the vague concept of provocation with regard to action taken against a flagrant violation of Articles 42 and 43 of the Treaty of Versailles and the assistance to be rendered to the victim of such violation or a violation of Article 2 of the treaty[168] . Moreover, provocation offered a very convenient opportunity to the signatories of such treaties to escape responsibilities thereunder. Nevertheless a review of State practice has shown that the Locarno treaties constituted the exception in the treaty practice after 1920 with regard to the notion of provocation which gradually became obsolete in the post-First World War period[169] .

3. (ii). d. *Resolutions of the Assembly of the League of Nations* .

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[166] This could be cited as an example of anticipatory self-defence. See *infra* Part Two, Ch. 9, First Title.
[167] See *infra* Part Two, Ch. 10.
[168] See *supra* p.
[169] See Brownlie op. cit. *supra* n. 93, pp. 227-8.

The *Sixth Assembly* of the League adopted a Resolution[170] on Sept. 25,1925 according to which " a war of aggression" constituted an "international crime". This resolution did not mean to establish new law and, indeed, this might have been the reason for the 1st Commission of the Assembly to note that unhappily the notion that the war of aggression was an international crime had not yet entered positive law.

The *Eighth Assembly* adopted unanimously on Sept. 24,1927 a resolution proposed by the Polish delegation according to which: "(1) All wars of aggression are and shall always be prohibited; (2) Every pacific means must be employed to settle disputes of every description, which may arise between States. The Assembly declares that the member States of the League are under the obligation to conform to these principles". Whether the resolution created any legal obligations to member States or not is a matter of controversy. The preparatory work of the resolution cannot be said to support the view that the resolution created any legal obligation[171] . Furthermore, a large number of writers took the view that it had moral significance only[172] , while others relying on the wording of the resolution suggested that the instrument created legal obligations for the members of the League[173] . It is interesting to point out that in its Advisory Opinion in the *Railway Traffic Between Lithuania and Poland* the P.C.I.J. held that as the representatives of Lithuania and Poland participated in the adoption of a resolution of the Council of the League, the two parties were bound by their acceptance of the Council's resolution that constituted an engagement between them[174] , which shows that it was not unknown for a resolution of an organ of the League to be binding upon the States that assented to it. Another issue raised by the resolution was whether it permitted resort to war after recourse to means of pacific settlement of disputes had been had. The suggestion behind the wording of the resolution was that it did, provided that every pacific means had been exhausted and that it referred to wars already prohibited by the Covenant[175] .

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170 Wehberg op. cit. *supra* n. 116 , pp, 41-2; Brownlie p. 71.

171 Brownlie p. 72.

172 See Wehberg op. cit. *supra* n. 116, p. 42; Calogeropoulos-Stratis, *Le Pacte Général de Rénonciation à la Guerre, 1931*, pp. 39-41, 45-6; Stone op. cit. *supra* n. 18, p. 325; Brownlie p. 72 n. 3.

173 Oppenheim op. cit. *supra* n. 116, p. 180; Francois, *66 H.R.C. 5 (1938 IV)*, p. 260; Brownlie pp. 72-3.

174 P.C.I.J. Series A/B No 45, p. 116; 6 I.L.R. 403 (1932), at p. 405.

175 See Wehberg op. cit. *supra* n. 116, p. 43; Brownlie p. 73.

3. (ii). e. *The Report by de Brouckère. Recommendations of the Committee of the Council concerning Article 11* [176] .

The Belgian delegate de Brouckère submitted to a special Committee set up by the League Council, a memorandum with regard to the methods or regulations tending to speed the elaboration of the decisions to be taken by the Council for putting into effect the obligations of the Covenant. The said memorandum was relied upon by the Committee of the Council for the establishment of the recommendations concerning Article 11 of the Covenant on March 15, 1927[177] . De Brouckère stressed the importance of Article 11 rather than of Article 16 of the Covenant by arguing that between the first act of hostilities and the real beginning of war there was usually a rather long interval which the League of Nations should utilize for the sake of peace. Moreover according to the view of the German Government which was stated in the Committee of arbitration and security war could not be prevented by preparing war against war, but only by removing its causes[178] . Indeed, this had been the aim of the Council of the League which had been successfully achieved in the Graeco-Bulgarian dispute in 1925. Despite the term "recommendations" in the document of the Committee and the fact that mainly threats of war were contemplated there seemed to exist a distinct tendency among the members of the League to regard the prevention of acts of force short of war more important for the maintenance of international peace and security than the suppression of a state of war through the application of Article 16 of the Covenant and as we have submitted *supra* in this chapter, this marks the beginning of the abandonment of the technical state of war doctrine as a conclusive factor for the regulation of the use of force between States, which found its formal completion in the general prohibition of the use of force of Article 2(4) of the United Nations Charter.

3. (ii). f. *The Resolution of the Sixth International Conference of American States, Feb. 18,1928* .

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176 Wehberg pp. 53-8.
177 Ibid. p. 136.
178 Ibid. p. 55.

According to the said resolution "The Sixth International Conference of American States considering that war of aggression constitutes an international crime against the human species: Resolved: (1) All aggression is considered illicit and as such is declared prohibited. (2) The American States will employ all pacific means to settle conflicts which may arise between them"[179]

In another resolution in which the American republics condemned war as an instrument of national policy, the Conference adopted obligatory arbitration for the solution of their international differences of a juridical character[180] . With regard to the legal effect of the resolution it has been argued that it was binding and that it had the validity of a precedent[181] or that it stated what the law was though not creating it[182] . However, its real weakness lay with the problem of defining aggression and it was also stressed by the failure of the Conference to adopt a resolution on the inadmissibility of intervention in the internal affairs of States[183] .

4. *The General Treaty for the Renunciation of War as an Instrument of National Policy* .

4. (i). *General Considerations* .

The General Treaty for the Renunciation of War or Pact of Paris or Kellogg-Briand Pact was signed in Paris on August 27, 1928 and it is viewed in connection with the attempt to improve the regime of the Covenant with regard to the regulation of the use of force and the maintenance of international peace and security which,until the Pact of Paris, had taken the form of condemnation of war of aggression as a criminal breach of international peace[184] . The Pact of Paris became binding on sixty four States, virtually the entirety of the international community, and due to the fact that it was concluded outside the framework of the League of Nations, it survived the demise of the latter remaining in full force[185] .

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179 Text in Brownlie pp. 73-4.

180 Ibid.

181 Wehberg p. 72; Oppenheim op. cit. *supra* n. 116, p. 181.

182 Brownlie p. 74.

183 Ibid.

184 Brierly, Some Implications of the Pact of Paris, *10 B.Y.I.L. 208 (1929)*, p. 208.

185 See Bowman & Harris (eds.), Multilateral Treaties, Index, 1984, pp. 75-6. At present. 66 States are parties to the Pact of Paris. Of these, Antigua and Dominica acceded to the Pact in 1988.

The Pact of Paris has the merit of being concise and brief in its provisions. The essence of the Pact is embodied in the Preamble and the first two of its three Articles, which read as follows:

> The High Contracting Parties persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;
>
> Convinced that all the changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.
>
> Article I
> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.
>
> Article II
> The High Contracting Parties agree that the settlement or the solution of all the disputes or conflicts of whatever origin they may be, which may arise among them, shall never be sought except by pacific means[186].

The Pact was originally proposed by the French Foreign Minister, A. Briand as a bilateral treaty between France and the U.S.A. In reply the U.S. Secretary of State, Mr F. Kellogg, counter-proposed that a greater contribution to world peace would be achieved if the proposed treaty obtained the adherence of the principal world Powers to a declaration renouncing war as an instrument of national policy and the American proposal was eventually accepted by France. A long diplomatic correspondence then followed which is of the highest importance for the interpretation of the Pact of Paris. An initial French proposal that only "wars of aggression" should be renounced was opposed to by the American side; in his reply to the French Government on Feb. 27,1928, Mr Kellogg asserted that an unqualified renunciation of war as an instrument of national policy was compatible with the Covenant of the League of Nations and at the same time avoided the difficulties in defining the aggressor. The French Government in its reply of March 30, 1928, insisted on three points,namely, that the renunciation of war would not impair the right of legitimate defence, the obligations of France under the Covenant of the League as well as her obligations under the treaties of Locarno and the various agreements of neutrality and guarantee to which she was a party. Mr Kellogg replied that the renunciation of war would not impair the right of legitimate defence and eventually both the French and

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186 *94 L.N.T.S. 57, U.K. Treaty Series 1929,* No 29.

the U.S. Governments severally submitted Notes and drafts of the proposed treaty to the British, German, Italian and Japanese Governments. The French draft contained an express reference to self-defence "within the framework of existing treaties" and a definition of war as an instrument of national policy whereas the American draft which eventually prevailed, did not. Finally the treaty was presented by the U.S. Government to fourteen States on June 23, 1928. The parties signed the treaty on condition of the right of self-defence and the other undertakings under the Covenant and the Locarno treaties not being impaired[188].

Before dealing with the legal character of the treaty the present author would like to point out two characteristics of the Pact with a certain degree of political importance. First, the Pact of Paris was primarily laid out and its terms were clarified by the principal world Powers, and it was only subsequently presented, both the draft treaty and the diplomatic exchanges until the 23 June 1928, to the other States which were requested to participate. Secondly, it achieved minimizing the consequences of the U.S. non-participation in the League of Nations by linking her with the League system[189].

4. (ii). *The Legal Character and the Meaning of the Pact of Paris*.

The Pact of Paris is an international treaty which was negotiated rather meticulously, signed and ratified by its signatories. Nevertheless some jurists disputed the legal character of the Pact on grounds of generality and vagueness of its terms, which according to their view attributed only moral value to it; of the lack of explicit qualification with regard to the renunciation of war; of the existence of reservations to it and the absence of any provision for sanctions in the nature of mutual assistance and armed action to suppress any violation of the Pact[190].

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[188] For an account of the diplomatic background of the Pact of Paris see F. Kellogg, The War Prevention Policy of the U.S.A., 22 *A.J.I.L. 253 (1928)*; Mandelstam, L' Interprétation du Pacte Briand-Kellogg par les gouvernements signataires et les parléments des Etats signataires, *40 R.G.D.I.P. 537 (1933)*, p. 538 et seq.; Brownlie pp. 80-2; *cf*. Shotwell, *War as an Instrument of National Policy, 1929*, p. 131.

[189] Borchard, The Multilateral Treaty for the Renunciation of War, *23 A.J.I.L. 116 (1929)*, p. 118; Hunter-Miller, *The Peace Pact of Paris, 1928*, p. 131; Shotwell op. cit. *supra* n. 187, p. 131.

[190] See 23 A.S.I.L. Proceedings 1929, pp. 88-109; Brownlie p. 83 n. 1; *Dissenting Opinion of Judge Pal in the Trial of War Criminals in the Far East, 1956*, p. 37 et seq.; Hindmarsh op. cit. *supra* n. 116, pp. 124, 167-8.

The majority of authors have not doubted the character of the Pact as a legal instrument and indeed it would seem ludicrous to do so because "states do not go through futile charades to create moral obligations"[190]. The contention of the lack of a sanctions or collective security system under the Pact of Paris seems to be self-defeating because it is not unusual for international treaties to provide for no sanctions in case of violation of their terms[191].

A very interesting issue regarding the interpretation of the Pact lies with the so-called reservations submitted by the signatories during the negotiations. Apart from the declaration of the British Government which created most of the controversy and concentrated express reactions by some States, there is general agreement that the declarations expressed during the diplomatic correspondence preceding the conclusion of the Pact constitute an integral part of the latter in that they are conclusive of the intention of the parties and form the most authoritative interpretation of the treaty[192]. These statements were nothing else but a restatement of Mr Kellogg's clarifications in the Note of June 23, 1928, and they led to the undertaking of the same obligations as it would have been the case had they been part of the text of the Pact, as in fact was the case with the French draft. Moreover they did not contravene the U.S. Note by advancing contradictory explanations which would result in the limitation or modification of the effect of the treaty with regard to its application as between the party formulating the reservation and the other signatories[193]. The term "reservation" seems justifiable only insofar it describes a condition for the acceptance of the treaty as it was proposed by the U.S. Government and it does not refer to the essential context of the declarations which did not derogate from the U.S. proposal.

The most important issue raised by the Pact of Paris is the scope in which unilateral resort to force by States was regulated thereunder. By virtue of Article I of the treaty the signatories condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy. Furthermore, under Article II the parties to

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190 Brownlie p. 83. Also see Descamps, *31 H.R.C. 399 (1930 I)*, pp. 456-9.

191 See Q. Wright, The Meaning of the Pact of Paris, *27 A.J.I.L. 39 (1933)*, p. 41.

192 Brownlie p. 84; Shotwell op. cit. *supra* n. 187, p. 187 et seq. ; Hunter-Miller op. cit. *supra* n. 188, p. 121; Mandelstam, *40 R.G.D.I.P. 537 (1933)*, p. 554; id. L' Interprétation du Pacte par les organs de la Société des Nations, *42 R.G.D.I.P. 241 (1935)*, p. 282; Lauterpacht, Les Travaux Préparatoires et L' Interprétation des Traités, *48 H.R.C. 713 (1934 II)*, p. 809. *Cf*. Wehberg p. 75.

193 See McNair, *The Law of Treaties, 1961*, p. 158.

the Pact undertook to settle all the disputes or conflicts of whatever nature or whatever origin they might be and which might arise among them only by pacific means because as it is stated in the Preamble, there was the conviction that all changes in the relations among signatories should be the result of a peaceful and orderly process.

There are two possible interpretations as to the ambit of the Pact of Paris in relation with the use of force by States:

(1) The first one would rely on the fact that according to the wording of the Pact only war was condemned and renounced, and war under the customary law of the period was given a rather restrictive meaning, namely that of a state of war. Consequently measures short of war like reprisals and intervention would not be prohibited by the Pact and furthermore they could survive the stipulation of Article II about the employment of pacific means for the settlement of disputes, because reprisals were deemed to be "pacific" in character; lastly the above interpretation could be supported by the controversy created by the reply of the Committee of Jurists in the aftermath of the *Corfu incident* with regard to the effect of the League Covenant on the use of force short of war[195].

(2) The second possible interpretation with reference to the effect of the Pact of Paris on the use of force would be that the General Treaty outlawed war as well as armed force short of war[196]. The matter is quite controversial in view of the contention over the term "war" in the Covenant and the little guidance offered by the preparatory works of the Pact[197].

Nevertheless, if by preparatory work only the preceding diplomatic correspondence is to be understood, then it can be inferred that, in view of the express pronouncements of the signatories with regard to the right of self-defence (that subsisted under the Treaty), defensive action was the only instance of unilateral resort to force short of war that

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[195] Waldock, *81 H.R.C. 455 (1952 II)*, pp. 473-4; Hindmarsh op. cit. *supra* n. 116, p. 124; Lauterpacht, The Pact of Paris and the Budapest Articles of Interpretation, *20 Grot. Soc. Proc. 178 (1934)*; Stone op. cit. *supra* n. 109, p. 300 but *cf*. p. 286; Bowett, *Self-Defence in International Law, 1958*, p. 136; Cf. Descamps, *31 H.R.C. 399 (1930 I)*, p. 464.

[196] See Q. Wright, *26 A.J.I.L. 362 (1932)*; id. *27 A.J.I.L. 39 (1933)*, p. 52; Giraud loc. cit. *supra* n. 92, pp. 817-820; Hunter-Miller op. cit. *supra* n. 188, p. 95; McNair, Collective Security, *17 B.Y.I.L. 150 (1936)*, p. 157; Brierly, *4 Camb. L.J. 308 (1932)*, pp. 314-5; id. *10 B.Y.I.L. 208 (1929)*, pp. 208-9; id. *The Law of Nations, 6th ed. by Waldock 1963*, p. 412; de Brouckère, La Prévention de la Guerre, *50 H.R.C. 5 (1934 IV)*, pp. 29-30.

[197] See Oppenheim op. cit. *supra* n. 116, p. 184; McNair, *17 B.Y.I.L. 150 (1936)*, p. 157 n.1; Brownlie p. 85.

had been really contemplated. If the signatories had regarded the customary law of the 19th century as being in full force in 1928 then they would not have stressed their concern about self-defence being excepted, in fact they would not have taken any pains at all to clarify this exception. It is also significant that the declarations were made in terms of the "right of legitimate defence" without linking the latter to the term "war" at all- for instance, "war" in self-defence.

The contention that reprisals were pacific means for the settlement of disputes implied a rather bizarre concept of the term pacific: It was not the character of the measures applied for the settlement of a particular dispute that really was important but the fact that the application of such measures did not disrupt the state of peace by bringing about a state of war. This contention may have been compatible with the Pact of Paris, had the phrase "...that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process..." not appeared in the Preamble of the Treaty. The use of force short of war between the signatories of the Pact for the settlement of their disputes, could hardly have been described as an orderly process[197] . Moreover, the contention that the Pact provided only for the change in relations and not for the enforcement of existing legal relations[198] does not take into consideration the stipulation of Article II that the settlement of all disputes , of whatever origin, should not be sought but by pacific means only, as well as the statement in the Preamble that war is renounced as an instrument of national policy "to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated". Indeed, it would be hard to conceive how the above statement could have been fulfilled in good faith if reprisals and generally the use of force short of war were to subsist. The use of armed force by way of reprisals was not considered under customary international law to create a rupture of peaceful relations - that is of the state of peace - between States, but due to their inherent hostile character it was doubtful whether the States, as a whole, against which they were directed, (i.e., the public opinion therein and the Government thereof) would consider themselves to be in peaceful relations with the author of a pacific blockade or a bombardment. It has been suggested that the admissibility of the lawfulness of reprisals as "pacific means" for the settlement of disputes

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[197] Brierly, *4 Camb. L.J. 308 (1932)*, p. 314.
[198] Oppenheim op. cit. *supra* n.196.

under the Pact of Paris would "approach the bounds of credibility" due to the fact that the term "pacific means" in the Pact "has a comprehensive character indicated by its reference to all disputes or conflicts of whatever nature or of whatever origin they may be" [200]. This view is supported by the declarations of some States both upon their adherence to the Pact and their view of the latter as signatories thereof. When Switzerland adhered to the Pact of Paris the Swiss Federal Council stated in the communication of adherence that pacific means were to be understood as those which were usually employed in the peaceful settlement of disputes such as conciliation, mediation and arbitration, and this view was not objected to by the other signatories[201] . In 1933, Mr Litvinov, the Soviet delegate at the Disarmament Conference, stated that renunciation of war did not mean only renunciation of the right to declare or wage war in the formal sense but equal renunciation of all military operations and all acts of violence against another State[202] .

Moreover, references to the Pact of Paris with regard to acts of force short of war were made by signatories thereto both outside and within the League of Nations, in the latter case in their capacity as members of the organs thereof.

In the conflict between the Soviet Union and China in 1929 the U.S.A. reminded both parties of their obligations under the Pact of Paris[203] .

In the Sino-Japanese conflict in Manchuria in 1931, A. Briand, the Acting President of the Council of the League, stated that the responsibility of a member of the League for not seeking redress for grievances against another State except by pacific means was reaffirmed in the Pact of Paris[204] . The Assembly of the League in its resolution of March 11, 1932 with regard to the Sino-Japanese conflict, considered that "(1).....(2) The undertaking entered into by members of the League of Nations to respect and preserve as external aggression the territorial integrity and existing political independence of all members of the League; (3) Their obligation to submit any dispute which may arise between them to procedures for peaceful settlement ..... are in full harmony with the Pact of Paris which is

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[200] Brownlie p. 86.
[201] Ibid. pp. 87-8
[202] Political Committee seance du 15 Fevrier 1933, Procés verbaux, p. 2, reference in Brownlie p. 88.
[203] Brownlie *supra* n. 114. *Cf*. Mandelstam, *42 R.G.D.I.P. 241 (1935)*, p. 288.
[204] L.N.O.J. 1931, p. 2378.

one of the cornerstones of the peace organisation of the world"; and in the operative part of the same resolution it was proclaimed that it was "incumbent upon members not to recognize any situation treaty or agreement which might be brought about by means contrary to the Covenant of the League or the Pact of Paris"[205] .

The Stimson doctrine of non-recognition was also partly based on the Pact of Paris. In the Leticia dispute between Colombia and Peru the League Council adopted a report whereby the presence of Peruvian forces in Colombian territory was incompatible with the principles of the Covenant and the Pact of Paris[206] .

On Nov 4, 1932 the Chairman of the Commission of Neutrals which was established in 1931 with a view to the settlement of the dispute between Bolivia and Paraguay over the Chaco territory, issued a Note that linked the declaration of nineteen American States of August 3 ,1932 (related to the Chaco war), that proclaimed the non-recognition of either any territorial settlement not obtained by peaceful means or any acquisition of territory effected through occupation or conquest by force of arms, with the Pact of Paris[207] .

In the Italo-Ethiopian dispute of 1935, the report of the Committee of Six which was adopted by the Council of the League, referred to the Pact of Paris[208] . References to the Pact of Paris were also made during the so-called "China Incident" of 1937 [209].

During the Czechoslovak crisis in September 1938 the U.S. President, F.D.Roosevelt referred to the obligations of the Pact in a message sent to the Prime Ministers of Britain and France, Hitler and President Benes[210] . In the Russo-Finish dispute in 1939 the Pact of Paris was cited by the Assembly of the League in its condemnation of the Soviet action[211] .

Lastly, when Britain and France communicated to the League of Nations that a state of war existed between them and Germany, they

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[205] League of Nations Supplement, 101-110, 1932-33, p. 87.
[206] L.N.O.J. 1933, pp. 599-609.
[207] Hackworth, *Digest of International Law*, vol. vi, pp. 45-47.
[208] L.N.O.J. 1935, pp. 1223-6; *30 A.J.I.L. Suppl. 50-2 (1936)* .
[209] Brownlie p. 78.
[210] Ibid. p. 79.
[211] L.N.O.J. 1939, p. 539.

declared that by committing an act of aggression against Poland (which was initiated without the prior existence of a "state of war" between Poland and Germany), Germany had violated her obligations under the the Pact of Paris[211] .

By contrast, the treaty was not invoked in the incorporation of Austria and Czechoslovakia by Germany in 1938 and 1939 respectively, that of Albania by Italy in 1939 as well as in the invasion of Poland by the Soviet Union in 1939, probably due to the absence of actual hostilities in all the above instances. It is, nevertheless, accepted that in all four cases the obligations under the Pact of Paris were disregarded[212] .

Another source of controversy in interpreting the Pact of Paris is found in the stipulation that war was renounced "as an instrument of national policy". There was no definition whatsoever of the term in the final text of the Treaty, and its somewhat vague meaning was pointed out ever since the early days of the Pact[213] . The only official interpretation of war as an instrument of national policy was attempted in the French draft (submitted on April 20,1928) according to which it meant "instrument d' une action politique personelle, spontanée et independente dont elles [ie the contracting parties] prendraient l' initiative et non d' une action dans laquelle elles se trouveraient entrainées par l' application d' une traité tel que le Pacte de la S.D.N. ou toute autre traité enregistré a la S.D.N."[214] . Moreover, the diplomatic correspondence that preceded the Pact seems to indicate that war was admissible and consequently it would not constitute an instrument of national policy if it was undertaken in self-defence or by virtue of the relevant provisions of the Covenant and other security arrangements -e.g. the Locarno treaties.

The Pact of Paris was not linked to any system of economic or military sanctions. The only provision contemplating a case of a violation of the Pact was the statement in the Preamble whereby the violator "should be denied the benefits of furnished by this treaty". It has been argued that this was a superfluous provision being simply a statement of the rule that a State can repudiate a treaty broken by the other party[215] .

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211 Ibid. p. 386.

212 Oppenheim op. cit. supra n. 116, p. 186; Brownlie pp. 88-9; *cf*. *In Re Weizsaecker et al. (The Ministries Trial) per Judge L. Powers*, 16 I.L.R. 361 (1949) .

213 Colombos, The Paris Pact, otherwise called the Kellogg Pact, *14 Grot. Soc. Proc. 87 (1928)*, p. 90.

214 Mandelstam, *40 R.G.D.I.P. 537 (1933)*, p. 557.

215 Oppenheim op. cit. supra n. 116, p. 192; Brownlie p. 91.

Was this implicit of the admissibility of waging war against the violator of the Pact ? The matter is rather controversial. It has been suggested both in theory and in State practice that failure to have recourse to means of peaceful settlement of disputes was incompatible with the Pact of Paris. Indeed the commencement of hostilities by a State which had refused arbitration was deemed , by some jurists, to be the *conditio sine qua non* for the qualification of that State as the aggressor[216] . Other jurists argued for the admissibility of war against the violator by way of *argumentum a contrario* from the statement cited in the Preamble[217] , while others took the opposite view[218] . The only instance in State practice where a state of war was justified upon a prior violation of the Pact of Paris was that between Great Britain and France on one hand and Germany on the other in September 1939[219] .

4. (iii). *The Subsequent Practice of the Signatories. The Vindication of the Pact of Paris* .

According to Brownlie the best guide to the meaning of the Pact is the subsequent practice of the parties thereto insofar as it constitutes evidence of their intention and raises the issue of *estoppel* , and which leaves little doubt that the Pact was understood to prohibit any substantial use of armed force[220] .

In several pronouncements by Governments, such as the Memorandum on the signature by the British Government of the optional clause of the Statute of the P.C.I.J., the message by President Hoover to the U.S. Senate on Dec. 10, 1930, the speech delivered by the U.S. Secretary of State Stimson before the American Council of Foreign Relations on August 8, 1932, and the communication of the Soviet delegation on March 7,1932, significant references were made with regard to the state of law on the use of force by States. These references were independent from texts of treaties or particular conflicts and revealed an

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216 Hunter-Miller op. cit. *supra* n. 188, p. 127; Shotwell op. cit. *supra* n. 187, p. 203.

217 Mandelstam, *40 R.G.D.I.P. 537 (1933)*, p. 556; Stone op. cit. *supra* n. 109, p. 300; Giraud loc. cit. *supra* n. 92, p. 804; *In Re Weizsaecer et al.* , 16 I.L.R. 346 (1949).

218 Descamps, *31 H.R.C. 399 (1930 I)*, p. 464; Brierly, *10 B.Y.I.L. 208 (1929)*, p. 209. It appears that the issue was not dealt with in the discussions of the 1st Commission of the 12th Assembly during the abortive attempt to harmonise the Pact of Paris with the Covenant of the League; see Mandelstam, *42 R.G.D.I.P. 241 (1935)*, p. 272.

219 Supra n. 211

220 Brownlie p. 87.

acceptance of the Pact of Paris as a positive obligation[221] . In addition the treaty-making practice of the period following the conclusion of the Pact of Paris is of high importance.

The Anti-War Treaty of Non-Aggression and Conciliation (or otherwise, the *Saavedra Lamas Pact*), signed in Rio de Janeiro in 1933 provided in Article 1 that the parties "solemnly declare that they condemn wars of aggression in their mutual relations or in those with other States and that the settlement of disputes and controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of International law"[222] . Moreover, the right of self-defence was reserved in a "Statement of reasons" cited in an annex of the Argentine draft[223] .

The *Montevideo Convention on the Rights and Duties of States (1933)* provided in Article 8 that no State had the right to intervene in the internal or external affairs of other States[224] .

In the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936) a *Convention for the Maintenance, Preservation and Re-establishment of Peace* was signed, and by taking consideration of the Pact of Paris and the Saavedra Lamas Pact, it proscribed the acquisition of territory by armed force; intervention in the internal and external affairs of States; forcible collection of pecuniary debts; and stipulated an obligation for the pacific settlement of disputes. Moreover an Additional Protocol relative to Non-Intervention was signed and it was met with no U.S. reservation[225] .

A large number of bilateral treaties of Friendship and Security, Guarantee, Neutrality and Non-Aggression[226] were signed in the period 1925 -39 with express references to the Pact of Paris in their Preambles or being reminiscent of the wording of the latter in some cases. An illustration of this practice is the Treaty of Non-Aggression and Arbitration between Greece and Romania of 1928 by which the contracting parties undertook not to use force against each other by way of an attack or invasion and not to resort to war except in cases of (1) the exercise of the right of self-defence; (2) action undertaken by virtue of Article 16 of the

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221 Ibid. pp. 93-5.
222 Text in *163 L.N.T.S. 393 ; 28 A.J.I.L. Suppl. 79 (1934)* .
223 Brownlie p. 98.
224 Text in *165 L.N.T.S. 19 ; 28 A.J.I.L. Suppl. 75 (1934)* .
225 Brownlie p. 99 n. 2.
226 Ibid. p. 102.

Covenant of the League of Nations and (3) action by virtue of a decision of the Assembly or the Council of the League of Nations or Article 15(7) of the Covenant only if in this case the action was directed against the party that is the first to attack[227].

This practice has been regarded as conclusive of the state of law in this period, namely, the prohibition of the use of force as an instrument of national policy[228]. A contention which could be directed against those bilateral instruments is that during the period in question there had not been formulated a generally accepted definition of aggression. However, it may be argued that the Conventions of London of 1933 provided a detailed definition of aggression while the Greek-Romanian treaty of non-aggression and arbitration attempted a definition of aggression[229].

Finally, the absence of an absolute and conclusive reference to "war" in the legal sense as to the regulation of or non-resort to force is of the greatest value in that it signified the removal from international instruments related to the use of force between States the principal source of confusion and uncertainty as to both the state and content of law.

The Pact of Paris was not established as an authoritative instrument with regard to the law on the use of armed force by States until after the Second World War.

The *International Military Tribunal in Nuremberg* held in its judgment that in 1939 aggressive war was illegal as a consequence of the Kellogg - Briand Pact[230]. The Tribunal supported its finding by quoting the U.S. Secretary of State, Stimson saying in 1932 that "...Hereafter when nations engage in armed conflict either one or both of them must be termed violators of this general treaty law..... . We denounce them as law-breakers"[231]. Moreover, by contending that the law was not static, but that by continual evolution it followed the needs of a changing world, and that in many cases treaties did no more than expressed and defined for more accurate reference the principles of law already existing, the Tribunal referred to the treaty - making history which preceded the Pact - that is, the Draft Treaty of Mutual Assistance of 1923; the Geneva Protocol of 1924; the

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227 Text in *108 L.N.T.S. 188* .

228 Oppenheim op. cit. *supra* n. 116, pp. 180-1; Francois, *66 H.R.C. 5 (1938 IV)*, p. 260; de Brouckère, *50 H.R.C. 5 (1934 IV)*, pp. 22-3.

229 Brownlie p. 102.

230 *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* , Part 22, H.M.S.O. 1950, p. 444 et seq.

231 Ibid. p. 445.

resolution of the Eighth Assembly of Sept. 24, 1927; the resolution of the Sixth International Conference of American States of 1928 - and held that the interpretation of the Pact applied by the Tribunal was thereby reinforced[232].

The *International Military Tribunal of the Far East* sitting in Tokyo relied on the Nuremberg judgment in order to dismiss the contentions that the Pact of Paris had not made war criminal[233].

In *Re von Leeb et al. (The German High Command Trial)* the U.S. Military Tribunal in Nuremberg relied on the statement in the Preamble of the Pact of Paris, that the signatories were "persuaded that the time has come when all changes in their relations with one another should be sought only by pacific means" and held that by entering into the Pact of Paris the parties thereto had considered it imperative that existing international relations should not be changed by force[234].

In *Re Weizsaecker et al. (The Ministries Trial)* the same Tribunal held that the renunciation of war by the Kellogg - Briand Pact was nothing but the ultimate step taken by that instrument after having recognized that wars and invasions had been in violation of International law. It is worth observing that the term invasion was mentioned as distinct from the term aggressive war[235]. Furthermore, in *Re Hirota et al.* the International Military Tribunal for the Far East in Tokyo considered all the acts of force committed by Japan from the Manchurian Incident in September 1931 until the end of the Second World War in 1945 to be unlawful as breaches *inter alia* of the Kellogg - Briand Pact[236].

With the exception of the Japanese attack on the Dutch East Indies (Indonesia) which took place under a formal state of war, because the Netherlands had anticipatorily declared war on Japan, all the other instances of Japanese use of force were not committed thereunder. The same also applies to all instances of resort to force by Germany, except with regard to the U.K., France and the U.S.A. : none of them took place under a formal state of war.

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232 Ibid. pp. 445-6.

233 Brownlie pp. 172-3.

234 15 I.L.R. 382-3 (1948).

235 16 I.L.R. 346-4 (1949).

236 Ibid. p. 359; see also *In Re Roechling et al.*, 15 I.L.R. 405 (1948); *In Re Zulke* , ibid. p. 417; *In Re Garbe*, ibid. p. 419; *N. v. B.* and *B. v. T.* , 24 I.L.R. 942, 964 (1957). *Cf. Blue Star Line v. Burmeister and Wain (The Adelaide Star)*, 15 I.L.R. 421 (1948).

Finally, by the Resolutions 95 of Dec. 11,1946 and 177 of Nov. 21,1947 the General Assembly of the United Nations approved of the Charter and judgment of the Nuremberg Military Tribunal as an expression of general international law. Although General Assembly Resolutions do not create legal obligations it has been submitted and seems generally accepted that the votes and the statements by representatives in the General Assembly of the U.N. and subsidiary bodies provide cogent evidence of the general acceptance by States of particular rules of law; moreover the fact that many States that voted on the said Resolutions adhered to the London Agreement establishing the Tribunal as well as the fact that they took part in the prosecution estopped them from denying the nature of the Nuremberg Charter and Judgments as part of general international law[238]

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5. *The Period 1939-1945* .

The invasion of Poland by Nazi Germany on 1 September 1939, and the subsequent state of war between Germany, on the one hand, and Great Britain and France, on the other, is widely accepted as the starting point of the Second World War[239] .

The position of the War with respect to the collective attempt at preserving international peace and security through the framework of the League of Nations was that of the "final act" of the process of undermining and erosion of the League that commenced during the 1930s. The conduct of Japan in China (1931 et seq.), Italy in Ethiopia (1935-36), Germany in Austria (1938) and Czechoslovakia (1938-39), and of the U.S.S.R. in Finland (1939-40) repudiated everything that the League stood for.

One would expect that the devastating conflict of 1939-1945 against the Axis Powers would be fought under the banner of unilateralism or, at best, by way of ephemeral alliances. Surprisingly, it was not so The idea of an international organisation for collective security, far from being abandoned, was retained and was developed in a more comprehensive manner. The joint Declaration of the President of the U.S.A. and

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238 Brownlie pp. 190-1, 194 n. 1.

239 The conflict acquired truly worldwide dimensions, however, only in 1941, after the attack against the U.S.S.R. by Germany on 22 June 1941 and the attack against the U.S.A. by Japan on 7 December 1941.

the Prime Minister of Great Britain (otherwise known as the Atlantic Charter), of 14 August 1941, proclaimed the abandonment of unilateral resort to force and the " ... establishment of a wider and permanent system of general security ..."[239] .

In the Declaration of the United Nations of 1 January 1942, the U.S.A., the U.K., the U.S.S.R. , China and the States at a state of war with Axis Powers[240] subscribed to the Atlantic Charter of 14 August 1941, stated that they were engaged in a "common struggle" against the Axis and declared that they would pursue the war in cooperation with each other[241] . This declaration had the effect of attributing to the armed struggle of the anti-Axis coalition the character of a collective war of sanction[242] .

It, moreover, set in train the establishment, in San Francisco in 1945, of the United Nations Organisation whose constituent instrument, the Charter of the United Nations, declares in its preamble that:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
>
> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, ...
>
> AND FOR THESE ENDS
>
> ... to ensure, by the acceptance of principles and the institution of methods, that armed forces shall not be used, save in the common interest ...

Furthermore, Article 1 of the Charter states the purposes of the Organisation, the first of which is stipulated in paragraph 1:

> ... To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for suppression of acts of aggression or other breaches of peace and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace ...

If the above provisions are read in conjunction it becomes clear that the use of armed force under the United Nations system is intended to be

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239 Text in 35 *A.J.I.L. Suppl. 191 (1945).*

240 Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia.

241 Text in 36 *A.J.I.L. Suppl. 191 (1942)*.

242 See Brownlie, *International Law and the Use of Force by States, 1963*, pp. 332-3, 332 n. 3.

monopolised by the Organisation[244] . Unlike the Covenant of the League of Nations that prescribed a detailed process of peaceful settlement of disputes (Articles 12-15) failing which unilateral resort to "war" was admissible, the latter is exclusively reserved to the U.N. Organisation as a whole. What is more, the event that would give rise to collective action is, first, left undefined in the Charter and, secondly, its determination is delegated to the Security Council which has broad discretion under Article 39 of the Charter to determine that a specific situation warrants the undertaking of collective action[245] .

This monopoly on the use of force finds its corollary, in the context of the United Nations, in the prohibition of the unilateral resort to force by States. This rule is provided in Article 2(4) of the Charter:

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

At the same time the Members of the Organisation are under the obligation stipulated in Article 2(3) of the Charter to settle their disputes by peaceful means[246] . The text of Article 2(4) makes no reference to "war" and has thus dispensed with the disingenuous interpretation of the term in the Covenant of the League and the Pact of Paris. As will be seen *infra* (Chapter 3), armed reprisals are unlawful under the Charter of the United Nations.

However, the sweeping prohibition has not eliminated instances of unilateral resort to force in the practice of States subsequent to the introduction of the Charter. Moreover, the advent of the political and military antagonism between the U.S.A. and the U.S.S.R. (otherwise known as the "Cold War") prevented the Security Council of the United Nations from discharging its primary responsibility for the maintenance of international peace and security. This was effected by way of exercising the right of negative vote (veto) invested in the Five permanent Members

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[244] With the important proviso of Article 51 that admits unilateral forcible action in exercise of the right of individual and collective self-defence against an armed attack. See *infra* Part Two, Ch. 9.

[245] See Brierly, The Covenant and the Charter, *23 B.Y.I.L. 83 (1946)*, pp. 86-7; Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, pp. 487-9.

[246] *Cf*. Waldock, *81 H.R.C. 455 (1952 II)*, pp. 489-491.

of the Council that has the effect of preventing the Council from adopting a decision[246] .

These facts have led to claims by certain jurists of the legal demise of Article 2(4) and of virtual return by States to unilateral resort to force[247] . The ineffectiveness, as a consequence of the "Cold War", of the mechanism of the United Nations for the maintenance of international peace is presented as the main cause of this result. It is argued in a manner of "fatal inevitability" that since the only reason for the stipulation of an overall prohibition of the use of force (namely, the use of force by the community as a whole) cannot function, then there is no point in maintaining this prohibition. It is then pointed out that States have continued to resort to force unilaterally despite the prohibition.

This writer does not share the above view for two reasons:

First, it is politically flawed to assert that the inchoate or ineffective character of institutional machinery of enforcement and dispute settlement would immediately lead to settlement of dispute by way of unilateral forcible action. Such claim gives to the failure of the law to prevent its own violation the character of the rule rather than the exception. As Henkin wrote it constitutes a " ... judgement of the vitality of the law by looking only at its failures ..."[248] . It, moreover, falsely assumes that the function of a police authority in every community constitutes the established state of affairs and a prerequisite for the effectiveness of the law. It is submitted that the rule is, rather, that individual members of the community have a duty to abide by the law and that the functions of police are only exceptional. Indeed, the example of Reisman of drawing a parallel between the United Nations during the Cold War and an ineffective sheriff in a town of the American "Wild West" may sound compelling and, as far as, the right of self-defence is concerned, it merely states the obvious with regard to international society. The creation of the United Nations did not presuppose or result in the abolition of national armies. However, there is a great difference

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246 See Article 27 of the Charter; also see N.D. White, *The United Nations and the maintenance of international peace and security, 1990,* pp. 7-9.

247 See Franck, Who Killed Article 2(4)? OR: Changing Norms Governing the Use of Force by States, *64 A.J.I.L. 809 (1970)* ; Reisman, Coercion and Self-Determination: Construing Article 2(4), *78 A.J.I.L. 642 (1984)* ; id. Article 2(4): The Use of Force in Contemporary International Law, *78 A.S.I.L. Proceedings 74 (1984)* ; id. Criteria for the Lawful Use of Force in International Law, *10 Yale J.I.L. 279 (1984-85)* .

248 See Henkin, The Reports of the Death of Article 2(4) are Greatly Exaggerated, *65 A.J.I.L. 544 (1971)* .

between self-defence and promotion of individual interests by force. The latter is simply destructive of the balance of interests that the law, whether domestic or international, strives to achieve in a community.

Reisman's parallel is also a *non sequitur* in that it is based on an analogy (that of the U.N. with a "sheriff") which is untrue[249]. A sheriff or a police force presupposes a superior authority that supervises its functions, which is non-existent in contemporary international community. Insofar as the collective security mechanism of the United Nations is concerned it has been set up by way of treaty, namely, on the basis of consent by States that have agreed to abide by it and have resort to it. That this mechanism has proved "ineffective" in practice is not a result of an inherent flaw in it but, rather, of the attitude of certain States towards it. It is submitted that to place the blame on the United Nations for acts that constitute a violation of its Charter amounts to the untenable position of substituting the validity and the rule of the law with its very violations. Moreover, the fact that the U.S.A., the U.S.S.R. , and to a lesser extent, the U.K. and France, have exercised their right of veto in the service of their own, rather than, community interests calls for a re-examination of this right, not for claims of the total inadequacy of the United Nations Organisation or the provision of Article 2(4), and its supplanting with individual vigilanteism. Finally, the assertion for return to unilateral resort to force, whether for the promotion of "values" or not[250] , would be destructive to the victim of force, the author of force and the international community at large[251] .

Secondly, the above view ignores the fact that the stipulation of Article 2(4) constitutes, apart from a treaty provision, a rule of customary international law that exists separately and independently from the Charter[252] .

Article 2(4) is not " ... the product of some momentary burst of enthusiasm ..."[253] . Its introduction constitutes the culmination and part of a process in the practice of States that started with the conclusion of the Pact of Paris in 1928 and generated, until 1945, a genuine presumption

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249 See E. Lauterpacht, *Aspects of the Administration of International Justice, 1991*, pp. 38-39.

250 Reisman, *10 Yale J.I.L. 279 (1984-85)*, p. 281.

251 See Falk, The Decline of Normative Restraint in International Relations, *10 Yale J.I.L. 263 (1984-85)*, p. 268.

252 See *Nicaragua Case (Merits)*, I.C.J. Rep. 1986, p. 14, at pp. 94-97, paras 177-181.

253 Gordon, Article 2(4) in Historical Context, *10 Yale J.I.L. 271 (1984-85)*, pp. 274-5.

against the the unilateral resort to force[254] . Moreover, the practice of States subsequent to the United Nations Charter evinces adherence to the rule of the prohibition of the use of force in three respects.

(i) No State has denounced or abrogated the Charter of the United Nations, including Article 2(4). Gordon has rightly suggested that the inference that the rule of the prohibition of force does not correspond to actual practice " ... is too subjective and fragile a criterion to replace the formal evidence of withdrawal of State consent ..." , according to the terms of the Charter or the general law of treaties, " ... as an indicator of the continuing force of treaty obligations ..."[255] .

(ii) States have adhered to certain General Assembly Resolutions - e.g. G.A. Res. 2625 (XXV), G.A. Res. 3314 (XXIX), G.A. Res. 42/22 - adopted by consensus, that constitute evidence of *opinio juris* of a customary law rule of non-use of force[256] .

(iii) By far more important, however, are the statements by Governments of States that have resorted to armed force since 1945. Instead of a general rule rule of admissibility of unilateral resort to force, and demise of Article 2(4) of the Charter, States have without exception resorted to justification premised on exceptions to the prohibition, most notably, the right of self-defence. In its Judgment on the Merits of the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)* [257] the Court ruled:

> ... In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but it defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule ...[258]

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[254] See *supra* . *Cf*. I.C.J. Rep. 1986 *per Judge Jennings*, pp. 530-533.

[255] Gordon, *10 Yale J.I.L. 271 (1984-85)*, p. 275.

[256] I.C.J. Rep. 1986, p. 14, at pp. 99-100, 103, paras 188, 195; Brownlie, *Principles of Public International Law, 4th ed. 1990*, p. 14. *Contra* . Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of Sources of International Law, 1979* .

[257] Hereinafter referred to as *Nicaragua Case* .

[258] I.C.J. Rep. 1986, p. 14, at p. 98, para 186.

Furthermore, the rule of the non-use of force is not a rule of customary law *simpliciter* . It is a rule that has the character of *jus cogens* in the sense that no State can contract out of it by treaty or consent[259] .

It is, therefore, concluded that the rule of the prohibition of the use of force in Article 2(4) and customary international law is part and parcel of contemporary customary international law and discussion should ensue not in relation to its validity as a rule of law but rather in relation to the scope of its exceptions and in terms of its own formulation in the Charter as to the meaning of the concepts of "force", "international relations", "territorial integrity and political independence".

The following Chapters in this Part of this study deal with all these issues.

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[259] Ibid. pp. 100-1, para 190; Brownlie op. cit. *supra* n. 18, p. 513.

CHAPTER 2
THE ACTIVITIES OF ARMED BANDS AS A VIOLATION OF THE RULE PROHIBITING THE USE OF FORCE BY STATES.

1. *Introduction* .

The prohibition of the threat or use of force stipulated in Article 2(4) of the United Nations Charter extends to the use of force by the land, naval and air forces of a State and it is at present considered to include the use of force by armed bands against a State [victim State] when the said bands are organised for the purpose of being sent into the territory of the victim State, or,when already operating therein,they are assisted , namely, trained, armed, financed, in the forcible pursuit of their aim by another State [assisting State].
The organisation of armed bands may take place and their bases of operation against the victim State may be situated either on the territory of the victim State or on the territory of the assisting State or on the territory of a third State.[1]

Forcible activities by armed bands have become the object of concern in the practice of States ever since the end of the First World War.[2] During the drafting of the United Nations Charter, Bolivia and the Philippines proposed the inclusion therein of a definition of aggression which would enumerate acts which would constitute aggression and would enable the Security Council to act under Chapter VII of the Charter. The Bolivian definition referred to ".....support given to armed bands for the purpose of invasion....",whereas the Philippine proposals considered as aggression the interference ".....with the internal affairs of another nation by supplying arms,ammunition,money or other forms of aid to any armed band,faction or group."[3] Both proposals failed to be adopted

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[1] See Brownlie, International Law and the Activities of Armed Bands, *7 I.C.L.Q. 712 (1958)*, pp. 712-713; P. Lamberti-Zanardi, Indirect Military Aggression, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p. 111 et seq.

[2] Brownlie mentions a number of provisions in treaties concluded in the inter-war period which deal with guarantees against the "toleration on national territory of,or support to, groups which are likely to make armed incursions into or interfere in the internal affairs of other States; loc.cit. *supra* n. 1, pp. 713-714.

[3] See the proposals submitted to the Third Committee of the Third Commission on 5 May 1945; U.N.C.I.O. vol.3 Doc.2,G/14(K) p.538 (4); Doc.2,G/ 14(V) p.577(1-3).

and,indeed,this would seem hardly surprising in view of the fact that prior to the adoption of the Charter,both in the inter-war period and before, force had been exercised between States directly through the use of their regular armed forces. It was not until after the adoption of the United Nations Charter that assistance to armed bands came to constitute the most prominent means of inter-State use of force.

The reasons that prompt States to align politically with Opposition movements and render their material assistance to these movements in their armed struggle against the Government of another State cover a very wide spectrum of policy. Ideological and political antagonism between the two superpowers,the United States and the U.S.S.R.,in pursuit of widening their respective spheres of political influence at the expense of each other; the desire to disseminate revolutionary and nationalist government change against *regimes* considered to be "backward",reactionary and subservient to foreign-almost exclusively Western-Powers[4]; the political affinity to peoples having the right of self-determination against the colonial[5] or mandatory [6] (under Article 22 of the Covenant of the League of Nations) Powers in charge of the administration of their territories;the wish to restore the geographical unity of a territory divided by colonial boundaries[7] ; the desire of a Government to extend its political influence over other States situated in the same geographical region[8]; the disapproval of the establishment or the non-establisment of a State contrary to the aspiration of the majority of the population of the territory[9]; sympathising with the struggle of the population of a territory under military occupation against the occupant Power. In fact, what seems to lie behind such practice is taking advantage of the existence of an on-going internal conflict or creating one within a State in order to achieve the furtherance of certain interests of the assisting State, which range from political or territorial advantages strictly pertinent to the assisting State to the promotion of principles of high moral charge such as self-determination, democracy, socialism, without committing its

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[4] E.g. the support rendered to the political Opposition in various Arab countries by President Nasser of Egypt.

[5] E.g. the situation in the Portuguese colonies in Africa in the period 1960-1974.

[6] E.g. the presence of South Africa in Namibia.

[7] E.g. the crisis between Malaysia and Indonesia in 1963-1965.

[8] E.g. the Libyan interference in the internal affairs of her neighbouring States,namely,Egypt,Sudan,Chad and Tunisia.

[9] E.g., respectively,the establishment of the State of Israel that lies at the basis of the so-called Arab-Israeli conflict and the presence of Morocco in Western Sahara.

own armed forces and, thus,dispensing with the military, economic and political risks of an inter-State conflict.

It was the dramatic increase in assistance rendered to armed bands and in fomenting internal strife within another State in the post-Second World War State practice that gave rise to the need of dealing with the problem more ardently and of drawing a direct link between such activities and the principles of non-intervention and non-use of force.The matter has been almost exclusively dealt with by way of General Assembly Resolutions and constituted the substance of an important decision of the International Court of Justice.[10] In addition to the above considerations, it is evident from the debates at the Security Council with regard to complaints that arose due to the military action taken by victim States against armed bands on the territory of the alleged assisting State, that the Council on some occasions deplored the use of force emanating from every quarter and sometimes failed to adopt a resolution because of lack of the required majority. Furthermore, the constituent instruments of some Regional International Organisations contain provisions that stipulate the illegality of fomenting subversion in another State and prohibit their Members to interfere "directly or indirectly" in the internal affairs of other States.

Article 18 of the Charter of the Organisation of American States provides that "...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 States..." while Article 3(5) of the Charter of the Organisation of African Unity imposes the obligation of " ...Unreserved condemnation,in all its forms,of political assassination as well as subversive activities on the part of neighbouring States or any other State;....".

Moreover, numerous statements of Governments both within and outside the United Nations organs as well as final documents adopted upon the conclusion of inter-Governmental Conferences have had a direct bearing on the issue of assistance to armed bands as a violation of the principles of the prohibition of the use of force and non-intervention. Principle VI. of the Helsinki Final Act of 1975 adopted at the conclusion of the Conference on Security and Co-operation in Europe,

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10 *Case concerning Military and Paramilitary Activities in and against Nicaragua(Nicaragua v. United States)* ; I.C.J. Rep. 1986,p.14.

provides that the participating States ".....will, inter alia, refrain from direct or indirect assistance to terrorist activities, or subversive or other activities directed towards the violent overthrow of the regime of another participating State..."[11] .

Lastly, a number of bilateral treaties of non-aggression or of peace that were concluded over the past twenty years,such as the Camp David Peace Treaty of 1979 between Egypt and Israel[12] , and the Nkomati Accord of 1984 between Mozambique and South Africa[13] , expressly prohibit the organisation or encouragement of subversive activities on the territory of either of the signatories directed against the other·

The General Assembly of the United Nations in a series of Resolutions which dealt with the issue of the maintenance of international peace and security and the principles of non-use of force and non-intervention addressed the problem of assistance to armed bands on six occasions.

At its fourth session the General Assembly adopted Resolution 290(IV) of 1 December 1949 entitled "Essentials of Peace" the third operative paragraph of which calls upon every state "...[T]o refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State..."[14]

Operative paragraph 1 of G.A. Resolution 308(V) of 17 November 1950, " Peace through Deeds", solemnly reaffirms that "...whatever the weapons used, any aggression whether committed openly or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world...".[15]

Furthermore, in operative paragraph 2 of G.A. Resolution 2131(XX) of 21 December 1965, "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty", it is provided that "...[N]o State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State...".[16]

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[11] Text in *14 I.L.M. 1293 (1975)*, p. 1295.

[12] Text in *18 I.L.M. 362 (1979)*, p. 364.

[13] Text in *23 I.L.M. 282 (1984)*, pp. 283-4. See Keesing's 1984, pp. 32835-6.

[14] G.A. Res. 290(IV), G.A.O.R. 4th session 1949, p. 13.

[15] G.A. Res. 308(V), G.A.O.R. 5th session, Suppl. No 20, p. 13.

[16] G.A. Res. 2131(XX), G.A.O.R. 20th session, Suppl. No 14, p. 11.

In 1970 on the twenty-fifth anniversary of the United Nations, the General Assembly adopted without vote G.A. Resolution 2625(XXV), "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations" [17] which elaborates and interprets the prohibition of the threat or use of force stipulated in Article 2(4) of the Charter[18] provides that "...[E]very State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts within another State..."

By virtue of Article 3(g) of G.A. Resolution 3314 (XXIX) of 14 December 1974, "Definition of Aggression", " [T]he sending by or on behalf of a State of armed bands, groups of irregulars or mercenaries which carry out acts of armed force against another State or its substantial involvement therein..." shall constitute aggression.[19]

Lastly, G.A. Resolution 42/22 of 18 November 1987, "Declaration on the Enhancement and Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations" states in its sixth operative paragraph that "[S]tates shall fulfil their obligations under international law to refrain from organising, instigating or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries in other States, or acquiescing in organised activities within their territory directed towards the commission of such acts...".[20]

The question of assistance to armed bands as a means of inter-State use of force was also considered by the International Law Commission on three occasions. By virtue of G.A. Resolution 378(V) of 17 November 1950[21], the General Assembly decided to refer the proposal of the U.S.S.R. on the Definition of Aggression[22] to be considered by the I.L.C.[23]. In its Report to the General Assembly it was stated that:

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[17] G.A. Res.2625(XXV), G.A.O.R. 25th session, Suppl. No 28, p. 121.

[18] D.W.Bowett, The Use of Force for the Protection of Nationals Abroad, in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p.39 at p. 40 ; N.D.White, The Legality of Intervention Following the Nicaragua Case, *ix International Relations 535 (1989)*, at p. 538. *Cf.* Arangio-Ruiz , *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law, 1979*, p. 100 seq.

[19] G.A. Res. 3314(XXIX), G.A.O.R. 29th session, Suppl. No 31, p. 142 .

[20] G.A. Res. 42/22 , G.A.O.R. 42nd session, Suppl. No 49, p. 287.

[21] G.A. Res. 378 (V), G.A.O.R. 5th session, Suppl. No 20, pp. 12-13.

[22] Doc. A/C.1/108.

[23] The matter was dealt by the I.L.C. at its 92nd-96th, 108th, 109th, 127th-129th and 133rd meetings; I.L.C. Ybk 1951, Vol. I. Three members of the Commission submitted proposals for a Definition of Aggression which referred to both the direct and indirect use of force by

" The Commission gave consideration to the question whether indirect aggression should be comprehended in the definition. It was felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect indirect forms of aggression such as the fomenting of civil strife by one State in another, the arming by a State of organised bands for offensive purposes directed against another State and the sending of 'volunteers' to engage in hostilities against another State...".24

Article 2(4-6) of the I.L.C. Draft Code of Offences against the Peace and Security of Mankind censures,

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4. The organisation, or the encouragement of the organisation by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organisation of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in support of such incursions.

5. The undertaking or the encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organised activities calculated to foment civil strife in another State.

6. The undertaking or encouragement by the authorities of a State of terrorist activities in another State or the toleration by the authorities of a State of organised activities calculated to carry out terrorist acts in another State.....25

States. Mr Yepes suggested that " ... an act of aggression shall be understood to mean any direct or indirect use of violence.....Violence exercised by irregular bands organised within the territory of a State or outside its territory with the active or passive complicity of that State shall be considered aggression within the meaning of the preceding paragraph..." , Doc. A/CN.4/L.12; I.L.C. Ybk 1951, Vol. II, p. 40. Mr Hsu proposed that "Aggression.....is the hostile act of a State against another State committed by (a).....(b) the arming of organised bands or third States, hostile to the victim State, for offensive purposes; or (c) the fomenting of civil strife in the victim State in the interest of some foreign State;.....", Doc. A/CN.4/L.11 and Corr. 1; ibid. Finally, Mr Cordova considered that "... Aggression is the direct or indirect employment by the authorities of a State of armed force against another State.....", Doc. A/CN.4/L.10; ibid.

24 I.L.C. Ybk 1951, Vol. II, Part Two, p. 132, para 47; The Commission proposed a definition on the basis of a proposal by Mr Alfaro: " Aggression is the threat or use of force by a State in any manner, whatever the weapons employed and whether openly or otherwise....", Doc. A/CN.4/L.8; id. p. 33, at p. 37, para 36. The definition was far from being explicit and detailed with regard to the forms of assistance to irregular groups using armed force against the Government of a State and it was eventually rejected.

25 I.L.C. Ybk 1954 Vol. II, Part Two, p.151.

Finally Article 4 of the I.L.C. Draft Declaration on Rights and Duties of States stipulates that:

> Every State has the duty to refrain from fomenting civil strife in the territory of another State and to prevent the organisation within its territory of activities calculated to foment such civil strife.[26]

Moreover, the issue of assistance to armed bands and the precise degree of responsibility incurred by the assisting State with regard to the principles of non-use of force and non-intervention in the internal or external affairs of States, as well as the means of response by the victim State to counter such activity, were dealt with by the International Court of Justice in the *Nicaragua Case* [27].

On 9 April 1984 the Government of Nicaragua filed an Application with the I.C.J. instituting proceedings against the United States on the following grounds:

> (a) That the United States in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding and directing military and directing military and paramilitary actions in and against Nicaragua has violated and is violating its express Charter and treaty obligations under:
> Article 2(4) of the Charter of the United Nations;
> Articles 18 and 20 of the Charter of the Organisation of American States;
> Article 8 of the Convention on Rights and Duties of States;
> Article 1, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.
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> (b) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:
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> .....
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> efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.
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> (c) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.
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> (d) That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.....[28]

The support of ".... military and paramilitary actions..." that Nicaragua indicted the United States with concerned the assistance

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[26] I.L.C. Ybk 1954 Vol. II, Part Two, p.151.
[27] I.C.J. Rep. 1986, p. 14.
[28] Cited in the Judgment of the Court on the Merits, I.C.J. Rep. 1986 p. 14, pp. 18-19, para 15.

provided by the United States Government, by way of supply of, funds, arms and logistical support, to the Opposition, otherwise known as *contras*, which waged an armed struggle against the Sandinista Government of Nicaragua.[29] The United States justified her assistance to the *contras* as an act of collective self-defence in support of the Government of El Salvador which was faced with armed insurgency in her territory that was allegedly supported by the Nicaraguan Government. The latter contended that the above justification constituted an admission by the United States of its "... substantial involvement in the military and paramilitary operations against Nicaragua..."[30]

The Court observed that "..... the normal purpose of an invocation of self-defence is to justify conduct which would otherwise be unlawful. If advanced as a justification in itself, not coupled by a denial of the conduct alleged, it may well imply both an admission of that conduct and of the wrongfulness of that conduct in the absence of the justification of self-defence....." but it declined to uphold the basis of the contention that the invocation of self-defence was *per se* conclusive as to the establishment of the entirety of the acts complained of in the absence of express admission of the facts on the part of the respondent State [31]. Thus, though the Court noted that the United States justification of collective self-defence constituted "....certainly a recognition as to the imputability of some of the activities complained of...."[32], it proceeded to establish the facts, which formed the ground of the Nicaraguan complaint, on the basis of the evidence before it. It found that although the *contra* movement was not created by the United States and did not operate as a United States Government 'agent' the United States Government financed, trained, equipped, armed and organised the guerrillas.[33]

The Court declined to apply the multilateral treaties invoked by Nicaragua due to the so-called multilateral treaty reservation appended by the United States to its Declaration of acceptance of the compulsory jurisdiction of the Court under Article 36(2) of the Statute of the I.C.J., and instead it considered the Nicaraguan complaint on the basis of customary

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[29] I.C.J. Rep. 1986 p. 14, pp. 20-21, paras 18-19.
[30] Ibid. pp. 44-45, para 74.
[31] Ibid.
[32] Ibid.
[33] Ibid. pp.53-65, paras 93-116.

international law.[34] General Assembly Resolutions 2131(XX), 2625(XXV) and 3314(XXIX)[35], all of which refer to the inadmissibility of assistance to armed bands, were heavily relied upon by the Court as evidence of customary international law on the prohibition of the use of force and the inadmissibility of intervention in the affairs of other States.[36] Moreover, the Court linked both by ruling that,

> "...The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State 'involve a threat or use of force'. These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. ....."[37]

The conclusion was finally reached that the United States assistance to the Nicaraguan Opposition was contrary to the principles of both non-use of force and non-intervention.[38]

2. *Some Considerations on the Activities of Armed Bands .*

The present author proposes to discuss the following aspects of the issue of the activities of armed bands as a violation of the prohibition of the use of armed force between States in the light of instances of State practice:

(i) The question of what kind of groups of individuals merit to be considered as 'armed bands'.

(ii) The question of the circumstances in which activities by armed bands entail a breach of the principle of non-use of force and Article 2(4) of the Charter of the United Nations.

(iii) The question of the means of unilateral response to the activities of armed bands on the part of the victim State. The latter contingency is considered in detail in the context of individual defensive action, *infra* Part Two , Chapter 9.

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[34] Ibid.p. 92, para 172.
[35] Article 3(g) of the latter.
[36] Ibid. pp.99, 103, 106-107, paras 188, 195, 202-203.
[37] Ibid. p. 108, para 205. *Cf.* p. 119, para 228.
[38] Ibid. pp.118-119, 123, 124, paras 227-228, 238, 242.

2(i). *The Question of What kind of Groups of Individuals merit to be considered as "Armed Bands".*

On the basis of the practice of States it may be argued that not any group of individuals may be considered as an 'armed band' for the purposes of the international law on the use of force.[39]

Governments have treated as armed bands any group of individuals (a) who are not subject to any government authority; (b) who use force against the Government of a State, (c) for the fulfilment of a political objective and whose activities, if linked with support provided by another State, constitute a violation of the principle of non-use of force by States.

(a) The proposition that armed bands must not, for the purposes of *jus ad bellum*, be under any government authority connotes the absolute lack of any constitutional or institutional subordination of a group of individuals to the Government or to the executive branch of a State according to the municipal law thereof. Accordingly, the regular land, naval, air and police forces of a State, as well as government militias or units of territorial army should be excluded from the notion of armed bands. The units of the Nationalist Chinese Government Army, that entered Burma in the aftermath of the Communist victory in the Chinese civil war and that had hitherto been regarded as the Regular Army of China, were labelled 'guerrillas' from the moment the Nationalist Chinese Government in Taiwan dissociated itself from any command responsibility over these troops [40].

The organisation of such groups, however, may vary from a highly elaborate structure with political and military sections, a comprehensive chain of command, special uniform and insignia, operational, logistical, supply and communication centres (similar to the ones of the Regular Army of a State), to a loose grouping of individuals that merely mount armed operations collectively. All of the national resistance movements against the Axis occupation forces in European countries during the Second World War and all of the so-called 'national liberation' movements - like S.W.A.P.O., P.O.L.I.S.A.R.I.O., P.A.I.G.C., A.N.C.,

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[39] Terminology refers to such groups, also as irregulars, rebels, insurgents, guerrillas.
[40] Keesing's 1952-1954, p. 1304.

F.R.E.L.I.M.O. - may be said to belong to the former category in terms of the structural organisation, while groups of dissident exiles like the ones in the cases of the invasions of Guatemala (1954), Costa Rica (1955) and, most recently, Liberia (1989) and Rwanda (1990), could fall under the latter.[41]

In terms of numerical strength armed bands may vary again from large groups numbering several thousand fighters, as was the case with the *Vietkong* guerrillas in South Viet-Nam or the *contras* in Nicaragua, to a small number of individuals like organisations that hijack airliners, take hostages or perpetrate bomb attacks.

Armed bands may use as the *terrain* of their activities either the territory of the victim State as is the case with the Chadian rebels, the Eritrean fighters, the Salvadorean insurgents, or the territory of a third State, like the small groups that use force against the citizens or property of another State - viz. hijacking of aircraft, hostage taking, bomb attacks - or both as is the case with the activities of the various Palestinian organisations against Israel. The *locus* from which the activities of armed bands emanate may be either the territory of the victim State itself- see, for instance, the activities of the Salvadorean insurgents- or the territory of a third State or States. The former situation applies to armed groups that are based in their organisational entirety on the territory of another State- this is for instance the case with the P.L.O. from 1970-1982. -and the latter is relevant with regard to armed groups whose political section is based in one country while their military branch is based in another or others- e.g. the allegations by the South African Government with regard to the activities of the A.N.C. On 30 January 1981 the South African armed forces launched an operation against what was described as the planning and control headquarters of the A.N.C. in Maputo, the capital of Mozambique. The operation was undertaken upon the assertion that the Maputo headquarters served as the launching pad for A.N.C. operations inside South Africa[42] . Moreover, on 19 May 1986 the South African forces mounted simultaneous commando raids against alleged A.N.C. offices and camps in Zimbabwe, Botswana and Zambia. In the case of Zambia the

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[41] The question of the intensity of the organisation of armed bands is pertinent in the context of the law of armed conflict or *jus in bello,* for the characterisation of their members as combatants or non-combatants according to the relevant provisions of the Hague Conventions of 1907, the Geneva Conventions of 1949 and the Additional Protocols thereto, in the event of an armed conflict of non-international character which may be in progress.

[42] Keesing's 1981, p. 30889.

operation was directed against the A.N.C. operational centre outside the capital Lusaka[43].

Furthermore, the latter situation is pertinent with regard to the activities of mercenaries. The Report of the Security Council Special Mission in relation to the mercenary attack on Benin in 1977 revealed that the perpetrators were recruited in France, Senegal and the Ivory Coast, they were trained in Morocco and mounted their operation from the territory of Gabon[44].

(b) A group of individuals should constitute an 'armed band' for the purposes of the principle of non-use of force only if they pursue their activities by any means that involve the threat or use of armed force. Mere possession of weapons of whatever destructive capability does not suffice as long as they are not used. Consequently, dissident groups that pursue a non-forcible struggle against the Government of a State, by way of media propaganda, for instance, should not be considered as 'armed bands'.

Force must, additionally, be used against the Government of a State either directly, by attacking Government functionaries, the armed forces of the State, Government property, or indirectly against civilians of the victim State or their property, not in their own right as such, but in pursuit of compelling the Government of the victim State to resort to certain acts or omissions in forming its policy or to satisfy certain political demands of the group. In the *Nicaragua Case* the Court ruled by relying on the provisions of General Assembly Resolution 2625 (XXV) that assistance to armed bands "... is contrary to the principle of the prohibition of the use of force when the acts of civil strife ..... 'involve the threat or use of force'...."[45]

The intensity of the use of force by an 'armed band' may vary according to the size of the armed group or according to the sophistication of their weaponry or the frequency of committing acts of force against the victim State. A numerically small group of armed individuals that use weapons of advanced technology may inflict as extensive a destruction as a

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[43] Keesing's 1986, p. 34662.

[44] Doc. S/12294 and Rev. 1 of 8 March 1977, S.C.O.R. 32nd yr. Special Suppl. No 3, paras, 136, 141-143, 145, pp. 38-39. The States named in the Report as being involved in the mercenary action strongly denied the finding of the Report. See S.C.O.R. 32nd yr. 2000th mtg paras 142-160 (Gabon); 2001st mtg. paras 33-46 (Senegal), 54-67 (France), 72-96 (Morocco) and 108-138 (Ivory Coast); 2005th mtg. para 35 (Gabon).

[45] I.C.J. Rep. 1986 p. 14, pp. 108, 119, paras 205, 228.

force of thousands of guerrillas with less sophisticated equipment. Moreover, notwithstanding the size of the group and the type of weapons used, the frequency of their activities, especially if they are spread over a long period of time, is very likely to be conceived by the victim State as the determinant factor of the gravity of such activities by way of their accumulation rather than the specific effects of each and every one of them considered separately[46].

(c) The proposition that the forcible activities of armed individuals have to be committed in the pursuit of a political objective is very pertinent because it draws the fundamental distinction between 'armed bands' for the purposes of the principle of the prohibition of the use of force between States and mere marauding bandits [47], who are subject to the municipal criminal law of the State. Moreover, State practice seems to establish conclusively and authoritatively that States that have become victims of the use of force by armed individuals refer to a breach of Article 2(4) of the Charter and the customary law principle of the prohibition of the use of force only in cases where the armed bands aspire to realising a political goal. The latter, as State practice suggests, may be either the overthrow of an existing Government[48]; or the expulsion of another State's Administration from a colonial territory[49]; or a territory under international mandate according to Article 22 of the Covenant of the League of Nations [50]; or a territory under military occupation [51]; or from a part of the territory of a State for the purposes of seceding from the parent State [52].

In all of the above contingencies the armed struggle against the Government of the State or the Administering Power of a territory is assumed by groups that have the *locus standi* of an Opposition to the

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[46] This is the attitude adopted by the State of Israel with regard to the armed activities of Palestinian armed organisations against it. See *infra* Ch. 4 on Reprisals.

[47] See S.G.Kahn, Private Armed Groups and World Order, *1 N.Y. I. L. 32 (1970)*, at p. 51.

[48] E.g. the armed insurgency by the Salvadorean Opposition against the Government of El Salvador (1980-1991).

[49] E.g. the armed struggle by P.A.I.G.C. against the Portuguese colonial administration.

[50] E.g. the struggle by S.W.A.P.O. against South Africa in Namibia.

[51] E.g. the use of force by Palestinian guerrilla organisations against Israel in the territories occupied in 1967.

[52] E.g. the insurgency led by the E.P.L.F. against the Government of Ethiopia aiming at the secession of Eritrea.

former in the sense of aspiring to achieving a change of policies by the State or the extinction of a specific Administration over a territory.

In certain cases, namely, the ones involving activities of mercenary bands, the actual use of force has been undertaken on behalf of, rather than directly by, the organisation representing the political Opposition to the Government of the victim State- e.g. the cases of mercenary attacks against Guinea in 1970[53] , Benin in 1977[54] and the Seychelles in 1981 [55] . Still, the objective of the use of force in these cases remains political because the actions by the perpetrators of force aims at the overthrow of the Government of the State against which it has been resorted to.

2(ii). *The Question of the Circumstances in which the Activities of Armed Bands entail a breach of Article 2(4) of the Charter of the United Nations and the Principle of the Prohibition of the Use of Force .*

Article 2(4) of the Charter prohibits the threat or use of force by a State Member of the United Nations against other States. Similarly General Assembly Resolution 2625 (XXV) of 24 November 1970 provides under its first principle that "..... Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any other State....."[56]. Finally, Article 1 of the Annex to General Assembly Resolution 3314 (XXIX) of 14 December 1974 defines Aggression as the ".... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.....".

It becomes evident from the aforementioned provisions that the prohibition of the use of force is relevant as between States and States only so far as the authorship of the use of armed force is concerned.

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[53] The responsibility for the attack was claimed by the *Front de la Liberation Nationale de Guinee* (F.L.N.G.), the Opposition to the Government of President Toure; Keesing's 1969-1970, p. 24353. However, the Government of Guinea imputed the attack to Portugal; see Letter dated 22 November 1970 from the representative of Guinea to the President of the Security Council, Doc. S/9987, S.C.O.R. 25th yr. Suppl. Oct.-Dec. 1970, p. 51; also see S.C.O.R. 25th yr. 1558th mtg. para 18.

[54] The Report of the Special Mission of the Security Council in Benin found that the mercenaries had been recruited by an organisation called *Front de Liberation and Rehabilitation du Dahomey* (F.E.R.D.) in order to overthrow the marxist Government of Benin. Loc. cit. supra n. 38c, p. 39, para 145.

[55] Keesing's 1982, p. 31513.

[56] See also, I.C.J. Rep. 1986 p. 14, pp.99, 101, paras 188, 191.

Consequently, the initiation of activities that involve the threat or use of force by groups of armed individuals, although it constitutes the grim reality that faces several Governments, it does not *per se* entail any breach of the principle of the prohibition of the use of force.[57]

The practice of States suggests that in order for the activities of armed bands to constitute a breach of the principle of the prohibition of the threat or use of force, a 'link' ought to be established between the actual author of the use of force, namely a guerrilla group, against the Government of a State, and the acts or omissions on the part of another State with regard to the activities of the armed bands. This 'link' can be established by way of involvement by a State in the activities of armed bands using force against another State, which comprises a wide range of State acts or omissions. As to the latter it may be said that the manifest and deliberate unwillingness of a State to deal with the activities of armed bands operating from its territory against another establishes the required 'link'. With regard to the former, General Assembly Resolutions 2131 (XX), 2625(XXV), and 3314 (XXIX) provide a satisfactory basis for ascertaining the kind of State activity that constitutes involvement in the acts of force committed by armed bands. On the basis of the above Resolutions the following acts or omissions appear to be pertinent: the organisation of, assistance to, participation in, fomenting, inciting, financing, tolerating, instigating, armed, subversive, terrorist activities or the sending of armed bands, groups, irregulars or mercenaries which commit acts of armed force against another State or the substantial involvement (of the assisting State) therein. Some of the above terminology reveals a certain degree of pleonasm, in that assistance to armed bands seems to include the financing and arming thereof, while fomenting, inciting and instigating could be held to suggest the same contingency; on the other hand, however, it also uncovers a wide spectrum of State conduct of formidable proportions which has been extensively practiced over the past half-century.

The question arises of whether all of the above acts constitute a violation of the principle of the prohibition of the threat or use of force by States. The answer was given in the negative by the International Court of

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[57] An attempt by the non-aligned and socialist States during the period of decolonisation to assert a right of self-determination movements to resort to force in self-defence under Article 51 of the Charter was met with fierce opposition and, for reasons discussed under a different rubric, cannot be said to have become part of customary international law.

Justice in its Judgment on the Merits in the *Nicaragua case.* The Court ruled with regard to the assistance rendered by the United States Government by way of organising, supplying of weapons, logistical support, training and funds to the *contra* guerrillas fighting the Government of Nicaragua:

> ".... As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the *contras* in Nicaragua.....
> ..... In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras,* while undoubtedly an act of intervention in the internal affairs of Nicaragua, ..., does not in itself amount to a use of force".58

Moreover, in view of the United States justification of her assistance to the contras as an act of collective self-defence in support of El-Salvador, because Nicaragua was allegedly assisting the Salvadorean insurgents, the Court referred to the concept of 'armed attack' as a requirement of individual and collective self-defence and observed the following:

> "...There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. ....."59

Certainly, if the act of 'sending' armed bands to the territory of a State or the 'substantial involvement' therein, is to be considered an

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58 I.C.J. Rep. 1986 p. 14, pp. 118-119, para 228.
59 Ibid. p. 103, para 195.

'armed attack' giving rise to the right of individual or collective self-defence, it naturally constitutes a breach of the principle of non-use of force.

The practice of States is rather less specific with regard to acts of State support for the activities of armed bands that constitute a violation of the principle of the prohibition of the use of force, and statements by Governments both within and without the framework of the United Nations are not at all suggestive or elaborate in isolating certain aspects of State involvement in such activities as breaches of the above prohibition.

Indiscriminate references have been made to General Assembly Resolutions 2131, 2625, 3314, by States faced with armed insurgency as a proof of the complicity of the State allegedly assisting the armed bands[60] .In the overwhelming majority of cases, emphasis was laid on the fact that the guerrillas operated from or were based on the territory of the recalcitrant State[61]. This was in itself deemed as sufficient ground to establish a breach of the principle of non-use of force without taking great pains in identifying the specific aspects of the host State's involvement. Accusations of organising, training, arming, financing of armed bands have certainly been made in a substantial number of cases, but they seem to hold the position of illustrations or evidence of a generally unlawful support *in absracto* that constituted an *a priori* breach of the principle of non-use of force rather than the determinant factor of whether the alleged 'support' was or was not in violation of the said principle. Indeed, the Judgment of the Court could thus seem quite unnecessarily pedantic and somewhat redundant in view of the pre-existing State practice; however, it is submitted, that this would be a rather hasty conclusion.

Naturally, the practice of States suggests that any support to armed bands is illicit and should be censured; but it does not follow that every support is necessarily a breach of the principle of the prohibition of the use of force by States, as it does not follow either, and this the Court upheld,

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[60] See statement by the representative of Madagascar during the S.C. debate on the mercenary attack against Benin, S.C.O.R. 32nd yr. 2002nd mtg. para 97. Statement by the representative of Brazil during the S.C. debate on the invasion of the Democratic Republic of the Congo (1967), S.C.O.R. 22nd yr. 1367th mtg. para 106. Statement by the representative of Israel during the S.C. debate on the operation "Peace for Galilee" (1982), S.C.O.R. 37th yr. 2375th mtg. para 54.

[61] See statement by the representative of Portugal during the S.C. debate on the Samine incident between Portugal and Senegal (1969), S.C.O.R. 24th yr. 1516th mtg. para 132. Statement by the representative of Israel during the S.C. debate on the Israeli operation in Lebanon of 2 Sept. 1970, S.C.O.R. 25th yr. 1551st mtg. para 47.

that every breach of the latter necessarily gives rise to the right of self-defence.

What victim States have been faced with, in the majority of instances of State practice, is the use of force which is actually carried out by groups of armed individuals irrespective of their being assisted by a third State or not. If assistance is forewarded it has as a result either the intensification of the forcible activities perpetrated by the armed bands or their possible prolongation. But, with the possible exception of mercenary activities or actual sending of armed bands into the territory of another State as a proxy author of force (e.g. the sending of S.W.L.F. by Somalia into Ogaden in Ethiopia), such assistance does not necessarily signify the initiation of an armed struggle and, equally, its cessation is not a *conditio sine qua non* of the termination of guerrilla activities.

Assistance *in abstracto* including the financing, organising, arming, training, providing of logistical support to guerrillas is *prima facie* a form of unlawful intervention in the internal affairs of the State that suffers the activities of the armed bands in that it constitutes a kind of preservation of their struggle against the Government of that State.[62] At the same time, however, certain forms of assistance to guerrillas, such as the provision of weapons, logistical and intelligence support, training in military operations, their recruitment and organisation into contingents, have, in terms of their serviceability, an outright bearing on the actual use of material force in the course of the guerrilla operations. If a State provides training and arms to a guerrilla force which to everybody's knowledge wages an armed struggle against another State, it is not only a case of maintenance of a civil strife on the territory of another State; it is a case of maintenance *par excellence* of the use of force waged by a guerrilla group against the Government of another State. For, the provision of weapons, for instance, to a guerrilla group guarantees that its purpose is the use of armed force against the victim State and this brings the assisting State very close to the actual source of the victim State's plight, namely, the insurgents, notwithstanding the fact that the assisting State is not its actual author. According to the above submission, therefore, the assisting State constitutes the "vehicle" that leads directly to a use of force against another State, and consequently merits to be considered as a violator of the principle of the prohibition of the use of force against other States. Hence, it is submitted, that although State practice has been rather unclear with

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62 See I.C.J. Rep. 1986 p. 14, p. 124, para 242.

regard to which forms of assistance do and which do not constitute a breach of the principle of non-use of force, the references by victim States to an abstract contingency of 'support' to guerrillas coupled by the stressing of actions like the arming, training, organising, providing of sanctuary and bases to guerrilla groups, may suggest that these forms of support, albeit not of an exhaustive enumeration, are indicative of breach of the prohibition of the use of force by States.

State sponsorship of guerrilla activities, as the practice of States suggests, is *prima facie* presumed primarily on grounds of territoriality, namely, on the basis of the territory of the State from which the guerrilla activities are waged or where the guerrillas are based. This has been considered as conclusive evidence on the part of States victims of such activities in a great number of cases, and has considerably influenced their practice in forcible response against the States allegedly assisting the armed bands, which in the majority of cases were neighbouring States of the target of the guerrilla action.

However, the above contingency seems to have been equally dictated by political tension or long-standing dispute as between the victim State and the alleged sponsor of the guerrilla activities with the result of the latter becoming part and parcel thereof[63], or, because of the originating of the said activities in the policies of the victim State, they acquired the political sympathy of the neighbouring States or of the international community at large[64]. The Arab-Israeli conflict presents a combination of both the aforementioned situations in that the establishment of the State of Israel has been conceived by the Arab States as an effrontery to themselves while the post- 1967 occupation of Arab territories by Israel has generated a world-wide sympathy for the aspirations of the P.L.O. Still, assertions and accusations of complicity on the basis of territorial neighbourliness or political tensions and disputes, have been met by opposition on the part of the alleged assisting States in view of their disclaimer of any involvement in the activities of armed bands, or of the presentation of certain measures they have adopted to curb such activities from their territories, or prohibit the use of the latter for the transport of material support to guerrillas operating on the victim State's territory. The

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[63] See, for instance the United States assistance to the *contras* in Nicaragua and the N.Viet-Namese assistance to the *Vietkong* in S.Viet-Nam.

[64] See the armed struggle of national liberation movements in colonial territories and the struggle of S.W.A.P.O. and the A.N.C. against South Africa.

attacks perpetrated by mercenary bands have amply manifested that at least the territorial factor alone is by no means conclusive in establishing the complicity of a Government in guerrilla activities.

This can be ascertained by way of a twofold consideration.

First, on the basis of evidence, with regard to the acts allegedly committed by the assisting State, furnished by the victim State or its allies, such as the monitoring of activities around the border area between itself and the allegedly recalcitrant State. If assistance to armed bands is asserted by the victim State but no cogent evidence is provided with regard , for instance, supply of matériel or infiltration of individuals, then it has been ruled by the I.C.J. in the *Nicaragua case* that this can only be interpreted to mean that "... either that this flow exists, but it is neither as frequent nor as considerable as alleged by the respondent State; or it is being carried on without the knowledge and against the will of a government which would rather put a stop to it....."[65]. Moreover, as far as the assisting State is concerned, its political affinities with a guerrilla movement or the background tension in its relations with the victim State are of significance but they are deemed to fall short of and be secondary to concrete evidence of the existence of acts (and presumably omissions) related to assistance to armed bands that operate from its territory.[66]

Secondly, acts of assistance rendered to guerrillas, if proved to take place, then they must be imputed to the Government of the State from the territory of which they are alleged to be perpetrated; evidence of such imputability may not be itself revealed, in view of the secrecy with which States generally invest their intelligence gathering machinery, but it is assumed to exist if the victim State or its allies "... take advantage of it in order to forestall or disrupt..." such acts of support.[67]

On the basis of both of these assumptions the lack of either or both of them cannot establish the complicity of the Government of a State, and consequently the finding that this State is in breach of the prohibition of the use of force. The final evaluation of the above contingency must include examination of the means that every State in the region, including the one faced with armed insurgency, possesses in order to curb acts of assistance to guerrillas that may take place on its territory as well as of the geographical features of the region and of the inherent clandestine

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[65] I.C.J. Rep. 1986 p. 14, p. 84, para 154 .
[66] Ibid. p. 82, paras 150-151.
[67] Ibid. pp. 84-85, paras 155-156 .

nature of such acts. The Court considering the allegations of the Government of El-Salvador in the Declaration of Intervention in the proceedings of the *Nicaragua case* under Article 63 of the Statute of the I.C.J. [68], of a constant flow of arms to the Salvadorean insurgents through the territory of Nicaragua, observed the following:

> ".....,, if the flow of arms is in fact reaching El-Salvador without either Honduras or El-Salvador or the United States succeeding in preventing it would be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States..... As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorean armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it....." [69]

This, it is submitted, is in agreement with pre-existing State practice. In many a statement of Governments that have been accused of assisting and abetting the activities of armed bands evidence was presented of application of measures at their disposal aimed at curbing such activities or geographical particularities of the terrain where infiltration of personnel or traffic in arms has taken place were invoked.

The internal strife in Nicaragua provides two illustrations of the above contingency. During the Nicaraguan civil war relations between Nicaragua, on the one hand, and Honduras and Costa Rica, on the other, became strained because the *contra* guerrillas had their bases on the territory of the latter. On 22 March 1983 Nicaragua requested an urgent meeting of the Security Council to consider " ... the great increase of acts of aggression ... " against it [70]. During the debate the representative of Nicaragua claimed that the *contra* bands operated from Honduran territory [71] . The representative of Honduras denied the allegation that

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[68] Text in *23 I.L.M. 38 (1984)* .
[69] See I.C.J. Rep. 1986 p. 14, p. 85, para 157 .
[70] Doc. S/15651, S.C.O.R. 38th yr. Suppl. for Jan.-March 1983, p. 82; Doc. S/15656, id. p. 85.
[71] U.N. Chronicle, vol. XX, No 3, May 1983, p. 10

there were guerrilla bases in Honduras and said that it was impossible for the Honduran Army to control a border of thousands of kilometres [72].

The Government of Costa Rica adopted certain administrative measures such as the closure of premises and the expulsion of members of A.R.D.E. (one of the *contra* organisations) [73]. Moreover, the Costa Rican Government agreed to the establishment in February 1982 of joint border patrols with the Nicaraguan security forces [74].

In the context of the early years of the Arab-Israeli conflict the then newly established State of Israel faced continuing acts of infiltration by Arab armed bands across the 1949 Armistice line from the West Bank of the Jordan River (then under Jordanian occupation). During the Security Council debate on the Qibya raid of 1953, the representative of the U.K. stated that:

> " ... [the] nature and the length of the border makes it difficult for Jordanian authorities to control the border with Israel ..." [75]

A number of victim States, moreover, took several non-forcible measures on their territories by way, for instance, of erecting earthworks, or barbed-wire fences [76], or invoked error "in the heat of the battle" or the geography of the area, if their armed forces crossed into a neighbouring State in the course of military operations against the guerrillas . The latter is illustrated by the explanations offered by the U.S. and South Viet Namese Governments in relation to the incursions by the U.S. and South Viet Namese forces in Cambodia during operations against the *Vietkong* guerrillas in 1964 [77] and in 1968 [78].

Lastly, the Court singled out a form of support to armed bands which it deemed lawful in relation to the principles of the prohibition of the use of force and non- intervention. It ruled that :

> "... There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be

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[72] **Ibid**. p. 12.
[73] See Keesing's 1984, p. 33275; Keesing's 1986, p. 34532; Keesing's 1987, pp. 35309-35310.
[74] Keesing's 1983, p. 32308.
[75] S.C.O.R. 8th yr. 632nd mtg. para 54.
[76] See *infra* Part Two, Ch. 9, Second Title.
[77] See S.C.O.R. 19th yr. 1119th mtg. para 27, 1121st mtg. paras 28-29.
[78] See Keesing's 1969-1970, p. 24016.

regarded as unlawful intervention, or as in any other way contrary to international law....." 79

State practice seems to be quite consistent with regard to the provision of so-called 'humanitarian assistance' or 'moral and political support' in that States, mainly the ones accused of assisting armed bands have unopposedly asserted a right of offering asylum to 'refugees' from political oppression or civil strife and that they should not become the targets of the use of force by another State, merely for supporting the armed opposition within the territory of the latter; 'support', however, has been referred to *in abstracto* without having being elaborated as to its precise extent. While 'humanitarian assistance' is in principle lawful its distribution to the armed bands poses a separate issue. It seems that it can lawfully take place on the territory of the assisting State or the State where the armed bands are based but it does not appear to be beyond any doubt that this can be the case with regard to the territory of the victim State where the insurgency takes place, without any form of prior consent by the latter. The Government of Sri Lanka protested vehemently, and was supported by other Governments, against the drop of food and medicine by the Indian Air Force in Jaffna in 1987, while it agreed to the provision of such aid to be distributed by itself 80 . Moreover, the distribution of the international relief aid to the famished peoples of Eritrea and Tigray during the 1984-85 drought was insisted upon to be carried out by the Ethiopian Government. This is illustrated by the Ethiopian Government's unwillingness to allow shipment and distribution of relief aid, without its involvement, to E.P.L.F. and T.P.L.F. controlled areas. In January 1985 the Ethiopian Government seized the cargoes of the Australian vessel *The Golden Venture* and of a German freighter. Both ships were loaded with relief supplies destined for Eritrea and Tigray via Sudan. The German vessel's cargo was finally released , but only after its having been consigned to the Ethiopian Government 81.

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79 The Court reached the above finding by relying on the first and second principles "..... declared by the Twentieth International Conference of the Red Cross...". See I.C.J. Rep. 1986 para 242, pp. 124-125. Also, ibid. *per Judge Schwebel,* para 180, p. 350. The dissenting Judge considering the case of the so-called 'self-determination movements' also ruled that moral and political support to such armed groups is lawful; this seems to apply to every type of guerrilla group.

80 Keesing's 1987, pp. 35315-35316.

81 Keesing's 1985, p. 33384. Allegations were made that the Ethiopian Government deliberately blocked aid to the guerrilla controlled areas. This was countered by Ethiopian officials as an attempt by Western States to "politicize" the issue of famine; id. p. 33383.

In the aftermath of the Gulf Conflict of 1991 the Iraqi Government embarked upon the crushing of the Kurdish uprising in the north of the country that led to a large flow of refugees into Turkey and Iran in late March 1991.

In the early stages of the Kurdish refugee crisis there was an absence of coordinated international response to it. The U.S. Government reiterated its policy of non-intervention in the internal affairs of Iraq and the U.K. Foreign Secretary, D. Hurd, stated that " ... I don't think we can get into the business of using force ... in order to impose a particular answer on Iraq ..." [82]. On 2 April 1991 a French proposal of adopting a Security Council resolution authorising the protection of the Kurds was defeated due to opposition by China, the U.S.S.R. and the U.S.A. that maintained that this would set a precedent for United Nations involvement in the internal affairs of States [83] .

On 5 April 1991 the Council adopted S.C. Res. 688 (1991) [84] which recalled Article 2(7) of the Charter (that stipulates the non-intervention of the Organisation in matters within the domestic jurisdiction of Member States) and condemned " ... the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the area ...". The resolution was not adopted under Chapter VII of the Charter. Indeed, no reference to Article 2(7) would have been necessary if this had been intended. Moreover, the wording of the resolution does not indicate that there existed an actual threat to the peace. The word "consequences" seems to point to future possibility, rather than actual fact. Furthermore, S.C. Res. 688 (1991) demanded that Iraq ended the repression of its civilian population and insisted that " ...Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations ..." It is submitted that this pronouncement was not and could not be the basis for unilateral or collective action without the consent of the Iraqi Government. Indeed, on 18 April 1991 the United Nations concluded an agreement with Iraq according to which U.N. officials would

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[82] Keesing's 1991, p. 38127.

[83] Ibid.

[84] Text in *30 I.L.M. 858 (1991)* , Voting 10:3(Cuba, Yemen, Zimbabwe):2 abst. (China, India).

introducing troops into Northern Iraq on the part of the U.K., Italy, Germany, France, the Netherlands and the U.S.A. on 17 April 1991 [86]. The action, that constituted an abrupt reversal of the policy of non-intervention in Iraq, was undertaken in promotion of the concept of "safe havens" to protect the Kurds from Iraqi attacks [87].

This action was undertaken outside the United Nations and was in stark contrast with previous statements of non-intervention and opposition to the French proposal of 2 April 1991[88]. Moreover, the States that dispatched troops linked their action to the distribution of relief aid to the Kurds - which deprives it of the character of the so-called "humanitarian intervention" [89]- and were prompt to withdraw the armed contingents when U.N. officials were ready to be posted in the area. Furthermore, the allied action was met with opposition on the part of Iran, itself a recipient of large numbers of Kurdish refugees, and scepticism on the part of the United Nations. On 17 April 1991 Secretary General Perez de Cuellar stated that the deployment of troops in Iraq required the permission of the Iraqi Government [90]. It is submitted that due to the opposition to it, its inconsistency with practice advocated only days before, and the speed with which precedence was given to the U.N process of managing the crisis, the dispatch of coalition forces in Northern Iraq does not constitute practice contributing to the creation of customary law[91].

It may be submitted in conclusion that the customary law principle of non-use of force extends to activities of armed bands, namely, groups of armed individuals that do not belong to the armed or security forces of another State. The prohibition of the use of force covers such activities only in case of provision of material assistance to the guerrillas by another State that establishes a direct "link" between the assisting State and the fighting potential of the guerrillas against the victim State. It excludes the provision of humanitarian assistance and political support for the insurgency.

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[86] See Keesing's 1991, p. 38127.
[87] The term was coined by the U.K. Prime Minister, J. Major, during the E.E.C. summit in Luxembourg on 8 April 1991; ibid.
[88] *Cf*. Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, *55 Modern L.R. 153 (1992)*, pp. 176-7.
[89] See *infra* Part Three , Ch. 11, Second Title.
[90] Keesing's 1991, p. 38128. Also see N.D. White & H. McCoubrey, International Law and the Use of Force in the Gulf, *x Int. Rel. 347 (1991)*, pp. 358-9.
[91] Greenwood loc. cit. *supra* n. 88, p. 177.

CHAPTER 3
REPRISALS INVOLVING THE USE OF ARMED FORCE.

The prohibition of the threat or use of armed force in Article 2(4) of the United Nations Charter has settled conclusively the long standing controversy, which arose in the aftermath of the Corfu incident of 1923, concerning the admissibility of armed reprisals under the Covenant of the League of Nations and the Pact of Paris. Both of these instruments stipulated, respectively, limitations to and prohibition of the hitherto sovereign right of States to resort to "war". The use of the term "force" in Article 2(4) of the Charter in contrast to the term "war" used in both the Covenant and the Pact of Paris seems to preclude *a priori* the application of any legalistic interpretation, such as the one pursued by the Government of Italy in defence of the Italian bombardment of Corfu in 1923, in favour of the lawful practice of armed reprisals[1] .

"Force", whether within or without a formal state of "war" is now banned. Consequently, armed reprisals being considered under classical International law as instances of armed force short of a state of war fall under the prohibition of Article 2(4) of the Charter. Moreover, the wording of Article 2(3) of the Charter by virtue of which the Members of the United Nations are under the obligation to settle all their disputes by peaceful means, is directed against the very reasoning of the serviceability of armed reprisals in the practice of States, namely, the inflicting of punishment and the exacting of retribution by way of armed force against a State found in breach of its International law obligations towards the State-author of reprisals[2] . It can be, therefore, submitted that armed reprisals are unlawful under the Charter of the United Nations[3] .

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[1] See *supra* Ch. 1.

[2] See *The Naulilaa Case (Portugal v. Germany)*, 2 U.N.R.I.A.A. p. 1011, at pp. 1025-1028; also in Annual Digest of Public International Law Cases 1927-28, pp. 526-7. D. W. Bowett, *Self-Defence in International Law, Manchester 1958*, p. 13.

[3] Authority seems to be considerably uniform in support of the above submission. See Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht 1955* , pp. 143-4, 154, 184; Brierly, *The Law of Nations, 6th ed. by Waldock, Oxford 1963*, pp. 415-416; Wehberg, L' Interdiction du Recours a la Force. Le Principe et les Problemes qui se posent, *78 H.R.C. 7 (1951 I)*, at p. 72; Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, at p. 493 and id., General Course on Public International Law, *106 H.R.C. 5 (1962 II)*, at p. 233; Bowett, op. cit. supra n.2; Brownlie, *International Law and the Use of Force by States, Oxford 1963*, pp. 281-2; Higgins, *The Development of International Law through the Political Organs of the United Nations, Oxford i963*, pp. 217-218; Stone, *Legal Controls of International Conflict, London 1954*, pp. 286-7 but the author implicitly takes the opposite view in , *Aggression and World Order, 1958*, pp. 92-102; McDougal and Feliciano, *Law and Minimum World Public Order, 1961*, pp.

Furthermore, and in addition to the text of the United Nations Charter, reprisals involving the use of armed force are unlawful under customary international law.

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation which was adopted by the General Assembly of the United Nations by consensus, stipulates that:

> ...States have a duty to refrain from acts of reprisal involving the use of force...[4]

207, 208 n. 193; Wright, The Strengthening of International Law, *98 H.R.C. 5 (1959 III)*, at p. 167; id. Legal Aspects of the U-2 Incident, *54 A.J.I.L. 836 (1960)*, at pp. 848-9; id. The Goa Incident, *56 A.J.I.L. 617 (1962)*, at p. 628; Guggenheim, *Traité de Droit International Public, vol. ii, 1954*, p. 91; Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, *92 H.R.C. 5 (1957 II)* at p. 120; Schwarzenberger, The Fundamental Principles of International Law, *87 H.R.C. 195 (1955 I)*, at pp. 327-8, 330; Schwarzenberger and Brown, *A Mannual of International Law, 6th ed. 1976*, pp. 151,256; Ch. de Visscher, *Theories et Realités en Droit International Public, 4th ed. 1970*, pp. 333-4; Mosler, *International Society as a Legal Community, 1980*, pp. 280-1; Goodrich, Hambro and Simons, *The Charter of the United Nations, 3rd ed. 1969*, pp. 54, 346; Cot and Pellet, *La Charte des Nations Unies*, 1985,p. 121; Wengler, L' Interdiction de Recourir a la Force. Problemes et Tendences, *7 Rev. Belge D. I. 401 (1971)*, at p. 413, *Cf.* p. 449; Barsotti, Armed Reprisals, in Cassese (ed.) *The Current Legal Regulation of the Use of Force, 1986*, pp. 79-81; Skubizewski, Use of Force by States. Collective Security. Law of War and Neutrality, in Sørensen (ed.) *Manual of Public International Law, 1968*, p.754, *Cf.* however, of the fact that the author confuses reprisals with self-defence: "... But armed reprisals that are taken in self-defence against an armed attack are permitted..." ; Obradovic, Prohibition of the Threat or Use of Force, in Sahovic (ed.) *Principles of International Law Concerning Friendly Relations and Cooperation, 1972*, p.104; Rosenstock, The Declaration of Principles of International Law concerning Friendly Relations: A Survey, *65 A.J.I.L. 713 (1971)*, at p. 719; Grieg, *International Law, 2nd ed. 1976*, pp. 888-9, cf. 890,891; Schachter, General Course in Public International Law, *178 H.R.C. 9 (1982 V)*, at p. 169; id. The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, at pp. 1625-6; id. In Defense of International Rules on the Use of Force, *53 University of Chicago L. R. 113 (1986)*; id. Self-Help in International Law, *37 Journal of Internat. Affairs 231 (1984)*, pp. 241 seq. ; Jiménez de Aréchaga, International Law in the Past Third of a Century, *159 H.R.C. 9 (1978 I)*, at pp. 92-3; Fawcett, General Course of Public International Law, *132 H.R.C. 369 (1971 I)*, at p. 494; Rousseau, Principes de Droit International Public, *93 H.R.C. 373 (1958 I)*, at p. 539; Sørensen, Principes de Droit International Public, *101 H.R.C. 5 (1960 III)*, at p. 245; Thierry-Combacau-Sur-Vallee, *Droit International Public, 5eme ed. 1986*, p. 531; implicitly Henkin, General Course on Public International Law, *216 H.R.C. 9 (1989 IV)*, at pp. 149, 157; L.M. Gross, The Legal Implications of Israel's 1982 Invasion into Lebanon, *13 Cal.West.I.L.J. 458 (1983)* at p. 475; G.F. Intoccia, American Bombing of Libya: An International Legal Analysis, *19 Case West. J. Int. L. 177 (1987)*, at pp. 198-200; J.A. McCredie, The April 14, 1986 Bombing of Libya: Act of Self-Defence or Reprisal?, *19 Case West. Res. J. I. L. 215 (1987)*, at pp. 237-9; D. Sullivan, Legal Restrictions on the Right to Use Force against International Terrorism, *10 A.S.I.L.S. I.L.J. 169 (1986)*, at pp. 189-191; L. Stuesser, Active Defence: State Military Response to International Terrorism, *17 Calif. West. I.L.J. 1 (1987)*, pp. 7-8; K. Motshabi, International Law and the United States Raid on Libya, *104 S.A.L.J. 669 (1987)*,at pp.681-2; J.L.Taulbee and J.Anderson, Reprisal Redux, *16 Case West. Res. J.I.L. 309 (1984)*; C. Greenwood, International Law and the United States Air Operation Against Libya, *89 West Va. L.R. 933 (1987)* at pp. 948-953; Thornberry, International Law and its Discontents: The U.S. Raid on Libya, *8 Liverpool L.R. 53 (1986)*, at p. 60.

[4] G.A. Res. 2625 (XXV) of 1970, G.A.O.R. 25th session, Suppl. No 28, p. 121.

The above document was held by the International Court of Justice in the *Nicaragua case* to constitute evidence of the *opinio juris* of the customary law prohibition of the threat or use of force[5] and the preparatory work prior to its adoption reveals uniformity of opinion as to the illegality of armed reprisals[6]. Moreover the Court ruled that:

> ...for a State to use force against another on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful by way of exception, only when the wrongful act provoking the response was an armed attack...[7]

which is implicit that the Court does not consider as lawful the use of force, by a State against another, in any circumstances other than in self-defence [8]. Judge Nagendra Singh has been more explicit in his Separate Opinion in the *Nicaragua case* , by expressly advocating the illegality of forcible retaliation [9].

The practice of the Security Council can be argued to be unequivocally consistent in respect of the illegality of reprisals under the Charter. In S.C. Resolution 101 (1953) of 24 November 1953 adopted with regard to the Qibya Incident, the Council found that

> ...the retaliatory action at Qibya taken by the armed forces of Israel on 14-15 October 1953 and all such actions constitute a violation of the cease-fire provisions.....and are inconsistent with the parties' obligations under the General Armistice Agreement between Israel and Jordan and the Charter of the United Nations...

and then expressed

> ...the strongest censure of that action which can only prejudice the chances of a peaceful settlement which both parties in accordance with the Charter are bound to seek...10

Moreover, in S.C. Resolution 188 (1964) of 9 April 1964 in respect of the air raid launched by the U.K. Royal Air Force against Fort Harib on the territory of the Yemen Arab Republic, the Council after "...Recalling

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[5] I.C.J. Rep. 1986, p. 14 at pp. 99-100, para 188.
[6] See Obradovic, loc.cit. *supra* n.3.
[7] I.C.J. Rep. 1986, p. 110, para 211.
[8] Henkin, loc.cit. *supra* n.3, p. 157.
[9] I.C.J. Rep. 1986, p. 151.
[10] S.C. Res. 101(1953) of 24 Nov. 1953, S/3139/Rev.2, adopted at the 642nd mtg by 9:0:2 abstentions (Lebanon, U.S.S.R.).

Article 2 paragraphs 3 and 4 of the Charter of the United Nations..." condemned

...reprisals as incompatible with the purposes and principles of the United Nations...11

In his Report to the Security Council pursuant to the Council's Resolution of 4 April 1956 on the Palestine Question, the Secretary General of the United Nations stressed the fact that the reservation of the right of self-defence under the Armistice Agreements between Israel and its Arab neighbours

...does not permit acts of retaliation, which repeatedly have been condemned by the Security Council... 12

Individual statements of Governments reveal a uniformity and consistency of practice concerning the inadmissibility of reprisals as a matter of law. During the debate at the Security Council on the Qibya incident Mr. Lodge, the United States representative, stated :

"...The individual Members of the United Nations have bound themselves, in signing and adhering to the United Nations Charter, to refrain in their international relations from the threat or use of force and to settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered. Nations should not take the law into their own hands. ..."13

In a similar fashion the Argentine representative stated in the course of the debate concerning the Almagor incident of July 1966:

"... The Argentine Government can scarcely agree, even if there are important reasons involved that armed retaliation should become an accepted form of international conduct.....

We hold that as international relations are today, States should resort first and foremost to methods of settling disputes peacefully. ..."14

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11 S.C. Res. 188 (1964) of 9 April 1964, S/5650, adopted at the 1111th mtg by 9:0:2 abstentions(U.K. , U.S.A.); Ibid. S.C.O.R. 19th yr. , pp. 9-10. Other condemnations of acts of armed reprisal are found in S.C. Resolutions 106 (1955), S/3378 [Gaza Strip Incidents of 1955]; 111(1956), S/3538, [Lake Tiberias Incident of 1955]; 228(1966) [Samu Incident of 1966]; 248(1968) [Karameh Incident of 1968]; 262(1968) [Beirut Raid of 1968]; 265(1969) [Es Salt Raid of 1969]; 270(1969) [Israeli air strike in S.Lebanon]; 280(1970) [Israeli land incursion into S.Lebanon]; 573 (1985) [Israeli air raid against the P.L.O. Headquarters in Tunis; in this instance Israel was condemned for an act '..of armed aggression perpetrated....against Tunisia..']

12 Doc. S/3596, S.C.O.R. 11th yr. , Suppl. for April-June 1956, p.30 at p. 41, para 46.

13 S.C.O.R. 8th yr. , 627th mtg. para 60.

14 S.C.O.R. 21st yr. , 1292nd mtg. paras 94-95.

Furthermore, in a letter dated May 29, 1974 the Acting Secretary of State K. Rush replied to Professor Eugene Rostow's suggestion of readmitting armed reprisals under Article 51 of the Charter by stating the following:

> "..... resolution 2625 also contains the following categorical statement: 'States have a duty to refrain from acts of reprisal involving the use of force'. That injunction codifies resolutions of the Security Council which have so affirmed.
> The United States has supported and supports the foregoing principle. ....."[15]

On February 16, 1979 a Department of State examination of the United States position with respect to acts of armed reprisals during the period 1953-1975 found that:

> ".... While the United States has modified its initial position of willingness to isolate armed reprisals and condemn them as illegal by insisting on a balanced condemnation of both the provocative acts, especially acts of terrorism, and the armed reprisals the United States has not changed its position that reprisals involving the use of armed force are illegal. ....."[16]

Much more interesting, however, appears to be the attitude of the States that resorted to retaliatory action. No-one of the reprisal-authors, without any exception whatever, has ever asserted a *de lege lata* right of armed reprisals. Instead the action taken was justified as an exercise of the right of self-defence.

This has been consistently asserted by the Government of Israel since the Qibya incident of 1953[17].

In the debate at the Security Council on the Fort Harib incident, Sir Patrick Dean, the representative of the U.K., not only did he characterize the operation of his country's Air Force as action in self-defence, but

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[15] Text in 68 A.J.I.L. 736 (1974).
[16] Text in 73 A.J.I.L. 489 (1979), at p. 492.
[17] See statements at the Security Council by Mr. Eban, S.C.O.R. 8th yr. 637th mtg. paras 4, 21, 23, 42 (Qibya incident); S.C.O.R. 9th yr. 670th mtg. paras 131-134 (Nahalin incident); S.C.O.R. 10th yr. 693rd mtg. para 62(Gaza incidents); Mr. Comay, S.C.O.R. 19th yr. 1162nd mtg. para 45 (Kibbutz Dan incident); Mr. Rosenne, S.C.O.R. 23rd yr. 1460th mtg. paras 42-55 (Beirut Raid); Mr. Tekoah, S.C.O.R. 24th yr. 1466th mtg. paras 87,89 and 1468th mtg. para 59 (Es-Salt Raid); Mr. Rosenne, S.C.OR. 25th yr. 1551st mtg. para 47 (Israeli Operation in S. Lebanon); Mr. Netanyahu, U.N. Chronicle vol. XII, nos 10/11, Nov./Dec. 1985, p.4 (Israeli Air Strike on the P.L.O. Headquarters in Tunis).

proceeded to distinguish expressly reprisal action from self-defence as being "punitive" or "retributive" in nature [18].

The United States offered the justification of self-defence on two occasions of retaliatory use of force by its armed forces, namely, the Gulf of Tonkin incident of 1964[19] and the air strike against Libya of 14-15 April 1986[20]

Moreover, the Portuguese Government always justified its armed retaliatory actions taken on the territory of the African States bordering on its colonies in Africa as in accordance with the right of self-defence[21].

The South African armed forces have mounted military operations in the territories of the neighbouring States of Angola, Botswana, Zambia, Zimbabwe, Lesotho and Mozambique, in retaliation to the armed activities of the S.W.A.P.O. and the A.N.C. ,against the South African presence in Namibia and the racial segregation policies in South Africa proper respectively. In all instances of use of force the South African Government defended its actions by invoking the right of self-defence[22].

The importance of the above practice lies in this: There has certainly been armed force used in a considerable number of instances the circumstances of which reveal a punitive character and an aim at retribution with respect to the States against which it was directed. When this practice, however, was placed within the framework of the law in force, it was the right of self-defence which was invoked and no right of resorting to force in reprisal. Being confronted with State practice which

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[18] S.C.O.R 19th yr. 1109th mtg. para 26. Furthermore, the U.K. abstained in the voting on the draft resolution, finally adopted as S.C. Res. 188(1964), and in explaining the abstention the U.K. representative stressed the fact that his Government had no objection with regard to the condemnation of reprisals in op. para. 1 of the Resolution, for the U.K. considered the action as in self-defence, not reprisal. See id. 1111th mtg. para 29.

[19] See the statement to the Security Council by Mr. A. Stevenson, S.C.O.R. 19th yr. 1140th mtg. paras 44-49.

[20] Letter dated 14 April 1986 from the Acting Permanent Representative of the U.S.A. to the President of the Security Council, Doc. S/17990; also see the statement to the Security Council by Mr. V. Walters, the U.S. representative in the Council; both texts in 80 A.J.I.L. 632-636 (1986). See further Keesing's vol. XXXII 34454 (1986), at p. 34457.

[21] See statements by the Portuguese Government before the Security Council: S.C.O.R 24th yr. 1486th mtg. para 72(The shelling of the village of Lote in Zambia, June 1969); id. 1520th mtg. para 12 (The shelling of the Village of Samine in Senegal, November 1969). During the period 1960-74 Portugal was faced with national liberation armed struggle in each one of its African colonies of Guinea (Bissau), Angola and Mozambique.

[22] See statement by Mr. Eksteen, on behalf of South Africa, to the Security Council; S.C.O.R. 2298th mtg. para. 16 (Operation 'Protea' mounted by the South African Army inside Angola, 24 August 1981); statement by Mr. Schirnding, on behalf of the South African Government, to the Security Council, U.N. Chronicle, vol. XXII, Number 6, June 1985, p.23 (South African commando raid against alleged A.N.C. bases in Botswana).

has all the characteristics of reprisal but is purported to be required by law on the basis of self-defence, one cannot but immediately point to the total absence of any *opinio juris* with regard to a customary law exception to the principle of the prohibition of the use of force other than that of self-defence. Moreover, such practice accompanied by an *opinio juris* that reflects a universally recognized and *de lege lata* exception to the rule of non-use of force, apart from failing to lead to the creation of a rule of customary law of the legality of armed reprisals rather seems to reinforce the rule of their illegality in contemporary international law and is far from discrediting its legal force. The Judgment of the Court in the Nicaragua case is very unequivocal in this respect; the Court ruled:

> ...If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule...23

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Reprisals must be distinguished from self-defence. The distinction is a crucial one, for both acts constitute instances of unilateral resort to armed force and form part of the more general concept of self-help, namely the pursuit of protecting or satisfying one's rights by unilateral forcible action 24. Forcible self-help in general is held to be inadmissible. Counsel for the U.K. in the *Corfu Channel Case* defended the Royal Navy mine-sweeping operation inside the territorial waters of Albania by arguing that "..... international law did *and I say still does and must* recognize a larger measure of self-help than municipal law needs to recognize..."25. The Court rejected the above submission by ruling that:

> The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the defects in present international organisation, find a place in international law. ..... The U.K. Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international

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23 I.C.J. Rep. 1986, p.98 para. 185. Also see Barsotti loc. cit. *supra* n.3, pp. 91-2; Schachter, *53 Univ. Ch. L.R. 123-4 (1986) supra* n. 3.

24 See Bowett op. cit. *supra* n.2 and id. *66 A.J.I.L. 1 (1972)*, at p. 3 ; Lauterpacht, *The Function of Law in the International Community, 1933*, pp.393-6; Waldock loc. cit. *supra* n.3; Schachter, *82 Mich. L.R. 1620 (1984)* loc.cit. *supra* n.3.

25 I.C.J. Pleadings 1950 vol. IV, pp. 582-4.

relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. ...."26.

Furthermore, as practice of States shows, the plea of self-defence is to be invoked in defence of most cases of unilateral resort to force 27. This in itself,however, is very likely to signal, as indeed it has (see, for instance the practice of Israel) a practice of forcible retaliation with all the traditional characteristics of reprisals28 , which is nevertheless justified in law as self-defence. The aim of such practice appears to be, not any wish of a *de lege lata* re-introduction of reprisals in the body of international law, but, rather, an enlargement of the content of the right of self-defence29. Authority indicates that the distinction between reprisals and self-defence lies in the discrepancy of their aim, being respectively punitive and protective30.

The *Naulilaa Award* emphasized that an act of reprisal

... tend à imposer, à l' Etat offenseur, la réparation de l'offense ou le recour à la legalité, en évitation de nouvelles offenses.... 31

In the debate before the Security Council on the Fort Harib incident Sir Patrick Dean, the U.K. representative, said with regard to the U.K. resort to force:

"...There is in existing law a clear distinction to be drawn between two forms of self-help. One, which is of retributive or punitive nature, is termed "retaliatory" or "reprisals"; the other which is expressly contemplated and authorized by the Charter, is self-defence against armed attack...."32

State practice, however, indicates that the above ground for distinction between self-defence and reprisals, though, in itself, a

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26 I.C.J. Rep. 1949, p. 4 at p. 35. It must be pointed,however, that only the use of force in self-defence is considered to be a permissible exercise of forcible self-help; see Bowett *supra* n. 3.
27 Schachter, *53 Univ. Ch. L.R. 113 (1986)*, at p. 123, loc. cit. *supra* n.3.
28 Namely, prior illegal act and resort to force in retribution for the former.
29 Greenwood loc. cit. *supra* n.3, at p. 953 seq. ; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures, 1984*, p. 39.
30 Schwarzenberger, *87 H.R.C. 195 (1955 I)*, p.343; Bowett *supra* n.3; Goodrich,Hambro and Simons, op. cit. *supra* n.3; F. Kalshoven, *Belligerent Reprisals,1971*, p.27; Intoccia, loc. cit. *supra* n.3, p. 198; Stuesser, loc. cit. *supra* n.3, p. 7; *Cf.* Sullivan, loc.cit. *supra* n.3, p. 191.
31 2 U.N.R.I.A.A. p. 1011, at p. 1026.
32 S.C.O.R. 19th yr., 1109th mtg. para. 26.

satisfactory point of departure, has been undergoing considerable strain. The reason lies in the invocation by a number of States of the right of self-defence, and hence, the characterisation of an otherwise punitive act as protective by simply looking at the act that has given rise to the armed response, not in isolation, but against the overall background of the relations between the State-author and the State-victim of the use of armed force. In short, what is taken into account for justifying resort to force is a *Nadelstichtaktik* [32bis] (tactics of the needle prick) or an "accumulation" or the "cumulative" effect of past events rather than one act of force[33].

The concept of "accumulation of events" has been introduced by the Government of Israel in defence of Israeli uses of force on the territory of Arab States in retaliation of acts of force perpetrated against Israel therefrom. In the Security Council debate with regard to the Qibya incident, Mr. Eban, the representative of Israel, stated:

> "...I cannot approach this question in any perspective narrower than that of Arab-Israeli relations as a whole..."[34]

During the debate on the Es-Salt incident of 1969, Mr. Tekoah, the representative of Israel in the Security Council, justified his country's forcible action by arguing:

> "....For the last twenty years Israel has striven to safeguard its existence and independence in the face of Arab war..... The Israeli action of 26 March was an act of self-defence....Where there is aggression there is defence;.....Those who openly wage war against Israel cannot complain if it turns the point of its sword against them....."[35]

On 1 October 1985 the Israeli Air Force launched an air strike against the P.L.O. Headquarters in Tunis that resulted in heavy casualties. The act of force that gave rise to the Israeli action was the killing of three Israeli tourists in Cyprus as a result of the attack on their yacht by armed

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[32bis] The term is used in Blum, The Legality of State Response to Acts of Terrorism, in B. Netanyahu (ed.), *Terrorism How the West Can Win, 1986*, pp. 135-6.

[33] Bowett, *66 A.J.I.L. 1 (1972)*, at p.6; Blum, The Legality of State Response to Acts of Terrorism, in B. Netanyahu (ed.), *Terrorism How the West Can Win, N.York 1986*, 133, at p. 136 ; B. Levenfeld, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defence and Reprisal under Modern International Law, *21 Columbia J. Transnat. L. 1 (1982-83)*; Greenwood, loc. cit. *supra* n.3, p. 954; W.V. O'Brien, Deterrence and Self-Defence in Counterterror Operations, *30 Va J.I.L. 421 (1990)*, pp. 469-478.

[34] S.C.O.R. 8th yr. , 637th mtg. para. 4.

[35] S.C.O.R. 24th yr. , 1466th mtg. paras. 57,87.

individuals[36]. However, Mr. Netanyahu, the Israeli representative in the Security Council, referred to "terrorist acts" planned at the P.L.O. Headquarters in Tunis and directed against Israel, Israeli targets outside Israel and against Jews everywhere during the "..past year.."[37].

Israel, has not been the only State that defended its action on the basis of "accumulation of events". When the Fort Harib incident was considered by the Security Council, Sir Patrick Dean presented the U.K. action as defensive by invoking past "... series of actual air attacks from Yemen on the South Arab Federation and its inhabitants...violations of the Federal territory by incursions into its air space...." which should be considered "... against the background of the general attack by radio and by subversion against the Federation of Southern Arabia, including deliberate incitement to rebellion and murder..."; lastly, it was claimed that action against Fort Harib was taken due to "... the unreasonable hostility and the continuing active opposition on the part of the Yemeni authorities to the Federation..."[38]

Finally, the United States air strike against Libya of 14-15 April 1986 was also justified as an exercise of the right of self-defence. The U.S. action was taken in the aftermath of a bombing attack in West Berlin on 5 April 1986 which resulted in the death of a U.S. serviceman and several others injured. Ambassador H.S. Okun, the Acting Permanent Representative of the U.S. to the United Nations, in a letter dated 14 April 1986 and addressed to the President of the Security Council communicated the following:

> "...Over a considerable period of time Libya has openly targeted American citizens and United States installations. The most recent instance was in West Berlin on April 5, ..."[39]

The concept of "accumulation of events" as a basis for resort to force in self-defence seems to consist of a wide range of acts some of which involve the threat or use of force and others simply consist of hostile or

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[36] Keesing's 1985, pp. 34008,34077.

[37] U.N. Chronicle, vol. XII, nos 10/11, Nov/Dec. 1985,p. 4. It must be noted that in this instance it was stressed that the Israeli action was taken against the "terrorist killers" and not against their host country. This seems to indicate a narrower perspective of "accumulation of events" as far as the author of the use of force is concerned; emphasis was laid on the action taken by the guerrillas as such, rather than by the host State by way of using guerrillas *qua* weapon against Israel.

[38] S.C.O.R. 19th yr. ,1106th mtg. paras. 48,52; 1109th mtg. para32.

[39] Doc. S/17990; also see statement of Mr. V. Walters before the Security Council; extracts of both documents printed in *80 A.J.I.L. 633 (1986)*, at p. 635.

unfriendly policy which do not as such entail the use of force. Given the purpose of self-defence as being the resort to force in order to counter an armed attack which has occurred against the State-author of the use of force[40], it is hard to see against what the forcible action given rise to by this "accumulation of events" is purported to defend the State, beyond the forcible response to the act of force perpetrated by the subsequent victim of reprisals. Indeed, the plea of "accumulation of events" as justifying the exercise of the right of self-defence appears to be a very convenient means to dispense with the requirement of proportionality in the use of force in self-defence[41] or even to simply disguise the truly punitive character of the action taken. If self-defence is asserted against past incidents of use of force which may have been left unopposed or even were opposed on the ground when they took place, then it is unavoidable that the question of what the aim of the action is, namely, whether it is defensive or punitive, is bound to arise. It appears to this writer that a use of force by a State in response to some remote instances of other uses of force by another State is not to be considered defensive due to the lack of the requirement of "immediacy" of the exercise of self-defence. It, rather, appears to be an exercise of punishment, for in such cases there is simply nothing to be defended; what seems to be sought is to obtain satisfaction for and deter future acts of force- the very character of "sanction", which reprisals purportedly are in law[42].

By far more obscure and misleading is the assertion of deterrence of future acts force for it constitutes an attempt to present the forcible action taken as "anticipatory self-defence"[43]. In the debate at the Security Council on the Gulf of Tonkin incident the U.S. alleged that the bombardment of the N. Viet-Namese positions subsequent to the repulsion of the N. Viet-Namese vessels that attacked U.S. warships was deemed necessary in order to "....secure its naval units against further aggression..." [44]. To this statement the Czechoslovak representative retorted:

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[40] or according to the proponents of the so-called "anticipatory self-defence" against an "imminent", but still, an armed attack.

[41] Bowett, *66 A.J.I.L. 1 (1972)*, at p.6.

[42] Kelsen, *Collective Security under International Law, U.S. Naval War College, International Law Studies 1954 , 1956*, pp. 34-35; Kalshoven, op. cit. *supra* n. 30,pp. 22-26.

[43] The said concept is fraught with controversy as to its legality. Even if *arguendo* it is accepted then strong evidence must be provided in support of the imminence of the armed attack- a contingency which is very unlikely in practice. See Greenwood, loc cit. *supra* n. 3, at p. 956 seq.

[44] Statement by Mr. A. Stevenson, S.C.O.R. 19th yr. , 1140th mtg. para 44. The U.S. air strike against Libya was similarly defended on the basis of the U.S. having "...evidence

"...The United States delegation maintains that the aggression against the territory of the Democratic Republic of Viet-Nam was an act of legitimate self-defence under Article 51 of the Charter. The American description itself of the act, however, exceeds the definition of this Article. In the United States version, the alleged Viet-Namese attack was immediately followed by an equally alleged act of self-defence; the alleged attack was repelled, resulting in the sinking of at least two patrol boats and the damaging of two others..... Consequently, had there been a Viet-Namese naval attack during the night of 4 August 1964 then it was allegedly followed by an immediate action of defence and even of retaliation against the boats which were said to have undertaken this attack. Thus even in the United States version, there was no place for any further United States military action in terms of self-defence.....

Even in the light of that version, the attack by the United States against the territory of the Democratic republic of Viet-Nam could not be considered as an act of legitimate self-defence. At the most it could be qualified....as an act of reprisal; and as we all remember this Security Council, by its resolution of 9 April 1964, " condemns reprisals as incompatible with the purposes and principles of the United Nations"...45

Moreover, the justification of self-defence seems to be more credible if the action taken in its exercise is directed against the source of the use of force to be repelled. In the Security Council debate on the Fort Harib incident the representative of Czechoslovakia pointed out that:

"...it would be very difficult to find any sort of factor which would qualify the action against Harib as self-defence under Article 51 of the Charter.....

If the alleged violations and attacks from Yemen had been carried out by isolated aircraft and helicopters, the only immediate defence should have been directed against those machines. However, what was attacked by a superior air force was a land objective, which had nothing to do with the alleged raids which would have justified or rather served as a pretext for the attack....

The whole scope of the action against Harib thus exceeds the dimensions of these incidents, a fact which is shown particularly clearly by the extent of its disastrous effects, which brought death to twenty-five human beings..."46

The above is of importance in the case of armed action taken due to activities of armed bands. To justify action as self-defence against the host or assisting State of such groups it is necessary to establish that a link exists between the activities of the guerrillas and the host State of such an intensity as for the armed action by the guerrillas to amount to an armed attack perpetrated by the host State itself. The Court in the *Nicaragua case*

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of future terrorist acts..."; see statement by Mr. Walters, loc. cit. supra n. 39. It is worth noting that no concrete evidence was presented by the U.S. Government in support of the above claim.

45 Ibid. 1141st mtg. paras. 30-31.

46 S.C.O.R. 19th yr. , 1110th mtg. paras. 23,24,25.

ruled that such a link exists only if the assisting State sends the armed bands or if its involvement in their activities renders them *quasi* agents of the Government of the assisting State [47]. If the assistance of the host State only amounts to the provision of arms, funds, training, logistical support, then the victim State of the armed bands may take proportionate counter-measures [48].

It is obvious from State practice that lack of evidence of such link is most likely to result in the very strong condemnation of armed action taken against an alleged host State or on the territory of such State by the victim of the activities of armed bands; moreover, the use of force by the latter is likely to be censured as "armed attack" or "aggression". The condemnations of S.Africa for its actions against Lesotho [49] and Botswana [50], and of Israel for the Beirut raid [51] and the air strike on the P.L.O. Headquarters in Tunis [52] are illustrations of the above submission.

The fact that the concept of "accumulation of events" may entail a situation of political tension or a long-standing unfriendly conduct between two or more States points to the direction of the existence of a dispute. Certainly, if force is used and is justified as defensive on the basis of a body of past events and the relations as a whole between the State-author and the State-victim of the use of force, then the right of self-defence -as the only universally accepted exception to the rule of the prohibition of the unilateral use of force- is bound to be asserted beyond its protective role in the event of an armed attack. Furthermore, such an exercise of self-defence will probably assume proportions of a great extent effectively amounting to a right of States to vindicate their rights or settle their disputes by way of armed force.In view of the obligation of States under Article 2(3) of the Charter and customary international law to settle

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[47] I.C.J. Rep. 1986, pp. 63-65, 103, paras 113-116, 195; see also N.D. White, *ix Internat. Rel. 535 (1989).*

[48] Ibid. pp. 110,127,paras. 210,249. The scope of proportionate counter-measures is proposed to be discussed in a subsequent section.

[49] S.C. Res. 527 (1982) of 15 Dec. 1982; S. Africa was strongly condemned for its "... premeditated aggressive act against the Kingdom of Lesotho...".

[50] S.C. Res. 568 (1985) of 21 June 1985; strong condemnation of South Africa for aggression.

[51] S.C. Res. 262 (1968) of 30 Dec. 1968; condemnation of the Israeli operation as "...premeditated military..." action.

[52] S.C. Res. 573 (1985) of 4 Oct. 1985; vigorous condemnation of the Israeli raid as "... armed aggression...".

their disputes by peaceful means, it is submitted that such a contingency would contravene existing international law [53].

State and United Nations practice suggest that the solution of a long-standing dispute in which either of the parties shows unwillingness of settling the dispute is in no way promoted by resort to force. With regard to the Qibya incident of 1953, Maj. Gen. Bennike, the Chief of Staff of U.N.T.S.O. in Palestine stated in his report to the Security Council that "... the application of such measures.... creates the chain reaction of retaliatory measures... and blood feuds..."[54]. In the debate on the Lake Tiberias incident of 1955 the Soviet representative said that "...Our Charter makes it quite clearly that other methods than the use of armed force are

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[53] Practice of States through statements of Governments, conclusion of bilateral and multilateral treaties, consensus in the adoption of U.N. Resolutions, reveals an *opinio juris* as to the existence of positive obligation by States to settle their disputes by peaceful means. See The Pact of Paris of 1928, Art. II; The Charter of the United Nations Art. 2(3); G.A. Res. 2625 (XXV) of 1970; *The Corfu Channel Case* , I.C.J. Rep. 1949, p. 35; Nicaragua Case, I.C.J. Rep. 1986 p. 14, at pp. 99-100, para. 188. The peaceful means for the settlement of disputes are proposed in Article 33 of the U.N. Charter and they are, "... negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or other peaceful means of their choice...". It is submitted that States are under an obligation to settle their disputes by peaceful means in general and not under any obligation to seek settlement of disputes by resorting to a specific means. Waldock pointed to the lack of a judicial body of compulsory jurisdiction on the international plane as a situation which in view of the absolute prohibition of the use of force under the Charter would entail the "... seeds of trouble..."; *81 H.R.C. 455 (1952 II)*, at p. 490. This appears to the present author as to strict an analogy with domestic law. The existence of compulsory jurisdiction thereunder, far from being the only method of dispute settlement, does not constitute as such an automatic prohibition of forcible settlement of disputes, but is distinct from and exists alongside the latter. According to Jennings, General Course on Principles of International Law, *121 H.R.C. 327 (1967 II)*, at pp. 586-587, the non-resort to force in accordance with Article 2(4) does not necessarily imply compliance with Article 2(3) and this may constitute a dangerous prospect for the effectiveness of the former provision, "... for it is impossible indefinitely to hold a position where a person is forbidden to employ self-help and yet at the same time is not enabled to take his opponent into Court...". Whether Article 2(3) of the Charter entails an obligation to settle a dispute in general, is not the object of this research. Be that as it may, it does not follow, and indeed is irrelevant to the settlement of any dispute in the face of intransigence on the part of either party thereto, that the other should be released from its obligation not to have recourse to force. Article 2(3) expressly refers to the settlement of disputes "... in such a manner that international peace and security are not endangered". To resort to force because the other party in a dispute is not forthcoming to settling the dispute by way of one or another of the means contained in Art.33 of the Charter, is to jeopardise the very framework of the Charter system. Moreover, the obligation to settle a dispute seems to be distinct from the means by which the dispute is to be settled. The willingness to settle a dispute, even if it emanates from one of the parties thereto, is always assumed to be achieved by peaceful means.

[54] S.C.O.R. 8th yr. , 630th mtg. para. 61. Sir Gladwyn Jebb, the U.K. delegate in the Security Council stated that "... such actions...must inevitably create new obstacles to the cause which the Council has at heart, namely, the return of peace to the Middle East...", ibid, 640th mtg. para. 10.

to be employed for the settlement of disputes..." 55. Mr Wiggins, the United States delegate, said in his speech to the Council with respect to the Beirut raid that "... violence leads to more violence and retaliation rather than bringing an end to terrorism weakens the forces of peace..."56. Moreover, the danger of escalation and conflagration of the reprisal action into a major conflict has been also pointed out. The Yugoslav representative speaking during the debate on the Lake Tiberias incident said that "... the attacker cannot always restrict the range of his actions; measures of retaliation no matter what their range, can lead to sharp response on the part of the side attacked and can have grave and unforeseen consequences..." 57.

Although the "accumulation of events", the whole context of the dispute between the author and the victim of reprisals, is acknowledged by third States, it is not accepted as a justification for armed action by either of the parties to the dispute 58. The fact is that such action by being unilateral and by having as its basis the overall background of relations between the author and the target of the use of force, *as perceived by the former* , it offers strong grounds for doubting the objectivity of the presentation of the overall relations by the author of the retaliatory action 59.

The concept of "accumulation of events", as justification for resort to force, has been repeatedly rejected by the Security Council 60.
States may take account of the overall relations between two disputant parties in assessing possible routes for peaceful settlement or determining their attitude towards a draft resolution laid before them at the Security Council; but they fall short of accepting it as justifying resort to force. The delegate of Uruguay stated during the debate on the Almagor incident of 1966:

> "...If the air attack on Syria of 14 July is considered in isolation it undoubtedly constitutes an illegal aggressive act; second, if that attack is linked to the acts of sabotage, and so forth.... the responsibility is considerably mitigated.... especially if both Syrian

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55 S.C.O.R. 11th yr. , 710th mtg. para. 94.
56 S.C.O.R. 23rd yr. , 1460th mtg. para. 73. Indeed, more than forty years of the so-called Arab-Israeli conflict seems to support the above statements.
57 S.C.O.R. 11th yr. , 711th mtg. para. 10; Schwarzenberger, *87 H.R.C. 195 (1955 I)*, at p.328.
58 Statement by the French delegate in the Security Council during the debate on the Qibya incident; S.C.O.R. 8th yr. , 635th mtg. para. 63.
59 Statement by Mr. Zafrulla Khan, the Pakistani delegate in the Security Council during the Qibya incident debate; ibid. 640th mtg. paras. 26,28.
60 Bowett, *66 A.J.I.L. 1 (1972)*, at p.7; Sullivan, loc. cit. *supra* n.3, p.191; *Cf.* Greenwood loc. cit. *supra* n.3, p. 956.

and Israel incidents are viewed against the general background of passion, hostility and hate which has prevailed in that region since 1947..... This mitigation of responsibility also applies to the Syrian Arab Republic... It is obvious that armed reprisals cannot in any circumstances be recognized as a lawful instrument in international relations and that the illegal use of force constitues a violation of the positive international law created in San Francisco. These reprisals are known as "taking the law into one's own hands". They can be explained by the extenuating circumstances to which I referred previously, but they cannot be justified, for there are international organs empowered to intervene in the case of acts such as those which provoked the reaction of 14 July...." 61

The "accumulation of events" as an explanatory factor of resort to force, although not preventing the latter from being condemned or deplored, may be of moral and political significance in implying that the victim of reprisals bears some degree of responsibility for the forcible action 62 . Such an "accumulation of events", however, is unlikely to offer the 'benefit' of condemnation for reprisals to States whose policy constitutes a denial of the fulfilment of a right under international law at the time when they resort to force. This attitude has so far been demonstrated with regard to the denial of the right of self-determination of colonial peoples and practices of human rights violations, especially in the form of racial discrimination 63.

It may be deduced from State practice that the distinction between reprisals and self-defence is generally maintained on the basis of their aim. The starting point and indeed the final judgment over an act of force is to be founded on the plea of self-defence that is asserted by the author of the use of force. Any use of force going beyond the necessity of self-defence or against a target other than the source of the armed force, which must be designated as such beyond any doubt on the basis of evidence, seems bound to be characterised as reprisal. It appears that the punitive essence of the latter is deduced *a contrario* by the absence of any irrefutable grounds for self-defence.

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61 S.C.O.R. 21st yr., 1293rd mtg. para. 47. Uruguay abstained in the voting on the draft resolution because it was thought that a condemnation of Israel "... would neither be useful or conducive..." towards achieving peace in the region; ibid. para. 57.

62 The many instances of condemnation of Israel for reprisals and not for aggression may be implicit of the Arab States prior breach of international law; see Barsotti, loc. cit. *supra* n.3, pp. 89,93,95.

63 It is worth mentioning that Portugal, Rhodesia and South Africa have always been condemned for "armed attack" or "armed aggression" for resorting to force on the territory of neighbouring States in response to activities by guerrilla groups and despite the fact that the characteristics of the majority of those forcible actions partake the nature of reprisals. See Barsotti, loc. cit. supra n.3 pp.84-88; *Cf.* Cot and Pellet op. cit. *supra* n. 3, p.121.

Thus, it seems that States that have resorted to reprisals have sought to justify their action as defensive, on the basis of its aim rather than on any assertions of non-distinction between reprisals and self-defence [64] or permissibility of limited force in "defensive reprisals" as long as major force is permitted in self-defence[65] .

The premise that reprisals are unlawful under the Charter of the United Nations and customary international law has been subject to doubt by learned authority [66].

The line of argument advocated rests on a twofold basis. First, it is argued, that the ineffectiveness of the collective security machinery of the United Nations compels a resurrection of the pre-Charter customary law of reprisals either by way of a "...second order level of legal inquiry that is guided by the more permissive attitudes towards the use of force..."[67], or by directly arguing for the re-institution of the concept of reprisals by not interpreting the Charter "... arbitrarily... but to read experience into it...", which, in its turn, reveals that coercion is necessary for the protection of

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[64] Tucker, Reprisals and Self-Defence: The Customary Law, *66 A.J.I.L. 586 (1972)*; Blum, loc.cit. in Netanyahu op. cit. *supra* n.33, pp. 134-5; Levenfeld, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defence and Reprisal under Modern International Law, *21 Columbia J.I.L. 1 (1982-83)*, at pp. 37-8; Cf. Skubizewski, loc. cit. in Sørensen op. cit. *supra* n.3, p. 754.

[65] Dinstein, *War,Aggression and Self-Defence, 1988*, p.202 seq. esp. at p. 210; id. The Legal Issues of "Para-War" and Peace in the Middle East, in Moore (ed.), *The Arab-Israeli Conflict,vol. ii, Princeton 1974*, p.158, at p. 164.

[66] E. S. Colbert, *Retaliation in International law, N.York 1948*, pp.201-204; Cheng, *General Principles of Law as Applied by International Courts and Tribunals, 1953*, p.101; Stone, *Aggression and World Order, 1958*, pp. 92-102; Falk, The Beirut Raid and the International Law of Retaliation, *63 A.J.I.L. 415 (1969)* ; Bowett, Reprisals Involving Recourse to Armed Force, *66 A.J.I.L. 1 (1972)*; Lillich, Readings in International Law from the Naval War College Review 1947-77,R. B. Lillich and J.N. Moore (ed.) vol. ii: *The Use of Force, Human Rights and General International Legal Issues*, pp. 130,133,136,138 ; Levenfeld, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defence and Reprisal Under Modern International Law, *21 Columbia J.Trans. L. 1 (1982-83)*, at p. 35; G.B.Roberts, Self-Help in Combating State-Sponsored Terrorism: Self-Defence and Peacetime Reprisals, *19 Case West. Res. J.I.L. 243 (1987)*, pp. 283-285; A.N. Salpeter-J.C. Waller, Armed Reprisals During Intermediacy- A New Framework for Analysis in International Law, *17 Vill. L.R. 270 (1971-72)*, pp. 296-7; G. Carpenter, The South African Raid on Terrorist bases in Lesotho, *8 S.A.Y.I.L. 154 (1982)*, 156-7; G. von Glahn, *Law Among Nations, 5th ed. 1986*, p. 568; Cf. M. Virally, Cours General de Droit International Public, *183 H.R.C. 9 (1983 V)*, pp. 106-7.

[67] Falk, loc. cit. *supra* n. 66, pp. 430-1. The author argues that "... If the Charter status of reprisals exhausted legal inquiry, then there would be no prospect of moderating force in retaliatory settings wherein the Charter approach was ineffectual..... The customary international law of reprisal is a very important illustration of such second order legality...". Note that, although the author appears to consider that a prohibition of resort to force in armed reprisals is not part of customary law, he imposes strict limitations to what he considers as lawful resort to armed retaliation, id. pp.441-2. See also criticism by Blum,The Beirut Raid and the International Double Standard, *64 A.J.I.L. 73 (1970)* .

the objectives of the United Nations [68] . Both of the above theses are manifestly conspicuous for their total disregard of the practice of States and the Security Council, as well as the *opinio juris* under which the above practice has occurred which reveal the unlawfulness of reprisals in contemporary international law. It is submitted that the invocation of the ineffectiveness of the United Nations collective security machinery as offering licence to States to resort to forcible self-help is a *de lege lata* flawed argument.It finds no support in the practice of States because no State has ever asserted a right to resort to armed force in reprisals as required by law. Secondly, the ineffectiveness of the Charter security machinery, as indeed the one of the old League of Nations, does not seem to be due to the provisions of the Charter as such but rather to the attitude certain members of the organisation have towards these provisions [69]. Finally, and as a consequence of the second of this author's submissions, the immediate resort to self-help by States because, apart from the ineffectiveness of the United Nations system, of the state of development of international law in general is in direct contradiction to considering the latter as law at all- an assertion never put forward by any authority. The 'inchoate' character of the international community manifested by a lack of central legislative and executive authority for the making and enforcing of the law, as well as the absence of compulsory jurisdiction of any court, does, by no means, create a permissiveness of self-help by way of reprisals as a "legal institution"[70].

The second line of criticism is based on the practice of the Security Council [71]. It is being argued that on certain occasions, acts of reprisals taken by Israel against Arab States, have escaped condemnation by the Security Council; this is attributed to the "reasonableness" of the acts of armed retaliation that escaped censure, which, in its turn, is largely based on the proportionality of the force used, as well as of the selection of the target of the use of force [72]. Consequently, "... there is clearly some evidence that certain reprisals will, even if not accepted as justified, at least avoid condemnation...", and "... if this trend continues we shall

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[68] Lillich , op. cit. *supra* n.66, p. ; he further maintains that the prohibition of the use of force "... is not an absolute virtue; it has to be weighed against other values as well...", ibid. Also see references to Stone, Colbert, Carpenter, Salpeter and Waller and Roberts, loc. ct. *supra* n. 66

[69] Brierly, The Covenant and the Charter, *23 B.Y.I.L. 83 (1946)*, at p. 84.

[70] Lauterpacht, *The Function of Law in the International Community, 1933*, pp. 394-5.

[71] Bowett, loc. cit. *supra* n. 66. Also see O'Brien, *30 Va J.I.L. 421 (1990)*, pp. 469-478.

[72] Bowett, loc. cit. *supra* n. 66, pp.10 seq.

achieve a position in which while reprisals remain illegal de jure they become accepted de facto. Indeed it may be that the more relevant distinction today is not between self-defence and reprisals, but reprisals that are likely to be condemned and those which because they satisfy some concept of 'reasonableness' are not..."[73]. The above thesis, however, seems a tentative one for the author concedes that "... it is possibly premature to suggest that the principle is now jeopardized. The principle of inadmissibility of reprisals is part of the broader prohibition of the use of force that constitutes jus cogens..." [74].

Still, its implications are alarming because what it seems to suggest is that reprisals may be tolerated within the very framework of the United Nations whose Charter is deemed to have rendered them unlawful [75]. However, a study of the cases in which condemnation was withheld does not seem to suggest that the Security Council or its Members were prepared to accept certain acts of reprisal as "reasonable". With regard to the Nahalin incident of 1954, the Security Council took no action on the basis of procedural irregularity [76]. Consideration of the Qalqilya incident of 10 October 1956 was interrupted by the eruption of the Suez Crisis on 29 October 1956. Another Israeli action, the air raid on the site of the Syrian development scheme of the Jordan River failed to be condemned by the Council [77]. The Israeli action was nevertheless deplored[78] and condemnation seems to have been withheld because of the failure of the

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[73] Id. p.10.
[74] Id. p.22.
[75] Barsotti, loc. cit. *supra* n.3, p.82. An examination of the practice of the Security Council reveals that the disproportionate nature of certain reprisals was stressed in some Resolutions of the Council; see S.C. Resolutions 228(1968) on the Samu incident and 248(1968) on the Karameh incident. However, such reference seems not to constitute condonement of the armed action but rather an attempt at explaining why it has been solely Israel that was condemned and not simultaneously and in the same Resolutions, the Arab States that encouraged infiltration of armed bands against the former. See Barsotti, pp.92-3.
[76] Jordan that had been the target of the Israeli action was not a Member of the United Nations at the time when the complaint was launched. Although it was Lebanon that requested a meeting of the Council to consider the incident, the complaint was deemed to be "... in substance a complaint by Jordan..."; in view of the fact that the latter had not given notice in advance, according to Article 35(2) of the Charter, that it accepted the obligations of the pacific settlement of disputes, the Council declined to consider the matter. See statement by Sir Pierson Dixon, the President of the Council, S.C.O.R. 9th yr. 671st mtg, para. 16.
[77] A draft resolution sponsored by Jordan and Mali condemning Israel-Doc. S/7437.S.C.O.R. 21st yr. Suppl. for July-Sept. 1966,p. 59-was defeated by 6:0:9 abstentions; S.C.O.R. 21st yr. ,1295th mtg, para. 76.
[78] See statement by the representative of Uruguay, ibid. 1293rd mtg, para.47.

draft resolution to equally censure the Syrian support for armed infiltration inside Israel[79].

Finally, on two occasions condemnation by the Council was frustrated by the United States negative vote. On 8 September 1972 the Israeli Air Force launched a series of strikes on Palestinian refugee camps in Syria and Lebanon in retaliation of the killing of the Members of the Israeli national Olympic team in Munich on 5 September 1972. In voting against the draft resolution [80] Mr. Bush, the representative of the United States, stated that the United States delegation "...are..convinced that the Council would have done neither the parties nor itself any good by adopting a draft resolution which ignored realities, which spoke to one form of violence and not another, which looked to effect but not to cause..." [81]. On 2 December 1975 the Israeli Air Force mounted a large-scale air raid on three Palestinian refugee camps in Southern Lebanon; a draft resolution [82] which would have condemned Israel was not adopted due to the negative vote of the United States. The representative of the latter stated: "...Now, the United States strongly deplores the Israeli action....But we also believe that the problem of loss of innocent life resulting from incursions from Lebanon and other neighbouring States... should also be condemned...." [83].

It, therefore, becomes clear that the failure of condemning Israel was due to reasons of procedure, considerations of the Council's role to promote the settlement of the Arab-Israeli dispute at large which went beyond any condemnation of either side, and insistence that the acts of Arab States, especially their support for activities by armed groups against Israel, should have been condemned alongside the Israeli resort to retaliatory force.

In conclusion it may be stated that reprisals are unlawful under present international law; whether taken by way of punishment or deterrent of future acts of the State against which they are directed, they still have the character of unilateral enforcement sanctions by way of use of armed force. No plea of ineffectiveness of the present structure of the international community can be held to justify resort to armed retaliation aspiring to the settlement of disputes or the vindication of rights. Practice

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[79] Statement by the representative of Uganda, ibid. 1294th mtg, para. 7.
[80] Doc. S/10784, submitted before the Council at its 1661st mtg by Guinea, Somalia and Yugoslavia; para. 39, S.C.O.R. 27th.
[81] S.C.O.R. 27th yr. , 1662nd mtg para. 76.
[82] Doc. S/11898.
[83] S.C.O.R. 30th yr. , 1862nd mtg para. 134.

in the context of the Arab-Israeli dispute, the Portuguese colonies, the situation in Rhodesia and the relations between South Africa and her neighbouring States, suggests that tension and long-standing disputes, instead of being settled, become dangerously protracted with potentially immeasurable peril for international peace and security. Finally, aggrieved States are recognised the right to resort to equally effective reprisals that are short of the use of armed force [84].

[84] See *Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France)*, 54 I.L.R. p. 304; Bowett, *13 Va J.I.L. 1 (1972-73)*; Elagab, op. cit. ; Zoller, op. cit. ; Schachter, *37 Journal of Intern. Aff. 231 (1984)*.

CHAPTER 4
THREAT OF FORCE

The prohibition of armed force under Article 2(4) of the United Nations Charter extends to the threat apart from the actual use of force by States. It was for the first time that the prohibition of the threat of force has been included in a contractual provision which illegalises the use of armed force. This development came probably as a result of the Nazi experience with regard to the seizure of Austria in 1938 and Czechoslovakia in 1939 where in both cases the threat of armed force by Germany was followed by unopposed invasions.

According to Brownlie:

> " ... A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal ..."[1]

The meaning of "threat of force" has not received extensive consideration and there seems to exist a good deal of uncertainty with regard to characterizing certain instances of State practice as "threats of force" within the meaning of Article 2(4) of the Charter[2] .

States often have large parts of their armed forces stationed along or within proximity of the frontiers of neighbouring States; they stockpile certain types of weapons, such as nuclear weapons; they take measures by way of domestic legislation pertaining to their security; an illustration of the latter is the Ordinance Containing Instructions for the Armed Forces in Time of Peace and in State of Neutrality issued by the Swedish Government on March 3, 1983[3] . According to the Ordinance any foreign submarine found submerged in the internal waters of Sweden shall be forced to surface and be taken ashore for further action; moreover, the use of armed force is not excluded[4] .

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[1] Brownlie, *International Law and the Use of Force by States, 1963*, p. 364. *Cf* . Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 12, 18.
[2] See Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1625.
[3] See Sadurska, Threats of Force, *82 A.J.I.L. 239 (1988)*, pp. 255-6, esp. n. 8 at p. 255.
[4] Ibid. The above piece of legislation followed the abortive large-scale operation conducted by the Swedish armed forces with regard to the intrusion of an unidentified

States also enter defensive alliance treaties (N.A.T.O. , Warsaw Pact) and they often conduct military manoeuvres on their territories.
Are all the above cases to be considered as threats of force within the meaning of Article 2(4) of the Charter? The deployment of nuclear weapons by certain States, for instance, has been described as a "deterrent", namely, a means of preserving the peace through the certainty of mutual destruction in case of resort to force by way of nuclear attack[5] .
Nevertheless, the legality of the possession and deployment of any type of weapons as well as any measure relevant to the security and defence of the State adopted by any Government within the territory of the State is undisputed under International law[6]; indeed, it seems to derive its legitimacy from the principle of State sovereignty.

The aforementioned submission may be, and indeed, it has often been qualified by the whole context of relations between specific States or groups of States, namely, considerations of strategic policy, power politics, spheres of influence of the two super powers.
The deployment of Soviet missiles in Cuba in 1962 was interpreted by the U.S.A. as a "deliberately provocative and unjustified change in the status quo".[7] Similarly the Soviet Union interpreted any change of the regime in the Eastern European States as prejudicial to her security: it was stated within regard to Czechoslovakia in 1968 that the result of "Czechoslovakia's separation from the socialist commonwealth" would have been that " N.A.T.O. troops might approach the Soviet borders..."[8] .
Most recently the U.S. Government announced that it was contemplating unilateral military action against a Libyan plant suspected of making chemical weapons[9] . Taking into consideration the high tension in the US - Libyan relations due to the allegations

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foreign submarine in the territorial waters of Sweden, in the vicinity of a top secret naval base, on 10 October 1982.
[5] Sadurska loc. cit. *supra* n. 2, p. 247 but *cf*. pp. 246-7.
[6] See I.C.J. Rep. 1986, p. 14, at p. 134, para 269; Tucker, Using Force Against Libya? *N. York Times , January 11, 1989*, at A 25, cols 2-5, extracts reprinted in D' Amato, International Law in the Public Forum: The New York Times and the Libyan Chemical Weapons Plant, *83 A.J.I.L. 527 (1989)*, p. 528.
[7] 47 Dept. of State Bull. 1962, p. 715.
[8] See Reisman, Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary Law and Practice, *13 Yale J.I.L. 171 (1988)*, p. 174 notes 7-9.
[9] Keesing's 1989, p. 36385; D' Amato loc. cit. *supra* n. 6.

made by the United States Government that Libya sponsors terrorist activities against American targets[10], the economic measures instituted by the U.S. against Libya[11] and the air raids by the U.S. Air Force on Tripoli and Bengazi in April 1986 [12] it may be concluded that the potential capacity of Libya to produce chemical weapons was conceived as a possible threat to the security of the United States. During the drafting of the Declaration on Principles of Friendly Relations[13] the meaning of the term "threat of force" was commented on but without any formal proposals being made with regard to it. It was claimed that a threat of force could be direct or indirect and could be expressed both in deeds and words[14]. Chile in a proposal with regard to the content of the principle of the non-use of force suggested that:

> "The expression threat of force shall refer to any action, direct or indirect, whatever the form it may take, which tends to produce in the other state a justified fear that it or the regional community of which it is a part will be exposed to serious and irreparable harm..."[15]

It was moreover stated that the meaning of the term threat of force should be approached with caution[16] while the issue of the threat of force was linked with the rather vague concept of provocation in the sense that a State could provoke another State into using armed force against it so as the latter State be presented as violating international law[17]. Be that as it may, the meaning of the threat of force was not elaborated and hence the sole reference to the threat of force in the restated text of Article 2(4) of the Charter under the First Principle of the Declaration.

During the United Nations quest for the definition of Aggression the issue of the "threat of force" and its inclusion in the Definition of Aggression was met with opposition and scepticism due to the controversy surrounding the possible response to such "threat" in anticipatory self-defence and the ambiguous concept of provocation that

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10 See 25 I.L.M. 182-191, 199-202 (1986).
11 Ibid.
12 Keesing's 1986, p. 34456.
13 G.A. Res. 2625 (XXV), G.A.O.R. 25th session, Suppl. No 28, p. 121.
14 G.A.O.R. 20th session Annexes, p. 87.
15 Doc. A/AC.125/L.23, G.A.O.R. 21st session Annexes, p. 30.
16 G.A.O.R. 20th session Annexes, p. 87.
17 G.A.O.R. 21st session Annexes, p. 34.

aggression[18] and it is probably for this reason that the "threat of force" does not appear in Article 1 of the 1974 Definition of Aggression (G.A. Res. 3314 (XXIX) of 1974).

The International Law Commission (I.L.C.) in the course of its work on the *Draft Code on Offences against the Peace and Security of Mankind*, has included "any threat by the authorities of a State to resort to an act of aggression against another state" in the Draft Code[19] . During the debates in the I.L.C. it has been acknowledged that the result of the threat of force was the same in some circumstances, at least- with that of the use of force, because as, it has rightly been pointed out, "...there was only a difference of degree between the threat of employment of armed force and the actual employment of it"[20] .

This was demonstrated in the cases of the *Anschluss* (the incorporation of Austria in the Third Reich) and the seizure of Czechoslovakia in March 1938, and September 1938 and March 1939 respectively. In both cases the Nazi Government issued explicit threats of military action unless its demands were met; however, both cases were regarded by the International Military Tribunal of Nuremberg not as constituting aggressive wars, but rather as parts of the common plan to wage a war of aggression in Europe[21] . The fact, moreover, that in cases where the threat to use force is followed by unopposed invasion is usually regarded as an actual use of force[22] , does not, in the present author's view, deprive such explicit threat of any significance with regard to its onerous nature. In fact, an explicit threat of the use of armed force is an extremely convenient means of achieving one's purposes and at the same time dispensing with any possible risks which an overt use of force entails[23] .

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[18] Report of the Special Committee on the Question of Defining Aggression, G.A.O.R. 12th session, Suppl. No 16, p. 7, paras 53-56; Report of the Special Committee on the Question of Defining Aggression, G.A.O.R. 24th session, Suppl. No 20, p. 18, paras 31-33; also see Wengler, L' Interdiction de Récourir à la Force: Problèmes et Tendences, *7 Révue Belge D.I.* 401 (1971), p. 405 n. 12. See *infra* Part Two, Ch. 9, First Title.

[19] Article 2(2), I.L.C. Ybk 1951, vol. i, pp. 58-60; id. 1954, vol. ii, pp. 151-2; G.A.O.R. 40th session, Suppl. No 10, p. 30 n. 36, para 86; G.A.O.R. 41st session, Suppl. No 10, p. 104 n. 84.

[20] Comment by Mr. Yepes, I.L.C. Ybk 1951, vol. i, p. 58, para 40.

[21] *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany,* Part 22, H.M.S.O. 1950, pp. 427, 429. In the case of the occupation of Denmark, which was effected under similar circumstances, the Tribunal held that it was a war of aggression; ibid. p. 436.

[22] Brownlie op. cit. *supra* n. 1, p. 365.

[23] Comment by Mr. Yepes, loc. cit. *supra* n. 20, para 41.

A threat of force may also be and, indeed, in most cases is implicit. It may be deduced from putting the armed forces of a State on alert along the borders of the target State.

On 25 March 1987 the Turkish Government issued a permit enabling the State-owned Turkish Petroleum Corporation to conduct hydrographic research for oil exploration in the Aegean Sea outside the Turkish territorial waters. On the following day the Greek Government repeated its offer to submit the continental shelf dispute to the I.C.J, but warned that if the Turkish Petroleum Corporation vessel carried out research "in areas where under conventional and customary law the continental shelf belongs to Greece, the Greek Government will take the necessary measures to ensure its sovereign rights". The Greek armed forces were promptly put on alert[24] .

A similar situation may arise out of the conduct of military manoeuvres - viz. the U.S. Navy manoeuvres in the Gulf of Sirte in January 1989[25] .

While the unlawful character of an explicit threat of force is clearly discernible, it is not so when a threat of force is implicit. Army movements and the conduct of military manoeuvres do not as such qualify as threats of force. It is submitted that it is the context of the relations between the two States that attributes the character of the threat of force to an act which is generally considered to be lawful. The reference to the context of relations of the State-author and the State-target of the threat must not be understood as the general context of the international relations between the two States, namely, the fact that two global or regional powers, such as the U.S.A. and the U.S.S.R. , had opposing interests only because of the fact that they both were of matching military power and each one exercises considerable political influence over a number of States. What really must be taken into account is the context of the relations between the two States with regard to a particular dispute or controversy. The threat of use of force by Greece against Turkey in March 1987 is perceived as such if the relations of the

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[24] The situation between Greece and Turkey is also a case of explicit threat. The Prime Minister of Greece, Mr. A. Papandreou, stated that the Greek armed forces " ... would teach Turkey a very hard lesson" if Turkey continued with "aggressive acts" in the Aegean. See Keesing's 1987, p. 35129.

[25] Keesing's 1989, p. 36385. According to the U.S.A. the manoeuvres were conducted on the high seas. Libya, on the other hand, has asserted territorial sovereignty over the Gulf of Sirte by claiming that it constitutes a historic bay.

two States are viewed against the background of the dispute over the Aegean Sea continental shelf.

Similarly the U.S. military manoeuvres in the Panama Canal Zone may be qualified as a threat of force in the light of the tension in the relations of the U.S. Government and General Noriega[26] .

The qualification of an action by a State as a "threat of force" derives its wrongful and unlawful character from the element of coercion which must be established with regard to an action purported to be a threat of force. This is supported by the judgment of the I.C.J. in the *Nicaragua Case* .In dealing with the principle of non-intervention in connection with the assistance provided to armed bands operating against a State the Court held:

> " ... The element of coercion which defines and indeed forms the very essence of intervention, is particular obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting state when the acts committed in another state "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force and that of non-intervention ..."[27]

Thus, if the Opposition to the Government of State A threatens to resort to force against that Government and State B threatens State A that that it will provide the Opposition with military and logistical support unless State A heeds to certain demands of State B, then State B commits an unlawful threat of force and possibly intervention in the internal affairs of State A.

The unlawful character of the threat of force is complemented by Brownlie's submission that if the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal[28] . Thus, in the example above, State A could legitimately counter-threaten that it should take all appropriate counter-measures to intercept the traffic in arms and logistical support to the Opposition[29] .

Nicaragua contended that the joint military manoeuvres conducted by the U.S. and Honduran armed forces in Honduras constituted a threat

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[26] Keesing's 1988, pp. 35815-8, 36215; Keesing's 1989, pp. 36645-6, 36684.
[27] I.C.J. Rep. 1986, p. 14, at p. 108, para 205.
[28] Op. cit. *supra* n. 1.
[29] I.C.J. Rep. 1986, p. 14, at pp. 110, 127, paras 211, 249.

of force. The Court rejected the Nicaraguan claim because the manoeuvres were held in circumstances which did not constitute on the part of the U.S.A. a breach of the principle of the prohibition of the threat or use of force[30]. The character of an action as an unlawful use of force is, therefore, not to be judged solely in the background of the context of the relations between the the threatening and the target State with regard to a specific dispute. The circumstances surrounding the action purported to constitute a threat of force seem to be equally relevant.

In the specific case of the joint U.S.-Honduran military manoeuvres it could be argued that the threat of force to Nicaragua was subsumed by the actual use of force by the U.S.A. against Nicaragua. This seems to the present author to be a rather tentative argument, in view of the fact that the Court did not find a direct link between the manoeuvres on the one hand and the U.S. direct use of of force against Nicaragua and its assistance to the *contras* on the other.

In fact, it becomes clear from the appraisal of the facts of the Nicaraguan conflict that the Court drew a distinction between the instances of the use of force directly by the U.S.A. (i.e. the laying of mines in Nicaragua's internal and territorial waters, the attacks on Nicaraguan ports, oil installations and a naval base) and its indirect use of force in support of the *contras*. The alleged threat of force by way of military manoeuvres was considered as pertinent to the former situation[31]. The non-existence of any causal link between the conduct of the manoeuvres and the action against the Government of Nicaragua seems to have been decisive in respect of the above finding of the Court.

The illegality of the threat of force, though not expressly denied, has been treated with a certain degree of scepticism. Sadurska[32] has argued that there is no justification for equal treatment of the threat with the use of force because International law is preoccupied with the political independence of States not due to a concern for the freedom of States from external pressure but due to the need for peace and order among nations. This has been contrasted with domestic legal systems where the prohibition of duress, undue influence and criminal threat is purported to be linked to the protection of the freedom of the individual as the *ultimate ratio* of domestic society[33]. The same author concludes that, "[It]

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[30] Ibid. p. 53, para 92.
[31] Ibid. p. 118, para 227.
[32] Sadurska, *82 A.J.I.L. 239 (1988)*, p 249 et seq.
[33] Ibid, p. 249.

seems that as long as the threat of force does not jeopardize peace or lead to massive violations of human rights, international actors demonstrate varying degrees of approval or more or less reluctant tolerance for unilateral threats"[34] . The coercive character of a threat of force is dispensed with by arguing that "international law, as any other kind of law, is intimately linked with coercion: denying this does not change reality itself"[35] . Finally, the whole line of argument boils down to the much-cherished and much-referred to finding of the inability of the Security Council of the U.N. to act and, thus, a threat of force is elevated to the status of a means of enforcing the law[36] . The threat of force is also presented as having the merit of being a lesser and often reasonable form of coercion[37] .

If the above suggestions are accepted the aspect of inter-State relations which is more likely to be encroached upon is the very peace and order among nations. It is submitted that first, to base an argument in favour of the threat of force on the difference of the ultimate values protected in domestic and international communities is a *non sequitur* . Domestic law is also preoccupied with order and peace among the individual members of human society. Indeed, a means to achieve this is the legal requirement to refrain from exercising duress etc. against another member of the community. Similarly, the prohibition of the threat of armed force aspires to achieving the same end.

Secondly,it must be admitted that international law is linked with coercion ; at the same time, however, it must also be borne in mind that international law regulates armed coercion: the unilateral use of force is only permitted in the exercise of the right of individual or collective self-defence if an armed attack occurs (Article 51 of the U.N. Charter).

Thirdly, the lack of effectiveness of enforcement machinery on the international plane may be a *prima facie* serious defect of international law. It should be realized, however, that on both domestic and international planes it is primarily the individual members of the community that have the duty to observe the law and that police action is an exceptional measure and does not represent the rule on the domestic plane.The existence or not of enforcement machinery does not in any case

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[34] Ibid. p. 250.
[35] Ibid. p. 251.
[36] Ibid. p. 253.
[37] Ibid. pp. 253, 261.

waive the undertaking by members of both the international and domestic communities to respect the law.

A threat of armed force is said to be used to vindicate and enforce a right against another State or to promote the settlement of a dispute. However, the use of a means of coercion does not solve a dispute in the long-run. It merely inflicts a fast, rather resentful and unilaterally assessed settlement which may constitute a temporary solution but not an ultimate settlement of the dispute. The threat of force by Greece against Turkey in March 1987 may have caused Turkey to refrain from conducting hydrographic research on the Aegean Sea continental shelf, but it has by no means provided a solution to the dispute over the Continental shelf as such.

As for the vindication of a denied right the reliance on the *Corfu Channel Case* and, in particular, on the fact that the Albanian authorities regarded the exercise of the customary right of innocent passage by the British warships on 22 October 1946 as a threat of force does not hold any water in view of two points.

First, a threat of force constitutes by its very nature an act short of and equally coercive with an actual use of force and ,therefore, an act of self-help which was expressly rejected by the Court in the very same case with regard to the *Operation Retail* - The mine-sweeping of the Corfu Channel by the British Navy in order secure evidence against Albania[38] .

Secondly, it is implicit in the Court's Judgment in the *Nicaragua Case* that what a State conceives as a threat of force is not in itself conclusive of the character of such an act. The ultimate conclusion lies with the circumstances in which the action allegedly constituting a threat was carried out[39] . In the light of the *Nicaragua Case* the circumstances in which the passage of the British warships took place on 22 October 1946 indicated nothing less than the exercise of a right established in customary law[40] . The threat of use of force because of its coercive nature does not constitute a peaceful means for the settlement of disputes between States in the sense of Article 2(3) of the U.N. Charter; on the contrary, temporary suspension of disputes effected by the threat of force may contain the seeds of escalating a dispute to the point of resorting to actual armed violence[41] .

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[38] I.C.J. Rep. 1949, p. 4, at pp. 34-35.
[39] I.C.J. Rep. 1986, p. 14, at p. 118, para 227.
[40] I.C.J. Rep. 1949, p. 4, pp. 30-31.
[41] *Supra* n. 18.

In conclusion, it is submitted that a threat of force in violation of Article 2(4) of the Charter and customary law exists if there is an explicit or implicit indication of the intention to use force by one State against another that is not factually premised on an exception to the rule of non-use of force. This statement of intention to use force must be viewed against the background of the relations between both States with regard to a specific dispute and in the light of the facts surrounding the articulation of the purported threat.

CHAPTER 5
FORCE: ECONOMIC COERCION[1].

The prohibition of the threat or use of force in Article 2(4) of the United Nations Charter has been left unqualified. This being the case the issue arises whether the said prohibition extends over economic coercion. The question is rather complex in view of the broadness, interdependence and multifarness of inter-State economic activity. Furthermore, it is well established that the regulation of a State's foreign trade relations is normally a right within the sovereign prerogative of every State, namely, that international law imposes no obligation on any State to trade with any other State[1bis]. On the other hand it is equally a fact that foreign trade , because of its nature, affects other nations[2].

Moreover, the concept of State sovereignty suggests readiness to concede concomitant rights to other States and assume obligations under international law[3]. Therefore, while *prima facie* the freedom of economic conduct of States is something undisputed under international law, it does

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[1] The topic is sometimes held to include *political or ideologigal coercion* . The situation envisaged by this term is political or ideological propaganda that emanates from abroad and is directed against the Government of the target State. Viewed from the point of the State that is its source, such conduct may be a legitimate exercise of the right of freedom of expression. Conversely, if the target Government has genuine popular support, then ideological propaganda may have no effect on the citizenry. In case, however, of domestic political discontent, such propaganda may constitute a critique that can influence the attitude of the local electorate, for instance, but it is unlikely to be the sole factor of an ultimate fall of an unpopular Government. The seeds of such eventuality already exist within the local population. It is only where such action is accompanied by severe economic measures, or even material assistance to insurgents, that may form the component of an act of unlawful intervention - viz. the charges made by Lebanon against the U.A.R. in 1958: It was alleged that hostile propaganda was coupled with infiltration of armed bands in Lebanon. The practice of States contains no instance where political propaganda alone was held to constitute a case of violation of the rule of non-use of force. This is not the case with regard to economic coercion which is to be dealt with in this section. On political coercion see Farer, Political and Economic Coercion in Contemporary International Law, *79 A.J.I.L. 405 (1985)*, p. 407.

[1bis] See Vattel, *Le Droit des Gens, Book I, Ch. VIII, The Classics of International Law, 1916*, p. 40; *Nicaragua Case (Merits)* I.C.J. Rep. 1986, p. 14, p. 138, para 276; J.C. Henderson, Legality of Economic Sanctions under International Law; The Case of Nicaragua, *43 Wash. and Lee L.R. 167 (1986)*, p. 179. *Cf*. Lauterpacht, Boycott in International Relations, *14 B.Y.I.L. 125 (1933)*, p. 130; Akehurst, *A Modern Introduction to International Law 6th ed. 1987*, p. 16; S.C. Neff, Boycott and the Law of Nations: Economic Warfare and Modern International Law in Historical Perspective, *59 B.Y.I.L. 113 (1988)*, pp. 114-5, 129.

[2] Thomas & Thomas, *Non-Intervention. The Law and its Import in the Americas, 1956*, p. 409.

[3] Brownlie, *Principles of Public International Law, 4th ed. 1990*, p. 288; Lillich, Economic Coercion and the International Legal Order, *51 Int. Aff. 358 (1975)*, pp. 366-7.

not seem to be unlimited due to the reciprocity which is implicit in the principles of State sovereignty and the sovereign equality of States. However, the above contention is by far less absolute and rigid than the asserted prohibition of economic coercion under Article 2(4) of the Charter.

At the outset the present author must exclude three types of economic conduct which is not relevant to the issue under consideration.

First, certain economic conduct may be unlawful under specific provisions of treaties. The General Agreement on Tariffs and Trade[4] , for instance, introduces in Article 1 the most-favoured-nation clause to eliminate discriminatory economic measures among the Members of the Organisation and Article 11 stipulates the unlawfulness of discriminatory export prohibitions or restrictions. A similar prescription also appears in the context bilateral treaties. An illustration of this are the so-called Treaties of Friendship Commerce and Navigation (F.C.N. Treaties) which the U.S.A. has concluded with over 40 countries and which provide for the undertaking by one party not to discriminate or restrict the import or export of a product in which the other party has an important interest, unless such restrictions are applied to like imports from or exports to all other countries[5] . One such Treaty was concluded on January 21, 1956 between Nicaragua and the U.S.A.[6] In the *Nicaragua Case*[7] , Nicaragua claimed that the U.S. had violated the provisions of the F.C.N. Treaty relating to the freedom of communication and commerce. The Court upheld the claim by ruling that " ... [I]n the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce ...".[8] Moreover, with regard to the Executive Order dated May 1, 1985 whereby the President of the United States imposed an all-out embargo on Nicaraguan exports to the U.S.A., the Court held that it

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[4] Text of the Agreement in *55 U.N.T.S. 266* .

[5] See D. Muir, The Boycott in International Law, in Lillich (ed.), *Economic Coercion and the New International Economic Order, 1976*, p. 21 at p. 34.

[6] *9 U.S.T. 449* . Article 14(2) accorded both parties most-favoured nation status and precluded both the United States and Nicaragua from restricting the imports or exports of the other party, unless the restricting party applies the same restrictions to all third parties with whom the restricting State trades. The Treaty was terminated by the U.S.A. on 1 May 1985, and the termination took effect on 1 May 1986.

[7] I.C.J. Rep. 1986, p. 14.

[8] Ibid. p. 139, para 278.

"constituted a measure in contradiction with Article 19 of the 1956 F.C.N. Treaty"[9] .

Secondly, economic measures authorised by a competent organ of an International Organisation as sanctions must be excluded. This is the case, for example, of the economic sanctions imposed by the United Nations Security Council under Article 41 of the Charter against Rhodesia by virtue of the S.C. Res. 232 (1966)[10] and S.C. 253 (1968)[11] , against South Africa by S.C. Res. 418 (1977)[12] , and against Iraq by S.C. Res. 661 (1990)[12bis] .

Thirdly, economic coercion is justified, outside treaty commitments, when exercised by way of defensive[13] or punitive retaliation. The retaliatory exercise of economic coercion is revealed in the practice of some States.

The West German "Parliamentary Weeks" held in West Berlin in February 1968,were considered by the Soviet Union as breach of the Allied Agreements. When the Soviet protest was rejected, East Germany imposed restrictions on the traffic of goods and travel between East Germany and West Berlin. These measures were justified as a form of "self-defence". The East German Minister of the Interior said that "It is the clear duty of our socialist State to protect its citizens from dangers emanating from the West".[14]

In 1969 the Spanish authorities suspended the Gibraltar - Algeciras ferry service "in defence of Spanish interests"[15] . The Spanish action was related to the dispute between Spain and the U.K. over exercise of sovereignty in respect of Gibraltar.

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[9] Ibid. p. 140, para 279. The plea of national security that the U.S. Government argued in justification for the economic measures against Nicaragua under Article 21 of the 1956 F.N.C. Treaty was also rejected by the Court; Ibid. pp. 141-142, paras 281-282.

[10] Resolutions and Decisions of the S.C. 1966, S.C.O.R. 21st yr. , p. 7.

[11] Ibid. 1968, S.C.O.R. 23rd. yr. , p. 5.

[12] Ibid. 1977, S.C.O.R. 32nd yr. , p. 5.

[12bis] Lauterpacht & others (eds.), *Kuwait Crisis-Basic Documents, 1991*, p. 88. See also S.C. Res. 713 (1991) of 25 September 1991 imposing a mandatory arms embargo on Yugoslavia; S.C. Res. 733 (1992) of 23 January 1992 imposing a mandatory arms embargo on Somalia; S.C. Res. 748 (1992) of 31 March 1992 imposing a mandatory air and arms embargo on Libya.

[13] This is inferred by the concept of proportionate counter-measures against political intervention introduced by the Court in the *Nicaragua Case* . See *infra* Part Two, Ch. 9, Second Title.

[14] Keesing's 1968, pp. 22799-22800.

[15] Keesing's 1969, p. 23453.

In 1960 President Eisenhower reduced the quota of sugar import to the United States from Cuba[16] . The U.S. Secretary of State denied that the reduction of the sugar quota was an exercise of reprisal[17] . However, the U.S. Court of Appeal for the 2nd Circuit stated in the *Banco National de Cuba v. Sabbatino* that "legislative history made it abundantly clear that the main purpose ..... was to impose a sanction against an unfriendly nation.".[18] The Cuban Government responded by nationalizing U.S. property in Cuba by virtue of Law No 851 of July 6, 1960, "in the security and defence of the state".[19]

Most recently retaliatory action by instituting economic measures has been taken by both the European Community and the United States. In February 1985, a GATT panel ruled that U.S. trade in fresh oranges had been substantially impaired and that tariff preferences given by the E.C. to Mediterranean countries had upset competition between U.S. and Mediterranean supplies. At a session of the GATT Council on April 29, the E.C. refused to allow the panel's finding to be endorsed or to implement its recommendation that some alternative tariff compensation be offered. As a response the U.S. increased the tariffs on E.C. pasta imports and the E.C. retaliated by raising the duty on U.S. lemons[20] .

Another illustration of economic reprisal is the U.S. imposition of 100 per cent duties on E.C. products on 1 February 1989 in retaliation for the imposition of 100 per cent tariffs on U.S. growth-hormone-beef by the E.C. on 1 January 1989[21] .

By virtue of Executive Orders 12543 and 12544 of 7 and 8 January 1986 the President of the U.S.A. ordered, respectively, the prohibition of trade between U.S. citizens and Libya and blocked Libyan Government property situated in the U.S.A. or held by U.S. citizens[22] .

In the immediate aftermath of the invasion of Kuwait by Iraq on 2 August 1990, the Governments of the U.K. , the U.S.A. and other countries

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16 Keesing's 1960, p. 17538.
17 43 Dept of State Bull. p. 404 (Statement of 24 August 1960).
18 307 F. 2nd 845 (1962).
19 Bowett, International Law and Economic Coercion, in Lillich (ed.) op. cit. *supra* n. 5, p. 89, at p. 94.
20 Keesing's 1986, p. 34366.
21 Keesing's 1989, pp. 36405, 36712.
22 See *U.S. Federal Register, vol. 51,* No 11 (Jan. 16, 1986); *25 I.L.M. 173-202 (1986).*

took unilateral action to freeze Iraqi and Kuwaiti assets within their territories. Greenwood has taken the view that the above action constituted " ... economic measures as first steps of collective self-defence with Kuwait or ... economic counter-measures in response to an unlawful attack against a friendly State ..."[22bis]

Lastly, the lawful character of economic reprisals is *a fortiori* supported by the *U.S. - France Air Services Award* [23] .

By virtue of the Air Services Agreement of 27 March 1946 between France and the U.S.A.[24] , air carriers designated by the U.S. were authorised to operate from the West coast of the U.S. to Paris, via London. Pan American World Airways (*PanAm*) was designated by the U.S. as carrier and it intermittently operated services untill March 1975.

In 1978 *PanAm* informed the French authorities of their intention to resume services on the same route with a change of gauge in London from a Boeing 747 aircraft, which would be used between the U.S. and London, to a smaller Boeing 727 aircraft, which would be used between London and Paris when the flight would have fewer passengers. The proposed change was rejected by the French authorities as inconsistent with the 1946 Agreement. The U.S. challenged the above interpretation.

PanAm resumed the gauge according to the proposed change and on 3 May 1978 the French authorities refused to allow the passengers to disembark and ordered the *PanAm* 727 aircraft to return to London. On 4 May 1978, the U.S.A. proposed arbitration and France accepted in principle on 13 May. However, on 9 May 1978 the U.S. Civil Aeronautics Board required two French airlines to file schedules of their proposed flights. On 31 May, the Board issued a further order (which was to be implemented on 12 July 1978) prohibiting *Air France* to operate certain flights to the U.S. The second order never came into effect because on 11 July 1978 the two countries agreed to submit the dispute to arbitration.

[22bis] Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, *55 Modern L.R. 153 (1992)*, p. 159.

[23] U.N.R.I.A.A. vol. XVIII, p. 417; 54 I.L.R. 304.

[24] *139 U.N.T.S. 253* ; Exchange of Notes of 5 April 1960 amending the 1946 Agreement, *458 U.N.T.S. 292* .

One of the issues the tribunal was seized with consisted of the question of whether the U.S. had the right to take the measures it had prescribed on 9 May[25] . The arbitral Tribunal unanimously held that when a State considered that an obligation owed to it had been violated it was entitled to resort to "counter - measures", provided that "its retaliation was in approximate proportion to the alleged violation"[26] . Moreover, the Award marked a considerable departure from the requirement for prior unsuccessful resort to peaceful means for obtaining redress for the wrong suffered, in that it did not consider such process as obligatory on the part of the injured party even if there was a duty to negotiate or to resort to arbitration[27] .

Expropriation of alien property may be undertaken by way of reprisal. The nationalisation of the B.P. concession by the Libyan Government in 1971 was justified as a retaliatory measure against the failure of the U.K. to prevent the occupation by Iran of the Tumb islands in the Persian Gulf[28] .
However, it has been suggested that an act of expropriation appears to constitute more than punitive retaliation in that it amounts to a permanent economic "gain" for its author and, correspondingly, to a permanent economic "loss" for its target. It, therefore, seems to lack the character of a coercitive act that is undertaken to counter a prior detrimental conduct, which, if it ceases, renders the economic reprisal redundant[29] .

The above instances of lawful or unlawful economic coercion cover a substantial part of inter - State economic relations. The question that arises, therefore, is whether the exercise of economic force as such against a State may be as damaging and onerous as it is the case with the use of armed force and, if so, whether it should be prohibited by Article 2(4) of the United Nations Charter. There is little doubt that economic pressure may be a powerful weapon against the economy, internal stability or the political independence of a State.

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[25] U.N.R.I.A.A. vol. XVIII, p. 419.
[26] Ibid. p. 443, paras 81, 83.
[27] Ibid. p. 443, para 89. *Cf*. Bowett, Economic Coercion and Reprisals by States, *13 Va J.I.L. 1 (1972)*, p. 10. *Contra* Elagab, *The Legality of Non-Forcible Counter-Measures in International Law, 1988*, pp. 77-8.
[28] The islands were part of the State of Ras Al-Khaymah (now a constituent element of the U.A.E.) that was under U.K. protection; see D.J. Harris, *Cases and Materials on International Law, 4th ed. 1991*, p. 541.
[29] See Elagab op. cit. *supra* n. 27, pp. 105-6, 111; Farer, *79 A.J.I.L. 405 (1985)*, pp. 411-412.

After the nationalization of the Anglo - Iranian Oil Company by the Iranian Government in 1951, the United Kingdom and the seven major international oil companies refused to buy Iranian oil and threatened to stop buying from shipping companies who carried Iranian oil; the result was that only 40 tankers loaded Iranian oil during Mossadech's rule from 1951 - 54 [30]. Furthermore, the great public discontent towards S. Allende's Government in Chile in 1973 was caused to a great extent by the economic pressure exercised by the U.S. Government[31].

Authority has argued that "the flow of goods and services in the international arena can be managed as to inflict a substantial measure of coercion upon a target state and ... with increasingly tight economic interdependences, the vulnerability of most states to economic coercion tends to increase"[32]. That economic coercion is by its nature likely to be potentially detrimental to the State against which it is directed is not a conclusion drawn from recent international practice. In the period prior to the U.N. Charter the practice of boycott was extensively used[33].

In 1932, during the Manchurian conflict between China and Japan, the Chinese resorted to a boycott of Japanese goods. The legality of the above measures was considered by the Special Committee of Nineteen of the Assembly of the League of Nations. This Committee did not reach a conclusion with regard to the lawfulness of the boycott at its inception, but considered it as a lawful measure of reprisal for the Japanese attack on Manchuria, on September 18,1931[34].

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[30] See Delanis, Force under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion, *12 Vand. J. Trans. L. 101 (1979)*, p. 125.

[31] Sigmund, The "Invisible Blockade" and the Overthrow of Allende, *52 Foreign Aff. 322 (1974)*.

[32] McDougal & Feliciano, *Law and Minimum World Public Order, 1961*, p. 196.

[33] The term *boycott* means the variety of measures directed at the social and economic isolation of an adversary, whether privately or governmentally organised on the domestic or international plane; see *Encyclopaedia of Public International Law, vol. 3*, pp. 74-5.

[34] See L.N.O.J. 1933, Spec. Suppl. 112, at p. 56. When the Assembly of the League adopted the Report of the Lytton Commission of Inquiry it stated that: " The use of the boycott ... could not fail to make a situation which was tense still more tense. The use of the boycott by China, subsequent to the events of September 18, 1931, falls under the category of reprisals"; see *28 A.J.I.L. Suppl. 145 (1934)*. Also see Wehberg, L' Interdiction du Recours a la Force: Le Principe et les Problèmes qui se posent, *78 H.R.C. 7 (1951 I)*, pp. 69 notes 2-4, 70; Bowett, *Self-Defence in*

The issue of economic coercion has been dealt with by a number of jurists who have suggested tests pertaining to the legality or not of this form of coercion.

Bowett, takes the view that economic conduct should be judged by the intent of its author and to that extent he proposes as a yardstick the concept of "economic conspiracy" by analogy from the English law of Tort[35] . The merit of this theory is that it protects the economic interests of a State and does not legitimise economic coercion injurious to another State when the furtherance or protection of the political interests of the author of the economic measures is involved[36] . This theory has been criticized in that it can be very difficult to apply in practice because Governments rarely make revealing admissions with regard to their decision-making[37] .

Some authorities have propounded the theory of a reliance test which applies to situations of a State using economic aid or trade agreements to cause another State to rely on it economically[38] . The illicit character of an economic conduct with regard to the above situations lies in the case of an abrupt discontinuance of trade[39] . Again, this theory was criticized on the basis of disregarding the premise that it is a prerogative of State sovereignty to trade or not with other States[40] as well as on the numerous instances of economic measures taken in reprisal; in 1982 Nigeria suspended oil shipments to Ghana until one-fifth on oil debt totalling $150,000,000 had been paid[41] .

A third submission bases the unlawfulness of certain economic conduct on its effect on the target-State, and more specifically, on any action that deprives the target State of essential resources or interfering with its normal economic

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International Law, 1958, p. 114; Goodrich, Hambro, Simons, *The Charter of the United Nations, Commentary and Documents, 3rd ed. 1969,* p. 49.

35 Bowett loc. cit. *supra* n. 19, p. 93. See also Winfield & Jolowicz on *Tort, 13th ed. 1989,* pp. 514-521.

36 Ibid.

37 Elagab op. cit. *supra* n. 27, p. 195; Delanis loc. cit. *supra* n. 30, p. 119; Parry, Defining Economic Coercion in International Law, *12 Texas I.L.J. 1 (1977)* , p. 4.

38 McDougal & Feliciano op. cit. *supra* n. 32, pp. 121-9; Parry *supra* n. 37.

39 Elagab *supra* n. 37; Damrosch, Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs, *83 A.J.I.L. 1 (1989),* pp. 32-7 but *cf*. p. 39.

40 See *supra* n. 1bis.

41 Elagab *supra* n. 37.

conditions[42] . The Arab oil embargo of 1973 may fall under the above contention with regard to the States that were not directly involved in the Palestine situation[43] .

Lastly, there is the mixed intent-effect submission with regard to economic coercion whereby an economic conduct would be deemed illicit only if its purpose would be to annihilate the target State economically with the result seriously compromising its security[44] .

All the above proposals about the licit or not character of economic conduct have the merit of contributing various criteria and standards which will enable to identify the nature of certain economic measures resorted to by States. But they only refer to the inherent substance of economic conduct as such. However, it is submitted that is not directly relevant with regard to the specific *de lege lata* prohibition of economic coercion under international law in general and Article 2(4) of the Charter in particular. It is submitted that the establishment of the injurious nature of a certain economic conduct, by whatever criteria or standards, only implies but does not in itself ascertain with finality the violation of one or another rule of international law. What is needed is to seek for a prohibiting rule of international customary or treaty law which is a totally distinct matter. Thus, the question arises whether Article 2(4) which launches a general prohibition of the threat or use of force and which embodies a principle of both treaty and customary law[45] , bans economic coercion.

At the San Francisco Conference where the Charter of the United Nations was drafted, the Brazilian delegate proposed an amendment to the original paragraph 4 of Chapter II of the Dumbarton Oaks proposals[46] , including the use of economic measures under the prohibition of the use of force[47] . The said amendment was rejected with a big majority[48] ; however, a

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42 Thomas & Thomas op. cit. *supra* n. 2, p. 91.

43 Bowett loc. cit. *supra* n. 19, pp. 90-1, n. 8; cf . Shihata, Arab Oil Policies and the New International Economic Order, *16 Va J.I.L. 261 (1976)* .

44 See Muir, *9 Journal of International Law and Economics 186 (1974)*, p. 203; cf . Paust & Blaustein, The Arab Oil Weapon-A Threat to International Peace, *68 A.J.I.L. 410 (1974)*, p. 414; McDougal & Feliciano op. cit. *supra* n. 38, pp. 190-6; Neff loc. cit. *supra* n. 1, pp. 140, 146; Farer, *79 A.J.I.L. 405 (1985)*, p. 413.

45 I.C.J. Rep. 1986, p. 14, at pp. 97-100, paras 183-188.

46 Text of the Proposals in U.N.C.I.O. vol. 3, p. 3.

47 U.N.C.I.O. vol. 6, p. 559.

48 Ibid. pp. 334-5. The Brazilian amendment was rejected by 2 votes to 26.

number of jurists[49] take the view that economic force falls under the prohibition of Art. 2(4) mainly due to the lack of clarity of the reasoning behind the rejection of the Brazilian amendment and the statement made by the U.S. delegate that the phrase "or in any other manner [inconsistent with the purposes of the United Nations]" was designed to ensure that there should be no loopholes in the application of Article 2(4)[50] .

During the quest for the definition of Aggression by the Special Committee on the Definition of Aggression in 1953, two attempts by Bolivia[51] and the U.S.S.R.[52] to introduce economic coercion therein failed to be adopted. Moreover G.A. Res. 3314 (XXIX) of 1974 does not include any reference whatsoever to economic aggression. Article 5 of the Definition provides *inter alia* that no no economic consideration may serve as a justification for aggression. This, however, is far from prohibiting economic coercion. Instead, it expressly prohibits the use of armed force to repel such conduct or to advance a State's economic interests[53] .

The question of the prohibition of economic coercion under Article 2(4) was very widely debated in the course of the drafting by the special Committee on Friendly Relations,of the Declaration on Principles Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (G.A. Res. 2625 (XXV) of 24 October 1970).

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[49] See Bucheit, The Use of Non Violent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations, *122 U. Pa. L.R. 983 (1974)*, p. 1010; Zedalis, Some Thoughts on the United Nations Charter and the Use of Military Force against Economic Coercion, *17 Tusla L.J. 487 (1982)*, p. 493; Paust & Blaustein, *68 A.J.I.L. 410 (1974)*, pp. 417-8.

[50] *Contra* Brownlie, *International Law and the Use of Force by States, 1963*, p. 362; Bowett, *Self-Defence in International Law, 1958*, p. 148; Goodrich, Hambro, Simmons op. cit. *supra* n. 34, p. 49; Lillich, Economic Coercion and the "New International Economic Order": A Second Look at Some First Impressions, *16 Va J.I.L. 232 (1976)*, p. 236; Stone, *Aggression and World Order, 1958*, p. 59; Dinstein, *War, Aggresion and Self-Defence, 1988*, p. 84; *cf* . Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of Sources of International Law, 1979*, p. 100.

[51] Doc. AC.66/L. 9, 15 September 1953, para 3.

[52] Doc. A/AC. 66/L. 11, 14 October 1953, p. 2.

[53] The attempts by the delegates of Latin American and developing States to include economic coercion in the draft Definition of Aggression were unsuccessful. See G.A.O.R. 29th session, Sixth Committee, Summary Records of Meetings 18 Sept.-9 Dec. 1974, pp. 54 (Peru), 55-6(Kenya), 69(Pakistan), 72(Argentina), 73(Bolivia), 85(Cuba). *Cf* . p. 44 (Sweden). See also Farer, *79 A.J.I.L. 405 (1985)*, pp. 410-411; *Contra* Stone, *Conflict Through Consensus, 1977* .

Two opposing views by two different groups of States were put forward with regard to the alleged prohibition of economic pressure by Article 2(4) of the Charter[53a] . The Latin-American, Socialist and developing States supported that economic force was included in the prohibition of the threat or use of force under Article 2(4) and the relevant arguments may be summarized under the following points[54] :

First, the text of Article 2(4) was not clearly limited either textually or by necessary implication to a prohibition of armed force alone. Where the Charter of the U.N. meant armed force it used that term expressly- viz. the Preamble and Article 46 of the Charter.

Secondly, since the Security Council could apply either economic or other measures under Article 41 of the Charter it was clear that the Charter did not intend to make a sharp distinction between armed and other forms of force.

Thirdly, the rejection of the Brazilian amendment in the San Francisco Conference did not imply that States at the Conference did not agree with ideas contained in that amendment.

Fourthly, economic force was a force to be reckoned with. Therefore the Charter should be interpreted in the light of current developments and needs so that the principles and purposes of the Charter be given their fullest effect.

The Western States opposed the above view and their line of argument was the following[55] :

First,the term "force" in Article 2(4) refers to armed force only and this interpretation is in accordance with the Preamble of the Charter which states that "armed force shall not be used save in the common interest".

Secondly, were economic and political pressure to be embraced by Article 2(4) there would be a *lacuna* in the Charter, namely, that there would be a whole series of situations with which the Organisation would be unable to deal effectively. The Security Council could hardly categorize most cases of economic or political coercion as breaches of peace or threats to peace under Article 39 of the Charter. Moreover, there was no foundation in the practice of States for the interpretation that economic measures taken by

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53a *Cf*. Neff, **loc. cit.** *supra* n. 3, pp. 124-9, 137-140, 145.

54 G.A.O.R. 20th session, 1965, U.N. G.A. Annexes, pp. 88-90; Id. 21st session, 1966, pp. 35-37; Id. 22nd session, 1967, pp. 14-15.

55 Ibid.

virtue of Article 41 of the Charter constituted prohibited use of force. Lastly, there was the danger of broadening the content of the right of self-defence. Thirdly, at the San Francisco Conference an amendment submitted by Brazil to extend the prohibition of Article 2(4) was rejected.
Fourthly, it would be difficult to distinguish between economic and and political pressure of a degree likely to imperil "the territorial integrity or political independence" and less severe economic or political pressures to which States resort in the course of their diplomatic relations. To lay down a general rule in advance might result to interfering with the right of States to regulate their economic relations with one another.
Finally, there were certain forms of economic coercion that clearly violated the principles of international law, which, however, should be considered within the context of intervention and not the use of force.

From the final text of G.A. Res. 2625 (XXV) of 1970 it becomes clear that the consensus reached was that economic pressure were to be dealt with under the principle of non-intervention and not that of the non-use of force. The relevant passage of the Resolution reads as follows[55a] :

"No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."

The same wording appears in operative paragraph 8 of G.A. Res. 42/22 of November 18, 1987, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations[56] . Indeed, both the above texts constitute *verbatim* restatements of operative paragraph 2 of G.A. Resolution 2131 (XX) of 21 December 1965, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty[57] .

Finally, in the *Nicaragua Case* the Court found that the principles as to the use of force incorporated in the Charter - and the fundamental principle

[55a] G.A. Res. 2625 (XXV) G.A.O.R. 25th session, Suppl. No 28, p. 121.
[56] G.A. Res. 42/22, G.A.O.R. 42nd session, Suppl. No 49, p. 287.
[57] G.A. Res. 2131 (XX) G.A.O.R. 20th session, Suppl. No 14, p. 11.

in this area is that expressed under Article 2(4) - "correspond, in essentials, to those found in customary international law".[58] The question of economic coercion was not dealt with in the context of the principle of non-use of force and this could not have been the case at all because Nicaragua, the plaintiff, asserted that the U.S.A. was responsible for an indirect form of intervention in its internal affairs inasmuch it has taken certain action of economic nature against Nicaragua, namely, the cessation of economic aid in 1981, the 90% reduction in the sugar quota for U.S. imports from Nicaragua and the trade embargo of 1985[59] . The Court in finding that there was no breach of the customary rule of non-intervention with regard to the economic measures imputed to the U.S.A. , clearly distinguished between economic coercion in violation of specific treaty provisions - such as Article 19 of the O.A.S. Charter - and economic force under customary law which was dealt with under the principle of non-intervention[60] .

It may thus be submitted in conclusion that economic conduct of a certain nature may be rather injurious and detrimental to the State against which it is directed. Certainly, such economic pressure is not licit and is not exonerated under customary international law. Whether the unlawful character of such economic pressure is based on the intent of its author, or on its effect upon the target-State, or on both, or on a so-called bond of reliance, its prohibition is formulated on the basis of the principle of non-intervention and not that of the non-use of force. Indeed, as we have already seen, economic relations between States are multifarious and it is often difficult to pronounce upon the lawfulness or not of such or such economic conduct. A flexible and broad aspect of inter-State relations of this sort is best, in the present author's view, regulated by the principle of non-intervention. Indeed it has been said that "[A] reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of

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[58] I.C.J. Rep. 1986, p. 14, at p. 99, para 188.

[59] Ibid. pp. 125-6, paras 244-245.

[60] Ibid. p. 126, para 245. Indeed, due to the multilateral treaty reservation of the U.S.A. in accepting the jurisdiction of the Court under Article 36(2) of the I.C.J. Statute, the Court was prevented from applying such multilateral treaties like the O.A.S. Charter or the GATT agreement.

Poland"[61] . Each economic activity of allegedly coercive nature could be considered according to the standards set by various jurists and if found injurious it could be condemned as a violation of the principle of non-intervention.

By contrast the prohibition of the threat or use of force is of an *a priori* absolute and rigid character in that, it is submitted, it refers to a particular action from the moment of its initiation; armed force seems to fulfil this requirement. The brand of intervention by contrast may not be attributed to a particular action from its very initiation and there, in the present author's view, lies the reason for considering the regulation of economic coercion under the principle of non-intervention. The coercive nature of an interventionary activity may not be *prima facie* discernible and this has been very comprehensively stated by Sir Ian Sinclair in the course of the drafting of Resolution 2625 [62] :

> "In considering the scope of intervention it should be recognized that in an interdependent world it is inevitable and desirable that states will be concerned with and will seek to influence the actions and policies of other states and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of states and the self-determination of their peoples"

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[61] See Winfield, The History of Intervention in International Law, *3 B.Y.I.L. 130 (1922-23)*, p. 130.

[62] See Doc. A/AC.119/L. 8, G.A.O.R. 20th session, Annexes, p. 116.

CHAPTER 6
THE USE OF FORCE IN THE "INTERNATIONAL RELATIONS" OF STATES. SELF-DETERMINATION OF COLONIAL PEOPLES AND ARTICLE 2(4) OF THE CHARTER .

1. *Introduction* .

Article 2(4) of the United Nations Charter imposes on Member States the duty to refrain "in their international relations" from the threat or use of force. It can be logically inferred, therefore, from the wording of Article 2(4) that the prohibition of the use of force by States applies only with regard to situations of resort to armed force on the international plane. Consequently, the use of armed force by a State within its territory and against its citizens does not run contrary to Article 2(4) of the Charter[1] . Thus, a State may use force in a variety of situations which range from the dispersing of demonstrations by its police or armed forces, as it was the case in the Chinese capital Beijing in June 1989 and in Romania in December 1989, to the suppression of a rebellion or insurrectionist movement, as it is the case of the force used by the Nicaraguan Government against the *contra* guerrilla movement.

Controversy has arisen with regard to the lawfulness of the use of force by the incumbent Government and its character as force used in the internal relations of the State, in cases of armed struggle of colonial peoples against the State administering their territories- in other words, struggle for the realization of the right of self-determination of those peoples.

2. *The Concept of Self-Determination in International Law* .

In Verzijl[2] the following passage occurs:

[1] The use of armed force against the nationals of another State falls within the international relations of States(as is the case with treatment of aliens in general). Moreover, the use of force against the armed forces of a State stationed within the territory of another State by virtue of prior agreement between the two States again constitutes use of force in international relations. See Article 3(d) of the 1974 Definition of Aggression, G.A. Res. 3314 (XXIX) G.A.O.R. 29th session, Suppl. No 31, p. 142.

[2] Verzijl, *International Law in Historical Perspective, vol. i, 1968,* p. 321.

"Seldom has there been advanced as a legal right a claim so obviously of a political nature and of such a slogan-like quality as the so-called right of self-determination"

The concept of self-determination has become the object of great doctrinal debate with regard to its legal nature, its beneficiaries and its content[3] . Nevertheless, in the aftermath of the process of decolonization the nature of self-determination as a legal right can hardly be denied.

The first contractual instrument,where self-determination was cited, was the Charter of the United Nations. Articles 1(2) and 55 thereof refer to the "principle of self-determination" as a basis for the development of friendly relations among nations. Prior to the Charter of the United Nations self-determination was recognized as a principle having political tenor only. The International Committee of Jurists which was appointed by the Council of the League of Nations, stated in its Report on the *Aaland Islands* dispute[4]

"Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations".

Despite the weak formulation in the United Nations Charter, self-determination evolved from a mere principle into a legal right through the practice of the Organisation in the context of decolonisation by way of General Assembly Resolutions, and the attitude of Member States, mainly the Colonial Powers, to the said practice.

The turning point of the recognition of a right to self-determination of the colonial peoples came about by the Declaration on the Granting of

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[3] Authors who take the view that self-determination constitutes a right include: Higgins, *The Development of International Law through the Practice of the Political Organs of the United Nations, 1963*, p. 103; H. Wilson, *International Law and the Use of Force by National Liberation Movements, 1988*, pp. 58-76; Umozurike, *Self-Determination in International Law, 1972* ; R.C.A. White, Self-Determination: Time for Reassessment?, *28 N.I.L.R. 147 (1981)* . *Contra* Verzijl op. cit. *supra* n. 2; Pomerance, *Self-Determination in Law and Practice, 1982* ; Emerson, Self-Determination, *65 A.J.I.L. 459 (1971)* , p. 462; Blum, Reflection on the Changing Concept of Self-Determination, *10 Israel L.R. 509 (1975)* .

[4] L.N.O.J. 1920, Spec. Suppl. No 3, p. 5.

Independence to Colonial Countries and Peoples (G.A. Res. 1514 (XV) of 14 December 1960)[5] , which declares the following:

The General Assembly,.....
Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World Peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

.....

5.Immediate steps shall be taken, in Trust and Non-Self-Governing or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories.....

On 16 December 1966 the United Nations General Assembly adopted the two International Covenants on Economic, Social, Cultural and Civil and Political Rights respectively[6] . Common Article 1(1) to both instruments reads as follows:

1. All peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development. ...

Lastly,the 1970 Declaration on Friendly Relations (G.A. Res. 2625 (XXV) of 1970)[7] includes self-determination as the fifth of the seven principles stated therein, and "solemnly proclaims" that

"... By virtue of the principles of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every state has the duty to respect this right in accordance with the provisions of the Charter...."

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[5] G.A. Res. 1514 (XV) of 14 December 1960, G.A.O.R. 15th session, Suppl. No 16, p. 66. Voting: 89:0:9 abstentions (Australia, Belgium, The Dominican Republic, France, Portugal, Spain, South Africa, U.K. , U.S.A.)

[6] U.K.T.S. 6, (1977) Cmnd 6702; 6 I.L.M. 360, 368 (1966).

[7] G.A. Res. 2625 (XXV), G.A.O.R. 25th session, Suppl. No 28, p. 121.

A plethora of other General Assembly Resolutions referring to *ad hoc* colonial situations reiterated and affirmed the right of self-determination of peoples[8].

Resolution 1514 (XV) constitutes the starting point and the foundation on which the development of the right of self-determination has been effected. The International Court of Justice, moreover, affirmed the status of self-determination as part of positive international law. In the *Namibia Advisory Opinion*[9] the Court held that Resolution 1514 (XV) constituted an important stage in the development of international law related to non-self-governing territories which made the principle of self-determination applicable to all of them and concluded:

> "...In the domain to which the present proceedings relate, the last fifty years have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court,if it is faithfully to discharge its functions may not ignore ..."[10]

In the *Western Sahara Advisory Opinion*[11] the Court reiterated the findings of the *Namibia Opinion* and held that Resolution 1514 (XV) served as the basis for decolonisation that started during the 1960s[12]. Judge Dillard in his Separate Opinion[13] was very explicit in submitting that " ... [T]he pronouncements of the Court thus indicate,....., that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations ...".

The 1970 Declaration on Friendly Relations has been held by the I.C.J. in the *Nicaragua Case*[14] to be declaratory of customary international law. Although the Court was mainly dealing with the

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[8] See for instance G.A. Res. 1699 (XVI) of 19 December 1961, "Non-Compliance of the Government of Portugal with Chapter XI of the Charter of the United Nations and with the General Assembly Resolution 1542 (XV)", G.A.O.R. 16th session , Suppl. No 17, p. 38; G.A. Res. 1742 (XVI) of 30 January 1962, "The Situation in Angola", G.A.O.R. 16th session, Suppl. No 17, p. 67; G.A. Res. 2379 (XXIII) of 28 October 1968, "The Situation in Southern Rhodesia", G.A.O.R. 23rd session, Suppl. No 18, p. 57.

[9] I.C.J. Rep. 1971, p. 16.

[10] Ibid. p. 31, para 53.

[11] I.C.J. Rep. 1975, p. 12.

[12] Ibid. pp. 32-33, para 57.

[13] Ibid. p. 121.

[14] I.C.J. Rep. 1986, p. 14.

customary law on the prohibition of the use of force it found that:

"...The effect of consent to the text of such resolutions cannot be understood as merely that of a reiteration or elucidation of the treaty commitment undertaken in the Charter. On the contrary it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of the use of force, for example, may thus be regarded as a principle of customary law ..."[15]

In the present author's view the comprehensive tenor of language in the above finding of the Court and, in particular, the treatment of the rule of the prohibition of the use of force *as part* of an integral "set of rules" declared by General Assembly Resolution 2625 (XXV), supports the submission that the Court referred to the 1970 Declaration as a whole and not for the purposes of the principle of the use of force only.

Furthermore, because of the fact that the right of self-determination was developed almost exclusively through General Assembly Resolutions the status of the concept as a legal norm was disputed on the grounds of the non law-binding effect of the resolutions of the General Assembly[16] .

Without attempting to discuss this highly controversial issue,which as such can be the subject of a separate study, the present author takes the view that although General Assembly resolutions do not as such have any law-creating effect, due to the provisions of Articles 10 - 14 of the United Nations Charter and unless it is specifically provided so therein, they may be evidence of the state of customary international law. This is the case, if the circumstances of their adoption, namely, the lack of opposing votes, very few abstentions, adoption by consensus, statements of the representatives of Member States, reveal a certain degree of consent to their provisions. This is clearly implicit in the Judgment of the Court in the *Nicaragua Case*[17] .

The attitude of some of the Colonial Powers is of great significance with regard to the transformation of self-determination from a "principle" to a "legal" right under international law. Both the United Kingdom and France, the countries with the largest colonial possessions, abstained when

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[15] Ibid. pp. 99-100, para 188.

[16] L. Gross, The Right of Self-Determination in International Law, in M. Kilson (ed.), *New States in the Modern World, 1975*, p. 176 et seq.

[17] *Supra* n. 15; also see Higgins op. cit. *supra* n. 3, p. 101; White loc. cit. *supra* n. 3; Wilson op. cit. *supra* n. 3, pp. 68-9; *cf*. Arangio-Ruiz, *United Nations Declaration on Friendly Relations and the System of Sources of International Law, 1979*, pp. 92-6.

Resolution 1514 (XV) was adopted. Nevertheless, not long after the adoption of the above-mentioned resolution, their view that self-determination as promulgated
by the 1960 Declaration on Colonialism was merely a hortatory pronouncement and that their policy with regard to non-self-governing territories should exclusively rest on Article 73 of the United Nations Charter, seemed to have changed[18] . In a debate in the Fourth Committee of the General Assembly on the Portuguese African colonies, the U.K. representative stated that "colonialism was dead and that the current policy of the Portuguese Government was wrong"[19] .

Moreover, at a meeting of the Security Council in Addis-Ababa where the situation in the Portuguese territories was debated the U.K. representative agreed that "the peoples of the Portuguese territories should, if it is their wish, be enabled to exercise their inalienable right to self-determination and that the Government of Portugal, in accordance with Chapter XI of the Charter, had the responsibility to lead its dependent peoples towards that goal"[20]. Similarly, France followed the same line of argument referring to the Portuguese colonies of Angola, Mozambique and Guinea-Bissau[21] .

Self-determination is furthermore surrounded by controversy with regard to the beneficiary of the right. Resolutions 1514 (XV) and 2625 (XXV) as well as Article 1 of both the United Nations Covenants on Human Rights postulate self-determination as a right belonging to "all peoples". What exactly is meant by the term "peoples" is quite unclear. There are "peoples" that live within territories geographically separate from the territory of the administering State and that are ethnically and culturally distinct from the population of the latter, or "peoples" that live within the territory of the administering State and are ethnically and culturally distinct from the rest of the population[22] .

In view of the fact that the right to self-determination has rather broad a content, ranging from the granting of constitutional rights on the part of the incumbent Government to the attaining of self-government of a section of the people of the State in the form of the creation of a new

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[18] N. Ronzitti, Resort to Force in Wars of National Liberation, in Cassese (ed.), *Current Problems of International Law, 1975*, p. 319 at pp. 338-341; cf . Emerson loc. cit. *supra* n.3.
[19] See G.A.O.R. 23rd session, Fourth Committee, 1793rd mtg., para 20.
[20] S.C.O.R. 27th yr. 1677th mtg. para 67.
[21] Ibid. para 59.
[22] Pomerance op. cit. *supra* n. 3, p. 2 et seq.

State for example, the controversy related to the beneficiary of the right is further multiplied. According to General Assembly Resolution 1541 (XV) a full measure of self-government could be effected by one of the following means[23] :

(i) Emergence as a sovereign independent state.
(ii) Free association with an independent state.
(iii) Integration with an independent state.

The above alternative situations stand in direct conflict with one of the best established principles of international law, namely, the principle of the territorial integrity of States. They entail the practical consequence of dismembering the territory of a State.

The practice of States and of the United Nations indicates that self-determination amounting to one of the above three situations contemplated by Resolution 1541(XV) may be exercised only in cases of non-self-governing or colonial territories , namely, territories that are "... geographically separate and distinct ethnically and /or culturally ..."[24] from the State administering them. Consequently, this implies that minorities living within the boundaries of established States do not possess a right to self-determination similar to that of colonial peoples and that secession of part of the territory of established States is *prima facie* inadmissible. According to H. Gros-Espiel, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, "[P]eople and nation are two closely related concepts; they may be one and the same but they are not synonymous. The right has been attributed to peoples and not to nations"[25] .

Judge Nagendra Singh in his Declaration appended to the Advisory Opinion of the I.C.J. in the *Western Sahara Case* took the view that the

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[23] G.A. Res. 1541 (XV) of 15 December 1960, G.A.O.R. 15th session, Suppl. No 16, p. 29.
[24] Principle (V) of G.A. Res. 1541 (XV); also see Higgins op. cit. *supra* n. 3, p. 104; Wilson op. cit. *supra* n. 3, pp. 80-1; White, *28 N.I.L.R. 147 (1981)*, pp. 150-1; Brownlie, The Rights of Peoples in Modern International Law, in Crawford (ed.), *The Rights of Peoples, 1988*, p. 5; R. Falk, The Rights of Peoples (in Particular Indigenous Peoples), in ibid. p. 26; Koteswara-Rao, Right of Self-Determination in the Post-Colonial Era: A Survey of Juristic Opinion and State Practice, *28 I.J.I.L. 58 (1988)* ; Thornberry, Self-Determination, Minorities, Human Rights: A Review of International Instruments, *38 I.C.L.Q. 867 (1989)*, p. 874; The Right to Self-Determination. Implementation of the United Nations Resolutions, H. Gros-Espiel, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub. 2/405/Rev. 1, para 90. *Cf*. Kelsen, *The Law of the United Nations, 1951*, pp. 555-6; Pomerance op. cit. *supra* n. 3, p. 4 et seq.
[25] Loc. cit. supra n. 24, para 56; also see U.N.C.I.O. vol. 6, p. 296, Doc. 343 I/1/16, May 16, 1945.

right of self-determination does not apply in cases where the territorial integrity of States is involved[26] . With regard to the United Nations Organisation the above position is epitomized in the statement made by Secretary General U-Thant:

"So far as the question of secession of a particular section of a Member State is concerned the United Nation's attitude is unequivocal. As an international Organisation the United Nations has never accepted and does not accept and I believe will never accept the principle of secession of a part of a Member State."[27]

The practice of States seems to assent to the above statement; the Biafran and the Katangese secessionist movements failed to attract the support of the international community[28] . Only in the case of Bangladesh (formerly, East Pakistan) did secession prove successful and it was recognized by the international community. The fact that East Pakistan satisfied the criteria of Resolution 1541 (XV) for non-self-governing territories, namely, geographical separateness and ethnic distinctiveness, though it had never been considered as such, as well as the fact that it was economically and administratively subordinate to the central government in West Pakistan seem to have qualified it as a self-determination unit[29] .

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[26] I.C.J. Rep. 1975, p. 12, at p. 80.

[27] U.N. Monthly Chronicle, February 1970, p. 36.

[28] The staunchest opponents of secession are the Afro-Asian States which acceded to independence in the 1960s and 1970s. At the Conference of Heads of State or Government of the Non-Aligned countries which took place in Cairo in 1964, the distinction between self-determination and secession was expressly drawn. See Wilson op. cit. *supra* n. 3, pp. 82, 84, but *cf*. p. 85.

[29] Crawford, *The Creation of States in International Law, 1979*, pp. 116-7; Nanda, Self-Determination in International Law, *66 A.J.I.L. 321 (1972)*, pp. 321-6; Mani, The 1971 War on the Indian Sub-Continent and International Law, *12 I.J.I.L. 83 (1972)*, pp. 83-99; Wilson p. 82. *Contra* East Pakistan Staff Study, *8 Rev. Int. Com. Jurists 23 (1972)*, pp. 51-2. *Cf*. G.A. Res. 2625 (XXV). Under the Principle of Equal Rights and Self-Determination of Peoples the following passage occurs:

" ... Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent States, conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour ..."

The above extract seems to suggest that secession and fragmentation of the territory of a State may be admissible if the government of a State is not representative of the population thereof and practices discrimination. See White, *28 N.I.L.R. 147 (1981)*, p. 159; Gros-Espiel, Spec. Rapp., loc. cit. supra n. 24, para 90.

The right of self-determination is also purported to apply to peoples under "alien domination". Apart from colonial situations which certainly seem to fall under the above rubric the term appears to contemplate cases of military occupation of a territory as being a violation of the right of self-determination[30] , such as the case of the Palestinian people[31] and the black population of South Africa.

The territorial factor seems to play an important role in the exercise of the right of self-determination, especially in the practice of the General Assembly. Although the I.C.J. in the *Western Sahara Case* took the view that the expression of the will of the people was paramount[32] , territorial claims may affect the policy of decolonisation to be followed[33] .
Conversely, and notwithstanding the fact that the colonial territory which is to accede to independence is in principle viewed as a whole, the practice of the United Nations is not characterized by rigid consistency as to the process whereby
independence is finally achieved. The former Belgian colony of Rwanda-Urundi became independent as two separate States, Rwanda and Burundi, while in the former British Cameroons different referenda were held in the Northern and Southern regions with the result of the former being integrated with Nigeria and the latter with the independent State of Cameroon[34] . By contrast in the case of the Comoros Archipelago the people of the island of Mayotte were not recognized the right to remain under the Administration of France[35] .

3. *Armed Struggles for Self-Determination and the concept of Domestic Jurisdiction .*

In the 33rd session of the U.N. Commission on Human Rights the representative of Pakistan stated tat: "The right of self-determination was applicable to all peoples whose freedom has been suppressed by external forces .... but that freedom did not include secession of part of a State unless the association in question had been accomplished illegally against the wishes of the peoples concerned", U.N. Doc. E/CN. 4/SR. 1411, para 4.

30 Gros-Espiel, Spec. Rapp., *supra* n. 24, para 45 notes 18, 20, *cf.* n. 23.

31 Ibid. pp. 50-51; Morphet, The Palestinians and their right to Self-Determination, in R.J. Vincent (ed.), *Foreign Policy and Human Rights, Issues and Responses, 1986,* pp. 85-103; Wilson p. 119.

32 I.C.J. Rep. 1975, p. 12, at pp. 36-37, para 72.

33 Ibid. p. 39, para 85; *per Judge Petren* , p. 114.

34 Pomerance p. 19.

35 Gros-Espiel loc. cit. *supra* n. 24, pp. 47-8.

Self-determination as the emergence of independent States has often been attained after a period of armed struggle of peoples against the Power administering their territories - see for instance, Algeria, Angola, Cyprus, Guinea-Bissau, Indonesia, Mozambique, Namibia, Vietnam. Colonial Powers faced with such situations resorted to force in order to suppress the armed struggle undertaken by the peoples aspiring to self-determination and independence. They, moreover, sought to preserve absolute immunity from the concern of the international community, and more specifically of the United Nations Organisation, with regard to the armed conflict within the boundaries of the territories under their administration. This was attempted by invoking the principle of domestic jurisdiction and hence the inadmissibility of interfering with and deliberating on situations of anti-colonial struggle on the international plane. The provision that has been invoked *in abundantia* is Article 2(7) of the United Nations Charter which reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. [36]

It is generally accepted that a matter which has become the subject of international obligations undertaken by a state[37], or a matter that constitutes an actual or potential threat to international peace and security[38], or a matter which involves the interpretation and application

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[36] Article 15(8) of the Covenant of the League of Nations provided:

> If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement.

[37] *Tunis-Morocco Nationality Decrees A.O.*, P.C.I.J. Series B, No 4, pp. 23-4.

[38] See the Consideration of the Spanish Question by the Security Council. The Sub-Committee appointed by the Security Council expressed the view in its report that although the Franco regime in Spain posed no actual threat to the peace in the sense of Chapter VII of the Charter, the continuation of a situation likely to endanger international peace and security took the matter beyond domestic jurisdiction; S.C.O.R. 1st yr., 1st series, Spec. Suppl., pp. 1-2, 8-10, paras 4, 22, 24, 28.

of principles of international law[39] - interpretation of treaties for instance - is not a matter that falls under the domestic jurisdiction of a state[40] .

Forty-five years after the introduction of the United Nations Charter, with self-determination being acknowledged as a legal right under international law, there is no doubt that matters pertaining to the realization of the said right of non-self-governing territories are matters outside the domestic jurisdiction of the State. This submission, however unreservedly stated at present, was met with staunch opposition by certain colonial States during the first three decades of the work of the United Nations.

In 1947 the Netherlands resorted to force against the *Republic of Indonesia* which had been proclaimed in 1945 upon the withdrawal of the Japanese occupation forces. The Netherlands, whose colonial possession Indonesia had hitherto been, only recognized the Government of the Indonesian Republic as exercising *de facto* authority over the islands of Java, Madura and Sumatra while considering herself as the *de jure* sovereign of the territory[41] . When the matter was brought to the attention of the Security Council by Australia and India[42] , the Netherlands opposed the adoption of a draft resolution submitted by Australia[43] on the grounds that there was no threat to or breach of peace in the sense contemplated under Chapter VII of the Charter, that the Republic of Indonesia was not a sovereign State but "a constituent element" of the Netherlands and hence the matter fell essentially within the domestic jurisdiction of the latter[44] .

The Security Council without dealing with the issue of domestic jurisdiction expressly, adopted a resolution[45] calling on both parties to "... cease hostilities forthwith..." and to settle their disputes by peaceful means.

In the course of the *Algerian war of Independence* , France persistently opposed the consideration by the United Nations of the

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39 *Interpretation of Peace Treaties A.O.* , I.C.J. Rep. 1950, pp. 70-71 but *cf . per Judge Krylov*, pp. 111-3; *Interhandel Case*, I.C.J. Rep. 1959, pp. 23-26.

40 Lauterpacht, The International Protection of Human Rights, *70 H.R.C. 5 (1947 I)*, pp. 25-51; Preuss, Article 2, paragraph 7 of the United Nations Charter and Matters of Domestic Jurisdiction, *74 H.R.C. 553 (1949 I)* ; Higgins pp. 58-130; Goodrich, Hambro, Simons, *The Charter of the United Nations, 3rd ed. 1969*, pp. 64-70; Schachter, The United Nations and Internal Conflict, in Moore (ed.), *Law and Civil War in the Modern World, 1974*, p. 422; J.P. Cot & A. Pellet, *La Charte des Nations Unies, 1985*, pp. 153-4.

41 See Wilson p. 106.

42 Letters of 20 July 1947, S.C.O.R. 2nd yr. , Suppl. No 16, S/447 & S/449, pp. 149-150.

43 S.C.O.R. 2nd yr. No 67, 171st mtg. p. 1626.

44 Ibid. pp. 1619-20, 1645-6; 181st mtg. pp. 1920-3; 185th mtg. p. 2011.

45 S.C. Res. 27 (1947) of 1 August 1947; also see, S.C. Res. 63 (1948) of 24 December 1948.

situation in Algeria on the ground that Algeria constituted an integral part of France and, therefore, the matter fell under the domestic jurisdiction of the latter[46] . The view taken by the U.N. General Assembly was opposite in that G.A. Res. 1573 (XV) of 19 December 1960 recognized the right of the Algerian people to self-determination[47] .

Similarly, *Portugal* had taken the view before 1974 - 75 , when she withdrew from all her colonial possessions, that she had been admitted as a Member of the United Nations with all her territories as defined in the Portuguese constitution and that the Organisation should desist from questioning the territorial integrity of the Portuguese state[48] . Again, the General Assembly took the opposite view in Resolution 1542 (XV) of 1960 in that it listed the Portuguese colonies as non-self-governing territories and asserted the obligation of Portugal under Chapter XI of the Charter to report to the United Nations information concerning them[49] . Higgins[50] submitted that "for a state to declare that an overseas possession, whose population is of different race and often in highly organised opposition, to be part of the metropolitan area may well be arbitrary and at variation both with the facts and the common sense"; this seems to constitute the present view of the entire international community. The 1970 Declaration on Friendly Relations[51] states that:

> ... The territory of a colony or other *non-self*-governing territory has a status separate and distinct from the territory of the State administering it ...

In any case the practice of the United Nations organs with regard to the issue of the plea of domestic jurisdiction in cases of armed struggle against colonialism seems to fall in context with the Advisory Opinion of the Permanent Court of International Justice in the *Tunis - Morocco Nationality Decrees Case* [52] in view of the fact that "friendly relations

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[46] Fraleigh, The Algerian Revolution as Case Study in International Law, in Falk (ed.), *The International Law of Civil War, 1971*, p. 191; I.L. Claude Jr., Domestic Jurisdiction and Colonialism, in Kilson (ed.) op. cit. *supra* n. 16, p. 129.

[47] G.A. Res. 1573 (XV) of 19 December 1960 "Question of Algeria", G.A.O.R. 15th session, Suppl. No 16, p. 3.

[48] Repertory of Practice of the United Nations Organs, Suppl. No 4, vol. 1, pp. 58, 60.

[49] G.A. Res. 1542 (XV) of 15 December 1960 "Transmission of Information under Article 73 e of the Charter", G.A.O.R. 15th session , Suppl. No 16, p. 30.

[50] Op. cit. *supra* n. 3, p. 98.

[51] G.A. Res. 2625 (XXV), G.A.O.R. 25th session , Suppl. No 28, p. 121.

[52] *Supra* n. 37; also see Claude Jr. loc. cit. *supra* n. 46, p. 132.

between States on the basis of respect for the principle of self - determination" constitutes a purpose of the U.N. Charter and also a contractual obligation the promotion of which the entire Membership of the Organisation has the duty to observe[53].

4. *Armed Struggles for Self-Determination and Jus ad Bellum .*

Armed struggles against colonialism have been a matter of international concern for three reasons that fall under the issue of the use of armed force in international law.

First, the authority of the administering Power to use force against a self-determination or national liberation movement.

Secondly, the alleged right of self-determination movements under international law to use force.

Finally, the line of action that third States may follow with regard to both the colonial States and the self-determination movements, namely the question of whether they are legitimised to assist either of the contestants.

4. (i) *Authority of the Administering Power to Use Force .*

As it has already been stated, the prohibition of the use of force by States in their international relations implies a duty of non-use of inter-State armed force as opposed to the right of States to use force within their territory to suppress acts of rebellion[54]. Armed struggles for self-determination are clearly not a matter of concern for the colonial Power only . A war of national liberation seems on the face of it to be akin to an ordinary civil war. It is submitted that this is not the case. The aim of such an armed struggle is self-determination of a people that is subjected to colonial or racist or alien rule[55] . To admit that forcible action against liberation movements is permitted on the part of the administering State would amount to a *non sequitur* in that a legal right under international law would be the object of suppression by the use of means, both material and legal, which would in practical terms assimilate the said right with an offence punishable under the

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53 Schwarzenberger, *International Law as Applied by International Tribunals, 1945*, p. 45; Q. Wright, 48 A.S.I.L. Proceedings 23 (1954), pp. 29-31.
54 Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht 1952*, p. 153 .
55 Ronzitti loc. cit. *supra* n. 18, pp. 320, 343.

municipal law of the State, such as rebellion, sedition,secession and so on[56] .

The 1970 Declaration on Friendly Relations clearly militates against such a possibility[57] . The seventh paragraph of the principle of the non-use of force provides that:

> ... Every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence...[58]

During the drafting of the Declaration Czechoslovakia[59] submitted a proposal which read:

> ... 3. Every State has the duty to refrain from all armed actions or repressive measures of any kind directed against peoples struggling against colonialism for their freedom and independence.

Moreover Chile[60] suggested in another proposal that:

> .....(b) The expression "in their international relations" in the above-mentioned Article 2(4) shall exclude from the prohibition the domestic activities of states the prohibition shall become applicable in the case of a community of human beings struggling for its freedom and independence.
>
> Thus the threat or use of force by a colonial Power against a group of human beings under its domination which is struggling for its freedom and self-determination shall be prohibited....

Those proposals were supported on the grounds of safeguarding the rights of colonial peoples and of the struggle for self-determination being part of international relations and thus falling under the ambit of Article 2(4) of the Charter[61] .

In reply to the above argument it was stated that the above

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56 Ibid. p. 320.

57 Also see G.A. Res. 1514 (XV) of 14 December 1960, para 4 ; G.A. Res 2131 (XX) of 1965, para 3.

58 See *supra* n. 51.

59 Doc. A/AC.125/L.16, part 1, G.A.O.R. 21st session Annexes, p. 30.

60 Doc. A/AC.125/L.23 in ibid. ; also see the Proposal by Argentina, Chile, Guatemala, Mexico and Venezuela, A/AC.125/L.49/Rev. 1, para 2(g), G.A.O.R. 22nd session, Annexes, p. 10.

61 G.A.O.R. 21st session, Annexes, p. 40.

proposals should be considered under the principle of self-determination rather than that of the use of force[62] . Whereas the Socialist and developing countries argued that it was by virtue of Article 2(4) of the Charter that such acts would be prohibited, the Western countries maintained that it was primarily the right - hitherto "principle" - of self-determination that militated for such conclusion.

The present author takes the view that what Article 2(4) of the Charter contemplates is the use of armed force between States. At the moment when armed struggle is initiated within the boundaries of a non-self-governing territory, the national liberation movement operating therein has no international status whatsoever. It is only its right to self-determination that brings international law into operation and, furthermore, it is the duty of the administering Power under Articles 1(2), 55, 73 of the Charter that makes armed struggles for self-determination part of its international relations and not the action as such of national liberation movements.

What the Socialist and developing States seem to argue is that the existence of the right of self-determination renders national liberation movements *a priori* beneficiaries of the principle of the non-use of force. In reality, it is submitted, it is the combination of the right of self-determination and the duty of the administering Power to respect it as an object of treaty obligation that renders the use of force against self-determination movements inadmissible. Indeed, the Charter of the United Nations is an international treaty and the use of force to suppress a struggle for self-determination would violate one of the purposes of the said instrument, namely, the respect of self-determination of peoples as the basis of friendly relations among nations[63] .

4.(ii) *The Authority of National Liberation Movements to Resort to Force* .

The existence or not under international law of a right of national liberation movements as such to use armed force has become the subject of great doctrinal controversy.

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62 Ibid.

63 Ronzitti loc. cit. *supra* n. 18, p. 349 but *cf*. pp. 321-4, 348; Schwebel, Wars of Liberation as Fought in the United Nations Organs, in Moore (ed.) op. cit. *supra* n. 40, p. 453; id. Aggression, Intervention and Self-Defence, *136 H.R.C. 419 (1972 II)*, p. 485; Crawford op. cit. *supra* n. 29, pp. 111-2; cf . Arangio-Ruiz op. cit. *supra* n. 17, pp. 137-8; Wengler, L' Interdiction de Recourir a la Force, *7 Revue Belge D.I. 401 (1971)*, p. 429.

The preparatory work of the 1970 Declaration on Friendly Relations reveals an unbridgeable disagreement between Socialist and developing States on the one hand and Western States on the other over the issue of whether national liberation movements are legitimised under international law to resort to armed force.

Proposals[64] submitted by the Socialist and developing countries during the work of the Special Committee on Friendly relations which asserted the right of colonial peoples to resort to armed force in self-defence against colonialism were justified on the grounds[65] that the practice of the United Nations did not regard the armed struggle of colonial peoples for liberation as a violation of the prohibition of the use of force; that the right of self-determination would have been meaningless if it could not be defended against a colonial Power which attempted to deny it by force; that colonial domination and oppression constituted aggression against colonial peoples; that the prohibition of Article 2(4) did not apply to force in a manner consistent with the purposes of the United Nations[66] .

The Western Powers[67] vehemently opposed the above line of argument by retorting that while the right of self-determination of peoples

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[64] G.A.O.R. 20th session: Proposals by Czechoslovakia A/AC.119/L.6, para 5; Yugoslavia A/AC.119/L.7, para 4; Ghana, India, Yugoslavia A/AC.119/L.15, para 3.

G.A.O.R. 21st session: Proposals by Czechoslovakia A/AC.125/L.16, para 7; Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Madagascar, Nigeria, U.A.R., and Yugoslavia A/AC.125/L/21 and Add. 1, para 6;

G.A.O.R. 22nd session: Proposal by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, U.A.R., and Yugoslavia A/AC.125/L.48, para 6.

[65] G.A.O.R. 20th session, Annexes, pp. 92-3; G.A.O.R. 21st session, Annexes, pp. 40-1, 43-4; G.A.O.R. 22nd session, Annexes, pp. 18-9, 20-1; G.A.O.R. 23rd session, Annexes, pp. 7-8.

[66] See J.C. Nkala, Legality of the Use of Force by National Liberation Movements; New Perspectives and Conceptions of International Law; An Afro-European Dialogue; *Austrian Journal of International Law, Suppl. 6, 186 (1983)*, pp. 192-3; T.S. Pekane, Reflections on Apartheid and the Legal Status of National Liberation Movements, ibid. p. 181; Obradovic, Prohibition of the Threat or Use of Force in Sahovic (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation, 1972*, p. 51 at pp. 115-7; Röling, International Law and the Maintenance of Peace, *4 N.Y.I.L. 1 (1973)*, p. 65; Zourek, *L' Interdiction de l' Emploi de la Force en Droit International*, 1974, p. 110; J. Toman, La Conception Soviétique des Guerres de Libération Nationale, in Cassese (ed.) op. cit. *supra* n. 18, p. 357; Tunkin, *Theory of International Law, translation by Butler, 1974*, p. 67; Abi-Saab, Wars of National Liberation and the Laws of War, *3 Annales d' études Internationales 101-3 (1972)* ; id. Wars of National Liberation and the Geneva Conventions and Protocols, *165 H.R.C. 363 (1979 IV)*, pp. 371-2. Cf . J. Faundez, International Law and Wars of National Liberation: Use of Force and Intervention, *1 African J. Intern. & Comp. L. 85 (1989)*, pp. 94-97.

[67] *Supra* n. 65; also see Dugard, The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism, *16 I.C.L.Q. 157 (1967)*, pp. 168-173.

was recognized as such, revolution was a political and not a legal concept. It was argued, moreover, that Article 2(4) did not deal with revolution and it did not confer the right to engage therein. On the other hand Article 2(4) of the Charter prohibited the use of armed force only between States, namely, entities having legal personality in international law. Moreover, to admit a so-called right of self-defence against colonial domination would have the result of greatly
increasing tensions and would be detrimental to international peace and security; also, the right of self-defence under Article 51 of the Charter applied not to "peoples" but only to States and to hold otherwise would amount to a *de facto* amendment of the Charter in contravention of Article 108 thereof.

Controversy persisted in the context of the long endeavour to achieve consensus on a definition of Aggression.
The 1974 Definition of Aggression[68] provides in Article 7 that

> ... Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of those peoples to struggle to that end and to seek and to receive support in accordance with the principles of the Carter and in conformity with the above-mentioned Declaration. ...

Although the above provision does not expressly refer to a right of peoples under colonial, racist and other alien domination to use armed force and, similarly, to "struggle" does not necessarily seem to suggest that it amounts to "armed struggle", Socialist and developing States interpreted Article 7 of the Definition as not affecting the alleged rights of peoples to forcibly realize their right to self-determination and the legitimacy of the use of force to this end under the right of self-defence[68].

By contrast, the Western States maintained that all that Article 7 purported to achieve was the safeguarding of the legitimacy of the right of

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[68] G.A. Res. 3314 (XXIX), 29th session, Suppl. No 31, p. 142.

[68] G.A.O.R. 27th session, Suppl. No 19, Doc. A/8719, Report of the Special Committee on the Question of Defining Aggression (31 January-3 March), p. 19 (Syrian proposal); Report of the Sixth Committee on the Question of Defining Aggression (Mr. Simon Bozanga, Rapporteur), Doc. A/9411, G.A.O.R. 28th session, p. 12; Statements by the Representatives of Romania, Yugoslavia, U.S.S.R., Egypt, Syria, in G.A.O.R. 29th session, Suppl. No 19, Doc. A/9619, pp. 18, 20, 26, 27, 37, 40.

peoples to self-determination. These States strongly refused to accept any right of peoples to resort to force; in fact, they upheld the view that self-determination should be exercised by non-violent means so as violence on the international plane be restrained rather than encouraged[69] . This attitude of Western States was consistently maintained in that resolutions of the U.N. General Assembly reaffirming the legitimacy of the struggle of peoples for independence by all means available, including armed struggle, have been met with the Western States abstentions or negative votes[70] .

The present author thinks that a discussion of whether or not peoples under colonial or racist or alien domination have a right in international law to resort to force against the State administering their territories is rather unnecessary.

Vattel[71] seems to accept the right to revolution of a people. He wrote that the Nation "may depose a tyrant and refuse obedience to him" but at the same time he conceded that the sovereign, whose rights were deemed identical with those of the State, had the right to use force to quell acts of disorder within the State[72] .

There is no warrant,therefore, to argue that under customary law the administered people have a legal rather than a political right to use force against the authorities of the administering Power. This is made clear by the fact that the concept of "people" is not identified with that of the State; it is rather the latter that has the right to use or desist from using force both within and outside its territory under both municipal and international law. It is also clear that when the

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[69] See Report of the Sixth Committee *supra* n. 68. Statements by the representatives of France, U.S.A., Australia, Canada in G.A.O.R. 29th session, Suppl. No 19, Doc. A/9619, pp. 22, 24, 33, 35. Cf . The statement of the U.K. representative. He said that his delegation "interpreted the Article [Art. 7] as doing no more than emphasizing the propriety of the legitimate exercise of that right and of action taken by peoples forcibly deprived of it to resist such forcible deprivation and, in so doing, to seek and receive support from others", ibid. p. 32. Although it is not specified that "action" means "armed action" the above statement may suggest that forcible exercise of self-determination seems likely only in cases of prior forcible action on the part of the Administering Power. Still, however, this possibility was not premised on the right of self-defence under Art. 51 of the Charter. Also see Pomerance op. cit. *supra* n. 3, p. 58.

[70] Wilson p. 102.

[71] Vattel. *Droit des Gens, Book I*, Ch. IV, para 51. Also see Oppenheim op. cit. *supra* n. 54, p. 249; Wehberg, *63 H.R.C. 7 (1938 I)*, p. 9; Schwebel, *136 H.R.C. 419 (1972 II)*, pp. 484-5; Schachter loc. cit. *supra* n. 40, p. 404. *Cf*. Falk, Janus Tormented: The International Law of Internal War in Rosenau (ed.), *International Aspects of Civil Strife, 1964*, p. 210 et seq. Contra Moore, *9 Va J.I.L. 209 (1969)*, pp. 252-3.

[72] Vattel op. cit. *supra* n. 71, Book III, Ch. XVIII, para 287.

people of a State or a territory that is administered by the State take up arms against the authorities therein they aspire to a change of government which in its turn may amount in the latter situation, to the establishment of an independent State. The *causa* , therefore, of the initiation of an armed struggle is self-determination and the alleged right of a people to revolt is to be deduced therefrom and not from the rules of international law pertaining to the use of force[73] .

National liberation movements have not the position of States in international law and this fact has caused both them and the States that advocate their right in international law to resort to force, to take a more traditional line of practice, namely, the proclamation of independent statehood of their territories seconded by the recognition of the proclaimed State by countries which support the cause of those movements.

In the case of *Indonesia* there was the proclamation of the Indonesian Republic in 1945, prior to the resort to force by the Netherlands, and the recognition accorded to it by some States, including its recognition as the *de facto* authority by the Netherlands, and it seems that the Security Council considered the matter "at least in part on the status of the Republic"[74] .

Similar practice was followed by the national liberation movements in the cases of *Algeria*[75] , *Guinea-Bissau*[76] , *Western Sahara*[77] and *Palestine*[78] . In the case of the Guinea-Bissau the General Assembly of the United Nations went as far as to condemn Portugal, the administering Power of the territory, for repeated acts of aggression against Guinea-

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[73] See Skubiszewski, Use of Force and International Law, in Sørensen (ed.), *Manual of International Law, 1968*, p. 771; Gross loc. cit. *supra* n. 16, p. 154; Ronzitti loc. cit. *supra* n. 18, pp. 350-1. *Contra* Nkala loc. cit. *supra* n. 66, p. 192.

[74] Wilson p. 107 but *cf*. p. 108.

[75] In September 1958 the *Front National de la Liberation Algerienne* (F.L.N.) established the provisional Government of the Algerian Republic in Tunis. See Bedjaoui, *Law and the Algerian Revolution, 1961*, pp. 73-5, 110-175; Wilson pp. 108-111; cf. Fraleigh loc. cit. *supra* n. 46, p. 190.

[76] The *Partido Africano da Indepedencia da Guine e Cabo Verde* (P.A.I.G.C.) declared the independence of Guinea-Bissau on 26 September 1973 which was recognised by 84 States by 31 May 1974. See Wilson pp. 111-112.

[77] On 26 February 1976 the POLISSARIO Front proclaimed the formation of the Saharan Arab Democratic Republic with a Government-in-exile based in Algiers. See Wilson pp. 113-116.

[78] At the 19th session of the Palestine National Council in Algiers from 12-15 November 1988, the independent State of Palestine was proclaimed, with Jerusalem as its capital. All Arab States, except Syria, a number of Non-Aligned States and China immediately recognised the Palestinian State. The U.S.S.R. recognised the proclamation of the State but not the State itself. See Keesing's 1988, pp. 36257, 36321.

Bissau and for illegal occupation of portions of its territory after having affirmed the terms of Article 2(4) of the Charter[79].

The above practice seems analogous to the traditional concept of recognition of belligerency, accorded to insurgents in a civil war, which was deemed as having the legal effect of the recognition of the rebel party as possessing international personality for the purposes of the internal armed conflict, but not full sovereign rights similar to those of independent States[80]. However, the practice of certain national liberation movements appears to have circumvented the classical international law consequences of the recognition of belligerency by asserting outright sovereign statehood and by being accorded recognition to this end by certain States. Indeed, it has been the view of the Socialist and developing States that such recognition renders a "people" that has the right to self-determination a separate entity in international law with the authority to use force analogous to that of sovereign States[81].

Western States have opposed this view on the grounds that the right of self-determination must be pursued by peaceful means and that recognition is accorded to governments only if the latter establish effective control over the population and territory which they purport to represent[82].

National liberation movements have also been recognized as the legitimate representatives of their peoples. Indeed, liberation movements such as the P.L.O. and S.W.A.P.O. were invited and did participate in the work of various international organisations; the U.N. General Assembly, more specifically, granted observer status to both of the above-mentioned liberation movements in 1974 [83] and 1976 [84], respectively.

Moreover, several national liberation movements participated in the drafting and signed the final act of the two Additional Protocols (1977) to the Geneva Conventions of 1949[85].

With regard to the observer status granted to some of those entities it is rightly pointed out that it does not amount to formal

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79 G.A. Res. 3061 (XXVIII), G.A.O.R. 28th session, Suppl. No 30, p. 2.

80 See Oppenheim op. cit. *supra* n. 54, pp. 248-253; Lauterpacht, *Recognition in International Law, 1948*, pp. 175-268; Castrén, *Civil War, 1966*, p. 153; Khairallah, *Insurrection under International Law, 1973*, p. 37.

81 Wilson pp. 116-7; Wengler, *7 Révue Belge D.I. 401 (1971)*, pp. 422-8.

82 See Wilson *supra* n. 81; D.J. Harris, *Cases and Materials on International Law, 4th ed. 1991*, pp. 142-8.

83 G.A. Res. 3210 (XXIX), G.A.O.R. 29th session, Suppl. No 31, p. 3.

84 G.A. Res. 31/152 (XXXI), G.A.O.R. 31st session, Suppl. 39, p. 136.

85 Wilson p. 128, n. 123.

representation of the territory which rests with the Administering Power[86]. Equally, the participation of some national liberation movements in the drafting and signing of the 1977 Protocols must not be taken as recognition of those movements as representatives of sovereign States. The International Committee of the Red Cross has never cited them amongst the parties to the said Protocols in its Annual Reports[87]. Both instruments are international treaties and as such constitute according to Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, agreements between States only. Moreover, the provisions of the above Protocols address situations of *jus in bello*, namely, of armed conflict in progress irrespective of the lawfulness or not of its initiation. It is submitted that it is extremely tenuous an interpretation to extract an affirmative conclusion from the 1977 Protocols as to any authority of national liberation movements to a *jus ad bellum*; the latter is solely regulated in international law by the provision of Article 2(4) of the Charter, which addresses itself to States only[88].

In the cases of Portuguese action against Zambia, Senegal and Guinea in 1969 the alleged right of national liberation movements to resort to force and to receive moral and material support was reasserted[89]. It is significant,however, that the Security Council in all three resolutions adopted in the above cases has made no reference to any such alleged rights but based its condemnation of the Portuguese action on the provision of Article 2(4) of the Charter and on its grave concern for the danger inherent in such incidents for international peace and security[90].

Similarly in the case of the South African action against Angola in 1976, S.C. Resolution 387(1976) of 31 March 1976[91] which formally stigmatised South Africa as the aggressor, was based on the principle of non-intervention in the internal or external affairs of another state[92]. Indeed, it appears from the practice of the United Nations organs that they would only condemn the action of an Administering Power against the colonial people, as an autonomous entity only, in cases of

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86 Ibid. pp. 121-2.

87 Annual Report of the I.C.R.C., Geneva 1987, pp. 107-110; *cf*. the case of Namibia, see Gros-Espiel loc. cit. *supra* n. 24, pp. 49-50.

88 *Cf*. Wilson p. 129.

89 Repertory of Practice of United Nations Organs, Suppl. No 4, vol. 1, p. 59, paras 134-5.

90 See S.C. Res. 268(1969) with regard to Zambia; S.C. Res. 273(1969) with regard to Senegal; S.C. Res. 275(1969) with regard to Guinea.

91 Resolutions and Decisions of the Security Council 1976, S.C.O.R. 31st yr., p. 10.

92 Stone, *Conflict Through Consensus, 1977*, pp. 82-3.

unilateral proclamation of independence by liberation movements that has attracted recognition by considerable number of States[93] or in case of an arbitrary proclamation of independence by a minority of the population of the hitherto non-self-governing territory which do not reflect the aspirations of the majority of the people living in the territory - viz. the case of Southern Rhodesia[94] .

4. (iii) *Assistance by Third States to Liberation Movements* .

The alleged right of self-determination movements to lawfully use force against colonial, racist or alien regimes gives rise to the issue of whether third States have the right to render assistance to those entities.

It is not surprising that those who advocate a right of liberation movements to resort to force have justified it on the basis of the right of self-defence[95] . Indeed, if this were accepted third States would be legitimised in rendering assistance by using armed force in collective self-defence against the administering Power. There is no instance in the practice of States of force being used on the basis of such contingency and the matter remains the object of academic debate. On the other hand assistance to self-determination movements by arming, financing, providing bases on their territories to them, has been as far as third States were prepared to act. This situation cuts across the well established duty under international law that States must refrain from assisting armed bands that operate on the territory of another State.

The said rule has been enshrined in three major Resolutions of the General Assembly of the United Nations.

G.A. Resolution 2131 (XX) of 1965[96] provides in its second paragraph that:

> ... 2. No state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state.

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[93] See *supra* n. 79.

[94] See S.C. Res. 253(1968) of 29 May 1968, Resolutions and Decisions of the Security Council 1968, S.C.O.R. 23rd yr. , p. 5.

[95] See *supra* n. 66.

[96] G.A. Res. 2131 (XX), G.A.O.R. 20th session, Suppl. No 14, p. 11.

The 1970 Declaration on Friendly Relations[97] which interprets Article 2(4)of the Charter states:

> ..... Every state has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts within another state...

Finally, according to Article 3(g) of the 1974 Definition of Aggression[98],

> The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state or its substantial involvement therein....

shall constitute a case of aggression.

At the same time, however, both the 1970 Declaration and the Definition of Aggression provide that peoples "in pursuit of the exercise of their right to self-determination ..... are entitled to seek and to receive support in accordance with the purposes and principles of the Charter"[99].

It is the combination of these two opposing situations as well as the fact that national liberation movements have operated in guerrilla manner that give rise to controversy. The fact, moreover, that the aim of the struggle is self-determination does not diminish at all the conspicuous contradiction of the alleged right of liberation movements to receive assistance from third States with the above - mentioned duty; the concept of the justice of the cause of the use force has ceased to be part of international law ever since the nineteenth century[100].

In the *Nicaragua case*[101] the International Court of Justice has dealt at considerable length with the activities of armed bands on the territory of a State, the lawfulness of the assistance accorded to those armed bands by third States and the ways of response that the target-State of the action of armed bands is entitled to resort to against both the guerrillas and the

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[97] G.A. Res. 2625 (XXV), G.A.O.R. 25th session, Suppl. No 28, p. 121.
[98] G.A. Res. 3314 (XXIX), G.A.O.R. 29th session, Suppl. No 31, p. 142.
[99] See Cot & Pellet, *La Charte des Nations Unies, 1985*, pp. 122-3.
[100] See *supra* Part One, Chapter 1. Also see Dinstein, *War, Aggression and Self-defence, 1988*, p. 69; Pomerance op. cit. *supra* n. 3, p. 48; Q. Wright, The Goa Incident, *56 A.J.I.L. 617 (1962)*, pp. 618-9; Kunz, Bellum Justum and Bellum Legale, *45 A.J.I.L. 528 (1951)*, pp. 532-5.
[101] I.C.J. Rep. 1986, p. 14.

assisting State or states[102] . Admittedly, the Court was not concerned with the activities of a national liberation movement "in the process of decolonisation"[103] . Whether this point suggests or not that cases of guerilla armed action promoting decolonisation and self-determination fall outside the Court's findings with regard to the *contra* activities against the Government of Nicaragua is something which is not warranted by the Judgment of the Court. The latter simply stated that the question was not at issue before it.

Judge Schwebel ,however, was seized with the question in his dissenting Opinion and stated that:

> " ...It is lawful for a foreign state to give people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign state to intervene in that struggle with force ..."[104]

Moreover, the present author believes that the Judgment of the Court seems to offer guide-lines, albeit by way of *obiter dictum* , due to the completion of decolonisation over the past three decades, which would compromise the struggle of peoples for self-determination with the prohibitive norm of customary international law with regard to the assistance to armed bands.

First, it is clear that the existence of a self-determination movement within a non-self-governing territory does not and cannot constitute an armed attack due to the fact that liberation movements have always sprung from within the population of the colonial territory rather than being extra-nationally sent and controlled. The colonial Power,therefore, is not entitled to resort to force in individual and collective self-defence against the assisting State.
Humanitarian assistance to the national liberation movement is by all means lawful.

The possibility of material assistance to the liberation movement by way of provision of arms, training, funds and logistical support seem to be the more problematic. At the outset it is submitted that third States should refrain from arming, training, advising, and providing sanctuary to self-determination movements as well as funding them, for otherwise the

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102 See *supra* Ch. 2 and *infra* Part Two, Ch. 9 , Second Title.
103 I.C.J. Rep. 1986, p. 14, at p. 108, para 206.
104 Ibid. *per Judge Schwebel* p. 351, para 180.

duty to refrain from the use of armed force and intervention would be completely sacrificed to the cause of self-determination with most grave consequences for international peace and security[105].

However, if such assistance is accorded to a national liberation movement, it is submitted that the administering Power is entitled to resort to counter- measures against it that must as a rule fall short of the use of armed force[106]. Forcible counter-measures in the sense of mounting elaborate military operations against a people struggling for self-determination would be contrary to the principle enunciated by the 1970 Declaration, namely that force shall not be used to deprive peoples of their right of self-determination. By contrast, force used strictly for the defence, and that only, of individual members or units of the administering Power's armed forces if they were attacked by members of the liberation movement, should be allowed. It would be unrealistic to hold otherwise. Such strictly defensive use of force may be said to partake the character of proportionate counter-measures against uses of force short of an armed attack[106a].

The practice of States shows that the use of force by a colonial power against a State whose government supported a national liberation movement fighting against the former was met with either express condemnation or proposals for the settlement of the dispute by investigation and conciliation on the part of the Security Council or by the offer of good offices on the part of other States, but never with approval of the action of the colonial Power.

In the *Sakiet-Sidi-Youssef* (Feb. 8, 1958) and the *Remada* (May 19, 1958) incidents where France resorted to force against Tunisia under the justification that the latter was assisting the Algerian rebels the matter was settled by direct negotiations between the two States after the U.K. and the U.S.A. had offered their good offices[107].

In the case of the Portuguese armed action against *Zambia*, *Senegal* and *Guinea* in 1969 it was argued by some representatives during the

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105 Stone, *Conflict Through Consensus, 1977*, pp. 66-86; Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 125-6; Schwebel, *136 H.R.C. 419 (1972 II)*, p. 486; Dugard, *16 I.C.L.Q. 157 (1967)*, pp. 161-3; R.C.A. White, *28 N.I.L.R. 147 (1981)*, pp. 152-3; Pomerance op. cit. *supra* n. 3, pp. 50, 57-60; N.D. White, The Legality of Intervention Following the Nicaragua Case, *ix Intern. Rel. 535 (1989)*, p. 547. *Contra* Farer, The Regulation of Foreign Intervention in Civil Armed Conflict, *142 H.R.C. 297 (1974 II)*, pp. 367-386.

106 See *infra* Part Two, Ch. 9, Second Title.

106a Ibid.

107 S.C.O.R. 13th yr. 8iith mtg. para 55; 826th mtg. para 12.

debates at the Security Council that rendering assistance to a self-determination movement in a non-self-governing territory should not serve as a cause of resorting to the use of armed force against the State that accorded it[108].

4. (iv) *Active Military Assistance to the Administering Power*.

The last issue of the present section is whether the administering Power has the right to request the assistance of another State in order to suppress the struggle of the people of a colonial territory to attain self-determination.

Although under classical international law States have the right to intervene in an internal strife at the request of the lawful government[109] the rule does not seem to apply in cases of self-determination armed struggles. So long as the administering Power does not have the right to use force herself to deprive a people of the exercise of its right to self-determination, she cannot use force in concert with another State either. Be that as it may, there is no instance in practice of former colonial states that would militate against such conclusion.

5. *Resort to Force by a State against a Colonial Power to promote Self-Determination*.

There are some instances in the practice of States where decolonisation and the realization of the right of self-determination were effected or attempted to be effected by the use of armed force on the part of a State against the colonial Power.

In December 1961 India invaded the Portuguese territories of *Goa, Damao* and *Diu* which were surrounded by Indian territory. Portugal had recourse to the Security Council and complained of the Indian aggression against Portugal in violation of Articles 2(3) and 2(4) of the United Nations Charter[110]. The representative of India[111] justified the action taken by his country on the grounds that Portugal had no sovereign right over the above territories, its presence therein being illegal *ab initio* and even more so after the adoption by the General Assembly of the United Nations

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[108] Repertory of Practice of United Nations Organs, Suppl. No 4, vol. 1, pp. 56-7, paras 115-117, 126.
[109] See *infra* Part Three, Ch. 12, First Title.
[110] S.C.O.R. 16th yr. 987th mtg. para 11.
[111] Ibid. paras 32, 37-39, 44, 46.

of Resolution 1514 (XV) of 1960. It was moreover argued that the Indian action could not constitute aggression because the illegality of the Portuguese possessions on Indian territory rendered the frontier between India and the Portuguese colonies non-existent and consequently there could be no "question of aggression against your own frontier or against your own people..."[112] . Finally, the Indian representative relied on the right of self-defence by arguing that the "Charter itself does not completely eschew force in the sense that force can be used in self-defence for the protection of the people of a country, and the people of Goa are as much Indians as the people in any other part of India"[113] .

The Indian arguments failed to persuade the representatives of the Western and Latin American States on the Security Council. The principal advocate against the Indian action in Goa during the Security Council debate became the representative of the U.S.A. who maintained that the point at issue before the Security Council was not decolonisation but a bold violation of the principle of the non-use of force enunciated in Article 2(4) of the Charter, which was law of universal application[114] . He concluded his country's position with regard to the use of force by a State in relation to promoting self-determination by stating that:

> "... Resolution 1514 (XV) does not authorise the use of force for its implementation. It does not and it should not and it cannot under the Charter .... Resolution 1514 does not and cannot overrule the Charter injunction against the use of armed force..."[115]

A draft resolution proposed by the Western Members on the Security Council deploring the Indian action and calling for the withdrawal of the Indian forces from Goa was defeated due to the negative vote cast by the U.S.S.R. The fact that India escaped condemnation by the Security Council does not by any means imply that she had been

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112 Ibid. para 46.

113 Ibid. para 77. In support of the Indian position see 987th mtg. paras 93-95 (Liberia), 125 (U.A.R.), 137-138 (Ceylon). *Cf*. 987th mtg. para 3 (U.S.S.R.) and 988th mtg. paras 12 (Equador) and 30 (Chile). Equador and Chile upheld the right of self-determination of the people of Goa, Damao and Diu but condemned the use of force by India. The U.S.S.R. opposed the debate of the question by the S.C. on the basis of the principle of domestic jurisdiction.

114 S.C.O.R. 16th yr. 987th mtg. paras 75, 80.

115 Ibid. 988th mtg. para 93; Q. Wright loc. cit. *supra* n. 100.

exonerated or that her action had been legitimised, for the majority of the Members of the Security Council (7 out of 11) condemned it[116] .

In November 1975 and following the publication of the Advisory Opinion of the International Court of Justice on the question of *Western Sahara* , the territory of the said former Spanish colony whose population were to exercise their right of self-determination, was "peacefully" invaded by Moroccan nationals, elements of her armed forces and official authorities. Morocco, despite the finding of the I.C.J. to the contrary, maintained that the so-called "green march" constituted an exercise of Morocco's inalienable sovereign rights and that the population of Western Sahara had always been part of the Moroccan nation[117] . Moreover, according to the Moroccan Government[118] self-determination according to Resolution 1514 (XV) could never be contrary to the unity and territorial integrity of States.
The Security Council condemned Morocco and called upon her to immediately withdraw from the territory of Western Sahara[119] .

In December 1975 the Indonesian army forcibly invaded the Portuguese territory of *East Timor* . According to the representative of Portugal this act would result in inhibiting the exercise of the right of self-determination, freedom and independence by the people of Timor[120] and amounted to an act of aggression in violation of Articles 2(3) and 2(4) of the Charter[121] . The population of East Timor were to exercise their right to self-determination in pursuance of the policy of decolonisation launched by Portugal in April 1974 . In August 1975 fighting broke out between two opposing political organisations on the island, FRETILIN, which advocated independence for East Timor, and UDT - APODETI which militated for the incorporation of the territory with the Republic of Indonesia[122] .

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[116] See also Q. Wright, *56 A.J.I.L. 617 (1962)*, p. 617; Higgins p. 188; Henkin, Force, Intervention and Neutrality in Contemporary International Law, 57 A.S.I.L. Proceedings 147 (1963), p. 153; Dugard, *16 I.C.L.Q. 157 (1967)*, pp. 174-6; Pomerance p. 49.
[117] S.C.O.R. 30th yr. 1854th mtg. paras 28-60.
[118] Ibid. 1849th mtg. paras 28-60.
[119] S.C. Res. 380(1975) of 6 November 1975, Resolutions and Decisions of the S.C. 1975, S.C.O.R. 30th yr. , p. 9.
[120] Letter dated 7 December 1975 from the representative of Portugal to the President of the Security Council, Doc. S/11899, S.C.O.R. 30th yr. Suppl for Oct.-Dec. 1975, pp. 53-54.
[121] S.C.O.R. 30th yr. 1864th mtg. paras 8-64.
[122] Ibid. para 22.

The representative of Indonesia after emphasizing his country's geographic, ethnic and cultural ties with East Timor justified the use of force on the ground *inter alia* of re-establishing order in the territory and enabling the people of the area to exercise their right of self-determination[123]. The Security Council deplored the Indonesian action and called for the withdrawal of all Indonesian armed forces from the territory[124].

In the cases of Goa, the Western Sahara and Timor three neighbouring States exercised force in order to bring about decolonisation by incorporating the non-self-governing, in each case, with their own national territory. India and Morocco claimed legal ties of territorial sovereignty between themselves on the one Hand and Goa and Western Sahara, on the other, while Indonesia insisted, more subtly, that Indonesian "volunteers", not her armed forces, were assisting the Provisional Government of East Timor, which interestingly enough had been set up by the pro-Indonesian UDT - APODETI organisation, in the rehabilitation of the country[125].

In all three cases, moreover, decolonisation was effected in a way which although was envisaged by and was compatible with Resolution 1541 (XV), namely, incorporation in an independent State, was either in direct contrast with the wishes of the entirety or the majority of the population of the territories in question (East Timor, Western Sahara) or failed to take into account what the population aspired to (Goa). Moreover, the incorporation of these territories was also unilaterally and forcibly asserted by the States concerned. Although the right of self-determination is exercised on the basis of an existing territorial unit as a whole, it is a right that belongs to the people of the territory and it is for the latter "to determine the destiny of the territory and not the territory the destiny of the people"[126].

The forcible character of effecting decolonisation in the Goa, Western Sahara and East Timor cases was met with disapproval on the part of the other Members of the Security Council. In the case of Western Sahara the Chairman of the Security Council expressed concern that

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[123] Ibid. paras 67-94.
[124] See S.C. Res. 384(1975) of 22 December 1975; also see G.A. Res. 3485 (XXX), G.A.O.R. 30th session, Suppl. 34, p. 118.
[125] Statement of the Indonesian representative, S.C.O.R. 31st yr. paras 5-26.
[126] *Western Sahara A.O.* (*per Judge Dillard*), I.C.J. Rep. 1975, p. 12, p. 121.

unless the "green march" had ceased it might have led to violent confrontations with the possibility of a conflict between Morocco and Spain[127].

What eventually happened was armed confrontation between the Moroccan armed forces and the POLISARIO Front established by the population of Western Sahara.

In the case of East Timor the Indonesian use of force was expressly condemned by the Chinese representative on the Security Council[128] and disapproved of, though not explicitly condemned, by the majority of other representatives who called for the withdrawal of the Indonesian forces from the territory[129].

Decolonisation was also attempted to be effected regardless of the fact that the territory under question was inhabited by a people that had opted to remain under the sovereignty of the administering Power. In April 1982 the armed forces of Argentina invaded and occupied the *Falkland Islands* which were part of the U.K.

Argentina justified its action as purporting to overturn an unlawful situation, namely, the "usurpation of its national territory, usurpation carried out by unacceptable and illegal means"[130]. At the same time the 1,800 inhabitants of the Falklands were not considered as a "people" having the right to self-determination[131].

With the exception of Panama, all the other States other than the parties to the dispute, that took part in the debate at the Security Council condemned the use of force by Argentina and what is more significant is that condemnation came from developing States in what seemed to be a change of position twenty years after the Goa incident[132]. Of great interest is the statement made by the Ugandan representative with regard to Argentine use of force:

> ".... Uganda regrets this latest development because we are conscious of the fact that there are similar, though not identical disputes in other parts of the world. It would

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127 S.C.O.R. 30th yr. 1845th mtg. paras 2-6.
128 Ibid. 1865th mtg. paras 3-9.
129 Ibid. 1867th mtg. paras 5-26 (Tanzania), 41-48 (U.S.S.R.). S.C.O.R. 31st yr. 1915th mtg. paras 28-32 (U.K.).
130 S.C.O.R. 37th yr. 2350th mtg. pp. 3-5, 11.
131 Ibid. pp. 7-8; also see E.Jiménez de Aréchaga, International Law in the Past Third of the Century, 159 *H.R.C. 5 (1978 I)*, p. 107.
132 S.C.O.R. 37th yr. 2350th mtg. pp. 96 (Togo), 23 (Guyana), 26 (Jordan).

be a dangerous precedent if the impression were to be given that the use of force is acceptable as a method of settling those disputes..."[133]

In the twenty-one years that separate the Goa from the Falklands incident the practice of States seems to have evolved to a general consensus that decolonisation is not to be realized by the use of force by States in violation of Article 2(4) of the Charter, aiming at recovering territories lost to the colonial Powers during the 16th - 19th centuries[134]. Moreover, in all the above instances of State practice forcible extra-national decolonisation seems to have been conceived as recovering territory rather than promoting the right of self-determination of the peoples living therein. In fact, the wishes of the people were either ignored - viz. Western Sahara, East Timor, the Falklands - or were presumed to be the same with the wishes of the State that used force - viz. Goa. In the latter case the representative of India did not even give any consideration whatever to the possibility that the people of Goa, Damao and Diu might have contemplated self-determination by way other than incorporation with India; in fact the assertion that the people of Goa were as much Indian as the people of any part of India seems to unilaterally render any other alternative way of achieving self-determination as by definition redundant[135].

Argentina and Morocco have summarily dismissed any wishes of the populations of the Falklands and Western Sahara on grounds of legal title to territorial sovereignty.

Indonesia seems to have followed a "half-way house" approach in the case of East Timor; while asserting close geographical ties between herself and the latter the assistance given to the Provisional Government of East Timor seems on the face of it to constitute respect for the wishes of the people. However, according to Mr Fry, Member of the Australian House of Representatives and head of a delegation of Australian MPs that visited East Timor, the Provisional Government did not represent the wishes of the people of Timor[136].

It can be concluded, therefore, that the use of force by States having as its object colonial territories seems in reality to constitute a case of

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133 Ibid. p. 91.

134 See Rubino, Colonialism and the Use of Force by States, in Cassese (ed.), *The Current Legal Regulation of the Use of Force By States, 1986*, p. 142.

135 S.C.O.R. 16th yr. 988th mtg. para 77.

136 S.C.O.R. 31st yr. 1909th mtg. paras 58-84.

forcible territorial change rather than promoting the right of self-determination of the people of the non-self-governing territory.

6. *Conclusion* .

The conclusion that may be drawn from the State practice of the past forty-five years with regard to decolonisation and the realisation of the right of self-determination of peoples in the light of the prohibition of the threat or use of force by Article 2(4) of the Charter may be summarized in the following points:

First, an armed struggle of a colonial people against the administering Power within the boundaries of a non-self-governing territory is a situation which belongs to the sphere of "international relations" for two reasons. First, the use of force by the administering Power to suppress a self-determination movement is not and cannot be a matter within its domestic jurisdiction, for the use of force is aimed against the very realization of the right of self-determination which is a right under international law and which Member States of the United Nations organisation, namely, virtually the entire international community, have pledged to respect by adhering to the Charter. Secondly, the fact that national liberation movements have operated in guerilla fashion and the fact that have received material support from third States brings the whole issue of struggles for self-determination in direct contradiction with the rule that assistance to armed bands constitutes a violation of Article 2(4) of the Charter.

Secondly, the assertion of the Socialist and Developing States that national liberation movements have a right of *jus ad bellum* in international law on the grounds of the exercise of the right of self-defence was merely an unsuccessful attempt to introduce an exception to Article 2(4) of the Charter which aspired to reconciling the norm of the prohibition of assisting armed bands with the struggle of colonial peoples for self-determination. The parallel practice of proclamations of independence and recognition seems to constitute evidence that the very advocates of the right of liberation movements to lawfully resort to force

did not consider their thesis to be as water-tight as to stand by itself. Instead, the return to the traditional practice of recognition, albeit with further reaching effects than the classical concept of recognition of belligerency is implicit of the principle that revolution against the Government of a State, whether colonial or not, is a political right and totally irrelevant to international law.

Moreover, the persistent objection on the part of Western States seems to have precluded the above assertion from becoming part of customary law.

Thirdly, the Judgment of the International Court of Justice in the *Nicaragua Case* may serve as a model for reconciling the contradiction between self-determination struggles and the prohibition of sending or assisting armed bands operating on the territory of a State. Any other formulation seems to the present author to be rather precarious in that it may amount to the absolute overruling of one principle of international law in favour of the other, it may result to a rupture in the continuity and evolution of international law as a body of law and it would constitute a *de lege ferenda* position which does not correspond to the practice of States and the pronouncements of the I.C.J.

Fourthly, the use of force by States against colonial Powers with the purpose of ending colonialism is not admitted as lawful in the practice of States. Indeed, the practice of those States that resorted to force under such a contingency indicates that their motive was not decolonisation in the sense of realizing the right of self-determination of the peoples living in the "liberated" territories but rather pure self-interest in an attempt to effect territorial changes by using force under the "gloss" of decolonisation and self-determination or under an alleged legal title to territorial sovereignty. What situations like Goa indicate is that the plea of self-determination purports not to cure illegality but to "allow illegality to be more readily accommodated through the processes of recognition and prescription..."[137].

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[137] Crawford, *The Creation of Sates in International Law, 1979*, p. 113; Q. Wright, *56 A.J.I.L. 617 (1962)*, p. 632.

CHAPTER 7
THE USE OF FORCE AGAINST THE TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE OF STATES.

1. *Introduction* .

The phrase "territorial integrity and political independence" has been the object of controversy as to its meaning in relation to the prohibition of the use of armed force in Article 2(4) of the Charter.

Force against the "territorial integrity" refers to the physical element of the State and the question of its meaning shall be dealt with in the subsequent sections.

"Political independence" is more pertinent to the "decision-making" process within the State and encompasses every function of the governmental authority with regard to the internal and external relations of the State[1] . Thus, the concept acquires a very wide range of content which may be impaired by both forcible and non-forcible activity (in the latter case it constitutes a breach of the duty of non-intervention)[2] .
The use of armed force against the "political independence" of the State is usually directed against its territorial integrity as well, and takes the form of direct or indirect curtailment of government functions within or without the State or the overthrow of the Government of the State[3] .

An illustration of direct use of armed force against the "political independence" of a State is the invasion of Kuwait by Iraq on 2 August 1990 which resulted in the overthrow of the Government of Emir Al-Sabah and its replacement by a "puppet" Government subservient to the Iraqi regime[4] . Instances of overthrow of Government also occurred in the cases of the U.S. interventions in Grenada (1983) and Panama (1989), and the Soviet interventions in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979). Moreover, attacks on government vessels on the high seas constitute a kind of use of force against the "political independence"

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[1] See McDougal & Feliciano, *Law and Minimum Public Order, 1961*, p. 177; Bowett, *Self-Defence in International Law, 1958*, p. 43; Asrat, *Prohibition of Force under the United Nations Charter, A Study of Article 2(4), 1991*, pp. 157-176; *cf* . Pompe, *Aggressive War: an International Crime, 1949*, p. 106.
[2] See Bowett op. cit. *supra* n. 1, p. 44 et seq.
[3] McDougal & Feliciano op. cit. *supra* n. 1; Bowett op. cit. *supra* n. 1, pp. 44-67; Asrat op. cit. *supra* n. 1.
[4] See S.C. Res. 661 (1990) of 6 August 1990, para 2; S.C. Res. 662 (1990) of 9 August 1990, preambular para 4.

of the State , because they impair the freedom of the State in relation to the unrestricted use of the high seas[4a] .

Indirect use of force against the "political independence" of a State occurs in the cases of material support provided by a State to the armed opposition that is fighting against the Government of another State and aims at its overthrow.

It is submitted *infra* that both "territorial integrity" and "political independence" are part and parcel of the concept of territorial sovereignty that is violated as long as force is used on the territory of a State without its consent[5] . Therefore, the use of force against the territory of a State affects at the same time its "political independence" and its "territorial integrity" . It is, however, the latter that in the majority of instances of use of force in State practice constitutes the the object of infringement. It is for this reason that the present author shall basically deal with issues pertinent to the relation between the use of force and the territory of the State.

A final point to be made at this juncture is the concluding phrase of Article 2(4) that force is prohibited "in any other manner inconsistent with the purposes of the United Nations". The phrase has been invoked in order to support claims of promoting some purposes of the United Nations (viz. the maintenance of international peace and security, and respect for human rights) by way of unilateral resort to force. State practice is conclusive that such action is inadmissible if it is pursued in violation of the principles of the organisation, one of which is Article 2(4)[6] .

2. *Inviolability of Frontiers and Demarcation Lines* .

It is not an exaggeration to observe that all cases of the use of armed force in the practice of States, both prior and subsequent to the adoption of the United Nations Charter, involve infringement of the territory of the State-victim of violence which ranges from the mere violation of its frontiers to the permanent loss of part or the entirety of its territory. Indeed, as Wehberg[7] observed the invasion of the territory of a State constitutes the classical example of resort to force. It is, therefore, most logical that Article 2(4) of the United Nations Charter would proscribe the

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[4a] See Asrat op. cit. *supra* n. 1, pp. 159, 160.
[5] *Cf . infra* Part Three , Ch. 12, First Title.
[6] See Id. Second Title.
[7] Wehberg, L' Interdiction du Recours à la Force. Le Principe et les Problèmes qui se posent, *78 H.R.C. 7 (1951 I)*, p. 75.

use of armed force "against the territorial integrity and political independence" of States.

Controversy has arisen with regard to the meaning of the above phrase,namely, whether it constitutes a limitation to the prohibition of the use of force only in those cases where armed violence is aimed at the mutilation of the territory of a State or it covers every violation of a State's frontiers irrespective of ultimate loss of territory.

Bowett[8] takes the view that territorial integrity is not a right of absolute and unqualified rigidity but rather "relative" to the rights of other States; accordingly, territorial integrity of States is seen as conditional on the absence of any real threat to the security of another State and it is by consequence not synonymous to territorial inviolability, in general. The above interpretation does not seem to be
warranted in view of substantial body of State and judicial practice.

The phrase "against the territorial integrity and political independence" of States was not included in the original Dumbarton Oaks Proposals and was inserted in what became Article 2(4) of the Charter at the San Francisco Conference upon insistence of the small States on a more specific guarantee with regard to their territorial integrity in view of strengthening the prohibition of Article 2(4)[9] . Indeed, this seems hardly surprising if account is taken of the express guarantee of the territorial integrity of Member States of the League of Nations which was contained in Article 10 of the Covenant of the League[10] and the fact that the gravest instances of the threat or use of force during the period of the League, such as the Sino-Japanese and Ethiopian conflicts, as well as the incorporation of Austria and Czechoslovakia to Germany and of the Baltic States to the

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[8] Bowett op. cit. *supra* n. 1, pp. 31-4, 150-2; Stone, *Aggression and World Order, 1958*, p. 43; *cf*. Jessup, *A Modern Law of Nations, 1947*, pp. 162-3.

[9] See U.N.C.I.O. vol. 3, pp. 63, 65 (Mexico), 237, 246 (Brazil), 399 (Equador), 454 (Egypt), 497 (Cuba), 558 (Ethiopia), 578 (Bolivia), 588 (Colombia). The final formulation of Article 2(4) did provoke serious discussion. The representative of Norway felt that the phrase "against the territorial integrity and political independence" should be omitted since it was a permanent obligation under international law and was covered by the phrase "sovereign equality" of States in Article 2(1); see U.N.C.I.O. vol. 6, p. 267. Also see Wehberg loc. cit. *supra* n. 7, p. 77; Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 493; Brownlie, *International Law and the Use of Force by States, 1963*, p. 267; Cot & Pellet, *La Charte des Nations Unies, 1985*, pp. 123-4.

[10] Bowett bases his argument that Article 2(4) of the Charter does not purport to prohibit territorial inviolability on the fact that Article 10 of the Covenant of the League of Nations referred only to ultimate loss of territory; op. cit. n. 1, p. 33. Also see Fischer-Williams, *Some Aspects of the Covenant, 1934*, p. 122.

Soviet Union, resulted in partial or complete territorial annihilation of the victim States.

The preparatory work of the 1970 Declaration on Friendly Relations reveal that that the prohibition of force against the territorial integrity and political independence of a State is not restricted solely to armed force that purports to achieve seizure of territory in the sense of acquisition of territory by conquest[11] . Moreover, paragraph 4 of the principle of the non-use of force in the 1970 Declaration[12] provides that:

> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of any State.

Similarly, the 1974 Definition of Aggression[13] reaffirmed in its seventh preambular paragraph that:

> ... The territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter...

The Helsinki Final Act of 1975[14] which was held to reflect existing customary law on the use of force by the International Court in the *Nicaragua Case*[15], expressly stipulates the inviolability of frontiers. Principle III Guiding Relations between Participating States provides that:

> The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

The International Court of Justice has dealt with the issue twice and has ruled in favour of the non-restrictive interpretation of Article 2(4).

In the *Corfu Channel Case* Counsel for the United Kingdom argued that the "Operation Retail", the mine sweeping operation carried out by

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[11] G.A.O.R. 20th session Annexes, p. 86; G.A.O.R. 21st session Annexes, pp. 38-9; G.A.O.R. 22nd session Annexes, pp. 17-8; G.A.O.R. 23rd session Annexes, p. 6.
[12] G.A. Res. 2625 (XXV) G.A.O.R. 25th session, Suppl. No 28, p. 121.
[13] G.A. Res. 3314 (XXIX) G.A.O.R. 29th session, Suppl. No 31, p. 142.
[14] 14 I.L.M. 1294 (1975).
[15] I.C.J. Rep. 1986, p. 14, at p. 100, para 189.

the British Navy in the territorial waters of Albania, " ... threatened neither the territorial integrity nor the the political independence of Albania..." because " ... Albania suffered thereby neither territorial loss nor of any part of its political independence...", that the action was taken "... to safeguard evidence necessary for the purposes of justice..." and that "... a properly limited right of self-help remains in modern international law..." to this effect[16] .

The Court rejected the U.K. argument and ruled:

"... The Court cannot accept such a line of defence. The Court can regard the alleged right of intervention as the manifestation of a policy of force,such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for from the nature of things it would be reserved for the most powerful States and might easily lead to perverting the administration of international justice itself.

The United Kingdom Agent, in his speech reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States respect for territorial sovereignty is an essential foundation of international relations..."[17]

Similarly, in the *Nicaragua Case* the Court referred to the principle of respect for State sovereignty as being "... closely linked with the principles of the prohibition of the use of force and of non-intervention..."[18] . Furthermore, when the Court appraised the facts of the case in the light of the principle of the non-use of force it held that:

" ... The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus, the assistance to the *contras* as well as the direct attacks on Nicaraguan ports, oil installations etc.... not only amount to an unlawful use of force but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force but also affect Nicaragua's sovereignty over certain maritime expanses. The Court found that these operations were carried on in Nicaragua's territorial or internal waters or both and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the Government of another State..."[19]

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[16] I.C.J. Pleadings 1950, vol. iii, p. 296.

[17] I.C.J. Rep. 1949, p. 4, at p. 35; also see Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1626; Asrat op. cit. *supra* n. 1, pp. 149-153.

[18] I.C.J. Rep. 1986, p. 14, at p. 111, para 212.

[19] Ibid. p. 128, para 251.

The significance of the above pronouncements of the Court is in the opinion of the present author very important in three respects.

First, territorial inviolability is safeguarded not only against direct physical acts of force such as invasion of territory, penetration in the air space or territorial waters of a State, laying of mines in the territorial or internal waters of a State but against indirect interventionary activities by States such as assistance to armed bands as well.

Secondly, all the above instances do not constitute cases of violation of the territorial integrity of a State *tout court* ; they constitute violations of the territorial sovereignty of a State, namely,
infringement of both the physical elements of land, sea and air and the totality of the competence of a State as a legal person[20] .

According to Komarnicki[21]

" ...La violation des frontières d' un Etat est la violation de la compétence essentielle de cet Etat, c' est par conséquant la violation par excellence des limites posées par le droit..."

Indeed, force that takes place on the territory of a State cannot be exercised *in abstracto* but it is aimed against the entirety of an international legal entity, namely, its political organisation, population and territory[22] . Principle IV of Part 1 of the Helsinki Final Act, 1975[23] seems to concur with the above view in providing that:

The participating States will respect the territorial integrity of each of the participating States. They will likewise in all circumstances refrain from any other act of military or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind. Accordingly, they will, *inter alia* , refrain from direct or indirect assistance to terrorist activities or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

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[20] See Brownlie op. cit. *supra* n. 9, p. 268; id., Principles of Public International Law, 4th ed. 1990, p. 287 et seq.
[21] Komarnicki, La Définition de l' Agresseur dans le Droit International Moderne, *75 H.R.C. 5 (1949 II)*, p. 55; Asrat op. cit. *supra* n. 1, p. 153.
[22] G.A.O.R. 20th session Annexes, p. 86; *cf*. Asrat op. cit. *supra* n. 1, pp. 159-160.
[23] *Supra* n. 14.

Lastly, the Bowett thesis seems to be at variance with judicial precedent and State practice in that it is based on the general and quite vague concept of "relativity of rights", rather than the Charter and customary law[23bis] . It, moreover, seems to evade the fact that the position of the law with regard to the use of force on the international plane stands adamantly on the premise that unilateral resort to force is in principle prohibited. This is the rule to which there is only one universally accepted and undisputed exception, namely, resort to force in self-defence.

In the latter case violation of the territorial integrity of the State against which defensive action is taken may certainly be involved but it is always to be kept within the context of the exceptional situation of self-defence. It is the necessity, "instant and overwhelming leaving no choice of means and no moment of deliberation"[24] and proportionality[25] of the use of armed force in self-defence which condition the exceptional and extraordinary derogation from the rule of territorial inviolability by force in this case. Indeed both the 1970 Declaration on Friendly Relations and the 1974 Definition of Aggression seem to allow this by referring to the inadmissibility of military occupation of the territory of a State "resulting from the use of force in contravention of the Charter"[26] .

To attribute to the phrase "against the territorial integrity and political independence of any State" its "plain meaning" and consequently interpret it restrictively[27] constitutes nothing else but placing in the very body of Article 2(4) the exception to the rule of non-use force and thus dispensing with every need for a clearly stipulated proviso thereto. In fact, this seems to imply that the *ultima ratio* of the regulation of the use of force by States is any potential threat to the security of the State, rather than the total prohibition of the use of force[28] . Moreover, if this is accepted as part and parcel of Article 2(4) of the Charter then its juridical force is virtually reduced to a minimum. For the concept of the security of the State is farther reaching than the necessity of self-defence and it allows for the admission as lawful- in terms of their compatibility with the phrase "against the territorial integrity and political independence"- of forms of resort to armed

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23bis See Brownlie op. cit. *supra* n. 9, p. 430.

24 See *The Caroline* in Moore, Digest of International Law, vol. ii, p. 409 et seq.; id. vol. vii, p. 919 et seq.

25 See I.C.J. Rep. 1986, p. 14, p. 103, para 194.

26 See *supra* notes 12, 13.

27 Bowett op. cit. *supra* n. 1, pp. 150-2.

28 Ibid. p. 33.

force which in State practice are surrounded by controversy. This is the case with the use of force for the protection of nationals abroad[29].

Furthermore, restrictive interpretation of Article 2(4) on the basis of the relativity of the right of territorial inviolability due to requirements of State security would encourage prolonged military occupation of another State's territory which may serve as the prelude for the ultimate acquisition of territory by the occupant - viz. the Israeli annexation of East Jerusalem and the Golan Heights - or the secession of the territory *durante occupatione* and the assertion by its inhabitants of independent statehood - viz. the proclamation of the so-called "Turkish Republic of Northern Cyprus" in the part of the Republic of Cyprus occupied by the Turkish armed forces. Indeed, the annexation of the Golan Heights by Israel was justified on the strategic importance of the territory for the security of the State of Israel[30] and this bears witness to the detrimental nature of the concept of the threat to the security of the State as a qualification of that of territorial inviolability inasmuch as it allows transgression of boundaries and possession of parts of the territory of a State on a purely subjective basis.

Admittedly, there is no doubt that States as political units are concerned with their security; it is submitted, however, that the law, formulated in accordance with the practice of States, has admitted the right of self-defence as the only universally accepted means of protecting the security of States against any extraneous and physically manifest forcible action directed thereat. It is the necessity of self-defence that activates the need for the protection of the security of the State and not the latter that activates the right to resort to force. If the concept of the security of the State is admitted as the ultimate qualifying condition of the inviolability of territory then it may be elevated to a form of national policy to be pursued rather than a state of fact to be protected. An illustration of this is the occupation of the Golan Heights, the West Bank of the river Jordan, the Gaza Strip and the Sinai peninsula by Israel in the aftermath of the Six-Day war of June 1967. The justification of the occupation of these territories was in the words of Mr A. Eban, the Israeli Foreign Secretary the " ... firm resolve never to return to the danger and vulnerability from which we [Israel] have emerged. This resolve must prevail over every

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29 See infra Part Three , Ch. 11, First Title.

30 See S.C.O.R. 36th yr. 2316th mtg. paras 21-42. Also *infra* Part Two, Ch. 9, First Title.

other consideration. To avoid a return to any of the conditions which prevailed on 4 June is a supreme national purpose, worthy of every effort and every consequence..."[31] . The "consequence" Mr Eban referred to came about fourteen years later with the annexation of the Golan Heights and the rationale of his argument seems to apply unabated to the continuing occupation of the rest of the territories, with the exception of the Sinai peninsula which was returned to Egypt in 1979, to the present day.

The military presence of Israel in the above territories was effected subsequent to the use of force. It becomes clear from the Security Council session of 13 November 1967 that the continuation of the military occupation of these territories was decided upon consideration of security as a national policy the forcible exercise of which is not admitted in State practice ever since the conclusion of the Pact of Paris of 1928[32] . No State seems to have accepted the Israeli thesis with regard to the occupation of the Arab territories in 1967. The U.K. Foreign Secretary Brown said with reference to Article 2(4) of the Charter that " ... the words 'territorial integrity' have a direct bearing on the question of withdrawal ... " of the Israeli armed forces[33] . The Malaysian representative stated more explicitly that the " ... territorial integrity of States is inviolable ... "[34] . In fact military occupation of a State's territory seems to be regarded with high suspicion in State practice as the first step towards the eventual annexation of territory and withdrawal of troops from occupying territories to the lines of the *status quo ante* features as the first practical step towards the avoidance of such possibility. Thus respect for the inviolability of the territory of a State, which is infringed in cases of military occupation , seems to constitute a primary guarantee against the acquisition of territory by force[35] .

On November 22, 1967 the Security Council adopted unanimously Resolution 242 which calls for the withdrawal of the Israeli armed forces from Arab territories occupied in June 1967[36] . The French representative

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[31] S.C.O.R. 22nd yr. 1357th mtg. para 13. Also see Mr. Eban's statement before the G.A. , G.A. Fifth Emergency Special Session, ES-V Plennary Meetings, 1526th mtg. para 87. It appears that the same reasoning lies behind the decision of the Israeli Government, on 19 April 1985, to proclaim a security zone in Southern Lebanon ; Keesing's 1985, p. 33688.
[32] See G.A. ES-V, 1539th plen. mtg. , para 15 (Equador).
[33] Id. 1529th plen. mtg. , para 15.
[34] Id. 1541st plen. mtg. , para 51.
[35] Report of the Secretary General of the United Nations to the General Assembly at its 22nd session, G.A.O.R. 22nd session, Suppl. 1A, para 47.
[36] S.C. Res. 242 (1967) of 22 November 1967, Resolutions and Decisions of the Security Council 1967, S.C.O.R. 22nd yr. , p. 8.

commenting on the text of the Resolution stressed the importance of the connection drawn between the Israeli withdrawal and the inadmissibility of the acquisition of territory by force[37].

During the Security Council debate on the proclamation of the so-called "Turkish Republic of Northern Cyprus" the French representative[38] called for the withdrawal of all foreign occupation forces while the representative of the Netherlands[39] stated that the real issue in this case was the continuing presence of foreign forces on Cypriot territory.

In operative paragraphs 3 and 1 of S.C. Res. 582 (1986) of 24 February 1986 and S.C. Res. 598 (1987) of 20 July 1987, respectively, with regard to the Iran-Iraq conflict the Security Council,acting in the case of the second Resolution under Chapter VII of the Charter, demanded the withdrawal of all forces to the internationally recognized boundaries without delay[40].

Finally, the Security Council adopted S.C. Res. 660 (1990) in relation to the invasion and occupation of Kuwait by the armed forces of Iraq on 2 August 1990. Operative paragraph 2 of the Resolution demanded the "unconditional withdrawal" of the Iraqi troops from Kuwait[41].

3. *Territorial Disputes* .

The general rule of the prohibition of forcible violation of State boundaries accepted in the practice of States may be blurred in cases where the boundaries violated are the object of a dispute between the contending States or in cases where they have never been conclusively determined and constitute mere demarcation lines. If neither of the contestants recognizes the line between them as a boundary separating their respective territories then a violation of each other's territory across the purported boundary would be disclaimed.

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[37] S.C.O.R. 22nd yr. 1382nd mtg. para 112. Also see id. paras 119 (U.S.S.R.), 137-141 (Bulgaria), 162 (Argentina), 189 (Mali). The need for withdrawal of troops was also emphasised during the plennary meetings of the Fifth Special Emergency Session of the General Assembly. See G.A. ES-V Plennary Meetings, 1529th mtg. paras 15 (U.K.), 71 (Denmark); 1530th mtg. paras 130-131 (Italy); 1531st mtg. para 56 (Belgium); 1537th mtg. para 128 (Finland); 1539th mtg. para 21 (Equador).

[38] U.N. Monthly Chronicle, January 1984, vol. xxi, No 1, p. 7.

[39] Ibid. p. 78.

[40] S.C. Res. 582 (1986), Resolutions and Decisions of the Security Council 1986, S.C.O.R. 41st yr. , p. 11; S.C. Res. 598 (1987), Resolutions and Decisions of the Security Council 1987, S.C.O.R. 42nd yr. , p. 5.

[41] S.C. Res. 660 (1990) of 2 August 1990, text in Lauterpacht & others (eds.), *The Kuwait Crisis-Basic Documents, 1991*, p. 88.

In the Goa incident India denied that the line separating the Portuguese dependencies from her territory constituted an international frontier[42]. When Iraq resorted to force against Iran in 1980 she asserted that her objective was to maintain her territorial integrity and her sovereignty over her national waters, thus considering her action not to be in violation of the territorial integrity of Iran[43].

The invasion of the Falkland Islands was equally claimed by Argentina not to be directed against the territorial integrity of the U.K.[44] In the aftermath of the invasion of Kuwait on 2 August 1990, Iraq asserted a historic claim of territorial sovereignty over the entirety of the territory of the Emirate[45]. Moreover, the Kashmir and the Middle East situations illustrate cases where force is resorted to across cease-fire or armistice lines drawn after cessation of hostilities had been agreed between the warring parties.

In all the above cases the central point at issue is the dispute over the boundaries of the territory where force takes place. This very dispute offers the grounds of justification for the use of force to both sides. The State that has resorted to force may argue that it either defends national territory or that it is inconceivable to use force against one's own territory[46]. However, what the use of force in reality purports to achieve in such cases is virtually to promote the settlement of dispute between the two parties in favour of the State that finds itself in *de facto* possession of the territory under dispute.

The successful occupant of the disputed territory often vests its claim with concepts which individually constitute undisputed rights in international law, with or without direct bearing on the prohibition of the use of force. Self-determination and decolonisation feature prominently

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42 S.C.O.R. 16th yr. 987th mtg. paras 46-47.

43 See Documents S/14191, S/14192, S/14199, S.C.O.R. 35th yr. Suppl. for July-Sept. 1980, pp. 114-115, 119; S.C.O.R. 2247th mtg. para 37; M. Ferretti, The Iran-Iraq War: United Nations Resolution of Armed Conflict, 35 *Villanova L.R. 197 (1990)*.

44 S.C.O.R. 37th yr. 2350th mtg. p. 11.

45 The Iraqi claim was first asserted in 1961 when Kuwait became an independent State and was resurrected, not before or at the time when the invasion took place, but only after the purported voluntary "merger" of the two countries. See Press Release by the Press Office of the Embassy of the Republic of Iraq, London, 12 September 1990, in Lauterpacht & others (eds.) op. cit. *supra* n. 41, p. 74 et seq. On the Iraqi historic claim on Kuwait see ibid. pp. 3-71; Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, 55 *Modern L.R. 153 (1992)*, pp. 155-7.

46 See Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law, 1979*, p. 104. Also see *supra* notes 42-44.

in the practice of States that resorted to force in cases of disputed territories- viz. Goa, the Falklands, Kashmir. Self-defence constitutes the other prominent justification for the continuance of the military occupation or the annexation of the territory of a State - viz. the Israeli occupation of the West Bank, the Gaza Strip and the annexation of the Golan Heights.

In both situations force serves as the means of settling the territorial dispute and this runs contrary to Article 2(3) of the Charter according to which States have the obligation to settle their disputes by peaceful means. This, it is submitted, constitutes an obligation under customary international law. It has been enshrined in numerous treaties between States[47] , it has featured in statements of Governments[48] and United Nations Resolutions. In the latter case the 1970 Declaration on Friendly Relations (G.A. Res. 2625 (XXV) of 1970) includes as its second principle that States shall settle their disputes by peaceful means. Moreover, the fourth paragraph of the principle of the non-use of force states:

> ... Every State has the duty to refrain from the threat or use of force ..... as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. ...[49]

It is only the obligation to settle disputes by peaceful means that is binding on States, not the specific means to be used to that effect, whether it be settlement of a dispute by adjudication or arbitration, mediation, conciliation, negotiations. The latter are the object of the free choice and discretion of States.

With regard to territorial and boundary disputes the practice of States shows an increasing preference for peaceful means of

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[47] See for instance the Pact of Paris of 1928.

[48] The representative of the U.K. in the Security Council stated with regard to the Israeli occupation of the Arab territories that " ... Britain does not accept war as a means of settling disputes ...", S.C.O.R. 22nd yr. 1381st mtg. para 20. Also see G.A. ES-V Plennary Meetings, 1531st mtg. para 102 (France), 1537th mtg. para 119 (Argentina).
Similar statements were made in the course of the consideration by the S.C. of the Indian-Pakistan crisis over Kashmir in 1965. See S.C.O.R. 20th yr. 1237ty mtg. paras 147 (Netherlands), 154 (U.K.), 197-199 (U.S.A.).

[49] G.A. Res. 2625 (XXV), G.A.O.R. 25th session, Suppl. No 28, p. 121.See also I.C.J. Rep. 1986, p. 14, at pp. 99-100, para 188.

settlement[50] . It is not surprising therefore that States which have used force in cases of disputed territory sought to present their action as promoting self-determination or being required by a necessity of self-defence.

Self-determination seems to be the underlying basis of the Kashmir dispute between India and Pakistan. The accession of Jammu and Kashmir to India in 1947 was considered by the Pakistani Government[51] as a "coup d' état" based on "violence and fraud against the wishes of the Muslim majority of the population".

Defence of national security is the crux of the Israeli argument with regard to the occupied Arab territories. Iraq also justified its action against Iran in September 1980 as self-defence[52] .
Turkey justified the presence of her armed forces in Cyprus during the Security Council debate on the proclamation of the Turkish Cypriot State as required by the principle of legitimate individual defence[53] .

No State has claimed force as a legitimate means in itself for promoting the solution of territorial disputes; on the contrary, the use of force has been presented as compelled by reasons of defensive necessity or promotion of the right of self-determination.

An additional argument advocating the interpretation that Article 2(4) is violated only in the case of crossing international boundaries has been claimed by Israel with regard to her action in 1967 and the continuance of the occupation of the Arab territories ever since. The Israeli Foreign Secretary A. Eban stated before the Security Council "the necessity of applying the principle of territorial integrity to accepted and secure international frontiers and not to fragile armistice lines"[54] . Armistice lines are certainly "fragile" in the sense that they do not possess the permanence of international boundaries. Whereas the latter purport to delimit definitively the territories of different States, armistice lines aim

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[50] See for instance *The Island of Palmas Award* , 2 R.I.A.A. , p. 829; *Eastern Greenland Case* , P.C.I.J. Series A/B No 53; *Burkina Faso v. Mali Case* , I.C.J. Rep. 1986, p. 554; *The Taba Award* , 27 I.L.M. 1421 (1988).
[51] Letter dated 15 January 1948 from the Minister of Foreign Affairs of Pakistan to the President of the Security Council, Doc. S/646 and Corr. 1, Annex 6, S.C.O.R. 3rd yr. Suppl. for Jan.-March 1948, pp. 80, 82-3.
[52] See *supra* n. 43.
[53] Loc. cit. *supra* n. 38, p. 77.
[54] S.C.O.R. 22nd yr. 1357th mtg. para 46; also see S.C.O.R. 36th yr. 2316th mtg. paras 21-42. The same view was taken by Arab States; see S.C.O.R. 22nd yr. 1345th mtg. para 84 (Jordan).

at guaranteeing the cessation of hostilities as a first step towards the settlement of disputes[55] . Withdrawal of troops is a following step and ultimate peaceful consideration of the merits of each party's claims seems to be the conclusion.

To use force across an armistice line entails the same effect as the crossing of existing and permanent boundaries in every respect but for the name of the line crossed. For, in both cases force serves as the means to promote settlement of the dispute unilaterally by the imposition of the claim of the State that resorts to force against the other party to the dispute without the latter being offered any opportunity whatever to argue its case[56] . Moreover, resort to force in both cases may escalate into a major conflict in view of possible arguments on both sides that they act in self-defence which implies the likelihood of the involvement of third States in the conflict under the justification of collective self-defence. Bowett[57] suggests that peaceful possession of territory or *de facto* authority over territory constitutes a sufficient basis upon which action in self-defence can be justified. The same contingency has been included in the Rio Treaty of Reciprocal Assistance of 1947 [58] . Article 9(b) provides that "[I]nvasion by the armed forces of a state....affecting a region which is under the effective jurisdiction of another State" shall be considered an act of aggression. Admittedly, the above thesis may constitute a satisfactory basis of departure with regard to the regulation of the use of force in case of controversy as to the title to territorial sovereignty with regard to the geographical area where forcible action takes place. Its weakness, however, lies in the fact that what is protected seems to be the peaceful possession and the *de facto* exercise of authority over the territory in dispute, which may serve as bases for acquiring title to the territory in question by effective occupation. The danger becomes more visible in cases of *de facto* and peaceful possession of territory in a situation of prolonged military occupation subsequent to the use of force, lawful or unlawful[59] . If what is really protected is the peaceful authority of the occupant then the possibility of adjudicating title to territory may become real; at the same time, it incurs the danger of disregarding the well established rule in

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[55] See Y. Blum, The Missing Reversioner: Reflections on the Status of Judea and Samaria, *3 Israel L.R. 279 (1968)*, p. 288.
[56] See K.H. Kaikobad, *The Shat-al-Arab Boundary Question, 1988*, p. 108.
[57] Op. cit. *supra* n. 1, p. 35; also see Q. Wright, The Goa Incident, *56 A.J.I.L. 617 (1962)*, p. 623; Asrat op. cit. *supra* n. 1, pp. 154-7.
[58] Text in *43 A.J.I.L. Suppl. 53 (1949)* .
[59] *Cf*. Asrat op. cit. *supra* n. 1, p. 154.

customary international law that acquisition of territory by force is inadmissible.

Roberts[60] suggests with reference to the Middle Eastern situation that in cases of prolonged military occupations that occur due to "ancient rivalries and deep seated territorial-cum-political disputes there may well not be a *status quo ante* to which States can easily revert as part of a diplomatic settlement". It is because of this likelihood that the best approach in the present author's view seems to be suggested by the 1970 Declaration on Friendly Relations which provides in the fifth paragraph of the principle of the non-use of force that:

> ... Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character...[61]

It becomes obvious from the summary records of the preparatory work of the Declaration that armistice lines are equated with official frontiers of States only for the purposes of the prohibition of the use of force which is totally unrelated to the question of the duration of those lines and that the *raison d' être* for this formulation is "to help ensure that they would serve their purpose which in many cases, had been to bring about a halt in the use of force so that the methods of peaceful settlement envisaged in the Charter could operate"[62].

This clearly indicates that what matters in territorial disputes is to bring about a peaceful settlement thereof and to eliminate in the highest degree possible any obstruction towards such settlement by the unilateral resort to force. Moreover, the fact that force is prohibited against lines separating the two disputant parties rather than against their authority as effective administrators of the territory under dispute seems to preclude any assertions attributing to prolonged military occupations, justified on the basis of their resulting from lawful use of force, the law-making effect of the peaceful exercise of sovereign authority over the territory in

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[60] Roberts, Prolonged Military Occupation; The Israeli-Occupied Territories since 1967, *84 A.J.I.L. 44 (1990)*, p. 75.
[61] See also G.A. Res. 378 (V), G.A.O.R. 5th session, Suppl. No 20, pp. 12-13.
[62] G.A.O.R. 21st session Annexes, p. 39; G.A.O.R. 22nd session Annexes, p. 17.

dispute[63] .Whether the occupant takes possession of and effectively administers the territory under dispute subsequent to lawful resort to force bears no significance whatever
on the merits of the case with regard to title to the territory under dispute[64] . Mr. Monroe the Legal Adviser to the U.S. Department of State said that:

> "It is difficult to justify a rule that the use of force in self-defence may, during any resulting occupation, give the occupant rights against the enemy sovereign not related to the original self-defence requirement or not required as concomitants of the occupation itself and the occupant's duties"[65]

In 1967 Israel crossed the 1949 Armistice Lines acting, according to the justification of her Government, in self-defence, and found herself in possession of territories which either belonged to - viz. the Golan Heights and the Sinai - or were *de facto* administered by her neighbouring Arab States-viz. the West Bank of the river Jordan, East Jerusalem, the Gaza Strip. If the almost quarter-of-a-century old Israeli occupation and *de facto* administration of the Arab territories is considered in conjunction with the right of self-defence then the merits of any territorial claims of Israel or the neighbouring Arab States over those disputed areas of the old Palestine Mandate will be inevitably linked with the concept of legitimacy or not of the use of force in international relations. It is submitted that this is to be judged according to the actual territorial position of the parties with regard to the lines dividing their respective areas of control. As for the latter, its merit as effective administration conferring sovereign title to territory in dispute is totally irrelevant to the lawfulness or not of the use of force which resulted in the taking of possession of territory and it

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[63] *Contra* Blum, *Secure Boundaries and the Middle East Peace, 1971*, p. 90; id. , *3 Israel L.R. 279 (1968)* ; Schwebel, What Weight to Conquest? , *64 A.J.I.L. 344 (1970)*, 345-6; E. Lauterpacht, *Jerusalem and the Holy Places, Anglo-Israeli Association, Pamphlet No 19, 1968*, p. 52; Stone, *Israel and Palestine; Assault on the Law of Nations, 1981*, pp. 51-54; id. *Conflict Through Consensus, 1977*, pp. 68, 72; Feinberg, The Legality of the Use of Force to Recover Occupied Territory, *15 Israel L.R. 160 (1980)*, pp. 173-4; Goodhart, International Law Relating to Occupied Territory, *87 L.Q.R. 293 (1971)*, pp. 293-5.

[64] See Q. Wright, The Middle East Problem, *64 A.J.I.L. 270 (1970)*, p. 272; Bowett, International Law Relating to Occupied Territory; A Rejoinder, *87 L.Q.R. 473 (1971)*, p. 475; Kaikobad op. cit. *supra* n. 56, pp. 109-114.

[65] Digest of the U.S. Practice in International Law, 1976, pp. 700-6.

should not be taken into account in a future settlement of the dispute by way of one of the means accepted in the practice of States[66].

Furthermore, refusal to withdraw from an occupied territory sovereignty over which has been a matter of dispute under the justification that would be prejudicial to the future establishment of permanent boundaries[67] is objectionable because it renders a mere nullity of any purported function and practical significance of demarcation lines in respect to the prohibition of the use of force and disregards the fact that the continuing military occupation of the territory entails a factual situation which may be detrimental for the case of the other party in a future dispute settlement.

4. *Forcible Recovery of Occupied Territory* .

The provision on the prohibition of the use of force across boundaries or demarcation lines in the 1970 Declaration on Friendly Relations raises the question of the admissibility of resort to force by the lawful sovereign to recover territory occupied by another Power.

This is in principle admitted in the practice of States provided that title to territorial sovereignty is not disputed *ab initio* with regard to the State that purports to have sovereignty over the territory in question[68] and the action taken in such a case by the lawful sovereign falls within the factual requirements of the right to resort to to force should a necessity of self-defence arises[69] . Such is the case with regard to the resort to force by the U.K. in April 1982 in view of expelling the Argentine occupation forces from the Falkland Islands.

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[66] Kaikobad op. cit. *supra* n. 56, p. 111; Dinstein, Opening Remarks in the Symposium on Human Rights and Israeli Rule in the Territories, *21 N.Y.U.J.I.L.D. 451 (1989)*, p. 459.

[67] See statement by Mr. A. Eban in S.C.O.R. 22nd yr. 1375th mtg. para 51; also see 1377th mtg. para 65 (U.S.A.). Also see Weil, Territorial Settlement in Resolution of 22 November 1967, in J.N. Moore (ed.), *The Arab-Israeli Conflict, 1974*, vol. ii, p. 319; *cf*. S.C. Res. 476 (1980) of 30 June 1980, Resolutions and Decisions of the Security Council 1980, S.C.O.R. 35th yr. , p. 13.

[68] Schachter, *82 Mich. L.R. 1620 (1984)*, pp. 1627-8; Jennings, *The Acquisition of Territory in International Law, 1963*, p. 72. The same is the case with regard to title to territory which was admissible in international law at the time when the title was established. An illustration of this contingency is the concept of conquest which prior to the Covenant of the League and the Pact of Paris was a legitimate mode of acquisition of territory. The subsequent outlawry of acquisition of territory by force does not invalidate retroactively titles to territorial sovereignty based on conquest - viz. the case of the Falklands. See D.J. Harris, *Cases and Materials on International Law, 4th ed., 1991*, p. 201 but *cf*. pp. 196-8.

[69] See *infra* Part Two , Ch. 9, First Title.

The position in State practice seems to be different in cases of military occupation of territory sovereignty over which has been disputed *ab initio* .

It is mainly in such cases where demarcation or cease-fire lines are drawn for the purpose of facilitating the peaceful settlement of disputes. In the Kashmir situation sovereignty over the territory has been in dispute since 1948, when former British India acceded to independence, and as a result hostilities broke out. The Security Council was seized with the Question and appointed a Commission to mediate between the disputant parties, India and Pakistan, for a settlement of the dispute[70] and a cease-fire line was established on 13 August 1948[71]. In September 1965 the Pakistani Army launched a large-scale attack across the cease-fire line. Statements by representatives of States
during the Security Council debates[72] as well as a series of Resolutions[73] by the latter reveal disapproval of the Pakistani argument that "...there is no international frontier between Pakistan and Indian occupied Kashmir"[74] .

A third and most interesting situation arises in a case where, although sovereignty over the territory which is aspired to being "liberated" is not disputed with regard to the author of violence, the resort to force is seen as part of a prolonged political conflict, which is endemic in a certain geographical region in which most of the States therein are involved and which has erupted in overt military action. Such case is reflected by the situation in the Middle East.

In October 1973 Egypt and Syria launched a large scale attack against the Israeli positions in the Sinai and the Golan Heights, respectively, which had been occupied by Israel as a result of the Six-Day war of 1967. Although the Egyptian representative on the Security Council justified the use of force resorted to as action in self-defence against an Israeli attack on

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[70] S.C. Res. 39 (1948) of 20 January 1948, in Djonovich (ed.), *United Nations Resolutions series II, Security Council*, vol. ii 1948-1950, p. 12.
[71] Text of the Agreement in Higgins, *United Nations Peacekeeping 1946-1967. Documents and Commentary, vol. 2 Asia, 1970*, p. 323.
[72] *Supra* n. 48.
[73] See S.C. Res. 210 (1965) of 6 September 1965; S.C. Res. 211 (1965) of 20 September 1965; S.C. Res. 214 (1965) of 27 September 1965; S.C. Res. 215 (1965) of 5 November 1965, calling for respect for the ceasefire and withdrawal of troops. Also see the identical telegrams dated 1 September 1965 from the Secretary General of the U.N. to the President of Pakistan and the Prime Minister of India, Doc. S/6647, S.C.O.R. 20th yr. Suppl. for July-Sept. 1965, pp. 233-4.
[74] S.C.O.R. 20th yr. 1238th mtg. para 29.

the Egyptian positions at the Suez Canal[75] it appeared that the real aim of the Egyptian - as well as Syrian - action was the recovery of the territories occupied by Israel as a result of the Six-Day War of 1967[76] . The above contingency was supported by a certain number of States[77] and seems to have been rejected by others[78] ,in the latter case, on the basis of a peaceful settlement of the Middle East Crisis according to the principles of S.C. Resolution 242 (1967) of 22 November 1967. The latter view seems to have prevailed due to the fact that S.C. Res. 338(1973) of 22 October 1973 which was adopted unanimously by the Security Council called for a cease-fire, the implementation of S.C. Res.242 (1967) and negotiations for the achievement of peace[79] .

Notwithstanding the fact that both Syrian and Egyptian sovereignty over the Golan Heights and the Sinai peninsula respectively was undisputed, the Security Council seems to have viewed the specific conflict of 1973 against the whole of the Middle East crisis in terms of territorial sovereignty; for, ever since 1948 the boundaries and indeed the very right of existence of the then newly established State of Israel became the object of dispute with the result of permanent tension in the area, five major armed conflicts[79a] and numerous acts of force on the part of both Israel and the Arab States.

Security Council Resolution 242 (1967) clearly stipulated that the right of every State in the region to live in peace within secure and recognised boundaries was a prerequisite for the establishment of a just and lasting peace in the Middle East. The achievement of such peace with regard to the occupied Arab territories[80] by Israel must follow the general pattern of settlement envisaged in Resolution 242 of 22 November 1967 which expressly refers in its third preambular paragraph to Article 2(3) of the Charter, namely, the duty of peaceful settlement of disputes among States and the prohibition of the use of force in international relations

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[75] S.C.O.R. 28th yr. 1743rd mtg. paras 37-39.

[76] Namely, the Sinai peninsula (Egypt) and the Golan Heights (Syria). See Ibid. para 52; also see 1744th mtg. paras 44-87 (Syria). *Cf. infra* Part Two , Ch. 9, First Title.

[77] See id. 1743rd mtg. paras 53-58 (China); 1744th mtg. paras 179-180 (India), 199 (Sudan); 1745th mtg. paras 38-39 (Guinea), 57-58 (Peru), 159 (U.S.S.R.); 1746th mtg. paras 9 (Nigeria), 19 (Kenya).

[78] See id. 1743rd mtg. paras 70-72 (U.K.); 1744th mtg. paras 27 (France), 39 (Austria); 1746th mtg. para 32 (Australia).

[79] S.C. Res. 338 (1973) of 22 October 1973, Resolutions and Decisions of the Security Council 1973, S.C.O.R. 28th yr. , p. 10.

[79a] Namely, in 1948-49 (Israel war of Independence), 1956 (The Sinai Campaign), 1967 (The Six Day War), 1973 (The *Yom Kippur* War), 1982 (The Israeli invasion of Lebanon).

[80] The Sinai was restored to Egypt after the 1979 Peace Treaty between Egypt and Israel.

[Article 2(4)][81]. Moreover, by virtue of the Disengagement of forces Agreements signed by Israel on 31 May 1974 and 4 September 1975 with Syria and Egypt, respectively[82], the parties thereto undertook to observe the cease-fire and to refrain from all military and paramilitary activities against each other.

5. *The Prohibition of Acquisition of Territory by Force .*

The prohibition of the threat or use of force against the territorial integrity and political independence of any State has as its corollary the inadmissibility of the acquisition of territory by States as a result of the threat or use of force and the disinclination in the practice of States to recognise such acquisition or the statehood of entities which emerge as a consequence of the use of force against the State whose territory they have hitherto formed part of[83] .

Both situations are examined in the context of the concept of non-recognition of territorial changes as the result of the use of force. According to Langer[84] :

> " ... The essence of non-recognition of a territorial transfer is the refusal, on the part of the non-recognizing Power to regard the sovereignty of the dispossessed Power superseded by that of the dispossessing Power and to give to acts of the latter the effects attaching to the acts of a rightful sovereign ..."

Moreover, non-recognition rests on the fact that the territorial change against which it is directed is the result of an act in violation of International law; indeed, it seems that non-recognition constitutes an application of the principle *ex injuria jus non oritur* [85] . The function of non-recognition in International law has been suggested by Lauterpacht[86] to constitute in the following passage:

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[81] See Feinberg, *15 Israel L.R. 160 (1980)*, p. 160; Wengler, *7 Revue Belge D.I. 401 (1971)*, pp. 407-8.

[82] Feinberg, *15 Israel L.R. 160 (1980)*, pp. 161-2.

[83] See Crawford, *The Creation of States in International Law, 1979*, pp. 106-7.

[84] Langer, *Seizure of Territory, First Greenwood Reprinting, 1969*, p. 96.

[85] Brownlie op. cit. *supra* n. 9, p. 410.

[86] Lauterpacht, *Recognition in International Law, 1948*, pp. 411-412; also see Chen, *The International Law of Recognition, 1951*, pp. 430-433; Patel, *Recognition and the Law of Nations, 1959*, pp. 11-115.

" ... Recognition is unnecessary and irrelevant only when the lawfulness of an act giving rise to the pretended title is clear and undisputed - lawfulness meaning either its conformity with general international law or with particular legal rights of other States. But recognition of a new title acquires definite significance as soon as the legality of the act or the existence of the legal title on which the act is based becomes a matter of doubt or dispute. When this happens, recognition removes the uncertainty by acknowledging the conformity of
the title in question with international law. The position is altogether different when the facts giving rise to the pretended new title are in violation of international law. In such cases recognition fulfils a function altogether distinct from other aspects of recognition. It is no longer an act of administration of international law; it is a political function. While not intended to do away with the moral or legal opprobrium attaching to the original illegality, it validates its consequences. It is against recognition of this nature that the policy or the obligation of non-recognition is directed ..."

The unilateral use of force by States in their international relations has become illegal by the evolution of customary international law that started with the the introduction of the Covenant of the League of Nations and the conclusion of the Pact of Paris of 1928 and culminated in Article 2(4) of the Charter of the United Nations. Conquest which had hitherto been admitted in State practice as one of the means of acquiring territorial sovereignty has been rendered unlawful[87] . Furthermore, the creation of States under conditions brought about by way of inter-State use of force is considered *prima facie* inadmissible. Non-recognition appeared in the practice of States prior to
the League of Nations although it seems that it was prompted by breaches of specific contractual obligations rather than violations of a rule of general international law. Thus, the refusal of the British Government to recognise the annexation of Bosnia-Hercegovina by Austria-Hungary in 1908 was justified on the breach of the Treaty of Berlin of 1878, rather than the inadmissibility of conquest in International law[88] .

The advent of the League of Nations and more specifically Article 10 of the Covenant of the League, which stipulated the guarantee of the territorial integrity of Member States against external aggression and the conclusion of the Pact of Paris of 1928 gave rise to the development of the law which resulted in non-recognition becoming a duty under International law.

This development was given impetus by instances in the practice of States during the 1930s amounting to territorial mutilation of States as a result of the threat or use of force, that took the form of either outright

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[87] See *supra* n. 68.
[88] Langer op. cit. *supra* n. 84, p. 13.

annexation of the victim's territory - viz.the Italian annexation of Ethiopia in 1936 and Albania in 1939, the German annexation of Austria (1938) and Czechoslovakia (1939), the Soviet annexation of Western Poland (1939), the Baltic States (1940) and Bessarabia (1940)- or the creation of a new State out of a part of the victim's territory - viz.Manchukuo[89] .

Moreover, non-recognition in the period of the League of Nations seemed to be directed against situations that constituted violation of rules of international law pertaining to the use of force by States, which although were vested with the character of treaty-obligations, were of general application, due to the large number of contracting parties thereto, and entailed the curtailing of the freedom inherent in the sovereignty of States to use force.

Non-recognition emerged as a statement of policy in the famous Note addressed to the Governments of China and Japan by the United States Secretary of State Stimson on 7 January 1932[90] .

However, it seems that non-recognition soon evolved into an obligation in that the practice of States reveals a number of instances in which it was envisaged as such. The Note of 16 February 1932 of the Members of the Council of the League other than China and Japan to the Governments of the latter, the Resolution of the Assembly of the League of 11 March 1932, the Chaco Declaration by nineteen American States, indicate by their wording that non-recognition was seen as a legal obligation[91] . The British *de jure* recognition of the Italian annexation of Ethiopia although *prima facie* in complete contradiction with any obligation of non-recognition was adopted against the background of diplomatic activity on the part of the British Government which reveals the wish of the latter to achieve some kind of release from an obligation of non-recognition[92] . Multilateral treaties concluded in the Americas, but participation to which was not confined to American States only, incorporated non-recognition as an express treaty obligation.

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[89] Brownlie op. cit. *supra* n. 9, pp. 411-8.

[90] Whiteman, *Digest of International Law*, vol. 5, pp. 874-5. The Stimson Note did not imply as such an obligation of non-recognition. See Lauterpacht op. cit. *supra* n. 86, p. 416; Brownlie op. cit. *supra* n. 9, p. 418.

[91] Lauterpacht op. cit. *supra* n. 86, p. 417; Brownlie, p. 419; Remarks by Ambassador Jacovides and K. Ioannou, Cyprus: International Law and Prospects of Settlement, *A.S.I.L. Proceedings 107 (1984)*, pp. 118, 129-130.

[92] Lauterpacht, p. 418.

Article 2 of the 1933 Rio Anti-War Treaty (the Saavedra Lamas Pact)[93] , which was adhered to or ratified by eleven European States, provides that the signatories and adherents thereto, "...will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of an occupation or acquisition of territory that may be brought about by force..."

Article 11 of the 1933 Montevideo Convention on the Rights and Duties of States[94] provides that:

> The contracting States definitively establish as the norm of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure.

The fifth principle of the Act of Chapultepec[95] of 1945 declared:

> ... (a) The proscription of territorial conquest and the non-recognition of all acquisitions made by force ...

Furthermore, the Charter of the Organisation of American States[96] provides in Article 17 that:

> No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

The United Nations Charter does not expressly impose on the Members of the Organisation an obligation of non-recognition of forcible territorial changes; however, the combined effect of the obligations under Articles 2(3) and 2(4) can hardly render any forcible acquisition of territory compatible with these obligations[97] .

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[93] *163 L.N.T.S. 393* .
[94] 165 *L.N.T.S. 19* .
[95] *39 A.J.I.L. Suppl. 266 (1945)* .
[96] *30 U.N.T.S. 449* .
[97] Thomas & Thomas, *Non-Intervention, 1956*, p. 270; statement by Mr. Yepes in the course of the preparation of the Draft Declaration on the Rights and Duties of States that non-recognition enshrined the principle contained in Article 2(4) of the Charter, I.L.C. Ybk. 1949, Vol. I, 14th mtg. para 120.

The Draft Declaration on the Rights and Duties of States[98] prepared by the International Law Commission in 1949 provides in Article 11 that:

> Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of Article 9 [namely, the duty to refrain from resort to war as an instrument of national policy and from the threat or use of force.]

Paragraph 8 of Article 2 of the International Law Commission Draft Code of Offences against the Peace and Security of Mankind[99] included "[T]he annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law" among the acts constituting offences against the peace and security of mankind.

The 1970 Declaration on Friendly Relations[100] includes in the tenth paragraph of the principle of the non-use of force the provision that:

> ... The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal ...

Article 5(3) of the 1974 Definition of Aggression[101] likewise provides that "[N]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful".

Finally, the 1975 Helsinki Final Act[102] declares that the participating States "...will refrain from any demand for or act of seizure and usurpation of part or all of the territory of any participating State ... " and furthermore that they " ... will.... refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal ... ".

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98 I.L.C. Ybk. 1949, Vol. II, Part Two, p. 288.
99 I.L.C. Ybk. 1954, Vol. II, Part Two, p. 151.
100 G.A. Res. 2625 (XXV), G.A.O.R. 25th session, Suppl. No 28, p. 121.
101 G.A. Res. 3314 (XXIX), G.A.O.R. 29th session, Suppl. No 31, p. 142.
102 Principles III (2) and IV (3), 14 I.L.M. 1292 (1975).

Despite the inconsistencies in the practice of non-recognition in the League period[103] the practice of States in the post-Charter period has consolidated non-recognition as an obligation under general international law.

Resolution 242 (1967) adopted unanimously by the Security Council on 22 November 1967 and purporting to lay down the principles for the establishment of just and lasting peace in the Middle East emphasized the "inadmissibility of the acquisition of territory by war"[104].

The annexation of East Jerusalem and the Golan Heights by Israel in 1980 and 1981 respectively was met by universal condemnation. The Security Council[105] reaffirmed the inadmissibility of the acquisition of territory by force "in accordance with the United Nations Charter, the principles of International law and relevant Security Council Resolutions"[106]. By virtue of operative paragraph 1 of S.C. Res. 497 of 17 December 1981 on the annexation of the Golan Heights the Security Council decided that the Israeli act " ... is null and void and without international legal effect ... "; likewise, operative paragraph 5 of S.C. Res. 478(1980) stipulated the non-recognition of the effects of the "Basic Law" enacted by the Israeli *Knesset* and by virtue of which East Jerusalem was incorporated into Israel, and determined that it was null and void.

Furthermore, the Security Council in its Resolution 582 of 8 October 1986 with respect to the *Iran-Iraq* conflict emphasized once more "the principle of the non-acquisition of territory by force"[107].

Finally, a more recent pronouncement by the Security Council on the illegality of forcible acquisition of territory occurred during the Kuwait crisis of August 1990. On 2 August 1990 the armed forces of Iraq invaded and occupied Kuwait. On 8 August 1990 the "comprehensive and eternal merger" of Kuwait with Iraq was announced[108].

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[103] Waldock, *81 H.R.C. 455 (1952 II)*, p. 481; Brownlie, pp. 413-8.

[104] See S.C.O.R. 22nd yr. 1382nd mtg. paras 76 (Nigeria), 112 (France), 119 (U.S.S.R.), 127 (Brazil), 137-139 (Bulgaria), 163 (Argentina), 173 (Japan). *Cf*. Stone, *Israel and Palestine; Assault on the Law of Nations, 1981*, p. 54; Weil, Territorial Settlement in Resolution of November 22, 1967, in Moore (ed.), *The Arab-Israeli Conflict, vol. ii, 1974*, p. 319.

[105] S.C. Res. 476 (1980) of 30 June 1980 and S.C. Res. 478 (1980) of 20 August 1980 on East Jerusalem. The U.S.A. abstained in both resolutions. Texts in Resolutions and Decisions of the Security Council 1980, S.C.O.R. 35th yr., pp. 13, 14; S.C. Res. 497 (1981) of 17 December 1981 on the Golan Heights (adopted unanimously), text in Resolutions and Decisions of the Security Council 1981, S.C.O.R. 36th yr., p. 6.

[106] S.C. Res. 497 (1981) of 17 December 1981.

[107] Text in Resolutions and Decisions of the Security Council 1986, S.C.O.R. 41st yr., p. 11.

[108] Keesing's 1990, p. 37635.

On 9 August the Security Council adopted unanimously S.C. Res. 662 (1990) which provided, *inter alia* , that:

> The Security Council
>
> .....
>
> 1. *Decides* that the annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void.
>
> 2. *Calls upon* all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation. .....[109]

Statements by individual members of the Security Council reiterated the inadmissibility of acquisition of territory by force. The representative of Malaysia stated that:

> " ... The world has come a long way from the history of wars and miseries brought about as a result of ambitions and imperatives of States to expand and annex other States around them. The annexation of Kuwait is totally unacceptable ..."[110]

According to the representative of Finland:

> " ... The acquisition of territory of another State by the use of force contradicts one of the most basic and firm principles of international law ..."[111]

Finally, the representative of Colombia expressed the view that:

> " ... The use of force can never legitimise the occupation and subjugation of territory ..."[112]

It is, moreover, noteworthy that Iraq did not purport to annex Kuwait, but it claimed that the "merger" was effected at the request of the "Provisional Free Government of Kuwait"[113] . The Iraqi argument was outright refuted in the Security Council[114] and the majority of States maintaining diplomatic missions in Kuwait refused to comply with the

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[109] Text in Lauterpacht & others (eds.), *The Kuwait Crisis-Basic Documents, 1991*, p. 90.
[110] S.C.O.R. 45th yr. S/PV. 2934 (9 August 1990), in Lauterpacht & others (eds.), op. cit. *supra* n. 109, p. 107.
[111] Ibid.
[112] Ibid.
[113] Press Release by the Press Office of the Embassy of the Republic of Iraq, London, 12 September 1990, in Lauterpacht & others (eds.), p. 73.
[114] See Lauterpacht & others (eds.), pp. 105-9. Also see Greenwood, *55 Modern L.R. 153 (1992)*, p. 157-8.

order of the Iraqi Government to close down their missions in Kuwait City and transfer them to Baghdad[115].

Emergence of "independent" States the territory of which consists of the part of the victim-State's territory which is under the military occupation of the State that resorted to force, constitutes a more subtle means of effecting territorial changes in that it is *prima facie* not a case of outright annexation of territory by the State-author of violence. It can, furthermore, be vested with claims of exercising the right of self-determination on the part of the population- most likely an ethnic minority group- of the area which proclaims its independence.

"Manchukuo" and the so-called "Turkish Republic of Northern Cyprus" constitute two illustrations of such territorial change in the practice of States.

Both of them emerged during a situation of military occupation of parts of the territories of States they belonged to, namely, China and Cyprus, respectively. In both cases the occupant Powers namely, Japan[116] and Turkey[117] strongly denied any territorial ambitions with regard to the territories under occupation; instead, the new "States" appeared as the realization of the right of self-determination[118] which constitutes a plea that undoubtedly may arouse the sympathy of various quarters of the international community towards the newly established entities[119].

However, it is submitted, that unless the emphasis is placed on the fact that a State is deprived of a part of its territory pursuant to an instance of use of force, the real significance of non-recognition of such entities cannot be appreciated. For what matters in these cases is not the aspirations of the population of the area to exercising their right of self-determination or the question whether they may be the beneficiaries of this right, but, rather, the fact that this is materialised

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115 Keesing's 1990, p. 37639; also see S.C. Res. 664 (1990) of 18 August 1990 para 3; S.C. Res. 667 (1990) of 16 September 1990 paras 1, 3, 4. Texts in Lauterpacht & others (eds.), pp. 90, 92-3.

116 L.N.O.J. 1931, p. 2280.

117 U.N. Monthly Chronicle, Jan. 1984, vol. xxi, No 1, p. 77.

118 Letter dated 15 November 1983 from Mr. R. Denktas - the leader of the Turkish-Cypriot community - appended to the letter dated 15 November 1983 from the representative of Turkey to the Secretary-General, Doc. S/16148, S.C.O.R. 38th yr. Suppl. Oct-Dec. 1983, p. 91.

119 See U.N. Monthly Chronicle, Jan. 1984, vol. xxi, No 1, p. 78.

within a situation which constitutes the direct result of the use of force, namely, a state of military occupation which in itself is inherently forcible as well[120].

The "birth" of Manchukuo provided the factual basis for the initiation and development of the duty of non-recognition by relying on the Covenant of the League of Nations and the Pact of Paris both of which have a direct bearing on the regulation of the use of force by States[121].

The "Turkish Republic of Northern Cyprus" was proclaimed on 15 November 1983. At the time of the declaration of independence the territory of the new "State", namely, the northern part of the Republic of Cyprus - independent State and Member of the United Nations since 1960 - was occupied by the Turkish armed forces which intervened in Cyprus on 20 July 1974 under Article IV of the 1960 Treaty of Guarantee signed between Cyprus on the one hand and Greece, Turkey and the United Kingdom on the other[122]. The proclamation of the "Turkish Republic of Northern Cyprus was met with universal condemnation on the part the international community, with the exception of Turkey which has been the only State that recognized the new entity. During the Security Council debate on the situation the representative of Guyana[123] considered the act of the Turkish Cypriot community as "an attempt to consolidate and give legitimacy to a situation created by invasion and occupation"[124]. Finally, S.C. Resolution 541 (1983) of 18 November 1983 called expressly for the non-recognition of the Turkish-Cypriot State[125]. Moreover, the ten Member States of the E.E.C. in a common statement issued in Athens on 16 November 1983 strongly deplored

the establishment of the Turkish Cypriot State and called for its non-recognition[126]. Furthermore, the continuing sovereignty of the Government of the Republic of Cyprus over the entirety of the territory of

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120 Crawford, *The Creation of States in International Law, 1979*, p. 107.

121 See Brownlie, p. 413 n. 7.

122 See *infra* Part Three, Ch. 12, Second Title.

123 Loc. cit. *supra* n. 119, p. 77.

124 For similar statements see ibid. pp. 76 (Greece), 77 (France), 78 (The Netherlands), 79 (U.K.), (Zimbabwe).

125 Voting 13:1(Pakistan):1 abstention (Jordan). Text in Resolutions and Decisions of the Security Council 1983, S.C.O.R. 38th yr., p. 15. See Crawford op. cit. *supra* n. 120, p. 118 n. 157; Brownlie, The United Nations Charter and the Use of Force, 1945-1985, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p. 491, at p. 492. *Contra*. Necatigil, *The Cyprus Question and the Turkish Position in International Law, 1988*, pp. 285-6.

126 Appended to the letter dated 16 November 1983 from the representative of Greece to the President of the Security Council, Doc. S/16155, S.C.O.R. 38th yr. Suppl. for Oct.-Dec. 1983, p. 99. Also see letters from the representatives of France (S/16153), ibid. p. 98;

the State has been implicitly affirmed by two decisions of the European Commission of Human Right (ECHR) concerning the admissibility of respective applications of the *Republic of Cyprus v. Turkey* in 1975 and 1978. The ECHR rejected the argument invoked by Turkey that it was not competent to deal with the applications on the grounds of non-applicability of Article 1 of the European Convention of Human Rights . The respondent claimed that the requirement of *ratione loci* was lacking due to the fact that Northern Cyprus had not been annexed by Turkey and that the only competent authority therein was the so-called "Turkish Federated State of Cyprus" which was proclaimed in 1975. In rejecting the above argument the ECHR implicitly relied upon the fact that Turkey's position in Cyprus was that of a belligerent occupant administering the territory under occupation[127] .

The duty of non-recognition of forcible territorial change has become the object of severe criticism with regard to both its legal basis and its effectiveness as a means of respect for the law ever since its enunciation in 1932[128] . What, moreover, is rather problematic with regard to the practice of non-recognition is the fact that certain decisions of English Courts pertaining to acts of entities which are

not recognised by the U.K. Government seem to be completely at variance with the policies of the executive[129] . It is very doubtful, however, that those judicial pronouncements are of any conclusive value with regard to the recognition of forcible territorial changes on the international plane, which constitutes the prerogative of the executive[130] . Moreover, what

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Nicaragua (S/16158), p. 101; Sierra-Leone (S/16162), p. 103; Hungary (S/16165), p. 105; Bulgaria (S/16170), p. 109; Mongolia (S/16172), p. 110; Viet-Nam (S/16174), p. 111; Portugal (S/16175) and Jamaica (S/16183), p. 115

[127] *Cyprus v. Turkey* , E.C.H.R. D.R. vol. 2, December 1975, p. 137 para 10, and vol. 13, July 1978, pp. 148, 150, paras 18, 24.

[128] See Fischer-Williams, The New Doctrine of "Recognition", *18 Grot. Soc. Proceedings 109 (1932)*; id. *44 H.R.C. 203 (1933 II)*, p. 281; J.B. Moore, Fifty Years of International Law, *50 Harv. L.R. 395 (1937)*, p. 436; McNair, The Stimson Doctrine of Non-Recognition, *14 B.Y.I.L. 65 (1933)*, pp. 71-74; Briggs, Non-Recognition of the Title by Conquest and Limitations of the Doctrine, *A.S.I.L. Proceedings 72 (1940)*; Rousseau, *Droit International Public, vol. iii, 1977*, p. 526; Kelsen, *Principles of International Law, 2nd ed. by Tucker, 1967*, pp. 420-433. *Cf*. Blix, Contemporary Aspects of Recognition, *130 H.R.C. 593 (1970 II)*, pp. 664-5; Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 160-1.

[129] See *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* [1967] A.C. 853; *Hesperides Hotels Ltd. and another v. Aegean Turkish Holidays Ltd. and another* (*per Lord Denning*), [1978] 1 All E.R. 283, e-f; *G.U.R. Corporation v. The Trust bank of Africa Ltd.* [1986] 3 W.L.R. 583. *Contra* . *The Arantzazu Mendi* (*per Lord Atkin*), [1939] A.C. 256, 264. Also see Mann, *Further Studies in International Law, 1990*, pp. 386-8.

[130] Brownlie, *Principles of Public International Law, 4th ed. 1990* , p. 99.

seems to be at issue before national courts are private claims arising out of "acts of every-day occurrence" or "perfunctory acts of administration"[131]; by contrast, the question in the present context is that of the legality of an entity that is not to be assessed on the basis of "the interest of justice and commonsence"[132] with regard to a specific private claim but rather on the basis of international law. It is the prohibition of the use of force as an illegality *per se* that gives rise to the duty of non-recognition and the latter has precisely the position of a statement of illegality which is unaffected by any practical necessities of private law[133]. The duty not to resort to force is a duty binding on States under customary International law and in upholding this, with regard to the attitude of the United States in particular, the
International Court of Justice in the *Nicaragua Case* referred to Article
11 of the 1933 Montevideo Convention on the Rights and Duties of States, which expressly stipulates the non-recognition of forcible territorial changes, as evidence of *opinio juris* of the customary law prohibition of the use of force[134]. It may, therefore, be submitted that non-recognition of territorial changes by force is an inherent part of the illegality of the use of force[135]. Consequently, the above indicates that non-recognition does not have the place of sanction, namely, a punitive act as the result of the prior illegality of the use of force, although *prima facie* and according to some jurists[136] it seems to function as such. The repeatedly stated inadmissibility of acquisition of of territory by force in statements of representatives of States, numerous Resolutions of the United Nations organs and in treaty practice point to the fact that the prohibition of forcible acquisition of territory is unlawful *ab initio* due to the proscription of the use of force and therefore non-recognition derives from and constitutes the external
manifestation of the above illegality on the part of the international
community in respect to territorial changes created by force[137]. As

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131 *Carl Zeiss Case* *supra* n. 129.
132 Ibid.
133 Lauterpacht op. cit. *supra* n. 86, p. 433; Waldock, *81 H.R.C. 455 (1952 II)*, p. 482; Brownlie op. cit. *supra* n. 9, pp. 419-422; O' Connell, *International Law, 2nd ed. , 1970*, p. 147; Crawford op. cit. *supra* n. 120, p. 127.
134 I.C.J. Rep. 1986, p. 14, p. 100, para 189. Moreover, the Court held that the principle of non-use of force constituted a rule of *jus cogens* ; ibid. pp. 100-101, para 190. Also see Dugard, *Recognition and the United Nations, 1987*, pp. 132 et seq., 143-5, 154-6.
135 See Brownlie loc. cit. in Cassese (ed.) op. cit. *supra* n. 125.
136 Rousseau op. cit. *supra* n. 128.
137 Lauterpacht op. cit. *supra* n. 86, pp. 413, 421.

Lauterpacht[138] points out the significance of non-recognition lies in " ...the maintenance of the authority of the law ... " and in the fact that it constitutes " ... the minimum of resistance which an insufficiently organised but law-abiding community offers to illegality ... ".

Furthermore, the forcible acquisition of territory is and must be unqualified with regard to the lawfulness or not of the use of force. With regard to the latter Jennings[139] very rightly suggested that "...it would be a curious law of self-defence that permitted the defender in the course of his defence to seize and keep the resources and territory of the attacker ... "; the above submission seems to be supported by the practice of States- viz. the universal condemnation of the Israeli annexation of the Golan Heights. Moreover, the universal non-recognition of the "Turkish Republic of Northern Cyprus" has been consistently maintained and linked directly with the presence of the Turkish army of occupation despite the claim argued by Turkey of the lawfulness of the presence of her armed forces in Cyprus under Article IV of the 1960 Treaty of Guarantee and the right of self-defence[140].

6. *Conclusion* .

The position of customary international law with regard to the territorial aspect of the use of force between States indicates the following conclusions.

First, conquest as a means of acquisition of title to territory has ceased to be part of International law.

Secondly, the phrase in Article 2(4) of the Charter with regard to the territorial integrity and political independence of States must be read as a whole, namely, that the prohibition of the use of force refers to the territorial sovereignty of a State, namely, both the physical element of land, maritime and air territory and the political competence of the Sate therein. Consequently, force is prohibited not only in the sense of the acquisition of territory but in violation of the boundaries of States as well.

Thirdly, the prohibition of the use of force has been extended to apply in the case of demarcation lines. Without attributing a character of

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138 Ibid. pp. 430-1.

139 Jennings, *The Acquisition of Territory in International Law, 1963*, p. 55. *Contra* . Stone, *Israel and Palestine; Assault on the Law of Nations, 1981*, p. 46; id. *Conflict Through Consensus, 1977*, p. 58; M. Halberstam, Recognition, Use of Force and the Effect of United Nations Resolutions under the Revised Statement of the Foreign Relations Law of the United States, *19 Israel L.R. 495 (1984)*, p. 502 et seq.; Blum loc. cit. *supra* n. 55.

140 See U.N. Monthly Chronicle, Jan. 1984, vol. xxi, No 1, pp. 77-79.

permanence to such lines with reference to the question of the best title over disputed territory, the law seems to assimilate them with the concept of boundaries for the purposes of the rule of the non-use of force only. Moreover, this development incurs the advantage of establishing the illegality of resort to force by dispensing with the need to examine the merits of a territorial dispute particularly with respect to claims of exercise of peaceful authority *à titre de souverain* in the territory under dispute.

Fourthly, lawful resort to force in self-defence or by way of counter-measures may involve the violation of boundaries or demarcation lines or even the occupation of part of the territory of the State against which such action is taken; however, such forcible violation or military occupation of territory must be strictly confined within the necessity and proportionality of self-defence and counter- measures and must be terminated when such necessity ceases to exist[141] . By contrast, the lawfulness of resort to force is not under any circumstances whatever to serve as the basis for the acquisition of territory.

Finally, the gradual evolution of the rule of the inadmissibility of force in international relations and the correlating illegality of conquest prompted the development of a duty of non-recognition of forcible territorial change which has the position of a statement of illegality on the part of the international community towards such change, not by way of sanction but as the external manifestation of the illegality which derives from and is identical with the legal character of the act of which it constitutes the offspring, namely, the use of armed force.

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141 See *infra* Part Two , Ch. 9, First Title.

PART TWO

THE RIGHT OF DEFENSIVE ACTION AS THE ONLY UNIVERSALLY ADMITTED EXCEPTION TO THE RULE OF NON-USE OF FORCE .

CHAPTER 8
THE HISTORICAL EVOLUTION OF THE CONCEPT OF SELF-DEFENCE IN INTERNATIONAL LAW .

1. *The State of the Law prior to the League of Nations* .

In Hall the following passage occurs:

"... In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary; and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles. If such suspension is necessary for existence,the general right is enough; if it is not strictly necessary, the occasion is hardly one of self-preservation ..."[1]

The right of self-preservation, which constituted the stereotyped justification for resort to force in the period under discussion, includes traces of natural law as well as analogies from domestic law. It was broad enough to include the concept of self-defence, and it meant a general right of protection against "...external danger and hostility ..."[2].

Cicero wrote about self-defence that *"Est haec non scripta sed nata lex "*[3] , and Gaius wrote that *"Adversus periculum naturalis ratio*

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[1] Hall, *International Law, 8th ed. by P. Higgins, 1924*, p. 322.

[2] See Cheng, *General Principles of Law as Applied by International Courts and Tribunals, 1953*, pp. 31, 69 et seq.

[3] Cicero, *Pro Milone*, IV, quoted in Giraud loc. cit. *infra* n. 11, p. 706.

permettit se defendere "[4] . Moreover, Grotius took the view that the "right of self-defence.....has its origin directly and chiefly in the fact that nature commits to each his own protection"[5] . Vattel wrote that "...la Nature donne aux hommes le droit d' user de force, quand cela est nécessaire, pour leur défense et pour la conservation de leurs droits"[6] ; he also made a reference to "les justes bornes, que la Nature a mises à un droit accordé seulement par la nécessité"[7] . Lastly he observed: " C' est en vain que la Nature prescrit aux Nations comme aux particuliers le soin de se conserver, celui d' avancer leur propre perfection et celle de leur état, si elle ne leur donne pas le droit de se guarantir de tout ce qui peut rendre ce même soin inutile"[8] .

The right of self-preservation was maintained by several authors of the 19th century. Thus Klüber took the view that self-preservation was one of the "droits absolus des Etats"[9] . Wheaton[10] equated the exercise of the right of self-preservation with the *raison d' Etat,* that is the interests of States conceived without any effort of accommodating the interests of other States[11] . Rivier argued that when a conflict arose between the right of self-preservation of a State and the duty of that State to respect the right of another the right of self-preservation overrode the duty and he summarized his position in the phrase *primum vivere* [12] . Westlake took a different view and regarded self-defence as an application of the right of self-preservation in case of actual or apprehended attack, the latter, however, being widely defined[13] . Furthermore, Fenwick[14] argued that the rights of self-defence and self-preservation derived from a fundamental right of existence.

The right of self-preservation was very closely connected, indeed sometimes it was identical, with the very broad concept of necessity which was applicable whenever action was deemed necessary for the security or

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[4] Gaius, *Fr. para 1 ad Legem Aquiliam Dig.,* quoted in ibid.

[5] Quoted in Bowett, *Self-Defence in International Law, 1958,* p. 4.

[6] Vattel, *Le Droit des Gens, Book III,* Ch. i, para 3.

[7] Ibid.

[8] Vattel op. cit. *supra* n.120, Book II, Ch. vi, para 49.

[9] Klüber, *Le Droit des Gens, 1831,* vol. i, paras 36-44.

[10] Wheaton, *Elements of International Law, 1866,* part ii, Ch. 1, para 61, in *The Classics of International Law, 1936,* No 19.

[11] Giraud, La Théorie de la Légitime Défense, *49 H.R.C. 691 (1934 III),* p. 723.

[12] Rivier, *Principes de Droit des Gens, 1896,* vol. i, para 20.

[13] Westlake, *International Law, vol. i, 1904,* p. 299; see also *International Military Tribunal of the Far East, Dissenting Opinion of Judge Pal, 1956,* p. 43.

[14] Fenwick, *International Law, 2nd ed. 1934,* p. 146.

safety of the State. Moreover, as the State taking such action was considered to be the sole judge of the situation, necessity usually appeared as the expression of the concept of the *raison d' Etat*. Furthermore, the action which was instigated by necessity could involve the infringement of the rights of a third State in so far this was necessary for the protection of the rights of the State resorting to force against the deliquent State[15].

Thus there was no clear distinction between self-defence on one hand and self-preservation and necessity on the other in the period prior to the League of Nations and they seemed to have been regarded as identical by both theory and the practice of States. With regard to the latter, the so-called right of Hot Pursuit on land is a pertinent illustration. It involved the invasion of the territory of a State in pursuit of insurgent or marauding bands under the presumption of the inadequacy of the invaded State to secure to its neighbour respect for its territorial sovereignty and it was mainly based on necessity. The practice of the U.S.A. contains many illustrations such as, the invasion of West Florida in 1818 in pursuit of marauding Indians; the Amelia island case in the same year; the invasion of Mexican territory in pursuit of marauding Indians in 1836 and the invasion of Mexico by General Pershing in pursuit of Mexican insurgents who had committed acts of force in U.S. territory in 1916[16]. According to Westlake this "right" was justified by analogy with the principle of abuse of rights; however, the assertion of such a right of hot pursuit was derived from a limited number of cases in which the invaded State found itself at a disadvantage to resist the invasion and in no case did it admit the right of incursion[17]. In addition, the analogy with the right of Hot Pursuit on the High Seas was inexact since it could never involve the violation of another State's territory. Lastly, and this is more important, the action of the pursuing State seemed to have the character of reprisals rather than self-defence[18].

An attempt to restrict the use of force in self-defence to cases of direct and immediate danger arose out of the *Caroline* Incident. The steamboat *Caroline* that was allegedly transporting weapons and men to Canada during an insurgency was sunk by the British army in U.S.

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[15] Bowett op. cit. *supra* n.5, p. 10.
[16] Moore, *Digest of International Law, vol. ii*, p. 402 et seq. ; Brownlie, *International Law and the Use of Force by States, 1963* , p. 37.
[17] Bowett op. cit. *supra* n. 5, pp. 39-40.
[18] Ibid. p. 40.

territory in December 1837. The destruction of the vessel was justified in a letter by the British Ambassador in Washington to the American Secretary of State: "The piratical character of the steamboat *Caroline* and the necessity of self-defence and self-preservation, under which Her Majesty's subjects acted in destroying that vessel would seem to be sufficiently established"[19].

In a letter dated April 24, 1842 the U.S. Secretary of State, Webster, required the British Government to show:

> "...necessity of self-defence,instant,overwhelming leaving no choice of means and no moment of deliberation.....the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it ..."[20].

The formula stated by Webster was not disputed in the reply of the British Government[21] and has been proved a valuable precedent as to the limits of the use of force in self-defence after the conclusion of the Pact of Paris and especially after the introduction of the United Nations Charter. But for the period under consideration it cannot be said that Webster's formula was a conclusive statement of the law with regard to resort to force in self-defence. War was absolutely permissible under International law while self-defence was considered either as identical with self-preservation or as a particular instance of it . Webster spoke of "a just right of self-defence [that] attaches always to nations as well as to individuals and is equally necessary for the preservation of both[22]. The Law Officers of the Crown dealing with the case spoke of self-preservation , the British Ambassador in Washington, Fox , wrote about the necessity of self-preservation in 1837 when the incident occurred[23] and it is by no means clear that he had a sharp distinction between the two in mind or that self-defence could have been deemed to stand as an autonomous legal concept which had the character of qualifying a general prohibiting rule. Indeed,

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19 Jennings, The Caroline and MacLeod Cases, 32 *A.J.I.L. 82 (1938)*, p. 85.
20 Ibid. p. 89
21 Ibid. pp. 89-91.
22 Ibid. p. 91.
23 Ibid.

there was no such thing as a general prohibiting rule that needed qualification and the practice of States was clear on this point[24].

The exercise of forcible reprisals illustrates the fact that the main preoccupation of Governments during this period was to avoid to the greatest extent possible the moral, political and legal implications of war in the legal sense, and it is worth observing that the state of war doctrine was developed to serve precisely the above concern. Moreover, a Government did not have to take great pains to justify its resort to armed force against another State. Giraud argued very correctly that if the question of self-defence narrowly lay with the question of the lawfulness of war then -in the period under discussion-there would be a major contradiction in terms, in that self-defence would operate only when an attack was unlawful; furthermore, he argued that so
long as war was a prerogative of the State self-defence did not have to be invoked in order to justify it[25].

Moreover, the overwhelming majority of the authors of this period placed the *Caroline* incident under the rubric of self-preservation[26]. Consequently, the principles of the use of force in self-defence that were formulated by Webster must be confined to the specifc case and they did not, and could not, have any significance to the state of law in general until the advent of the League of Nations.

2. *The Right of Self - Defence under the Covenant of the League of Nations and the Pact of Paris.*

The Covenant itself contained no definition of, and in fact it did not mention the right of self-defence at all. This of course does not imply that there have been any doubts with regard to the existence of such right in International law. As Giraud wrote, the real doubt did not lie with the theoretical basis of self - defence but with the application of the right in the specific situations where the right of self-defence was deemed to arise[27].

In the Graeco - Bulgarian dispute (1925), Greece justified the invasion of the Bulgarian territory before the Council of the League as an act of legitimate defence not prohibited by the Covenant. The Council did

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[24] See *Infra* p.
[25] Loc. cit. *supra* n. 11, pp. 672, 712.
[26] See references in Brownlie op. cit. *supra* n.16, p. 43 n. 5.
[27] Giraud loc. cit. *supra* n.11, p. 716.

not deny this contention and it only pointed out the danger of abuse of action labelled as self-defence and suggested that states should use the machinery of the League for the settlement of their disputes for the sake of international peace[28]. In the Chaco dispute between Bolivia and Paraguay the Council of the League admitted the right to take "military measures of defensive character"[29].

The Abortive Draft Treaty of Mutual Assistance of 1923 made no provision for the right of self - defence while the Geneva Protocol of 1924 provided in Article 2 for "resistance to acts of aggression". The latter stipulation is elucidated by the Report to the Assembly of the League by Politis and Benes where it was stated that "Le droit de légitime défense demeure respecté comme il doit l' être. L' Etat attaqué conserve entière la liberté de résister de toute ses forces aux actes d' agression dont il serait victime ..... il peut et doit commencer pour se défendre par ses propres moyens"[30].

The right of self-defence was expressly reserved in Article 2(1) of the Locarno Treaties but instant unilateral resort to force thereunder seemed to have been possible only in case of a flagrant breach of Article 2 or the demilitarization provisions of Articles 42 and 43 of the Treaty of Versailles, due to the provision in Article 4(1) whereby every alleged violation of the above stipulations was to be brought before the Council of the League of Nations. The Treaties of Locarno were, however, marred by the vague concept of provocation which constituted a qualification of the right to resort to force in self-defence provided in Article 2(1). It has been suggested that provocation could consist of the conduct of *dolus manoeuvres* , of the mounting of an attack or of the policy of the attacked state[31], but such general submissions entail the broadening of the concept of self-defence to the point of substituting the rule by the exception and of creating great opportunities for abuse, detrimental to international peace.

In fact it was not until the conclusion of the Pact of Paris that the right of self-defence loomed as a juridical concept constituting an exception to a general prohibiting rule of law. This is, moreover, strengthened by the fact that in the diplomatic correspondence that preceded the conclusion of the Pact the signatories seemed to have admitted that the right of self-defence would be the only instance of

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[28] L.N.O.J. 1925 II, p. 1709; Bowett op. cit. *supra* n. 5, p. 130.
[29] L.N.O.J. 1929, pp. 72-3.
[30] Quotation in Bowett op. cit. *supra* n. 5, p. 126.
[31] Giraud loc. cit. *supra* n.11, pp. 756-9.

unilateral resort to force on their part. The right of self-defence was, however, not expressly mentioned in the text of the Pact of Paris as it had been initially proposed in the French draft. Instead the U.S. Secretary of State, Mr Kellogg, in his Note of June 23rd, 1928 stated that:

> " There is nothing in the American Draft of an anti-war treaty which restricts or impairs in any way the right of self - defence. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self - defence".

This course of action, that is of keeping such vital a proviso out of the text of the Treaty, was criticized as amounting to the deception of public opinion[32] . Moreover self-defence was not defined at all in the various Government declarations prior to the conclusion of the Pact with the exception of the French Draft where self-defence was understood " ... dans le cadre des traités existants, notamment lorsque ceux-ci la violation de certain de leurs dispositions à une acte hostile"[33] . Furthermore, the lack of definition of self-defence was pointed out as unsatisfactory[34] and the issue that consequently arose was twofold, namely, what the content of the right self-defence was and who was to judge whether a situation gave rise to action in self-defence. We propose to discuss the latter first.

Mr. Kellogg maintained in his Note of June 23rd, 1928 that every state alone was competent to decide whether circumstances required resort to war in self-defence. Did this imply that states were also competent to determine with conclusive finality the lawfulness of their action ? The problem may be approached under two angles: The first envisages the exercise of the right of self-defence according to the requirements of good faith[35] . The concept is wide enough to entail a completely subjective determination of the situations giving rise to the use of force in self-defence and it seems to refer to a limitless right the exercise of which is not

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[32] See Wehberg, *The Outlawry of War, 1931*, p. 75; *cf* . Q. Wright, The Meaning of the Pact of Paris, *27 A.J.I.L. 39 (1933)* , (quotation of Mr. Stimson).
[33] Mandelstam, L' Interprétation du Pacte Briand-Kellogg par les gouvernements signataires et les parléments des Etats signataires, *40 R.G.D.I.P. 537 (1933)*, p. 556.
[34] Colombos, The Paris Pact, otherwise called the Kellogg Pact, *14 Grot. Soc. Proc. 87 (1928)* ; Brierly, *58 H.R.C. 5 (1936 IV)*, p. 130; Shotwell, *War as an Instrument of National Policy, 1929*, p. 211; Lauterpacht, The Pact of Paris and the Budapest Articles of Interpretation, *20 Grot. Soc. Proc. 178 (1934)* ; 23 A.S.I.L. Proc. 1929, pp. 88-109 ; de Brouckère, La Prévention de la Guerre, *50 H.R.C. 5 (1934 IV)*, p. 32.
[35] Diss. Opinion of Judge Pal, loc. cit. *supra* n. 13, p. 46.

framed within a minimum of objective legal requirements. Indeed it can go as far as equating self-defence with self-preservation, but the latter, as it has very correctly been pointed out, was incompatible with Article II of the Pact of Paris inasmuch as it implied the settlement of disputes by non-peaceful means. Moreover, in view of the fact that Article 1 of the Pact seemed to eliminate self-help the good faith approach is rendered rather unsatisfactory[36] .

The second approach is in terms of interpretation of treaties and more specifically of the principle of effectiveness. If Mr. Kellogg's statement was to be interpreted as every state being the sole judge in its own case then the Pact would have been deprived of its legal character and the provision in Article I would become completely illusory. Due to the fact that the right of self-defence was directly connected with the text of the Treaty and more specifically with the interpretation of the latter and as long as the interpretation of treaties is according to the *Tunis - Morocco Nationality Decrees Advisory Opinion* a question of international law suitable for adjudication[37] , then the justiciability of the question of self-defence is not to be disputed.

The opposite position was advocated by Defence Counsel in the course of the Nuremberg proceedings. Dr. Jahrreiss, Counsel for defendant Jodl, stated with regard to Mr. Kellogg's Note:

" ... War of self-defence is permitted as an unalienable right of all States; without this right, sovereignty does not exist; and every State is alone judge whether in a given case it is waging a war of self-defence.

No State in this world was ready to accept foreign jurisdiction concerning the question of whether its decisions on ultimate questions of existence were justified or not. ..."[38]

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[36] Brownlie op. cit. *supra* n. 16, p. 240.

[37] P.C.I.J. Series B, No 4, p. 7, at p. 30.

[38] See *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany,* Part 18, H.M.S.O. 1948, p. 86.

A similar, but not identical, position was asserted by the U.S.A. in the proceedings on Jurisdidction and Admissibility in the *Nicaragua Case* . The U.S.A. did not expressly deny the justiciability of claims of self-defence. Instead, it sought to assert the inadmissibility of the Nicaraguan application instituting proceedings on the basis of exclusive competence of the Security Council under Chapter VII of the U.N. Charter to deal with questions of use of armed force within the United Nations framework. The Court rejected the U.S. contention on the following grounds: (1) Nicaragua's application to the Court fell within Chapter VI and not Chapter VII of the Charter. The latter would have been the case had the U.S.A. given notification to the Council in accordance with Ch. VII "... so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorised ...". (2) The S.C. had primary and not exclusive responsibility to deal with matters of maintenance of international peace. The

The above view is not only pertinent to considerations of treaty interpretation but to the position in customary international law. Mr. Kellogg's Note referred to self-defence as being "inherent in every sovereign State" . Dr. Jahrreiss laid a great deal of emphasis on the subject of sovereignty in the sense of the lack of any superior authority over individual States, and supported his argument by illustratively referring to the Kellogg Note. The Defence Counsel's argument was rebutted by Sir H. Shawcross, the Prosecutor for the U.K. :

" ... Neither the Pact of Paris nor any other treaty was intended to - or could - take away the right of self-defence. Nor did it deprive its signatories of the right to determine, in the first instance, whether there was danger in delay and whether immediate action to defend themselves was imperative; and that only is the meaning of the express proviso that each State judges whether action in self-defence is necessary. But that does not mean that the State thus acting is is the ultimate and only judge of the propriety and of the legality of its conduct. It acts at its peril. Just as the individual is answerable for the exercise of his common law right of self-defence, so the State is answerable if it abuses its discretion, if it transforms "self-defence" into an instrument of conquest and lawlessness ... The ultimate decision as to the lawfulness of action claimed to be taken in self-defence does not lie with the State concerned, and for that reason, the right of self-defence, whether expressly reserved or implied, does not impair the capacity of a treaty to create legal obligations against war ..."[39]

The matter was conclusively settled in the Judgment of the International Military Tribunal at Nuremberg which held that: " ... whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication

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delineation of competence to deal with such issues that is provided in Article 24 of the Charter applies only to the U.N. General Assembly and not to the Court. The latter could exercise its judicial functions separately and complementarily to the Council's political functions. (3) The right of self-defence is a legal right and as such is subject to adjudication. See I.C.J. Rep. 1984 p. 393, at pp. 432-436, paras 91, 93-95, 98. The U.S. argument has been treated as amounting, in effect, to the position taken by Dr. Jahrreiss in Nuremberg because of the fact that the U.S. has the right of veto in the Security Council. This has the practicle consequence that the purported competence of the Council as the sole forum for the consideration of issues of use of force cannot function if there is a finding contrary to the U.S. political interests. See Kahn, From Nuremberg to the Hague: The U.S. Position in *Nicaragua v. United States* and the Development of International Law, *12 Yale J.I.L. 1 (1987)*, pp. 12-17.

[39] See The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22, H.M.S.O. 1949, p. 425.

if International law is ever to be enforced ..."[40], and this does not seem to contradict the argument of the Counsel for the U.K. that what the Pact of Paris did according to Mr. Kellogg's Note, was that it gave its signatories the right to determine *in the first instance only* whether there was any danger in delay and whether immediate action to defend themselves was imperative[41]. During the period under discussion the only precedent with regard to the content of the right of self-defence was the Webster formula which was stated in the diplomatic correspondence in the aftermath of the *Caroline Incident*. This was relied upon by the Nuremberg Tribunal when it discussed the German plea of anticipatory self-defence with regard to the invasion of Norway and Denmark[42]. The requirement of "instant and overwhelming necessity for self-defence, leaving no choice of means and no moment of deliberation" indicates only one aspect of the question of the use of force in self-defence, namely, a purely theoretical one from the point of view of international law; however, action in self-defence is largely a question of fact as well, that is a question of which situations would present a case of an instant and has deen debated until nowadays[43]. The best way to deal with the problem is to refer to some instances of the State and League of Nations practice.

In the Manchurian conflict between China and Japan in 1931 the latter justified its resort to force as action taken in self-defence and for the protection ot the life and property of the Japanese nationals living in Manchuria. At the outset of the dispute the Council of the League embarked on a course of action similar to the one it had taken in the Graeco-Bulgarian dispute, namely, the achievement of cessation of hostilities, withdrawal of troops and prevention of the aggravation of the situation, and it did not deal with the merits of the Japanese plea. It was not so with the parties to the dispute. Japan justified its action as having

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40 *In Re Goering et al.*, 13 I.L.R. 210 (1946); *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, H.M.S.O. 1950, p. 436; also see *In Re Hirota et al.*, 16 I.L.R. 359 (1949).

41 Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht, 1952*, pp. 177-197; Bowett op. cit. *supra* n. 5, pp. 140-1; Giraud loc. cit. *supra* n. 11, p. 801; Lauterpacht, *20 Grot. Soc. Proc. 178 (1934)*; Brierly, *58 H.R.C. 5 (1936 IV)*, pp. 130-1; id. Some Implications of the Pact of Paris, *10 B.Y.I.L. 208 (1929)*; de Brouckère, *50 H.R.C. 5 (1934 IV)*, p. 35; Q. Wright, *27 A.J.I.L. 39 (1933)*; Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 478; Mandelstam, *40 R.G.D.I.P. 537 (1933)*, p. 603. *Cf*. Wehberg op. cit. *supra* n. 32 pp. 100-3. He took the view that defensive action was inadmissible without prior authorisation of the League Council.

42 *In Re Goering et al.* 13 I.L.R. 210 (1946); loc. cit. supra n. 40, pp. 435, 437.

43 See *infra* Ch. 9, First Title.

been taken in self-defence by reference to past incidents, especially activities by the Chinese calculated to imperil the Japanese interests and endanger the Japanese rights in Manchuria based on international undertakings[44] . Moreover, Viscount Cecil observed that the Council of the League was not at that stage in possession of the facts necessary to form a conclusive opinion as to the dispute[45] . It was not until a year later (in 1932) when the Report of the Lytton Commission of Enquiry was submitted to the Council of the League of Nations that the question of the Japanese plea of self-defence was discussed. The Lytton Report found that the Japanese military operations in Manchuria could not be regarded as measures of legitimate self-defence. This time the Japanese representative, in arguing against the Lytton Report before the Council of the League, justified the Japanese action by referring not only to the whole background of the Sino-Japanese relations but by relying on Mr. Kellogg's Note of June 23rd, 1928 and the British reservation to the Pact as well[46] . That plea was finally rejected by the Assembly of the League of Nations which adopted *verbatim* the Lytton Report on Feb. 24, 1933[47] .

Italy pleaded self-defence when she informed the Council of the League about the invasion of Ethiopia on Oct. 3rd, 1935. Moreover, on Sept. 4th, 1935 the Italian representative at the Council spoke of "vital interests", "primary importance to Italian security and civilisation" and finally the "liberty to adopt any measures that may become necessary to ensure the safety of its colonies and to safeguard its own interests"[48] . The Council of the League ignored the Italian plea of Oct. 3rd, 1935 because in this case the attack on Ethiopia took place in the course of a dispute between the two states which originated in the Walwal incident of December 1934. Consequently under the Covenant and the Pact of Paris the settlement of the dispute should have been sought by pacific means only and any alleged Italian grievances should have been made from the very outset of the dispute. Instead, and despite an Arbitral award settling the dispute which arose from the Walwal frontier incident between the two countries, the Italian Government presented for the first time a detailed memorandum on September 4th, 1935 referring to what were supposed to be fundamental grievances against Ethiopia.

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[44] L.N.O.J. 1931, p. 2267.
[45] Ibid. p. 2269.
[46] L.N.O.J. 1932, p. 1873-4.
[47] *27 A.J.I.L. Suppl. 119 (1933)*, p. 145.
[48] *30 A.J.I.L. Suppl. 26 (1936)* .

In the Sino-Japanese dispute the issue of Japan's invocation of self-defence was complicated by the special position of this country in Manchuria due to concessions obtained therein by the peace treaty of Portsmouth terminating the Russo-Japanese war of 1904-5[49]. However, the reliance of Japan on the entire background of the Sino-Japanese relations in justifying its action as self-defence rendered the necessity of the action destitute of being instant and overwhelming. The situation was more clear in the Italo-Ethiopian conflict where the background of the relations between the two states indicated that there was no necessity to act at all in view of the dispute having been brought before the League of Nations and submitted to arbitration.

In both cases self-defence was equated with self-preservation, something which was inadmissible in view of Article II of the Pact of Paris. Moreover, the signatories thereto excepted unilateral use of force only in case of self-defence which implied that as an exception to the general prohibiting rule of Article I of the Pact, self-defence must have been understood to be restricted both with regard to the necessity giving rise to it and the intensity of the actual force to be used during its application[50], and this is *a fortiori* supported by the fact that neither the Japanese nor the Italian pleas were admitted as compatible with the right of self-defence reserved under the Pact of Paris.

The importance attached to the factual situations giving rise to the necessity of self-defence was more conspicuous in the attempts during the life of the League to formulate a universally accepted definition of aggression which would constitute nothing else but a consideration of the problem from the side of the author of violence. The question of defining aggression acquired particular international significance in connection with the Draft Treaty of Mutual Assistance of 1923 but the final form of the text contained no definition of aggression. The Geneva Protocol of 1924 considered as the aggressor the state that failed to comply with the obligations to employ the procedure of peaceful settlement of disputes provided thereby. Shotwell considered the Pact of Paris to define aggression and self-defence without a definition, the aggressor being the state that did not resort to peaceful means of settlement of disputes[51]. In 1933 the Soviet Union submitted a detailed definition of aggression to the

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[49] Northedge, *The League of Nations, 1986*, p. 138.

[50] Mandelstam, *40 R.G.D.I.P. 537 (1933)*, p. 583 n. 93; *cf*. Bowett op. cit. *supra* n. 5, p. 135.

[51] Shotwell op. cit. *supra* n. 34, p. 207; Brierly seems to take the same view in *10 B.Y.I.L. 208 (1929)*.

General Commission of the Disarmament Conference. The Soviet proposal was examined by the Committee on Security Questions of the General Commission with N. Politis as rapporteur and the Report of the Committee proposed a draft "Act Relating to the Definition of the Aggressor" which was finally rejected due to opposition by the U.K. and other states.

Article 1 of the draft provided that:

The state that was the first to commit any of the following acts against another state would be an aggressor:

(1) Declaration of war;

(2) Armed invasion;

(3) Armed attack on the territory, naval or air forces of the other state.

(4) Naval blockade;

(5) Aid to armed bands which after having been formed in the territory of the aggressor state invade the territory of of another state or the aggressor refuses despite the demand of the invaded state to take all possible measures to deprive the armed bands of aid and protection[52].

Nevertheless, the above provisions were included in the Conventions for the Definition of Aggression concluded between the Soviet Union and other states in 1933[53].

The attempts to define aggression continued for a lengthy period of time during the period of the United Nations. The present author does not propose to discuss the desirability of a definition of aggression. This writer only referred to the attempts made during the period of the League towards the achievement of a definition of aggression as an illustration of the importance attached to the factual aspect of self-defence with the view to restrict the application of the said right.

2 (i) *Some particular issues related to the right of self-defence* .

2. (i). a. *The British reservation to the Pact of Paris* .

On May 19th, 1928 the British Government in its notification of participation to the Pact of Paris addressed to the U.S. Government, submitted the following reservation:

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[52] The Politis Report modified the original Soviet proposals. See Brownlie op. cit. *supra* n. 16, p. 353 n. 5; Stone, *Aggression and World Order, 1958*, pp. 34-5; Giraud loc. cit. *supra* n. 11, p. 771 et seq.; Waldock, *81 H.R.C. 455(1952 II)*, pp. 482-4.

[53] See Brownlie op. cit. *supra* n. 16, p. 359, Appendix to Ch. XIX.

"There are certain regions in the world the welfare of which constitutes a special and vital interest for our peace and safety.... Their protection against attack is to the British Empire a measure of self-defence"

Furthermore, and despite the phrase "protection against attack" the reservation spoke of "interference" in cerain regions that could not be suffered. The wording of the reservation was quite vague and the situations of action contemplated thereby seemed to have been rather broad and subject to the ultimate determination of Great Britain[54] . The reservation was interpreted as referring to Egypt - and more particularly to the Suez Canal - only, or as being justified by the special situation of Britain as a state due to the existence of the British Empire[55] . By contrast, it was regarded as a violation of Article I of the Pact since it seemed to contemplate war as an instrument of national policy[56] . It has also been argued that the British reservation could be valid only insofar its scope was not larger than that of self-defence and that it did not intend to do more than to reserve the right of collective self-defence[57] . The reservation was expressly rebutted by the Soviet Union, Persia and Turkey. The problems raised by the British reservation to the Pact of Paris are of theoretical value only due to the fact that it was never relied upon by Great Britain - not even in the intervention in Suez in 1956 - and the fact is that as long as Britain accepted to be bound by the Pact it would be inconceivable that her reservation was inconsistent with the object and purpose thereof because otherwise the rest of the signatories would never have consented to it. This is, moreover, supported by the attitude of the signatories of the Pact of Paris, including Great Britain, in rejecting the Japanese pleas of special interests in China and by the principles stated by the I.C.J. in its Advisory Opinion in the *Reservations to the Genocide Convention* [58] .

2. (i). b. *The Monroe Doctrine* .

During the debate over the Pact of Paris in the U.S. Senate and subsequently in the interpretative report submitted by Senator Borah it

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[54] Brierly, *10 B.Y.I.L. 208 (1929)*, p. 209; Giraud loc. cit. *supra* n. 11, p. 742.
[55] Shotwell op. cit. *supra* n. 34, p. 196; Descamps, *31 H.R.C. 399 (1930 I)*, pp. 483-4.
[56] Hunter-Miller, *The Peace Pact of Paris, 1928*, p. 40 but *cf* . pp. 117-8.
[57] Waldock, *81 H.R.C. 455 (1952 II)*, p. 477; *cf* . Bowett op. cit. *supra* n. 5, pp. 205-7, 212-5. The concept of coll. self-defence if being dealt with *infra* Ch. 10.
[58] I.C.J. Rep. 1951, p. 21, at pp. 23-8.

was asserted that under the right of self-defence allowed by the treaty, the Monroe doctrine had to be maintained in view of the fact that it was part of the U.S. system of National defence. However, the U.S. Government did not submit any special reservation or declaration with regard to the Monroe doctrine; as for the validity of the Borah report with regard to the other signatories of the Pact Prof. Borchard in his letter to Sen. Bingham made it clear that the said report would be binding only if it was communicated to the other parties[59] . Finally, the political character and the scope of the doctrine rendered it incompatible with the provisions of the Pact [60] .

[59] See Mandelstam, *40 R.G.D.I.P. 537 (1933)*, pp. 569, 581.

[60] Brownlie p. 246; Giraud p. 741. The Monroe Doctrine (formulated in 1823 by U.S. President Monroe) was directed against any attempt by the European Powers to obtain territory in the Americas, either by way of conquest or by restoring the Spanish colonial Empire. The interpretation of the Doctrine rested solely with the Government of the U.S. and later in the 19th century as well as at the turn of this century the Doctrine was invoked to justify the U.S. expansion to the West and a series of interventions in Latin America. It is worth mentioning that the Monroe Doctrine was expressly reserved in Article 21 of the Covenant of the League. The U.S.A. eventually did not become a Member of the League and the importance of this provision was greatly diminished. For a critique of Article 21 and the Doctrine itself see Spencer, *30 A.J.I.L. 400 (1936)* .

CHAPTER 9
THE RIGHT OF INDIVIDUAL DEFENSIVE ACTION.

First Title: THE RIGHT OF SELF-DEFENCE AGAINST AN "ARMED ATTACK".

1. *Introduction*

In its Judgment on the Merits of the *Nicaragua Case* [1] the International Court of Justice has pointed that:

> ... The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence...

Moreover, in the Addendum to the Eighth Report on State Responsibility[2] , Special Rapporteur Ago submitted that "... at the present time it is proper to regard self-defence as the form - or better, the only form - of armed self-protection that is still conceded to a State by the international law now in force..."[3]. Although Ago's submission may be regarded as extremely restricted (in view of the Court's dichotomy between self-defence against an armed attack and counter-measures against uses of force short of an armed attack[4], the controversial issue of protection of nationals abroad and the problems arising from the use of force by the consent of the incumbent Government of a State), it is safe to submit that the overwhelming majority of cases of unilateral resort to force in the post-Charter era have been justified as an exercise of the right of self-defence. The U.S.A. invoked the plea of self-defence, as the Court noted, in the proceedings of the *Nicaragua Case* [5]. States that have unilaterally resorted to force against other States have consistently offered the justification of self-defence during debates at the United Nations organs and in statements outside the organisation. For example, Israel, Portugal, Rhodesia, and S.Africa that have frequently resorted to force beyond their

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[1] I.C.J. Rep. 1986, p. 14, at p. 102, para 193.
[2] Doc. A/CN.4/318/ADD. 5-7, I.L.C. Ybk. 1980, Vol. II, Part One, p. 13.
[3] Ibid. p. 53, para 87.
[4] See Second Title, *infra*
[5] I.C.J. Rep. 1986, p. 14, at p. 87, para 165.

national boundaries have, without failure, always justified their action as an exercise of self-defence.

It can, therefore, be submitted that the right of self-defence constitutes in contemporary customary international law the only universally admissible instance of unilateral resort to force by States. There has been no objection either in the practice of States or in the writings of publicists in relation to the existence as such of the right of self-defence in international law. Rather, objections and controversy arise with regard to the existence and the scope of the conditions for the exercise of the right in specific cases where unilateral use of force has been justified as an exercise of self-defence. Lauterpacht has rightly pointed with respect to self-defence that "... no law can disregard it"[6]. It is, therefore, not surprising that the concept of self-defence has been entrenched in the practice of States long before the establishment of the United Nations. It has been understood to constitute an exception to the regulation of "resort to war" in the Covenant of the League of Nations and to the prohibition of resort to war "as an instrument of national policy" in the Pact of Paris, though neither of the above instruments included a specific provision on self-defence[6bis]. It is not so with the United Nations Charter. Article 51 thereof 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 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.

The above provision appears to constitute the point of focus as a term of reference in the practice of States, namely, in the form of mutual security treaty-making[7] and in statements of Governments. Thus, Article 51 has been referred to by the representatives of Israel during the U.N. debates on the Suez Campaign of 1956[8], the Six Day War of 1967[9], the *Yom*

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[6] H. Lauterpacht, *The Function of Law in the International Community*, 1933, p. 180.

[6bis] See *supra* Ch. 8 and Part One, Ch. 1.

[7] Thus Article 3(1) of the Inter-American Treaty of Reciprocal Assistance (1947) stipulates the undertaking by all American States of assisting an American State that has been the victim of a armed attack "... in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations..." ; text in 43 *A.J.I.L.* 53 (1949) p. 54. Also see Art. 5 of the North Atlantic Treaty (1949), Art. 4 of the Warsaw Pact (1955).

[8] G.A.O.R. ES-1, Plennary Meetings and Annexes, 562nd pl. mtg. para 145.

[9] S.C.O.R. 22nd yr. 1347th mtg. para 32; G.A.O.R. ES-5, Plennary Meetings, Verbatim Records of Meetings 17 June-18 Sept. 1967, 1526th pl. mtg. para 134.

Kippur War of 1973[10] and the air raid on the Iraqi nuclear reactor (O.S.I.R.A.K.) in 1981[11]. Both France and Tunisia invoked Article 51 with regard to the Remada incident of 18 May 1958[12]. The U.S.A. invoked Art. 51 in the operation to rescue the crew of the *S.S. Mayaguez* [13] and in justification of the military action in Panama on 20 December 1989[14]. The U.K. initiated and conducted the military campaign to expel the Argentine occupation forces from the Falkland Islands, entirely on the basis of Art. 51 of the Charter[15].

Furthermore, both the 1970 Declaration on Friendly Relations [G.A. Res. 2625 (XXV)] and the 1974 Definition of Aggression, Art. 6, [G.A. Res. 3314 (XXIX)] leave the provision of Art. 51 intact by providing that nothing in their respective texts "... shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful"[16].

There is agreement in the jurisprudence of the Court, the practice of States and among jurists on the following aspects of self-defence. First, that the right of self-defence, especially as embodied in Art. 51 of the Charter, constitutes the exception to the rule of the prohibition of the threat or use of force. Secondly, that it is exercised in response to and for protection against an unlawful use of force[17]. Thirdly, that it is subject to the responsibility of the Security Council for the maintenance of international peace and security[18]. Fourthly, that the requirements for the exercise of the right are "immediate" necessity of self-defence and proportionality[19].

All consensus, however, seems to disappear when the relation between Art. 51 and customary law is dealt with. Thus, it becomes a matter

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[9] S.C.O.R. 22nd yr. 1347th mtg. para 32; G.A.O.R. ES-5, Plennary Meetings, Verbatim Records of Meetings 17 June-18 Sept. 1967, 1526th pl. mtg. para 134.
[10] S.C.O.R. 28th yr. 1733rd mtg. para 75.
[11] S.C.O.R. 36th yr. 2280th mtg. para 97.
[12] S.C.O.R. 13th yr. 819th mtg. paras 11(Tunisia), 87 (France).
[13] Letter dated 14 May 1975 from the representative of the United States of America to the President of the Security Council, Doc. S/11689, S.C.O.R. Suppl. for April-June 1975, pp. 24-25.
[14] U.N. Chronicle vol. XXVII no 1 March 1990, p. 67.
[15] See Documents S/14988, S/15002, S/15006, S/15025, S/15031, S.C.O.R 37th yr. suppl. for April-June 1982, pp. 34-5, 45, 47, 59, 62.
[16] I.C.J. Rep. 1986, p. 14 at p. 103, para 193.
[17] See for instance D.W. Bowett, *Self-Defence in International Law, 1958,* pp. 6, 109 seq.
[18] See the controversy that arose during the Falkland and Kuwait crises with regard to whether the Security Council had taken measures to restore international peace and security, which would require action in self-defence to be discontinued. See *infra*.
[19] See *The Caroline*, Moore Digest, vol. ii, p. 409 seq. and vol. vii, p. 919 seq, ; I.C.J. Rep. 1986, p. 14, at p. 103, para 194.

of controversy whether Art. 51 embodies pre-existing customary law (the Article safeguards, according to its wording, the "inherent" right of self-defence) or whether it constitutes a progressive development of the law. It is also debated whether the necessity for its exercise arises only "if an armed attack occurs" or, rather, if any use of armed force occurs, or even in anticipation of a use of armed force. In addition, the requirement of proportionality does not feature in the text of Art. 51 and it also constitutes the subject of debate as to its precise content. Lastly, the exact limitation of the exercise of self-defence in relation to the collective security function of the Security Council is yet another point of dispute.

The subsequent parts of this section shall deal with the above issues.

2. *Self-defence as an "Inherent Right".*

2.(i). Self-defence as a *"Right".*

Special Rapporteur Ago has submitted that "... self-defence connotes a situation or de facto condition, not a subjective right. The State finds itself in a condition of self-defence when it is confronted by an armed attack against it in breach of international law..."[20].

This appears to be at variance with the language of Article 51 and State practice in both of which self-defence is referred to as the exercise of a "right"; at the same time, it is submitted, that Ago seems to have simply stated the obvious. The occurrence of an "armed attack" signifies both a factual and a legal situation[21]. The actual use of force against a State constitutes both a fact and a breach of the rule of the prohibition of the use of force. The forcible reaction by the victim of the unlawful use of force for its own protection apart from being itself a factual situation clearly warrants a necessity of being accommodated in the context of the law that prohibits, as a rule, the unilateral resort to force. International law has recognised this necessity by exonerating the defending State for its recourse to force and, thus, by investing its action with admissibility in law. This contingency can be explained by the fact that the law would have been indifferent to the concept of self-defence in the absence of the rule according to which its subjects would be under the obligation to refrain

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[20] *Supra* n.2, p. 53, para 87.

[21] *Cf*. Mendelson, The Nicaragua Case and Customary International Law, in Butler (ed.), *The Non-Use of Force in International Law, 1990*,p. 85 at p. 88; Kunz, Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations, *41 A.J.I.L. 872 (1947)*,p. 878.

from the use of force, which is reserved for the organs of the organised community. No system of law, whatever the degree of its organisation and centralisation, is able to guarantee the immediate mobilisation of its enforcement mechanism for the protection of its subjects against violations of the above rule. At the same time, no system of law has been expected to put to the test its credibility by withholding its sanctioning from the exceptional situation that compels an individual subject to exercise unilaterally what is, as a rule, reserved for the organs of the community. Such unilateral action, in the exceptional circumstances of an actual and immediate danger to the individual subject of the law, has the position of an exception that reinforces rather than being detrimental to the law; as such it is of provisional character and its exercise is regulated by the law.[22] . Consequently, it is submitted, that there is no reason to deny the exercise of self-defence the character of a *de jure* right.[23]

On the other hand, self-defence is not a duty. This means that the victim of an armed attack is under no legal obligation to resist at all or effectively the aggressor; the armed forces of Kuwait offered only a token resistance to the Iraqi invasion of 2 August 1990[24] without any third State censuring Kuwait for its conduct.

2. (ii). Self-defence as *"inherent"* right.

The characterisation in Article 51 of the right of self-defence as "inherent" (*droit naturel* in the French text) has been criticised on grounds of terminology as introducing an element of natural law in the

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[22] See Lauterpacht op. cit. *supra* n. 6, pp. 180, 393-4; Kunz, loc. cit. *supra* n.21, p. 875; Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 495; McDougal & Feliciano, *Law and Minimum World Public Order, 1961*, pp. 126-7, 222; Brownlie, *International Law and the Use of Force by States, 1963*, p. 252; id. The Use of Force in Self-Defence, *37 B.Y.I.L. 183 (1961)*, 219; Kelsen, Collective Security and Collective Self-Defence under the United Nations Charter, *42 A.J.I.L. 783 (1948)*, p.795; Farer, Law and War, in Black & Falk (eds), *The Future of the International Legal Order vol. iii, 1971*, p. 28; Dinstein, *War, Aggression, Self-Defence, 1988*, pp. 167-8; Combacau, The Exception of Self-Defence in the United Nations Practice, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p. 9; Pompe, *Aggressive War: An International Crime, 1949*, p. 110; Cot & Pellet, *La Charte des Nations Unies, 1985*, pp, 769-770; Rifaat, *International Aggression, 1979*, p. 123; Greenwood, Self-Defence and the Conduct of International Armed Conflict, in Dinstein (ed.), *International Law at a Time of Perplexity, 1989*, p. 273. *Cf.* Bowett, op. cit. *supra* n. 17, pp. 8-9; Schwarzenberger, The Fundamental Principles of International Law, *87 H.R.C. 195 (1955 I)*, pp. 331, 332, 338; Kolesnik, The Development of the Right to Self-Defence, in Butler (ed.) op. cit. *supra* n. 21, p. 154.

[23] Dinstein op. cit. *supra* n. 22, p. 168.

[24] Keesing's 1990, p. 37632 et seq. ; Dinstein op. cit. *supra* n. 22, p. 169; Brownlie op. cit. *supra* n. 22, pp. 375-376; id. *37 B.Y.I.L. 183 (1961)*, p. 262.

Charter, namely, that the right exists irrespective of the provision of the law, as an attribute of the mere existence of States or entities that have the characteristics of statehood but lack express recognition[25].
Furthermore, it has also been rightly suggested that the term "inherent" does not signify that self-defence is, as a matter of law, part of the concept of State sovereignty[26]. This is apparent for the following reasons: First, self-defence as a right is attributable to entities having the characteristics of statehood irrespective of recognition[27]. The Arab-Israeli conflict may be cited as an illustration. Israel has not been recognised, with the exception of Egypt by any of the other Arab States. This lack of formal recognition, however, did not prevent the Syrian Government from stating that Israel had the right to defend herself against the *Scud* missile attack launched by Iraq on 17 January 1991[28].
Secondly, in cases of recognised States, self-defence is not exercised because of sovereignty but rather as a result of it, for the reason that States as subjects of international law are entitled to all rights thereunder[29]. Lastly, the concept of State sovereignty is a legal concept and its precise content may vary according to the "... state of development of international law at any given moment..."[30].

The best view, according to overwhelming authoritative opinion, is rather that the term "inherent" refers to the existence of the right of self-defence in customary law and the desirability of the drafters of the Charter to preserve it in Article 51[31].

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[25] Bowett op. cit. *supra* n. 17, pp. 6, 8-9; Kunz loc. cit. *supra* n. 21; Dinstein op. cit. *supra* n.22, p. 170; cf. Zourek, *L' Interdiction de l' Emploi de la Force en Droit International, 1974,* p. 102.
[26] Schwarzenberger loc. cit. *supra* n.22,pp. 339-340; Dinstein op. cit. *supra* n. 25.
[27] McDougal & Feliciano op. cit. *supra* n.22, p.221.
[28] Keesing's 1991, p. 37939.
[29] Schwarzenberger loc. cit. *supra* n. 26.
[30] Dinstein op. cit. *supra* n.25.
[31] Wehberg, L' Interdiction du Recours à la Force: Le Principe et les Problèmes qui se posent, *78 H.R.C. 7 (1951 I)*, pp. 81-82; Waldock *81 H.R.C. 455 (1952 II)*, p. 495; Bowett op. cit. supra n. 17, p.187; Schwarzenberger *87 H.R.C. 195 (1955 I)*, pp. 339-341; McDougal & Feliciano op. cit. *supra* n. 22, p.126; Brownlie op. cit. *supra* n. 22, pp. 271-272; id. *37 B.Y.I.L. 183 (1961)*, p. 239; Dinstein op. cit. *supra* n.22, p.171; Fawcett, Intervention in International Law, A Study of some Recent Cases, *103 H.R.C. 347 (1961 II)*, pp. 360-361; Goodrich-Hambro-Simons, *The Charter of the United Nations, Commentary and Documents, 3rd ed.,1969*, p.344; Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1634; E. Jiménez de Arechaga, International Law in the Past Third of the Century, *159 H.R.C. 9 (1978 I)*, p.96; J.N.Moore, The Secret War in Central America and the Future of World Order, *80 A.J.I.L. 43 (1986)*, pp.82-83; McDougal, The Soviet-Cuban Quarantine and Self-Defence, *57 A.J.I.L. 597 (1963)*, pp. 598-599; G.B.Roberts, Self-Help in Combating State-Sponsored Terrorism: Self-Defence and Peacetime Reprisals, *19 Case W. Res. J.I.L. 243 (1987)*, pp. 274-277; Linnan, Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defence and State

The Court in the *Nicaragua Case* has expressly taken the above view, with regard to the right of collective self-defence, by ruling that:

> ... First with regard to the existence of this right it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defence.
> Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary law... [32]

Moreover, the practice of States also provides evidence that the term "inherent right" points at the existence of the right of self-defence in customary law. The *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* of the United States Navy, provides that "... [T]he "inherent" right of self-defence refers to the right of self-defence as it existed in customary law when the United Nations Charter was written..."[33] .

In a letter dated 30 April 1982,from the representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council during the Falklands crisis it was stated that the right of self-defence "... is expressly recognized by Article 51 of the Charter, which makes it clear that the right of self-defence is "inherent" and that nothing in the Charter is intended to impair it..."[34] .

This *prima facie* consensus with respect to self-defence as a right of customary law breaks down when one proceeds to examine the content of this customary law of self defence.

In his dissenting opinion in the *Nicaragua Case* Judge Schwebel disagreed with the view that

> ... the terms or intent of Article 51 eliminate the right of self-defence under customary law, or confine its entire scope to the express terms of Article 51...[35]

Responsibility, *16 Yale J.I.L. 245 (1991)*, p. 310; Greenwood, *89 W.Va.L.R. 933 (1987)*, p. 938; Levenfeld, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defence and Reprisal under Modern International Law, *21 Col. J. Trans. L. 1 (1982)*, pp. 26-27. *Cf.* Stone, *Legal Controls of International Conflict, 1954*, pp. 243,245; Kunz *41 A.J.I.L. 872 (1947)*,pp. 875,879; Wright, United States Intervention in the Lebanon, *53 A.J.I.L. 112 (1959)*, p. 116; A. Shapira, The Six-Day War and the Right of Self-Defence, 6 *Israel L.R. 65 (1971)*, p. 71; D.W. Greig, Self-Defence and the Security Council: What Does Article 51 Require? , *40 I.C.L.Q. 366 (1991)*, p.368. ***Contra***. Kelsen, *The Law of the United Nations, 1951*, p. 914.

[32] I.C.J. Rep. 1986, p. 14, at p. 102, para 193.

[33] N.W.P. 9 (Rev. A)/FMFM 1-10, WASHINGTON D.C. 1989, 4.3.2., (4-9), n. 21.

[34] Doc. S/15016, S.C.O.R. 37th yr. Suppl. for April-June 1982, p. 54 at p. 55.

[35] I.C.J. Rep. 1986, p. 14, at pp. 347-348, para 173.

This approach reflects the view of eminent authority[36] that the customary law right of self-defence safeguarded in Article 51 is stated and is identical with the famous Webster formula in the diplomatic correspondence between the United States Department of State and the British Foreign Office in the aftermath of the *Caroline* incident of 1837[37] . It may be recalled that the United States Secretary of State Webster stated that for the destruction of *The Caroline* by the British armed forces to be lawful, there had to exist "... a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation..." and that ".... the local authorities in Canada.... did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it..."[38] . Moreover, the same authority point at the absence of any provision with regard to self-defence in the Covenant of the League of Nations, the Pact of Paris and the Dumbarton Oaks Proposals that formed the basis for the text of the Charter of the United Nations. Instead, it is argued, the preparatory works of the Charter at the San Francisco Conference, reveal that the only purpose for the creation of Article 51 and its insertion in the text of the Charter was to accommodate the pre-existing Inter-American arrangement for mutual assistance in the event of an armed attack against any American State- notably the Act of Chapultepec of 1945[39] . Consequently, it is concluded, that as long as (1) the provision of Article 51 is virtually redundant with regard to the existence of the right of self-defence and (2) as long as the latter would be ipso facto reserved under the Charter (in the same way as with the Covenant of the League of Nations and the Pact of Paris), its scope and content should be judged by reference to the prohibition of force in Article 2(4) rather than Article 51[40] .

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[36] Waldock, *81 H.R.C. 455 (1952 II)*, p. 496; Bowett op. cit. *supra* n.17, pp. 187-189; Schwarzenberger, *87 H.R.C. 195 (1955 I)*, p. 332; Schachter, *82 Mich.L.R. 1620 (1984)*, p. 1634; Stone, *Conflict Through Consensus, 1977*,p. 48; McDougal, *57 A.J.I.L. 597 (1963)*, pp. 599-600.

[37] *Moore International Law Digest, vol. ii*, p. 409 et seq. ; *id. vol. vii*, p. 919 et seq. Also see Kuhn, Terrorism and the Right of Self-Defence, *6 S.A.Y.I.L. 42 (1980)*,p. 46; Rostow, Nicaragua and the Law of Self-Defence Revisited, *11 Yale J.I.L. 437 (1985-86)*, p.451; J.N.Moore, *80 A.J.I.L. 43 (1986)*,pp. 82-83; Levenfeld, *21 Col.J.Trans.L. 1 (1982)*, pp. 26-27; Roberts, *19 Case W. Res. J.I.L. 243 (1987)*, pp. 274-275.

[38] *Moore Digest. , vol. ii, supra* n.37, p. 412.

[39] Text in *39 A.J.I.L. Suppl. 108 (1945)*; See U.N.C.I.O. Documents vol. 6, p. 459, vol. 12, p. 680 et seq.; references supra n. 36; McCormack, Anticipatory Self-Defence in the Legislative History of the United Nations Charter, *25 Israel L.R. 1 (1991)*.

[40] Bowett op. cit. *supra* n.17, pp. 185-186; Stone op. cit. *supra* n. 36, p. 48; McCormack, *25 Israel L.R. 1 (1991)*, pp. 20-24; B. Asrat, *Prohibition of Force Under the U.N. Charter. A Study of Article 2(4), 1991*, p. 204; *Cf* . Combacau loc. cit. in Cassese(ed.) op. cit. *supra* n.22,

The present author does not share the above view and proposes to submit the following points.

First, if self-defence is to be a right in law that is exercised in circumstances of exceptional necessity and within a legal system that precludes its subjects from resorting to force unilaterally, then the reference to *The Caroline* incident, as the comprehensive statement of the customary law on self-defence, is a very curious proposition. *The Caroline* incident and the subsequent correspondence related to it took place in the 19th century at a time when unilateral resort to armed force, far from being prohibited, was considered a privilege of State sovereignty. Self-defence, therefore, as a justification in the context of the legal environment of the 19th century is nothing more than an attempt at investing with moral or political plausibility conduct which would in any case be admissible in law. What Webster laid out to be the law of self-defence in the middle of the 19th century cannot be appreciated as such in view of the total lack of a *jus ad bellum* in the period under discussion[41].

Secondly, the argument that *The Caroline* represents the customary law on self-defence at the time of the conclusion of the United Nations Charter constitutes an unjustified proposition. It means in effect that State practice has remained "static" in the period 1837-1945 and this is according to authority not the case[42]. The argument for the static nature of customary law seems to rest on the twofold assumption that the requirement of an "armed attack" in Article 51 is too restrictive of the exercise of self-defence which is permitted for the protection of a State against any violation of the prohibition of the rule of non-use of force. The Webster formula of necessity of self-defence and proportionate response in self-defence, has survived as the basis of the content of the right of self-defence and it owes its survival to the fact that it is broad

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p. 11; Reisman, Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in L.F. Damrosch & D.J. Scheffer (eds.), *Law and Force in the New International Order, 1991*, p. 30.

[41] Addendum to the Eighth Report on State Responsibility by Special Rapporteur Ago, loc. cit. *supra* n. 2, pp. 52, 61, 65, paras 83, 106, 113; Brownlie op. cit. *supra* n. 22, pp. 216-217, 231 et seq. ; id. *37 B.Y.I.L. 183 (1961)*, p. 201; id. The Principle of the Non-Use of Force in Contemporary International Law, in Butler (ed.) op. cit. *supra* n.21, p. 23; Müllerson, The Principle of Non-Threat and Non-Use of Force in the Modern World, in Butler (ed.) op. cit. *supra* n.21, p. 32; Skubiszewski, Use of Force by States, Collective Security, Law of War and Neutrality, in Sørensen (ed.), *Manual of Public International Law, 1968*, p. 739, at pp. 766-767; Jiménez de Aréchaga, *159 H.R.C. 9 (1978 I)*, pp. 96-97; Zourek op. cit. *supra* n. 25, pp. 98-103.

[42] Brownlie op. cit. *supra* n.22, pp. 216-250; id. *37 B.Y.I.L. 183 (1961)*, pp.195 et seq. ; id. loc. cit. in Butler (ed.) op. cit. *supra* n.21, p. 23.

enough to accommodate the evolution of the law as evidenced in State practice[43] . While a necessity of self-defence is of no legal significance in the 19th century legal context, it acquires fundamental importance in the light of a rule prohibiting resort to force. It is, therefore, one thing to speak generally of a "necessity" of self-defence and it is quite another to specify the exact circumstances in which the use of force in self-defence is admissible. The latter clearly depends on the development of the state of the law with regard to the use of force by States. In the period 1919-1945 the establishment of the League of Nations, the conclusion of the Pact of Paris, the attempt to define Aggression and the conclusion of a number of bilateral non-aggression treaties, signifies an evolution in the law in that while force had hitherto been admissible in the practice of States resort to it, at least in the form of "war" was regulated under the Covenant of the League and prohibited under the Pact of Paris. It was in such legal climate that an exception for the protection of a State could be admitted in the form of the right of self-defence against certain uses of force[44] . The assertion that *The Caroline* principles represent in their general formulation the law on self-defence, not only ignores any development of the law in the intervening period until the adoption of the United Nations Charter, but it effectively negates the rule of the prohibition of the use of force by suggesting the continuing validity of the all-permisive character of the law on resort to force in the 19th century. According to Special Rapporteur Ago this would amount to the rather untenable situation that "... at the same moment in history and in consequence of the same historic events, nearly all Governments should have been able to sign a treaty instrument binding them reciprocally on the basis of a specific notion and that, at the same time, they should have been able to retain in their legal thinking the conviction of being reciprocally bound on the basis of a different notion..."[45] . It is thus cogent to submit that the customary law safeguarded in Article 51 is the customary law as it existed in 1945[46] . The suggestion, moreover, propounded by Bowett[47] that the prohibition of Article 2(4) is not inconsistent with the right of self-defence introduces the contingency that self-defence as a concept is independent as

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[43] Brownlie loc cit. in Butler (ed.) op. cit. *supra* n. 21, p. 25; *contra* McDougal & Feliciano op. cit. *supra* n.22,p. 217.
[44] References to Brownlie *supra* n.42; Skubiszewski loc. cit. in Sørensen (ed.) op. cit. *supra* n. 41; Jiménez de Aréchaga loc. cit. *supra* n. 41.
[45] Loc. cit. *supra* n. 2, p. 63, para 108.
[46] Brownlie op. cit. *supra* n.22, pp. 272-275; id. *37 B.Y.I.L. 183 (1961)*,pp. 246-247.
[47] *Supra* n. 40.

to its operation from any rule regulating or prohibiting the unilateral resort to force and it exists beyond and despite such rule. This effectively amounts to subjecting the rule to its purported exception, without which the latter cannot as a matter of law exist. According to Brownlie if this view is accepted "... Article 51 ceases to be the exception and becomes a permission that overrides the general principle set forth in Article 2(4)...."[48] . Reference to the preparatory work of the United Nations Charter reveals that Article 51 was understood with regard to the concept of collective self-defence as accommodating the "... necessity of preserving regional systems like the Inter-American one..."[49] . There is not the slightest indication, however, that the purpose of Article 51 was wholly and solely to bring in line the existing collective self-defence arrangements with the collective security provisions of the new organisation. After all, Article 51 speaks of individual self-defence and, if this is the basis for the exercise of collective self-defence in customary law, then Article 51 seems to constitute more than a mere technicality. In addition, the fact should not be overlooked that Article 51 constitutes part of an instrument the purpose of which is to abolish, as a rule, unilateral resort to force by individual States and substitute in its place a *quasi* monopoly of the use of force by the Organisation it establishes[50] . The provision of Article 51 merely introduces an exception to the above by recognising and sanctioning the contingency that has been firmly entrenched in the practice of States that a use of force (and as it will be seen *infra* a use of force of considerable gravity) may create an immediate necessity to be repelled "there and then" and which the collective security machinery of the organisation cannot deal with at once. Moreover, Article 51 expressly provides that the right to resort to force in self-defence is admissible "... until the Security Council has taken measures necessary to maintain international peace and security...". This passage understates the temporary and exceptional character of self-defence and effectively breaches any link with the 19th century doctrine of self-preservation and its unlimited licence to unilateral resort to force by subjecting the observance of the law to the preservation of the State[51] . During the Suez

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[48] Loc. cit. in Butler (ed.) op. cit. *supra* n.21, p. 23; Farer loc. cit. in Black & Falk (eds.) op. cit. supra n. 22, p. 32.
[49] U.N.C.I.O. Documents vol. 12, p. 680.
[50] Brownlie op. cit. *supra* n.22, pp. 269-275; id. 37 B.Y.I.L. 183 (1961), p. 237; *contra* Asrat op. cit. *supra* n. 40, p. 199 et seq.
[51] Schwarzenberger, *87 H.R.C. 195 (1955 I)*, pp. 344-345; Bowett op. cit. *supra* n. 17, p. 10; Henkin, Force, Intervention and Neutrality in Contemporary International Law, *A.S.I.L.*

crisis of 1956 the Egyptian Government invoked the right of self-defence against the Israel military action in the Sinai and the joint Anglo-French ultimatum, until the Security Council or the General Assembly had taken the necessary measures to restore peace and security in the area[52].

The restrictions on the Israel-bound shipping through the Suez canal that were introduced by Egypt in the aftermath of the Arab-Israeli war of 1948, were justified on the basis of the right of self-preservation[53]. To this the U.K. representative replied that

> "... This right at any rate to my delegation seems to be a very vague conception. Obviously states have a right to preserve themselves, if by that is meant to defend themselves in the face of unprovoked. This right is clearly acknowledged in Article 51 of the Charter, which lays down that it can only be exercised until the Security Council has taken measures necessary to maintain international peace and security. ..."[54]

A third point to be made is that in the forty-five years since the conclusion of the United Nations Charter, Article 51 has had considerable influence on State practice. The overwhelming majority of unilateral resort to force has been justified on the basis of Article 51 of the Charter. Moreover, the requirement of an armed attack in Article 51 has been ruled by the Court in the *Nicaragua Case* to constitute part of customary international law[55].

3. *Necessity of Self-Defence and the Concept of Armed Attack.*

3. (i). The Meaning of Necessity of Self-Defence.

The term "necessity of self-defence" is held by authority to connote the situation where the occurrence of an act of armed force in violation of Article 2(4) of the Charter by a State gives rise to the undertaking of protective action on the part of the State against which armed force is

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Proceedings 147 (1963), pp. 148-149; id. General Course on Public International Law, *216 H.R.C. 19 (1989 IV)*, p. 155.

[52] G.A.O.R. (ES-1) First Special Emergency Session, Plennary Meetings and Annexes, 561st plen. mtg, para 47.

[53] See S.C.O.R. 6th yr. 550th mtg, para 33 et seq.

[54] Ibid. para 93.

[55] I.C.J. Rep. 1986, p. 14, at p. 103, para 195. Although there is evidence that armed attack is considered as the primary, albeit not the only, event giving rise to the necessity of defensive action, its reference in Article 51 as the only type of use of force giving rise to the right of individual or collective self-defence has certainly influenced the practice of States. See *infra* section 3 and Second Title on Proportionate Counter-Measures.

directed[56] . Beyond the need of a prior use of armed force the controversial question arises of what kind of unlawful armed force gives rise to defensive necessity. Brownlie[57] has pointed that "... [T]he Webster formula defines necessity only in terms of itself which is like saying that a piece of string must be long without specifying the length...".

Article 51 of the Charter provides that the right of individual or collective self-defence is admissible "... if an armed attack occurs...", while the French text of the same provision stipulates that self-defence is legitimately exercised "... dans le cas où un Membre des Nations Unies est l' object d' une agression armée...". The issue of whether "armed attack" and "aggression" are identical concepts has generated much controversy, and, it is submitted that they are not[58] .

"Aggression" seems, rather, to signify an illegal use of force in the sense of a violation of Article 2(4) of the Charter[59] , and, although prior to the adoption of the United Nations Charter it was believed to be identical

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[56] Kunz, *41 A.J.I.L. 872 (1947)*, pp. 877-878; Waldock, *81 H.R.C. 455 (1952 II)*, pp. 484, 497; Brownlie op. cit. *supra* n.22, p. 239 et seq.; id. 37 B.Y.I.L. 183 (1961), pp. 222 n.4, 223; Kelsen, *42 A.J.I.L. 783 (1948)*, 791; Dinstein op. cit. *supra* n.22, p. 173; Skubiszewski loc. cit. in Sørensen (ed.) op. cit. *supra* n. 41, p. 767; Pompe op. cit. *supra* n.22, p. 60; Cot & Pellet op. cit. *supra* n. 22, p. 772; Schachter, Self-Defence and the Rule of Law, *83 A.J.I.L. 259 (1989)*, p. 272-273; Jiménez de Aréchaga, *159 H.R.C. 9 (1978 I)*, p. 95; Henkin, *216 H.R.C. 19 (1989 IV)*, p. 156; F.M. Higginbotham, International Law, the Use of Force in Self-Defence and the Southern African Conflict, *25 Col. J. Trans. L. 529 (1987)*,pp. 550-551; P. Kahn, From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law, *12 Yale J.I.L. 1 (1987)*,p. 18; Akehurst, Nicaragua v. United States of America, *27 I.J.I.L. 357 (1987)*, p. 370; P. Lamberti Zanardi, Indirect Military Aggression, in Cassese (ed.) op. cit. *supra* n.22, p.112; O'Connell, *The Influence of Law on Sea Power, 1975*, p. 80; Rifaat op. cit. *supra* n.22,p. 124; R. Higgins, The Legal Limits To the Use of Force by Sovereign States; United Nations Practice, *37 B.Y.I.L. 269 (1961)*,p. 303. *Cf.* Bowett op. cit. *supra* n. 17,pp. 109-114; Schwarzenberger, *87 H.R.C. 195 (1955 I)*,p. 332. ***Contra.*** McDougal & Feliciano op. cit. *supra* n.22, pp. 198, 200-201, 217, 230; McDougal, *57 A.J.I.L. 597 (1963)*, p.601; Feinstein, Self-Defence and Israel in International Law, *11 Israel L.R. 516 (1976)*, pp. 522-524; Rostow, *11 Yale J.I.L. 437 (1985-86)*,pp. 451-453; Roberts, *19 Case W. Res. J.I.L. 243 (1987)*,p. 277; Levenfeld, *21 Col. J. Trans. L. 1 (1982)*, pp.20-21.

[57] Loc. cit. in Butler (ed.) op. cit. *supra* n. 21, p. 25.

[58] See to this effect Combacau loc. cit. in Cassese (ed.) op. cit. *supra* n.22, p.22; Müllerson loc. cit. in Butler (ed.) op. cit. n. 21,p. 33; Kolesnik loc. cit. in ibid., p. 154; Dinstein op. cit. *supra* n.22,p.173; Pompe op. cit. *supra* n.22, p. 64; T.D. Gill, The Law of Armed Attack in the Context of the Nicaragua Case, *1 Hague Y.I.L. 30 (1988)*,p. 36; Higginbotham, *25 Col. J. Trans. L. 529 (1987)*, p. 548; D. Wallace Jr. , International Law and the Use of Force: Reflections on the Need for Reform, *19 Intern. Lawyer 259 (1985)*, p. 262; Lamberti Zanardi loc. cit. *supra* n. 56, p. 111. *Cf.* Skubiszewski loc. cit. *supra* n. 56, p. 777; Rifaat op. cit. *supra* n. 22, pp. 124-125. ***Contra.*** *Nicaragua Case (per Judge Schwebel), I.C.J. 1986, p. 14*, at pp. 349-350, paras 176-177; ibid. *(per Judge Jennings)*, pp. 543-544; Broms, The Definition of Aggression, *154 H.R.C. 305 (1977 I)*, p. 370; Macdonald, *xxiv Can. Y.I.L. 127 (1986)*, p. 148; Akehurst, *27 I.J.I.L. 357 (1987)*, p. 370.

[59] Pompe op. cit. *supra* n. 22, p. 60; *cf.* Kunz, *41 A.J.I.L. 872 (1947)*, p. 878.

with "armed attack"[60], it has come to be considered in State practice as a wider concept.

In the early stages of the United Nations deliberations on the Definition of Aggression the tendency appeared towards drawing the distinction between "aggression" in general and "armed attack" in particular. In 1956 the Report of the Special Committee on the Question of Defining Aggression[61] referred to the U.S.S.R. draft definition[62] which drew the distinction between "... enumerated acts of force constituting aggression and frontier incidents..." which were not; this distinction was purported to indicate that on the basis of their "... quantity and quality... [N]ot every use of armed force, only a specific use of armed force, may be considered as an act of aggression..."[63]. While the Soviet Government seemed to have considered the concepts of "aggression" and "armed attack" as identical[64], other delegations did not share the same view. The representative of the Netherlands suggested that if a definition of aggression would serve to facilitate the circumstances in which a State or a group of States could resort in individual or collective self-defence, then it should be appropriate that the definition be one of "armed attack", which, he added, was "... a specific case of armed aggression..."[65]. Moreover, the representative of Syria proposed that the definition included two parts, one "... dealing with armed attack within the meaning of Article 51..." and the second "... with other forms of aggression..."[66]. The point of distinction was identified on the basis of the quality and intensity of the acts of armed force, without, however, further elaboration. There were only two general points that were raised. First, that the fact that Article 51 was part of Chapter VII of the Charter indicated that self-defence was to be exercised only with regard to grave breaches of peace and not in case of "... small-scale hostilities connected with border incidents...[that] fell outside the scope of that Article..."[67]. With regard to border incidents it was

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60 Brownlie op. cit. *supra* n.22, p. 255; id. *37 B.Y.I.L. 183 (1961)*, p. 222.
61 Doc. A/3574, G.A.O.R. 12th session, Suppl. No 16.
62 Doc. A/C.6/L.332/Rev.1.
63 Loc. cit. *supra* n.61, p. 10, para 78.
64 Ibid. p. 25, para 215; a similar position was adopted by the Government of Czechoslovakia, ibid. para 216.
65 Ibid. pp. 13, 15, 16, 24, paras 108, 125, 128, 204; approvingly by the representatives of Norway and Iraq, ibid. p. 15, para 126.
66 Ibid. p. 16, para 126.
67 Ibid. p. 16, para 128 (Iraq), p. 24, para 205 (The Netherlands). *Cf.* Waldock, *81 H.R.C. 455 (1952 II)*, p. 497.

argued that although they might warrant limited defensive action[68] "... such protective action was not based on the provision of Article 51 but followed from the function of the State to maintain law and order on its territory..."[69] .
Secondly, it was claimed that action in self-defence as it was stipulated in Article 51 would be undertaken "... in circumstances that the victim State had no means other than military to preserve its territorial integrity or political independence..."[70] .

During the later stages of the preparatory work of the Definition of Aggression the question of whether self-defence could be exercised against any use of force was debated in a more elaborate fashion with regard to the assistance rendered by a State to armed bands operating against another State. According to Western States every form of material assistance was deemed to give rise to the right of self-defence, while the representatives of developing States argued that only the "sending" of armed bands constituted a ground for resort to force in self-defence against the assisting State[71] .

The Court in the *Nicaragua Case* has maintained the distinction between unlawful use of force *simpliciter* and unlawful use of force that amounts to an armed attack; the Court ruled that in respect of the principle of the prohibition of the use of force it was "... necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from others less grave forms..."[72] . The Court went further and ruled in respect of the exercise of individual and collective self-defence:

> ... In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands.....which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular armed forces, "or its substantial involvement therein". This description contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that in customary law, the prohibition of armed

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[68] Ibid. p. 16, para 128 (U.K. , The Netherlands)
[69] Ibid. (The Netherlands)
[70] Ibid. p. 24, para 205 (The Netherlands)
[71] See *infra* Second Title.
[72] I.C.J. Rep. 1986, p. 14, at p. 101, para 191.

attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States...[73]

It, moreover, went on to say that in the case of use of force that does not amount to an armed attack the victim State *alone* has the right to take proportionate counter-measures, without, however, specifying against whom they could be exercised or whether they could involve the use of armed force[74].

It is submitted that the term "necessity of self-defence" represents an over-simplified generalisation which would be more accurately put as "necessity of defensive action". State practice reveals that not every use of force warrants armed action in self-defence[75]. It is rather a case of ascertaining whether the "necessity of protective action" is a necessity to protect the State as a whole, namely, as an existing political, territorial and economic unit or, whether there arises a necessity to protect the authority of the State with regard to a use of force that occurs and is limited to a specific *locus* over which such authority extends. Thus, frontier incidents, uses of force against individual vessels, material assistance to an indigenous insurgency within another State do not call for resort to force in self-defence but rather for resort to protective action which the Court called counter-measures. An illustration of the above submission is found in the *Annotated Supplement To The Commander's Handbook on the Law of Naval Operations* of the United States Navy where the distinction is drawn between self-defence in relation to a unit of United States naval forces, namely, defending an individual warship only that refers to

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[73] Ibid. pp. 103-104, para 195. **Contra.** Ibid. (*per Judge Schwebel*) pp. 349-350, paras 176-177; (*per Judge Jennings*), p. 543-544; Bowett op. cit. *supra* n.17, pp. 192, 256-258; Schwarzenberger, *87 H.R.C. 195 (1955 I)*, p. 332; McDougal & Feliciano op. cit. *supra* n.22, pp. 240-241; Stone, *Aggression and World Order, 1958*, pp. 43-44; Schachter, *53 Univ. Chic. L.R. 113 (1986)*, p.133 but *cf.* id. *83 A.J.I.L. 259 (1989)*, p.273; Rostow, *11 Yale J.I.L. 437 (1985-86)*, p.453; J.N. Moore, *80 A.J.I.L. 43 (1986)*,p. 86; Akehurst, *27 I.J.I.L. 357 (1987)*, p. 370; Reisman, Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in L.F. Damrosch & D.J. Scheffer (eds.), *Law and Force in the New International Order, 1991*, p. 36 et seq.

[74] I.C.J. Rep. 1986, p. 14, at pp. 110, 127, paras 210-211, 249. See *infra* Second Title.

[75] See *infra* Second Title.

localized low-level situations, and self-defence in relation to the United States as a nation, that is, the United States territory and armed forces[76] .

Both the resort to force in self-defence against an armed attack, and in counter-measures are defensive in nature. The question then arises of whether it is proper to discuss defensive action under two headings instead of one - self-defence. Moreover, such doubt as to the dichotomy of self-defence and counter-measures seems to be reinforced by reference to the principle of proportionality, according to which, if it is strictly observed, every unlawful force could be repelled without any need of the above-mentioned distinction[77] . It is submitted that the distinction between self-defence and counter-measures is one that is pertinent to the kind of the necessity of protective action that is given rise upon the occurrence of an unlawful act of force[78] . The requirement of "scale and effects" of a particular use of force in order to constitute an armed attack in conjunction with the fact that the author of the use of force is a State, connotes an armed action of considerable magnitude, with regard to its execution and the gravity of its objective. If the object of the unlawful armed force is the territorial integrity, political independence, economic and security infrastructure of the target State as a whole, then the protective counter-action is to be expected to accommodate to such contingency. At the same time armed action which is of no such consequentiality like frontier incidents clashes over territory in dispute, attacks against individual vessels, creates a necessity to be repelled but it does not seem by the nature of the circumstances to constitute protection of the State as a whole[79] . The consequentiality of an act of force is a very important factor in respect of the protective force to be exercised, but, and this is essential, it must ascertained on the basis of the actual purport of

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[76] Loc. cit. *supra* n.33, 4.3.2.2/4-13/ notes 30-31. Also see *infra* Second Title in relation to the laying of submarine mines. *Cf* . D.L. Peace, Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis, *31 Va J.I.L. 545 (1991)*, pp. 563-4.

[77] Dinstein op. cit. *supra* n.22, p. 182; N.D. White, The Legality of Intervention Following the Nicaragua Case, *ix Intern. Rel. 535 (1989)*, p. 541 n.28.

[78] Kahn, *12 Yale J.I.L. 1 (1987)*, pp. 21-22.

[79] This, however, may not be the case as far as the participants themselves are concerned in the case of territorial disputes where the area in dispute over which fighting may break out, may be regarded by either of them as an integral part of his territory. State practice with regard to border clashes reveals that in principle the parties to the conflict refrain from invoking claims of individual or collective self-defence at least in the early stages of the fighting; at the same time, however, the danger of escalation is very high and it is at that point that claims of self-defence against an armed attack are made. See *infra* Second Title .

the use of force on the ground and not merely by the expectations that any unlawful force gives rise to for the target State[80].

Of course both defensive operations are to be limited within boundaries set by the extremely important requirement of proportionality, but at the same time the latter is itself adapted in the requirement of the specific necessity.

If State A is invaded by the armed forces of State B along the full length of the common frontier of the two States and a large portion of the territory of the former is occupied, then it is a case of an armed attack by State B against State A. In this situation State A may invoke the right of self-defence and resort to force along the full length of the deployed armed forces of State B and may even invade the territory of State B with the view of encircling the armed forces of the latter occupying its territory and ultimately expel or destroy them. It may also bombard airfields, naval stations and supply routes of State B. But it cannot, by application of the principle of proportionality, overthrow the Government or destroy the entire infrastructure of State B.

If, on the other hand, a war vessel of State A comes under fire by a naval helicopter of State B, while the warship may take defensive action against the helicopter, it is not a case of use of force that poses a danger to the entirety of State A in the sense that is directed against its security infrastructure as it would be the case if the entire or large sections of the fleet of State A came under aerial bombardment.

It is, therefore, the quality and quantity of the unlawful use of force that determine the kind of necessity for protective action to be taken. The practical significance of this is that it upholds the exceptional character of defensive action which must not be allowed to disrupt international peace and security at large. For if every use of force in violation of the rule of non-use of force were treated as creating a general necessity of self-defence, then it would be possible to assert a necessity of collective self-defence which in practice would involve the use of force by a third or more States

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[80] Pompe op. cit. *supra* n.22, p. 103 et seq. ; Brownlie op. cit. *supra* n.22, pp.366-368; id. *37 B.Y.I.L. 183 (1961)*, p. 257; Jiménez de Aréchaga, *159 H.R.C. 9 (1978 I)*,p. 95; Wengler, *7 Rév. Belge D.I. 401 (1971)*,p. 406; Lamberi Zanardi loc.cit, *supra* n. 56, p. 112; Müllerson loc. cit. *supra* n.58, p. 35; id. Self-Defence in the Contemporary World, in L.F. Damrosch & D.J. Scheffer (eds.), *Law and Force in the New International Order, 1991*, pp. 16-18. *Cf.* Kelsen, *42 A.J.I.L. 783 (1948)* ; Rifaat op. cit. *supra* n.22, p. 125. ***Contra.*** McDougal & Feliciano op. cit. *supra* n.22, pp. 175-177, 180-182, 198, 200-201, 217-218, 228, 230.

apart from the original warring parties, an escalation of the conflict and a major breach of the peace[81].

It is submitted that resort to force in the exercise of the right of self-defence as it is understood in contemporary customary international law constitutes part of a broader necessity for protective action that arises because of a use of force in violation of Article 2(4) of the Charter. This use of force must amount to an armed attack, a special type of unlawful armed force which entails a high degree of gravity posing a danger to the existence of the target State as a whole and which would restrict the unilateral resort to force against the source of the attack and at the same time would minimize the possibility of grave breaches of the peace[82].

3. (ii). Immediacy of Necessity of Self-Defence .

The necessity of action in self-defence must be *"immediate"*, namely, that as long as use of force is the only means to counter the danger that threatens the State[83] then it must be resorted to within reasonable time from when the necessity arose. Such necessity can be safely said to arise only when there is open violence in progress and everything is a matter of ascertaining the issue of when an armed attack or a mere use of force has started. An undue time-lag may be prejudicial for claiming defensive necessity[84] . The Falklands crisis, where the U.K. resorted to defensive force against the Argentine occupation forces almost one month after the invasion of the islands illustrates that what really matters is the immediate invocation of the right and the immediate mounting of measures to implement it as opposed to immediate action[85]. Mrs M. Thatcher, the Prime Minister of the U.K. , in a speech in the House of Commons Emergency Debate on 3 April 1982 announced the dispatch of an Expeditionary Force to the South Atlantic to expel the Argentine occupation forces[86]. This is understandable for practical reasons. Action in self-defence involves the commitment of the armed forces of a State and all the logistical requirements that such a contingency entails with regard to mobilisation and dispatch of troops to a certain area that may be

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[81] See *infra* Second Title .
[82] T.D. Gill, *1 Hague Y.I.L. 30 (1988)*,p. 50.
[83] Greenwood, International Law and the Air Operation against Libya, *89 W.Va.L.R. 933 (1987)*, p. 945.
[84] Cot & Pellet op. cit. *supra* n.22, p. 773; Dinstein op. cit. *supra* n.22, p. 191.
[85] Dinstein op. cit. *supra* n.22, pp. 220-221.
[86] Hansard Parliamentary Debates, H.C. , No 1239, 2nd-8th April 1982, p. 337 col. 637.

geographically remote. Moreover, the victim of the aggression may pursue a peaceful reversal of the effects of the aggression. The U.K. requested an emergency meeting of the Security Council upon the occurrence of the Argentine invasion and provoked the adoption of Security Council resolution 502 (1982) of 3 April 1982 calling on Argentina to withdraw her forces from the islands [87]. An invocation of a necessity of self-defence is essential to be followed by measures revealing a high degree of expectancy and probability to put into effect; otherwise the right to resort to defensive force is thought to wane [88]. To hold otherwise would mean that legitimate unilateral resort to force would lose its exceptional character and would appear as a form of enforcement (i.e. reprisal) exercised at will at any remote instance of time - a possibility that is not pertinent to the right of self-defence in any system of law and that would be destructive of the law.

It is, furthermore, essential to have knowledge of an actual use of force that precedes and creates the defensive necessity, in order to avoid the general and, in this writer's view, extremely dangerous proposition that self-defence is admissible if all other peaceful alternatives are exhausted, whether it be through recourse to the Security Council or other peaceful means [89]. While commentators taking the above view presuppose a prior occurrence of unlawful force they seem to imply that there is a duty of attempting to settle the dispute by peaceful means first and reserve action in self-defence as the last resort. This is very reminiscent of the theory of armed reprisals and the rules for their exercise set by the *Naulilaa Award* .

It is submitted that a necessity of self-defence is not and should not be part of the concept of pacific settlement of disputes. The latter constitutes an obligation (rather than a prerequisite of using force) that

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[87] Letter dated 2 April 1982 from the representative of the United Kingdom of Great Britain and Northern Ireland to the president of the Security Council, Doc. S/14946, S.C.O.R. 37th yr. Suppl. for April-June 1982, p. 3; also see Doc. S/14947, ibid. p. 4. Such an attempt, if it involves recourse to the Security Council unavoidably entails the issue of whether the Council has adopted "measures necessary to maintain international peace and security" which involves according to Article 51 the obligation to cease action in self-defence. See *infra* .

[88] O'Connell, *The Influence of Law on Sea Power, 1975*, p. 81; Macdonald, *xxiv Can. Y.I.L. 127 (1986)*, p. 152; *cf.* Schwarzenberger, *87 H.R.C. 195 (1955 I)*, p. 333.

[89] ***Contra.*** Stone, *Legal Controls of International Conflict, 1954*, p. 246; id. *Aggression and World Order, 1958*, p. 44; Dinstein op. cit. *supra* n.22, p. 191; Roberts, *19 Case W. Res. J.I.L. 243 (1987)*, p. 277; Intoccia, American Bombing of Libya: An International Legal Analysis, *19 Case W. Res. J.I.L. 177 (1987)*, p. 201; Levenfeld, *21 Col. J. Trans. L. 1 (1982)*, pp. 20-21, 34; Rostow, *11 Yale J.I.L. 437 (1985-86)*, p. 455. *Cf. Nicaragua Case (per Judge Schwebel)* I.C.J Rep. 1986, p. 14, at pp. 363-365, paras 201-205; Skubiszewski loc. cit. in Sørensen (ed.) op. cit. *supra* n.41, pp. 774-775; McCredie, *19 Case W. Res. J.I.L. 215 (1987)*,p. 227.

aims at the elimination of the very eventuality - namely, the use of force to settle disputes - that itself gives rise to the exceptional necessity of self-defence [90] . To hold otherwise would amount in effect to a situation similar to the one under the Covenant of the League of Nations that is simply not the case under the United Nations Charter: The latter prohibits in unequivocal terms, and does not merely regulate the circumstances of, resort to force for the settlement of international disputes.

Even when the right of self-defence was invoked when the necessity arose, force was used and then both the action and the invocation of the right ceased, either upon unilateral appraisal of the situation or by adherence to a Security Council call for a cease-fire (after which the consideration of the situation came under its deliberation), necessity of self-defence cannot be invoked with regard to the initial occurrence of force but only if the armed attack is renewed. What is required is a new resort to force that creates a "new" necessity of self-defence. In *The Eilat* incident that involved the sinking of an Israeli destroyer by U.A.R. missile batteries in the vicinity of Port Said in the aftermath of the Security Council sponsored cease-fire in the Six-Day War great significance was laid on whether *The Eilat* had penetrated inside U.A.R. territorial waters that would justify defensive action by the latter. According to the Indian representative in the Security Council "... [D]etermination of this fact has great importance in the context of Security Council resolution 236 (1967) which specifically prohibited any forward military movements subsequent to the cease-fire..."[91].

In the so-called *Yom Kippur* War of 6 October 1973 Egypt and Syria attacked the Israel armed forces in occupation of the Sinai peninsula and the Golan Heights that constituted Egyptian and Syrian territories that were lost to Israel in the Six-Day War of 1967. The Egyptian and Syrian actions were justified as an exercise of the right of self-defence, *not* against the initial occupation of these territories in 1967, but against an alleged Israel attack upon the Egyptian and Syrian Army positions on the West bank of the Suez canal and the Golan Heights, respectively [92] .

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[90] While such eventuality was envisaged under Article 12 of the Covenant of the League of Nations it was not deemed as an exercise of the right of self-defence, and in any case, it is not admitted by the Charter of the United Nations, unless it is collective action by virtue of Chapter VII thereof - namely, sanctioned by the Security Council. See, for instance, S.C. Res. 678 (1990) of 30 October 1990.

[91] S.C.O.R. 22nd yr. 1369th mtg , para 92.

[92] Letters dated 6 October 1973 from the representatives of Egypt (Doc. S/11011) Syria (Doc. S/11009 and Corr. 1) to the President of the Security Council, S.C.O.R. 28th yr. Suppl.

It constitutes an abuse of the exceptional character of the right of self-defence and its usurpation as a right, if it is invoked to justify armed action that aims at returning to a territorial *status quo ante* that has been altered by a process of negotiation and conclusion of a treaty by subsequently denouncing the treaty. Any demand for reinstating the denouncing party into the position that it held before the repudiation of the treaty involves matters that arise out of the general issue of termination of treaties and the terms of the specific treaty itself - both matters that are directly amenable to peaceful settlement and utterly foreign to any kind of urgency posed by a use of armed force. An illustration of such disingenuous invocation of self-defence is the outbreak of the eight-year long conflict between Iran and Iraq on 21 September 1980. The underlying issue of the conflict was the question of sovereignty over the Shatt Al-Arab waterway which is situated between the two States. By virtue of the Algiers Treaty of 1975 the common border between Iran and Iraq along the disputed waterway was the median line of the waterway's deepest channel rather than the previously accepted line running along the eastern (Iranian) bank of the Shatt Al-Arab. On 17 September 1980 the Iraqi Government unilaterally abrogated the Algiers Treaty and announced that Iraq "... understood that the pre- 1975 position had been reinstated, thus rendering void the legal relationship governing the Iran - Iraq boundaries including Iraq's recovery of full control and sovereignty over the Shatt Al-Arab..." and the subsequent military action by Iraq on 21 September 1980 was justified as self-defence of Iraq's territorial integrity and reassertion of her rights against Iran [93]. Mr McHenry speaking in the Security Council on behalf of the United States Government took the view that Iran and Iraq should immediately cease hostilities and adhere to the principle of non-acquisition of territory by force [94].

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adopted Resolution 338 (1973) of 22 October 1973 calling for an immediate cease-fire and the majority of its Members felt that the dispute should be settled by peaceful means.

[93] Letter dated 24 September 1980 from the representative of Iraq to the President of the Security Council transmitting the letter dated 24 September 1980 from the Minister of Foreign Affairs of Iraq addressed to the President of the Security Council, Doc. S/14192, S.C.O.R. 35th yr. Suppl. for July-Sept. 1980, pp. 114-115; Letter dated 26 September 1980 from the Secretary General to the President of the Security Council transmitting a letter dated 26 September 1980 from the President of Iraq to the Secretary General, Doc. S/14199, Ibid. , p. 119.

[94] U.N. Chronicle, vol. XVII, No 10 December 1980, p. 9.

3. (iii). The Characteristics of an Armed Attack.

An armed attack that gives rise to the necessity of individual and collective self-defence consists of (i) a use of armed force against a State in violation of Article 2(4) of the United Nations Charter and the customary law principle of non-use of force, (ii) the author of which is a State and (iii) which is of such scale and effects as to constitute a threat to the target State in its entirety as a territorial, political and economic entity.

3. (iii). a. The Use of Armed Force in violation of Article 2(4) .

The necessity of forcible defensive action - whether in self-defence or proportionate counter-measures - arises against another actual use of force by another State which itself is not defensive. Self-defence is not permissible against self-defence.

State practice does not admit resort to force in self-defence in the absence of a prior unlawful use of force[95]. Thus, unfavourable economic policy on the part of a State that affects the economy of another or the existence of a certain political regime in a State which is different from that of another State or a group of States in a certain geographical region, do not warrant resort to armed force in self-defence. Article 5(1) of the 1974 Definition of Aggression stipulates that "... [N]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression...".

With regard to economic coercion it may be recalled that, on the one hand, it is not prohibited by Article 2(4) of the Charter, and on the other, it must be first established that a certain economic policy constitutes a means of coercion against another State, rather than an exercise of the freedom to have economic relations with whatever State one wishes, whereupon it may constitute either unlawful intervention[96] or a threat to international peace amenable to the consideration of the Security Council[97].

That State practice does not accept economic considerations as a legitimate ground of resort to force in self-defence can be illustrated by the

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[95] The concept of anticipatory self-defence is discussed *infra* in section 5.

[96] In this case, such eventuality may warrant proportionate and, certainly, non-forcible counter-measures.

[97] See *supra* Part One Chapter 5 ; also see Bowett op. cit. *supra* n.17, pp. 113, 114; Higgins, *37 B.Y.I.L. 269 (1961)*, p. 303.

invasion of Kuwait by Iraq on 2 August 1990. In a Press release by the Press Office of the Embassy of the Republic of Iraq in London dated 12 September 1990, Kuwait has been accused of being the spearhead of an international conspiracy against Iraq aiming at waging "... economic war by flooding the International oil market with excessive oil production and without adherence to OPEC quotas. Their policy resulted in the sharp reduction of oil prices and consequently deprived Iraq of an important and desperate part of its resources in the aftermath of a very costly war and under the burden of heavy debts..."; furthermore, Kuwait was also accused of "... stealing oil from the Rimela South Field..." which extends across the Iraq-Kuwait border[98] . The justification for the Iraqi action was not based on the right of self-defence but rather on the invitation by a so-called Revolutionary Government of Kuwait[99]. Even so, the economic grievance of Iraq seems to have such a prominent position in the crisis that erupted on 2 August 1990 that it appears to be central in the Iraqi Government case with regard to resorting to armed force (under any justification) and may be held to be covered by the universal condemnation of the invasion[100] .

A similar situation was invoked by the Indian representative in the Security Council with regard to the large numbers of Benghali refugees that fled to India from East Pakistan due to the operations conducted by the Pakistan Army, during the debate on the Indian military intervention in East Pakistan in December 1971. Mr. Sen, the representative of India argued:

> "... Now, was that not a kind of aggression? If aggression against another foreign country means that it strains its social structure, that it ruins its finances, that it has to give up its territory for sheltering the refugees,....., what is the difference between that kind of aggression and the other type, the more classical type, when someone declares war or something of that sort?...."[101]

However, later in the debate Mr. Sen presented the refugee issue as a case of humanitarian assistance in the face of the Pakistan Government allegations that the Indian Government was engaged in fomenting the secession of East Pakistan and in rendering material support to the

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[98] Text in Lauterpacht & others (eds.), *The Kuwait Crisis - Basic Documents (1991)*, pp. 73, 74; Memorandum dated 15 July 1990 from the Foreign Minister of Iraq, Mr. Tariq Aziz, to Secretary General of the Arab League, Keesing's 1990, p. 37631.
[99] S/PV. 2932, text in Lauterpacht & others (eds.) loc. cit. *supra* n. 98, p. 100.
[100] S.C. Res. 660 (1990) of 2 August 1990. Also See Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, *55 Modern L.R. 153 (1992)*, p. 155.
[101] S.C.O.R. 26th yr. 1606th mtg , para 161.

insurgents[102] . Most delegates of the other Members of the Council did not deal with the refugee problem at all. Still the representative of Saudi Arabia stated that:

> "... Although the refugees on Indian soil are a burden on India there is no excuse for championing a separatist movement inside the State of Pakistan..."[103]

Political considerations that have given rise to the use of force purportedly in self-defence have arisen in the context of power-politics antagonism of the U.S.A. and the U.S.S.R. during the period of the so-called "Cold War" in the form of the so-called "doctrines" on foreign policy.

In the case of the U.S.S.R. such policy is epitomised in the so-called *Brezhnev Doctrine* that "... the weakening of any link in the world socialist system has a direct effect on all the socialist countries, which cannot be indifferent to this..."[104]. This particular foreign policy prerogative was first asserted as a form of self-defence in the military intervention of Czechoslovakia of 20-21 August 1968 by the combined armed forces of the U.S.S.R. , Poland, Hungary, East Germany and Bulgaria. Though the justification offered by the Soviet Government was in a considerable part rested on a prior request of assistance by the Czechoslovak Government, this was linked with the right of self-defence and the "...protection of the achievements of socialism..."; Mr. Malik, the Soviet representative in the Security Council stated:

> "... The decision of the socialist countries on rendering assistance to the Czechoslovak people is entirely in accordance with the right of States to individual and collective self-defence....
>
> ... The Warsaw Treaty steadfastly protects the achievements of socialism, the sovereignty and the independence of the fraternal socialist States..."[105]

To this the representative of Senegal retorted:

> "... My Government regrets and condemns this intervention which despite the existence of the Warsaw Treaty, constitutes an interference in the internal affairs of Czechoslovakia, which was not threatened by any aggression from outside..."[106] .

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[102] Ibid. 1607th mtg , para 173.
[103] Ibid. 1608th mtg , para 226.
[104] Tunkin, *Theory of International Law, translation by Butler, 1974*, pp. 435-436. This foreign policy doctrine has been abandoned in 1989 when the Soviet Union relinquished its political influence over the former Socialist States of Eastern Europe. See Keesing's 1989, pp. 36982, 37105.
[105] S.C.O.R. 23rd yr. 1441st mtg , paras 3, 90, 92.
[106] Ibid. 1443rd mtg , para 19.

The U.S.A. position was formulated on a twofold basis. First, through statements of policy by certain Administrations according to which the creation of communist regimes (that were invariably held to represent an extension of Soviet power) was to be resisted, and, secondly, through the concept, that has been formulated during the 1980s, of the admissibility of the so-called pro-democratic intervention, namely, the use of military force to promote or restore democracy. Thus, President Truman introduced a policy of military and financial aid to countries the U.S. deemed they were threatened by communism - e.g. Greece and Turkey during the late 1940s and 1950s[107]. President Johnson said in the aftermath of the U.S. intervention in the Dominican Republic that his Government had resisted an attempt at creating a communist regime in the Western Hemisphere[108]. Furthermore, President Reagan asserted that the U.S. would oppose, if necessary by force, the direct or indirect expansion of Soviet power in certain, predesignated, geographical regions[109] . The above-mentioned statement was coupled on 1 March 1985 with an assertion to intervene in order to restore democracy in Central America and the Caribbean[110] .

Such policies, however, whenever they resulted in the use of armed force on the part of the U.S. , were always justified on the basis of the law on the use of force. Thus, the Dominican Republic and the Grenada actions were justified on the basis of prior request for assistance by the local Governments and of the protection of the lives of U.S. nationals. Self-defence was invoked with regard to the assistance provided to the Nicaraguan *contras* and in respect of the military operation in Panama on 20 December 1989 that resulted in the overthrow of the country's ruler, General M.A. Noriega. In the case of the material assistance to the *contra* guerrillas, the U.S. Government argued that it constituted action in collective self-defence to assist the Government of El-Salvador which was faced with a leftist insurgency allegedly assisted by the Government of Nicaragua. The issue was considered by the International

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107 P. Calvocoressi, *World Politics since 1945, 6th ed. , 1991*, p. 9

108 *52 Dept. State Bull. (1965)*, p. 822.

109 M. Reisman, Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice, *13 Yale J.I.L. 171 (1988)*, p. 172; also see id. loc.cit. in Damrosch & Scheffer (eds.) op. cit. *supra* n. 73, pp. 29-36.

110 This was apparently a reference to the U.S. intervention in Grenada in 1983 and the U.S. involvement in the civil strife in Nicaragua during the 1980's. Reisman loc. cit. *supra* n. 109, p. 180.

Court of Justice in the *Nicaragua Case* and it was ruled that on the basis of evidence the Nicaraguan Government was not guilty of providing material assistance to the Salvadorean guerrillas (at least after 1981) and that even if it were that would not amount to an armed attack against El-Salvador; therefore, while only the latter would have to resort to proportionate counter-measures there was no basis for collective action in self-defence[111] .

The Panama operation of 20 December 1989, on the other hand, was justified on the basis of Article 51 of the Charter as action for the protection of U.S. nationals and the Panama canal[112] . President Bush asserted an additional ground by stating that the U.S. operation aimed at the restoration of democracy in Panama and the bringing of the Panamanian ruler to justice for drug trafficking[113] . The Panamanian operation was deplored[114] and it must be pointed that there had been no prior use of force against either the entirety of U.S. citizens or the canal[115] .

It is submitted that the so-called foreign policy "doctrines" are what their name indicates : statements of policy and not a "special type of international law"[116] . The Court in the *Nicaragua Case* pointed that:

> ... The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy and not an assertion of rules of existing international law...[117]

In so far as they purport to constitute instances of State practice they are either justified on the basis of existing rules of international law or on the basis of new ones. It appears that the former situation has prevailed for both the U.S.A. and the U.S.S.R. have attempted to justify their actions on the basis of exceptions to the general rule of the prohibition of the use of force, with the right of self-defence having been allocated a prominent

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111 I.C.J. Rep. 1986, p. 14, at pp. 119, 120, 127, paras 230, 232-233, 249.
112 U.N. Chronicle, vol. xxvii, No 1 March 1990, p. 67.
113 Keesing's 1989, p. 37112.
114 G.A. Res. 44/240 of 29 December 1989 (75 : 20 : 40); O.A.S. Res. of 22 December 1989 (20 : 1 : 6), Keesing's 1989, p. 37113.
115 Only one U.S. citizen was reported to have been killed as a result of the hostile policy of the Panamanian Government towards the U.S. See generally, Notes by Nanda, Farer, D'Amato in Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists? , *84 A.J.I.L. 494-524 (1990)* ; Quigley, The Legality of the United States Invasion of Panama, *15 Yale J.I.L. 276 (1990)* ; Henkin, The Invasion of Panama Under International Law: A Gross Violation, *29 Col. J. Trans. L. 293 (1991)* .
116 *Contra* . Reisman loc. cit. *supra* n.109, p. 183.
117 I.C.J. Rep. 1986, p. 14, at p. 109, para 207.

position. Thus, the Court in the *Nicaragua Case* ruled in relation to the assistance to the *contras* :

> ... the United States has not claimed that its intervention which it justified in this way on the political level, was also justified on the legal level, alleging the existence of a new right of of intervention regarded by the United States as existing in such circumstances.... the United States has on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack... [118]

While both the Soviet and the U.S. "doctrines" presuppose a claim for at least non-forcible interventionary policy, and are in this respect identical in nature, they have encountered substantial opposition by third States and by each of their proponents against the actions of the other. It is submitted that this can be considered both as a case of persistent objection and as a case of inconsistency of practice that are prejudicial to the formation of a new rule of international law[119] .

As to the legitimacy of pro-democratic intervention it is submitted that its admission as an exception to the rule of non-use of force would undermine international peace, because it implies that a not uncontroversial concept like "democracy" would serve as the basis for armed intervention against another State giving States the licence to overthrow Governments simply on a unilateral assessment and according to very subjective standards of what a democratic Government is. This would virtually annul the rule of Article 2(4) of the Charter and the necessity of any exception to it[120] .

A necessity of self-defence is also absent where State activity is exercised as part of its jurisdiction over persons and property. The problem has arisen with regard to suggestions

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[118] Ibid. p. 109, para 208.

[119] Wright, *53 A.J.I.L. 112 (1959)*, p. 117; Henkin, *216 H.R.C. 19 (1989 IV)*, pp. 152-153; *cf*. Reisman loc. cit. *supra* n. 109, pp. 184, 197.

[120] *Nicaragua Case, I.C.J. Rep. 1986, p. 14*, at p. 124, para 241; Schachter, The Legality of Pro-Democratic Invasion, *78 A.J.I.L. 645 (1984)*, pp. 647-648; Henkin, *216 H.R.C. 19 (1989 IV)*, p. 153; D'Amato, *Nicaragua* and International Law: The Academic and the Real, *79 A.J.I.L. 657 (1985)*, p. 658; Henkin, The Invasion of Panama Under International Law: A Gross Violation, *29 Col. J. Trans. L. 293 (1991)*, pp. 297-300 ; Nanda, Commentary on International Intervention to Promote the Legitimacy of Regimes, in Damrosch & Scheffer (eds.) op. cit. *supra* n. 73, pp. 181, 183; Franck, Intervention against Illegitimate Regimes, in Damrosch & Scheffer (eds.) op. cit. *supra* n. 73, pp. 159-170; ***Contra.*** Reisman, Coercion and Self-Determination: Construing Charter Art. 2(4), *78 A.J.I.L. 642 (1984)*; J. Kirkpatrick, The Use of Force in the Law of Nations (Review Essay), *16 Yale J.I.L. 583 (1991)*, p. 594; A.D. Sofaer, The Legality of the United States Action in Panama, *29 Col. J. Trans. L. 281 (1991)*, pp. 288-290 .

of a general right of self-defence on the high seas[121] . In so far as the right is exercised for repelling a use of force against an individual vessel then it is generally considered as an admissible use of force[122] , which, it must be stressed, does not represent self-defence of the State as a whole and should be characterised as proportionate counter-measure. When, however, self-defence is asserted independently of any immediate necessity arising from a use of force then it comes very close to the exercise of State jurisdiction, which is strictly prescribed in law in relation to the high seas (viz. Art. 22 of 1958 Geneva Convention on the High Seas and Art. 110(1) of the 1982 Law of the Sea Convention) and it is to be discharged only with regard to the specific instances laid out in the above provisions. Invocation of the right of self-defence, on the other hand, has the result of absolving the State acting under its cover from responsibility for an otherwise unlawful act and only with regard to an immediate necessity that usually arises due to the use of force. To apply this function of self-defence in the context of jurisdiction on the high seas would render any need for specific grounds for its exercise nugatory and would promote abuse and conflict in an area of great significance for the majority of States. State practice does not support such an assertion of self-defence. In 1956 during the Algerian War of Independence the French Government by virtue of the Algeria State of Emergency Decree of 17 March 1956 asserted the right of visit and search of other States' shipping on the high seas. The French justification was inconsistent and was based either on the doctrine of contiguous zone or on the right of self-defence; on the other hand the French action was met by universal opposition and it must be held not to have contributed to the creation of a rule of customary law[123] .

3. (iii). b. Use of Armed Force by a State against another State.

It is submitted that only a use of armed force by a State against another State constitutes an armed attack and hence a ground for the exercise of self-defence. Consequently, the use of force by the Government of a State against a group of individuals that have risen in revolt against it

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121 Bowett op. cit. *supra* n.17, pp. 66-86.
122 O'Connell, *International Law of the Sea, vol. ii, ed. by I.A. Shearer, Oxford, 1984*, p. 804; Brownlie op. cit. *supra* n.22, p. 305; A.V. Lowe, Self-Defence at Sea, in Butler (ed.) op. cit. *supra* n.21, pp. 188-189.
123 O'Connell, *The Influence of Law on Sea Power, 1975*, p. 123.

does not constitute a case of self-defence for it is not, in any case, a violation of Article 2(4) of the Charter.

Forcible response against an insurgency that is assisted by another State or it is based on the territory of another State, and is itself the author of the use of force in the sense that it is not under the complete control of the assisting Government and that it resorted to armed force on its own devices constitutes the basis for forcible response by way of proportionate counter-measures. The same is true for the use of force to protect the armed forces of an administering power from attack by units of a national liberation movement[124] .

It is only where a State is the author of the use of force that force can be used against it in self-defence[125] . This is in accordance with Article 2(4) that prohibits the use of force by States only and of Article 51 that speaks of an armed attack against a Member of the United Nations, namely a State[126] . Conversely, groups that have not constituted themselves into statehood in an area under the administration of another State, do not have the right of self-defence because they are not in the first place prohibited from using force[127] . When, however, the foreign administration has been relinquished and effective control has been established by the indigenous group then the rules of the prohibition of force and the exception of self-defence are thought to apply - e.g. S. Korea, South Viet- Nam, Israel[128] .

3. (iii). c. "Scale and Effects" of a Use of Armed Force that constitutes an Armed Attack.

The "scale" of a use of armed force may be held to imply the material intensity and the geographical extension of this use of force. So far as its perpetrator is concerned, the material intensity of a use of armed force depends on considerations of logistics and technology. Therefore,

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124 See *supra* Part One, Ch. 6.

125 Brownlie op. cit. *supra* n. 22, p. 375.

126 Linnan,*16 Yale J.I.L. 245 (1991)*, p. 309. *Cf*. A.K. Fletcher, Pirates and Smugglers: An Analysis of the Use of Abductions to Bring Drug Traffickers to Trial, *32 Va .J.I.L. 233 (1991)*, pp. 259-261.

127 *Supra* n.124

128 Article 1, Explanatory Note (a) of the 1974 Definition of Aggression; Memorandum of the U.S. State Dept., Legality of the United States Participation in the Defence of Viet-Nam, 4 March 1964, in R. Falk (ed.), *The Viet- Nam War and International Law, vol. 1, 1968*, p. 583, at pp. 587-8; McDougal & Feliciano op. cit. *supra* n.22, p. 221.

with regard to the land, naval and air forces of a State, whether a specific use of force amounts to an armed attack would depend on either the numerical strength of the forces involved or the amount of fire power unleashed or both. Thus, the penetration of a platoon of the armed forces of a State inside another State's territory at one point of their common border, or the sinking of a coast guard patrol boat by a destroyer of another State, or the strafing by a jet fighter of a frontier post of another State, would not in this writer's view constitute a case of an armed attack. By contrast, the penetration of an army division or divisions along the full or considerable length of the common border between two States, or the sinking of a number of units of a State's navy, or the aerial bombardment by a large number of aircraft of the cities, industrial and military installations of a State are generally taken to constitute classical cases of armed attack. However, technological advances in the manufacturing of weapons that aim at enhancing their destructive power may be held to identify the use of certain weapons as an armed attack. Consequently, resort to force by way of nuclear, chemical and biological weapons seems to fall within this category. Moreover, the launching of long-range missiles against the territory of another State - such as the Iraqi missile attack on Israel of 17 January 1991 - , the drop of fuel or cluster bombs, may be held to constitute cases of armed attack.

The likelihood of widespread destruction brings discussion to the requirement of "effects" of a use of force so as to constitute an armed attack. The term refers to the consequences of the use of force with regard to the State against which it is used. It is submitted that for a use of force to constitute an armed attack it must be directed against another State as such and must be prejudicial to the existence of the State as a whole. Thus, a use of force that is aimed at the territorial integrity of a State (in the sense of mere occupation of territory or acquisition of territory), its political independence (viz. the forcible overthrow of the Government of a State), the destruction of its security or economic infrastructure (namely, the use of force against the armed forces of a State, industrial and resources production cites) merits to be considered an armed attack because its natural outcome is in all probability to impair the *locus standi* of a State as a sovereign territorial and political unit.

Again, the above submission must ultimately undergo an examination in a "case by case" manner. Thus, factual considerations

pertaining to the size of the territory of a State, the size of its armed forces, the main industry that provides a substantial part of the income of a State, the number of the installations of a particular industry, must be taken into account. Therefore, the incursion of an army regiment in the territory of the People's Republic of China cannot be considered an armed attack while it is the opposite case with regard to the principality of Monaco. Furthermore, the destruction of an oil refinery in Saudi Arabia may not be an armed attack while the destruction of the Beira oil facilities in Mozambique by Rhodesian commandos on 23 March 1979 and the attempted destruction by the South African army of the Gulf Oil storage installation in the Cabinda province of North Eastern Angola on 21 May 1985 (had it been successful) would merit to be treated as such due to their importance to the economies of these countries and the fact that they constituted the only facilities of such industry.

There is no general agreement in authority about the existence of the "scale and effects" factor and this rather seems to be due to either a reluctance to accept armed attack as the only factor giving rise to the necessity of individual and collective self-defence or exclusive reliance on the requirement of proportionality[129] .

The "scale and effects" factor has been adopted by the Court in the *Nicaragua Case* in dealing with the concept of armed attack in the context of the activities of armed bands and State involvement therein[130] . The Court relied on the 1974 Definition of Aggression and more specifically on Article 3(g) thereof that is pertinent to the activities of armed bands against a State. The reference to the Definition of Aggression does not seem to constitute an identification of aggression with the concept of armed attack. While the Court stressed that according to Art. 3(g) an armed attack could be waged by indirect means the relevant passage of its Judgment does not indicate that Article 3(g), or, rather, Art. 3 of the

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[129] Brownlie op. cit. *supra* n.22, pp. 367-368; id. *37 B.Y.I.L. 183 (1961)*, p. 258; Dinstein op. cit. *supra* n.22, p. 182; N.D. White, *ix Intern. Rel. 535 (1989)*, p. 541, n.28. However, support for the "scale and effects" factor may be inferred by some authority. See Pompe op. cit. *supra* n.22, pp.103-104; Rifaat op. cit. *supra* n.22, p.125; Lamberti Zanardi loc. cit. in Cassese (ed.) op. cit. *supra* n. 56, p. 112; Falk, *75 Yale L.J. 1122 (1966)*, p. 1123 n. 7; id. *76 Yale L.J. 1095 (1967)*, pp. 1102-1104, *cf.* ibid. pp. 1124-5, 1140-2; Farer, *67 Col. L.R. 266 (1967)*, p. 276; id. *81 A.J.I.L. 112 (1987)*, p. 113-114; Kolesnik loc. cit. in Butler (ed.) op. cit. *supra* n.21, pp. 154-155; Skubiszewski loc. cit. in Sørensen (ed.) op. cit. *supra* n.22, p.777; Broms, *154 H.R.C. 305 (1977 I)*, p. 346; Shapira, *6 Israel L.R. 65 (1971)*, p. 72; Gill, *1 Hague Y.I.L. 30 (1988)*, p. 50, but cf. p. 51; Rowles, *80 A.J.I.L. 568 (1986)*, pp. 579-580; Higginbotham, *25 Col. J. Trans. L. 529 (1987)*, pp. 548, 555-6.

[130] *Supra* n.73.

Definition as a whole constitutes a statement of instances of armed attacks. It is submitted that it is, rather, a statement of the modality that an armed attack may take *provided* that the specific manner of its execution (namely, as to its scale and effects) is present. This is supported by Art. 2 of the Definition which provides that a first use of armed force by a State may not be determined as "aggression" by the Security Council because of the circumstances of its occurrence "... including the fact that the acts concerned or their consequences are not of sufficient gravity..."

The said passage seems to imply that the notions of armed attack and aggression are identical[131] . However, it must not be overlooked that Art. 2 of the Definition refers to determination by the Security Council under Chapter VII of the Charter on whether collective action should be undertaken by the Organisation against the State that perpetrated a use of armed force. Article 39 of the Charter gives the Council a wide discretion to decide on collective measures if there is deemed to exist a threat to the peace, a breach of peace or an act of aggression. If action by the Security Council is all that matters and if such action is to be set in train because of the existence of any of the above contingencies the specific nature of an actual use of force on the ground seems to be immaterial as far as the Security Council is concerned. Indeed, the Council may conceivably take into account factors such as the policies of the Government or the military planning of the armed forces of the State that resorted to force in a fashion similar to the Military Tribunal for the Far East with regard to the Lake Khassan (1938) and Nomohan (1939) incidents between the armed forces of Japan and the U.S.S.R. ; although both events were considered as frontier incidents at the time of their occurrence, the Tribunal ruled that they constituted aggressive war on the part of Japan[132] . At the same time, however, a claim of use of force in self-defence is made unilaterally by a State with regard to a use of armed force against it. According to Art. 1 of the Definition of Aggression, "aggression" is a use of armed force and whether the latter amounts to an "armed attack" or not, is a matter which is in the first instance beyond the powers of the Security Council under Article 39 of the Charter. It is a question of the existence of the objective

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131 Broms loc. cit. *supra* n. 129.

132 Brownlie op. cit. *supra* n.22, pp.210-211; It must not be overlooked that the Definition of Aggression is purported to be used by the Security Council as guidance for the discharge of its functions under Chapter VII of the Charter. See Preambular para 4 of G.A. Res. 3314 (XXIX) and Preambular para 2 of the main text of the Definition of Aggression annexed to G.A. Res. 3314 (XXIX).

criteria of "scale and effects" of the use of force that will determine the existence of a necessity of self-defence, the propriety of collective self-defence and will assist the Security Council to judge whether claims of self-defence are really cogent and do not serve as a guise for aggression[133].

In view of the fact that when a breach of peace happens it is often justified as self-defence on the part of both participants, then the requirement of the scale and effects of a resort to force acquires great importance for both the claim of defensive necessity and the subsequent examination of such a claim by the Security Council. It is submitted that if the above passage of Art. 2 of the Definition of Aggression is viewed in this light then its importance goes beyond the area of the powers of the Security Council under Chapter VII of the Charter and may well be considered as a statement of customary international law[134].

The requirement that the effects of a use of force that amounts to an armed attack must be an actual danger to the existence of a State as a whole inevitably leads to the conclusion that the State author of the armed attack intends to deliver a devastating blow to the target State. However, it is submitted that such intent should not be identified with an *animus aggressionis* analogous to the concept of *mens rea* of criminal law. This is a notion that is virtually impossible to establish with regard to a State and its Government at the time when force is unleashed and when claims of self-defence are asserted. It implies reliance on the stated position of the party that resorts to force, that inevitably becomes the judge and advocate of its own intention[135]. Rather, the intent of the use of force should be inferred by the purport of the act itself, when it actually takes place, and claims of lack of *animus aggressionis* (pertinent with regard to the legally dubious concept of anticipatory self-defence) are best dealt with by third party examination such as the Security Council or adjudication[136]. Furthermore, the scale and effects of a use of force as a requirement of its characterisation as an armed attack has the merit of being a factor that can be objectively ascertained by third States and the Security Council. This

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[133] Article 51 stipulates that measures of self-defence should be brought to the attention of the Security Council which eventually will adopt measures for the maintenance of international peace and security. See *infra* sub-section 3. C. (vi) and section VI.

[134] *Nicaragua Case (Merits)* , IC.J. Rep. 1986, p. 14, at pp. 99, 103, paras 188, 195.

[135] Brownlie op. cit. *supra* n.22, pp.377-378.

[136] Pompe op. cit. *supra* n.22, pp.103-104; Broms, *154 H.R.C. 305 (1977 I)*, p. 346. Contra. Stone, *Conflict Through Consensus, 1977*, pp. 43, 44-45; Schwebel, Aggression, Intervention and Self-Defence in Modern International Law, *136 H.R.C. 419 (1972 III)*, pp. 469-470; *Cf*. McDougal & Feliciano op. cit. *supra* n.22, pp. 175-176.

entails the advantage that claims by the victim State that is the victim of an armed attack may be objectively weighed against the background of the actual event of armed force against it and may influence the attitude of its allies with regard to invoking the right of collective self-defence.

3. (iii). d. The Commencement of an Armed Attack.

The question of when an armed attack has started is essential for the invocation of a necessity of self-defence and for dispensing with claims of anticipatory self-defence. According to Brownlie "...[T]he question which should be posed is not when is anticipatory action justified but when has an armed attack occurred ?...."[137] . Similarly, Dinstein has submitted that "... since self-defence is linked to an armed attack, it is important to pinpoint the exact moment at which an armed attack begins to take place..."[138] .

The question is relevant to the so-called "priority principle", namely, that the State that resorts to force first is to be deemed the perpetrator of aggression. Although the priority principle seems to be inherent in the context of armed attack and self-defence it poses certain problems if it is strictly applied.

First, when a conflict breaks out between two States it is not always clear which State resorted to force first. At the outbreak of the Six-Day war both Egypt and Israel asserted that they had been attacked by the other country first[139] .

Secondly, because of the fact that the priority principle seems to apply to any use of force, it does not take into account the scale and effects of a use of force as requirement of an armed attack and this may be held to be of little contribution to the question of what constitutes an armed attack. During the work of the Special Committee on the Question of Defining Aggression in 1956 the Soviet Union proposed a draft definition of Aggression according to which the priority principle would be the sole ground for identifying the aggressor; at the same time frontier incidents

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137 Brownlie op. cit. *supra* n.22, p.367; id *37 B.Y.I.L. 183 (1961)*, p. 258.
138 Dinstein op. cit. *supra* n.22, p.176.
139 Stone, *Conflict Through Consensus, 1977*,p. 45; Schwebel loc. cit. *supra* n.136, pp. 464-465; Dinstein op. cit. *supra* n.22, pp. 176-177.

were excluded as justifications for defensive force, without, however, specifying what constituted a frontier incident[140].

Thirdly, the priority principle in its srictest form, namely, the actual use of fire power on the ground does not seem to take into consideration either situations of violations of a State's territory which are unaccompanied by the firing of weapons[141] or the tremendous advance in technology of weapons production, such as missiles. O'Connell has pointed out in relation to naval operational planning that:

> ... weapon systems are so instantaneously activated and homing or guidance systems are, in theory at least, so accurate and their terminal impact so destructive, and design of modern warships affords so little possibility for damage control, that the victim may well be deprived of the capacity for self-defence and the assailant of the capacity of graduated force....[142]

Lastly, the 1974 Definition of Aggression has not adopted the rigid formulation of the priority principle and has linked it with the effects of the act of force on the ground. Article 2 of the Definition provides that "... The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression..."[143].

It is submitted that the point of commencement of an armed attack is dependent upon the means by which it is carried out, provided that the requirement of "scale and effects" is manifest during its execution. This means that a train of events is set in motion that leads to the forcible trespass of another State's territorial integrity, political independence, economic and security infrastructure. This train of events has in the majority of cases of State practice ended with the use of open violence. The question that arises is at which precise point of this series of events, and prior to the outbreak of armed violence, should the starting point of an armed attack be placed. Dinstein suggests that the embarking "... on an irreversible course of action..." is the crucial point of the commencement of an armed attack and that the issue is reduced to "... not whether war would materialise but when..."[144]. He places great importance, by reference to the air attack on the U.S. fleet in Pearl Harbour in 1941 and the events preceding the Six-Day war of 1967, on remote events that, in the

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140 See criticism by the representative of the Netherlands, Report of the Special Committee, Doc. A/3574, G.A.O.R. 12th sess. Suppl. No 16, p. 19, para 151.
141 Dinstein op. cit. *supra* n.22, p. 178.
142 O'Connell, *The Influence of Law on Sea Power, 1975*, p. 70; Jiménez de Aréchaga, *159 H.R.C. 9 (1978 I)*,p. 97; Linnan, *16 Yale J.I.L. 245 (1991)*, p. 338.
143 Italics original.
144 Op. cit. *supra* n.22, pp. 179-181.

former case, did precede the air strike[145], and in the latter, constituted the totality of the Egyptian Government policy in late May 1967[146], as conclusively establishing that both Japan and Egypt had committed themselves "... to an attack in an ostensibly irrevocable way..."[147]. Action against Japan would have been and against Egypt was lawful in what he calls *"Interceptive Self-Defence"* which, unlike anticipatory self-defence or pre-emptive strike, is resorted to not against a "foreseeable" attack but against an attack "... which is imminent and practically unavoidable..."[148]. Dinstein concedes that "... [T]he invocation of the right of self-defence must be weighed on the basis of the information available at the moment of action without the benefit of post factuum wisdom..."[149].

Dinstein's thesis warrants certain observations. First, to say that action in self-defence is legitimately resorted to before the actual outbreak of violence on the part of the purported aggressor *against* an armed attack which is *already* in progress merely begs the question of which specific prior event is to be taken as the point where an armed attack starts. With regard to the Japanese attack in Pearl Harbour Dinstein is right to assert that had the U.S. attacked the Japanese carrier group first it would have been "... a miraculously early use of counter force..."[150], because what seems very logical to suggest in the safety of an *ex post facto* assessment half a century later, would require the U.S.A. to exhibit such powerful speculation that would reach the point of divine inspiration. State practice is pertinent to what States really do or do not do, and in the case of Pearl Harbour the U.S.A. did nothing; what she could have done or would have done is simply immaterial.

Secondly, the notion of *Interceptive self-defence* seems to constitute a brave attempt at admitting the legality of anticipatory self-defence which also requires an "imminent" armed attack, by simply devising a new term. As for the Six-Day war it is treated by commentators as the classical case of anticipatory self-defence in the post-Charter era. Suffice it to mention at this stage that Israel did not invoke the right of

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145 Namely, the departure of the Japanese air carrier task force.
146 Viz. the inflammatory statements by President Nasser as to the destruction of the State of Israel, the request for the withdrawal of U.N.E.F. from the Sinai and the closure of the Straits of Tiran.
147 Op. cit. *supra* n.22, p.180.
148 Ibid.
149 Ibid., p. 181.
150 Ibid., p. 180.

anticipatory self-defence in June 1967, but claimed that she had been subject to open violence on the part of Egypt[151] .

It is submitted that the starting point of an armed attack is dependent on the means by which it is carried out and consists of either the moment when open violence erupts or the event which though does not in itself constitute a case of open armed force, it can only be objectively followed, because of its nature, by armed violence. Thus, the departure of a naval task force from its station is not the beginning of an armed attack, while the launch of a missile or the crossing of the frontier of a State by the armed units of another is.

3. (iii). e. Consideration of Specific Instances of Use of Force that may amount to an Armed Attack.

Instances of use of force in State practice that may amount, because of their scale and effects, to an armed attack, may be found in the illustrative Article 3 of the 1974 Definition of Aggression which provides that:

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provision of Article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. [152]

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[151] See statement by Mr. Rafael, the representative of Israel in the Security Council, before the Council on 5 June 1967, S.C.O.R. 22nd yr. 1347th mtg, para 30. See *infra* section on Anticipatory Self-Defence.

[152] See also Article 4 of the Definition which stipulates that:

It can be submitted that Article 3 reflects customary international law. The Court in the *Nicaragua Case* has so ruled with regard to paragraph (g) that is pertaining to the consideration of the case before it[153]. If this is the case with regard to use of force perpetrated by armed groups then the brief comparison that the Court drew between action by armed bands and that by regular armed forces of a State (that constitutes the classical case of use of force) militates for considering paragraphs (a-f) as also reflecting customary law. The subsequent part of this section shall deal with a number of such instances of use of force which are mainly cited in Article 3 of the Definition of Aggression.

1. Declaration of war; the existence of a State of war; initiation of an armed conflict.

In classical international law a declaration of war was thought to bring about a state of war in the legal sense[153bis].

Article 2(4) of the Charter and the Definition of Aggression lay emphasis rather on the actual use of material force against a State.

It is, therefore, submitted that a declaration of war which is unaccompanied by actual resort to force should be treated as a threat to peace or threat of force or breach of peace and it should be brought to the consideration of the Security Council, rather than being considered as an armed attack[154].

On the other hand a declaration of war that in unequivocal terms states an intention to attack, if accompanied by acts that reveal that an

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153 I.C.J. Rep. 1986, p. 14, at p. 103, para 195.

153bis *Supra* Part One , Ch. 1.

154 Report of the Special Committee on the Question of Defining Aggression, Doc. A/8019, G.A.O.R. 25th sess. Suppl. No 19, pp. 38 (para 103), 39 (paras 104-107), 40; Broms, The Definition of Aggression, *154 H.R.C. 305 (1977 I)*, p. 347. Prior to the U.S. invasion of Panama, the Panamanian National Assembly declared, on 15 December 1989, war on the U.S.A. because of the economic sanctions of the latter against Panama. President Bush relied on that fact in justifying the U.S. action of 20 December 1989 as exercise of the right of self-defence. However, there was no indication that Panama took subsequent measures of armed force in carrying out its declaration of war against the U.S.A. See Keesing's 1989, p. 37112; Quigley, *15 Yale J.I.L. 276 (1990)*, pp. 282, 286-7; Henkin, The Invasion of Panama Under International Law: A Gross Violation, *29 Col. J. Trans. L. 293 (1991)*, pp. 301-2. *Contra* . A.D. Sofaer, The Legality of the United States Action in Panama, *29 Col. J. Trans. L. 281 (1991)*, pp. 284-5.

attack is being mounted, may be held to justify resort to force in self-defence.

The starting point of the armed attack in this case is not the declaration of war itself but rather the acts that purport to put the intent formulated therein into effect. Thus, the event that would have as its immediate next step a use of armed force on the part of the State that declared war, such as the approaching of naval units or aircraft to the territory of the target State, or the occurrence of fighting along the land mass of the target State[155].

The existence of a state of war, that under the pre-Charter law was brought about by a declaration of of war or a statement to that effect, and its maintenance for a long period of time may be indicative of hostile tension between two States - see, for instance, the state of war that existed between Albania and Greece from 1949 - 1985. So far as there are no acts of force, then it should be treated as a threat to peace or breach of peace and this would depend in its turn on the precise level of tension at a certain point of time during the state of war period. Equivocal acts on the part of either of the parties to the state of war situation could be treated as the starting point of an armed attack only if their next immediate stage would lead to open violence and only if such acts are expressly rationalised by reference to the existence of a state of war.

On 7 June 1981 the Israel Air Force launched an air strike and destroyed OSIRAK, the Iraqi nuclear reactor, situated in the suburbs of the Iraqi capital Baghdad. One of the grounds justifying the action that were offerred by the Israel Government was the existence of a state of war between Israel and Iraq since 1948[156]. Israel, however, referred to the existence of a state of war in conjunction with the right of so-called "anticipatory self-defence" that seemed to be considered directly pertinent to the act of force itself [157]. Moreover, the Israel action was dealt with by the representatives of the other Members of the Council strictly by reference to the admissibility of anticipatory self-defence rather than the admissibility of armed action against Iraq because of the existence of a state of war [158].

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[155] Brownlie op. cit. *supra* n.22, pp. 367-368.

[156] S.C.O.R. 36th yr. 2280th mtg , paras 63-67; Dinstein op. cit. *supra* n.22, p. 176.

[157] Ibid. paras 97-100; 2288th mtg, paras 81-85 but cf. para 86 in which Ambassador Blum,the Israel representative in the Security Council, linked the Israel action with the general background of the Arab - Israel conflict.

[158] *Cf*. Greenwood, The Concept of War in Modern International Law, *36 I.C.L.Q. 283 (1987)*, p. 303.

It is submitted that, by virtue of Articles 2(4) and 51 of the Charter, what really matters, in case of a declaration of war or the existence of s state of war, is not the existence alone of those contingencies that gives an unlimited licence to resort to force as exercise of belligerent rights but rather the existence of factors admitting recourse to force in self-defence. This how the Israeli air strike on OSIRAK was both presented by Israel and treated by other States.

The same position seems to exist in case of claims of belligerency in the aftermath of the cessation of hostilities by the conclusion of an armistice agreement. By virtue of Security Council resolution 95 (1951) of 1 September 1951 that was adopted pursuant to a complaint by Israel with regard to the restrictions imposed by Egypt to all Israel bound shipping passing through the Suez canal. The 6th preambular paragraph of the resolution provides that

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

Egypt justified her interference with shipping through the Suez canal on the basis of the existence of a state of war with Israel and the necessity of self-defence[159] . During the debate at the Security Council, Sir Gladwyn Jebb, the representative of the U.K. stated that

> "... If Egypt were involved in actual hostilities, it would no doubt be justified in taking measures for its own defence. This not, however, the situation at present time.
>
> Hostilities are not in progress and have not been in progress for two and a half years. It cannot even be maintained that Egypt is under any imminent threat of attack from Israel. We must therefore conclude that the claim to exercise belligerent rights for the defence of Egypt cannot be now sustained..." 160

While considerations of *jus ad bellum* and the right of self-defence can be said to represent the present state of the law with regard to initiation of hostilities under a state of war or in the aftermath of an armistice, this does not seem to be the case with regard to the conduct of active hostilities once force has been resorted to in self-defence. In other words it does not appear that the conduct of hostilities is to conform to the requirements of self-defence rather than the rules of the *jus in bello* .

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[159] S.C.O.R. 6th yr. 550th mtg, paras 23-32, 33 et seq. , 42-43.
[160] Ibid. paras 93-94.

While there is agreement in theory and practice with regard to land warfare, controversy has arisen in respect of armed conflict at sea and the exercise of belligerent rights against neutral shipping. It is argued that because of the incompatibility of a "state of war" with the Charter, a state of war cannot be proclaimed [161], and that the Hague Conventions of 1907 on Naval Warfare cannot be applied in the post-Charter era because they are deemed to be applied in cases of a state of war [162]. State practice is characterised by paucity and the sole instance of such practice in relying on the right of self-defence can be found in the Falklands conflict of 1982. On 2 April 1982 the Argentine armed forces invaded and occupied the Falkaland Islands over which the U.K. had exercised sovereignty since 1830. The U.K. conducted the campaign for the expulsion of the Argentine occupation forces on the basis of the right of self-defence and relied on this right for every operational measure it took after the *jus ad bellum* requirement of self-defence had been satisfied.

On 7 April 1982, Mr. Nott, the Secretary of Defence, announced in a speech in the House of Commons the establishment of a Maritime Exclusion Zone over a 200-mile radius around the islands, within which any Argentine warships and naval auxiliaries would be "... treated as hostile and they would be liable to attack..." [163].

The repossession of the South Georgia Island on 25 April 1982 was again justified as an exercise of the right of self-defence [164].

Moreover, the establishment of a Total Exclusion Zone was justified as a measure of self-defence "... without prejudice to the right to take additional measures of self-defence under Article 51 of the Charter..." [165].

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[161] E. Lauterpacht, The Legal Irrelevance of a State of War, *A.S.I.L. Proceedings 58 (1968); Contra* Greenwood, *36 I.C.L.Q. 283 (1987)* ; L. Doswald-Beck, The International Law of Naval Armed Conflicts: A Need for Reform, *7 I.Y.I.L. 251 (1986-87)*, pp. 258-9.

[162] N. Ronzitti, The Right of Self-Defence and the Law of Naval Warfare, *14 Syracuse J.I.L. and Commerce 571 (1988)*.

[163] Hansard Parliamentary Debates, H.C. , No 1239. p. 541, col. 1045; also see, Letter dated 9 April 1982 from the representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, Doc. S/14963, S.C.O.R. 37th yr. Suppl. for April-June 1982, p. 16.

[164] Letter dated 26 April 1982 from the representative of the United Kingdom.... to the President of the Security Council, Doc. S/ 15002, Ibid. p. 45.

[165] Letter dated 28 April 1982 from the representative of the United Kingdom... to the President of the Security Council, Doc. S/ 15006, Ibid. p. 47.

On 2 May 1982 a U.K. submarine torpedoed and sank the Argentine battle cruiser *General Belgrano* ; this act was again justified as the exercise of the right of self-defence[166] .

Such practice that purports to supplant the traditional rules of the *jus in bello* with the right of self-defence has attracted considerable criticism. First, it is thought to beg the question of whether only one or both belligerents would have the right of self-defence while the conflict is in progress [167] . Secondly, as long as the application of self-defence is to be effected in a case by case manner, the controversial issues with regard to the content of self-defence will inevitably arise [168] . Thirdly, if action against neutral shipping is justified as self-defence it amounts to a *non-sequitur* , because the neutral States are not parties to the dispute and the only justification for such action outside the traditional laws of armed conflict would seem to be the legally dubious doctrine of "necessity" [169] . Finally, it is submitted that, if every instance in an armed conflict is judged as a separate event according to the right of self-defence then the possibility of the exercise of collective self-defence would entail a dangerous escalation of a conflict which might prejudice international peace and security.

For all the above reasons, it is submitted that a doctrine that would purport to replace the laws of naval warfare with the right of self-defence as far as the conduct of hostilities is concerned, does not constitute part of the law. State practice is insufficient and inconsistent. While in the Falklands crisis such a doctrine could find a solid basis, it is somehow contradicted by the Iran-Iraq conflict in which numerous attacks by both belligerents against neutral shipping were treated as inadmissible and hostile, hence the dispatch of escort warships by the U.K. , U.S.A. and France [170] . Lastly, the Court in the *Nicaragua Case* has expressly admitted the applicability of the Hague Convention VIII of 1907 relevant to the laying of mines in considering the laying of mines without notification in

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[166] Letter dated 3 May 1982 from the representative of the United Kingdom.... to the President of the Security Council, Doc. S/ 15031, Ibid. p. 62.

[167] Remarks by Frits Kalshoven, *14 Syracuse J.I.L. and Commerce 571 (1988)*, pp. 582-583.

[168] A.V. Lowe, The Laws of War at Sea and the 1958 and 1982 Conventions, *12 Marine Policy 286 (1988)*, p. 287; Remarks by H.B. Robertson in loc. cit. *supra* n. 167, at p. 586.

[169] Commentary of the I.L.C. on the Draft Articles on State Responsibility; Report of the I.L.C. on the work of its thirty-second session (5 May-25 July 1980), Doc. A/35/10, I.L.C. Ybk. 1980 Volume II, Part Two, p. 26, at pp. 43-45, paras 22-24; Remarks by T. Halkiopoulos in loc.cit. *supra* n.167, p. 583.

[170] Lowe loc. cit. *supra* n. 168, p. 286.

Nicaragua's territorial and internal waters as opposed to an application of the right of self-defence [171].

2. Invasion, Occupation, Annexation by the armed forces of a State of the Territory of another State.

Invasion and occupation or annexation of the whole or part of the territory of a State constitutes the classical case of an armed attack [172]. The above acts are proximate in time to each other with invasion preceding occupation. Annexation is normally proclaimed after occupation is established and it formalises on the part of the aggressor the intent to acquire the territory under occupation. Proximity in time is merely the characteristic of acts that are closely connected in nature by a relation of cause and effect. While the effect of an invasion may not be occupation of territory the latter is always the result of an invasion, and it may be considered as the continuation of the latter [173]. Be that as it may, the fact that an invasion constitutes an act of force renders the same forcible nature to its effects, namely, to the resulting occupation or annexation. The Argentine invasion of the Falkland Islands of 2 April 1982 resulted in the occupation of the territory. Security Council resolution 502 (1982) of 3 April 1982 demanded the immediate withdrawal of the Argentine forces. This illustrates the fact that a military occupation as a result of prior invasion constitutes itself an act of force that must be reversed. On 21 September 1980 the armed forces of Iraq launched an offensive across the frontier with Iran. This illustrates an act of invasion which was not followed by an unopposed military occupation in the sense that the territorial sovereign withdrew his forces and desisted from fighting. Operative paragraph 1 of Security Council resolution 479 (1980) of 28 September 1980 called upon both Iran and Iraq to "... refrain immediately from any further use of force...". With regard to Iraq this could be interpreted as a call for the cessation of her invasion.

The sequence of invasion, occupation and annexation is illustrated by the Iraqi invasion of Kuwait on 2 August 1990. The invasion and occupation of the entire territory of the Emirate of Kuwait took place on 2 August 1990 while on 8 August 1990 the "merger" of Iraq with Kuwait was

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171 I.C.J. Rep. 1986, p. 14, at p. 112, para 215.
172 Broms, *154 H.R.C. 305 (1977 I)*, p. 348.
173 Report of the Special Committee on the Question of Defining Aggression, Doc. A/ 8019, G.A.O.R. 25th sess. Suppl. No 19, p. 41, para 113; *cf*. ibid. p. 43, para 116.

proclaimed [174]. By virtue of Security Council resolution 660 (1990) of 2 August 1990 the Council condemned the Iraqi invasion and demanded the immediate and unconditional withdrawal of the Iraqi forces from Kuwait. When the "merger" was proclaimed, the Council adopted S.C. Res 662 (1990) of 9 August 1990 deciding that the act of annexation was null and void and demanding "once again" the withdrawal of the Iraq forces.

It appears from the above illustrations that the invasion of the territory of a State constitutes the starting point of the illegality that ultimately extends over the occupation and annexation of the invaded territory. When invasion is in progress, and that seems to be the case when the armed forces of the invaded State are resisting the invader's advance, the illegality of force is limited to the act of invasion; when occupation is established then illegality is mainly focused on it, while condemnation of an annexation is thought to constitute a statement of this illegality that is usually manifested in policies of non-recognition of acquisition of territory by force.

An invasion constitutes an armed attack because of its scale, namely, the involvement of substantial number of troops and depending, of course on the size of the territory that is invaded, and its effects. Thus, the invasion of a small State like Kuwait was effected at its initial stages by a force smaller than the one massed along the Kuwait - Iraq border [175].

The effects of an invasion in order to constitute an armed attack must be a violation of the territory of the State of considerable proportion, a trespass, which constitutes a forcible rebuttal of the territorial sovereign [176]. If the invasion is followed by occupation then its effects would amount to a permanent severance of exercise of sovereignty over the occupied territory, while annexation would imply loss of territory. Such acts, therefore, may be directed against the existence of a State both as territorial and political unit. Thus, it is of no importance that the invaded territory may not be contiguous with the administrative centre of the State. During the Falklands crisis the Argentine Government argued that the U.K. did not have the right of self-defence with regard to "islands situated 8,000 miles from British territory" [177]. The assertion was rejected

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[174] Keesing's 1990, p. 37632 et seq.
[175] Ibid.
[176] I.C.J. Rep. 1986, p. 14, at p. 111, para 212.
[177] Letter dated 28 April 1982 from the representative of Argentina to the President of the Security Council, Doc. S/15009, S.C.O.R. 37th yr. Suppl. for April-June 1982, p. 51.

in the most unequivocal terms by the Government of the U.K. on the basis of Articles 73 and 2(3,4) of the Charter [178].

It is submitted that the commencement of an invasion takes place upon the crossing of a State's land boundaries or the outer limits of its territorial sea and air space. Thus during the Security Council debate on the Suez crisis of 1956, the Egyptian representative stated that:

> "... Egypt has been the victim of aggression; its territory has been invaded; and.... it has been obliged to take the necessary measures and to use force to repel the aggressors invading its territory. But it did not resort to force until Israel troops had actually entered Egyptian territory in large numbers, equipped with tanks and aircraft..."[179]

Similarly, the use of force in self-defence at sea has in the majority of cases been treated as a response to a trespass on the territorial waters of a State. The sinking of the Israel destroyer *Eilat* by Egyptian missile batteries on 21 October 1967 was justified by the Egyptian Government as an act of self-defence because of *The Eilat* 's "... violation of the territorial waters of the U.A.R. and its attempt to carry out aggression against the city of Port Said..." [180]. It is significant that the Israel representative disputed the Egyptian justification on the basis of the assertion that *The Eilat* was sailing on the high seas when it was sunk by the missiles [181]. The same emphasis on the fact that the position of warships inside the territorial sea of a State may constitute an act of force giving the right of defensive response is illustrated by the Security Council debate on the Gulf of Tonkin incident of 4 August 1964. Mr. A. Stevenson, the U.S. representative, stressed the fact that the U.S. warships were on the high seas when they were attacked by N. Viet-Namese torpedo boats[182], while the representative of the U.S.S.R. advocated the N. Viet-Namese view that the U.S. vessels were inside the territorial waters of N. Viet-Nam[183].

Occupation of territory is established with respect to the land mass of a State. Action in self-defence would be directed towards terminating it, but in this case the requirement of "immediacy" of the necessity of self-defence should be observed [184].

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178 Letter dated 30 April 1982 from the representative of the U.K. .... to the President of the Security Council, Doc. S/15016, ibid. pp. 54-55.
179 S.C.O.R. 11th yr. 750th mtg. para 44.
180 S.C.O.R. 22nd yr. 1369th mtg, para 17; also see ibid. para 91 (Pakistan).
181 Ibid. para 27.
182 S.C.O.R. 19th yr. 1140th mtg, para 46.
183 Ibid. para 59; see also O'Connell, *The Influence of Law on Sea Power, 1975*, pp. 125-129.
184 See *supra*

An interesting situation arises in cases of invasion and subsequent occupation *as a result of* a resort to force in self-defence. It is conceivable that should a necessity of self-defence permits it and provided that the requirement of proportionality is strictly observed, action may be taken within the territory of the aggressor and the defending State may find itself in occupation of parts thereof. According to the Government of Israel the resort to force on 5 June 1967 was justified as an exercise of the right of self-defence. As` a result of this action Israel found herself in occupation of hitherto Arab held territories (namely, the Golan Heights, the West Bank of the Jordan River, the Gaza strip and the Sinai Peninsula). On 20 July 1973, during a debate at the Security Council on the Palestine Question and while the Israel occupation was still in place, Mr. Tekoah, the Israel representative submitted the following:

"... Article 51 of the Charter declares unequivocally : 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs...' . Israel's recourse to arms in self-defence has been in accordance with the Charter and not in contravention of it. Furthermore, no principle and no provision of the Charter precludes border changes, especially following the use of force in self-defence and especially where no secure and recognized international boundaries had existed between the victim of the aggression and the States that had been waging war against it for two and a half decades in violation of the Charter..." 185

The above statement appears to advocate not only the legitimacy of military occupation as a result of force in self-defence, but the legitimacy of the acquisition of territory by the defending State 186 .
It is submitted , that, although occupation of the territory of the aggressor may ensue as a result of action in self-defence, it must cease after the necessity of self-defence (namely, an actually in progress armed attack) has disappeared. Furthermore, self-defence may not serve as a ground for acquisition of territory by force, for it is incompatible with the essence of self-defence which is the protection of the territory of the defending State 187 . Moreover, the occupation of territory *as a measure* of self-defence

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185 S.C.O.R. 28th yr. 1733rd mtg, para 75.

186 See also Stone, *Conflict Through Consensus, 1977*, pp. 58-59, 62-63; Higgins, The Place of International Law in the Settlement of Disputes by the Security Council, *64 A.J.I.L. 1 (1970)*, pp. 7-8; Schwebel, What Weight to Conquest?, *64 A.J.I.L. 344 (1970)*, pp. 345-347; Blum, The Beirut Raid and the International Double Standard, *64 A.J.I.L. 73 (1970)*, pp. 94-98.

187 Greenwood loc. cit. in Dinstein (ed.) op. cit. *supra* n.22, pp. 282-283; Jennings, *The Acquisition of Territory in International Law, 1963*, p. 55; Cot & Pellet op. cit. *supra* n.22, p. 773; Greig, Self-Defence and the Security Council: What Does Article 51 Require?, *40*

would not survive the test of proportionality; indeed, it is only under the legally dubious doctrine of anticipatory self-defence that such occupation of territory could be maintained - viz. the Israel security zone in Southern Lebanon [188].

3. Bombardment or the use of any weapons by the armed forces of a State against the territory of another State.

The situation envisaged by the above rubric is the use of force by the launching of long or short-range explosive projectiles, namely land or naval artillery bombardment, attack by way of missiles, the drop of bombs from aircraft. Such use of force must be directed against the territory of a State, namely, its cities and population, military and economic installations. The factor of the scale of the use of force depends on the intensity of the bombardment (the number of batteries, warships and aircraft used) and/or the destruction potential of the bombs used (namely, cluster or fuel bombs, nuclear bombs, bombs equipped with chemical or biological warheads). As for the effects of the bombardment it must be aimed at destroying population centres, military and economic installations.

The start of the attack must depend on the kind of weapons used and the manner in which the bombardment is carried out. It is submitted that artillery and naval bombardment starts with the actual firing of weapons. An aerial bombardment appears to start at the moment the aircraft formations enter the airspace of the target State. With regard to aircraft it is a matter of technological advance; given the speed, the capacity for high altitude flight and the radar evasion techniques, it is a matter of achieving as a early a detection as possible, of approaching hostile aircraft [189] .This does not constitute an impossibility and offers a cogent alternative to claims of anticipatory self-defence.

Attack by way of missiles is slightly more problematic in view of the technology involved in conjunction with the time span of reacting after

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I.C.L.Q. 366 (1991), pp. 394, 396. *Cf.* Feinberg, *15 Israel L.R. 160 (1980)*, pp. 172-175; Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1637.

[188] Brownlie loc. cit. in Butler (ed.) op. cit. *supra* n.21, p. 25.

[189] Kinley, The Law of Self-Defence, Contemporary Naval Operations and the United Nations Convention on the Law of the Sea, in E.D. Brown - R.R. Churchill (eds.), *The United Nations Convention on the Law of the Sea: Impact and Implementation; Proceedings, Law of the Sea Institute, Nineteenth Annual Conference, 1987*, p. 23.

the launch of the missile [190]. Everything depends on the kind of missile that is launched. It is believed that long-range missiles are easier subject to radar detection after their launch (which constitutes the start of the attack) and thus the prospective victim is given sufficient time to react[191]. The majority of the *Scud* long-range missiles launched by Iraq against Israel on 17 January 1991 were detected and destroyed by the Israel anti-missile batteries soon after their launch. Short-range missiles are more problematic due to the lack of time for defensive reaction after their launch; it has been suggested that, rather than introducing a general acceptance of anticipatory self-defence, it is preferable to expand the starting point of armed attack before the actual launch to the moment of the "lock-on" of the missiles' radar guidance system onto the target [192].

4. Blockade of the ports or coasts of a State.

Oppenheim defines blockade as:

"... the blocking by men-of-war of the approach to the enemy coast, or part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all nations..."[193]

Moreover the same author submits that a blockade has to be made effective "... by the presence of a blockading squadron of sufficient strength to prevent egress and ingress of vessels..."[194].

The preparatory work of the Definition of Aggression reveal that the term "blockade" in Article 3(c) thereof should be understood as wider than the traditional concept of blockade so as to include the cutting-off of access to sea of land locked States. Indeed, in its final Report on the Definition of Aggression the Sixth Committee of the United Nations General Assembly included the following passage:

"... The Sixth Committee agreed that nothing in the definition and in particular Art. 3(c) shall be construed as a justification for a State to block, contrary to international law, the routes of free access of a land locked country to and from the sea..."[195]

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[190] O'Connell op. cit. *supra* n. 183, pp. 70 et seq.
[191] Ibid.
[192] Ibid. p. 82.
[193] Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht, 1952*, p. 768; also see O'Connell, *International Law of the Sea, vol. ii, ed. by Shearer, 1984*, p. 1150.
[194] Oppenheim op. cit. *supra* n.193, pp. 778, 782.
[195] Quoted in Broms, *154 H.R.C. 305 (1977 I)*, p. 349.

The problem with the above passage is its reference to prohibition of passage "contrary to international law" that suggests that such prohibition may be in certain circumstances lawful; moreover, the question of access to sea by land locked States is one that it is pertinent as to its regulation by the Law of the Sea, and finally, the prohibition as such of access to sea does not necessarily amount to a resort to force [196].

In so far as the use of armed force is concerned, a blockade could be effected by the use of surface war vessels, submarines, aircraft and the laying of submarine contact mines [197]. To consider a blockade as an instance of armed attack, its intensity in conjunction with the number and importance of the blockaded ports must be such as to amount to the economic srangulation of the victim State. Moreover, it is submitted that measures taken by a State that affect the shipping of another State and that can be justified on the basis of the rules of the Law of the Sea, are to be considered as creating a dispute with regard to rights and duties under the Law of the Sea, rather than a case of use of force, let alone an armed attack. On 22 May 1967 the Egyptian Government announced the closure of the straits of Tiran (that connect the Gulf of Aqaba with the Red Sea) to Israel shipping and other vessels carrying certain cargoes to Israel. Israel considered the Egyptian action as blockade and an act of aggression giving rise to the right of self-defence; thus, Mr. Eban, the Foreign Minister of Israel stated in his address to the 5th Special Emergency Session of the General Assembly:

> "... From the moment the blockade was imposed, active hostilities had commenced and Israel owed Egypt nothing of her Charter rights..."[198]

This view, however, was objected to by other delegates. The issue appears to have been whether the Gulf of Aqaba was an international waterway or, as Egypt contended, a maritime area divided into the territorial seas of several States that had the right to regulate passage of third States' ships through their territorial waters. Irrespective of what each State thought to be the status of the Gulf of Aqaba, resort to force

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[196] Broms loc. cit. *supra* n.195, pp. 349-350; Wengler, *7 Révue Belge D.I. 401 (1971)*, pp. 409-410.

[197] *Cf*. Oppenheim op. cit. *supra* n. 193, p. 781.

[198] G.A. ES-5, G.A.O.R. Fifth Special Emergency Session, Plennary Meetings, Verbatim Records of Meetings, 17 June - 18 September 1967, 1526th plen. mtg, para 133; also see paras 132, 134. In addition see S.C.O.R. 22nd yr. 1343rd mtg para 170; 1348th mtg para 175; 1351st mtg para 83.

against Egypt for the measures taken seems to have been considered inadmissible. Before hostilities broke out on 5 June 1967, the U.S. representative in the Security Council stated that in his Governments view the Gulf of Aqaba was an international waterway, but at the same time he pointed out that the issue of innocent passage through the Strait of Tiran could be solved "...by peaceful measures in the sense of Article 33 of the Charter..."[199] . Lastly, during the 5th Special Emergency Session of the General Assembly the representative of Cyprus stated that the international status of the Gulf of Aqaba was a matter open to controversy and that the legal merits of the case would seem to be a proper subject for adjudication or arbitration [200] .

5. Attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State.

Such use of force as contemplated by the above rubric constitutes an armed attack if used with great fire power and amounts to the destruction of the military security infrastructure of a State, by destroying substantial sections of its armed forces. The destruction of the U.S. Pacific fleet and Air Force at Pearl Harbour on 7 December 1941 constitutes the classical example.

The phrase "marine and air fleets" which is included in Article 3(d) of the Definition of Aggression raises two observations. First, it does not specifically refer to the war marine or air fleets of a State. Indeed, in this respect it could be considered as redundant. Thus, the destruction of a State's of commercial or fishing marine fleet whose economy is largely based on marine commerce or fisheries, may amount to an armed attack, for the use of force is directed against the economy of the State [201] . Secondly, it implies that for the purposes of the exercise of self-defence against an armed attack a use of force against individual vessels would not suffice; although the attacked ship could take protective proportionate

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[199] S.C.O.R. 22nd yr. 1343rd mtg, paras 29-33.
[200] ES-5, 1541st plen. mtg, para 73.
[201] See the statement made by the Japanese delegate at the adoption by consensus of the Definition of Aggression, according to which an attack on the Japanese fishing and commercial fleets would be equivalent to a blockade of the Japanese coast; Report of the Special Committee on the Question of Defining Aggression, Doc. A/9619, G.A.O.R. 29th sess. Suppl. No 19, Annex I, p. 16.

counter-measures to repel the use of force against it, it is not a case of self-defence of the State as a whole [202].

6. Armed Forces of a State that are within the territory of another State by virtue of an Agreement between the two States.

Article 3(e) of the Definition of Aggression stipulates that a use of force against the host State exists if these forces are either used in contravention of the terms of the agreement or their presence in the territory of the host State continues after the termination of this agreement [203]. Both situations are illustrated by the Remada incident of 1958 and the Bizerta crisis of 1961, between Tunisia and France with regard to the presence of armed forces of the latter on Tunisian territory.

On 9 February 1958, a day after the French air strike on the Tunisian town of Sakiet-Sidi-Youssef, the Tunisian Government demanded the evacuation of the French forces from Tunisia and prohibited French troop movements by also demanding that French troops should be confined to barracks [204]. In accordance with this decision the 15,000 French troops stationed in Tunisia were confined to their barracks, road blocks were erected in order to prevent troop movements, telephone communications from the camps were cut off and food supplies and services by local authorities ceased [205]. The Tunisian Government justified these measures on the basis of the right of self-defence under Article 51 of the Charter as a response to the French military action against the town of Sakiet [206].

On 18 May 1958 a serious clash occurred between the French and Tunisian forces in the Remada area in southern Tunisia when a detachment of French troops attempted a sortie from their barracks and tried to force their way through the road block guarded by Tunisian troops [207]. The French representative in the Security Council disputed the plea of self-defence invoked by the Tunisian Government by asserting that

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[202] Statement by the Syrian delegate, loc. cit. supra n.201, p. 20; Skubiszewski loc. cit. in Sørensen (ed.) op. cit. supra n.22, p. 773; Annotated Supplement to the Commander's Handbook of the U.S. Navy *supra* n. 76.

[203] Broms, *154 H.R.C. 305 (1977 I)*, p. 351; Brownlie, *37 B.Y.I.L. 183 (1961)*, p. 262; Skubiszewski, loc. cit. in Sørensen (ed.) op. cit. *supra* n.22, pp. 774-775.

[204] Keesing's 1957-1958, p. 16203.

[205] Ibid. p. 16204.

[206] S.C.O.R. 13th yr. 819th mtg, paras 10, 11, 55, 58; 821st mtg, para 12.

[207] Keesing's 1957-1958, p. 16328.

there had been no armed attack against Tunisia, that the Tunisian forces opened fire first and that the Saharan units of the French army stationed in the southern region of the country were exempt from the restrictions [208]. The representative of Iraq made the following statement:

> "... France is not entitled to station any forces on Tunisian territory against the will of the Government and the people of Tunisia...
> By their acts of repeated aggression especially since the bombing of Sakiet, the French forces have forfeited any right to hospitality..."209

The Bizerta crisis of 19-20 July 1961 arose with regard to the French naval base there which had been established in 1891. In the aftermath of the Sakiet incident the Tunisian Government first demanded the evacuation of the base, but on 17 June 1958 it was agreed by an exchange of letters between the French and Tunisian Governments that negotiations for a provisional agreement on the status of the base should begin no later than 1 October 1958. These negotiations never took place and the Tunisian Government consistently raised the question of the evacuation of the base during the ensuing period of time [210]. At the end of June 1961 the French military authorities of the base undertook works for the extension of the runway of the base without prior notification of the Tunisian Government [211]. On 17 July 1961 President Bourguiba announced that the Bizerta base would be blockaded from 19 July 1961 and that no French aircraft or warships would be allowed to enter Tunisian airspace or territorial waters. On 19 July heavy fighting broke out between French and Tunisian forces in the town of Bizerta [212]. Tunisia invoked the right of self-defence but only after French troops inside the base had started to be reinforced and French aircraft penetrated Tunisian airspace without prior authorisation [213]. France invoked the same right against the Tunisian measures of 19 July 1961 [214]. To this the Tunisian delegate stated that:

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[208] S.C.O.R. 13th yr. 819th mtg, para 87; 820th mtg, paras 16, 45-46.
[209] Ibid. 820th mtg, para 71.
[210] Keesing's 1961-1962, p. 18341.
[211] See, Formal Protest of 6 July 1961 by President Bourguiba of Tunisia to the French Government transmitted to the Security Council in the letter dated 21 July 1961 from the representative of Tunisia to the President of the Security Council, Doc. S/4871, S.C.O.R. 16th yr. Suppl. for July-Sept. 1961, pp. 17-20.
[212] Keesing's 1961-1962, pp. 18342-18343.
[213] S.C.O.R. 16th yr. 961st mtg, paras 31-49, 52, 56, 59;
[214] Ibid. paras 80-81.

"... It would have been understandable for French troops on the ground, believing themselves to be threatened by one danger or other, to have retaliated against Tunisian troops or Tunisian civilians demonstrating peacefully in the streets, but to use the expression self-defence to describe shooting by aircraft coming from the "Arromanches" as it lay in the vicinity of Tunisian territorial waters and by aircraft coming from Algeria for the purpose of dropping paratroops on Tunisian soil in defiance of the Tunisian Government's ban on flights - that is really beyond my understanding..."215

At the request of 55 States the General Assembly convened in Special Session on 21 August 1961. During the debate there was unanimity on upholding Tunisia's sovereignty over its territory but at the same time it was argued that any procedure for the withdrawal of the French forces would consist of peaceful means so as to avoid an escalation of tension and deterioration of the situation 216 . It has been suggested that Article 3(e) of the Definition of Aggression seems somewhat rigidly formulated because it appears to give extreme emphasis to the concept of sanctity of territorial sovereignty and would establish the occurrence of the use of armed force on the basis of simply not meeting a withdrawal schedule laid out by the territorial sovereign alone 217 . State practice reveals that the presence of foreign troops on the territory of another State is realised only by the consent of the territorial sovereign. Moreover, the termination or continuation of such presence is generally thought to be achieved through a process of negotiations : this was certainly the intention of the Tunisian Government and it is furthermore illustrated in the recent negotiations between the Philippines and U.S. Governments with regard to the Subic Bay naval base of the U.S. forces. It is submitted that an unlawful use of force by the foreign troops against the host State should be held to exist when these troops resort to force against the host State itself, or against targets, other than the host State, within the territory of the latter and without its consent, or when an agreed schedule for their withdrawal has lapsed and they forcibly resist any attempt of the host State to remove them 218 . Whether such force constitutes an armed attack would depend on its scale and effects.

A statement of the wish for the evacuation of foreign troops may be held to constitute an exercise of sovereignty. The question arises whether the intransigence of the State whose troops are stationed on the territory of

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215 Ibid. para 185; see also 963rd mtg paras 15 (Ceylon), 39, 42 (U.A.R.), 55 (Chile).
216 G.A.O.R. S-3, Third Special Session, 21-25 August 1961, Plennary Meetings, 998th plen. mtg, paras 34-36, 38 (Argentina), 95-98 (U.S.A.)
217 B.B. Ferencz, *Defining International Aggression, vol. ii, 1975*, p. 37.
218 Broms, loc. cit. , Brownlie loc. cit. *supra* n. 203.

the host State to enter negotiations for the evacuation of its forces would constitute a use of force. It is submitted that this question must be answered in the negative. However, such intransigence if it is manifest may be interpreted as a violation of sovereignty and depending on the level of tension that it might cause, it may be referred to the Security Council as a threat to the peace [219], or provoke non-forcible counter-measures on the part of the territorial sovereign. Such were the measures adopted by the Tunisian Government in 1958 (when restrictions were imposed on the movement of French troops) and in 1961 when the Bizerta base was sealed off. It is submitted that a use of force occurs only in the case where the foreign forces react forcibly against these measures. It is significant that the French delegate in the Security Council stated with regard to the Remada incident that the French troops were fired on first and that the Saharan contingents were exempted from the Tunisian restrictions; this seems to suggest that the Tunisian measures had not, in principle, been met with the objection of the French Government [220].

7. Allowing the territory of a State to be used for forcible acts by another State against a third State.

This contingency contemplates a situation in which a State consents that its territory be used by the armed forces of another State in order to launch an attack against a third State. The consent given by the territorial sovereign to the aggressor renders the former a co-author of the use of force in so far as the source of the use of force against the target State is located in its territory. This, depending on the scale and effects of the use of force, would give rise to the defensive necessity to repeal this force and the complicity of the "host" of the aggressor would entitle the victim State to resort to force in self-defence against the source of the armed attack on the territory of the host State [221].

However, one point must be clarified. A use of force from the territory of the host State must be launched and this is a question pertinent to the issue of the commencement of an armed attack. Thus, the U.K. would be considered as the aggressor for the U.S. air strike against Libya in 1986, should the latter be considered an act of reprisal, for the U.K.

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[219] See statement of the Argentine representative during the Third Special Session of the G.A. , G.A.O.R. S-3 , 998th plen. mtg, para 38.
[220] *Cf*. Higgins, *37 B.Y.I.L. 269 (1961)*, p. 298.
[221] Greenwood, loc. cit. in Dinstein (ed.) op. cit. *supra* n.22, pp.277-278.

allowed the U.S. Air Force to launch the raid from its bases in the territory of the U.K. [222].

The U-2 incident of 1960 provoked, on 9 May 1960, a statement by the Soviet Premier Khrushchev according to which "... [T]hose countries that have bases on their territories should note most carefully the following: if they allow others to fly from their bases to our territory we shall hit at those bases..." [223].

On 14-15 May 1975 the U.S. forces launched an operation in the Gulf of Thailand for the rescue of the crew of the *S.S. Mayaguez* which had been arrested by the Cambodian authorities. The operation was justified as an exercise of the right of self-defence [224]. The U.S. operation was mounted from the U.S. base at Utapao in Thailand territory. On 13 May 1975 the Thai Prime Minister informed the U.S. Charge d' Affaires in Bangok that the Thai Government would not permit the territory of Thailand to be used by the U.S.A. for any action against Cambodia [225]. The Thai Government expressed its concern about the mounting of the U.S. operation in terms of it becoming the target of Cambodian action [226].

The consent of the territorial sovereign must be firmly established upon evidence. The introduction of foreign troops in the territory of another State without any resistance or protest by its Government or under a prior agreement, may be held to establish consent. Thus, on 7 August 1990 the Israel Defence Minister, Mr. M. Arens in a statement to the Knesset said that Israel would take action if Iraq (that had invaded and occupied Kuwait on 2 August 1990) introduced troops in Jordan [227]. This statement involves questions of anticipatory self-defence and Israeli action would have been legitimate only if the consent of Jordan had been firmly established and the Iraqi troops had undertaken forcible action against Israel.

8. Activities of Armed Bands.

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[222] Greenwood, *89 West Va.L.R. 933 (1987)*, p. 938.

[223] *Whiteman Digest of International Law, vol. 5*, p. 714. As it is considered in Second Title infra, the U-2 cannot be held to constitute an unlawful use of force and such statements, while appropriate in cases of actual use of force, would rather appear to constitute a threat of force in violation of Art. 2(4) of the Charter.

[224] Keesing's 1975, p. 27239; Letter dated 14 May 1975 from the representative of the United States of America to the President of the Security Council, Doc. S/11689.

[225] Keesing's *supra* n.224.

[226] Ibid.

[227] Keesing's 1990, p. 37638.

The Court in the *Nicaragua Case* has expressly recognised the possibility of an armed attack being launched by indirect means, namely, by using the activities of bands of guerrillas [228].

In order to characterise a use of force waged by armed bands as an armed attack it must be established that, although the source of force on the ground is the guerrillas, the author of the use of force is a State. In other words there has to be not only complicity of a State in the activities of the insurgents (by way of material support) but there has to be total control over the armed bands in the sense that they constitute a "weapon" or a "means" of the assisting State to use force against another State: The use of force by the armed bands constitutes a *longa manu* force by the assisting State [229].

It is submitted that the above contingency is brought about in the following cases.

(i). First, when the guerrilla movement is founded, recruited and sent to the territory of another State by the assisting State.

This is the case with regard to activities by bands of mercenaries. On 16 January 1977 a mercenary force attacked the capital of the African State of Benin. The invaders were successfully repelled by the Benin Army. By virtue of Security Council resolution 404 (1977) of 8 February 1977, the Council decided to dispatch an investigatory mission to Benin with the mandate to report on the events of 16 January 1977. In its report on 8 March 1977 the Special Mission found that Benin had been subjected to an armed attack [230]. The sending of insurgents that had been recruited by another State is illustrated by the Indonesian organised infiltration of Malaysia in 1963-65 [231]. Although Indonesia escaped condemnation by the Council due to the negative vote of the U.S.S.R. , the majority of delegates condemned her action. Thus the representative of Brazil stated that:

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228 I.C.J. Rep. 1986, p. 14, at p. 103, para 195.

229 Ibid. pp. 61-62, paras 108-109; *contra per Judge Schwebel* pp. 343-344, paras 166-167, 170; *cf. per Judge Jennings*, p. 543. Also see Lamberti Zanardi loc. cit. in Cassese (ed.) op. cit. *supra* n.22, pp.112-115. *Cf.* Gill, *1 Hague Y.I.L. 30 (1988)*, pp. 51-52; Müllerson loc. cit. in Butler (ed.) op. cit. *supra* n.21, pp. 33-35.

230 Doc. S/12294/Rev. 1 of 8 March 1977, S.C.O.R. 32nd yr. Special Suppl. No 3, p. 39, para 141. The Special Mission, however, did not attribute the authorship of the attack to a particular State.

231 The Indonesian Government openly admitted its involvement before the Security Council; S.C.O.R. 19th yr. 1144th mtg, para 103.

"... All the evidence indicates that the attack would not have been the act of individuals but was the result of a planned action supported by the military authorities of Indonesia..." 232

A similar case occurred on 25 May 1977 when the Ethiopian province of Ogaden was invaded by a force of 3,000-6,000 heavily armed guerrillas that purportedly belonged to the hitherto unknown Western Somalia Liberation Front (W.S.L.F.), which according to the Ethiopian Government was alleged to be an "artificial liberation movement" used by Somalia to "expand its territory" 233 . On 21 February 1978 the Somali Government formally admitted that the Somali armed forces were fighting alongside the guerrillas 234 .

(ii). This contingency brings discussion to the second case where assistance to armed bands constitutes an instance of armed attack, namely, the active participation of the armed forces of the assisting State on the side of the guerrillas.

Apart from the participation of the Somali Army in the fighting against the Ethiopian armed forces on the side of the so-called W.S.L.F. , Tanzania and S. Africa have demonstrated similar conduct.

In April 1979 the Tanzanian Army actively assisted Ugandan dissident exiles to overthrow the tyrannical regime of President Idi Amin. Due to the unpopularity of the latter the Tanzanian action did not attract substantial criticism. It is interesting, however, that at the 16th Annual Summit of the O.A.U. held in the Liberian capital, Monrovia, on 17 July 1979, President Obasanjo of Nigeria warned that the Tanzanian intervention in Uganda constituted an extremely dangerous precedent, for it seemed to blur the fundamental distinction between the overthrow of a tyrant from within the country and an attack from outside 235 .

In October 1987 the Angolan armed forces launched a major offensive against the positions of the rebel organisation U.N.I.T.A. that had been waging armed insurgency against the Angolan Government since 1975 236 . The operation was repelled by the forces of U.N.I.T.A. with the active support of the S.African Army, which was formally admitted by the S.African Chief-of-Staff, Gen. Johan Geldenhuys on 11 November 1987

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232 S.C.O.R. 19th yr. 1148th mtg, para 32; also see 1144th mtg, para 127 (U.K.), 1145th mtg, paras 17, 23 (U.S.A.).

233 Keesing's 1977, p. 28634.

234 Keesing's 1978, p. 28760.

235 Keesing's 1979, p. 29840.

236 The civil war in Angola was terminated by a Peace accord signed in Lisbon between the two factions in 1991.

237 . S.Africa was unanimously condemned by the Security Council by Security Council resolution 602 (1987) of 25 November 1987, for aggression against Angola.

(iii) A third case of assistance to insurgents that amounts to an armed attack is the arming of a hitherto unarmed opposition to a Government of another State for the sole purpose of resorting to guerrilla warfare aiming at the overthrow the latter[237bis] . This is the case with regard to the invasion of Cuba by dissident exiles on 17 April 1961. On 18 April 1961 the President of the U.S.S.R. , Mr. Khrushchev in a message to the President of the U.S.A. J.F. Kennendy stated that "...[A]n armed aggression has begun against Cuba. It is not a secret to anyone that the armed bands which invaded that country have been trained, equipped and armed in the United States..."[238] .

It can be inferred, therefore, from the three cases submitted above that material assistance by a State to a guerrilla movement that has emerged as the outcome of an indigenous rebellion against the Government of another State, does not constitute an armed attack by the assisting State against the victim State because in this case the author of the use of force as well as its source on the ground, is the guerrillas themselves [239] .

This category includes (a) the so-called national liberation movements that waged guerrilla warfare against the former colonial Powers (namely, the Algerian F.L.N. , P.O.LI.S.A.R.I.O. in Western Sahara, P.A.I.G.C. in Guinea-Bissau, M.P.L.L.A. in Angola, S.W.A.P.O. in Namibia, F.R.E.L.I.M.O. in Mozambique, A.N.C. in S.Africa); (b) guerrilla organisations that advocate the aspirations of the population of a territory under military occupation, namely, the P.L.O. in the territories occupied by Israel ; (c) guerrilla movements that represent indigenous political opposition to the Government of a State (namely, the Nicaraguan *contras* , the Salvadorean F.M.L.N. , the Angolan U.N.I.T.A., the Afghan guerrillas, the Eritrean E.P.L.F.).

Still, the "independence" of an initially indigenous guerrilla movement may become "dependence" on another State in the sense of

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[237] Keesing's 1987, p. 35552.
[237bis] *Cf*. I.C.J. Rep. 1986, p. 14, pp. 103-104, para 195.
[238] Keesing's 1961-1962, pp. 18151-18152.
[239] I.C.J. Rep. 1986, p. 14, at p. 104, para 195. Also see Lamberti Zanardi loc. cit. in Cassese (ed.) op. cit. *supra* n.22, p. 113; P.S. Reichler & D. Wippman, The United States Armed Intervention in Nicaragua: A Rejoinder, *11 Yale J.I.L 462 (1985-86)*, p. 471.

the guerrillas becoming *quasi* Government "agents" of the assisting State. This is, however, a contingency that has to be proved on the basis of evidence and that is not discernible at the outset of an initially indigenous armed insurgency [240]. It is a very delicate task and it must involve meticulous research and great deal of evidence in order to prove that an indigenous movement has come to constitute an "agent" of the assisting State. The practice of States does not offer any assistance for the formulation of a general rule with regard to the kind of control that is required for a guerrilla movement to lose its autonomy. It is significant, however, that an organisation like the Nicaraguan *contras* that from a small, ill-equipped force evolved in a short time, largely due to the U.S. material support, into a sophisticatedly armed force of thousand of fighters, was not considered by the Court as being completely subordinate to the U.S. Government so as to constitute an "agent" of the latter [241].

3. (iii). f. Cessation of the Necessity of Self-Defence.

The significance of determining when a necessity of self-defence ceases to exist lies in the fact that armed action under this justification will have to be terminated. It is submitted that the cessation of self-defence arises in two situations: (1) when the aggression is reversed by the defending State or the aggressor himself, and (2) when the Security Council takes "measures for the maintenance of international peace and security".

1. Reversal of the Aggression.

Action in self-defence is held to stop if the defending State successfully repels the armed attack against it or if the aggressor after being repelled desists from further acts of force [242]. Continuation of armed action in this context on the part of the defending State incurs the risk of being characterised as an act of aggression [243]. It, moreover, involves

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[240] I.C.J. Rep. 1986, p. 14, at pp. 61-62, paras 108-109.
[241] *Supra* n. 240; *Cf.* Ibid. *per Judge Jennings supra* n. 229; also *cf.* Müllerson loc. cit. and Gill loc. cit. *supra* n.229.
[242] *Cf*. Wengler, *7 Revue Belge D.I. 401 (1971)*, p. 413.
[243] Rifaat op. cit. *supra* n.22, p. 127.

claims of anticipatory self-defence, namely, that despite his withdrawal the aggressor is very likely to resume an armed attack [244]. Thus, if the aggressor stops the armed attack and withdraws from the territory of the victim State, then action in self-defence is no longer justified. If, on the other hand, the aggressor halts his advance, but remains in occupation of the victim State's territory, the latter may continue to use force in self-defence in order to expel him, provided that the Security Council has not taken any measures for the maintenance of international peace and security and that the requirement of the "immediacy" of the necessity of self-defence is observed.

The successful resistance of the victim of the aggression that leads to the expulsion of the invading or occupant forces (or the cessation of other use of force against its territory or armed forces) must be held to indicate termination of the defensive action. Although the aggressor may renew the armed attack, this should not militate for continuation of the use of force by the defending State under the justification of self-defence [245]. The maintenance of the defending State's armed forces in a high state of alert would be justified, but any further action on its part would rather depend on actual renewal of the armed attack by the aggressor. This is illustrated by the Israel response to the launch against her of long-range Scud missiles by Iraq on 17 January 1991 and subsequent days. After countering the initial strike, Israel forces did not pursue further action against the missile launchers on Iraqi territory but they would resist every subsequent attack as it was perpetrated by the Iraqi Army [246].
Moreover, when the Ethiopian Army succeeded in repelling the Somali attack in Ogaden by expelling the W.S.L.F. and the regular Somali armed forces back into Somalia, the Ethiopian Government suspended all operations and refrained from ordering the Army to pursue action inside Somalia; President Mengistu of Ethiopia stated that "...[W]e will not interfere in the internal affairs of other people. The defensive war we are waging goes as far as our frontier..."[247].

Finally, the Court in the *Nicaragua Case* ruled as unnecessary for the purposes of self-defence the U.S. measures against Nicaragua that were purportedly taken in collective self-defence of El Salvador in 1981, because

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[244] Wengler loc. cit. *supra* n.242.
[245] See *infra* section 5.
[246] Keesing's 1991, p. 37936-37937.
[247] Keesing's 1978, p. 28989. *Cf*. Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 216-219.

they were adopted after the "... major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition completely reduced in consequence. Thus, it was possible to eliminate the main danger to the Salvadorean Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity..." of self-defence [248].

2. Adoption by the Security Council of measures for the maintenance of international peace and security.

Article 51 of the Charter expressly stipulates that the "inherent" right of self-defence is to be exercised "... until the Security Council has taken measures necessary to maintain international peace and security...". The importance of this proviso is cogently expressed in Bowett:

> "... This clause illustrates the essentially provisional nature of action in self-defence under a centralized system; such a system presupposes that the right is inevitable as an interim measure of protection, but that it should cease when the machinery of the centralized system itself operates as an effective protection of the individual member's rights. Accordingly under the Charter, such action by the individual State, or even by a number of States acting under the 'collective' right, is envisaged as temporary measure and in no way a substitute for the collective action by the organisation.
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> This view is supported by the fact that all members have conferred primary responsibility for the maintenance of international peace and security on the Security Council..."[249]

It is, moreover suggested, that in the case of paralysis of the Security Council due to the cast of a negative vote by one of the Permanent Members, it is the General Assembly that assumes responsibility for the maintenance of international peace and security by virtue of General

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[248] I.C.J. Rep. 1986, p. 14, at p. 122, para 237; *contra*. id. *per Judge Schwebel* , p. 365, paras 207-208.

[249] Bowett, *Self-Defence in International Law, 1958*, p. 195 but *cf*. n.1; Wehberg, *78 H.R.C. 7 (1951 I)*, p. 83; Waldock, *81 H.R.C. 455 (1952 II)*, pp. 495-496; Wright, *53 A.J.I.L. 112 (1959)*, pp.117-118; Higgins, *37 B.Y.I.L. 269 (1961)*, pp. 303-304; Kelsen, *42 A.J.I.L. 783 (1948)*, pp. 793, 796; Dinstein, *War, Aggression, Self-Defence, 1988*, p. 195 et seq. ; Fawcett, *103 H.R.C. 347 (1961 II)*, pp.365-366; Greig, *40 I.C.L.Q. 366 (1991)*, pp. 389-392; Greenwood, How legitimate is force against Iraq?, *The Times* , August 10, 1990, p. 10, cols. 5-8. *Cf.* Goodrich, Hambro, Simons op. cit. supra n.31, p. 352; Feinberg, *15 Israel L.R. 160 (1980)*, p. 172.

Assembly resolution 377 (V) "Uniting for Peace" [250], and the measures adopted thereunder warrant the cessation of action in self-defence [251]. Considerations that the General Assembly is not a substitute for the Security Council have led some jurists to take an opposite view [252]. However, what seems to matter is the taking of measures for the maintenance of peace and security and not which organ takes them. The United Nations Organisation purports to hold the monopoly of the use of force and this is a function which is primarily but *not* exclusively entrusted to the Security Council [253].

State practice evinces concern for the consequences that outbreaks of violence may have for international peace and security as a whole irrespective of their justification. During the eight-year long Iran-Iraq conflict the Security Council adopted no less than seven resolutions stating grave concern for the danger of the escalation of the conflict and calling on both belligerents to cease hostilities [254]. When the Iran-Iraq conflict broke out, the President of the Security Council issued a statement on 23 September 1980 saying that "...[T]he Members of the Council are deeply concerned that this conflict can prove increasingly serious and could pose a grave threat to international peace and security..." [255]. Individual Members that have invoked the right of self-defence have done so by expressly stating adherence to the exclusive competence of the United Nations, whether the Security Council or the General Assembly, to maintain international peace and security. Thus, during the First Special Emergency Session of the General Assembly on the Suez crisis of 1956 the representative of Egypt stated:

> "... until such time as the necessary measures are taken by the Council or the General Assembly, the Egyptian Government has no other choice but to defend itself and to protect its rights against this armed and unprovoked attack..." 256

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250 5 U.N. G.A.O.R. Resolutions 10 (1950).

251 Wehberg loc. cit. *supra* n.249; Waldock loc. cit. *supra* n.249, p. 496; Wright loc. cit. *supra* n.249, p. 118; Schachter, *83 A.J.I.L. 259 (1989)*, p. 264.

252 Kelsen loc. cit. *supra* n.249, p. 796; Fawcett loc. cit. *supra* n.249, p. 366.

253 Viz. Article 24(1) of the Charter.

254 S.C. Resolutions, 479 (1980) of 28 Sept. 1980, 514 (1982) of 12 July 1982, 522 (1982) of 4 Oct. 1982, 540 (1983) of 31 Oct. 1983, 582 (1986) of 24 Feb. 1986, 588 (1986) of 8 Oct. 1986, 598 (1987) of 20 July 1987. The latter resolution was adopted under Ch. VII of the Charter.

255 Doc. S/14190, Resolutions and Decisions of the Security Council 1980, p. 23.

256 G.A.O.R. ES-1, Plennary Meetings and Annexes, 561st plen. mtg , para 47; also see 563rd plen. mtg , para 254 (El Salvador).

The same deference, though in the context of whether "effective" measures had been adopted by the Security Council, was shown by the U.K. during the Falklands conflict of 1982 [257]. The significance of this lies in the fact that State practice appears to have evolved into accepting a limitation of the exercise of a right that exists in customary law by a rule that is stipulated in treaty law - the Charter of the United Nations. Both customary law and treaty law are considered to "retain a separate existence" which means that they neither subsume nor exist in complete insulation from each other[257bis]. It is submitted that in this respect Article 51 of the Charter has influenced the practice of States, not into abandoning the right of self-defence, but into ceasing its exercise when community action is undertaken through the United Nations[257*].

Two interrelated issues arise in the present context of discussion. First, the question of who is competent to decide that necessary measures have been taken for the maintenance of international peace and security, and, secondly, the question of what kind of measures are deemed necessary for the maintenance of international peace and security. It is submitted that the question must be dealt under two contingencies.

First, the primary task for such decision lies with the Security Council (or the Assembly), while at the same time the defending State is legitimised to reach its own decision, although this would happen at the risk that its action may be considered as a threat to international peace or an act of aggression under Article 39 of the Charter [258]. It is submitted that this is the case in which the Security Council (or the Assembly) issue a recommendation or a decision the execution of which calls for action exclusively by the aggressor State. This is the case with regard to calls or demands of withdrawal of the invading forces from the victim State's territory - see, for instance, Security Council resolution 502 (1982) of 3 April 1982 on the Falklands crisis, and Security Council resolution 660 (1990) of 2 August 1990 on the Kuwait crisis. In this case "necessary measures" means "effective" measures the result of which would be the reversal of the aggression *but* which should depend for their realisation

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[257] Letter dated 30 April 1982 from the representative of the U.K.... to the President of the Security Council, Doc. S/15017, S.C.O.R. 37th yr. Suppl. for April-June 1982, p. 55.

[257bis] See I.C.J. Rep. 1986, p. 14, p. 95, paras 177-178.

[257*] *Cf*. H.H. Almond Jr. , An Assessment of Economic Warfare: Developments from the Persian Gulf, *31 Va J.I.L. 645 (1991)*, p. 665.

[258] *Cf.* Bowett op. cit. *supra* n. 249, p. 196; Dinstein op. cit. *supra* n.249, p. 197; Kelsen loc. cit. *supra* n. 249, p. 793. ***Contra.*** Stone, *Legal Controls of International Conflict, 1954*, p. 244 n.9; Higgins loc. cit. *supra* n. 249, p. 304.

on positive action on the part of the aggressor. It appears that in this case the scope and result of action in self-defence (the expulsion of the aggressor from one's territory) is exactly the same with the demand *to the* aggressor. Consequently, in the event of intransigence on the part of the latter to comply with the demand of the Security Council, and if self-defence had been invoked and measures taken for its implementation, action under the plea of defensive necessity may proceed without a violation of Article 51 of the Charter. The fact that it is the aggressor that, under the decision of the Council, has to act positively and reverse the outcome of its act and that it is the defending State that may do the same by acting unilaterally against the aggressor simply constitutes a twofold approach to the same outcome. It is submitted that the exercise of self-defence in such circumstances of Security Council deliberations has the function of upholding rather than going against the rule of law [259] . This is illustrated by the action resorted to on the part of the U.K. against the Argentine forces occupying the Falklands subsequent to the adoption of Security Council resolution 502 (1982) of 3 April 1982 which demanded the immediate withdrawal of the latter. When the U.K. resorted to force the Argentine Government in a letter dated 29 April 1982 from the representative of Argentina to the President of the Security Council, contended that "... these illicit actions by the U.K. are claimed to be justified by a so-called right of self-defence. Among other reasons, that right cannot be invoked when the Security Council has adopted measures for the maintenance of international peace and security..." [260] . To this the Government of the U.K. countered that:

> "...The fact that Argentina has not withdrawn its armed forces from the Falkland Islands, contrary to the demand in paragraph 2 of resolution 502 (1982), is sufficient to indicate that the decision of the Council has not, in fact, been effective to restore international peace and security because of Argentina's refusal to comply..... in the face of Argentina's flagrant and open violation of resolution 502 (1982), the U.K. is exercising its inherent right of self-defence..." 261

It is a totally different situation when the Security Council undertakes positive action itself by adopting, in the sense of deciding or ordering, measures that are to be carried out by the entire Membership of

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[259] Lauterpacht, *The Function of Law in the International Community, 1933*, p. 393.
[260] Doc. S/15014, S.C.O.R. 37th yr. Suppl. for April-June 1982, pp. 53-54; also see Letter dated 14 April 1982 from the representative of Panama to the President of the Security Council, Doc. S/14978, ibid. p.22, at p. 25.
[261] *Supra* n.257, at pp. 55-56.

the Organisation, except the aggressor State, or by the parties to the dispute, including the aggressor. In this case the latter constitutes the target of these measures, as opposed to their sole executor, or positive action is required by all parties that are involved in a conflict. It is submitted that measures necessary for the maintenance of international peace and security are *a priori* deemed to constitute decisions or calls adopted under Chapter VII of the Charter (Security Council resolution 661 (1990) of 6 August 1990 imposing comprehensive economic sanctions on Iraq for her invasion of Kuwait); decisions or calls that threaten the imposition of such measures (Security Council resolution 50 (1948) of 29 May 1948, paragraph 11); decisions or calls that aspire to the comprehensive settlement of a situation of long-standing dispute (Security Council resolution 242 (1967) of 22 November 1967). The question of whether these measures are "effective" in their implementation against the aggressor or the question of the means by which they can be rendered "effective", is a matter for the Security Council *alone* to decide, because the Council is, in the above contingencies, discharging *ad hoc* powers of settlement of disputes and the primary duty for the maintenance of international peace and security expressly invested upon it by the Charter. In other words such measures are adopted without allowing in principle any discretion or initiative on the part of the aggressor. Thus, the representative of Israel in the Security Council, Mr. A. Eban, observed with regard to the Egyptian plea of self-defence in justification for the restrictions imposed on Israel-bound shipping through the Suez canal, that:

> "... Article 51 of the Charter allows a nation to undertake action in self-defence only on two conditions, both of which are absent here. One of them is that that country should be the victim of armed attack, and not even the Egyptian representative himself has invoked any such prospect. The second is that the Security Council has not yet assumed responsibility for the maintenance of international peace and security in that area. The Security Council has undertaken its responsibilities in that area by underwriting the General Armistice Agreements and calling upon the parties to ensure their continued fulfilment..." 262

Following the invasion of Kuwait by Iraq on 2 August 1990 the Security Council adopted Res. 661 (1990) of 6 August 1990 that imposed comprehensive economic sanctions on Iraq. Interestingly enough, the 6th preambular paragraph thereof affirms "... the inherent right of individual

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262 S.C.O.R. 6th yr. 551st mtg , para 36; ibid. 550th mtg , para 93 (U.K.); S.C. Res. 95 (1951) of 1 Sept. 1951.

or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter...".

The above passage seems to be somewhat contradictory, for, if the right of self-defence is to be affirmed in accordance with the terms of Article 51, then it should be superseded by the terms of Res. 661 (1990) imposing sanctions against Iraq under Chapter VII of the Charter[262bis]. The above preambular paragraph has been asserted in justification for the dispatch of U.S. and other troops to Saudi Arabia [263], and to institute a so-called naval "interdiction" to enforce the economic sanctions imposed by resolution 661 (1990) on Iraq-bound shipping suspected of breaching the terms of the resolution [264].

With regard to the dispatch of U.S. and other troops to Saudi Arabia, this was effected at the request of the Saudi Government and was justified as a preparatory defensive measure against imminent threat of invasion of the Saudi Kingdom by Iraq [265]. The above measures in so far as they concerned Saudi Arabia herself should rather be considered as distinct from the occupation of Kuwait and Res. 661 (1990) that aimed at ending the Iraqi aggression; indeed, the wording of the 6th preambular paragraph of the resolution appears to be rather awkward in seeking to link the right of self-defence of Kuwait against Iraq with that of Saudi Arabia against Iraq which is a totally different situation. Moreover the U.S. and other troops were dispatched to Saudi Arabia in defence of the latter and *not* of Kuwait. Thus, the right of self-defence could be invoked in case of renewed aggression by Iraq against Saudi Arabia. This, however, would not constitute a renewal of the right that Kuwait had when the invasion of 2 August 1990 happened but a new situation in which self-defence becomes operative with regard to Saudi Arabia and her allies only[265bis]. Thus, in the hypothetical situation that force would have had to be used for the defence of Saudi Arabia, it could not in principle extend to the liberation of Kuwait, unless the requirement of proportionality rendered the latter contingency a *de facto* outcome of the defensive action in

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[262bis] *Contra*. Greenwood, *55 Modern L.R. 153 (1992)*, pp. 164-5; R.N. Gardner, Commentary on the Law of Self-Defence, in Damrosch & Scheffer (eds.) op. cit. *supra* n. 73, p. 50; D.B. Rivkin Jr., Commentary on Aggression and Self-Defence, in Damrosch & Sceffer (eds.) op. cit. *supra* n. 73, pp. 57-58.

[263] Statement by Mr. The. Pickering (U.S.A.) at the 2934th mtg of the S.C. of 9 August 1990, in Lauterpacht & others (eds.) op. cit. *supra* n.98, p. 105.

[264] Keesing's 1990, pp. 37639-37640.

[265] Keesing's 1990, pp. 37636-37639; *supra* n.263.

[265bis] A. Chayes, The Use of Force in the Persian Gulf, in Damrosch & Scheffer (eds.) op. cit. *supra* n. 73, pp. 5-6; *Contra*. Greenwood loc. cit. *supra* n. 262bis.

support of Saudi Arabia. This is, furthermore, illustrated by the fact that when Israel became the victim of the Iraqi missile attack on 17 January 1991 she resorted to force in self-defence in order to repel the attack against her, but did not resort to further force against the massive concentration of Iraqi armed forces in and around Kuwait; the latter were being subject to action endorsed by the Security Council. It can be argued that Israel did have the right to attack and destroy the Iraqi missile launchers on the territory of Iraq, but she refrained from doing so on the basis of considerations of policy [266].

With regard to the claim of using naval force for the implementation of Res. 661 (1990) as an exercise of the right of self-defence, it is submitted that it has contradicted previous practice that requires the Security Council itself to decide upon further measures to implement the ones already imposed by its own resolution - viz. Security Council resolution 221 (1966) of 9 April 1966, paragraph 5 of which empowered the U.K. "... to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia...". The above resolution appears to authorise measures to render "effective" the measures adopted by the Council against the minority regime in Rhodesia by virtue of operative paragraph 8 of Security Council resolution 217 (1965) of 20 November 1965. The U.S. proposal of a naval "interdiction" was met with considerable scepticism on the part of the French and Soviet Governments [267], and outright opposition by certain members of the Security Council. Mr. Alacron de Quesada of Cuba stressed that according to Article 51, self-defence stopped until the Security Council had taken measures necessary for to maintain international peace and security and concluded:

> "... I think that what is most important about the Article and resolution from which he [the U.S. representative] has quoted from is that both assert this Council's authority to handle the crisis..." 268

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[266] Keesing's 1991, p. 37939.
[267] Keesing's 1990, p. 37640.
[268] S/PV 2937, 18 August 1990, in Lauterpacht & others (eds.) op. cit. *supra* n.98, p. 112; also ibid. pp. 109 (Yemen), 115 (Iraq). See N.D. White & H. McCoubrey, *x Int. Rel. 347 (1991)*, pp. 350-1, 353-4 ; Mullerson, Self-Defence in the Contemporary World, in Damrosch & Sheffer (eds.) op. cit. *supra* n.73, p. 22 but *cf*. p. 23; *cf*. Greenwood, *55 Modern L.R. 153 (1992)*, pp. 162-2.

That this is the case is illustrated by the ultimate decision of the U.S. and the U.K. to refer the matter to the Security Council that called upon the States that were cooperating with the Government of Kuwait and that maintained naval forces in the region "... to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward marine shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid out in resolution 661 (1990)..." [269].

The suggestion was, furthermore, propounded by Mrs. M. Thatcher, the Prime Minister of the U.K., that:

> "... We hope that economic sanctions will prove to be sufficient. That is why they must be strictly enforced. But we are not precluded by reason of any of the Security Council resolutions from exercising the inherent right of collective self-defence in accordance with the rules of international law.
>
> To undertake now to use no military force without the further authority of the Security Council would be to deprive ourselves of a right in international law expressly affirmed by Security Council Resolution 661;..." 270

This view strongly suggests that in case economic sanctions were not proved to be effective, the U.K. Government took the view that the right of collective self-defence could be legitimately invoked to liberate Kuwait. Again such assertion was ultimately not made for the use of force to expel the Iraqi forces from Kuwait was authorised by virtue of Security Council resolution 678 (1990) of 29 November 1990. The representative of Malaysia in explaining the vote of his delegation stated that:

> " ... Malaysia would like to make it clear that our support for Resolution 678 (1990) is not without reservations. The authorization of force ... can only be taken under the terms of the Charter of the United Nations. We have not agreed to any attempt unilaterally to apply Article 51 of the Charter once the Security Council is seized of the matter. In this regard we have always insisted on the centrality of the United Nations role in the maintenance of international peace and security. Any proposed use of force must be brought before the Council for its prior approval, in accordance with specific provisions of Chapter VII of the Charter. We regret that this point is not clearly reflected in this resolution, a precedent that may not bode well for the future ..."270bis

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[269] S.C. Res. 665 (1990) of 25 August 1990, operative para 1.

[270] Hansard Parliamentary Debates, H.C., No 1533, 6 September 1990, p. 383, col. 737.

[270bis] See S.C.O.R. 45th yr. S/PV. 2963rd mtg. (29 November 1990), in Lauterpacht & others (eds.), *The Kuwait Crisis-Basic Documents, 1991*, p. 170. Also see B.H. Weston, Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy, *85 A.J.I.L. 516 (1991)*, pp. 520-1; N.D. White & H. McCoubrey, *x Int. Rel. 347 (1991)*, p. 354-

4. *The Rule of Proportionality* .

Proportionality of self-defence is the second requirement, apart from the necessity of self-defence, for the exercise of the right in international law [271] .

Its meaning consists in that the force resorted to in self-defence must be limited to repelling the armed attack that gave rise to the necessity of self-defence and be kept within this necessity. Consequently, it is submitted that proportionality connotes a requirement of performance of armed action in self-defence [272] .

Thus, the *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* of the U.S. Navy defines proportionality as

> "... The requirement that the use of force be in all circumstances limited in intensity, duration and scope to that which is reasonably required to counter the attack or threat of attack..." [273]

The application of proportionality in practice may be difficult due to the specific factual situation on the ground between two States. It may be that two armies facing each other for a long period of time could react more forcefully should a violent incident occur [274] .

It is submitted that the requirement of proportionality of action in self-defence entails a limiting effect on the action of the defending State with regard to (A) the means it will use against the aggressor; (B) the *locus* of the military operations, and (C) their target. The starting point for the

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6; Greenwood, *55 Modern L.R. 153 (1992)*, pp. 167-9; Mullerson loc. cit. *supra* n. 268; T.M. Franck & F. Patel, U.N. Police Action in Lieu of War. The Old Order Changeth, *85 A.J.I.L. 63 (1991)*, p. 66. *Cf*. Schachter, United Nations Law in the Gulf Conflict, *85 A.J.I.L. 452 (1991)*, pp. 460-1; Rostow, Until What? Enforcement Action or Collective Self-Defence, *85 A.J.I.L. 506 (1991)*, pp. 508-514; Chayes loc. cit. *supra* n. 265bis, p. 10.

[271] *Nicaragua Case (Merits)*, I.C.J. Rep. 1986, p. 14, at p. 103, para 194.

[272] Report of the Special Committee on the Question of Defining Aggression, Doc. A/7620, G.A.O.R. 24th session, Suppl. No 20, p. 29, para 73; Doc. A/8019, G.A.O.R. 25th session, Suppl. No 19, pp. 47-48, paras 131-132; Wright, *53 A.J.I.L. 112 (1959)*, p. 117; Fawcett, *103 H.R.C. 347 (1961 II)*, p. 365; Brownlie op. cit. *supra* n.22, pp. 261-264; Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1637, but cf. p. 1638; id. *53 Univ. Chic. L.R. 113 (1986)*, pp. 132, 143; Jiménez de Aréchaga, *159 H.R.C. 9 (1978 I)*, p. 97; Greenwood, *89 W. Va. L.R. 933 (1987)*, p. 946.

[273] Loc. cit. *supra* n.33 at 4.3.2/4-9. Cf. Dinstein op. cit. *supra* n.22, pp. 216-217.

[274] Brownlie op. cit. *supra* n.22, p. 264; id. loc. cit. in Butler (ed.) op. cit. *supra* n.21, p. 25; cf. Schwarzenberger, *87 H.R.C. 195 (1955 I)*, pp. 333-334.

application of proportionality is the moment of the occurrence of the armed attack, namely, the point in time where the necessity of self-defence has arisen. The fulfilment of proportionality would depend on a consideration of the means, *locus* , and target of the military operations of the defending State.

4. (i). The Means of Response to an Armed Attack .

The use of which weapons by the defending State depends on the means used by the aggressor. It is submitted that exact identity in kind between the defensive response and the attack within the same broad category of weapons is not required [275] . Thus, an attack by conventional weapons is to be met with defensive response with any other conventional weapons. Consequently, an attack by way of artillery bombardment may be countered with action by way of helicopter gunships against the artillery batteries; action, however, would be disproportionate if it entailed the aerial bombardment of the capital of the aggressor State. Similarly, an attack by nuclear or chemical weapons could be be countered by similar means. This writer believes that nuclear weapons should never be used in the first instance to counter an attack by conventional weapons because of the immensely destructive potential of the former and their long-term effects on the natural environment of their target. Their use, however, may envisaged only when the defending State's conventional defence structure is subject to such devastating use of armed force that its use only, is not sufficient for repelling the aggressor [276] . By contrast, an attack launched by way of chemical or biological weapons may be held to be proportionately countered by battlefield (as opposed to strategic) nuclear

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[275] Greenwood loc. cit. in Dinstein (ed.) op. cit. *supra* n.22, pp. 279-281; Lachs, *169 H.R.C. 10 (1980 I)*, p. 164.

[276] Brownlie op. cit. *supra* n.22, pp. 262-264; N. Singh, *Nuclear Weapons and International Law, 1959*, pp. 132-136; *cf.* Greenwood loc. cit. in Dinstein (ed.) op. cit. *supra* n.22, p. 281. The general issue of the legality of the use of nuclear weapons constitutes an autonomous area that has generated prolific academic research. It is not the purpose of this study to deal with it in its merits. See generally, Schwarzenberger, *Legality of Nuclear Weapons, 1958* ; H. Kissinger, *Nuclear Weapons and Foreign Policy, 1957* ; H. Nash, *Nuclear Weapons and International Behaviour, 1975* ; H. Fujita, *International Regulation of Nuclear Weapons, 1988* ; N. Singh & E. McWhinney, *Nuclear Weapons and Contemporary International Law, 2nd rev. ed. 1989* ; Pogany (ed.), *Nuclear Weapons and International Law, 1987* ; A.S. Miller & M. Feinrider, *Nuclear Weapons and Law, 1984* ; E.L. Meyrowitz, *Prohibition of Nuclear Weapons, 1990* ; V. Harle & P. Sivonen (eds.), *Nuclear Weapons in a Changing Europe, 1991* .

weapons, if it is of such intensity as to result in widespread destruction of the population and other living resources of the defending State. Still, however, the permanent character of the effects of a nuclear attack should be very scrupulously judged against the effects, beyond the short-term ones, of chemical and biological weapons. It can be said that while the effects of the former can be reasonably successfully countered at least with regard to the population of the State by the use of certain protective measures (namely, the distribution of chemical gas masks, the construction of special home-made bunkers); biological weapons, on the other hand, do have more lasting effect by affecting the entire living resources of the State.

An interesting question arises with regard to whether covert counter-insurgency operations, namely, assistance given to guerrillas operating against the Government of a State, is a proportionate measure of self-defence against assistance given by the former to guerrillas operating against the Government of the defending State or one of its allies. This was the justification that was invoked by the U.S.A. in the proceedings of the *Nicaragua Case* .The U.S. justified her material assistance to the Nicaraguan *contras* as collective self-defence on behalf of the Government of El Salvador against the assistance allegedly provided by the Nicaraguan Government to the Salvadorean insurgents. The Court did not rule whether the U.S. assistance was proportionate, because it found that the alleged Nicaraguan involvement did not amount to an armed attack and therefore the U.S. did not have the right of self-defence [277] . Judge Schwebel has dealt with the matter at some length and maintained that defensive measures could be covert and that the test of proportionality did not imply "perfect proportionality" [278] . The advantage of covert actions according to Judge Schwebel lies in that they can be "... more modest and more readily terminated..." and that they entail less loss of life [279] .

It is submitted that the thesis propounded in the dissenting opinion of Judge Schwebel should be regarded at least with some suspicion [280] . It

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[277] I.C.J. Rep. 1986, p. 14, at p. 122, para 237.

[278] Ibid. *per Judge Schwebel*, pp. 269-270, 367-369, paras 9, 210-213; Rostow, *11 Yale J.I.L. 437 (1985-86)*, p. 454; Moore, *80 A.J.I.L. 43 (1986)*, p. 107; *cf.* Macdonald, *xxiv Can. Y.I.L. 127 (1986)*, p. 153.

[279] *Supra* n.278, at p. 367, para 210.

[280] Higginbotham, *25 Col. J. Trans. L. 529 (1987)*, p. 559 notes 137,138, but *cf*. p. 560; Reichler & Wippman, *11 Yale J.I.L. 462 (1985-86)*, pp. 469, 471; Kahn, *12 Yale J.I.L. 1 (1987)*,

amounts to the following situation: Both Governments of States A and B are faced with armed insurgency aiming at overthrowing each one of them. If State A assists the armed opposition in State B, then State B has the right of self-defence by assisting the armed opposition in State A. Moreover, the same right of collective self-defence belongs to B's ally, State C. This implies in effect that the only tangible means of defence would be the overthrow of the Government of the assisting State, a contingency which is not supported by the practice of States [281]. The authorities that argue for the legitimacy of such contingency point at the overthrow of the Axis Governments as one of the aims of a war of self-defence of the Allied Powers against these countries [282]. It is submitted that such a conclusion is somewhat arbitrary because the declaration of intent to overthrow these Governments has taken place in a situation of total global war and it was subscribed to, not by one or a few States acting individually, but as a policy of collective sanction [283]. Such action would nowadays be undertaken only under the authority of the United Nations Security Council [283bis], and if one is to draw a conclusion from the attitude towards the B'aath Government in Iraq of the Organisation and the U.S. - led coalition that forcibly implemented Security Council resolution 660 (1990) against Iraq for its invasion of Kuwait, the overthrow of a Government, even as a matter of collective security, is not a contingency which is readily to be implemented.

Moreover, if the cessation of the assistance to the guerrillas operating against the defending State can only be achieved by offering the same situation to the assisting State (amounting even to the point of overthrowing its Government), this creates a situation that partakes a great deal of vindictiveness, as opposed to concern for one's own protection, and merits to be characterised as **reprisal** [284]. Indeed, instead of defending itself (namely, adopting measures of defence against its own guerrillas and intercepting the assistance supplied to them) the defending State

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[281] Reichler & & Wippman, *11 Yale J.IL. 462 (1985-86)*, p. pp. 469-470; D'Amato, *79 A.J.I.L. 657 (1985)*, p. 658. ***Contra*** Rostow loc. cit. *supra* n.278, p. 453; Moore loc. cit. *supra* n.278, p. 114.

[282] I.C.J. Rep. 1986 (*per Judge Schwebel*), p. 270, para 9; Rostow *supra* n.281; Moore *supra* n. 281.

[283] See The Declaration by the United Nations of 1 January 1942, text in *36 A.J.I.L. 191 (1942)* ; Brownlie op. cit. *supra* n.22, pp. 109, 332; Farer, *84 A.J.I.L. 503 (1990)*, p. 508.

[283bis] *Cf*. Dinstein *supra* n. 247.

[284] Joyner & Grimaldi, *25 Va.J.I.L. 621 (1985)*, p. 647.

remains entangled in the misery of its own civil war, it contributes to perpetuating of a civil war in another State and if a request for assistance in collective self-defence is answered, then there is real danger of creating a major conflict.

Finally, the overthrow of a Government, especially by way of assisting guerrillas, is a task that it is rather difficult to achieve. The fact that it is of no real purpose for the protection of the beleaguered Government against a domestic insurgency militates against the characterisation of covert action as "modest and easily terminated". On the contrary, it reveals its real nature, namely, an attempt at preserving "public deniability" [285] of one's own defensive action that is itself in contradiction with the requirement of reporting action in self-defence to the Security Council. In fact, it constitutes a curious proposition that a State that has the genuine belief that it acts in self-defence should be fearful of openly pursuing its protective action [286].

4. (ii). The *locus* of the defensive action.

One of the results of the requirement of proportionality of self-defence is that the military operations of the defending State are limited locally to the geographical area where the attack takes place. As a result the distinction drawn in classical international law between the "region of war", namely, "... that part of the surface of the earth in which the belligerents may prepare and execute hostilities against each other...", and the "theatre of war", the locality where hostilities actually take place [287] seems to have been overturned in favour of the latter [288].
Thus, the action in self-defence resorted to by Ethiopia against the W.S.L.F. and the Somali Army was confined to the territory of Ogaden. Similarly, the resort to force in self-defence by the U.K. against the Argentine forces occupying the Falklands was also confined to the islands under occupation and a 200 miles zone around them. Moreover, State practice in naval warfare demonstrates a consistent tendency to confine naval operations very close to the belligerents' coast, namely, either in the territorial sea or the contiguous zone [289]. It is conceivable that action may be taken on the

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285 Kahn loc. cit. *supra* n.280, p. 29.
286 See *infra* section 6.
287 Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht*, 1952, p. 237.
288 Greenwood loc. cit. in Dinstein op. cit. *supra* n.22, p. 277.
289 O'Connell, *The Influence of Law on Sea Power*, 1975, pp.122-129.

territory of the aggressor State provided that, first, the source of material force on the ground is situated therein (namely, airfields from which air strikes are launched, missiles or artillery batteries in action against the victim State) and, secondly, the undertaking of military action in the territory of the aggressor is closely connected with either dislodging his forces from the territory of the defending State (the conduct of an encirclement manoeuvre through the territory of the aggressor), or disrupting the logistical and supply network between his command centre and his forces on the ground [290] . It is submitted that action on the territory of the aggressor is a contingency that depends on the actual situation on the ground in the aftermath of the occurrence of the armed attack and it should not be licensed *a priori* as a general rule.

Judge Schwebel took the opposite view in his dissenting opinion in the *Nicaragua Case* . By reference to instances of the practice of the United Nations (Korea), Israel, France (the Sakiet incident), U.K. (Harib Fort incident), U.S. , China, Viet-Nam, Iraq, U.S.S.R., Afghanistan and Nicaragua, he concluded:

> ...It is by no means suggested that all of these actions are of the same legal value; some were clearly lawful, others clearly not. But what is significant is that these actions, whose legality has been affirmed by those carrying them out, provide ample and significant State practice indicating that what is proposed as a limitation upon self-defence and counter-intervention is not today applied as a rule of international law. It is not generally accepted State practice.... [291]

He, then, proceeded by arguing that refraining from action on the territory of the aggressor should even *not* be accepted as a rule of international law for in Judge Schwebel's view this "... would encourage rather than deter aggression..." [292] .

The present author does not share the above view. To argue that a rule of customary law emerges on the basis of State practice and *opinio juris* without taking into account the possibility of persistent objection to that practice constitutes a very narrow conception of the creation of customary law [293] . Moreover, the statement on the undesirability of the opposite contingency is alarmingly disturbing because it effectively advocates that an aggressor should "suffer" for its delict, not by virtue of

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[290] Wengler, *7 Révue Belge D.I. 401 (1971)*, pp. 412-413.
[291] I.C.J. Rep. 1986 (*per Judge Schwebel*), p. 372, para 219.
[292] Ibid. para 220; also see Moore, *80 A.J.I.L. 43 (1986)*, pp. 58, 88-89.
[293] See *infra* Second Title.

collective security or judicial action, but by unilateral action in self-defence ! It is not clear by what logic, other than that of self-help or self-preservation, self-defence, an action which is clearly protective, should partake the character of inflicting suffering on the aggressor. Indeed, should the above thesis supported by Judge Schwebel be accepted any distinction between self-defence and reprisals will be rendered totally nugatory.

4. (iii). The Target of defensive action .

It is submitted that the target of defensive force should be the actual source of armed force on the ground and not the aggressor State considered as a whole. The same is the case with regard to counter-measures against uses of force short of an armed attack [294] . Thus, the use of defensive force against targets that are totally unconnected with the action that has given rise to the necessity of self-defence, is disproportionate and, therefore, unlawful. The mining of the Nicaraguan ports and the attacks on oil installations were considered by the Court in the *Nicaragua Case* as totally unconnected with what had given rise to the necessity of self-defence of El Salvador, namely, the alleged material assistance by Nicaragua to the Salvadorean insurgents [295] . Indeed, it is strongly implicit in the Judgment that only action against the network as such of rendering material assistance to the Salvadorean guerrillas would have been lawful [296] . It appears from the Judgment that this "network" would not include the ports of Nicaragua, where the material supplies for the guerrillas might have arrived, and which would have significance for the economy of Nicaragua as a whole. It seems that it is rather the final stage of the dispatch of the *matériel* to the Salvadorean insurgents that would legitimately be the target of defensive force, namely, the routes of supply close to the area where the guerrillas actually used force against the Government of El Salvador. To stretch the principle of proportionality to cover targets that are not strictly connected or not connected at all with the source of armed force on the ground would amount to a sharp escalation of force [297] .

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[294] Ibid.
[295] I.C.J. Rep. 1986, p. 14, at p. 122, para 237.
[296] Ibid. p. 124, para 241.
[297] Rowles, *80 A.J.I.L. 568 (1986)*, p. 580.

In the general context of activities of armed bands the victim State's armed response is to be directed against the guerrillas themselves, because they constitute the source of force on the ground, and with regard to every specific instance of force by the guerrillas [298]. The totality of the past guerrilla acts, the so-called "accumulation of events" theory is not accepted in the practice of States and its main practical result is to by-pass the requirement of proportionality with regard to the use of force that immediately precedes the armed response of the victim State [299]. Thus, massive sweeping operations against guerrillas on the territory of another State derive their attractiveness from the fact that they purport to eradicate the activities of the armed bands once and for all at one blow - see for instance, the operation "Peace for Galilee" that was launched by Israel against the P.L.O. in Lebanon in June 1982. Such operations are, on the basis of precedent in the practice of States that resorted to them, disproportionate for they entail a massive use of force over a sizeable geographical area, and are waged indiscriminately with regard to the local population of the host State of the guerrillas resulting in heavy casualties and large-scale destruction of property. It appears that it is the purpose of the operation (namely, the destruction of the guerrilla organisation as a whole) that is taken into account at the expense of the rule of proportionality which is sought to be accordingly extended [300].

It is submitted that to give prominence to the purpose of one's military response as defined by the interests of the defending State and sacrifice the requirement of proportionality thereunder, may, first, render the exceptional defensive use of force an exercise of national policy and quite possibly aggression, and, secondly, it may escalate a conflict to dangerous levels [301].

5. *The Doctrine of Anticipatory Self-Defence* .

In Waldock the following passage occurs:

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[298] Higgins, *37 B.Y.I.L. 269 (1961)*, p. 303; *infra* Second Title.
[299] See *supra* Part One , Ch. 3 and *infra* Second Title.
[300] Adendum to the Eighth Report on State Responsibility by Rapporteur Ago supra n.2, pp. 69-70, para 121; approvingly in I.C.J. Rep. 1986 (*per Judge Schwebel*), pp. 367-369, paras 212-213; Feinstein *11 Israel L.R. 516 (1976)*, p. 537 et seq.
[301] Greenwood loc. cit. in Dinstein (ed.) op. cit. pp, 278-279.

"... Does Article 51 cut down the customary right by restricting forcible self-defence to cases where the attack provoking it has actually been launched ? The question is whether the words "if an armed attack occurs" introduce into the law of self-defence the principle of the second blow - the riposte to a stroke already delivered - as a rigid test of legitimate self-defence. If so, an imminent threat is no longer sufficient to create an immediate right to resort to self-defence.... That goes beyond the necessary meaning of the words.... Nor does it seem that at San Francisco there was an intention to cut down the right of self-defence beyond the already narrow doctrine of the *Caroline* Incident.
That doctrine allows and only allows a right of defence in the face of imminent threat of attack - in face of an armed attack already impending over the defending State. Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier... . If... the attack becomes manifestly imminent, then it would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow..." 302

The Court in the *Nicaragua Case* refrained from passing judgment on the legality of anticipatory self-defence by stating that:

...In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of

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302 Waldock, *81 H.R.C. 455 (1952 II)*, pp. 497-498. Also see, Bowett op. cit. *supra* n. 17, pp. 188-189, 191, 192; Wright, 53 *A.J.I.L. 112 (1959)*, p. 117; id. The Strengthening of International Law, *98 H.R.C. 5 (1959 III)*, pp. 167-168; but cf. id. The Cuban Quarantine, *57 A.J.I.L. 546 (1963)*, pp. 560-561; McDougal & Feliciano op. cit. *supra* n.22, pp. 231-240; Higgins, *37 B.Y.I.L. 269 (1961)*, pp. 301-302; Fawcett, *103 H.R.C. 419 (1961 II)*, pp. 361-363; Schwebel, *136 H.R.C. 419 (1972 II)*,pp. 480-481; Feinstein, *11 Israel L.R. 516 (1976)*, pp. 529-537; Greig, *40 I.C.L.Q. 366 (1991)*, p. 397; Shapira, *6 Israel L.R. 65 (1971)*, pp.74-75; Rifaat op. cit. *supra* n.22, pp. 126-127; Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1634; id. *53 Univ. Chic. L.R. 113 (1986)*, pp. 134, 136; id. *83 A.J.I.L. 259 (1989)*, p. 267; Kuhn, *6 S.A.Y.I.L. 42 (1980)*, p. 47; W.T. Mallison & S.V. Mallison, The Israeli Air Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defence ? , *15 Vand. J. Trans. L. 417 (1982)*, 420-424; Rostow, *11 Yale J.I.L. 437 (1985-86)*, p. 452 n. 59; Joyner & Grimaldi, *25 Va.J.I.L. 621 (1985)*, p. 659 but *cf.* p. 660; Stone, *Conflict Through Consensus, 1977*, pp. 47-50; McDougal, *57 A.J.I.L. 597 (1963)*, pp. 598, 600-601; Phillips, *10 Hous. J.I.L. 275 (1988)*, pp. 287, 291-292; McCredie, *19 Case W. Res. J.I.L. 215 (1987)*, pp. 230-231; Blum loc. cit. in Netanyahu (ed.) op. cit., pp. 136-137; Sullivan, *10 ASILS. I.L.J. 169 (1986)*, pp.177 et.seq. ; Intoccia, *19 Case W. Res. J.I.L. 177 (1987)*,pp. 203-205; C.J. Botha, *11 S.A.Y.I.L. 138 (1985-86)*, pp. 148-149, but *cf.* p. 150; Gross, *13 Cal. West. I.L.J. 458 (1983)*, pp. 479-486; J.E. Brinberg, The Sun Sets on Tamuz 1: The Israeli Raid on Iraq's Nuclear Reactor, *13 Cal. West. I.L.J. 86 (1983)*, pp. 104-105; Wengler, *7 Révue Belge D.I. 401 (1971)*, p. 405 n.12, but cf. p. 404; Linnan, *16 Yale J.I.L. 245 (1991)*, p. 339; W.T. Mallison, Aggression or Self-Defence in Lebanon in 1982, *A.S.I.L. Proceedings 174 (1983)*, p. 177; Greenwood, *89 W. Va. L.R. 933 (1987)*, pp. 942-944; Levenfeld, *21 Col. J. Trans. L. 1 (1982)*, pp. 29-30; McCormack, *25 Israel L.R. 1 (1991)*, pp. 35-42; Chayes, *The Cuban Missile Crisis, 1974*, p. 65.

armed attack has not been raised. Accordingly, the Court expresses no view in that issue... 303

Judge Schwebel, however, appears very close to endorsing the legality of anticipatory self-defence in his dissenting opinion, although it seems that his main concern focuses on whether self-defence may be exercised against uses of force that do not amount to an armed attack. He expressed the view:

"... The Court rightly observes that the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised in this case, and that the Court accordingly expresses no view on that issue. Nevertheless, its Judgment may be open to the interpretation of inferring that a State may react in self-defence, and that supportive States may react in self-defence, only if an armed attack occurs...

I wish, *ex abudanti cautela* , to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs..." 304

The *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* of the U.S. Navy expressly argues for the admissibility of anticipatory self-defence by reference to the *Caroline* incident 305 .

Moreover, during the Security Council debate on the Israel air strike on Iraq's nuclear reactor on 7 June 1981, Mr. Blum, the Israel representative in the Security Council, defended his country's right of anticipatory self-defence by referring to authoritative literature in support of anticipatory action 306 .

There is evidence that prior to the adoption of the United Charter, the doctrine of anticipatory self-defence was considered admissible in law. The Military Tribunal at Nuremberg rejected the German pleas of anticipatory self-defence for the attacks by Germany on Norway and the Soviet Union, not on the basis of illegality of the doctrine but on the fact that there was no imminent threat of attack against Germany in either of

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303 I.C.J. Rep. 1986, p. 14 at p. 103, para 194. *Cf.* Macdonald, *xxiv Can. Y.I.L. 127 (1986)*, pp. 147, 154.

304 Ibid. (*per Judge Schwebel*), p. 347, paras 172-173.

305 Loc. cit. *supra* n.33, 4.3.2.1/4-12, 4-13, n.29.

306 Reference was made, *inter alia*, to works by Waldock, Bowett, Schwebel and McDougal (*supra* n. 302); S.C.O.R. 36th yr. 2280th mtg, paras 98-100; 2288th mtg, paras 81-84.

the above instances [307]. Furthermore, the International Military Tribunal for the Far East expressly upheld the Netherlands anticipatory declaration of war against Japan of 8 December 1941 before the Japanese forces launched any armed action against the Netherlands East Indies [308].

It is submitted that such evidence must be treated with caution because, first, apart from the Netherlands action, State practice in the period prior to the Charter is characterised by paucity of instances of invocation of anticipatory self-defence. The Italian action against Ethiopia in 1935, which was justified as anticipatory self-defence, was ultimately treated by the League of Nations as aggression. Secondly, the ruling of the Military Tribunal for the Far East seems to refer primarily to the conduct of Japan rather than that of the Netherlands; therefore, whatever the legality of the latter's action, Japan would have been condemned as the aggressor [309].

It is submitted that the doctrine of anticipatory self-defence is unlawful and inadmissible under present international law for a number of reasons [310].

First, in so far as the right to anticipatory self-defence is based on the survival of the *Caroline* doctrine under Article 51 of the Charter, it is argued that in the context of the 19th century law there was *no jus ad bellum* and force could be resorted to freely by States and, therefore, there

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[307] *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, part 22, H.M.S.O. 1950, p. 411, pp. 435, 437, 441; also *41 A.J.I.L. 172 (1947)*,pp. 205, 206-207, 213.

[308] Brownlie op. cit. *supra* n.22, p. 258 n.5.

[309] Ibid.

[310] See Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht, 1952*, p. 156; Jessup, *A Modern Law of Nations; An Introduction, 1947*, p. 165 et seq. ; Kelsen, *The Law of the United Nations, 1950*, pp. 269, 797 et seq. ; id. *42 A.J.I.L. 783 (1948)*, p. 791; Wehberg, *78 H.R.C. 7 (1951 I)*, pp. 81-82; Kunz, *41 A.J.I.L. 872 (1947)*, p. 875; Brownlie op. cit. *supra* n.22, p. 272 et seq. ; id. *37 B.Y.I.L. 183 (1961)*, pp. 227-228, 242-243; id. loc. cit. in Butler (ed.) op. cit. *supra* n.21, pp. 24-25; Kolesnik loc. cit. in Butler (ed.) op. cit. *supra* n.21, pp 154-155; Farer loc. cit. in Brown & Falk (eds.) op. cit. *supra* n.22, pp. 36-41; Dinstein op. cit. *supra* n.22, pp.174-176 but *cf.* pp.179-180 where the author discusses the concept of "interceptive" self-defence; Skubiszewski loc. cit. in Sørensen (ed.) op. cit. *supra* n.22, pp. 767, 778; Broms, *154 H.R.C. 305 (1977 I)*, pp. 342, 344-345; Henkin, *A.S.I.L. Proceedings 147 (1963)*, pp. 150-152; id. *216 H.R.C. 19 (1989 IV)*, p. 156; O'Connell, International Law and Contemporary Naval Operations, *44 B.Y.I.L. 19 (1970)*, p. 61 et seq. ; id. *The Influence of Law on Sea Power, 1975*,pp. 82-84; Combacau loc. cit. in Cassese (ed.) op. cit. *supra* n.22, p. 24; Cot & Pellet op. cit. *supra* n.22, p. 778 and notes 28-34; Macdonald, *xxiv Can.Y.I.L. 127 (1986)*, pp. 147, 154; Paust, Responding Lawfully To International Terrorism: The Use of Force Abroad, *8 Whittier L.R. 711 (1986)*, p. 719; Wallace, *19 International Lawyer 259 (1985)*, p. 263; Lamberti Zanardi, *La Legitima Difesa nel Diritto Internazionale, Milano 1972*, p. 231; id. loc. cit. in Cassese (ed.) op. cit. *supra* n.22, pp. 111-112; G. Fischer, Le Bombardement par Israël d' un Réacteur Nucléaire Irakien, *27 A.F.D.I. 147 (1981)*, pp. 164-165; Zourek op. cit. *supra* n.22, pp. 105-106.

was no real purpose for an exception of self-defence to a non-existent rule of the prohibition of unilateral armed force by States. Instead the wider concept of self-preservation was invoked which is clearly inadmissible under the United Nations Charter [311]. Moreover, the ordinary meaning of the text of Article 51 precludes *a priori* any interpretation permitting anticipatory action [312].

Secondly, the provision of Article 51 as to the prior occurrence of an armed attack before resorting to force in self-defence has had a marked impact on the practice of States subsequent to the introduction of the United Nations Charter:

(i) Claims of "accumulation of events" in the context of the activities of armed bands, though inadmissible as a matter of law, are based on the totality of *past acts of force* on which the probability of future attacks is based. Thus the past occurrence of an act of force is even to the adherents of this theory of certain importance.

(ii) The "classical" illustration offerred by adherents of anticipatory is the Six-Day war of 5 June 1967, when Israel resorted to anticipatory armed action simultaneously against Egypt, Jordan and Syria [313]. Israel, however, did not invoke any right of anticipatory self-defence in justification of her action. The Israel representative in the Security Council justified his country's resort to force in the following terms:

> "... It is evident from the preliminary reports received that in the early hours of this morning Egyptian armoured columns moved in an offensive thrust against Israel's borders. At the same time Egyptian planes took off from airfields in Sinai and struck out towards Israel... Egyptian artillery in the Gaza strip shelled a number of Israeli villages..."[314]

It becomes clear that Israel justified its action as defensive on the basis of prior Egyptian acts of force that indicated the commencement of an armed attack, rather than a general right of anticipatory defence.

(iii) In a letter dated 7 October 1973 from the representative of Israel to the President of the Security Council [315] on the day after the outbreak of the *Yom Kippur* war which was initiated by Egypt and Syria, it was stated

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[311] See statement of the U.K. representative in the S.C. , S.C.O.R. 6th yr. 550th mtg, para 93, supra p. 11; also Zourek op. cit. *supra* n.310, p. 105.
[312] Brownlie op. cit. *supra* n.22, p. 275; Kunz loc. cit. *supra* n.310; Kelsen op. cit. and loc. cit. *supra* n.310; Henkin, *A.S.I.L. Proceedings 147 (1963)*, pp. 148, 151.
[313] Greenwood, *89 W. Va. L.R. 933 (1987)*, p. 943.
[314] S.C.O.R. 22nd yr. 1347th mtg, para 30.
[315] Doc. S/11011, S.C.O.R. 28th yr. Suppl. for Oct.-Dec. 1973.

that although Israel had become aware that such an attack had been imminent she made it clear that she would not herself initiate military action.

(iv) States that have had information or very compelling fear that they would be the target of an attack by another State, have decided to expose the intention of the alleged aggressor by referring the matter to the Security Council rather than launching an attack against the alleged aggressor.

Thus, the Government of the Republic of Guinea (which had been the victim of a mercenary attack sponsored by Portugal in November 1970) requested an emergency meeting of the Security Council to consider "... an imminent military aggression by Portugal against the Republic of Guinea..." which was alleged on the basis of intercepted radio transmissions from the headquarters of the Portuguese Colonial Army in Guinea-Bissau [316] . The Council adopted Security Council resolution 295 (1971) of 3 August 1971 by virtue of which a Special Mission was dispatched to Guinea to investigate and report on the situation on the spot. In its report the Mission appreciated the concern of the Guinean Government for possible armed action against Guinea, especially in view of the prior mercenary attack [317] .

A similar resort to the Security Council was had by the Viet-Namese Government alleging an imminent attack by China when the border clashes between the two countries occurred in 1979 [318] .

Lastly, in a letter dated 1 April 1982 from the representative of the U.K. to the President of the Security Council, it was stated that the U.K. had good reason to believe that the armed forces of Argentina were about to attempt to invade the Falkland Islands, and an urgent meeting of the Security Council was requested [319].

Although reference to the Security Council of a State's concern that an attack upon it is imminent does not constitute a panacea with regard to preventing an aggression, the fact that the situation becomes publicised

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[316] Letter dated 3 August 1971 from the representative of Guinea to the President of the Security Council, Doc. S/10280, S.C.O.R. 26th yr. Suppl. for July-Sept. 1971, p. 41.

[317] Doc. S/10309 and Rev.1 of 15 September 1971, S.C.O.R. 26th yr. Special Suppl. No 4. In a statement of the President of the S.C. on behalf of all its Members the report was endorsed and it was affirmed that "... the territorial integrity and political independence of the Republic of Guinea must be respected..."; issued at the 1603rd mtg of 30 November 1971, Resolutions and Decisions of the Security Council 1971, S.C.O.R. 26th yr. , p. 5.

[318] Letter dated 10 February 1979 from the Foreign Minister of Viet-Nam to the President of the Security Council, Doc. S/13077, S.C.O.R. 34th yr. Suppl. for Jan.-March 1979, p. 55.

[319] Doc. S/14942, S.C.O.R. 37th yr. Suppl. for April-June 1082, p. 2.

might be sufficient to dissuade the putative aggressor from carrying out his plans. Mr. Camara, the Minister of Foreign Affairs of the Republic of Guinea, stated to the Special Mission that investigated the alleged imminent attack by Portugal against his country:

> "... At the same time our enemies knew that the Security Council had been informed of the matter and that the time had proved to be unsuitable. That is why they had to put off the attack to a later date..."320

(v) Apart from reference to the Security Council a country that believes itself to be under the threat of attack is entitled to take all necessary measures for the preparation of its defence 321. Such contingency may help deprive the alleged aggressor from the benefit of surprise and is very likely to disrupt his plans. During the meetings of the Security Council Special Mission with members of the Guinean Government, one of the members of the Mission, Mr. Tomeh of Syria enquired why, although it had been alleged imminent, there was no aggression; to this the Minister for Foreign Affairs replied:

> "... That can be explained by the fact that at the same time as we informed the Security Council we also ordered the general mobilisation of the people and we sent messages to alert all defensive positions on the border and inside the country, so the aggressor knew that we were ready for him and would have to change the date planned for the attack..."322

Furthermore, the prospective victim may request military assistance on the part of his allies as part of preparing his defence against the allegedly impending attack. Thus in the aftermath of the Iraqi invasion of Kuwait on 2 August 1990, King Fahd of Saudi Arabia fearing an imminent threat of invasion of his country by Iraq, requested on 7 August 1990 the dispatch of U.S. and other troops to the territory of the Kingdom 323 .

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320 Doc. S/10309 and Rev.1, S.C.O.R. 26th yr. Spec. Suppl. No 4, p. 26.

321 This contingency, as the Italo-Ethiopian conflict of 1935 illustrates, may itself serve as a ground for anticipatory action on the part of the putative aggressor , and it might be held to constitute an illustration of the paranoic consequences of admitting the legality of the doctrine of anticipatory self-defence in contemporary international law.

322 *Supra* n.320.

323 Keesing's 1990, pp. 37636, 37638; S/P.V. 2934, 9 August 1990, statement by Mr. Pickering (U.S.A.), in Lauterpacht & others (eds.) loc. cit. *supra* n.98, p. 105.

It is, therefore, evident from the above that the the requirement of "instant and overwhelming necessity" of self-defence is simply absent in cases of alleged imminent attack.

Thirdly, the leading proponents of anticipatory self-defence point out at the existence of an "imminent" , in the sense of "impending" attack [324] . It is submitted that if an attack is characterised as "impending", namely, as about to start in the sense that the the next act of the prospective aggressor would be an act of armed force, then discussion must turn to the question of whether the armed attack has indeed commenced. Indeed, this appears to be a preferable solution to an *a priori* adherence to the concept of anticipatory self-defence because it is compatible with the terms of Article 51 of the Charter and avoids the eventuality of a grave breach of peace based on the highly speculative character of anticipatory action. Hence, attempts to justify anticipatory defence on the basis of State practice formulated in terms of " if Nazi Germany had been attacked before 1 September 1939 there would not have been a Second World War" or "if the Japanese fleet had been bombed while it had been sailing in the North Pacific there would not have been any Pearl Harbour", simply constitute intellectual exercises in futility [325] . Such a method purports to rely on certain instances of State practice that have the position of consummated facts, and by restructuring them by way of hypothesis, to arrive to the conclusion of the desirability of anticipatory self-defence - a line of argument that this author finds quite untenable.

Moreover, claims of "imminence" of an attack entail the extremely difficult determination of the precise content of the intention of a Government [326] . That the Japanese Government had drawn plans for attack against the Netherlands East Indies was supported by evidence that was revealed after the end of the Second World War and was submitted before the the Military Tribunal for the Far East. It was thus only *retroactively* established that the Netherlands had in fact resorted to

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[324] See *supra* n.302, Waldock loc. cit. p. 498; Bowett op. cit. p. 189; Wright, *98 H.R.C. 5 (1959 III)*, p. 167; McDougal & Feliciano op. cit. p. 231; Fawcett loc. cit. pp. 361-3; Shapira, *6 Israel L.R. 65 (1971)*, p. 74; Schachter, *82 Mich.L.R. 1620 (1984)*, p. 1634; id. *53 Univ. Chic. L.R. 113 (1986)*, p. 136; id. *83 A.J.I.L. 259 (1989)*, p. 267; W.T. Mallison-S.V. Mallison, *15 Vand. J. Trans. L. 417 (1982)*, 429; Joyner & & Grimaldi, *25 Va.J.I.L. 621 (1985)*, p. 659; McDougal, *57 A.J.I.L. 597 (1963)*, p. 598; W.T. Mallison, *A.S.I.L. Proceedings 174 (1983)*, p. 177; McCredie, *19 Case W. Res. J.I.L. 215 (1987)*, p. 232; Sullivan, *10 ASILS. I.L.J. 169 (1986)*, p. 177.

[325] Dinstein op. cit. *supra* n.22, p. 180; Feinstein, *11 Israel L.R. 516 (1976)*, p. 530.

[326] Brownlie op. cit. *supra* n.22, p. 259.

defensive action [327] . In fact, State practice reveals that the determination of the "imminence" of the attack, in the sense mentioned *supra* , can never be safely established in advance (a situation that constitutes the most essential feature of anticipatory self-defence) but always *ex post facto* . In reality what seems to be the position is that the "impending" nature of an attack lies entirely with the would be aggressor, who may modify his plans at will, often according to the degree of preparedness of the prospective victim. Thus Mr. Ismaël Touré, Minister of Financial Affairs of Guinea, explained to the S.C. Special Mission that his Government thought that an attack was "imminent" because of information about troops positioned along the frontier with Guinea-Bissau and ready to launch the assault. When, however, he was asked, why, if the attack had been imminent, it had not taken place so far, he conceded that there must have been "... changes according to the conditions on the aggressor's side and also according to conditions in Guinea..."[328] .It is worth mentioning that in the view of Mr. Tomeh of Syria, "imminent" meant "... that something is to happen very shortly, perhaps in a day or two..."; Mr. Touré, however, was not very precise when he said that "... when we refer to the period of gestation or imminence of the attack we mean at any time, even tomorrow, the attack could take place... According to all the information we have received, the attack must necessarily take place before the end of this year, or by November 1971 at the latest..." [329] .

Fourthly, the Israel air strike on OSIRAK has signaled a new and extremely dangerous trend towards a theory of "pre-emptive strike". Such theory, on the one hand, effectively abolishes the requirement of "imminence" of an armed attack, and, on the other, the fact that the traditional concept of anticipatory self-defence constitutes the archetypal theoretical basis, may serve as an illustration of the degeneration and abuse of the doctrine of anticipatory defence as formulated by Waldock. In fact, traces of a "pre-emptive strike" theory are discernible even in the works of jurists that adhere, in principle, to the requirement of "imminent" attack when the issue of nuclear arms proliferation is discussed [330] . The *raison d' être* of the concept of "pre-emptive strike" is

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[327] Mc Dougal & Feliciano op. cit. *supra* n.22, pp. 231-232.
[328] *Supra* n. 320, pp. 24-25.
[329] Ibid.
[330] Waldock loc. cit. *supra* n.302, p. 498; Bowett op. cit. *supra* n.17, pp. 191-192; McDougal & Feliciano op. cit. *supra* n.22, p. 238 et seq. ; Fawcett loc. cit. *supra* n.302, p. 362; McDougal, *57 A.J.I.L. 597 (1963)* ; Phillips, *10 Hous. J.I.L. 275 (1988)*, pp. 291-292; Intoccia, *19 Case W. Res. J.I.L. 177 (1987)*, pp. 203-205.

that force can be legitimately used against a State that constitutes a *potential* author of an armed attack, however distant in the future this possibility might be; the advance in nuclear armaments serves just as the pretext to argue for the admissibility of such resort to force.

Israel launched an air strike and destroyed OSIRAK, Iraq's nuclear reactor, on 7 June 1981, because "... A threat of nuclear obliteration was being developed against Israel by Iraq... We were obliged to remove that mortal danger..."[331] . Moreover, according to the Israel Government *The Caroline* incident, that is traditionally cited in support of anticipatory self-defence, cannot sufficiently accommodate present day realities; thus:

> "... To try and apply it to a nuclear situation in the post-Hiroshima era makes clear the absurdity of the position of those who base themselves upon it. To assert the application of the *Caroline* principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence...
>
> ... Indeed, the *concept* of a State's right to self-defence has not changed throughout recorded history. Its scope has, however, broadened with the advance of man's ability to wreak havoc on his enemies. Consequently, the concept took on new and and far wider application with the advent of the nuclear era. Anyone who thinks otherwise has simply not faced up to the horrific realities of the world we live in today, and that is particularly true for small States whose vulnerability is vast and whose capacity to survive a nuclear strike is very limited..." [332]

Some authors have gone so far as to advocate a permissibility of "pre-emptive" force for reasons such as the possession of weapons of mass destruction by smaller States that tend to change the regional balance of power [333] , or, even, the development of defensive military systems that reduce another State's *offensive* military capability ! [334] Furthermore, it is argued that *victory* is better achieved by way of "pre-emptive strike" [335] .

To this very disturbing trend certain points must be raised.

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[331] Statement by the Israel representative before the Security Council, S.C.O.R. 36th yr. 2280th mtg , para 59.

[332] Ibid. 2288th mtg , paras 80, 85; also cf. D'Amato, Israel's Air Strike Upon the Iraqi Nuclear Reactor, *77 A.J.I.L. 584 (1983)*, p. 588; Intoccia, *19 Case W. Res. J.I.L. 177 (1987)*, pp. 203-205.

[333] M. Silverberg, International Law and the Use of Force: May the United States Attack the Chemical Weapons Plant at Rabta ? , *13 Boston Coll. I.C.L.R. 53 (1990)*, pp. 57, 86 et seq. ; R. Zedalis, Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defence, *19 Case W. Res. J.I.L. 129 (1987)*, pp. 149 et seq. ; Phillips, *10 Hous. J.I.L. 275 (1988)*, pp. 291-292.

[334] Zedalis loc. cit. *supra* n.333, p. 162.

[335] Silverberg loc. cit. *supra* n.333, p. 58.

(a) The concept of "pre-emptive strike" has as a result that any plausibility of the serviceability of anticipatory self-defence disappears. If any State has the right to identify potential threats to its security, as it itself perceives it, and resort to force in order to preserve this security - *not* when it is actually threatened by an attack in progress - in order to achieve "victory" (which is also an aspiration of the aggressor), or in order to safeguard its *offensive* capability (rather than protect itself against an actual attack), then it is submitted that one would deal with outright aggression and that the world would be a less safe place even by the 19th century standards [336].

(b) Secondly, and with reference to nuclear weapons, it has always been asserted by the traditional possessors of nuclear armaments that they constituted a "deterrent", namely, that a first strike against them would provoke a nuclear response. This, in turn, implies, first, that if anticipatory self-defence or "pre-emptive strike" are to acquire any meaning their invocation should be confined as among the exclusive group of nuclear powers, and, secondly, that a second strike capability is possible [337] . It is ludicrous to believe that a State that possesses nuclear weapons would invoke anticipatory self-defence against a State that does not have any nuclear weapons at all. The reverse possibility, namely, the resort to anticipatory action against a State that possesses nuclear capability by one that does not, would probably be suicidal for the latter. As for pre-emptive action in order to forestall a nuclear capability programme in progress, like the Israel destruction of OSIRAK, it is merely futile, because it offers no guarantee that the same venture will not resume after a brief delay. Despite the Iraqi Government assurances that OSIRAK was not intended for the manufacturing of nuclear weapons [338] , it became clear in the aftermath of the expulsion of Iraq from Kuwait in February-March 1991,

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[336] The concept of "pre-emptive strike has been rejected by jurists that accept the doctrine of anticipatory self-defence against an "imminent" attack. See Wright, *53 A.J.I.L. 112 (1959)*, p. 117; id. *98 H.R.C. 5 (1959 III)*, pp. 167-168; Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1634; id. *83 A.J.I.L. 259 (1989)*, p. 267; cf. id. 53 *Univ. Chic. L.R. 113 (1986)*, p. 134; Mallison & Mallison, 15 *Vand. J. Trans. L. 417 (1982)*,p. 429; Joyner & Grimaldi, *25 Va.J.I.L. 621 (1985)*, p. 659; McCredie, *19 Case W. Res. J.I.L. 215 (1987)*, p. 232; Sullivan, *10 ASILS. I.L.J. 169 (1986)*, p. 182; Mallison, *A.S.I.L. Proceedings 174 (1983)*, p. 180; Chayes op. cit. *supra* n.302, p. 65.

[337] Farer loc. cit. in Black & Falk (eds.) op. cit. *supra* n.22, p. 38; Wright, *57 A.J.I.L. 546 (1963)*, p. 561.

[338] During the S.C. debate the Iraqi Government strongly emphasised that Iraq had been party to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and that had agreed to the imposition of I.A.E.A. safeguards on all Iraqi nuclear activities; S.C.O.R. 36th yr. 2280th mtg , para 37.

that Iraq had developed an advanced research programme which would enable her to produce nuclear weapons. This indicates that the Israel strike was far from from rendering the Middle East "a safer place" [339] ; instead, it would not surprising if the Israel action intensified Iraqi hostility and galvanised Iraq towards producing nuclear weapons [340] .

A fifth objection with regard to the right of anticipatory self-defence is that it is impossible to apply the rule of proportionality in view of the absence of any positive action on the part of the putative aggressor [341] . The massing of troops and the conduct of military preparations offer no indication of the actual amount of force that will be eventually employed. Instead the result of action in anticipatory self-defence is to effectively render the rule of the prohibition of the use of force nugatory [342] . A practical result of admitting anticipatory self-defence would be to dispense with the distinction between self-defence and reprisals; indeed this seems to be the reasoning behind the "accumulation of events" theory [343] . Furthermore, in so far as the admissibility of anticipatory action is purported to be based on the terms of Article 51, namely, in terms of an exception to the rule of Article 2(4), it entails the contradictory result of a permanent suspension of the rule of Article 2(4) which is imposed unilaterally. This is manifested in the practice of continuing military occupation or the establishment of the so-called "security zones" on the territory of other States - see the practice of Israel with regard to the West Bank of the Jordan River, the Gaza Strip and Southern Lebanon [344] . In addition, it is submitted that as along as anticipatory defence could be exercised collectively [345] , then it is necessary to ascertain that the "impending" use of force really constitutes an armed attack. It must be born in mind that the Court in the *Nicaragua Case* ruled that collective self-defence can be exercised only if an armed attack occurs, while any use of force short of an armed attack can be repelled by taking proportionate counter-measures on the part of the victim State alone. While anticipatory action in case of individual self-defence and counter-measures may be

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[339] *Supra* n.331.
[340] Farer loc. cit. *supra* n.337, p. 41.
[341] Brownlie op. cit. *supra* n.22, pp. 259, 261-262; *cf.* Higgins, *37 B.Y.I.L. 269 (1961)*, p. 301.
[342] Wehberg, *78 H.R.C. 7 (1951 I)*, pp. 81-82; Brownlie, *37 B.Y.I.L. 183 (1961)*, p. 227; Zourek op. cit. *supra* n.22, pp. 105-106.
[343] Botha, *11 S.A.Y.I.L. 138 (1985-86)*, p. 150.
[344] Brownlie loc. cit. in Butler (ed.) op. cit. p. 25; cf. Greig, *40 I.C.L.Q. 366 (1991)*, p. 397.
[345] This is theoretically feasible and no-one of the authorities supporting the doctrine has expressly ruled out such possibility.

treated in the same fashion, the exercise of anticipatory collective self-defence must be preceded by the finding that what is about to be launched will really be an armed attack. It is submitted that it is impossible to predict that the allegedly imminent use of force shall be, when unleashed, of scale and effects that would amount to an armed attack. This is something which cannot be fully appreciated in the face of anything else but open use of force. It may also be added that the scale of the preparation of the armed forces of the putative aggressor could offer credible ground for arguing that an armed attack is being mounted; still, however, this entails a great deal of speculation that does not involve the element of certainty that is inherent in open violence for a unilateral breach of peace to be excused.

Finally, claims of anticipatory self-defence or "pre-emptive strike" have been persistently objected to by third States and for this reason it is submitted that they do not contribute towards the creation of customary international law. The Six-Day war was justified by Israel as action in self-defence after an armed attack had occurred; it later transpired that Israel had in fact resorted to force first and the Israel Government did nothing to dispel such claim. A number of representatives in the Security Council and the General Assembly expressly condemned the concept of "preventive war" and pointed at its incompatibility with the United Nations Charter [346] . The Israel strike on OSIRAK was met with unequivocal and universal condemnation by the Security Council [347] , the General Assembly [348] and individual States [349].

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[346] G.A. ES-5 (17 June-5 July 1967) G.A.O.R. Fifth Special Emergency Session, Plennary Meetings, Verbatim Records, 1530th plen. mtg , paras 58 (Sudan), 153 (India); 1539th plen. mtg , paras 83 (Spain), 71-72 (Cyprus). S.C.O.R. 22nd yr. 1351st mtg , para 97 (Bulgaria); 1360th mtg , para 54 (Pakistan). The Israel action of 5 June 1967 may also be held to be an illustration of inconsistency of practice that precludes the formation of customary law. In justifying the resort to force the Israel Government relied heavily on inflamatory proclamations and threats uttered by the Egyptian and Syrian Governments against the existence of the State of Israel prior to the outbreak of hostilities; see statement by Mr. Eban, the Foreign Minister of Israel, before the S.C. , S.C.O.R. 22nd yr. 1348th mtg , paras 142-154. It is noteworthy, however, that similar threats by the Israel Government against Syria in the early May of 1967, that prompted the latter to activate the 1966 Mutual Defence Pact with Egypt, were not considered by the former as serious enough to provoke such response; see Ch. Yost, The Arab-Israeli War: How it Began, in *Moore (ed.) The Arab-Israeli Conflict, vol. ii, 1974*, p. 5 at pp. 8-10. In any case it does not appear to be accepted that verbal threats uttered in a period of tension between two States give rise to necessity of self-defence; see statement by Mr. Rossides, the representative of Cyprus, G.A. ES-5, G.A.O.R. Fifth Special Emergency Session, 1541st plen. mtg , para 72.

[347] S.C. Res. 487 (1981) of 19 June 1981.

[348] G.A. Res. 36/27 (109:2:34) of 13 November 1981.

In addition practice reveals that the overwhelming majority of States seem to refrain from invoking the pleas of anticipatory defence and "pre-emptive strike". Thus, the U.S. Government specifically refrained from relying on the said doctrine in order to justify the so-called "quarantine" during the Cuban missile crisis [350].

6. *The Reporting of Measures of Self-Defence to the Security Council*.

Article 51 of the Charter provides that "...[M]easures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council...". It is submitted that the above constitutes a requirement that has the position of treaty obligation; the wording "shall be immediately reported" seems to support this contingency [351]. The issue that arises with regard to the content of this obligation is whether non-compliance would invalidate a claim of self-defence. The Court in the *Nicaragua Case* treated the question in the context of customary law and treaty law separately and ruled that:

> ... At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which a State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed ... , a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition for the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors

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[349] S.C.O.R. 2280th mtg , paras 31 (India), 39 (Brazil), 70 (Pakistan); 2286th mtg , paras 15-16 (Guyana), 49 (Turkey); 2288th mtg , paras 115 (Mexico), 141 (Uganda).
[350] Chayes op. cit. *supra* n.302, pp. 63-64.
[351] Bowett op. cit. supra n.17, pp. 197-198; Tünnermann Bernheim, *11 Yale J.I.L. 104 (1985-86)*, pp. 135, 136 n.183. *Contra* Greig, *40 I.C.L.Q. 366 (1991)*, p. 385 et seq.

indicating whether the State in question was itself convinced that it was acting in self-defence. ... 352

Judge Schwebel, on the other hand, took the view that:

"... All this said, there remains under the Charter of the United Nations, a literal violation of one of its terms. The term in question is a procedural term; of itself it does not, and by the terms of Article 51, cannot, impair the substantive, inherent right of self-defence, individual or collective. The measures of the United States in assisting El Salvador by, among other means, applying force against Nicaragua, are not transformed from defensive into aggressive measures by the failure to report those measures to the Security Council. But there is nevertheless a violation of an important provision which is designed to permit the Security Council to exert its supervening authority in a timely way. .... the international community at large, as represented by the Security Council, has an interest in the maintenance of international peace and security which should not be pre-empted by the failure of a State to report its defensive measures to the Security Council. ..." 353

It is submitted that despite the fact that the pronouncement of the majority of the Court seems quite obscure, there is more room for agreement rather than dissent between the Judgment and Judge Schwebel's opinion.

It may be that there is no obligation in customary international law to report measures of self-defence to the Security Council, but what is in strict terms only a treaty obligation, its function and its aim is to realise a requirement that is part of both customary law and the Charter, namely, that no State is the sole and final judge of its action in self-defence 354 . With regard to Article 51 of the Charter authority seems to be in agreement that the importance of reporting measures of self-defence to the

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352 I.C.J. Rep. 1986, p. 14, at p. 105, para 200.

353 Ibid. *per Judge Schwebel* , p. 376, para 227.

354 Lauterpacht, *The Function of Law in the International Community, 1933*, pp. 177-180; Judgment of the International Military Tribunal at Nuremberg, part 22, H.M.S.O. 1950, p. 436; I.C.J. Rep. 1986, p. 14, at pp. 27-28, paras 34-35; id. *per Judge Lachs*, pp. 502-504; id. *per Judge Schwebel*, pp. 285-287, paras 46-50, but *cf* . pp. 287-296, paras 51-77; Schachter, *83 A.J.I.L. 259 (1989)*, p. 260 et seq. ; Dinstein op. cit. *supra* n.22, pp. 193-194; Kahn, *12 Yale J.I.L. 1 (1987)* . *Contra* . I.C.J. Rep. 1986, *per Judge Oda*, pp. 555-558. It must be noted, however, that the inadmissibility of exclusive judgment on the part of a State that resorts to force in self-defence is realised through the reporting requirement to the Council only with regard to its political dimensions. In other words, irrespective of the merits in law of an action allegedly in self-defence, resort to force under this justification entails a breach of international peace. As such it must be addressed by the Security Council and measures, such as a call for a cease-fire, may be adopted. But this does not imply, nor has it ever been the case in practice, that the Council has itself exclusive competence at adjudicating each party's legal rights in respect of resort to force in self-defence, rather than an international tribunal. See *supra* Ch. 8, p. 207 n. 38. Also see E. Lauterpacht, *Aspects of the Administration of International Justice, 1991*, pp. 37-48, 112-114.

Council fulfils exactly the above contingency and *a fortiori* reinforces the fact that the right of self-defence is only an exceptional right and the primary responsibility for the maintenance of international peace and security lies with the United Nations Security Council [355].

The implication in the Court's Judgment that failure to report measures of self-defence may affect the lawfulness of resort to self-defence must be treated with some scepticism. Indeed, the subsequent passage in the Judgment suggests that, although not required by customary law, the report of action in self-defence to the Security Council could have evidential value in respect of the genuine nature of a State's belief that it is acting in self-defence [356]. Thus, if the reporting obligation under Article 51 is treated as a *sine qua non* for the lawfulness of resort to force in self-defence and at the same time is given a subsidiary position in customary law, despite the fact that it can be altogether disregarded, this amounts to saying that a right whose genesis and requirement of performance are identical in customary and treaty law may be legally invalidated by the non-observance of a requirement of a treaty but not of customary law. The validity of a claim of self-defence is really based on the examination of whether there exists a necessity of self-defence and whether resort to force took place in a proportionate fashion. This examination may be carried out by the Council, by way of adjudication, and by the members of the international community individually. With regard to the Council it is set in train by the report of measures of self-defence. An obligation to report is therefore an obligation of procedure and not of substance as to the lawfulness of action in self-defence [357]. Still, it is an important obligation the violation of which, although it does not affect the substance of claims of self-defence, may incur scepticism as to the genuineness of a claim of self-defence. Scepticism, however, does not imply either acceptance or rejection of such claims. Furthermore, State practice shows that, though States do not usually report in detail individual measures taken during armed action allegedly in self-defence, they consistently report resort to force in self-defence. The ideal position in accordance with Article 51 is illustrated by the scrupulous communication by the U.K. to the Council of

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[355] Wehberg, *78 H.R.C. 7 (1951 I)*, p. 83; Waldock, *81 H.R.C. 455 (1952 II)*, pp. 495-496; McDougal & Feliciano op. cit. *supra* n.22, p. 220; Higgins, *37 B.Y.I.L. 269 (1961)*, p. 304; Schachter loc. cit. *supra* n.354, pp. 263-265; Reichler & & Wippman, *11 Yale J.I.L. 462 (1985-86)*, p. 471; Rowles, *80 A.J.I.L. 568 (1986)*, p. 577.

[356] Higgins, *37 B.Y.I.L. 269 (1961)*, p. 306 n.1.

[357] Dinstein op. cit. *supra* n.22, pp. 198-199; Grieg, *40 I.C.L.Q. 366 (1990)*, p. 384 et seq.

the measures adopted against Argentina in the Falklands. The identification of the particular measures allegedly taken in self-defence, in case the defending State does not furnish them (and this constitutes the rule), may be provided by the target State, or fact finding missions (see, for instance, the statements made before the Council by the various Chiefs of Staff of U.N.T.S.O. in Palestine), or mass media, or third States.

It can therefore be concluded that the lack of any report to the Security Council of action which is purported to be defensive, or of the precise measures taken in the pursuit of such action does not affect the final judgment on the legality or not of action in self-defence. This, however, does not warrant any claims of justifying such failure to report on the basis of the nature of the allegedly defensive measures. Thus, Judge Schwebel took the view that the U.S. had the right not to report to the Council its assistance to the contras because it was covert [358] . It may be argued in reply to this assertion that in so far as covert action is concerned, it is by its nature non ascertainable and it appears to constitute an attempt at defeating the aim of the reporting requirement, namely, that no State is the sole judge of its action in self-defence and consequently it may constitute a repudiation of self-defence as an exceptional instance of use of force [359] .

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[358] I.C.J. Rep. 1986 (*per Judge Schwebel*), pp. 373-374, paras 221-224.

[359] Dinstein op. cit. *supra* n.22, p.198; Kahn loc. cit. *supra* n. 354, pp. 28-29; Rowles loc. cit. *supra* n. 355.

Second Title: PROPORTIONATE COUNTER-MEASURES AGAINST INSTANCES .OF USE OF FORCE SHORT OF AN 'ARMED ATTACK'.

In the Judgment on the Merits of the *Nicaragua Case* [1] the following passages occur:

> ... As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force(those constituting an armed attack) from other less grave forms.....[2]
>
> ... When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question: if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs ? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. ....[3]
>
> ... The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when the wrongful act is not an armed attack. In the view of the Court, under international law in force today - whether customary international law or that of the United Nations system - States do not have a right of "collective" armed response to acts which do not constitute an "armed attack". ....[4]
>
> ... While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force...[5]

1. *The concept of "Counter-Measures" in International Law .*

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[1] I.C.J. Rep. 1986, p.14.
[2] Ibid. p. 101, para 191.
[3] Ibid. p. 110, para 210.
[4] Ibid. p. 110, para 211.
[5] Ibid. p. 127, para 249.

The reference in the Court's Judgment to "counter-measures" against a use of force that does not amount to an "armed attack" renders necessary a discussion of the content of the term.

The term "counter-measures" is relatively novel in the literature and theory of international law. Prior to the *Nicaragua Case* the term has been used, mainly, in the context of non-forcible punitive retaliatory action.[6] This, however, does not seem to indicate that "counter-measures" has evolved into a term of art indicative of the concept of reprisal. The literature emerging on the subject suggests that counter-measures may constitute a generic term which describes State responses against a wrongful act committed by another State, the purpose of which varies considerably. Thus, "punishment" in the sense of an act of reprisal is not but one of the aims of counter-measures the others being self-protection, reciprocity, suspension or termination of a treaty, inducement to settling a dispute.[7]

It is submitted that counter-measures serve to describe, as a matter of terminology, a general category of acts that preclude the international responsibility of the State that resorts to them in a variety of factual situations, and such acts, are each one of them individually subject to regulation, with regard to its legitimacy and requirements of performance, by the law in force. In its Commentary on Art. 30 of Part 1 of the Draft Articles on State Responsibility the I.L.C. stated that:

> ... It is only, and this should be emphasized, when the countermeasure in question can be described as legitimate - permissible under international law and taken in accordance with the conditions laid down in international law - that it can be valid as a

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[6] *Case Concerning the Air Services Agreement of 27 March 1946, United States of America v. France,* 54 I.L.R. 303; *Case concerning United States Diplomatic and Consular Staff in Tehran, United States of America v. Iran, I.C.J. Rep. 1980 p.3* at p. 27, para 53; I.L.C. Commentary on the Draft Articles on State Responsibility, I.L.C. Ybk 1979 vol. II, Part Two, p. 115 at p. 116, para 3; Fourth Report on the content, forms and degrees of international responsibility (part 2 of the draft Articles) by Mr. W. Riphagen, Special Rapporteur, Doc. A/CN. 366 and Add. 1, I.L.C. Ybk 1983 vol II, Part One, pp.3-25, at p. 17; Malanczuk, Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility, *43 Z.a.ö.R.V.705 (1983)*,pp. 715-723, cf. pp.724-735; Elagab, *The Legality of Non-Forcible Counter-Measures in International Law, Oxford 1988,* p. 4; Alland, International Responsibility and Sanctions: Self-Defence and Countermeasures in the I.L.C. Codification of Rules Governing International Responsibility, in *M. Spinedi and B. Simma (eds.), United Nations Codification of State Responsibility, 1987,* p.143 at p. 146; *cf* . Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures,* 1984, pp. 62-3, 75.

[7] Elagab op. cit. *supra* n.6, pp. 3-5, 44-7; Zoller op. cit. *supra* n. 6 pp.4-44, 46, but cf. id. at pp. 62-3, 75; Fourth Report by Riphagen loc. cit. *supra* n. 6 at pp. 17-18.

circumstance precluding the wrongfulness of conduct of of the State not in conformity with what, under other conditions, would be required of it by an international obligation...8

Consequently, the concept of *exceptio non adimpleti contractus*, namely, the unilateral suspension or termination of a treaty in case of breach of obligation under the treaty by another party thereto, is legitimate and regulated by Article 60 of the 1969 Vienna Convention on the Law of Treaties9 . Similarly, the concept of economic reprisals is legitimate because economic coercion is not prohibited by Article 2(4) of the Charter or the customary law prohibition of the use of force, and their application is regulated by international arbitration precedents such as the *Naulilaa* and the *U.S.A. v. France* Awards 10 .

Unfortunately, the Commission went on to ultimately identify counter-measures with acts whose ".... object is to inflict punishment or to secure performance..."11 . This established a regrettable deviation from the general thesis of "legitimacy" cited *supra* that had as a result that the focus of its work fell exclusively on the notion of "reprisals" as legitimate counter-measures12 .

Still, however, it is not conclusive that the Commission envisaged counter-measures exclusively as unilateral acts of reprisal, for it expressly included sanctions undertaken in pursuance of decisions of international organisations in the concept of reprisals under Art. 30 of the Draft13 . Moreover, Special Rapporteur Riphagen, though himself inclined to consider the concept of counter-measures in the context of reprisals, strongly suggests in his Fourth Report on Part 2 of the Draft Articles on State Responsibility that counter-measures is a wider concept than that of punitive retaliation. It is stated that "... [U]nder the terms of Article 30 of part 1 of the draft articles on State responsibility, the reprisal is a legitimate counter-measure which precludes the wrongfulness of the act..."14 .

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8 I.L.C. Ybk 1979 vol. II, Part Two, pp. 115-116, para 2.
9 Malanczuk loc. cit. *supra* n.6 p.721; cf. Fourth Report by Riphagen loc. cit. *supra* n.6 p.17 paras 92-93.
10 Eighth Report by Special Rapporteur Ago, I.L.C. Ybk 1979 vol.II, Part One p.39, para 81.
11 I.L.C. Commentary, supra n. 8 paras 3-4.
12 Eighth Report by Ago, *supra* n.10 p. 39 para 79; I.L.C. Commentary, *supra* n. 8, p. 116; Fourth Report by Riphagen *supra* n.6, p.17; Alland loc. cit. p. 147; Malanczuk loc. cit. p.717.
13 I.L.C. Commentary, *supra* n.8, p.119 paras 13-14.
14 *Supra* n.6, p.17 paras 92-95. The same Rapporteur in his preliminary Report (I.L.C. Ybk 1980 vol.II Part One, p. 107, Doc. A/ CN.4/330) drew up a "catalogue" of likely relationships due to a State's wrongful act that included "... the duty to make reparation in its various forms, non-recognition, *exceptio non adimpleti contractus*, and other counter-measures...", ibid p.5 para 9; *cf*. Alland *supra* n.12.

2. *The Concept of Counter-Measures in the Context of the Law on the Use of Force .*

The Judgment of the International Court in the *Nicaragua Case* appears to reinforce the submission that counter-measures are not and should not be considered a term of art. The notion was considered in the context of the use of armed force by States, and more specifically, in the context of the right self-defence as an exception to the rule of the prohibition of the use of force. The Court dealt with the invocation by the United States of the right of collective self-defence in support of the Government of El Salvador against the alleged material support rendered by Nicaragua to the Salvadorean guerrillas. The United States offered the plea of collective self-defence in justification for its provision of material support to the *contra* insurgents fighting against the Government of Nicaragua. The Court rejected the United States plea of collective self-defence by, first, drawing a distinction between uses of force that amount to an "armed attack" and uses of force that do not[15] . It then proceeded to rule that the right of individual and collective self-defence was to be exercised only in the event of an "armed attack", while in any other instance of use of force the victim State has a right to take proportionate counter-measures against the author of the use of force[16] . According to the Judgment, an "armed attack" constitutes the use of armed force by the regular armed forces of a State or by armed bands if such action "... because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident..."[17] . It has been subsequently held that assistance to insurgents in the form of provision of weapons, training and logistical support constitutes a use of force *short of* an armed attack, while the provision of financial assistance constitutes mere intervention in the internal affairs of the victim State[18] . Furthermore, the laying of mines in the territorial and internal waters of Nicaragua was ruled to constitute a violation of the principle of the use of force- again short of an armed attack[19] .What becomes clear from the Judgment of the Court is, that in

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[15] *Supra* n. 2.
[16] *Supra* notes 4, 5.
[17] I.C.J. Rep. 1986, p. 103, para 195.
[18] Ibid. p. 119, para 228; cf. ibid. (*per Judge Jennings*)p. 543; contra ibid.(*per Judge Schwebel*) pp. 344-5,347-8, paras 167-8,172-3.
[19] Ibid. p. 128, para 251.

cases of use of force which does not amount to an armed attack the victim State has a right to resort to proportionate counter-measures on the international plane *individually only*, and not collectively with the assistance of another State[20] . This can be, moreover, inferred from the fact that the Court appears to admit, at least in situations of insurgency, the right of the victim State to receive outside military assistance from another State within its own territory[21]. It can also be inferred from the Judgment that counter-measures against mere uses of force could entail the use of armed force[22] . It is submitted that this is based on the character of proportionate counter-measures as defensive measures. The concept was treated as "analogous" to self-defence when the Court dealt with the United States plea of collective self-defence in support of the Government of El Salvador[23] . This plea was subsequently rejected[24] . It was ultimately held, however, that El Salvador - as well as Honduras and Costa Rica - had the right to exercise proportionate counter-measures individually only[25] . If the inadmissible necessity for collective action in counter-measures is established in the context of defensive action, then the necessity for individual action by the victim State, which indeed purportedly serves as the basis for the collective one and *is* lawful, is *a fortiori* of the same defensive character. Furthermore, if the fact that the I.L.C. had previously dealt with reprisals as a form of counter-measures and expressly rejected the notion of forcible punitive retaliation[26] is considered in conjunction with the appearance of the term in its generic form and unqualified as to its precise nature, in a Judgment of the International Court pertinent to the use of armed force, it is very likely that a flawed impression of an express sanctioning of lawfulness of armed reprisals might be created. Such a contingency has been expressly addressed by Judge Nagendra Singh in his Separate Opinion in the *Nicaragua Case*; he stated that:

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[20] Akehurst, Nicaragua v. U.S.A. , *27 I.J.I.L. 357 (1987)* p. 372; Farer, Drawing the Right Line, *81 A.J.I.L. 112 (1987)* p. 113.
[21] I.C.J. Rep. 1986, p. 126, para 246; Akehurst loc.cit. *supra* n. 20, p. 373.
[22] I.C.J. Rep. 1986, p. 124, para 241; ibid. *(per Judge Schwebel)* pp. 348-350, paras 174-175, 177; J.F.Murphy, *State Support of International Terrorism, Legal, Political and Economic Dimensions, 1989*, pp.103-4; Dinstein, *War, Aggression and Self-Defence, 1988*,p. 183; N.D. White, The Legality of Intervention Following the Nicaragua Case, *9 Intern. Rel. 535 (1989)* p. 543; J.L. Hargrove, The Nicaragua Judgment and the Future of the Law of Force and Self-Defense, *81 A.J.I.L. 135 (1987)* p.138; Akehurst, 27 I.J.I.L. 357 (1987) p. 371; Farer, 81 A.J.I.L. 112 (1987) p. 113.
[23] I.C.J. Rep. 1986, p. 110, para 210.
[24] Ibid. para 211.
[25] Ibid. p. 127, para 249.
[26] I.L.C. Ybk 1979 vol. II, Part Two, p. 118, paras 10-11.

...The logic behind this extension of the principle of non-use of force to reprisals has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War...[27]

In addition, the fact that counter-measures must be legitimate on the basis of already existing international law, as to their admissibility and requirements of performance, and that unilateral resort to force is legitimate only in the exercise of the right of self-defence both indicate that counter-measures may entail the use of armed force so long as they are resorted to in conformity with the conditions of the exercise of self-defence; namely, that there is a necessity giving rise to to the exercise of protective action and that the latter must be proportionate to the danger that must be repelled. It must be pointed that, although the exercise of the right of self-defence may be pursued by non-forcible means[28], any use of force in circumstances other than of defensive necessity creates a presumption of illegality. This is implicit in the *U.S. - France Award* that stated:

... If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through countermeasures...[29]

It is, therefore, submitted that the distinction between resort to force in individual or collective self-defence against an "armed attack", and resort to force in proportionate counter-measures against uses of force short of an armed attack, is not a one concerning genre for both actions are defensive in nature. It is not even a distinction concerning proportionality for this is merely a requirement of performance in

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[27] I.C.J. Rep. 1986, p. 151.

[28] Bowett,The Interrelation of Theories of Intervention and Self-Defence, in J.N.Moore(ed.) *Law and Civil War in the Modern World, 1974*,p. 38 at p. 40; id. *13 Va.J.I.L. 1 (1972)* at pp. 7-8.

[29] 54 I.L.R. 303 at p. 337, para 81; Bowett, *Self-Defence in International Law, 1958*, p.258; Brownlie, *International Law and the Use of Force by States,1963*, pp. 279, 366, 372-5; M.Sørensen, Principes de Droit International Public, *101 H.R.C. 5 (1960 III)* p. 240; E.S.Fawcett, General Course on Public International Law, *132 H.R.C. 362 (1971 I)* pp. 500-1;T. Franck, Some Observations on the I.C.J.'s Procedural and Substantive Innovations, *81 A.J.I.L. 116 (1987)* p.120; R.St.J. Macdonald, The Nicaragua Case: New Answers to Old Questions?, *xxiv Can.Y.I.L. 127 (1986)* p. 145; T.A. Phillips, Exchanging Excuses for Uses of Force- The Tug of War in the Persian Gulf, *10 Hous.J.I.L. 275 (1988)* p.292.

exercising force after a defensive necessity has arisen[30]. It is, rather, a distinction as to the precise kind of necessity to defend oneself as dictated by the kind of use of force that faces the victim State; more specifically, it concerns the precise nature of the danger that faces the victim State - both qualitatively and quantitatively - and the precise nature of its object[31] . On the other hand, it must be stressed that in the above instances of legitimate uses of defensive force the object that needs to be protected is always a State (as a territorial and political unit); as for the perpetrator of the use of force that warrants protective action it is either a State or a group of private individuals. It is indicated by the the wording of Art. 2(4) of the Charter, the principle of non-use of force in General Assembly resolution 2625 (XXV) and of Art.1 of the Definition of Aggression, G.A. 3314 (XXIX), that the rule of the prohibition of the use of force is addressed to States only; again the objects of the prohibition are States (as territorial and political units) or the destruction (not the promotion) of the purposes of the United Nations. As for the latter it seems that only the exercise of the right of self-determination of peoples under colonial or alien domination is covered by the prohibition- viz. General Assembly resolution 2625 (XXV). It is not force against the above peoples as such that is prohibited; it is force which is intended to or results in the deprivation of the said peoples' right of self-determination. That various colonial peoples have in the past resorted to armed struggle against their administering powers simply because of the

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[30] *Cf* . Dinstein op.cit. *supra* n. 22, pp.181-3; N.D. White loc.cit. *supra* n. 22, p.541 n.28.
[31] Farer *81 A.J.I.L. 112 (1987)*, pp. 113-4; Macdonald *xxiv Can.Y.I.L. 127 (1986)* p.148 but *cf.* ibid. at p. 145; Rifaat, *International Aggression, 1979*, p.125; Brownlie op. cit. *supra* n. 29 pp. 327,366; R.A. Falk, International Law and the United States Role in the Viet- Nam War, *75 Yale L.J. 1122 (1966)* pp.1123 n.7, 1157-8; F.M. Higginbotham, International Law, the Use of Force in Self-Defence, and the Southern African Conflict, *25 Col.J.Trans.L. 529 (1987)* pp. 548,555-6; Falk, International Law and the U.S. Role in Viet- Nam: A Response to Professor Moore, *76 Yale L.J. 1095 (1967)* pp.1102-4 but cf. ibid. at 1124-5,1140-2; J.P. Rowles, "Secret Wars", Self-Defense and the Charter - A Reply To Professor Moore, *80 A.J.I.L. 568 (1986)* pp. 579-80; Farer, Intervention in Civil Wars: A Modest Proposal, *67 Col.L.R. 266 (1967)* p. 276; McDougal & Feliciano, *Law and Minimum World Public Order, 1961*, pp. 196-202 and id. Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective, *68 Yale L.J. 1057 (1958-59)* pp. 1115-9. *Cf.* Ch. C. Joyner& M.A. & Grimaldi, The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention, *25 Va.J.I.L. 621 (1985)* pp. 662-3, 665; T.D. Gill, The Law of Armed Attack in the Context of the Nicaragua Case, *1 Hague Y.I.L. 30 (1988)* pp. 50-1.
Contra: Bowett op. cit. *supra* n.29 pp.256-8 and loc. cit. in Moore (ed.) op. cit. *supra* n. 28 p. 40; Dinstein op. cit. *supra* n. 22 p. 182; J.N. Moore, International Law and the United States Role in Viet- Nam: A Reply, *76 Yale L.J. 1051 (1967)* pp. 1055, 1075 but cf. pp. 1067,1076; id. The Secret War in Central America and the Future of World Order, *80 A.J.I.L. 43 (1986)* pp. 87 n.183, 88-9, 105-7, 114.

latters' disinclination to relinquish their rule cannot be characterised as defensive action by way of exception to the rule of the prohibition of force. An exception to a rule pertinent to States only, implies that it aims at the benefit of States only. State practice seems to support the above argument in that attempts by the developing and socialist States made during the drafting of G.A. Resolutions 2625 and 3314 to justify the armed struggles of various colonial peoples as exercises of the right of self-defence were met with persistent objection on the part of Western and Latin American States and cannot be held to represent customary law[32].

3. *Situations Creating the Necessity of Proportionate Counter-Measures*.

Force can be used by the regular armed forces of a State or private individuals. There is not the slightest difficulty in characterising the former as a violation of Art. 2(4) and customary law; for the latter to fall under the same prohibition State involvement must exist in the forcible activities of private individuals. The precise degree of a violation of the rule of the prohibition of the use of force, namely, whether it amounts to an armed attack or mere use of force is the starting point for determining whether the victim State shall resort to force in self-defence or proportionate counter-measures. Moreover, the degree of the violation of the said rule that establishes the defensive necessity to resort to force seems to be a matter of the quality and quantity of the unlawful use of force as well as of its precise object.

The Judgment of the Court in the *Nicaragua Case* has given prominence in the above by ruling that it is the "scale and effects" of an instance of use of armed force that elevates it to the point of being an armed attack[33]. Furthermore, it is always the event of a use of armed force that is an armed attack as indicated by the Court's exclusive reliance on the United Nations Definition of Aggression [G.A. Res. 3314 (XXIX)] that expressly stipulates in Art. 1 that "... [A]ggression is the use of armed force by a State against another State..."[34]. In addition it is always a case of purely State use of force, namely, that both the author and the actual

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[32] H.Wilson, *International Law and the Use of Force by National Liberation Movements, Oxford 1988. Supra* Part One, Ch. 6.
[33] I.C.J. Rep. 1986, p. 103, para 195. Cf. Dinstein op. cit. and N.D. White loc. cit. *supra* n. 30.
[34] N.D. White, *9 Int. Relat. 535 (1989)* p. 538.

source of armed force on the ground is a State[35] . An armed attack is understood to constitute a use of armed force or the initiation of a series of acts of force proximate in time with each other, of considerable magnitude, the object of which is the destruction of the political, or territorial, or economic infrastructure of the target State as such[36] . It is submitted that it is this event that creates the necessity to protect the State as a whole and that gives rise to the exercise of proportionate use of force in individual or collective self-defence.

An armed attack, as any use of armed force, may be perpetrated either directly by the armed forces of the aggressor State or indirectly by way of armed bands. Again the *Nicaragua* Judgment points exclusively at the Definition of Aggression which in Art. 3(a-g) provides a list of possible uses of armed force by States, which though not exhaustive - viz. Art. 2 of the Definition - may be held to represent the most classical and frequent instances of inter-State use of force. A large-scale invasion of the territory of a State by the armed forces of another State, resulting in the occupation of part or of the entirety of the territory of the victim State constitutes a case of armed attack. The invasion and subsequent occupation of Kuwait by the armed forces of Iraq on 2 August 1990 is an illustration of the above contingency; Security Council Res. 661 (1990) of 6 August 1990 reaffirmed in its sixth preambular paragraph "... the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait..."[37] . The activities of armed bands constitute an armed attack by a State against another State only when the former - the aggressor State - is both the author and the source of the use of force[38] . This in its turn indicates that the armed bands are merely an instrument *qua* weapon in the hands of the aggressor State and such a situation exists in the "sending" of guerrillas to invade the territory of another State - e.g.. the sending by Somalia of the Western Somalia Liberation Front (W.S.L.F.) that invaded the Ethiopian province of Ogaden in 1977[39] ; or the "substantial involvement" of the aggressor State in the activities of armed

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[35] *Cf.* O. Schachter, The Extra-Territorial Use of Force Against Terrorist Bases, *11 Hous.J.I.L. 309 (1989)* p. 311.
[36] Brownlie op. cit. *supra* n. 29 pp.278-9, 366; McDougal and Feliciano *supra* n. 31.
[37] Text in E. Lauterpacht, C.J. Greenwood, M. Weller, D. Bethlehem (eds.) *The Kuwait Crisis: Basic Documents vol. 1, Cambridge International Documents Series, 1991*, pp. 88-9.
[38] Brownlie op. cit. *supra* n. 29 pp.372-5 and id. International Law and the Activities of Armed Bands, *7 I.C.L.Q. 712 (1958)* pp. 730-2; Higginbotham *25 Col.J. Trans.L. 529 (1987)* p. 548; Gill *1 Hague Y.I.L. 30 (1988)* p.36 seq.
[39] Keesing's 1977 p. 28634; id. 1978 pp. 28760, 28989-91; I.C.J. Rep. 1986 p. 103 para 195; N.D. White *supra* n. 34.

bands, either by exercising total control over them reducing the guerrilla organisation to a *quasi* Government agent[40] or by enabling a hitherto unarmed political opposition-in-exile to become a potent fighting force that invades and uses force against the victim State - e.g. the invasions of Guatemala in 1954[41] and Cuba in 1961[42] by dissident exiles. Finally, the active participation of a State's regular armed forces on the side of the guerrillas fighting against the Government of another State - viz. the participation of Tanzanian troops on the side of Ugandan exiles fighting against the Government of President Amin[43] and the active assistance offerred by the South African army to the rebel group U.N.I.T.A. against the Angolan Government troops in 1987[44] .

State practice, however, acknowledges the occurrence of certain State activities that take place in circumstances in which no actual danger is posed to the security of the victim State as a whole[45] . Such eventualities create the necessity of being repelled by the use of armed force or simply countered by non-forcible means, that in both instances are protective in character. Whether it is a case of one or the other contingency it depends on whether such activities themselves entail or not the use of armed force.

3. (i). *Non-Forcible State Activities* .

It is submitted that there are two situations in which certain activities do not entail the use of armed force and, therefore, do not create a necessity to resort to protective forcible action against another State.

3. (i). a. *Unauthorised Aerial Intrusions.*

The first situation contemplated under this rubric constitutes of the unauthorised entry of aircraft into another State's air space.

Intrusions by civilian aircraft are generally considered not to give rise to a defensive necessity for the use of armed force and the legitimacy of any measures to terminate the intrusion should be judged by reference

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[40] I.C.J. Rep. 1986, pp. 62-3, paras 109-112; N.D. White *supra* n. 34 p. 541 n. 29.
[41] Keesing's 1952-1954 pp. 13667, 13679.
[42] Id. 1961-1962 pp. 18151-5.
[43] Id. 1979 p. 29671. *Cf. infra* Part Three , Ch. 11, Second Title.
[44] Id. 1987 pp. 35488, 35552; S.C. Res. 602(1987) of 25 November 1987.
[45] Farer, *81 A.J.I.L. 112 (1987)* pp. 113-4; Falk, *75 Yale L.J. 1122 (1966)* p. 1123 n. 7

to existing rules of of international law on civil aviation, and more specifically, to the 1944 Chicago Convention on Civil Aviation[46] and the1971 Montreal I.C.A.O. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[47] .Indeed, the forcible termination of an unauthorised intrusion by civilian aircraft is viewed as a violation of the provisions of the above treaties. In the *Aerial Incident of 27 July 1955 Case (Israel v. Bulgaria, U.K. v. Bulgaria, U.S.A. v. Bulgaria)* the Government of Israel submitted that any violations of Articles 6 (infringement of airspace due to intrusion of international scheduled air services) and 9 (intrusion into a prohibited area) of the 1944 Chicago Convention could be remedied "... without causing an undue degree of physical danger to the aircraft and its occupants..."[48] . On 4 June 1973 Israel was condemned as having acted in breach of the 1944 Chicago Convention for the shooting down of a Libyan passenger aircraft over the Sinai peninsula- then occupied by Israel- on 21 February 1971[49] . In the Security Council debate on the shooting down by Soviet aircraft of the Korean Airlines flight 007 on 31 August- 1 September 1983 the Soviet action was deemed as a violation of the Chicago Convention[50] . On 17 May 1989 Iran instituted proceedings against the U.S.A. ,for the shooting down of the Iranian Airways flight 655 by a U.S. warship over the Persian Gulf on 3 July 1988, for violation of the 1944 Chicago and 1971 Montreal Conventions[51] .

Furthermore, the use of armed force against civilian aircraft has been considered inadmissible as unnecessary. In the *Aerial Incident of 27 July 1955 Case* the Government of the United Kingdom submitted the following:

> ... there can be no justification in international law for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters without previous authorisation the airspace above the territory of that State...[52]

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[46] U.N.T.S. vol. 15 pp. 296-363.
[47] *10 I.L.M. 1151 (1971).*
[48] I.C.J. Pleadings *1959*, p. 87 ,*para 66*.
[49] *12 I.L.M. 1180 (1973)*
[50] See statements by the Japanese and Australian delegates, *22 I.L.M. 1114 (1983)* , pp. 1116, 1118.
[51] Application Instituting Proceedings, filed on 17 May 1989, *Aerial Incident of 3 July 1988, Iran v. U.S.A. , 28 I.L.M. 843 (1989)* , pp. 845-6.; S.C Res. 616 (1988) of 20 July 1988.
[52] I.C.J. Pleadings 1959, p. 358, para 66; statement of the Japanese representative *supra* n.50; Resolution of the I.C.A.O. Council of 16 September 1983 on the KAL-007 incident, *22 I.L.M. 1114 (1983)* , pp. 1150-1; cf. U.S.A. Memorial, I.C.J. Pleadings 1959, p. 242 where it appears to be suggested that force may be used if there is sufficient and essential evidence

It must be pointed out that the aerial incident of 3 July 1988, though not involving intrusion of another State's air space, took place during the Iran- Iraq conflict at a time when U.S. warships had been subject to uses of armed force by Iranian gunboats, and illustrates a situation of error as to the identity of an alleged source of force, which may become more or less justifiable according to the facts of every particular case[53].

Cases of intrusion of Government or military aircraft into the air space of another State offer a rather plausible argument of defensive necessity. Still, however, the treatment of such action as an armed attack or simple use of force must depend on the specific incident. The U-2 incident, namely, the shooting down by the Soviet authorities of a U.S. high flying reconnaissance aircraft on 1 May 1960 was treated and referred to the Security Council by the U.S.S.R. as a case of "aggression"[54]. The majority of the Security Council Members took the view that the flight had been greatly exaggerated by the Soviet Government[55]; in fact, the above incident does not appear to give rise to any necessity for defensive armed action due to the lack of an actual use of force by the unarmed U-2 aircraft[56]. Finally, in the *Nicaragua Case* the Court held that unauthorised overflights of the territory of a State by "... aircraft belonging to or under the control of the government of another State. ..." constitute in every case a violation of the territorial sovereignty of a State[57].

3. (i). b. *Financial Assistance to Insurgents.*

The second contingency in which the State activity involved does not constitute use of armed force and consequently gives rise to no defensive necessity by way of armed force, arises in cases of assistance to armed bands in the form of provision of financial support. This kind of

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that the security of the State whose air space has been infringed is threatened; approvingly in G.M. McCarthy, Limitations on the Right to Use Force against Civil Aerial Intruders: The Destruction of KAL flight 007 in Community Perspective, *6 N.Y.L.S.J.I.C.L. 177 (1984) P.201*.

[53] Report of I.C.A.O. fact-finding Investigation of the Aerial Incident of 3 July 1988, November 1988, 28 I.L.M. 900 (1989) at 909 seq. The U.K. Government demonstrated strong support for the U.S. by emphasising the right of forces engaged in such hostilities to defend themselves, Keesing's 1988 p. 36170. See also D.L. Peace, *31 Va J.I.L. 545 (1991)*, pp. 564-5.

[54] Doc. S/4314, S/4315, U.N. Repertory of Practice, Suppl. no 3 , vol.1, p. 140 ; Q. Wright, Legal Aspects of the U-2 Incident, *54 A.J.I.L. 836 (1960).*

[55] Wright loc. cit. *supra* n.54, pp. 840, 842.

[56] Ibid. pp. 846, 849.

[57] I.C.J. Rep. 1986, p. 128, para 251.

assistance has been characterised in the *Nicaragua Case* as "... an act of intervention..." which "... does not in itself amount to a use of force..."[58] .

The financing of a guerrilla movement fighting against the Government of a State does not seem to have the position of a *conditio sine qua non* with regard to the actual capacity of the guerrillas to wage armed struggle or the improvement of such capacity. Indeed, it can by no means be ascertained that by receiving a certain amount of capital , the guerrillas will inevitably spend it in order to improve their fighting ability. The management of such funds is solely dependent on the guerrillas themselves rather than the providing State. Moreover, if the actual source and authors of the use of force against the victim State on the ground are the guerrillas themselves then their assistance by another State through the provision of funds constitutes coercive interference in the internal affairs of the victim State irrespective of the fact that the aim of such policy may not be identical with the objective of the guerrilla activities, provided of course that the assisting State is aware of that objective[59] . The Eritrean E.P.L.F. has waged armed struggle against the Government of Ethiopia is a leftist guerrilla movement. It has, however, been financially assisted by the Government of Kuwait despite the lack of political allegiance of the latter with the E.P.L.F. [60] . It appears that assistance to the Eritrean insurgents was motivated by allegiance on the basis of religion (Islam is the predominant religion in Eritrea); other than that it is not evident that the secession of Eritrea from Ethiopia - the objective of the E.P.L.F. struggle - has been a matter of Kuwaiti policy. It is very unlikely, however, that the Government of Kuwait is unaware of this contingency and by its provision of funds to the rebels has brought itself to the position of interfering in the internal strife in Ethiopia, in the sense of establishing a link between itself and the guerrillas against the Ethiopian Government.

3. (ii). *Forcible State Activities.*

The next set of State activities is one that entails the use of armed force and calls for armed action on the part of the victim State which is directed against the source of force, is defensive in nature and aims at

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[58] Ibid. p. 119, para 228.
[59] Ibid. p. 124, para 241.
[60] Keesing's 1975, p. 27032; id. 1977, p. 28635.

protecting the specific object of the use of force. The latter, it may be stressed, does not as a form of State activity appear to be prejudicial to the entirety of the territorial integrity, political independence, economic or security infrastructure of the victim State[61] .

State practice evinces such incidents of use of force that do not amount to armed attack in (a) two forms of action by a State's own armed forces, namely, (1) frontier incidents and (2) laying of submarine mines in the internal or territorial waters of another State; and (b) in the form of assistance to armed bands- in the sense of an indigenous armed opposition to the Government of the victim State initially being formed as such without the complicity of the assisting State - by providing to them arms, training and logistical support.

3. (ii). a. 1. *Frontier Incidents* .

Frontier incidents are localised incidents of use of armed force that may arise purely by accident or be the product of tension created by long-standing disputes with regard to the demarcation of frontiers (viz. the Himalayan fighting between India and China in 1962), or to territory on either side of the frontier (viz. the Sino-Soviet border clashes in the Far East of 1969, the Sino- Viet Namese border fighting in 1979), or to territory as a whole which is divided between the disputants by way of cease-fire or armistice lines (viz. the India-Pakistan dispute over Kashmir)[62] .

The accidental outbreak of force such as might be the case of the killing of a sentry from across the frontier or the trespassing by a small group of military personnel of another State's territory is generally held to be settled by way of investigation, request of punishment of the culprits and compensation. This has been the attitude of both the Soviet and Chinese Governments

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[61] cf. L. Henkin, General Course on Public International Law, *216 H.R.C. 13 (1989 IV)* pp. 158-9.

[62] See generally: E. Giraud, Théorie de la Légitime Défense, *49 H.R.C. 691 (1934 III)* ; J. Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, *41 A.J.I.L. 872 (1947)* p. 878; G. Fitzmaurice, The Definition of Aggression, *1 I.C.L.Q. 137 (1952)*; Bowett, *Self-Defence in International Law, 1958*, pp. 256-8; and id. The Interrelation of Theories of Intervention and Self-Defence, in J.N. Moore (ed.), *Law and Civil War in the Modern World, 1974*, p. 38 at p. 40; M. Sørensen, Principes de Droit International Public, *101 H.R.C. 5 (1960 III)* p. 240; Brownlie, *International Law and the Use of Force by States, 1963*, pp. 210-211, 278-279, 366; Rifaat, *International Aggression, 1979*,p.125; Macdonald, *xxiv Can.Y.I.L. 127(1986)* pp.145,148; Dinstein, *War, Aggression and Self-Defence, 1988*, p.182.

when clashes occurred on the Damansky/Chenpao island on the border between China and the U.S.S.R. in the Far East on 2 March 1969, and before it became clear on the 15th March that the 2nd March clashes had been in reality an assertion of Chinese territorial claims on the island currently considered part of Soviet territory[63].

It is, however, the second category of border fighting that is deemed the most dangerous for international peace and security at large. Border clashes over non-demarcated or disputed territory or across cease-fire lines dividing the armies of two claimants over territory in dispute, are not immediately treated by the disputing States - which each consider itself as the territorial sovereign - as "aggression" or "armed attack" or even the prelude of an armed attack that ultimately gives rise to the right of individual or collective self-defence. It is only after the force used reaches a high level of material intensity that claims of "aggression" and self-defence are put forward.

The Chinese offensive in the Himalayan Border region with India on 20 October 1962, came after a series of border skirmishes involving the armed forces of both countries and was finally justified as self-defence in the face of "... large scale frenzied attacks by aggressive Indian forces..."[64].

Similar claims of self-defence were offered by both the Chinese and Soviet Governments with respect to the border incidents in the Far East and Sinkiang in south west China on 2 March and 13 August 1969 respectively. With regard to the former incident on the Damansky/Chenpao island, the matter was initially deemed as calling for investigation and compensation[65]; it was only after a Chinese attack in regimental force on 15 March that the Soviet Government spoke of defending the territory. As for the latter incident at Sinkiang it was an allegation by the Chinese Government of a Soviet military incursion 2km inside China that prompted the invocation of self-defence[66].

From September 1978 to February 1979 a series of border clashes took place on the Sino-Viet Namese frontier. In a letter dated 10 February 1979 to the President of the Security Council the Government of Viet-Nam expressed concern for the mass deployment of Chinese troops along the common border of the two countries; it is significant that the " daily armed activities" by the Chinese forces were presented as constituting a "...

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[63] Keesing's 1969-1970 pp. 23313-4.
[64] Ibid. 1961-1962, pp. 19122,19124.
[65] *Supra* n. 63.
[66] Ibid. p. 23641.

threat to peace and security in the area..." rather than an armed attack[67] . It was only after the invasion of of Viet- Nam by the Chinese forces on 17 February 1979 that the Viet- Namese Government spoke of "aggression" and asserted the right of self-defence. The Chinese Government also justified their action as "... limited counter-attack in self-defence..." due to the Viet- Namese border provocations[68] .

From 5-11 March 1964 armed clashes between the armies of India and Pakistan occurred on the Kashmir- West Pakistan border. At a press conference on 18 March 1964 Mr. Nehru, the Prime Minister of India, in reply to a question on whether the Indian army would take unilateral action in protecting the cease-fire line, stated: "... we are not prepared to go across the cease-fire line and take the territory under the occupation of Pakistan.... Obviously if it becomes necessary in defence of our territory to cross the cease-fire line they (the Indian armed forces) will cross it - but that is not a policy..."[69] .

The disputed area of Rann of Kutch became the location of border fighting between the Indian and Pakistani armed forces in the period 9 April- 29 June 1965. On 28 April 1965 the Prime Minister of India, Mr. Shastri, stated during a debate at the Indian Parliament that the matter should be settled by peaceful means beyond reaching "... a point of no return..." and he rejected calls by Members of Parliament for retaliatory action at other points of the Indo-Pakistani border[70] .

The practice of States indicates, furthermore, that even if fighting escalates to considerable proportions and claims of armed attack and self-defence are made, although they are not as such repudiated by third States, a conflict may be considered highly localised and of intensity that does not warrant the exercise of collective self-defence. Whether fighting is of such scale as to constitute an armed attack seems to be a question which depends on the circumstances and the motivation surrounding the border incident (especially when it involves transgression into another State's territory), as evidence of any intention to launch a large-scale operation; moreover, the fact that the target State of the use of force considers itself

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[67] Doc. S/13077, S.C.O.R. 34th yr. Suppl. Jan.-March 1979, p. 55.
[68] S.C.O.R. 34th yr. 2114th mtg. para 103; id. 2129th mtg. paras 76-80.
[69] Keesing's 1965-1966 p. 21065.
[70] Ibid. pp. 20927-20928.

the victim of an armed attack as well as the individual assessment of the allies of the target State are pertinent[71] .

During the border clashes between China and the U.S.S.R. in 1969, Romania and Czechoslovakia opposed and defeated a Soviet proposal at the meeting of the Political Consultative Committee of the Warsaw Pact in Budapest on 17 March 1969, to expand the Alliance by admitting Mongolia so as to deploy Warsaw Pact troops on the Sino-Mongolian frontier[72] .

In the aftermath of the Chinese attack across the border with Viet-Nam on 17 February 1979 and after Viet- Nam had characterised the Chinese action as "aggression" the U.S.S.R. dispatched military supplies to Viet- Nam but left no doubt that it did not intend to actively assist it in collective self-defence because the hostilities were of limited scale[73] . Certainly, this illustration presents a situation of frontier incidents being escalated into an invasion of territory by using a formidable striking force. This, it is submitted is in principle a case of armed attack according to the*Nicaragua Case* [74] . Still, all factual considerations must be taken into account. China defended its action as self-defence, there was a territorial dispute in the area that obscured the issue of whose territory had been invaded, and Viet- Nam managed to localise the conflict in the border area. Although the latter is no legal obstacle to invoke the right of collective self-defence it may be of significance by serving as a justification of declining to assist a State if fighting in its actual form is not of the effects, or the scale ,locally, to pose a threat to the security of a State as a whole.

Moreover, concern is often expressed that frontier fighting may escalate to a point of being prejudicial to international peace and security.

On 1 September 1965 fighting broke out in Kashmir between the Indian and Pakistani armies when the latter crossed the cease-fire line. On the same day, the Secretary-General of the United Nations, U -Thant, sent identical letters to the President of Pakistan and the Prime Minister of India stating that "... [W]ithout any attempt to apportion blame, it may be said that such actions now come from both sides of the line.... An outright

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[71] I.C.J. Rep. 1986, pp. 119-121, paras 231-234; Brownlie, op. cit. *supra* n. 62 pp. 210-211, 366; Rifaat op. cit. *supra* n. 62; Macdonald loc. cit. *supra* n. 62 p.148; Cf. Fitzmaurice loc. cit. *supra* n. 62 p. 139; Bowett loc. cit. in Moore (ed.) op. cit. *supra* at n. 62; Dinstein op. cit. *supra* id. ; Kunz, loc. cit. *supra* n. 62.
[72] Keesing's 1969-1970 p. 23 644.
[73] Ibid. 1979 p. 29872.
[74] *Supra* n. 39.

military confrontation between the armed forces of India and Pakistan is threatened and may be imminent which can have only the gravest implications for the peace of the world..."[75] .

During the Security Council consideration of the Sino-Viet Namese border clashes in 1979, the representative of the United Kingdom stated:

"... Wars can come in two ways: deliberate aggression or drift... Perhaps the Security Council cannot stop the extension of war by the deliberate act of a Government bent on national aggrandizement. But it can help to avoid a limited conflict from drifting into catastrophe..."[76]

A similarly dangerous escalation was created in July 1977 when border clashes between Egypt and Libya degenerated into a full-fledged conflict involving the invasion of Libyan territory by the Egyptian armed forces[76bis]

Finally, the outbreak of border fighting in a number of cases took place while attempts at peaceful settlement of the dispute that created the tension were pursued either between the parties themselves or by way of mediation. The continuing effort at peaceful settlement, despite the occurrence of frontier incidents, may be taken to reflect the conviction of the parties that the territorial dispute must be solved by peaceful means, and that armed force may be prejudicial to their respective interests.

Prior to and during the Himalayan fighting between India and China no less than 400 notes pertinent to the subject-matter of the dispute were exchanged between the two countries[77] .

Notes were exchanged between the Chinese and Soviet Governments during the border clashes of 1969 and the fighting stopped on 10 September 1969 after the Chinese Government agreed on a five-point negotiations plan presented by the Soviet Prime Minister[78] .

The border fighting between Peru and Ecuador of 28-31 January 1981 was terminated after the joint mediation by Argentina, Brazil, Chile and the U.S.A. , the guarantor powers under the 1942 Rio Protocol between Peru and Ecuador by virtue of which the territory in dispute where the fighting took place had been allocated to Peru[79] .

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[75] Doc. S/6647, S.C.O.R. 20th yr. Suppl. for July-Sept. 1965.
[76] S.C.O.R. 34th yr. 2115th mtg. para 21.
[76bis] Keesing's 1977, pp. 28710-28711.
[77] Keesing's 1961-1962 p. 19121.
[78] Ibid. 1969 -1970 p. 23645.
[79] Ibid. 1981 p. 30763.

3. (ii). a. 2. *The Laying of Submarine Mines.*

The laying of mines in time of peace, as opposed to a situation of armed conflict, and the failure to give any warning or notification with regard to their location at a peril for the safety of international shipping, constitutes a violation of "... certain general and well recognized principles, namely: elementary, considerations of humanity, even more exacting in peace than in war...", regardless of the status of the waters where they are laid[80].
The laying of mines in the territorial or internal waters of a State constitutes *a fortiori* a violation of its territorial sovereignty and a threat or use of force against that State[81].

The submarine mine is as, a source of force, static for the target must establish contact with the mine. It is clandestine and indiscriminate for it is not overtly noticeable and the perpetrator of the mine-laying may keep his identity concealed for a considerable period of time. Its effects, however, for the coastal State may be potentially devastating. According to one commentator submarine mines are "... capable of altering geographical circumstances by making certain areas impassable to ships..."[82], and consequently have effects in its economy, constitute a violation of its territory and may be prejudicial to its naval forces. Moreover, if the numerical and geographical scale of mine-laying amounts to effectively blockading the ports and ship-traffic lanes within the territorial sea of the coastal State, then it may constitute a full-fledged blockade according to Art. 3(c) of the Definition of Aggression, General Assembly resolution 3314 (XXIX), and possibly an armed attack. As a source of force, regardless of its being an armed attack, it is submitted that mine-laying in the territorial or internal waters of a State creates the defensive necessity for its repelling by way of mine-sweeping and by taking proportionate action against the vessel or aircraft laying the mines.

On the other hand it must be in principle doubtful that the laying of mines on the high seas or in international straits composed of the

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[80] *The Corfu Channel Case*, I.C.J. Rep. 1949, p. 22; *Nicaragua Case*, I.C.J. Rep. 1986, p. 112, para 215.
[81] I.C.J. Rep. 1986 p. 14, p. 128, para 251.
[82] Patterson, Mining: A Naval Strategy, *23 Naval War College Review 53 (1971)* p. 63; approvingly by Phillips, *10 Hous.J.I.L. 275 (1988)* p. 289.

territorial sea of two or more States constitutes, in general, a threat or use of force, so long as it is prima facie impossible to establish the precise vessels of the precise State that constitute the target of the mines[83]. It is submitted that the forcible removal of the source of force that submarine mines pose to international shipping on the high seas should not extend beyond an operation of mine-sweeping, in the sense of destroying vessels, aircraft or permanent artificial installations of a specific State. This is illustrated by the mine-sweeping operation that was undertaken by the Navies of the U.K., the U.S.A., the U.S.S.R., Italy, France, Saudi Arabia, Egypt and Yemen in July 1984 that removed unidentified submarine mines from the Red Sea[83bis]. *A fortiori* any forcible removal of a minefield from the territorial waters of a State that form part of international straits cannot be by virtue of the *Corfu Channel Case* a defensive counter-measure[84].

However, if the laying of mines is attributed to a certain State on the basis of evidence and at the same time constitutes integral part of systematically using force by the above State - by more overt means - against the merchant vessels or warships of another State, then it is submitted that defensive counter-measures can lawfully be taken against the source of such force.

On 14 April 1988, during the Iran-Iraq conflict, the United States frigate *U.S.S. Samuel B. Roberts,* was damaged by mine explosion east of Bahrain; United States warships had been the target of Iranian gunboat attacks and had been established that Iran was responsible for mine-laying in the Persian Gulf[85]. On 18 April 1988 United States naval units bombarded and destroyed two Iranian oil platforms used as bases in order to mount mine-laying sorties[86].

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[83] It is conceivable that such act, will create international responsibility against the State on which the mine-laying is imputed on the basis of evidence for violating the principle of the freedom of navigation on the high seas. *Contra* : Phillips loc. cit. *supra* n. 82.

[83bis] The mines were detected in the Gulf of Suez and the straits of Bab El Mandab at the northern and southern ends of the Red Sea respectively. Responsibility for their planting was initially attributed to both Iran and Libya. There was not any conclusive evidence, however, of involvement of these two States. Suspicion was later focused on Libya, but still its involvement was not established beyond any reasonable doubt. See Keesing's 1985, pp. 33371-33373.

[84] I.C.J. Rep. 1949, p.33.

[85] Phillips loc. cit. *supra* n. 82 p. 276.

[86] Keesing's 1988 p. 36169. *Cf*. D.L. Peace, Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis, *31 Va J.I.L. 545 (1991)*, pp. 563-564. See *supra* First Title.

3. (ii). b. *State Support of Armed Bands.*

Activities of armed bands, in the case of their being the outcome of a rebellion within the State and irrespective of the support received from another State, constitute an autonomous source of force, which always creates the necessity of taking measures in order to repel it. The history of insurgency in the post-1945 period reveals that guerrilla movements fighting against the Government of a State have relied, in one way or another, on some kind of support by other States. This assistance may range from the very low-level and lawful form of political or humanitarian support, by way of foodstuffs and medicine[87], to the higher level of provision of weapons, training and logistical aid. It is the latter form of assistance that establishes a link between the assisting State and the guerrillas by bringing the former very close to the actual use of armed force, and constitutes a breach of the rules of non-intervention in the internal affairs of a State and of the prohibition of the threat or use of force[88].

Victim States of activities of armed bands have consistently resorted to force in order to counter activities in a twofold fashion: (a) Force has been used in the majority of cases within the territory of the State by the armed forces of the latter alone or in conjunction with the armed forces of another State that have been dispatched at the request of the beleaguered Government; (b) secondly, force has been used, by the victim State individually, across international boundaries on the territory of another State.

3. (ii). b. 1. *Forcible Counter-Measures Within the Territory of the Victim State.*

In cases where the Government of the victim State acts alone, the use of force in order to suppress internal revolt - possibly with the exception of colonial territories - does not contravene the rule of the prohibition of the use of force for it does not constitute force in the "international relations" of the State. Consequently, resort to force by the Sinalese Government for the crushing of the Tamil insurgency in Sri Lanka from 1987 to-date, by the Sandinista Government of Nicaragua

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[87] I.C.J. Rep. 1986, pp.124-125, paras 242-243; id. (*per Judge Schwebel*), p. 351, para 180.
[88] Ibid. pp. 104, 118-119, paras 195,228; G.A. Resolutions 2131(XX), 2625(XXV), 3314(XXIX).

against the *contra* rebels from 1979-1989, by the Salvadorean Government against the F.M.L.N. from 1979 to-date and by the Iraqi Government for the suppression of the Kurdish and Shia revolts in February and March 1991[89] are not illicit by reference to Art. 2(4) of the Charter[90] . A possibility of breach of the latter may arise in the case of a request by the beleaguered State for outside military assistance. As will be seen in greater detail in a subsequent section the issue in cases of such request is whether the latter emanates genuinely from the Government of the requesting State rather then from an Opposition group (viz. the Soviet intervention in Hungary[1956], the U.A.R. intervention in Yemen[1962], the U.S. intervention in Panama[1989], the Iraqi invasion of Kuwait[1990]); or from an individual whose precise constitutional authority to act as the executive Government of the State is lacking (the U.S. intervention in Grenada[1983]) or is uncertain (the U.S. intervention in the Dominican Republic[1965]); or from an entity installed as the Government by the State whose assistance was subsequently requested (the Soviet intervention in Afghanistan[1979]). Moreover, in spite of the doctrinal controversy on the admissibility at all of intervening in a situation of civil strife, it has generally been acknowledged in state practice that an established Government is entitled to request and receive assistance from another State in crushing an insurgency[91]; *a fortiori* , such assistance appears to be admissible in law if the insurgency is assisted by another State[92] . In the *Nicaragua Case* the Court held that,

> ... Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the Opposition...[93]

State practice offers a number of illustrations in support of the right of a State faced with armed insurgency to receive outside military assistance either in the form of military equipment or the dispatch of contingents of the assisting State's armed forces. It is also noteworthy that

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[89] *Cf*. S.C. Res. 688(1991) of 5 April 1991.
[90] Bowett loc. cit. in Moore (ed.) op. cit. *supra* n. 62 p. 39.
[91] Garner, Questions of International Law in the Spanish Civil War, *31 A.J.IL. 66 (1937)* p.68; Brownlie op. cit. *supra* n. 62 pp.321-327; Farer, *81 A.J.IL. 112 (1987)* p. 114; N.D. White, *ix Int. Relat. 535 (1989)* pp. 542-543.
[92] Brownlie op. cit. *supra* n. 91 p. 327; Q. Wright, United States Intervention in the Lebanon, *53 A.J.I.L. 112 (1959)* p. 123.
[93] I.C.J. Rep. 1986, p. 126, para 246.

in the cases where support to the guerrillas from another State was alleged the dispatch of troops was based on consideration of defensive necessity.

On 11 January 1955 Costa Rica became the victim of land invasion and air strikes by a force of dissident exiles that was initiated from the territory of Nicaragua and aimed at overthrowing the Government of President Figueres; the rebels were repelled by the Costa Rican security forces after an eleven-day fighting[94] . The Government of Costa Rica referred the matter to the Council of the O.A.S. by invoking Art. 6 of the Inter-American Treaty of Reciprocal Assistance. This provision stipulates the following:

> If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack... the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of aggression...

The Council resolved on 16 January 1955 to call upon all the American Republics to give prompt consideration to a Costa Rican request for aircraft[95] .

During the second week of May 1958 large-scale disturbances broke out throughout Lebanon against the Government of President Chamoun, which were instigated by Moslem opponents of the Government's pro-Western policies and sympathisers of President Nasser and the U.A.R.[96] . On 13 May 1958 the Lebanese Government expressly accused the U.A.R. of being responsible for the disturbances and of "massive interference" in the internal affairs of Lebanon[97] ; on 22 May 1958 it brought the matter to the attention of the Security Council[98] . Similar accusations against the U.A.R. were made by the Government of Jordan in the aftermath of the violent overthrow of the monarchy in Iraq on 14 July 1958 and the subsequent dissolution of the Arab Federation of Iraq and Jordan[99] . On 15 and 17 July 1958 respectively the representatives of Lebanon[100] and Jordan[101] made it

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[94] Keesing's 1955-1956 p. 14048. The Government of Nicaragua strongly denied any involvement in the action of the armed dissidents, ibid.

[95] On 16 January 1955 the U.S. Government announced that it would supply Costa Rica with aircraft; Keesing's 1955-1956 p.14048.
Doc. C-a-169, Inter-American Treaty of Reciprocal Assistance, Applications vol. I 1948-1959, General Secretariat O.A.S. Washington D.C., 1973, 3rd ed. , pp. 183-7.

[96] Keesing's 1957-1958 p. 16181.

[97] Ibid.

[98] Doc. S/4007, S.C.O.R. 13th yr. Suppl. for April-June 1958, p.33.

[99] DOC. S/4053, Ibid. Suppl. for July-Sept. 1958, p.37.

[100] S.C.O.R. 13th yr. 827th mtg. para 84.

[101] Id. 831st mtg. paras 24-25.

known to the Security Council that U.S. and U.K. troops had landed in their respective countries at the request of their Governments in accordance with the right of individual and collective self-defence under Article 51 of the Charter in view of the "massive intervention by the U.A.R. in Lebanon" and "... the threat to the integrity and independence of Jordan through imminent foreign aggression and an attempt by the U.A.R. to create internal disorder and to overthrow the existing regime in Jordan..."[102] .

It was the Swedish representative who took issue with the justification of self-defence by doubting the existence of an armed attack[103] ; moreover, the United Nations Observers Group in Lebanon (U.N.O.G.I.L.) had reported to the Security Council on 4 July 1958 that "...it has not been possible to establish from where arms were acquired. Nor was it possible to establish if any of the armed men observed has infiltrated from outside; there is no doubt, however, that the vast majority was in any case composed of Lebanese..."[104] .

The establishment of the Federation of Malaysia by virtue of the London Agreement of 9 July 1963 provoked an extremely vehement reaction on the part of the Government of Indonesia which considered the London Agreement as a violation of a prior agreement concluded between the Foreign Ministers of Malaya and Indonesia at a meeting in Manilla whereby the Federation of Malaysia would come into existence before the people of Sarawak and Sabah expressed their wishes in a referendum[105] . From 1963-1965 the Indonesian Government embarked upon a policy of so-called "confrontation" that involved large-scale infiltration of Indonesian "volunteers" and sabotage operations, initially into Sarawak

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[102] Id. 828th mtg. paras 54-55(Lebanon); 831st mtg. para 24(Jordan); also see id. 827th mtg. paras 34-35, 38, 40-43, 49(U.S.A.); cf. 831st mtg. para 35. In that instance the U.S. representative justified the U.S. action by reference to "... the inherent right of nations to call for assistance when threatened...". S.C.O.R. 13th yr. 831st mtg. paras 27, 29(U.K.); id. 828th mtg. para 9(France). Moreover the U.S. President, D. Eisenhower in a special message to Congress dated 15 July 1958 stated that, "...[I]n response to this appeal from the Government of Lebanon the U.S. has dispatched a contingent of U.S. forces to Lebanon....to encourage the Lebanese Government in defense of Lebanese sovereignty and integrity...As the U.N. Charter recognizes, there is an inherent right of coll. self-defense...", Whiteman Digest of International Law, vol. 12, p. 137; H. McMillan, the U.K. Prime Minister justified the dispatch of U.K. troops to Jordan in a statement to the House of Commons on 17 July 1958 as action taken in coll. self-defence under Art. 51 of the Charter, Keesing's 1957-1958, p. 16308.

[103] S.C.O.R. 13th yr. 830th mtg. para 48. *Contra* : 831st mtg. para 99(China).

[104] Doc. S/4040; Keesing's 1957-1958, pp. 16295, 16440-1.

[105] The regions of Sarawak and Sabah are situated on the island of Borneo the remainder of which constitutes Indonesian territory; Keesing's 1963-1964, pp. 19715-6, 19746-7.

and Sabah, and subsequently into the Malay peninsula, and culminated in the Labis parachute drop of 2 September 1964 that involved a massive air borne infiltration of armed individuals very deep into the peninsula. It was in the aftermath of the Labis drop that Malaysia referred the matter to the Security Council[106] . During the debate,as well as previously, the Indonesian Government made no secret of its connivance in the sending of the bands and did not deny the fact that some of the participants in the Labis drop had been proved to be members of the Indonesian armed forces[107] . Although Indonesia avoided formal censure by the Council due to the negative vote of the U.S.S.R. , individual members expressed their outright condemnation and considered the Indonesian action as a case of "armed attack" requiring action in self-defence[108] . Indeed, the Malaysian Government took action jointly with the U.K. that dispatched units of the Royal Navy and the R.A.F. while Australia and N. Zealand provided military aid in the form of equipment[109] . The joint British and Malaysian action was confined within the territory of Malaysia.

The Government of Laos was faced with armed insurgency by the communist organisation *Pathet Lao* from 1959-1975; during the insurgency the Laotian Government requested and received military assistance from Thailand that dispatched ground forces in Laos, and the U.S. that made its Air Force available[110] .

During the *Vietkong* insurgency in S. Viet- Nam from 1959-1975, the S. Viet- Namese Government received military assistance in the form of armed contingents that took part in the fighting against the guerrillas on the territory of S. Viet- Nam, from the U.S.A. , Australia, N. Zealand, S. Korea and the Philippines[111] . By far the largest military commitment in assisting the S. Viet- Namese Government was that of the U.S. It is significant that the U.S. Government consistently alleged "infiltration" of armed individuals from N. Viet- Nam that went back to 1959, rather than mere assistance to the*Vietkong* in the form of provision of arms, training and logistical support; when this infiltration increased and was proved to comprise of elements of the N. Viet- Namese army, in 1965, the U.S.

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[106] Doc. S/5930, S.C.O.R. 19th yr. Suppl. for July-September 1964.
[107] Id. 1144th mtg. para 103; Keesing's 1965-1966,p. 20591.
[108] S.C.O.R. 19th yr. 1148th mtg. para 32(Brazil), 1144th mtg. para 127(U.K.), 1145th mtg. para 25(U.S.A.).
[109] Keesing's 1963-1964, p. 20184.
[110] Ibid. 1965-1966,p.21746; 1969-1970 p. 24088.
[111] Ibid. 1961-1962,p. 18615; 1965-1966,p. 20777.

resorted to force directly against N. Viet- Nam in collective self-defence[112]
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On three occasions the Republic of Congo/Zaire was invaded by mercenaries (5 July 1967) and former Katangese rebels (8 March 1977, 11 May 1978). The Congolese/Zairean Government brought the situation arising from the action of mercenaries to the attention of the Security Council on 6 July 1967[113] . During the debate the representative of Brazil, Mr. De Carvalho Silos, raised a very significant point with regard to the activities of armed bands as a source of use of force in its own right and went as far as to suggest that such activities constitute *per se* a violation of the United Nations Charter; he stated:

> "... Even if these persons are not mercenaries, even if they are, for instance, volunteers, - and I mean actual volunteers whose motivations are ideological - their action could constitute a clear violation of the principles of our Charter as an intervention by a foreign Power or foreign Powers in the internal affairs of the Democratic Republic of the Congo..."[114]

In all three instances the Government of Congo/Zaire requested and received military assistance from third countries. In the case of the mercenary attack on Kinsangani (former Stanleyville) in July 1967, Ethiopia dispatched jet-fighters with their crews while the U.S. sent three aircraft to provide long-range logistical support[115] . In the first invasion of the Shaba province (former Katanga) by Katangese exiles in 1977, the Zairean army was assisted by 1,500 Moroccan troops[116] . In the second invasion of the Shaba in 1978 the mining town of Kolwezi fell in the hands of the rebels that resorted to violence against the town's white population; French and Belgian troops were dispatched in order to rescue their nationals and other Europeans which seemed to be the main objective of the mission, although the French Government expressly took

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[112] Letter dated 7 February 1965 from the representative of the United States of America to the President of the Security Council, Doc. S/6174, S.C.O.R. 20th yr. Suppl. for Jan.-March 1965, pp. 43-5; Statement by the U.K. Prime Minister in the House of Commons on 9 March 1965, Hansard no 649 5th-11th March 1965, p. 238, col. 2; The Legality of the United States Participation in the Defense of Viet-Nam, Memorandum of Law, Office of the Legal Adviser, Dept. of State, printed in R.A. Falk(ed.), *The Viet-Nam War and International Law, vol. 1, Princeton 1968*, pp. 583-603; discourse by J.R. Stevenson, United States Military Action in Cambodia: Questions of International Law, in The Cambodian Incursion...Legal Issues, *Proceedings of the Fifteenth Hammarskjöld Forum, 1971*, pp. 24-33; Gill, *1 Hague Y.I.L. 30 (1988)* pp. 40-1.
[113] Doc. S/8036, S.C.O.R. 22nd yr. Suppl. for July-Sept. 1967, p. 63.
[114] S.C.O.R. 22nd yr. 1367th mtg. para 107.
[115] Keesing's 1967-1968, p. 22189.
[116] Ibid. 1977 p. 28397.

the view that apart from the protection of French nationals the dispatch of troops was also in response to the request from the Government of Zaire[117].

Mozambique has been in a state of civil war since its independence in 1975 which has been waged by the Mozambique National Resistance Movement (RE.NA.MO.). The latter consists of mainly Portuguese settlers and from 1975-1980 it was armed, trained and financed by the Rhodesian Government, while ever since 1980 it has been assisted by the South African Government[118]. Despite the 1984 Nkomati Accord[119] between Mozambique and S.Africa whereby both parties undertook not to allow their territories be used by armed individuals operating against either of them, the RE.NA.MO. activities continued. In 1987 the Mozambique army assisted by 10,000 Zimbabwean and 1,000 Tanzanian troops launched a major offensive against RE.NA.MO. within the territory of Mozambique[120].

On 25 May 1977 the Ethiopian province of Ogaden was invaded by a large force of 3,000-6,000 armed individuals claiming to be the Western Somalia Liberation Front (W.S.L.F.)[121]. By 21 February 1978 it had been established that the W.S.L.F. had been sent into Ogaden by the Somali Government and that the Somali regular army was fighting alongside the irregulars; the Ethiopian Government invoked the right of self-defence and the Ethiopian army was assisted in fighting the W.S.L.F. by large contingents of Cuban and S. Yemeni troops[122]. The Ethiopian action was confined in the territory of Ogaden and on 9 March 1978 the Somali army was forced to completely withdraw therefrom. On 14 February 1978 President Mengistu Haile Mariam of Ethiopia stated that "...[W]e will not interfere in the internal affairs of other people. The defensive war we are waging goes as far as our frontier..."[123].

Chad is a State where occurrences of insurgency are very frequent. In 1968 an insurgency against the Government of President Tombalbaye was crushed with the assistance of French troops that were deployed at the

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[117] Ibid 1978, pp. 29125-6.
[118] Ibid. 1979,pp. 29760-1; 1980, pp.30073, 30611; 1983, p. 32114.
[119] Ibid. 1984, pp. 32835-6.
[120] Ibid. 1988, p. 35685. The military assistance by Tanzania and Zimbabwe was offerred on the basis of Agreements concluded between Mozambique and the above States.
[121] Ibid. 1977, p. 28634.
[122] Ibid. 1978, pp. 28760, 28989,28991.
[123] Ibid. 1978, p. 28989.

request of the President[124]. In 1983 French troops were re-introduced in Chad at the request of the Government of President Hissene Habré that was faced with insurgency led by the former President of the country Goukouni Oueddei. The rebels were assisted by Libya the army of whom occupied the Aozou strip, a belt of territory in dispute between Chad and Libya. In the debate at the Security Council of a Chadian complaint against Libya, after the Air Force of the latter had launched an air raid on Chadian army positions in the disputed territory in the north of Chad during the first week of August 1983, the Soviet delegate accused France of intervening in the civil war in Chad; on this the representative of the Netherlands commented that a distinction had to be maintained between military assistance requested by the Government of a country acting in self-defence and armed intervention in the affairs of a neighbouring State[125]. The French forces took part in the fighting on the side of the Government in 1986 when French fighter bombers launched an air raid on the main rebel base in Faya Largeau[126]. The evidence of Libyan involvement on the side of the rebels seems to have played a crucial role in the French participation in the fighting against the insurgents; by contrast the French contingent stationed in Chad declined to assist the Government of President H. Habré to crush a rebellion that broke out spontaneously and without any evidence of outside assistance in December 1990 and resulted in the overthrow of the President's Government[127].

Since 1983 Sri Lanka has been in a state of civil war between the Government and the Tamil United Liberation Front (T.U.L.F.) which are based in the north of the country and aim at the secession of the north-west region. On 29 July 1987 the Governments of India and Sri Lanka concluded an Agreement whereby India pledged to ensure that its territory would not be used " ... for activities prejudicial to the unity, integrity and security of Sri Lanka..."; clause 2.16(c) of the Agreement provided that:

> ... In the event that the Government of Sri Lanka requests the Government of India to afford military assistance to implement these proposals the Government of of India will co-operate by giving to the Government of Sri Lanka such military assistance as and when requested...[128]

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124 Ibid. 1969-1970, p. 23548.
125 U.N. Chronicle vol. XX no 9 Sept. 1983, p. 13.
126 Keesing's 1986, p. 34208.
127 Ibid. 1990, p. 37907.
128 Text of the Agreement in *27 I.J.I.L. 274-278 (1987).*

In pursuance of the above provision 3,000 Indian troops were dispatched to Jaffna peninsula in North-West Sri Lanka on 30 July 1987 in order to assist the Sri Lankan army with the disarming of the T.U.L.F. (the so-called Tamil Tigers) and to undertake general peacekeeping duties[129]. When civil strife resumed in October 1987 the Indian contingent joint the Sri Lankan army in fighting against the rebels[130].

On 1 October 1990 the small African State of Rwanda was invaded by a force of 10,000 Rwandan dissidents that were servicemen in the Ugandan army and belonged to the so-called Rwandan Patriotic Front[131]. At the request of the Rwandan Government French, Belgian and Zairean troops were dispatched to assist the Government in stalling the invasion and to help evacuate European, American and Canadian nationals[132]. Only the Zairean contingent actually took part in the fighting against the rebels in execution of a mutual defence Agreement between the two countries, while the French and Belgian Governments stressed that the presence of their troops in Rwanda aimed only at the protection of their and other foreign nationals[133].

Apart from resorting to force against guerrilla groups the victim State may take on its own territory protective measures short of the use of armed force, either individually[134], or in conjunction with its neighbouring States - acting on their territories. Such measures may consist of, *inter alia*, border controls, closing of the frontier, erection of obstacles, laying of mines, restriction of freedom of movement along the frontier, proclamation of security zones.

Thus, beginning in August 1980, the Moroccan army has constructed a complex line of fortifications intended to prevent POLISARIO incursions into certain areas of Western Sahara and notably the region where the phosphate mines are situated; the line is more than 300 miles long and includes, earthworks, minefields, ditches, barbed wire fences and observation posts[135].

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[129] Keesing's 1987, p. 35313.
[130] Ibid. pp. 36283-4.
[131] The Ugandan Government strongly disclaimed any involvement in the invasion; Ibid. 1990, pp. 37765-6.
[132] Ibid. p. 37766.
[133] Ibid. This may also serve as illustration of declining to committing one's troops in assisting a Government against an insurgency in the absence of evidence of another State's involvement on the side of the rebels; see *supra*
[134] Brownlie, International Law and the Activities of Armed Bands, *7 I.C.L.Q. 712(1958)* p. 730
[135] Keesing's 1981, pp. 31003-4.

After having dislodged the Khmer Rouges guerrillas from their bases on the Thai-Cambodian frontier, the Cambodian Government and the Viet- Namese forces (that had been stationed in Cambodia since the Viet- Namese intervention of December 1978) consolidated their positions by adopting certain preventive measures against guerrilla infiltration, which consisted of laying mines and clearing the jungle at border crossing points, and of erecting a 75km barbed wire fence along the Thai border[136].

In its attempt to check the activities of the A.N.C. the South African Government erected a 12-mile long high voltage electric fence along the border with Zimbabwe in March 1985[137] , while a similar fence was installed along the border with Mozambique in August 1986[138].

During the civil war in Nicaragua A.R.D.E. , one of the *contra* groups fighting against the *Sandinista* Government, operated from the territory of Costa Rica; despite the deterioration in the relations between the two countries, agreement was reached in February 1982 for the establishment of joint border patrols, while in June 1982 a bilateral Commission was formed the duty of which was "... to analyse and solve any border problem which might arise in the future..."[139]. Moreover, following an incursion by A.R.D.E. guerrillas into Nicaragua on 15 May 1984, the Government of Costa Rica took certain enforcement measures against A.R.D.E. that consisted of raiding the organisation's headquarters, the closure of its communication centre and the arrest, expulsion or imprisonment of its members[140].

The Ethiopian Government has maintained a State of Emergency over Eritrea since 1970 by virtue of which a 6-mile strip of land along the coast and the border with Sudan was declared a "prohibited zone" from which the Government had the power to displace the inhabitants and move them into new areas within reasonable reach of police authorities and army garrisons[141].

Finally, on 25 October 1989 Zambia and Mozambique signed an Agreement for the establishment of a joint Security Commission to contain RE.NA.MO. incursions and to regulate the movement of individuals across the common border between the two countries[142].

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136 Ibid. 1985, p. 33732; ibid. 1986, p. 34426.
137 Ibid. 1985, p. 33639.
138 Ibid. 1986, p. 34794.
139 Ibid. 1983, p. 32308.
140 Ibid. 1984, p. 33275; ibid. 1986, p. 34532; ibid. 1987. pp. 35309-35310.
141 Ibid. 1971-1972, p. 24507.
142 Ibid. 1989, p. 37143.

3. (ii). b. 2. *Extra-Territorial Use of Force Against Armed Bands.*

Controversy arises in cases of extra-territorial use of force by victim States against armed bands that operate from the territory of another State. Armed action by the victim State beyond its borders could be justified either as an exercise of criminal jurisdiction or of the right of self-defence[143] . The former requires the express authorisation of the territorial sovereign while the latter does not; hence it is of no surprise at all that certain States that have on many occasions resorted to force beyond their frontiers in order to counter guerrilla activities justified their action as an exercise of the right of individual or collective self-defence. The latter has been generally deemed to be exercised in international law by States only[144]; but defensive action may be conceivably directed against armed bands, namely, non-State entities[145]. Is this latter action to be characterised, despite its protective nature, as self-defence under Art. 51 and customary law? Article 51 and customary international law require for the exercise of self-defence (individual or collective) the existence of an armed attack[146]. State practice and the *Nicaragua Case* suggest that the source of an armed attack against which the victim State resorts to force in self-defence beyond its borders must be linked and is directly imputable to another State [147] . For whatever action is to be taken against the source of the armed attack, if it is to be exercised outside the territory of the victim State against armed bands, it necessarily takes place on the territory of another State - and this constitutes a *prima facie* violation of Art. 2(4) of the Charter.

It is generally accepted that forcible activities of private individuals from the territory of a State against another State give rise to international

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[143] Schachter, The Extra-Territorial Use of Force Against Terrorist Bases, *11 Hous.J.I.L. 309 (1989)* p. 311.
[144] See *supra* First Title.
[145] Schachter loc. cit. supra n.143.
[146] I.C.J. Rep. 1986, p. 103, para 195.
[147] Brownlie, *7 I.C.L.Q. 712 (1958)* p. 731, id. op. cit *supra* n. 62 pp. 372-5 and id. *System of Law of Nations, State Responsibility, Part I, 1983*, pp. 161-2, 168-170; M.R Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States, 1962*, pp. 25-35, 109-115; Bowett op. cit. *supra* n.62 pp.48-9; Y. Blum, The Beirut Raid and the International Double Standard, *64 A.J.I.L. 73 (1970)* pp. 79-87 and id. The Legality of State Response to Acts of Terrorism, in B. Netanyahu (ed.) *Terrorism, How the West Can Win, 1986*, pp, 168-170; Levenfeld, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law, *21 Col.J.Trans.L. 1 (1982-83)* pp. 5-12; Q. Wright, Subversive Intervention, *54 A.J.I.L. 521 (1960)*, p. 531. *Cf.* Schachter loc. cit. *supra* n. 143, pp. 311, 314.

responsibility on the part of the former State if it does not prevent by exercising 'due diligence' the said individuals from committing injurious acts against the latter[148]. The fact that such activities amount to the threat or use of force establishes their injurious nature. Responsibility of the host State requires knowledge of the activities of the armed individuals. It is submitted that knowledge of the mere existence of a group of political opponents of the Government of another State on the territory of a State is not sufficient to create responsibility of the latter. It is the activities themselves of private persons that violate international law. According to the *Corfu Channel Case* a State on whose territory an act contrary to international law has occurred may be called upon to give an explanation. That State cannot evade such a request by claiming ignorance, and it may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it could not be concluded from the mere fact of the control exercised by a State over its territory that that State necessarily knew or ought to have known of the act or its authors. This fact does not involve in principle the responsibility of the State. However, the fact that a State has exclusive control exercised within its frontiers may make it impossible to furnish direct proof of facts which if correct would involve that State's responsibility in case of violation of international law. The State which is the victim must in such case be allowed a more liberal recourse to inferences of fact and circumstantial evidence so long as the latter do not leave room for reasonable doubt[149] .

The practice of States shows that the States from the territory of which armed bands operate may deny any knowledge of forcible activities of individuals from their territories. Such denial has been manifested recently by Uganda for the invasion of Rwanda by dissident exiles in October 1990[150] , by Angola for the invasion of the Shaba province of Zaire by Katangese rebels in 1977 and 1978[151] , by Nicaragua for the invasion of Costa Rica by dissident exiles[152] , by France, Senegal, the Ivory Coast,

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148 Oppenheim's *International Law, vol.i, 8th ed. by Lauterpacht, 1955,* p.365; Bowett op. cit. *supra* n. 147; Garcia-Mora op. cit. *supra* n. 147; Blum loci citi *supra* n.147; Levenfeld loc. cit. *supra* n. 147.

149 I.C.J. Rep. 1949, p. 18.

150 See *supra* n. 131.

151 Keesing's 1977, p. 28397; id. 1978, p. 29127.

152 *Supra* n. 94.

Morocco and Gabon for the mercenary attack against Benin in 1977[153], and by South Africa for the mercenary attack against the Seychelles in 1981[154].

Moreover, claims have been raised on the part of States accused of harbouring armed bands in their territories that the individuals in question are 'refugees' or 'civilians' rather than guerrillas, or that they were disarmed the moment they entered the territory of the State. This line of argument was put forward by Mozambique with regard to the Rhodesian incursion and occupation of the town of Mapai on 30 May 1977[155] and the S. African commando raid on the alleged A.N.C. headquarters in the capital Maputo on 30 January 1981[156]. Similar arguments were asserted by Botswana in respect of a Rhodesian attack on an alleged guerrilla camp in the territory of the former on 22 December 1976. The Hon. Q.K.J. Masire, the Vice-President of Botswana, in a statement before the Parliament of Botswana said that:

> "... It has always been the policy of our Government to grant asylum to genuine political refugees from neighbouring countries. It has also always been our policy not to permit Botswana to be used as a launching pad for attacks against neighbouring countries..."[157]

The same plea recurred in the aftermath of a South African commando raid on ten alleged A.N.C. centres in Gaboronne, the capital of Botswana, on 14 June 1985[158].

On 9 December 1982 S. African commandos launched an operation against homes of alleged A.N.C. members in residential areas of Maseru, the capital of the Kingdom of Lesotho. At the debate in the Security Council, H.M. King Motlotlehi Moshoeshoe II addressing the Council on behalf of his country stated that the A.N.C. fighters who had occasionally retreated to Lesotho and had been found in possession of arms "... had always been dealt with in accordance with Lesotho's laws and international obligations..."[159].

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153 S.C.O.R. 32nd yr. 2000th mtg. paras 142-160(Gabon); 2001st mtg. paras 33-46(Senegal), 54-67(France), 72-96(Morocco), 108-138(Ivory Coast); 2005th mtg. para 35(Gabon).
154 Keesing's 1982, p. 31762.
155 S.C.O.R. 32nd yr. 2014th mtg. paras 18, 13-32.
156 Keesing's 1981, p. 30889.
157 Doc. S/12262. S.C.O.R. 31st yr. Suppl. for Oct.-Dec. 1976,pp. 56-7.
158 U.N. Chronicle vol. XXII, no 6, June 1985, p. 23.
159 U.N. Ybk. 1982, p. 315.

The Government of Jordan claimed with regard to the Es-Salt raid of 1969, that the Israeli action was directed not against *fedayeen* bases but against civilians[160] .

Assertion of non-knowledge of the activities of armed bands depends to a large extent on the *modus operandi* of the guerrillas. It is submitted that in the case where the guerrillas have their bases on the territory of a neighbouring State from where they infiltrate the territory of the victim State the existence of such preparation camps, where training is going on, from where operations are mounted, where the guerrilla force regroups and where its field command, logistical and communications network are situated, it is very hard for the Government of the host State to claim that all such activity is unnoticed. Hence, despite denials to the contrary claims such as these of the Honduras Government as to the non-existence of any *contra* bases on the territory of the country seem to be of a rather fragile credibility[161].

The picture becomes rather less clear in case of genuine 'refugee' camps where the individual members of a guerrilla force may have their domicile but which do not serve as starting points of concentration for the mounting of operations. It is submitted that as long as the latter still emanate from the territory of the host State it would be rather difficult for the latter to claim total ignorance of the fact.

Lastly, such claims by the host State could only have a better chance of being substantiated with credibility if it is host of the headquarters of the guerrilla organisation and not of its fighting force, such as is the case with Tunisia where the P.L.O. headquarters are situated while the P.L.O. fighters are based mainly in Lebanon. In this case the use of force waged by the guerrillas may be decided, planned and co-ordinated from its headquarters , but it is carried out from the territory of another State. Again, a point must be made clear. The host State of the headquarters of the organisation is definitely aware of the fact that the latter engages in guerrilla warfare against another country. What the host State cannot be aware of is the circumstances under which an actual use of force is launched against the victim State. In 1968 Beirut was the city where the P.F.L.P headquarters were situated. The Lebanese Government was certainly aware of the activities of the former against Israel. But it is very unlikely that the Lebanese Government should have prior knowledge of

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160 S.C.O.R. 24th yr. 1466th mtg. paras 118-119, 121.
161 Keesing's 1983, p. 32307.

specific operations against Israeli targets like the attack on the EL-AL airliner at the airport of Athens on 26 December 1968[162] . The same conclusion seems to be warranted with regard to States whose territory merely serves as transit passage of the guerrilla force from their bases to the territory of the victim State, or as temporary refuge from the battle; Laos and Cambodia had respectively been used by the *Vietkong* in the above way during the Viet- Nam conflict[163].

Furthermore, in assessing the question of whether due diligence was shown on the part of the host State towards curbing the activities of armed bands it is essential to take into account the means that this Government possesses to curb such acts, the geographical features of the region where the guerrillas operate and the clandestine character of the latter's activities[164] . During the Security Council debate on the Qibya raid the representative of the U.K. pointed that the "... nature and length of the border makes it difficult for Jordanian authorities to control the border with Israel..."[165]. On 22 March 1983 Nicaragua requested an urgent meeting of the Security Council to consider "... the great increase in acts of aggression..." against it; during the debate the Nicaraguan delegate alleged that the *contra* guerrillas operated from Honduran territory with "... the assent and under the direction of important sectors of the Honduran Army..."[166]. In rejecting the Nicaraguan allegations the representative of Honduras countered that it was impossible to control a border of thousands of miles[167].

Moreover, political pressure on Governments by the population of the host State are not to be lightly dismissed. In case of sympathy and widespread support for the cause of the guerrilla struggle on the part of the population of the host State, the Government of the latter may find itself in a very delicate position; while it is prepared to exhibit a minimum amount of diligence with regard to the guerrilla activities emanating from its territory, it is not, on the other hand, likely to risk inviting immense

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[162] *Contra:* Blum loc. citi *supra* n. 147; Levenfeld loc. cit. *supra* n. 147.

[163] *Cf*. Falk, International Law and Military Operations against Insurgents in Neutral Territory, *68 Col.L.R. 1127 (1968)* pp. 1131,1133,1147; however, see id. The Cambodian Operation and International Law, in Falk(ed.), *The Viet-Nam War and International Law, vol. iii, 1972*, p. 33 seq.

[164] I.C.J. Rep. 1986, p. 85, para 157; Brownlie, *System of Law of Nations, State Responsibility, Part I, 1983*, p. 165. Contra: Garcia-Mora op. cit. supra n. 147, p. 30; Blum supra n. 147. *Cf*. Bowett, op. cit. *supra* n. 147, pp. 55-6.

[165] S.C.O.R. 8th yr. 635th mtg. para 54.

[166] U.N. Chronicle vol. XX no 3 May 1983, p. 10.

[167] Ibid. p. 12.

opposition to it or even its downfall by taking direct action against the guerrillas[168]. Such action by the host State is likely to be taken only when the guerrilla organisation acquires political power so as to threaten the Government of the host State itself. In September 1970 the Jordanian army took military action against and expelled the P.L.O. from Jordan[169]. Other than that, the most that a host State is likely to do against a guerrilla organisation is to adopt administrative measures against them by expelling or imprisoning officials, or by closing down offices and headquarters - viz. the expulsion of the A.N.C. from Mozambique in the aftermath of the 1984 Nkomati Accord[170] and the closing down of the A.R.D.E. offices in Costa Rica[171].

A question that arises is whether the establishment of the responsibility of a State for activities of armed bands would entitle the victim State to resort to force across its boundaries on the territory of the host State. It is submitted that such responsibility, as all State responsibility because of acts contrary to obligations under international law, should entail liability to pay compensation and should not entitle to resort to unilateral military action against the host State of the guerrillas. This contingency would depend on the level of connivance of the host State in the activities of the armed bands, and more specifically on the precise level of involvement in these activities[172].

Unilateral extra-territorial military action is a *prima facie* violation of Art. 2(4) of the Charter and requires justification on the basis of an exception to the prohibition of the use of force by States. Moreover, military action on the territory of another State creates the presumption that force is used against this State. If this is to be the case and be justified as exercise of the right of self-defence then, in the context of forcible activities by armed bands, the connivance of the host State must be of a level to be equated with an armed attack[173]. Unless this is established, any unilateral action on the territory of the host State is very likely to have the character of reprisal and would be unlawful under international law in

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[168] See the remarks by Mr. Baroody, the representative of Saudi Arabia in the Security Council, during the debate on the Guinean complaint against Portugal of 12 Dec. 1969 (Doc. S/9554, S.C.O.R. 24th yr. Suppl. for Oct.-Dec. 1969,pp. 155-7), S.C.O.R. 24th yr. 1523rd mtg. paras 58-59; also viz. remarks by the same representative during the debate on the Es-Salt raid, S.C.O.R. 24th yr. 1467th mtg. para 82.

[169] Keesing's 1969-1970, p. 24206.

[170] Ibid. 1986, p.34088; id. 1988,p. 35687.

[171] *Supra* n. 140.

[172] Brownlie op. cit. *supra* n. 164, p. 182.

[173] I.C.J. Rep. 1986, p. 103, para 195.

force today[174]. It is submitted that the punitive character of such action on the part of the victim State is established by virtue of the fact that the host State may not be itself the actual author of the armed force facing the victim State. It is the guerrillas themselves that in most cases actually constitute the "source" as well as the author of force against the victim State[175], and it is, moreover, this action that warrants the undertaking of protective counter-action. The host State simply incurs responsibility for allowing its territory to be used for injurious activities against another State. However, the host State may bring itself closer to the authorship of the use of force against the victim State, by its involvement by way of assisting the armed bands in their forcible struggle against the Government of the latter[176]. The provision of arms, training and logistical support have a direct bearing on the actual on-the-ground ability of the guerrillas to pursue their forcible activities and constitutes a violation of the customary law rule of the prohibition of the use of force by States and of Art. 2(4) of the Charter[177].

The question arises whether the victim State is legitimised to resort to defensive use of force against the guerrillas or against the assisting/ host State, or against both, should *any* form of assistance to the insurgents is established. The issue is very controversial and its complexities have been highlighted during the preparatory work of the Definition of Aggression[178]. The Special Committee on the Definition of Aggression was faced with two opposing views: The first was propounded by the Western States and it called for the right to resort to force in self-defence in the face of any form of assistance to armed bands[179]. The

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[174] See Part One, Ch. 3; *cf*. I.L.C. Ybk. 1984 vol.II Part Two, p. 102, paras 361-2.

[175] A State becomes the actual author of the use of force only in case of an armed attack by way of armed bands.

[176] In this case the host State becomes also the assisting State of the guerrillas. These 'capacities', however, do not always coincide on the same State. Guerrillas when operating from outside the victim State's territory have always had their bases on the territory of a neighbouring State (host State). In certain cases the host State would also provide arms, training and logistical support to the guerrillas - viz. Egypt with regard to the *fedayeen*, Syria and Jordan with regard to the *Al-Fatah*. But in other cases the provision of the above kind of aid originates from a non-neighbouring country - viz. the *contras* were based in Honduras and Costa Rica while they were provided with assistance by the U.S.A. ; the Algerian F.L.N. would take refuge in Tunisia but the bulk of its supplies was provided by the U.A.R. ; the Afghan guerrillas although based in Pakistan received aid from the U.S.A. ; it was the same with regard to the *Khmer Rouges* that were based in Thailand and assisted by the U.S.A.

[177] *Supra*

[178] Gill, *1 Hague Y.I.L. 30 (1988)*, p. 37

[179] See Six Power draft Definition of Aggression, Doc. A/ AC 134/L.17; Report of the Special Committee on the Question of Defining Aggression, G.A.O.R. 24th Session, Suppl.

second was advanced by the non-aligned States and suggested a distinction between two forms of involvement in the activities of armed bands as warranting different kinds of response. In the case of 'sending' by a State of armed bands that invade the territory of another State "... in such circumstances as to amount to an armed attack..." the right of self-defence should be exercised; by contrast, in the case where "... a state is the victim in its own territory of subversive or terrorist acts....it may take all reasonable and adequate measures to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence..." even if the armed bands are supported by another State[180].

The same distinction appears to have been relied upon in the *Nicaragua Case* albeit in a somewhat less clear fashion[181]. The non-

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no 20, A/7620; I.C.J. Rep. 1986 (*per Judge Schwebel*) pp. 344-5, 347-8, paras 167-8, 172-3; S. Schwebel, Aggression, Intervention and Self-Defence, *136 H.R.C. 413 (1972 II)* pp. 482-3; Schachter, *11 Hous. J.I.L. 309 (1989)* ; Reisman, *11 Hous. J.I.L. 317 (1989)*; Intoccia, *19 Case W.Res. J.I.L. 177 (1987)* pp. 209, 272-3; Blum loc. cit. in Netanyahu(ed.) op. cit. supra n. 147; McCredie, *19 Case W.Res.J.I.L. 215 (1987)* p. 241; Roberts, Self-Help in Combating State Sponsored Terrorism: Self-Defense and Peacetime Reprisals, *19 Case W.Res.J.IL. 243 (1987)* pp. 258-9 and cf. 247, 265, 289-293; Akehurst, *27 I.J.I.L. 357 (1987)* p. 370; Bowett, *Self-Defence in International Law, 1958*, pp. 48-9 but cf. pp. 55-6 and id. loc. cit. in Moore(ed.) op. cit. *supra* n. 28, p. 40; Murphy op. cit. *supra* n. 22,pp. 105-7; Higginbotham, *25 Col.J.Trans.L. 529 (1986-87)* p.555; Moore,*76 Yale L.J. 1051 (1967)* and id. *80 A.J.I.L. 43 (1986)* pp.88-9, 105-6; Macdonald, *xxiv Can.Y.I.L. 127 (1986)* p.145.

[180] See Report of the Special Committee on the Question of Defining Aggression, Annex II, Report of the Working Group, Appendix A, Doc. A/8719, p. 19, G.A.O.R. 27th Session, Suppl. no 19. Also see: G.A.O.R. 24th Session; Thirteen Power draft Definition of Aggression, A/AC.134/L.16 and Corr. 1; Report of the Special Committee on the Question of Defining Aggression, Doc. A/7620, Suppl. no 20, paras 28-29, 61-65; Report of the Sixth Committee, Doc. A/7853, G.A.O.R. Annexes, p. 2, paras 13, 21-22.
G.A.O.R. 25th Session; Report of the Special Committee on the Question of Defining Aggression, Doc. A/8019, Suppl. no 19, paras 27-29, 51-54, 126-129; Report of the Sixth Committee, Doc. A/8171, G.A.O.R. Annexes, p. 1, paras 18-19.
G.A.O.R. 26th Session; Report of the Special Committee on the Question of Defining Aggression, Doc. A/8419, Suppl. no 19, paras 26-28; Report of the Sixth Committee, Doc. A/8525, G.A.O.R. Annexes, p.1, paras 24-25.
G.A.O.R. 27th Session; Report of the Sixth Committee, Doc. A/8929, G.A.O.R. Annexes, p. 1, para 22.
G.A.O.R. 28th Session; Report of the Special Committee on the Question of Defining Aggression, Doc. A/9019, Annex II, Report of the Working Group, Appendix B, para 22; G.A.O.R. Suppl. no 19. Also see: Brownlie, *7 I.C.L.Q. 712 (1958)* pp. 730-2 and id. op. cit. *supra* n. 62 pp. 372-5; Sullivan, *10 ASILS. I.L.J. 169 (1986)* p.193; Farer, *81 A.J.I.L. 112 (1987)* and id. *67 Col. L.R. 266 (1967)* pp. 276-7; Henkin, *216 H.R.C. 13 (1989 IV)* pp. 159-161; Falk, *75 Yale L.J. 1122 (1966)* ,id. *76 Yale L.J. 1095 (1967)* pp. 1102-3, 1124-5,1142 but cf. 1140 and id. *68 Col.L.R. 1127 (1968)* pp. 1135-8 but *cf.* pp. 1131-3, 1147; Rowles, *81 A.J.I.L. 568 (1986)* pp. 579-580; Q. Wright, *53 A.J.I.L. 112 (1959)* p. 123, id. *60 A.J.I.L. 750 (1966)* pp.766-7, and id. *51 A.J.I.L. 257 (1957)* p. 271; N.D. White, *ix Int. Rel. 535 (1989)*; Gross, *13 Cal.West. I.L.J. 458 (1983)*; Garcia-Mora op. cit. *supra* n. 147 pp. 115-120.

[181] I.C.J. Rep. 1986, p. 103 para 195; *contra* id. *per Judge Schwebel*, pp. 342-3 paras 163-4; *cf* . id. *per Judge Jennings*, pp. 543-4.

aligned draft Definition of Aggression seems to suggest a distinction in responding to acts of armed bands on the grounds of their territorial basis in accumulation with their being or not the primary author of the use of force: The 'sending' by a State of armed bands that 'invade' the territory of the victim State clearly indicates that the guerrillas may be the source of force on the ground but at the same time they have the position of a 'weapon' in the hands of the State that sends them. By contrast the fact that a State may be faced *ab initio* with insurgency in its own territory implies that the guerrillas have been formed spontaneously in the territory of the victim State and that they constitute both the source and the author of armed force[182] . Again, in the former case the victim State has the right to invoke self-defence, both individual and collective, and legitimately resort to force against the assisting State as such. This is understood to involve, subject to the requirement of proportionality, the likelihood of force used in the territory of the assisting State, while the latter situation seems to imply that forcible response should be directed only against the armed bands and be restricted on the territory of the victim State[183].

In the *Nicaragua Case* the Court expressly addressed the issue of when the involvement in the activities of armed bands constitutes an armed attack against the victim State that gives the latter the right to resort to force in self-defence. Reliance has been laid on Art. 3(g) of the Definition of Aggression and on this basis the Court has elaborated on the material dimensions and intensity of the 'sending' of armed bands, specifically mentioning the " scale and effects" of the latter's activities, and suggested that the "substantial involvement" in the assistance to armed bands signified 'agency' on behalf of the assisting State and that the mere provision of weapons, training, logistical support amounted to a use of force *short of* an armed attack[184]. It then proceeded to rule that in a situation where the victim State is faced with State involvement in guerrilla activities that does not amount to an armed attack, it has the right to resort to "proportionate counter-measures" that, it is strongly suggested, are analogous to the right of self-defence. It has not been made clear, however, whether the exercise of these counter-measures should take place on the territory of the victim State only, or whether they could

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[182] Gill loc. cit. *supra* n. 178, pp. 39-40.
[183] Ibid. pp. 41-2.
[184] I.C.J. Rep. 1986, pp. 103-4,61-62, paras 195, 108-9. Contra, id. *per Judge Schwebel* , pp. 343-344, 346, paras 166-167, 170.

be exercised extraterritoriality; or whether they should be directed against the guerrillas only or against the assisting State as well.

A passage of the Judgment in the *Nicaragua Case* may be read as implying (albeit vaguely) the possibility of extra-territorial action against guerrillas. The Court held that:

> ... Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the *contras* was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed Opposition to the Government of Nicaragua ... intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of Government in Nicaragua ...[184a]

The implicit admissibility of extraterritorial resort to force may be deduced by the fact that the formation of a large guerrilla group would be somewhat excessive for countering arms supplies to the Salvadorean insurgents. Indeed, it might be argued that this could be achieved by other means, possibly including limited strikes against the supply routes on Nicaraguan territory[184b]. This, however, can only be a tentative interpretation in view of the lack of clarity in the Court's Judgment in respect of resort to this action.

Since the Court has dealt with the customary law on the use of force by States consideration of State practice is necessary.

The overwhelming majority of States that have become victims of activities of armed bands have resorted to force against the guerrillas within their territories only even though it had been alleged or even established on the basis of evidence that the guerrillas were assisted by another State[185]. Examples abound. In the period 1946-49 the Greek Government resorted to large-scale operations against the communist guerrillas only within the territory of Greece notwithstanding the fact that a Security Council Special Commission dispatched to the Balkans to investigate the situation, reported that Yugoslavia, Albania and Bulgaria were providing arms and logistical support to the guerrillas[186]. Moreover, the Governments of Chad (1983-87), Mozambique(1975-), Ethiopia(1961-91), Somalia (1988-91) , Sudan (1983-), Nicaragua (1979-1989), El Salvador (1979-91), Malaysia (1963-65), Sri Lanka (1987-), Cambodia (1979-91),

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[184a] I.C.J. Rep. 1986, p. 124, para 241.
[184b] See N.D. White, *ix Int. Rel. 535 (1989)*, p. 543.
[185] Gill loc. cit. *supra* n. 178, p. 41.
[186] Doc.S/360.

Afghanistan (1978-92), Yemen (1962-69), Turkey (1979-) and Iraq (1975-), have used force against the guerrilla movements operating against them strictly within the territory of the State.

There is, however, a significant minority of States that have often resorted to force beyond the boundaries of their proper territories or territories under their administration. The justification offered for such extra-territorial action has been in almost all cases the right of self-defence to counter the use of force waged by armed bands against their territories, their citizens or their interests outside their territories[187], always in conjunction with the alleged involvement in the guerrilla activities of the State on whose territory military force is exercised. Such involvement is indiscriminately considered of a nature of giving rise to the right of self-defence and includes the supply to the guerrillas of bases or sanctuaries, arms, training, political and financial support; even the existence of a guerrilla organisation's headquarters or information offices in a country have been deemed sufficient grounds for military action on the territory of that State[188].

On 8 February 1958 the French Air Force launched an air raid on the Tunisian town of Sakiet-Sidi-Youssef that resulted in heavy loss of life. Statements by the French Government authorities justified the action as an exercise of the legitimate right of self-defence against anti-aircraft batteries installed in Tunisian territory, and that Sakiet was a base from where the Algerian F.L.N. would launch their operations against the French army in Algeria[189]. The responsibility of the Tunisia was emphasised in further statements of the French Government; it was claimed that Tunisia furnished aid to the Algerian fighters "... enabling them to conduct operations from Tunisian territory directed against the integrity of French territory..."[190]; that the insurgents "... aided and abetted by the Tunisian authorities had been able to establish a complete organisation in Tunisia..."[191]; and, finally, that "... an independent and

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[187] Viz. the justifications of the Israeli air strike on the P.L.O. headquarters in Tunis in 1985, and of the U.S. air raids on Libya in 1986.

[188] Viz. the simultaneous S. African raids on A.N.C. offices in Zambia, Botswana and Zimbabwe on 19 May 1986, and the Israeli air strike on the P.L.O. headquarters in Tunis on 1 October 1985.

[189] Keesing's 1957-1958, p. 15886.

[190] Doc. S/3954, S.C.O.R. 13th yr. Suppl. for Jan.-March 1958, p. 15.

[191] Repertory of Practice of the U.N. organs, supl. no 2 vol. 1, p. 105, para 126.

sovereign country must not allow people to take cover behind its frontiers and attack others even if these others are their enemies..."[192].

The armed forces of the white minority regime in Rhodesia frequently launched operations against the Z.A.N.U.-Z.A.P.U. self-determination movements on the territory of neighbouring States of Mozambique, Zambia and Botswana. The justification was again the right of self-defence - viz. The Rhodesian incursion in Mozambique followed by the occupation of the town of Mapai on 30 May 1977 which was justified as "...necessary to achieve the destruction of Z.A.N.U.-Z.A.P.U. ..."[193]; the commando raid against a refugee camp in Zambia on 7 March 1978[194].

Portugal resorted to force under the same justification of self-defence in the territories of Zambia, Senegal and Guinea that had a common border with the Portuguese colonies of Angola and Guinea (Bissau), where Portugal was being faced with armed struggle by the indigenous populations that aspired to independence[195]. It was stressed by the Portuguese Government during the debates in the Security Council that the harbouring of guerrillas by the three above States was an outright violation of Art. 2(4) of the Charter[196].

During the Viet- Nam conflict the *Vietkong* would use as a route of supply the territories of Laos and Cambodia. Although neither Government of these countries was assisting the guerrillas[197], two major operations were launched on their territories by the S. Viet- Namese army individually in Laos and jointly with U.S. forces in Cambodia. On 1 May

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[192] S.C.O.R. 13th yr. 819th mtg. paras 70-72, 74, 76-77; id. 820th mtg. para 9.

[193] Keesing's 1977, p. 28550.

[194] Id. 1978, p. 28949.

[195] See S.C.O.R. 24th yr. 1486th mtg. para 72 (Portuguese shelling of the Zambian village of Lote, 30 June 1969); id. 1516th mtg. para 102 and 1520th mtg. para 12 (Portuguese shelling of the Senegalese village of Samine, 25 Nov. 1969); id. 1522nd mtg. paras 50-52 (shelling of two Guinean villages on 2 Dec. 1969).

[196] S.C.O.R. 24th yr. 1486th mtg. para 119 (the Lote incident); note that the Portuguese delegate also stressed that the Portuguese forces had strict instructions "... which are being obeyed.." not to cross into Zambian territory, ibid.

[197] A S. Viet- Namese incursion into Cambodia that the latter brought to the attention of the Security Council (Doc. S/5697) in 1964 was attributed by S. Viet- Nam to 'error' (S.C.O.R. 19th yr. 1118th mtg. paras 19, 26, 35-36), while the representative of the U.S.A., despite his claim that the *Vietkong* were using Cambodia as a 'passageway' to infiltrate S. Viet Nam, made it clear that the U.S. did not wish to imply that the Cambodian Government assisted the guerrillas (S.C.O.R. 19th yr. 1119th mtg. para 97, 1122nd mtg. paras 14, 17, 19). Moreover later allegations of Cambodian assistance by allowing traffic-in-arms through Cambodian territory were vigorously denied by the Cambodian Government - Keesing's 1969-1970, pp. 24015-6, Doc. S/8149 S.C.O.R. 22nd yr. Suppl. July-Sept.. 1967 pp. 288-9. Finally, another S. Viet- Namese incursion inside Cambodia on 18 Jan. 1968 was again attributed to error - Keesing's 1969-1970, p. 24016.

1970 the S. Viet- Namese and U.S. forces launched an offensive inside Cambodian territory justified as action in collective self-defence and directed against *Vietkong* bases on the territory of Cambodia; the operation was, moreover, described as "... restricted in extent, purpose and time and confined to the border areas which had been completely occupied by N. Viet- Namese and Vietkong forces..."[198] . Furthermore, the operation undertaken by the S. Viet- Namese army on the territory of Laos on 8 February 1971 was described by the S. Viet- Namese Government as "limited" aiming at "... disrupting the supply and infiltration network of the Communist North Viet- Namese troops lying in Laotian territory[199]. Moreover the U.S. State Dept. in a statement transmitted to the Security Council after stressing the fact that no U.S. troops were participating in the operation, it took the view that "... [T]he measures of self-defence being taken by the Republic of Viet- Nam are fully consistent with international law..."[200] .

The U.S.A. justified the air strike against the Libyan cities of Tripoli and Bengazi on 15 April 1986 as anticipatory self-defence against imminent future terrorist attacks against U.S. targets[201].

The S. African armed forces have on numerous occasions resorted to force on the territories of its neighbouring States of Angola, Zambia, Zimbabwe and Mozambique. All military operations were justified as an exercise of the right of self-defence against, and this important, the guerrilla movements of S.W.A.P.O. and A.N.C. as such, rather than the States on whose territory the action had taken place; moreover, it has always been stressed that S. Africa's neighbouring States bore responsibility for allowing S.W.A.P.O. and A.N.C. fighters to establish bases and operate from their territories. In a letter dated 27 June 1980 from the Minister of Foreign Affairs and Information of South Africa, Mr. R.F. Botha, addressed to the President of the Security Council it was stated "... S. Africa harbours no aggressive intentions against Angola and its people.... any action on the part of S. African security forces is aimed solely at S.W.A.P.O.

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[198] Doc. S/9781, S.C.O.R 25th yr. Suppl. April-May 1970, pp. 176-7; Address of President Nixon to the American People of 30 April 1970, Keesing's 1969-1970, p. 24131.

[199] Statement by President Thieu of S. Viet- Nam, Keesing's's 1971-1972 p. 24621; Note 8 Feb. 1971 by the President of the Security Council transmitting a note verbale from the observer of the Republic of Viet- Nam, Doc. S/10104, S.C.O.R. 26th yr. Suppl. Jan.-March 1971, p. 61.

[200] Doc. S/10106, S.C.O.R. 26th yr. Suppl. Jan.-March 1971, p. 63.

[201] See *supra* Part One , Ch. 3. The issue of anticipatory action in self-defence is equally applicable with regard to counter-measures and it is dealt with in the context of self-defence against an armed attack; *supra* First Title, section 5.

and not at Angola and its people..."[202]. Furthermore, in another letter to the President of the Security Council on 10 April 1980, Mr. R.F. Botha stated that "... S. Africa has no alternative but to take protective action against aggression committed from Zambian soil... S. African actions... are aimed solely at the elements committing aggression and not against the countries concerned or their citizens...."; he then, however, went on to to claim that, ".... Zambia must bear full responsibility for allowing terrorist elements to establish sanctuaries in and operate from its territory. It is therefore Zambia which is in persistent breach of the provisions both of international law and of the Charter of the United Nations to the effect that States must refrain from the threat or use of force in their international relations..."[203]. In another communication to the Security Council following the so-called operation *Protea*, a large-scale incursion by the S. African army inside Angola on 24 August 1981, Mr. Botha again stressed the fact that "... [I]n countering S.W.A.P.O. incursions S. Africa has been guided by limiting its operational response to S.W.A.P.O. targets..."[204].

Between 1953-1992, Israel has frequently resorted to the use of armed force in response to the activities of armed organisations based in most cases on the territory of its neighbouring Arab States. The justification offerred by Israel has consistently been the right of self-defence. The assertion of this right by Israel has a unique character in that Israel has consistently declined to consider the acts of force by armed groups in isolation; instead, it has relied on the 'cumulative effect' of previous armed activities against it and the certainty that they will recur in the immediate future[205]. Moreover, the Israeli Government has also considered the activities of armed bands or groups against Israel as part of a concerted Arab policy of hostility and 'aggression' against it, and has held its neighbouring Arab States directly responsible for the guerrilla use of force directed against it.

Mr. A. Eban, the representative of Israel in the Security Council, justified his country's military action in the Sinai on 29 October 1956 as an exercise of the right of self-defence aimed at eliminating the bases of the

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[202] Doc. S/14028, S.C.O.R. 35th yr. Suppl. April-June 1980,pp. 115-6.
[203] Doc. S/ 13886, id. , p.14.
[204] Doc. S/14652, S.C.O.R. 36th yr. Suppl. July-Sept. 1981, pp. 50-2.
[205] See *supra* Part One , Ch. 3.

fedayeen which, he stated, constituted "... the spearhead of the unilateral belligerency imposed by Egypt on Israel..."[206].

The operation *Peace for Galilee* of 4 June 1982 that involved a deep incursion of the Israeli armed forces inside the territory of Lebanon and culminated in subjecting the capital Beirut to siege, was justified in the Security Council in the following terms:

> "... Israel has been the target of on-going aggression for many years.....
> ..... Israel has regularly informed the Council over the years of the attempted atrocities and the actual atrocities perpetrated by the P.L.O. against Israel, Israelis and Jews around the world....
> ... It becomes...imperative for the Government of Israel to exercise its legitimate right of self-defence to protect the lives of its citizens and to ensure their safety....
> ... In the normal course of international affairs, a sovereign State assumes the responsibility for the actions not only of its Government but also of its subjects and " guests". Lebanon's duty to prevent its territory from being used for terrorist attacks against other States is based on general international law....
> ... The P.L.O. , the so-called guest of Lebanon,..... is acting with its customary brazeness in trespassing against the citizens of a neighbouring State, Israel....
> ... Israel must hold Lebanon fully responsible for any atrocity committed against it when it is conceived and planned in Lebanon irrespective of whether it is carried out from Lebanon or from any other territory...."[207]

Moreover, since the early 1970s the Israeli Government has placed ever increasing emphasis on the fact that the Israeli military operations are primarily directed against the guerrillas as such rather than against the States on whose territories they are based, while in the 1950s and 1960s the host States of the guerrillas were attributed responsibility for allowing their territories to be used for injurious acts against Israel, that was deemed as rendering them the actual authors of the use of force. Mr. Eban stated the following with regard to the Qibya raid of 1953:

> "... Jordan's task.... is to submit the State of Israel,....., to guerrilla warfare with the object of inflicting copious bloodshed, and demoralising the national life of Israel at its most vulnerable points..."[208]

The new trend of regarding the guerrillas as such the source and authors of force to be repelled is still accompanied by stressing the responsibility of the host State or even making general references to

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[206] S.C.O.R. 11th yr. 749th mtg. paras 33, 38-48, 97; G.A. (E.S.-I) 562nd plen. mtg. paras 105, 108-9, 111, 131-4.
[207] The latter was supported by references to G.A. Resolutions 2131(XX) of 21 Dec. 1965 and 2625 (XXV) of 24 Oct. 1970. S.C.O.R. 37th yr. 2375th mtg. paras 23, 24, 39, 54, 55.
[208] S.C.O.R. 8th yr. 637th mtg. para 43.

General Assembly resolution 2131 (XX) and General Assembly resolution 2625 (XXV) thus implying some form of assistance; this, however, appears to be necessary in order to justify armed action against the guerrillas on the territory of the host States, rather than to elevate the latter to the actual author of the use of force[209]. Thus in justifying his country's military incursion in Lebanon on 12 May 1970, Mr. Tekoah, the representative of Israel in the Security Council, said that the operation was directed solely against concentrations of terrorist organisations in S.E. Lebanon[210]. Similarly the Israeli bombing of the P.L.O. headquarters in Tunis on 1 October 1985 was justified as an act of self-defence " against terrorism" and it was emphasised that the air strike was directed against the "terrorist killers" and not against Tunisia[211].

Apart from the justification of self-defence for extra-territorial use of force against armed bands, a right of " hot pursuit" of guerrillas has also been asserted in certain cases.

During the Algerian War of Independence the French Government justified the incursion of an infantry company inside Tunisia on 1 September 1957 as an exercise of the right of "hot pursuit"; President Burguiba of Tunisia maintained in a broadcast that this "...right of pursuit..." had no basis in international law and claimed that it had been used as a pretext for attacks against the sovereignty and integrity of Tunisia[212]. The same right of "pursuit on land" was asserted by the Rhodesian Government in justification of a raid on a camp inside Mozambique on 8 August 1976 [213] and of the occupation of Mapai on 30 May 1977 . During the Security Council debate on the latter incident the representative of Lesotho stated:

> "... It is a right of every State to provide refuge to people who flee their country of origin because of oppression or persecution on grounds of their colour religion or race. If these people are pursued from the country of origin and they enter the territory of the State of refuge, or a third State, such pursuit must cease. Even in the law of the sea the principle of hot pursuit forbids the pursuing State to continue the pursuit once the pursued enters the territorial waters of its own or a third State..... The principle is very inappropriate to and cannot be used in respect of pursuit of fugitives on land. A State which pursues its fugitive citizens into the territory of another State, for any crime whatsoever, is guilty of violating the sovereignty and the territorial integrity of that State..."[214]

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209 A similar position seems to exist with regard to S. Africa; see supra p. 39.
210 S.C.O.R. 25th yr. 1537th mtg. para 35.
211 U.N. Chronicle vol. XII nos 10/11 Dec. 1985, p. 4.
212 Keesing's 1957-1958, p. 15886.
213 Id. 1976, pp. 27945-6.
214 S.C.O.R. 32nd yr. 2015th mtg. para 40.

Finally, on one occasion, the Israeli Government used the so-called right of "hot pursuit" as the basis for the justification of the major Israeli operation inside Southern Lebanon on 14 March 1978, by specifically referring to the Pershing expedition of Mexican armed bands in 1916[215]. The Israeli military incursion came as a reaction to the sea landing and subsequent commandeering of a bus by eleven P.L.O. fighters along the Haifa-Tel Aviv motorway on 11 March 1978 that resulted in the death of 34 Israelis and 1 U.S. citizen[216]. The fact that the P.L.O. operation was repelled and that it had been sea-borne (it had not been launched across the Israeli-Lebanese frontier) would seem to render the invocation of "hot pursuit" somewhat superfluous[217].

The so-called right of "hot pursuit" in the sense provided under the Law of the Sea does not correspond to any defensive necessity beyond repelling the armed bands where and when they use force; if this takes place on the territory of the victim State expelling the guerrillas therefrom it terminates any defensive necessity for further action (cf. *infra*). The object of "hot pursuit" as a right to resort to unilateral action seems to be the bringing of escaping wrongdoers before the jurisdiction of the pursuing State[218]. It is, therefore, an enforcement measure rather than an exercise dictated by defensive necessity. The persistent objection with regard to claims of a right of pursuit on land by third States as well as the paucity of the invocation of such right in State practice may militate for the submission that the so-called right is not part of general international law[219]. The analogy with the Law of the Sea is a rather untenable one; hot pursuit in this case is only permitted on the high seas which is under the jurisdiction of no State, and must cease when the pursued vessel enters the territorial sea of another or its own State[220]. It is recognised, however, that hot pursuit of insurgents by the victim State on the territory of a neighbouring State is admissible only by express consent of the latter in

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[215] Id. 33rd yr. 2071stth mtg. para 55.

[216] Keesing's 1979 , p. 29646.

[217] See criticism by the Libyan representative in the Security Council, S.C.O.R. 33rd yr. 2071st mtg. para 114.

[218] N. Poulantzas, *The Right of Hot Pursuit in International Law, 1969*, p. 2.

[219] Authority seems unanimous. See Bowett op. cit. *supra* n. 62 pp. 38-41; Brownlie 7 *I.C.L.Q. 712 (1958)* pp. 733-4 and id. op. cit. *supra* n. 62; Garcia-Mora op. cit. *supra* n. 147, pp. 120-4; Poulantzas op. cit. *supra* n. 218, p. 15.

[220] See Articles 23(2) of the 1958 Geneva Convention on the High Seas; 111(3) of the 1982 Law of the Sea Convention.

the form of a treaty[221]. Such consent was mutually given by the Governments of Iraq and Turkey in the Agreement of 20 April 1979 on the suppression of Kurdish separatism on the borders between the two countries[222]. That the Agreement contemplated the right to exercise hot pursuit on land was inferred from the lack of protest on the part of Iraq when the Turkish armed forces pursued Kurdish guerrillas 20km inside Iraq on 27 May 1983[223]. It must be made clear, however, that pursuit may form part of defensive action, which has been in progress on the territory of the victim State. If, for instance, after their expulsion from the territory of the victim State the guerrillas immediately regroup and continue their offensive from the territory of another State across the frontier, then a limited operation may be envisaged in order to silence the specific source of force against the army of the victim State involved in the initial operation that has started inside the victim State - not to destroy the guerrilla organisation in general. It is submitted that such action seems to be a case of defensive necessity subject to the requirement of proportionality and not part of a doctrine of hot pursuit on land[224].

The States that have been accused of offering refuge or material assistance to guerrilla organisations, and on whose territory force has been used by the victim State of the guerrillas, have, with the possible exceptions of Indonesia and Somalia, either denied any involvement in supporting the insurgents or justified such support on the basis of the right of individual or collective self-defence - viz. the U.S. justification for assisting the *contra* insurgency in Nicaragua. Denial of complicity or connivance, that aims at casting aside any allegations of State responsibility in general and of breach of the rule of the prohibition of the use of force in particular, constitutes the primary and most frequently invoked ground against allegations to the contrary. This rests on the assertion that, although the presence of individuals and organisations representing political opposition against the Government of another State is admitted, their status is that of political " refugees" escaping oppression because of the internal policies of the victim State, and that, due to their predicament, they are welcome in the territory of the receiving State. At the same time it has been emphasised that such policy of granting political asylum would be compromised and degenerate into a violation of

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221 Poulantzas op. cit. *supra* n. 218, pp. 15-16.
222 Keesing's 1979, p. 29923.
223 Id. 1983, p. 32585.
224 Poulantzas op. cit. *supra* n. 218 p. 16.

international law if they were allowed to pursue armed action against the Government from whose oppression they are fleeing[225]. Moreover, States whose territory has become the *terrain* of the use of force by the victim State against the guerrillas have pointed to the inability of the victim State to take sufficient measures of security within its territory against the guerrillas while asserting for themselves the right to take any "police" measures on their territory. Following the French air strike on the town of Sakiet, the Tunisian Government argued that it was not "... the asylum granted to Algerians who take refuge on Tunisian territory, or the slight traffic in arms that the 40,000 French soldiers guarding our frontiers were unable to prevent, which is prolonging the Algerian war..."[226]. After the Qibya raid of 1953, Jordan contended that "... [T]he Israeli Government must be brought to recognize the principle that action to stop the infiltration of which they complain must be confined entirely to the territory occupied by Israel in accordance with general practices and international procedure..."[226bis]. During the Security Council on the Israeli operation in S.Lebanon on 14-15 March 1978, the representative of Lebanon asserted the right of his country to be responsible for the maintenance of law and order in the territory of Lebanon notwithstanding the civil war therein and the exercise of virtually no control in that part of the country[227].

While the acts of infiltration and sabotage constitute a fact, the issue of State involvement therein is a matter to be established on the basis of evidence. Political support to the armed opposition within a State as well as "humanitarian" aid thereto does not constitute involvement in the guerrilla activities[228]. Yet, it has been used by the State-victims of guerrilla activities as a sufficient basis to take action against the armed bands on the territory of another State. Israel has consistently considered guerrilla infiltration from the neighbouring States of Lebanon, Syria, Jordan and Egypt (prior to the 1979 Peace Treaty) as being part of the hostile policy of these States against it. That these States have pursued such a policy cannot

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[225] See *supra* .
[226] S.C.O.R. 13th yr. 821st mtg. para 4.
[226bis] S.C.O.R. 8th yr. 638th mtg. para 75.
[227] Id. 33rd yr. 2071st mtg. para 16(Lebanon), para 81(Jordan). As for the Israeli action, it was pointed out that the landing of the P.L.O. fighters that were responsible for commandeering the Israeli bus along the Haifa-Tel Aviv motorway was indicative of the failure of the Israeli security forces to prevent infiltration in the territory of Israel. Ibid. para 114(Libya).
[228] I.C.J. Rep. 1986, pp. 124-5, para 242; id. *per Judge Schwebel*, p. 351, para 180.

be denied. What is doubtful though is whether political hostility towards a certain State accompanied by political sympathy towards the armed opposition against it amounts to a use of force. As it has been seen there must exist a link between a State and the guerrillas that has direct bearing on the actual use of force by the latter - viz. the provision of weapons, the training of individuals in combat, the provision of logistical support in the form of bases, communication facilities, intelligence. Moreover, the involvement of the assisting State must amount to either a sending of the armed bands or substantial involvement in their activities so as to constitute an armed attack giving rise to the right of individual or collective self-defence[229]. While the "sending" of guerrillas is relatively (not absolutely) easy to identify, the determination of what constitutes "substantial involvement" in their activities is rather complex. The Court in the Nicaragua Case seems to have considered the issue as one of agency and control, as if the guerrillas constitute part of the armed forces of the assisting State[230]. It is submitted that the Court's Judgment has introduced a distinction of a very essential and practical significance. Whatever the complicity of a State in the activities of armed bands is, the latter constitute the source of the use of force. The degree of complicity, however, finds its importance in that it is essential to determine the question of who the actual author of the use of force is. In a case of internal insurgency, and this is the case with regard to most guerrilla movements so far, the author of the use of force against the victim State is the insurgents themselves. By contrast, in a situation of sending armed bands to invade the territory of a State - viz. the mercenary attacks against Benin (1977) and the Seychelles (1981); the Indonesian-sponsored infiltration of Malaysia (1963-65); the sending of armed bands by Somalia into Ogaden in Ethiopia (1977-78) - the author of the use of force is a State, whereas the armed individuals are merely an instrument of that State. The question of the precise level of State use of force may be envisaged as a wide range of State involvement of such acts which is limited by two extremes: first, no State involvement at all, and secondly, the "sending" by a State of armed bands or its "substantial involvement" therein. Between these two extremes outside involvement may vary considerably. Individual forms of involvement, namely, training only or arming the guerrillas only, do not render a State the author of the use of force amounting to an armed attack. Multifaceted

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229 Id. p. 103, para 195; Brownlie op. cit. *supra* n. 62, p. 372; id. *7 I.C.L.Q. 712 (1958)* p. 731.
230 Id. pp. 61-62, paras 108-9; *contra* id. *per Judge Schwebel* pp. 343-344, paras 166-167, 170.

assistance, however, seems to blur the dividing line between a violation of Art. 2(4) of the Charter and a violation that amounts to an armed attack. Judge Jennings pointed in his dissenting Opinion in the *Nicaragua Case* :

> ... It may be readily agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may be a very important element in what might be thought to amount to armed attack where it is coupled with other kinds of involvement. Accordingly, it seems to me that to say that the provision of arms, coupled with "logistical or other support" is not armed attack is going much too far...231

This author feels bound to disagree. Although such support may contribute to the guerrillas becoming a formidable armed unit, it by no means implies that the assisting State has become the actual author of the activities against the victim State. Thus, the assistance provided by the U.S.A. to the *contra* guerrillas in Nicaragua and the *mujhahedin* guerrillas in Afghanistan may have created a formidable source of force against the Governments of these States but it did not create these movements (both have been indigenous) and it is a matter of evidence to determine whether such assistance was coupled by subjecting the guerrillas to a *quasi* command subordination hierarchy of the U.S. Government232. In the case of the Afghan guerrillas withdrawal of the assistance did not imply withdrawal of the guerrilla force itself. Indeed, this would have been the case if the guerrillas were fully subjected to U.S. command and constituted part of the strategic deployment of U.S. forces. It is submitted that the question of whether a guerrilla movement is completely subjugated to the command of the assisting State is a matter of evidence, which as the *Nicaragua Case* suggests, must not be circumstantial, and it should not be deduced simply on the basis of the existence of material support233. It is a flawed argument to maintain that, for instance, the F.L.N. has been an agent of Tunisia, S.W.A.P.O. under the command of Angola, the P.L.O. an agent of all the Arab States, the Salvadorean guerrillas an agent of Nicaragua and the E.P.L.F. subordinate to the Kuwaiti Government. In fact, far from being so, certain guerrilla organisations seem to have been quite politically influential in the States where they were based234.

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231 Id. *per Judge Jennings*, p. 543; approvingly, Gill, *1 Hague Y.I.L. 30 (1988)* pp. 51-2.
232 With regard to the Nicaraguan *contras*, see Id. pp. 61-62, paras 108-9.
233 *Supra* n. 232; cf. *The Corfu Channel Case* I.C.J. Rep. 1949, p. 18.
234 *Supra* notes 168, 169. Indeed, with respect to the so-called national liberation movements, the political case of these organisations seems to be reinforced and their broad

Uses of force against guerrillas on the territory of another State has on many occasions been considered as directed against it rather than against the guerrillas. It appears that the way and the circumstances of the uses of force by the victim State on the territory of other States involved excessive force and it affected the host State as such - although its precise complicity was not proved beyond any doubt - and in some cases it was solely and exclusively directed against the host State itself - e.g. the destruction of the Ghor Cannal (used for irrigation purposes) by Israeli commandos in Jordan on 23 June 1969[235]. Any operation on the territory of the host State that involves land forces is bound to be strikingly disproportionate if the number of the troops involved is considerably high and the operation has the character of a general "sweeping" action rather than the limited objective of silencing a specific source of force situated across the frontier which is in progress there and then. Such operations unavoidably interfere with the life of the citizens of the State, they inflict, by their nature large-scale destruction of human life and property, and it is very doubtful that they will be successful in completely destroying the guerrillas. Military operations like the joint S. Viet- Namese-U.S. incursion in Cambodia (1970), the S. African operations *Protea* (1981), *Daisy* (1981) and *Askari*(1983), and the Israeli operation *Peace for Galilee* (1982) were utterly unnecessary and disproportionate in view of the guerrilla uses of force preceding them, inflicted immeasurable damage to the States of Cambodia, Angola and Lebanon, and apart from causing a brief interruption of guerrilla activities, they failed to conclusively and permanently dispense with the guerrilla activities as a whole.

Furthermore, host States of the guerrillas that have openly exposed political support for their cause have in some cases become themselves the targets of the use of force by the beleaguered State, notwithstanding the fact that they have not been the authors of the use of force and that the action has been directed against targets totally unrelated to the guerrillas. Such action appears to aim at intimidating or punishing the host State itself. The destruction of the Ghor Cannal by Israeli commandos in Jordan in 1969 , the Beirut raid by Israeli commandos in 1968, the Portuguese mercenary attack against Guinea in 1971, the Rhodesian attack on the fuel depots in Beira in Mozambique (1979), and the S. African raid on the

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policies of the victim State that amount to violations of the right of self-determination of peoples under colonial or alien domination.

[235] Keesing's 1969-1970, p. 23667.

Angolan Oil Installations in Cabinda, 2,000 miles from the area where S.W.A.P.O. operated, are illustrations of such practice and constitute cases of armed reprisals that are unlawful under present international law.

In all cases the action by the guerrillas is directed against either the incumbent Government (guerrilla movements aiming at overthrowing the Government of a State) or the territorial integrity of a State - viz. secessionist movements like the Eritrean E.P.L.F. - or against the administration of a territory by another State (self-determination movements). With the exception of the latter[236] , in the absence of State connivance that generally amounts to a use of force or , in particular, to an armed attack, guerrilla action is a matter which would be *prima facie* considered as an internal issue of the victim State[237]. Moreover, and this includes every kind of guerrilla organisations,if the insurgency is simply the product of the internal administration and policies of a Government as well as the aspirations of the political opposition to the Government , rather than the policy of another State, then there is no violation of Art. 2(4) of the Charter[238]. The latter occurs only if another State provides the guerrillas with material assistance that has a direct bearing on the actual use of force by the insurgents. Still, notwithstanding such eventuality, the outbreak of armed insurgency has in most cases been totally beyond the activities of the assisting State. It is submitted, that it is only in the case of an unarmed opposition-in-exile and no hitherto use of armed force on the territory of the victim State, where the provision of military organisation, training, arms and logistical support for the purpose of starting guerrilla warfare amounts to an armed attack by the assisting State[239].

Though assistance to armed bands, that constitutes a case of unlawful use of force and that may not amount to an armed attack, suggests that defensive force is not to be resorted to against the assisting State as such for it is not the actual author of the use of force, the use of force by the guerrillas against the victim State represents a grim reality. There has been a tendency in the practice of States to consider action by guerrillas as deplorable in its own right[240]. Victim States that have used force on the territory of another State have escaped condemnation by the Security Council on the basis of lack of parallel condemnation of the

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236 See *supra* Part One , Ch. 6.
237 Falk, *75 Yale L.J. 1122 (1966)* p. 1125.
238 Bowett loc. cit. in Moore op. cit. *supra* n. 62, p. 39.
239 *Supra* .
240 *Supra* n. 114.

activities of the armed bands. The United States has on certain occasions prevented the adoption of draft resolutions by casting a negative vote, condemning S. Africa[241] or Israel[242] because it considered the condemnation solely of the State resorting to force as "unbalanced". At the same time, however, forcible action taken by victim States on the territory of host/assisting States was either condemned or deplored. That a victim State of guerrilla activities is entitled to protect its territorial integrity or political independence against use of force by armed bands, and that such action is defensive in character, is not denied[243]. The controversy lies with regard to, first, the target of the defensive action, and secondly the *locus* of this action. It is submitted that as long as forcible counter-measures must be directed against the source of the use of force that needs to be repelled, they must be directed solely against the insurgents[244]. As for the locality of resort to forcible counter-measures, it is submitted that two lines of conduct are open to the victim State: First, to confine the use of force to its territory either individually or jointly with its allies, or secondly to use force extraterritoriality on the territory of the host/assisting State individually. The latter possibility is the most controversial one. It is submitted that force on the territory of another State is as a rule inadmissible if no involvement of the latter is established, or no consent for such action is given. The joint S. Viet- Namese - U.S. action in Cambodia (1970) and the individual S. Viet- Namese action in Laos (1971) were met with strong protests by the Cambodian and Laotian Governments as constituting violations of the territorial integrity of their countries for no prior consent had been given for such action[245].

Extra-territorial use of force against guerrillas, that are themselves the authors of force and at the same time receive material assistance from another State, has been asserted exclusively against guerrillas that are based on the territory of another State, which incidentally may not be the one that provides the bulk of the assistance to the insurgents - viz. Honduras in relation to the activities of the *contra* movement. It is submitted that military action depends on the necessity to counter every and each one specific use of armed force by the guerrillas at a specific

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241 S.C.O.R. 36th yr. 2300th mtg. para 48 (Operation *Protea*)
242 Id. 37th yr. 2377th mtg. para 27 (Operation *Peace for Galilee*)
243 Brownlie op. cit. *supra* n. 62, pp. 374-5; Falk, *76 Yale L.J. 1095 (1967)*, p. 1140; Farer, *81 A.J.I.L. 112 (1987)*, p. 113.
244 N.D. White, *ix Int. Rel. 535 (1989)*, p. 543.
245 Keesing's 1969-1970, p. 24132; id. 1971-1972, p. 24622

location and specific time of occurrence[246]. Guerrillas constitute an individual source of armed force when and wherefrom they resort to armed force. It must be a flawed assumption to consider the mere existence of a guerrilla organisation as a danger to the entirety of the existence of the victim State as a matter of the prohibition of the threat or use of force, that becomes established on the basis of the insurgents being assisted from abroad. Even in this case Governments are extremely privileged in that they have unlimited access to capital arms and intelligence resources that enables them to acquire an a priori superior position over armed bands and maintain their position in the State[247]. The Ethiopian Government was faced with no less than three guerrilla movements - E.P.L.F. , E.R.P.D.F. , O.P.L.F. - for 30 years but this had not affected its international position as the Government of the State. The Government of Afghanistan has survived a large-scale guerrilla action. Sudan, Burma, Sri Lanka and Mozambique have endemic guerrilla movements that have not impaired their existence as sovereign States. It is a gross over-estimation that the existence of a guerrilla movement will mathematically lead to the destruction of the State as a whole.
Furthermore, a subsequent invocation on the above grounds, of the right of individual self-defence against an armed attack, beyond the frontiers of the victim State, may trigger off claims of collective self-defence by both the victim and the assisting States to their allies with a danger of a major conflict[248]. It is submitted that on the basis of overwhelming State practice and persistent opposition to claims of extra-territorial use of force, the use of force against armed bands as the only source and author of armed force should be confined within the territory of the victim State because it is there where guerrilla action occurs and it is, therefore, there that it should be repelled[249].

On several occasions armed bands are permanently based on the territory of a neighbouring State or simply withdraw therein under military pressure by the forces of the victim State. Still, it is where the actual use of guerrilla force takes place that must condition the response of the latter. It is submitted that on three occasions force is, by way of exception, to be used on the territory of another State:

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[246] Falk loc. cit. *supra* n. 243.
[247] Farer loc. cit. *supra* n. 243, p.114.
[248] Falk, *75 Yale L.J. 1122 (1966)*, p. 1136; Farer supra n. 247.
[249] Brownlie, *7 I.C.L.Q. 712 (1958)*, p. 730 and id, op. cit. *supra* n. 62, p. 373; Gill, *1 Hague Y.I.L. 30 (1988)*, p. 41.

First, when the exercise of armed force by the armed bands occurs from the territory of another State. On 8 April 1969, P.L.O. fighters launched a rocket attack on the Israeli port of Eilat from the Jordanian town of Aqaba; the Israeli Air Force attacked and destroyed the rocket launchers. King Hussein of Jordan dissociated his Government from the attack and announced that the perpetrators had been arrested by the Jordanian police[250].

Secondly, the case of attacks perpetrated from operational bases on the territory of another State. Such bases may be attacked if they constitute strictly military encampments used as the final launching ground for operations against the victim State. Again the use of force should be confined to the source of a specific instance of force by the guerrillas. The clandestine nature of the guerrilla operations may excuse the lapse of a certain period of time in order to spot the base and mount the operation. Such action should be exercised only if the territorial State is according to compelling evidence highly involved in the guerrilla activities by way of assistance that amounts to a use of force. At the same time, the aim of the insurgency may be also relevant. It is submitted that if the guerrilla action is directed towards impairing the territorial integrity of the victim State - viz. a secessionist movement -, the destruction of the security or economic infrastructure of the State, or the overthrow of the Government of the State without the guerrillas having a broad popular basis as a political opposition to the latter[251]. On 8 March 1988 the Nicaraguan Army took action against *contra* bases on Honduran territory. Such action may have been justifiable due to the aim of the *contras* at overthrowing the *Sandinista* Government[252], the existence of *contra* military encampments in Honduras and the insurgents narrow popular basis as an Opposition to the Nicaraguan Government[253]. The same action must be admitted in the case where the guerrilla bases are situated in an area of the

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[250] Keesing's 1969-1970, p. 23327.

[251] The opposite situation, which represents the political *locus standi* of all self-determination movements may be of significance with regard to the attitude of third States towards extra-territorial uses of force by the victim State. See, Farer, *67 Col. L.R. 266 (1967)*, p. 277 and id. loc. cit. *supra* n. 243, p.115; cf. Schachter, *11 Hous. J.I.L. 309 (1989)*, p. 314.

[252] I.C.J. Rep. 1986, p. 124, para 241.

[253] However, Honduras had persistently denied the presence of *contra* bases on its territory, considered the Nicaraguan operation as a violation of its territorial integrity and invited U.S. military assistance. The latter dispatched 3,200 troops, and this seems to have prompted the Nicaraguan Government, first to call off the operation and then to deny that Nicaraguan troops entered Honduras. Keesing's 1988, p. 35950.

host State which the guerrilla organisation has under its effective control because of the inability of the former to exercise any Government authority in the area, not due to the fact that the clandestine nature of the guerrilla activities has superseded the measures taken or because of the geography of the region, but due to circumstances that have the position of *force majeure* such as a state of civil war. This is the position of the Palestinian guerrilla camps in Southern Lebanon; the Israeli Air Force has often resorted to air strikes against their bases therein. Such selective action against precise Palestinian bases has so far gone without any protests; by contrast major land operations by Israel that involved invasion and occupation of Lebanese territory have attracted immense international reaction[254].

Thirdly, extra-territorial use of force against guerrillas forms part of the controversial issue of the protection of nationals abroad. In cases of highjacking of aircraft by armed groups and the holding of the nationals of a particular State as hostage in return for certain acts or omissions on the part of the the State, it is the latter that it is the target of the activities of the armed groups through its nationals. Resort to forcible counter-measures can be therefore envisaged - viz. the Israeli operation at Entebe (1976)[255]. This, however, is a rather tenuous submission[255a].

Conclusion.

It is submitted that the distinction between self-defence against an armed attack and proportionate counter-measures against a use of force that does not amount to an armed attack is not so much a distinction of kind, as it is a distinction of two different types of necessity that warrant defensive action without jeopardising international peace and security. This is implicit in the wording of Art. 51 of the Charter by virtue of which the exercise of the right of self-defence must cease when the Security Council takes measures against the aggressor. To invoke a necessity to protect the State as a whole with regard to any use of force, whether by regular armed forces or guerrillas, as if every use of force imputable to a State constitutes a case of an armed attack, may lead to extensive use of force that could escalate in a large-scale conflict, notwithstanding the

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254 *Supra* n. 227.
255 Schachter, *11 Hous. I.L.J. 309 (1989)*, pp. 311-312.
255a See *infra* Part Three , Ch. 11, First Title.

laudable cause for resorting to force in defence of one's State. The great and most likely risk for such an escalation lies in the invocation of the right of collective self-defence. State practice shows that the requirement of proportionality, equally important as that of necessity, can be very easily adapted to the latter. It was the same necessity that had been invoked in 1965 by the U.S.A. for the collective self-defence of S. Viet- Nam in its entirety as a political and territorial unit that led to the escalation of the conflict with the Cambodian operation of 1970. The consideration of the existence and activities of the P.L.O. and S.W.A.P.O. as a menace to their existence as a whole seems to have over-shadowed the specific uses of force by the above organisations and has led to large-scale military incursions by Israel and S. Africa inside the neighbouring States of Lebanon and Angola that resulted in great loss of life and property. It has even prompted long-distance operations like the 1985 Israeli air strike on the P.L.O. headquarters in Tunis although no guerrilla operations were being mounted from Tunisia. Indeed the invention of the so-called "accumulation of events" argument seems to imply that its adherents recognise that it is only the necessity to repel a specific use of force when and where it occurs that offers a credible justification for the use of force, and that its purpose is to accommodate individual and quite arbitrary views of certain Governments with regard to the overall security of the State[256].

That even such justifications have proved ineffective in order to crush the activities of armed bands have prompted certain States, under the invocation of the same necessity, to establish military occupations and thus outrightly impair the territorial integrity of other States - viz. the so-called "security zones" established by S. Africa in southern Angola from 1982-1988, and by Israel in southern Lebanon from 1983-the present day. To present a use of force that is directed against the territory of a State and is inherently associated with the internal policies of the latter, as a force aiming at the destruction of the State as a whole, and upon this basis to unleash defensive force to protect the entirety of the State may in certain circumstances - for example, when guerrillas receive material assistance from another State - acquire a large degree of plausibility. In this case it is a matter of evidence as to the precise level of another State's involvement that an extra-territorial use of force should be deemed admissible or not.

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[256] *Contra* : Blum loc. cit. in Netanyahu op. cit. *supra* n. 147, p. 136; Schachter loc. cit. *supra* n. 255, p. 313.

The fact, however, that other States are pronounced as accomplices of the guerrillas on very little evidence or general assumption based on the physical existence of the armed bands on the territory of the alleged assisting State; or on its political affiliation with the cause of the guerrilla action, and that force is used indiscriminately against them and the guerrillas, without any attempt at identifying the actual source and author of force, has led to very dangerous situations for international peace and security. The frequent uses of force by Portugal against the African States bordering on her colonies in Africa have provoked a very interesting statement that summarises the whole issue. During the debate in the Security Council on the Portuguese shelling of two Guinean villages on 2 December 1969, the representative of Madagascar stated:

> "... What assurances have we of peace and security so long as by their very nature Portugal's operations against the liberation movements go beyond the the bounds within which they should be confined ?..." 257

257 S.C.O.R. 24th yr. 1523rd mtg. of 17 Dec. 1969, para 31.

CHAPTER 10

THE RIGHT OF COLLECTIVE SELF-DEFENCE.

1. *Definition* .

The term collective self-defence connotes the situation where a State which is not itself the victim of an armed attack resorts to force in defence of another State that has been the victim of an armed attack, and has requested the assisting State's military assistance for its defence[1].

2. *Collective Self-Defence and Collective Security* .

Collective self-defence must be distinguished from collective security which envisages armed action that is directed at the maintenance or restoration of international peace and security. In contemporary international law such action, that has the character of enforcement action on behalf of the international community, fulfils a general interest shared by all States and has been entrusted to the United Nations Organisation, and more specifically to the Security Council thereof, which has primary responsibility for the maintenance of international peace and security, and to the General Assembly by virtue of the "Uniting for Peace" Resolution[2].

The unilateral use of armed force in order to vindicate international law and maintain international peace and security is inadmissible in contemporary international law. On 29 October 1956 the Israel armed forces launched a large-scale offensive in the Sinai peninsula

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[1] See *infra* notes 35-38 , Addendum to the Eighth Report on State Responsibility , by Special Rapporteur Ago, Doc. A/CN.4/318/ADD. 5-7, *I.L.C. Ybk. 1980, Volume II, Part One*, p. 13 at p. 68, para 118; Dinstein, *War, Aggression and Self-Defence, 1988*, p. 232. *Contra* , Stone, *Legal Controls of International Conflict, 1954*, p. 245: " ... Thus under general international law, a State has no right of "self-defence" in respect of an armed attack upon a third State. The very notion of *collective* self-defence seems contradictory, except as resorted to by two or more victims simultaneously attacked by the same Power ..."

[2] Bowett, *Self-Defence in International Law, 1958*, pp. 203-205, 223, 239-244; id. The Interrelation of Theories of Intervention and Self-Defence, in J.N. Moore (ed.), *Law and Civil War in the Modern World, 1974*, p. 47; Stone op. cit. *supra* n. 1, p. 264; Kelsen, Collective Security and Collective Self-Defence under the Charter of the United Nations, *42 A.J.I.L. 783 (1948)*, pp. 794-796; id. *Recent Trends in the Law of the United Nations, 1951*, p. 922.
Cf . McDougal & Feliciano, *Law and Minimum World Public Order, 1961*, p. 246; Dinstein op. cit. *supra* n. 1, p. 234.

across the 1949 Egypt-Israel Armistice Line, and in the early stages of the campaign they advanced in the vicinity of the Suez Canal. On 30 October 1956 the Governments of the U.K. and France communicated a joint ultimatum to both Israel and Egypt demanding the cessation of hostilities, the withdrawal of the forces of both belligerents from the area of the Suez Canal, and the acceptance of temporary occupation of certain key positions of the Canal area on Egyptian territory by U.K. and French forces; it was also stated in the ultimatum that "... failing an answer by 6.30 am, Cairo time, on 31 October 1956, the Governments of the U.K. and France would intervene in whatever strength they might deem necessary to secure compliance..."[3]. According to the representative of the U.K. in the Security Council the objectives of the Anglo-French action were purported to be the stopping of the fighting and the safeguarding of the free passage of shipping through the Suez Canal; Sir Pierson Dixon concluded that:

> "... I trust that the great majority of the members of the Council will agree that the action which the French Government and H.M. Government have taken is in the general interest and in the interest of security and peace..."[4]

Opposition to such claim has been unanimous. Mr. Lodge, the representative of the U.S.A. , introducing a draft resolution calling for Israel withdrawal behind the 1949 Armistice lines stated:

> "... We believe that if the draft resolution is adopted and promptly carried out ... the reason for the twelve-hour United Kingdom and French ultimatum as well as its basis, will have disappeared. In saying this I wish to make clear that we do not imply that in any circumstances this ultimatum would be justifiable or be found to be consistent with the purposes and principles of the Charter..."[5]

Moreover, the representative of Yugoslavia stated that:

> "... While the Security Council, the organ of the United Nations which bears primary responsibility for the maintenance of international peace and security, is considering the action to be taken in the face of Israel aggression against Egypt, two Member States of the United Nations have apparently decided to embark upon what can be described as the unilateral application of force. They have done so clearly without any kind of authorisation from the United Nations ..."[6]

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[3] Letter dated 30 October 1956 from the representative of Egypt to the President of the Security Council, Doc. S/3712, S.C.O.R. 11th yr. Suppl. for Oct.-Dec. 1956, p. 111.
[4] S.C.O.R. 11th yr. 749th mtg, para 11. See *infra* Part 3, Ch. 11, First Title.
[5] S.C.O.R. 11th yr. 749th mtg, para 22.
[6] Ibid. para 25; see also ibid. para 118 (Peru). G.A.O.R. (ES-1), Plennary Meetings and Annexes, 561st plen. mtg para 150 (U.S.A.), 562nd plen. mtg para 31 (Colombia), 563rd plen. mtg para 254 (El Salvador).

Collective self-defence is also *not* a substitute for collective security. It has been suggested that in the face of the paralysis of the Security Council due to super-power political antagonism, the only option left to States in order to protect themselves was to conclude collective defence arrangements based on Article 51 of the Charter. The rationale behind this argument is that by admitting the only legitimate situation of unilateral resort to force without prior authorisation by the Security Council, one dispenses with the danger of a State being left unprotected in the event of a Permanent Member blocking a decision of the Council by casting a negative vote[7] .

While this view may be cited to explain the political considerations that prompted States to contemplate the creation of and participation in collective self-defence arrangements (like, for instance, N.A.T.O. , the Warsaw Pact, the Inter-American Treaty of Reciprocal Assistance), the inference that such practice aims at establishing peripheral security arrangements as a matter of law divests the concept of collective self-defence of its true meaning which is none other than that of individual self-defence, namely, protective armed action in the event of a necessity giving rise to it and which is exercised by proportionate means[8] .

It is submitted that the emergence of collective self-defence groupings reveals simply the very pragmatic realisation that an individual State may protect itself more effectively against an armed attack if it is assisted by another or more States, than if it acts on its own.

Furthermore, where concerted enforcement action for the restoration of international peace and security is undertaken by a group of States acting under prior authorisation for such action by the United Nations, it does not constitute collective self-defence[9] . Whether military operations are pursued under an *a priori* agreed unified

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[7] Kunz, Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations, *41 A.J.I.L. 872 (1947)*, p. 874; Fenwick, The Atlantic Pact, *43 A.J.I.L. 312 (1949)*, p. 315; Dinstein, National and Collective Self-Defence, in Bassiouni-Nanda (eds.), *A Treatise on International Criminal Law, vol. i, Crimes and Punishment, 1973*, p. 284; Rifaat, *International Aggression, 1979*, pp. 192-193; Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1639; E. Jiménez de Aréchaga, International Law in the Past Third of a Century, *159 H.R.C. 9 (1978 I)*, p. 126.

[8] Bowett op. cit. *supra* n. 2, pp. 237-244. It must be pointed that such regional collective security arrangements are admissible under Chapter VIII of the U.N. Charter. However, insofar as they purport to undertake military enforcement action within the region they operate, it is, unlike Art. 51, only after prior authorisation by the Security Council that they can embark upon such action.

[9] T. Franck & F. Patel, U.N. Police Action In Lieu of War: "The Old Order Changeth", *85 A.J.I.L. 63 (1991)* .

central command bearing the insignia of the United Nations[10] or simply being allocated to one of the participating States[11], it does not alter the aim of the military action, namely, the restoration of international peace and security by virtue of prior endorsement by the Security Council that has primary responsibility to this effect[12]. Such action constitutes enforcement action and its prior sanctioning by the Security Council appears to remove from it the nuance of unilateral resort to force and harmonise it with the competence of the United Nations as the sole author of enforcement measures against aggression[13]. The practice of the Organisation appears to support this contingency. Apart from the measures for the maintenance of international peace and security that the Security Council delegated to individual Members in Korea and the Gulf conflict, it authorised by virtue of S.C. Res. 221 (1966) of 9 April 1966 the U.K. Royal Navy to " ... prevent, by the use of force if necessary,..." the shipment of oil to Rhodesia via the port of Beira on the Mozambique coast. Statements by individual Governments generally reveal no opposition and in some cases appear to be concurring. During the Security Council debate on the Suez crisis the representative of Peru stated that:

" ... the Council's functions with regard to peace cannot be evaded, and can be delegated only on its explicit instructions except in the case of self-defence..."[14]

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[10] Viz. action in Korea by virtue of S.C. Resolutions 83 (1950) of 27 June 1950 and 84 (1950) of 7 July 1950.

[11] Viz. action against Iraq in Kuwait by virtue of S.C. Res. 678 (1990) of 29 November 1990. Also see Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, *55 Modern L.R. 153 (1992)*, pp. 165-171.

[12] S.C. Res. 83 (1950) of 27 June 1950 appears to have been adopted under Art. 39 of the U.N. Charter as the *ad hoc* term of reference for the measures authorised by the Council. S.C. Res. 678 (1990) of 29 November 1990 makes a general reference to Chapter VII of the Charter; it is however presumed that the same provision of Art. 39 constitutes the basis for the action undertaken against Iraq. See N.D. White, The Invasion of Kuwait in D.J. Harris, *Cases and Materials on International Law, 4th ed., 1991*, Appendix IV, p. 1015; N.D. White & H. McCoubrey, International Law and the Use of Force in the Gulf, *x Int. Rel. 347 (1991)*, pp. 350, 355. *Cf*. Greenwood, *55 Modern L.R. 153 (1992)*, pp. 167-169.

[13] *Contra*, Schachter, United Nations Law in the Gulf Conflict, *85 A.J.I.L. 452 (1991)*, pp. 459-460, but. *cf*. pp. 461-463; Rostow, Until What ? Enforcement Action or Collective Self-Defence, *85 A.J.I.L.* 506 *(1991)*. The issue appears to be closely connected with the question of whether the Council has taken measures for the maintenance of of international peace and security whereupon action in self-defence should cease. See *supra* Chapter 9, First Title.

[14] S.C.O.R. 11th yr. 749th mtg para 118. *Cf*. S/PV. 2963 of 29 November 1990, statement by the representative of Iraq in which it was asserted that the Council could authorise military measures only under Articles 42 and 43 of the Charter, Lauterpacht and others (eds.), *The Kuwait Crisis: Basic Documents, 1991*, p. 161.

3. *The "Inherent" Right of Collective Self-Defence .*

Article 51 of the Charter expressly refers to collective self-defence as an "inherent" right. This implies that, like the individual exercise of the right, collective self-defence is acknowledged as part of customary international law.

The Court in the *Nicaragua Case* held that the wording of Article 51 "... testifies to the existence of the right of collective self-defence in customary international law ..."[15] . In his dissenting opinion Judge Oda is critical of the Court for not analysing more extensively precedent justifying the existence of collective self-defence in customary law[16] .

State practice in the period prior to the adoption of the United Nations Charter appears to admit the right of collective self-defence in the context of mutual assistance and defensive alliance treaties; indeed, the Act of Chapultepec of 1945 that certain authorities consider as the sole reason for the inclusion of Art. 51 in the text of the Charter, constitutes part of this practice[17] . The practice of States in the aftermath of the conclusion of the Charter reveals that Article 51 has served as the basis for the conclusion of multilateral collective self-defence treaties[18] while the practice of concluding bilateral defensive treaties has continued[19] . It is submitted that the above practice has further contributed to the existence of the right of collective self-defence in customary law[20] .

At the same time conventional practice in the form of collective defence treaties has led to a suggestion that under such instruments collective defence constitutes not only a right but an obligation as well[21] .

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[15] I.C.J. Rep. 1986, p. 14, at p. 102, para 193; *cf*. ibid. *per Judge Schwebel* , p. 362, para 200. *Contra* , Stone op. cit. supra n. 1.

[16] I.C.J. Rep. 1986 *per Judge Oda* pp. 253-258, paras 90-97; Higgins, *37 B.Y.I.L. 269 (1961)*, p. 307.

[17] Kunz, *41 A.J.I.L. 872 (1947)*, p. 874; Oppenheim, *International Law, vol. i, 8th ed. by Lauterpacht, 1955*, p. 959 et seq. ; Wright, United States Intervention in Lebanon, *53 A.J.I.L. 112 (1959)*, p. 118; *cf*. Dinstein op. cit. *supra* n. 1, pp. 235-236.

[18] *The Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro 1947*, 21 U.N.T.S. 77; *The North Atlantic Treaty, 1949*, 34 U.N.T.S. 243; *Treaty of Friendship and Cooperation and Mutual Assistance (The Warsaw Pact), 1955* , 219 U.N.T.S. 3.

[19] *Treaty of Dunkirk (France-U.K.), 1947*, 9 U.N.T.S. 187; *Panama Canal Treaty (U.S.A.-Panama), 7 September 1977*, 16 I.L.M. 1022 (1977), Art. IV; *U.S.S.R. - Socialist Republic of Viet- Nam, Treaty of Friendship and Cooperation, 3 November 1978*, 17 I.L.M. 1485 (1978), Art. 6; *Afghanistan - U.S.S.R. Treaty of Friendship, Goodneighbourliness and Cooperation, 5 December 1978* , 19 I.L.M. 1 (1980), Art. 4(1); *U.S.S.R. - People's Democratic Republic of Yemen, Treaty of Friendship and Cooperation, 25 October 1979* , 19 I.L.M. 644 (1980), Art. 5.

[20] Dinstein op. cit. *supra* n. 1, p. 235.

[21] I.C.J. Rep. 1986 *per Judge Schwebel* , p. 359, para 196; Kunz, *41 A.J.I.L. 872 (1947)*, p. 875; Dinstein op. cit. *supra* n.1, pp. 169, 239 et seq.

The matter is closely connected with the question of who has the right of collective self-defence which is to be considered at length presently. For the moment it is sufficient to point that by virtue of the terms of these multilateral or bilateral collective defence treaties, the obligation to resort to force to assist the other party always presupposes that the latter has been the victim of an "armed attack" (see *infra*). Thus the obligation of assistance is conditional upon a claim of individual self-defence which, with regard to its merits and admissibility in law, is not regulated by the collective defence treaty but, rather, by customary law[22] . Therefore, it is appropriate to say that the obligation to render assistance to the victim of an armed attack is nothing less than " ... the duty ... of each party ... to reach its decision fairly and justly in the light of the facts of the situation and of the obligation to give assistance ..."[23] . In other words every party to a collective defence treaty has the duty to render assistance only after prior determination of whether the conditions for the exercise of individual self-defence of the victim of aggression are present. Hence, assistance may be withheld if the requirement of necessity of self-defence is absent, or it may not amount to the use of armed force - e.g. the dispatch by the U.S.A. of *Patriot* anti-missile batteries to Israel when the latter came under long-range missile attack by Iraq on 17 January 1991. Indeed, collective self-defence treaties include wording with respect to assistance rendered individually or collectively to the attacked State like "such action as it deems necessary" (Art. 5, North Atlantic Treaty), or "each one of the parties may determine the immediate measures which it may individually take" (Art. 3(2), Inter-American Treaty of Reciprocal Assistance), or "such means as it deems necessary" (Art. 4, Warsaw Pact); such phraseology has been pointed at as evidence in that respect[24] .

It is submitted that if the carrying out of an obligation incurred by way of a treaty to assist the victim of an armed attack allows discretion on the part of the obligee to determine whether certain conditions have been fulfilled, then there is hardly any automatic duty to act. Instead, it appears to be the case that the propriety of assistance is in any case to be judged to a considerable extent by the assisting State, and this is a contingency that

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[22] Bowett, op. cit. *supra* n. 2, p. 238.

[23] Sir Eric Beckett, *The North Atlantic Treaty, The Brussels Treaty and the Charter of the United Nations, 1950*, pp. 28-29; Goodhart, The North Atlantic Treaty of 1949, *79 H.R.C. 187 (1951 II)*, p. 223; Fenwick, *43 A.J.I.L. 312 (1949)*, 314.

[24] Bowett op. cit. *supra* n.2, pp. 231-232; Sir Eric Beckett op. cit. *supra* n. 23; according to the latter this discretion exists whether such clauses are included or not in a defensive treaty. Also see Dinstein op. cit. *supra* n. 1, pp. 236-238.

partakes in the first instance the character of a right rather than a duty. Still, however, discussion must go further. To say that assistance to an attacked State must be given by the automatic operation of a treaty obligation without any consideration of whether the facts of a specific situation warrant a necessity of, first, individual self-defence by the State to be assisted, entails the danger that armed action may be resorted to purely on the individual assessment on the part of either the victim or the assisting State. In both cases a grave breach of peace may occur on merely subjective consideration.

It is submitted that a treaty of collective self-defence introduces an undertaking given in advance to exercise one's own right to use force for the assistance of another State. The requirements for this are a matter of customary law which remain unaffected by the treaty. It is only after the said requirements are satisfied on the basis of the facts of a given situation that any invocation of a treaty obligation can be made.

This contingency creates, in this writer's view, the need for a certain minimum of objective criteria in claims of resort to force in collective self-defence, and central to this consideration is the determination of who is the subject of the right of collective self-defence.

4. *The Subject of the Right of Collective Self-Defence .*

The writings of eminent authorities reveal that discussion of collective self-defence has focused exclusively on the assisting State; indeed it is the legal basis for the latter's action that appears to constitute the centre of juridical attention and the requirements for the exercise of collective defence are drawn on this basis.

Oppenheim views collective self-defence as the resort to force by a Member of the United Nations,

> " ... not only when it is itself the object of armed attack, but also when such attack is directed against any other State or States whose safety and independence are deemed vital to the safety and independence of the State thus resisting ... the aggressor. Such extension of the notion of self-defence is a proper expression of the ultimate identity of interest of the international community in the preservation of peace. It is also a practical recognition of the fact that - in the absence of an effective machinery of the United Nations for the suppression of acts of aggression - unless such right of collective self-defence is recognized the door is open for peacemeal annihilation of victims of aggression by a State or States

intent upon the domination of the world. In that sense collective self-defence is no more than rationally conceived individual self-defence ..."[25]

The above analysis centres on two distinct considerations. First, that the assisting State's security is threatened by an armed attack on a third State, and, secondly, that the action of the assisting State reflects an interest that *any* member of the international community may have against *any* aggression.

The first consideration has been elaborated by Bowett in the famous passage,

" ... State A violates the legally protected interests of States B and C. Here A is in breach of an established duty vis-a-vis both B and C and both may exercise their rights of individual self-defence ... or may exercise these in concert; this is the position which is properly termed 'collective self-defence'. The essence of this position is that the participants base their action on a violation of their own legally protected rights or interests, and this remains true whether they are two or twenty-two in number ..."[26]

The author then proceeds to define the assisting State's *own* right of individual self-defence on the basis of an "interdependence of security" between the victim State and the assisting State which, he claims, is evidenced by the existence of geographical proximity, cultural or economic ties[27] .

The second part of Oppenheim's thesis is advocated in Dinstein:

" ... An armed attack is like an infectious disease in the body politic of the family of nations. Every State has a demonstrable self- interest in the maintenance of international peace, for once the disease starts to spread there is no telling if and where it will stop. As long as the system of collective security within the United Nations organization is ineffective, collective self-defence constitutes the sole insurance policy against an armed attack ..."[28]

Both of the above views merit certain observations.

Dinstein's thesis that every aggression is of concern for every individual member of the international community to the point of exercising an independent right to protect its own "self" in the face of attack on another State comes very close to the concept of collective

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[25] Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht, 1952*, pp. 155-156; approvingly in I.C.J. Rep. 1986 *per Judge Schwebel* , pp. 361-362, par 199.
[26] Bowett op. cit. *supra* n. 2, p. 206; id. loc. cit. in Moore (ed.) op. cit. *supra* n. 2, pp. 48-49; approvingly in I.C.J. Rep. 1986 *per Judge Jennings* , p. 546.
[27] Bowett op. cit. *supra* n. 2, pp. 234-238.
[28] Dinstein op. cit. *supra* n. 1, p. 234; id. loc. cit. in Bassiouni-Nanda (eds.) op. cit. *supra* n. 7, p. 284. See also Goodrich, Hambro, Simons, *Charter of the United Nations, Commentary and Documents, 3rd ed. 1969*, pp. 348-9.

security. Certainly an act of aggression is of concern to the entire international community for it constitutes a breach of international peace. The suppression of the aggression, however, is by no means the responsibility of individual States acting unilaterally, especially under the justification of defending their individual "self". This is contrary to settled practice as it emerged during the Suez crisis of 1956 and it is submitted that it does not constitute part of customary law[29].

Bowett's thesis, on the other hand, is commendable by its attempt to restrict the exercise of collective self-defence by requiring the assisting State to prove that it has an individual right of self-defence. At the same time, however, the grounds for establishing the latter's individual self-defence, namely, the concept of "interdependence of security" appear so vague as to override the effort of minimizing the risk of armed conflict[30]. This inherent contradiction is further exacerbated by the fact that as the "interdependence of security" appears to be assessed exclusively by the assisting State itself and as long as it essentially remains not clearly delineated, it may, in practice, imply a very serious breach of peace on the basis of subjective consideration.

The best view, in the opinion of this writer, is to be founded on the basis of striking a balance between the predicament facing the victim State and any individual claim that the assisting State may have towards resorting to force in assistance to the former.

5. *The Requirements of Collective Self-Defence*.

The essence of collective self-defence is that it constitutes armed action by a State, not itself the target of the aggressor, in defence of another State, the victim of the aggressor. What is, therefore, needed is a *necessity* of individual self-defence that arises because of an armed attack against a State. It is the latter, and not the former, which is the "self" that must be defended[31]. This can be pursued by the victim State individually and it is this State alone which has the discretion of calling upon other States to participate in *its own* defence: What the victim State may do on its own devices, it may do in concert with other

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[29] See Bowett op. cit. *supra* n. 2, pp. 204-205, 216-219, 239-244; id. loc. cit. in Moore (ed.) op. cit. *supra* n. 2, pp. 46-48.
[30] Brownlie, *International Law and the Use of Force by States, 1963*, p. 330.
[31] Kunz, *41 A.J.I.L. 872 (1947)*, p. 875; Kelsen, *42 A.J.I.L. 783 (1948)*, p. 792.

States[32] . Thus the starting point for action in collective self-defence is a situation of individual self-defence that arises because of an actual armed attack against the State which is to be assisted. Any action to that effect must unavoidably have its genesis closer to the object of the collective action, namely, the protection of the State that has the right of individual self-defence[33] .

The majority of writers and State practice appear to advocate the contingency that there is a right in customary law to render assistance to a third State that has been the object of unlawful armed force[34] .

The above begs the question of the manner in which the rendering of assistance is to be activated. The Court in its Judgment on the Merits of the *Nicaragua Case* dealt with the concept of collective self-defence in customary international law and ruled that:

(1) The right of collective self-defence is exercised in the event of an armed attack[35] .

(2) "... it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have to declare itself to be the victim of an armed attack ..."[36] .

(3) " ... At all events, the Court finds that in customary international law, whether of a general kind or that particular to the Inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack ..."[37] .

(4) " ... the lawfulness of the use of force by a State in response to a wrongful act which it has not itself been the victim is not admitted when this wrongful act which it has

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[32] Kelsen, *Recent Trends in the Law of the United Nations, 1951*, p. 915.

[33] I.C.J. Rep. 1986, p. 14 at p. 120, para 232; Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 505.

[34] Adendum to the Eighth Report on State Responsibility by Special Rapporteur Ago, loc. cit. supra n. 1; Kunz, *41 A.J.I.L. 872 (1947)*, p. 875; Kelsen, *42 A.J.I.L. 783 (1948)*, p. 792; id. , *Recent Trends in the Law of the United Nations, 1951*, p. 915; Waldock loc. cit. *supra* n. 33, pp. 504-505; Wright, *53 A.J.I.L. 112 (1959)*, p. 118; Skubiszewski, Use of Force by States, in M. Sørensen (ed.), *Manual of Public International Law, 1968*, pp. 768-769; Brownlie op. cit. *supra* n. 30, pp. 330-331, 331 n.1, but *cf.* pp. 332-333; Sir Eric Beckett op. cit. *supra* n. 23, p. 13; Rifaat op. cit. *supra* n. 7, pp. 196-197; Goodrich, Hambro, Simons, *Charter of the United Nations. Commentary and Documents, 3rd ed., 1969*, p. 348 n. 209; Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1639; id. *85 A.J.I.L. 452 (1991)*, 457; Higgins, The Attitude of Western States Towards Legal Aspects of the Use of Force, in Cassese (ed.) *The Current Legal Regulation of the Use of Force, 1986*, p.441; Akehurst, *A Modern Introduction to International Law, 6th ed., 1986*, pp. 265-266; id. , Nicaragua v. United States of America, *27 I.J.I.L. 357 (1987)*, pp. 375-376; Falk, The Cambodian Operation and International Law, in Falk (ed.), *The Viet-Nam War and International Law, vol. iii, 1971*, p. 46.

[35] I.C.J. Rep. 1986, p. 14, at p. 103, para 195.

[36] Ibid. p. 104, para 195.

[37] Ibid. p. 105, para 199.

not itself been the victim is not an armed attack. In the view of the Court under international law in force today ... States do not have a right of "collective" armed response to acts which do not constitute an "armed attack" ..."[38].

Whether assistance is pledged by virtue of a treaty, or in case of the absence of a treaty, it is believed by some authority that it should be forthcoming only at the request of the Government of the victim State[39].

Article 3(2) of the Inter-American Treaty of Reciprocal Assistance provides that:

> ... On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American system, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. ...

Furthermore, the absence of a request for assistance or the lack of genuine request[40] has been treated as a contingency that undermines claims of collective self-defence. This is supported by the practice of States.

The Soviet intervention in Hungary in 1956 was justified by the Soviet Government as action in collective self-defence by virtue of a prior request by the Hungarian Government in accordance with the Warsaw Pact[41]. The representative of France in the Security Council pointed that the Soviet action " ... was spontaneous and ... it occurred before any appeal was made by the Hungarian Government ..."[42].

The dispatch of U.S. and U.K. troops to Lebanon and Jordan respectively in 1958 was justified as action in collective self-defence pursuant to the request of the Lebanese and Jordanian Governments [42bis].

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[38] Ibid. p. 110, para 211.

[39] Wright, 53 *A.J.I.L. 112 (1959)*, p. 118; Cot & Pellet, *La Charte des Nations Unies, 1985*, pp. 784-785; Adendum to the Eighth Report on State Responsibility by Special Rapporteur Ago, loc. cit. *supra* n. 1; Rowles, "Secret Wars", Self-Defence and the Charter - A Reply to Professor Moore, *80 A.J.I.L. 568 (1986)*, p. 572 n. 18. ***Contra***, I.C.J. Rep. 1986 *per Judge Schwebel*, p. 362, para 199; ibid. *per Judge Jennings*, p. 545; Moore, The Nicaragua Case and the Deterioration of World Order, *81 A.J.I.L. 151 (1987)*, p. 155; Dinstein op. cit. *supra* n. 1, p. 250. Cf., Schachter, *85 A.J.I.L. 452 (1991)*, 457.

[40] This implies that the authority that launches the request does not constitute the Government of the State as a matter of international law, either because the body which purports to be the Government of the State has been installed as a result of the use of force by the State-recipient of the request, or it does not constitute an organ of the State that would, in the usual conduct of international relations, be held to represent the State on the international plane. See *infra* Part Three, Ch. 12.

[41] S.C.O.R. 11th yr. 746th mtg, para 156.

[42] Ibid. para 90.

[42bis] S.C.O.R. 13th yr. 827th mtg, paras 34-35, 43 (U.S.A.), 84 (Lebanon), 87 (U.K.); 831st mtg, paras 24-25 (Jordan), 29 (U.K.). Statement by the U.K. Prime Minister, H. McMillan in the House of Commons on 17 July 1958, Keesing's 1957-1958, p. 16308.

The U.S. military action against North Viet- Nam in February 1965 was justified in a Memorandum from the Law Office of the Legal Adviser of the State Department in the following terms: " ... in response to requests from the Government of South Viet- Nam, the United States has been assisting that country in defending itself against armed attack from the Communist North ..."[43] . Moreover, in a letter dated 7 February 1965 from the representative of the U.S.A. to the President of the Security Council, the U.S. Government stated that " ... [T]he Republic of Viet- Nam, and at its request, the Government of the United States and other Governments, are resisting this systematic and continuing aggression ..." by North Viet-Nam[44] .

On 1 May 1970 the armed forces of South Viet- Nam and the U.S.A. launched a large-scale offensive against *Vietkong* positions on the territory of Cambodia; the action was justified as collective self-defence and reference was made to the letters by the U.S.A. to the Security Council of 7 and 27 February 1965[45] .

The military intervention by the U.S.S.R. and other socialist countries in Czechoslovakia in August 1968 was again justified as action in collective self-defence under the Warsaw Pact after prior request of the Czechoslovak Government[46] . The representative of Czechoslovakia in the Security Council repudiated the Soviet claim of prior request by his Government by stating that " ... [T]he Soviet armed forces were not invited into Czechoslovakia by anybody - not by anybody in position to speak for the Czech nation or the Czech people. They are uninvited guests ..."[47] .

The Ethiopian Government requested and received military assistance from Cuba, South Yemen and the U.S.S.R. in the fighting against the W.S.L.F. and the Somali regular armed forces in Ogaden in 1978; President Senghor of Senegal stated on 7 April 1978 that he supported the Cuban-Soviet assistance to Ethiopia as it aimed at the defence of the latter's frontiers[48] .

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[43] 5 I.L.M. 565 (1966), pp. 565, 579.

[44] Doc. S/6174/Corr. 1, S.C.O.R. 20th yr., Suppl. for January-March 1965, p. 43 at p. 44; also see Letter dated 27 February 1965 from the representative of the U.S.A. to the President of the Security Council, Doc. S/6206, in Ibid. pp. 78-79.

[45] Letter dated 5 May 1970 from the representative of the U.S.A. to the President of the Security Council, Doc. S/9781, S.C.O.R. 25th yr. Suppl. for April-June 1970, pp. 176-177.

[46] S.C.O.R. 23rd yr. 1441st mtg , paras 3, 90, 92 (U.S.S.R.).

[47] Ibid. para 162; see also ibid. paras 70 (Denmark), 40 (U.S.A.); 1442nd mtg, para 7 (Ethiopia).

[48] Keesing's 1978, pp. 28760, 28989-28991.

The U.S.S.R. justified the dispatch of large numbers of troops to Afghanistan in December 1979 as compatible with the right of collective self-defence in pursuance to a request by the Afghan Government which was made by virtue of the 1978 Treaty of Friendship, Goodneighbourliness and Cooperation between the two States[49] . The request by the Afghan Government was disputed on the basis of its genuineness; it was alleged that the Soviet forces had overthrown the legitimate Government of Afghanistan and installed the one that made the request of assistance[50] .

In the period 1981-1989 the U.S.A. provided material assistance to the *contra* insurgency in Nicaragua. The latter instituted proceedings against the U.S. before the International Court of Justice. According to the evidence available to the Court the United States justified its action as collective self-defence in support, on the one hand, of El Salvador, the Government of which was faced with armed insurgency that was assisted by the Government of Nicaragua, and on the other hand, of Honduras and Costa Rica, in the face of certain trans-border incursions by the armed forces of Nicaragua in the territory of these States[51] . With regard to the facts before it, the Court concluded that although El Salvador had indeed declared itself the victim of an armed attack and requested the assistance of the U.S.A. in 1984, this took place at a time much later than the activities Nicaragua had been accused of, namely, the provision of weapons to the Salvadorean guerrillas that enabled them to launch a large-scale offensive in 1981 [52] . As for Honduras and Costa Rica the Court found that there was very little information about the circumstances of occurrence of the trans-border incursions that would lead to their characterisation as an "armed attack"; in any case, these States did not behave as if they had been victims of armed attack at the time of the border incidents and at no time had they requested assistance from the U.S.A. [53] .

Lastly, in the aftermath of the invasion and occupation of Kuwait by Iraq in August 1990, the Government of Saudi Arabia requested and received on the territory of the Saudi Kingdom U.S. and other States' army

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[49] 34 Ybk of the U.N. 1980, p. 299.

[50] See statements by the representatives of Singapore, Kuwait, Japan, Pakistan, the U.K. , and Italy during the Sixth Special Emergency Session of the G.A., in Ibid. pp. 300-301.

[51] I.C.J. Rep. 1986, p. 14, at p. 119, para 229.

[52] Ibid. pp. 119-122, paras 229, 230, 233, 236. In any case, the Court held that the provision of weapons did not constitute a case of armed attack; ibid. p. 104, para 195.

[53] In fact, Honduras alleged that it had been the victim of "aggression" at a later stage. See ibid. paras 231, 234, 236.

contingents whose role would be the defence of the Kingdom in the event of imminent Iraqi invasion [54].

The requirement of the request of assistance by the State victim of the use of force and the exclusion of resort to force on the individual assessment of the assisting State, renders the latter's position of secondary importance as a matter of law. It opens, however, the dangerous possibility that concerted military action involving the armed forces of two or more States (an eventuality that implies a grave breach of peace), may commence solely on the individual assessment of the situation on the part of the victim State. This is of extremely practical significance in cases of regional disputes between weak States (as opposed to Great Powers) with powerful allies, which may rely on the occurrence of any use of force against them and request assistance. The balance in this case is struck by virtue of the requirement of armed attack for the exercise of collective self-defence.

It is submitted that only a use of force of the scale and effects so as to amount to a threat to the victim State as a whole, namely, as a political, territorial or economic entity, would justify unilateral resort to force by another or other States acting in concert against the aggression. Any collective reaction against acts of force short of an armed attack, while it might appear plausible in principle, could entail a breach of international peace of considerable magnitude, it could invite rapid escalation of the conflict by involving the allies of either side, and would contribute to the collapse of the entire organisational structure of international order[55]. Moreover, the existence or not of an armed attack is a contingency which is objectively verifiable and this constitutes a factor that would help determine the attitude of third States whose assistance is requested or established in advance in treaty provisions [56]. State practice supports the

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[54] S/P.V. 2934, 9 August 1990, statement by Mr. Pickering (U.S.A.), in Lauterpacht and others (eds.) op. cit. supra n. 14, p. 155; Keesing's 1990, p. 37638. However, there was little evidence that an attack by Iraq against Saudi Arabia was imminent. There was no indication that Iraq was massing troops on the Iraq-Saudi border; Iraq was only consolidating its armed forces on the Kuwait-Saudi border, following the occupation of the Emirate. See N.D. White & H. McCoubrey, *x Int. Rel. 347 (1991)*, p. 351. *Cf*. Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, *55 Modern L.R. 153 (1992)*, pp. 163-4.

[55] Farer, Drawing the Right Line, *81 A.J.I.L. 112 (1987)*; *contra*, Hargrove, *81 A.J.I.L. 135 (1987)*, p. 141.

[56] See Bowett op. cit. *supra* n. 2, p. 237 but *cf.* pp. 231-237; Dinstein op. cit. *supra* n. 1, pp. 238, 242 but *cf.* pp. 247-248; McDougal & Feliciano op. cit. *supra* n. 2, pp. 248, 251; Schachter, *82 Mich. L.R. 1620 (1984)*, 1639; Falk loc. cit. in Falk (ed.) op. cit. *supra* n. 34, pp. 44-46. *Cf.* Goodhart, *79 H.R.C. 187 (1951 II)*, p. 222. *Contra*. Hargrove loc. cit supra n. 55.

above argument. All collective self-defence treaties consider as the event which renders operative the obligation to assist the victim of the use of force (*casus foederis*) the occurrence of an "armed attack"[57] .

Statements by individual Governments with reference to claims of exercise of collective self-defence by other States, or decline to resort to force in collective self-defence, point at the existence or not of an armed attack.

During the debates in the Security Council and the General Assembly on the Soviet intervention in Hungary in 1956, a number of delegates pointed at the absence of an attack on Hungary [58] .

The dispatch of U.S. troops to Lebanon in 1958 was disputed by the representative of Sweden in the Security Council on the basis of the fact that his Government did not consider the internal disturbances in the country as constituting an armed attack in the sense of Article 51 [59] .

The military action against N. Viet- Nam in 1965 was justified by the U.S.A. on the basis of the existence of armed attack against S. Viet-Nam that was perpetrated by way of infiltration of elements of the N. Viet-Namese armed forces fighting alongside the *Vietkong* guerrillas in S. Viet- Nam [60] . By contrast, the joint S. Viet- Namese-U.S. operation in Cambodia in 1970 has been criticised for the lack of evidence with regard to the existence of an armed attack against S. Viet- Nam and the Cambodian Government's complicity therein [61] .

During the debate in the Security Council on the military intervention in Czechoslovakia in 1968, the representative of Senegal condemned it on the basis that Czechoslovakia " ... was not threatened by any aggression from outside ..."[62] .

The Government of the Soviet Union refrained from resorting to force in collective self-defence to assist Viet- Nam against China in 1979 by

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[57] Art. II, *Treaty of Dunkirk (France-U.K.)*; Art. 3(1), *Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro 1947* ; contrast this provision with Art. 6 of the Treaty; Art. 5, *North Atlantic Treaty, 1949* ; Art. 4, *Warsaw Pact, 1955* ; Art. 6, *U.S.S.R. - Viet- Nam, Treaty of Friendship and Cooperation, 1978* .

[58] S.C.O.R. 11th yr. 746th mtg , paras 116,119 (Peru), 108 (Cuba), 90-91 (France), 79 (U.K.). G.A.O.R. 11th session, Plennary Meetings, vol. III (1957), 670th plen. mtg , paras 65, 70-72 (Philippines).

[59] S.C.O.R. 13th yr. 830th mtg , para 48. It is worth mentioning that the United Nations Observers Group in Lebanon (U.N.O.G.I.L.) reported to the Security Council that the allegation by the Lebanese Government of U.A.R. sponsored infiltration of armed bands in the Lebanon had not been established; see Keesing's 1957-1958, pp. 16295, 16440-16441.

[60] 5 *I.L.M. 565 (1966)*, p. 566; also see supra n. 44.

[61] See *supra* Ch. 9, Second Title.

[62] S.C.O.R. 23rd yr. 1443rd mtg , para 19.

arguing that the scale of hostilities between the two countries remained limited - an assertion indicative of the fact that in the opinion of the U.S.S.R. there was no armed attack against Viet- Nam [63].

The invocation of the right of collective self-defence by the Afghan and Soviet Governments in justification of the latter's dispatch of troops in Afghanistan in 1979 was challenged by pointing to the fact that Afghan-Soviet allegations of armed attack and external aggression against Afghanistan were suspicious by not being substantiated by factual evidence [64]. The U.S. military operation in Panama on 20 December 1989 was justified as action in self-defence in accordance with the Panama Canal Treaty of 1977 concluded between Panama and the U.S.A. [65]. Article IV(1,2) of the Treaty provides that:

> ... The United States of America and Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it ...
>
> ... the United States of America shall have primary responsibility to protect and defend the Canal ... 66

The facts prior to the U.S. operation reveal that there had not been any attack on the Panama Canal[66bis]. Moreover, the "primary responsibility" of the United States with regard to the defence of the Canal brings the Treaty as to its nature closer to the concept of "treaties of guarantee" that envisage action which is "unidirectional" in that it is undertaken by one of the parties only, as opposed to the reciprocal character of collective defence treaties [67].

The Court's ruling in the *Nicaragua Case* that the State victim of an armed attack must declare itself as such and the implication that such declaration must be official and public appears at first glance to be redundant as too formalistic. Indeed, because of the contemporary

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[63] Keesing's 1979, p. 29872.

[64] 34 Ybk. of the U.N. 1980, p. 300 (statements by the representatives of Pakistan and the U.K.); also see Cot-Pellet op. cit. supra n. 39, p. 785.

[65] U.N. Chronicle vol. xxvii No 1 March 1990, p. 67; *cf*. Keesing's 1989, p. 37112.

[66] Text in *16 I.L.M. 1022 (1977)*.

[66bis] Henkin, The Invasion of Panama Under International Law: A Gross Violation, *29 Col. J. Trans. L. 293 (1991)*, pp. 302-3, 305-6. *Cf*. A.D. Sofaer, The Legality of the United States Action in Panama, *29 Col. J. Trans. L. 281 (1991)*, pp. 287-8.

[67] Oppenheim, *International Law, vol. i, 8th ed. by Lauterpacht, 1955*, p. 964 et seq.; Dinstein op. cit. *supra* n. 1, pp. 243-246. Treaties of guarantee raise the general issue of consent of a State to the military action by the guarantor State; see *infra* Part Three, Ch. 12.

sophisticated methods of gathering and disseminating of information, it can be expected that a use of force of the magnitude of an armed attack is to be easily ascertained by the rest of the international community.

It is submitted, however, that this represents a rather sceptical consideration of the Court's view [68] unless it is placed within the general context of the right of self-defence. A State that declares itself to be the victim of an armed attack unavoidably holds itself to be entitled to exercise the right of individual self-defence [69]. Indeed, Article 51 of the Charter seems to imply this by requiring the report of measures of self-defence to the Security Council [70]. The reporting requirement of action in self-defence may be held to constitute a means of declaration by a State to be the object of an armed attack. Moreover, the Court's ruling that no such requirement exists in customary international law could arguably be treated as warranting the desirability of such declaration in the official statements of a Government in order to counter-balance the lack of an explicit treaty procedure (like the one provided for in Article 51 of the Charter) in customary international law [71].

It is submitted that seen in this light a declaration that a State is the victim of armed attack places its concomitant claim of self-defence under the scrutiny of its allies and the international community and, in conjunction with a request of assistance, gives them the opportunity to decide whether they will exercise their right to resort to force in defence of the attacked State [72]. In practice this constitutes a very serious decision. It means that troops and resources will be committed to an armed conflict in which the assisting State is not *ab initio* implicated. Whether it will respond positively to the victim State's request is dependent on the concept of "interdependence of security" suggested by Bowett. It is submitted that this constitutes merely a political consideration that may lead a third State to rely on the requirements of collective self-defence stipulated in customary international law and resort to force in assistance of the victim of the armed attack. In other words, it may explain why a State may be forthcoming in joining the defensive action of the attacked State against the aggressor but it is not accepted in the practice of States as constituting the grounds prescribed by law for the exercise of collective

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[68] See, for instance, Moore, *81 A.J.I.L. 151 (1987)*, p. 155.
[69] *Cf.* I.C.J. Rep. 1986 *per Judge Jennings* , pp. 544-545.
[70] *Cf.* Ibid. *per Judge Schwebel* , p. 356, para 191.
[71] I.C.J. Rep. 1986, p. 14, at pp. 95-96, para 178.
[72] Ibid. p. 120, para 232.

self-defence. Matters appear to be somewhat complicated in the case of two States that are parties to the same collective self-defence treaty but that are not in friendly bilateral relations (viz. Greece and Turkey in N.A.T.O.) [73] . The question that arises is whether either of them may invoke the lack of "interdependence of security" in order to avoid assisting the other under the terms of the treaty. It is submitted that the answer in this question must be given as a matter of law in the negative. If the essence of a collective defence treaty is to pledge in advance the exercise of one's own right to assist another State if the latter is the victim of an armed attack, it does not and cannot supersede the basis for the exercise of collective self-defence, namely the existence of an armed attack against the victim State and request on the part of the latter for assistance. Any avoidance of honouring one's contractual obligation, should there be a treaty involved, must be based on legal rather than on political consideration.

[73] Dinstein op. cit. *supra* n. 1, p. 241.

PART THREE

CONTROVERSIAL EXCEPTIONS TO THE RULE OF THE PROHIBITION OF THE USE OF FORCE BY STATES .

INTRODUCTION .

The grounds for resort to armed force that are dealt with *infra* are often treated in international law literature as instances of *intervention* . For this reason, the present writer thinks that a brief discussion of the concept is pertinent, before the particular content of the purported exceptions is considered.

Intervention means the interference of a State in the internal or external affairs of another State in a manner impairing its territorial integrity or its political independence[1] .The interference must be "dictatorial"[2] and coercion constitutes its essence[3] .
In its Judgment on the Merits in the *Nicaragua Case* , the International Court of Justice outlined the characteristics of unlawful intervention in customary international law:

> " ... A prohibited intervention ... must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of intervention which uses force ..."[4]

Intervention was considered to be *prima facie* contrary to international law in that it constituted a violation of a duty of Non-Intervention[5] . It has been stated that the duty of non-intervention was a

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[1] Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 461; Brownlie, *International Law and the Use of Force by States, 1963*, p. 44; Potter, L' Intervention en Droit International Moderne, *32 H.R.C. 611 (1930 II)*, p. 614; Brierly, *The Law of Nations, 6th ed. by Waldock, 1963*, p. 402.
[2] Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht, 1952*, p. 150.
[3] Potter loc. cit. *supra* n. 1, p. 617.
[4] I.C.J. Rep. 1986, p. 14 , at p. 108, para 205.
[5] See also G.A. Res. 2131 (XX) of 1965, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A.O.R. 20th session, Suppl. No 14, p. 11. G.A. Res. 2625 (XXV) of 1970, Declaration of

restatement of the right of independence from the opposite side[6] .

Nevertheless, by the 19th century the rule of non-intervention had been subject to various exceptions whereby intervention was justifiable in terms of self-preservation or self-defence, the protection of the life and property of nationals abroad,reprisal, constraint towards obedience to international law[7] .

Intervention was considered admissible when it was undertaken by virtue of a treaty provision to which at least the intervening State was a party , or when the consent of the intervened State was *ad hoc* given with regard to a specific case . Such conduct may be said not to constitute, in principle, unlawful intervention, but this is not conclusive of the ultimate characterisation of the action as lawful[8]. Potter argued that what really mattered was not the existence or absence of consent, but that " ... l' élement essentiel et characteristique de l' intervention est l' action coercitive de l' Etat qui agit et non la résistance de celui qui subi l' action ..."[9] . Consent as such seems to acquire importance so far as the lawfulness of intervention is concerned and it is not a *conditio sine qua non* for the characterisation of an act as intervention or otherwise. For if intervention is an unlawful act because it inheres coercion, it may occur despite the existence of consent.

It is submitted that an action that is carried out by way of armed force is by its nature an instance of unlawful intervention . In the case, however, of State conduct that falls short of armed force or, that involves armed force and is undertaken with the consent of the intervened State, the element of coercion may not be discernible *ab initio* . It, therefore, remains to be seen *ex nunc* , as the intervening State's conduct progresses, whether it does in fact constitute intervention or not .

G.A.O.R. 20th session, Suppl. No 14, p. 11. G.A. Res. 2625 (XXV) of 1970, Declaration of Principles Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A.O.R. 25th session, Suppl. No 28, p. 121. It was held in the *Nicaragua Case (Merits)*, that these resolutions constituted evidence of customary law on the rule of non-intervention. See I.C.J. Rep. 1986, p. 14, at pp. 106-107, paras 202-203.

[6] See Bowett, *Self-Defence in International Law, 1958*, p. 44.

[7] See Stowell, *Intervention in International Law, 1921* .

[8] See *infra* Ch. 12.

[9] Potter loc. cit. *supra* n. 1, p. 655.

CHAPTER 11

THE USE OF FORCE FOR THE PROTECTION OF THE LIVES AND PROPERTY OF INDIVIDUALS.

Introduction .

The situations envisaged under the above rubric concern the use of armed force by a State in the territory of another State for the protection or rescue of individuals, whose lives are in mortal danger, and/or their property, which has arisen either due to the policies of the territorial State or due to the breakdown of law and order therein.

Such use of armed force is purported to constitute an exception to the general rule of non-use of force which is enshrined in Article 2(4) of the United Nations Charter and constitutes part of customary international law.

The alleged exception is generally permeated by considerations of humanity. State practice and theory, however, have introduced a distinction by reference to the status of individuals to be protected in relation to the State that uses force to protect them, as well as the State that is the target of the use of force. Thus, the general exception of the protection of individuals' lives and property is considered to comprise, in reality, of two distinct instances of allegedly lawful use of force: First, the application of armed force by a State for the protection of the lives and property of its nationals in another State. It may be the case that nationals of other States (other than the target State of the intervention) are rescued alongside the nationals of the intervening State. This does not deprive the action of the character of protection of nationals abroad and, certainly, does not imply at all legitimacy of the doctrine of humanitarian intervention[1] Secondly, the use of armed force for the protection of the nationals of the target State in case of widespread violations of their human rights by the territorial sovereign. The latter situation is described by the term "humanitarian intervention".

[1] See Bowett, The Use of Force for the Protection of Nationals Abroad, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, pp. 43-44.

Although certain jurists, mainly from the U.S.A. , do not draw such distinction[1bis] , the latter appears to be firmly established in the works of eminent authority[2] .

State practice seems to be concurrent with regard to the distinction between protection of nationals and humanitarian intervention. An illustration of this is to be found in the justification offerred by the United States Government for the military action in Grenada on 25 October 1983. The U.S. action was justified on three grounds: (1) Invitation by the Legitimate Government of Grenada. (2) The protection of the lives of U.S. citizens. (3) Invitation extended by the Organisation of Eastern Caribbean States (O.E.C.S.)[3] . With regard to the plea of protection of nationals it was expressly stated by the Department of State that the U.S.A. deliberately did not rely on a "... broad doctrine of 'humanitarian intervention'..." in

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[1bis] See Farer, The Regulation of Foreign Intervention in Civil Armed Conflict, *142 H.R.C. 297 (1974 II)*, pp. 387,392; Gordon, Bilder, Rovine, Wallace Jr. , International Law and the United States Action in Grenada: A Report, *18 Intern. Lawyer 331 (1984)*, p. 378; J.N. Moore, Grenada and the International Double Standard, *78 A.J.I.L. 145 (1984)*, p. 156; Nanda, The United States Armed Intervention in Grenada - Impact on World Order, *14 Cal.W.I.L.J. 395 (1984)* ,p. 423; id. , The Validity of the United States Intervention in Panama under International Law, AGORA: U.S. FORCES IN PANAMA: DEFENDERS, AGGRESSORS OR HUMAN RIGHTS ACTIVISTS, *84 A.J.I.L. 494 (1990)*, p. 496; Henkin, General Course on Public International Law, *216 H.R.C. 19 (1989 IV)*, p. 153; id. The Invasion of Panama Under International Law: A Gross Violation, *29 Col. J. Trans. L. 293 (1991)*, pp. 296-7; Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality, 1988*, p. 114.

[2] See Oppenheim, *International Law, vol. i, 8th edition by Lauterpacht, 1955*, pp. 309, 312-313, 686-691; Higgins, Intervention and International Law, in Bull (ed.), *Intervention in World Politics, 1984*, p. 29 at p. 38; Brownlie, *International Law and the Use of Force by States, 1963*, pp. 292 et seq. and 338 et seq. ; id. , The Principle of Non-Use of Force in Contemporary International Law, in Butler (ed.), *The Non-Use of Force in International Law, 1989*, p. 17 at p. 25; Akehurst, The Use of Force for the Protection of Nationals Abroad, *5 International Relations 3 (1977)*, at p. 15; Bowett, The Use of Force for the Protection of Nationals Abroad, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p. 49; id. , The Interrelation of the Theories of Intervention and Self-Defence, in Moore (ed.), *Law and Civil War in the Modern World, 1974*, p. 44; L. Doswald-Beck, The Legality of the United States Intervention in Grenada, *31 N.I.L.R. 355 (1984)*, p. 363; N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, 1985*, p. 108; Dinstein, *War, Aggression and Self-Defence, 1988*, p. 215; Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1629; F. Jhabvala, Unilateral Humanitarian Intervention and International Law, *21 I.J.I.L. 208 (1981)*, p. 209; D'Angelo, Resort to Force by States to Protect Nationals: The United States Mission to Iran and its Legality under International Law, *21 Va.J.I.L. 485 (1981)*, p. 518; Th. E. Behuniak, The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey, *79 Military L.R. 157 (1978)*, 158-159; J. Donelly, Human Rights, Humanitarian Intervention and American Foreign Policy, *37 Journal of Intern. Affairs 311 (1984)*, p. 312.

[3] Letter dated 25 October 1983 from the representative of the U.S.A. to the President of the Security Council, Doc. S/1607, S.C.O.R. 38th yr. Suppl. for Oct. - Dec. 1983, pp. 37-38; M. Nash-Leigh, Contemporary Practice of the United States Relating to International Law, *78 A.J.I.L. 200 (1984)*, p. 205.

favour of the "... narrower, well-established ground of protection of U.S. nationals..."[4] .

Moreover, while States have on several occasions preferred to justify military action on the territory of another State as protection of nationals, they have, generally, not relied on the doctrine of humanitarian intervention[5] . Indeed, as will be seen *infra* , the latter does not constitute part of the corpus of contemporary customary international law.

The use of force under either of the above justifications is very similar as a matter of function, if considerations of humanity are considered the least common denominator of both justifications[6] . However, the distinction between protection of nationals and humanitarian intervention really lies with the relationship between the individuals to be rescued and the State that takes military action.

The concept of nationality in conjunction with the long-standing rule of customary international law that every State has the duty "... to grant to aliens at least equality before the law with its citizens, as far as the safety of person and property is concerned..."[7] , has offered the basis for the argument that the link between a State and an individual through the bond of nationality provides the legal standing for the former to undertake protective action with regard to the latter[8] . Certainly, this is recognised in relation to international law of State Responsibility by virtue of the concept of "diplomatic protection"[9] . However, it is submitted, that it is very doubtful that an analogy can be drawn from the principle of diplomatic protection in order to establish the admissibility of the forcible protection of nationals abroad[10] . The former is pertinent to the duty of peaceful settlement of disputes which corresponds to the prevention of the settlement of disputes through armed violence by virtue of the rule of the prohibition of the use of armed force by States. The incompatibility of military action to rescue nationals abroad with the principle of peaceful settlement of disputes can be illustrated by the abortive U.S. military operation in Iran on 24 April 1980. The aim of the action was to liberate

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[4] Letter from Mr. D. R. Robinson to Professor Gordon, *18 Intern. Lawyer 381 (1984)*, p. 386.
[5] Akehurst, loc. cit. in Bull (ed.) op. cit. *supra* n. 2, p. 99.
[6] Brownlie, loc. cit. in Butler (ed.) op. cit. *supra* n. 2.
[7] Oppenheim, op. cit. *supra* n. 2, p. 688.
[8] See, Bowett, *Self-Defence in International Law, 1958*, pp. 94-96; Jhabvala, *21 I.J.I.L. 208 (1981)*, pp. 210-211.
[9] See *Panevezys-Saldutiskis Case* , P.C.I.J. Series A/B No 76.
[10] *Contra* Jhabvala, loc. cit. *supra* n.8.

the American hostages held at the U.S. Embassy in Tehran since its occupation by a group of Iranian demonstrators on 4 November 1979. The operation was launched at the same time when the International Court of Justice was adjudicating on the proceedings instituted by the U.S.A. against Iran with regard to the seizure of the Embassy in Tehran. In its Judgment on the Merits of the *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)* [11] the Court while declining to pronounce on the legality of rescue operations[12] , stated in an *obiter dictum* that:

> ... The Court ... feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries ...[13]

Moreover, the Charter of the United Nations that stipulates the prohibition of unilateral resort to force does not expressly provide for unilateral armed action for the protection of nationals abroad as an exception to Article 2(4). The question that arises is whether the position is identical under customary international law. The Court decided in the *Nicaragua Case* that:

> ... As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations ...[14]

In spite of the fact that the Court went on to explain the above passage by offering as an illustration the content of an *already existing* exception to the rule of Art. 2(4) in the text of the Charter, (namely, the right of individual and collective self-defence)[15] , the tenor of generality in the language of the ruling does not appear to establish conclusively that the Court intended the *dictum* to refer to exceptions expressly provided for in the text of the Charter. This has led at least one commentator to conclude that the Court's Judgment allows for the existence of a right to

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[11] Hereinafter refferred to as the *Hostages Case* ; I.C.J. Rep. 1980, p. 3.
[12] Ibid. p. 43, para 94.
[13] Ibid. para 93; Also see, Ronzitti op. cit. *supra* n. 2, pp. 71-72; Rubin, The Hostages Incident: The United States and Iran, *36 Ybk. World Affairs 213 (1982)*, pp. 227-228; *cf.* Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1631.
[14] I.C.J. Rep. 1986, p. 14, at p. 94, para 176.
[15] Ibid.

protect nationals in customary law in the aftermath of the Charter[16]. Whether this is true or not is a matter of examining the practice of States in the post-1945 period[17].

Lastly, it must be born in mind that the notion of nationality is surrounded with doctrinal uncertainty in international law as to a generally accepted definition[18].

The doctrine of humanitarian intervention, on the other hand, does not rely on any direct link between the intervening State and the individuals to be protected. On the contrary it asserts a right of protection of the citizens of a State against their own Government, a contingency which has been untenable under traditional customary law. It is only after the interest taken by international law in the protection of human rights of individuals on the part of their State that a legal standing for intervention has been sought to be formulated by the adherents of this doctrine.

Both grounds for military action have been sought to be justified as exceptions to the general prohibition of the use of force by States. The first observation, therefore, is that prohibition of armed force constitutes the rule. Furthermore, there are certain legal grounds that have been articulated for their admissibility in law and which are of common application to both protection of nationals and humanitarian intervention. At the same time each of them is purported to be supported as to its legality by additional individual bases which are commensurate to the particularities of each one of them with regard to the *status* of the individuals rescued.

The present writer proposes to discuss the arguments common to both concepts first, and the particular ones under separate headings for each concept.

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[16] J. Raby, The Right of Intervention for the Protection of Nationals: Reassessing the Doctrinal Debate, *30 C. de D. 441 (1989)*, p. 467.

[17] See *infra* First Title

[18] See Brownlie, op. cit. *supra* n. 2, p. 300; id. *Principles of Public International Law, 4th ed., 1990*, pp. 381-420.

Common Arguments with regard to the Lawfulness of both Protection of Nationals Abroad and Humanitarian Intervention .

The grounds of legality common to both protection of nationals and humanitarian intervention are drawn on the one hand from the text of Article 2(4) of the Charter, and on the other from what is perceived to be the ineffectiveness of the collective security system and a reassessment of the rule of the prohibition of the use of force in the context of this situation.

One argument that has been propounded in favour of a right to protect individuals, is that the use of force for the protection of nationals and humanitarian intervention is not directed "against the territorial integrity and political independence" of the target State[19] .

With regard to this contention it has been argued *supra* [19bis] that the phrase in Art. 2(4) that concerns the "territorial integrity and political independence" of any State had been inserted in the Charter at the request of weak States in order to reinforce the tenor of the prohibition, rather than to restrict its scope; moreover, State practice reveals that the said

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[19] Bowett, loc. cit. in Cassese (ed.) op. cit. *supra* n. 2, p. 40; Thomas and Thomas, The Dominican Republic Crisis 1965, *The Ninth Hammarskjöld Forum 1967*, p. 15; D'Angelo, *21 Va J.I.L. 485 (1981)*, pp. 491-498, 510-512; Jeffery, The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions, *30 I.C.L.Q. 717 (1981)*, pp. 725-728; Teson op. cit. *supra* n. 1, pp. 130-134; Raby, *30 C. de D. 441 (1989)*, 454-462; Reisman, Humanitarian Intervention to Protect the Ibos, in Lillich (ed.), *Humanitarian Intervention and the United Nations, 1973*, pp. 177-178; Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and Plea for Constitutive Alternatives, in Moore (ed.), *Law and Civil War in the Modern World, 1974*, pp. 236-237; Chilstrom, Humanitarian Intervention under Contemporary International Law, *1 Yale Studies in World Public Order 93 (1974)*, pp. 97-98. *Cf* . Nanda, *14 Cal. W. I. L. J. 395 (1984)*, pp. 316-317; Moore, The Control of Foreign Intervention in Internal Conflict, *9 Va.J.I.L. 209 (1969)*, pp. 262, 264.

The clause from the text of Article 2(4) "... or in any other manner inconsistent with the purposes of the United Nations..." is invoked mainly with regard to the doctrine of humanitarian intervention, under the special rubric of which it is being dealt *infra* . Some authorities, however, have relied on the said phrase from Art. 2(4) in support of the right of protection of nationals. The purpose of this invocation appears to be based on the humanitarian nature of protecting one's nationals. Given, however, the fact that protection of nationals is preferably justified as a form of exercise of the right of self-defence, such assertion of consistency with the purposes of the U.N. seems to be ancillary with regard to the concept of protection of nationals. See Bowett, ref. in this note; Schweisfurth, Operations to Rescue Nationals in Third States Involving the Use of Armed Force in Relation to the Protection of Human Rights, *23 G.Y.I.L. 159 (1980)* ; Wengler, L' Interdiction de Recourir à la Force. Problèmes et Tendances, *7 Rév. Belge D.I. 401 (1971)*, p. 417; Moore, *9 Va.I.J.L. 209 (1969)*, 264.

[19bis] See *supra* Part One , Ch. 7.

clause of Art. 2(4) far from being understood as territorial severance is held to connote territorial inviolability[20] .

The argument that military force for the protection of nationals and humanitarian intervention should be pursued unilaterally by States due to the ineffectiveness of the United Nations partakes the character of an application of the *clausula rebus sic standibus* : Namely, that the prohibition of the use of force in Art. 2(4) envisaged the effective work of the collective security system of the Charter of the United Nations[21] .

The period of the so-called "Cold War" with the super-power antagonism has admittedly prevented the United Nations Organisation from functioning properly with regard to the maintenance of international peace and security. However, it did not constitute an "unforeseen" circumstance warranting the abrogation of Art. 2(4). First, the preparatory work of the Charter indicates that a rift between the Permanent Members of the Security Council had indeed been foreseen[22] , and, secondly, it is very doubtful that the remedy of such eventuality would warrant a return to unilateral forcible action as a viable alternative. As early as 1949 the International Court of Justice in the *Corfu Channel Case* has dismissed any attempt of legitimising forcible unilateralism on the basis of the ineffectiveness of the United Nations system:

> ... The Court can only regard the alleged right of intervention as a manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever the present defects in international organisation, find a place in international law...[23]

What the above passage reveals is a demonstration of scepticism of unilateral resort to force being a pertinent alternative to the "ineffectiveness" of the United Nations. This is perfectly understandable in view of the fact that the use of armed force is likely to result in far greater harm than the breach it purports to meet[24] . Moreover, the rule

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[20] See Art. 1 of the United Nations Definition of Aggression appended to G.A. Res. 3314 (XXIX) of 1974. *Cf* . Statement of the French delegate in the Security Council during the debate on the Entebbe incident, S.C.O.R. 31st yr. 1943rd mtg. para 45.

[21] Lillich, loc. cit. in Moore (ed.) op. cit. *supra* n. 19, p. 238; Bazyler, Reexamining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia, *23 Stanford J.I.L. 547 (1987)*, p. 578; Sornarajah, Internal Colonialism and Humanitarian Intervention, *11 Ga. J.I. Comp. L. 45 (1981)*, 59-60; Chilstrom, *1 Yale Studies in World Public Order 93 (1974)*, p. 127 et seq.

[22] See Ronzitti op. cit. *supra* n. 2, p. 9.

[23] I.C.J. Rep. 1949, p. 4, at p. 35. See also I.C.J. Rep. 1986, p. 14, at p. 107, para 202.

[24] Akehurst, *5 Int. Rel. 3 (1977)*, p. 18; Brownlie, Humanitarian Intervention, in Moore (ed.) op. cit. *supra* n. 19, p. 224.

enshrined in Art. 2(4) of the Charter constitutes a rule of customary international law to which the *clausula rebus sic stantibus* is not applicable[25] . Finally, the practice of States is unsupportive of the contention that an "unforeseen" fundamental change of circumstances has occurred. On the contrary, as the Court has ruled in the *Nicaragua Case* , States appear to maintain the place of Art. 2(4) as a general prohibition by always seeking to justify their resort to force on the basis of an exception to Art. 2(4) of the Charter[26] .

A final point to be made at this stage is that the situations to be dealt with in this Chapter concern resort to force by States without the consent of the territorial sovereign. Such consent deprives such use of force of any trait of "dictatorial interference" in the affairs of the target State[27] and shifts the question from the issue of *a priori* lawfulness of the use of force for the protection of individuals to the genuineness of the consent extended to the intervening State.

First Title: :THE USE OF FORCE FOR THE PROTECTION OF THE LIVES AND PROPERTY OF NATIONALS ABROAD .

In the period prior to the Covenant of the League of Nations and the Pact of Paris States have asserted an autonomous right of using force for the protection of the lives and property of their citizens on the territory of another State[1] . In this period the right of forcible protection of nationals was justified as either self-preservation[2] , or self-defence[3] , or reprisal[4] , or a measure of "international police" due to the non-existent

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[25] *Nicaragua Case (Merits)*, I.C.J. Rep. 1986, p. 14, at p. 95 para 178. Also see Ronzitti *supra* n. 22.
[26] I.C.J. Rep. 1986, p. 14, at p. 98 para 186.
[27] Schweisfurth, *23 G.Y.I.L. 159 (1980)*, p. 159; Milenkoviç, Hijacking and National Sovereignty - With Reference to the Larnaca Airport Incident, *29 Review of International Affairs (Belgrade) 33 (1978)*, p. 35. *Cf*. Bowett, loc. cit. in Cassese (ed.) op. cit. *supra* n. 2, pp. 46-47.
[1] See Vattel, *Le Droit des Gens, Book II, Ch. vi*, 71; *Anglo-Spanish Arbitrations, Beni-Madan, Rzini Claim (1925), (Spanish Moroccan Claims Case)*, U.N.R.I.A.A. , vol. II, p. 616.
[2] Hall, *International Law, 8th ed. , 1924*, p. 322.
[3] Waldock, The Regulation of the Use of Force by Individual States in International Law, *81 H.R.C. 455 (1952 II)*, p. 467. *Cf*. Brierly, *58 H.R.C. 5 (1936 IV)*, p. 128.
[4] Hindmarsh, *Force in Peace, 1933*, p. 57.

organisation of the international community[5] . These rather multifarious legal grounds for the admissibility of protection nationals appear to deprive the concept of consistency of *opinio juris* in the practice of States. In any case, enquiry into the lawfulness or not of such use of force is somewhat futile due to the lack of any rule of international law on the prohibition of the use of force in the period under discussion[6] .

The introduction of the League of Nations and the conclusion of the Pact of Paris constituted the first attempts at regulating the resort to armed force by States[7] . During the period 1920-1945 the right of protection of nationals abroad was asserted on several occasions by the U.S.A. , Britain and Japan .

The most important invocation of the right was made by Japan during the Manchurian crisis of September 1931[8] . It was not until February 1933 when the Assembly of the League of Nations condemned the Japanese action in Manchuria but by that time it had become clear that there was no factual basis to intervene for the protection of nationals. It is, however, important that the attitude of the League Council when the dispute was first referred to it , was far from unequivocal. In its Resolution of 30 September 1931 the League Council took note of the Japanese representative's statement that the withdrawal of the Japanese troops from Manchuria would be in proportion with the safety of the life and property of the Japanese nationals[9] . Moreover in the debate on the Shanghai incident of 1932 at the Council of the League, the Japanese representative after denying that the Japanese action constituted an infringement of the territorial integrity of China claimed that the Council had recognised the right of the Japanese troops to remain in Manchuria to protect nationals and that it was the same case in Shanghai[10] . The British representative in the League Council took the view that the Council had recognised that the obligation of Japan to withdraw from Manchuria was dependent on the safety of the Japanese nationals and it was this interpretation that gave support to the view that the Resolution of 30 September 1931 tacitly recognised the right to protect nationals[11] .

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[5] Giraud, La Théorie de la Légitime Défense, *49 H.R.C. 691 (1934 III)*, pp. 737-738.
[6] Bowett, The Use of Force for the Protection of Nationals Abroad, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p. 39.
[7] See *supra* Part One , Ch. 1 .
[8] L.N.O.J. 1931, p.2267.
[9] Ibid. pp. 2307-8.
[10] L.N.O.J. 1932, pp. 344-345.
[11] Brownlie, *International Law and the Use of Force by States, 1963*, p. 296.

Still, protection of nationals appears to have been invoked in State practice as an autonomous basis for the use of force against another State and no attempts seem to have been made by Governments to accommodate protection of nationals with the Pact of Paris as part of the exception of self-defence[12] .

Finally, a definite conclusion as to the existence of a right of protection of nationals in the period of the League of Nations is not free from doubt at least with regard to the United States that became party to the Additional Protocol relative to Non-Intervention which was concluded in Buenos Aires in 1936, without any reservation with regard to such a right[13] .

The introduction of the United Nations Charter signaled the rule of the absolute prohibition of the use of armed force stipulated in Article 2 (4) of the Charter. The question of whether the right to protect nationals has survived or not the introduction of the Charter is a question which in the opinion of this writer must be dealt with on the basis of subsequent State practice . Authority have largely treated the question as being one of *prima facie* violation of the rule of non-use of force the wrongfulness of which is precluded by virtue of one of the following contentions:

(1) That the use of force to protect nationals abroad is based on the concept of necessity.

(2) That the use of force to protect nationals abroad is an exercise of the right of self-defence.

(3) That there is an autonomous right to use force for the protection of nationals abroad.

(4) That protection of nationals abroad is a form of protection of human rights.

The present author proposes to discuss the above arguments in the light of the State practice in the post- 1945 period.

(1) *That the use of force for the protection of nationals is based on the concept of necessity .*

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[12] The Japanese justification for resort to force in Manchuria in September 1931 was twofold: (1) self-defence, (2) protection of nationals, L.N.O.J. 1931, p. 2267.

[13] Brownlie op. cit. *supra* n.11, p. 294.

Fitzmaurice has taken the view that the use of force for the protection of nationals abroad is justified on the ground of necessity because "... certain kinds of grave physical injury are irremediable..."[14].

Bowett argues that necessity is the legal basis justifying military action for the protection of nationals only if the threat to their lives emanates from mobs, hijackers, mutinous troops and so on which act without the complicity of the Government of the target State[15].

State practice contains only one instance of invocation of necessity as justification. On 10 July 1960 Belgium introduced troops in the Congo - mainly in the southern province of Katanga and the capital of the country Leopoldville - without the consent of the Congolese Government shortly after the country had become independent. The Belgian Government justified the military action as aiming at rescuing Belgian and other European nationals whose lives were in mortal danger due to the riots and acts of violence that resulted from the mutiny of the Congolese *Force Publique*. The Prime Minister of Belgium, Mr. Eyskens, claimed before the House of Senate of the Belgian Parliament on 13 July 1960 that Belgian troops were introduced in the Congo:

> "... parce que le gouvernement s' est trouvé placé devant un cas de *force majeure*. Le gouvernement belge, comme le gouvernement de tout pays qui se respecte, a pour devoir d' observer une règle de morale internationale et une règle du droit des gens, qui impose à un pays de proteger la vie de ses ressortisans. Le gouvernement belge est intervenu uniquement dans le but d' éviter des effusions de sang, d' apporter une protection, combien necessaire, afin de préserver des vies humaines ..."[16]

The invocation of a state of necessity in the context of protection of nationals is problematic in that it extends the application of this kind of action beyond threats to the lives of nationals that are perpetrated by the Government of the target State and thus dispenses with the requirement of responsibility or complicity of the latter[17]. Moreover, it is very doubtful that in contemporary customary international law a state of necessity could justify the use of armed force in view of the fact that the

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[14] Fitzmaurice, The General Principles of International Law, *92 H.R.C. 5 (1957 II)*, p. 173. See also Wengler, *7 Rév. Belge D.I. 401 (1971)*, p. 417; Raby, *30 C. de D. 441 (1989)*, p. 486.

[15] Bowett loc. cit. in Cassese (ed.) op. cit. *supra* n. 6, p. 43. Bowett is one of the leading proponents of the admissibility of protection of nationals as an exercise of the right of self-defence. *Cf*. id. *Self-Defence in International Law, 1958*, pp. 90-91.

[16] Quoted in Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, 1985*, p. 30. Also see, Statement by Mr. Eyskens before the Chamber of Representatives, 11 July 1960, Keesing's 1959-1960, 17641; statements before the S.C., S.C.O.R. 15th yr. 873rd mtg. paras 181-184 (Belgium), 121 (Italy).

[17] Ronzitti op. cit. *supra* n. 16, p. 13.

determining factor for the resort to violence does not depend on an external objectively ascertained event but rather on the subjective consideration of the intervening State with regard to what it, and it alone, conceives to be a threat to its security[18].

In its Commentary on the Draft Articles on State Responsibility, the International Law Commission concluded that "... the practice of States is inconclusive with regard to whether a state of necessity constitutes an exception to Article 2(4) of the Charter ..."[19].

It is, therefore submitted, that State practice is inconclusive and does not support the contention of protection of nationals being justified on the basis of a state of necessity.

(2) *That the use of force for the protection of nationals is an exercise of the right of self-defence .*

This is by far the most compelling contention for the admissibility of the right to protect the lives of nationals and it is supported by eminent authority.

Waldock has expressed the view that resort to force for the protection of nationals is an exercise of the right of self-defence on the basis of the *Caroline* formula in these terms:

> "... There must be:
> (1) An imminent threat of injury to nationals.
> (2) A failure or inability on the part of the territorial sovereign to protect them.
> (3) Measures of protection strictly confined to the object of protecting them against injury ..."[20]

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[18] Commentary by the I.L.C. on the Draft Articles on State Responsibility, Doc. A/35/10, I.L.C. Ybk. 1980, Volume II, Part Two, p. 34, para 22.

[19] Ibid. p. 45, para 26.

[20] Waldock, *81 H.R.C. 455 (1952 II)*, p. 467. See also Bowett op. cit. *supra* n. 15, pp. 87-105; id. loc. cit. in Cassese (ed.) op. cit. *supra* n. 6, pp. 40, 43; id. The Interrelation of Theories of Intervention and Self-Defense, in Moore (ed.) *Law and Civil War in the Modern World, 1974*, p. 44; McNair, *The Law of Treaties, 1961*, pp. 209-210; Speech by Lord McNair in the House of Lords on 12 September 1956, Hansard Parliamentary Debates, H.L., 5th series, vol. 199 , cols. 659-660; Gilmore, *The Grenada Intervention, 1984*, p. 58; Moore, *78 A.J.I.L. 145 (1984)*, p. 156; Doswald-Beck, *31 N.I.L.R. 355 (1984)*, p. 361; Nanda, *14 Cal. W. I.L.J. 395 (1984)*, 407, 409-410; Thomas & Thomas, The Dominican Republic Crisis 1965, *The Ninth Hammarskjöld Forum, 1967*, pp. 13-16; Fenwick, The Dominican Republic: Intervention or Collective Self-Defense, *60 A.J.I.L. 64 (1966)*, p. 64; Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 212-215; Schachter, *82 Mich.L.R. 1620 (1984)*, 1632; Jeffery, The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions, *30 I.C.L.Q. 717 (1981)*, pp. 724-728.

The above view is largely based on the Vattelian argument that the nationals of a State constitute an extension of the State itself; therefore, an attack on the nationals constitutes an attack on the State, because the element of a "community" (in the sense of the population of the State) is essential for the existence of the State[21] .

The argument that protection of nationals is a form of exercise of the right of self-defence might be considered commendable in that it aspires to accommodating the use of force towards this end with the rule of non-use of force, the supremacy of which is implicitly recognised[22] .

The overwhelming practice of States that have resorted to armed force under the plea of protection of nationals abroad seems to characterise such action as an exercise of the right of self-defence.

In a statement to the House of Commons on 31 October 1956 the Foreign Secretary of the U.K. , Mr. Selwyn Lloyd, after strongly denying that the U.K. action in Suez constituted a violation of the Charter of the United Nations, stated that:

> " ... the effect of the Charter is that force may lawfully be used or threatened on the express authority of the United Nations or in self-defence. And self-defence undoubtedly includes a situation where the lives of the State's nationals abroad are in imminent danger ..."[23]

In a speech to the House of Lords on 1 November 1956 the Lord Chancellor expressed the same view on the basis of the formula articulated by Waldock and said that the doctrine of the protection nationals " ... was established in the case of the *Caroline* ..."[24] . It is noteworthy that the plea of protection of nationals was argued by the U.K. very briefly during the debate at the Security Council[25] , and was completely abandoned before the General Assembly of the United Nations in favour of the argument that action had been taken in order to separate the belligerent parties (Egypt and Israel) and to restore international navigation through the Suez Canal. It may be argued that this line of action was followed because it could not be argued plausibly that there was

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[21] See Bowett op. cit. *supra* n. 15, pp. 91-92, but *cf*. p. 93; id. loc. cit. in Cassese (ed.) op. cit. *supra* n. 6, pp. 40-41; Doswald-Beck loc. cit. *supra* n. 20; Thomas & Thomas loc. cit. *supra* n. 20, p. 14. *Cf*. Jeffery, loc. cit *supra* n. 20, p. 724.

[22] Schachter loc. cit. *supra* n. 20.

[23] Hansard Parliamentary Debates, H.C., 5th series, vol. 558, col. 1565. Mr. Selwyn Lloyd went on to reproduce *verbatim* Waldock's requirements for the exercise of protection of nationals; ibid. col. 1566.

[24] Hansard Parliamentary Debates, H.L., 5th series, vol. 199, cols. 1348-1350, 1355.

[25] S.C.O.R. 11th yr. 749th mtg. paras 2-11.

any evidence of threat to the lives of British nationals in Egypt[26] . Indeed, it seems ironic that the real threat to the lives of British and other European nationals occurred when the joint Anglo-French military operation was launched at the Suez Canal area[27] .

On 14 May 1975 the U.S. armed forces launched an operation in Cambodia that achieved the release of the freighter *S.S. Mayaguez* and her crew that had been arrested by the Cambodian authorities in the Gulf of Siam on 12 May 1975[28] . According to the Cambodian authorities the *Mayaguez* was involved in an espionage operation inside the territorial sea of Cambodia and the crew was taken ashore for interrogation[29] .
In a letter dated 14 May 1975 from the representative of the U.S.A. to the President of the Security Council it was stated that:

> " ... the United States Government has taken certain appropriate measures under Article 51 of the Charter of the United Nations the purpose of which is to achieve the release of the vessel and its crew ..."[30]

It must be noted that the U.S. Government provided no evidence of a threat to the lives of the crew of the Mayaguez , while it was the U.S. military action that seems to have endangered the lives of the U.S. citizens in Cambodian custody[31] .

On 27 June 1976 a scheduled *Air France* flight from Tel Aviv to Paris was hijacked by an armed group which were believed to be members of the Popular Front for the Liberation of Palestine (P.F.L.P.)[32] . After refuelling at Benghazi airport in Libya, the *Air France* flight was commandeered to Entebbe Airport in Uganda where the hijackers were joined by six more men[33] . President Amin of Uganda visited Entebbe airport stating his conviction that the passengers were innocent but emphasising that the cause of the Palestinians was a just one and hoping for the early release of the hostages provided the hijackers' demands were met by Israel[34] . These demands were the release of 53 Palestinians

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[26] Bowett op. cit. *supra* n. 15, p. 104.
[27] R. Fullick & G. Powell, *Suez: The Double War, 1979*, pp. 114-115, 151-152.
[28] Keesing's 1975, p. 27239.
[29] Ibid.
[30] Doc. S/11689, S.C.O.R. 30th yr. Suppl. for April-June 1975, pp. 24-25.
[31] Several members of the crew were injured during the operation; Keesing's 1975, p. 27239. Also see Paust, The Seizure and Recovery of the Mayaguez, *85 Yale L.J. 774 (1976)*, pp. 800-802.
[32] Keesing's 1976, p. 27888.
[33] Ibid.
[34] Ibid.

imprisoned in Israel, West Germany, Switzerland and Kenya by 1 July 1976 failing which the hostages would suffer strict and severe punishment[35]. After a second visit to the airport by President Amin, the hijackers released 47 of the hostages (women, children, old men) but subsequently went on to separate the remaining hostages into Israelis and non-Israelis; the latter were released on 1 July 1976[36]. As for the remaining Israeli hostages, the hijackers threatened to execute them if their demands were not met by 4 July 1976[37]. On the night of 3-4 July 1976 Israel commandos landed at Entebbe airport and released the hostages; the operation resulted in the death of three hostages, seven hijackers, twenty Ugandan soldiers and one Israeli commando, as well as considerable material damage at the airport[38]. During the debate on the Entebbe incident at the Security Council, Mr. Herzog, the Israel representative, justified the operation as an exercise of the right of self-defence applied in accordance to the *Caroline* formula and supported his argument by detailed reference to previous State practice and juridical authority[39]. The representative of the United States expressed his Government's support to Israel and stated that:

> " ... there is a well established right to use limited force for the protection of one's own nationals from imminent threat of injury or death where the State in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the the right of self-defence, is limited to such use of force as it is necessary and appropriate to protect threatened nationals from injury ..."[40]

An Islamic Republic was proclaimed in Iran on 11 February 1979 subsequent to the overthrow of the Shah; on 22 October 1979 the Shah arrived in N.York for medical treatment and his admission in the U.S.A. provoked strong protests from the Iranian Government on 26, 30, 31 October and 1 November 1979[41]. On 4 November 1979 the U.S. Embassy in Tehran was occupied by a group of Iranian demonstrators that held the diplomatic and consular staff therein as hostage the release of which was made conditional on the extradition of the Shah from the U.S.A. to Iran[42]. The Iranian Government did not appear to have incited the occupation

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35 Ibid.
36 Ibid. p. 27889.
37 Ibid.
38 Ibid. pp. 27889-27890.
39 S.C.O.R. 31st yr. 1939th mtg. paras 101, 106-121.
40 Ibid. 1941st mtg. para 77.
41 Keesing's 1980, pp. 30141, 30149-30150.
42 Ibid. p. 30150.

of the U.S. Embassy[43] but it was later established that it had subsequently endorsed the demonstrators' action[44] . The U.S. Government demanded the unconditional release of the hostages[45] and took a series of economic and diplomatic counter-measures against Iran[46] . At the same time the U.S. instituted proceedings against Iran before the I.C.J.[47] and brought the hostages question to the attention of the Security Council[48] . On 24 April 1980 a U.S. commando force mounted an operation inside Iran for the release of the Embassy hostages; the rescue mission was, however, abandoned in its early stages due to the failure of three of the eight helicopters involved[48] . In a letter dated 25 April 1980 from the representative of the U.S.A. to the President of the Security Council it was stated that the mission in Iran,

> " ... was carried out by the United States in exercise of of its inherent right of self-defence, with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our embassy ..."[49]

Lastly, the United States Government invoked the right to protect U.S. nationals as an exercise of the right of self-defence in justification of the military operation in Panama on 20 December 1989[50] .

It is submitted that the characterisation of military action for the protection of nationals as an exercise of the right of self-defence on the basis of the argument that an attack on the nationals of a State is an attack on the State itself, is ill-founded and question-begging.

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[43] Ibid. Also see *Hostages Case* , I.C.J. Rep. 1980, p. 3, at pp. 29-30, paras 58-60; *cf*. para 61.

[44] Keesing's 1980, p. 30205; I.C.J. Rep. 1980, p. 3, at pp. 33-35, paras 69-74.

[45] Keesing's 1980, p. 30150

[46] Ibid. pp. 30206, 30529. Also see M. Nash, Contemporary Practice of the U.S. Relating to International Law, *74 A.J.I.L. 657 (1980)*, pp. 657, 663-665, 658-660, 668-673.
These measures included the halting of shipment of $300,000,000 worth of military spare parts; the expulsion of Iranian students from the U.S.A.; a ban of oil imports from Iran; the break-off of diplomatic relations; the freezing of assets of the Iranian Government in the U.S.; the prohibition of all exports to Iran except for food an medicine; the invalidation of all entry visas to the U.S.

[47] Text of the application in *74 A.J.I.L. 258 (1980)*.

[48] The Security Council adopted S.C. Res. 457 (1979) of 4 Dec. 1979 and S.C. Res. 461 (1979) of 31 Dec. 1979, respectively calling for the release of the hostages and deploring their continuing detention. On 13 January 1980 a U.S. draft Resolution authorising economic sanctions against Iran under Articles 39 and 41 of the Charter failed to be adopted due to the negative vote of the U.S.S.R. See S.C.O.R. 35th yr. 2191st mtg. paras 44-56, 149, 164-168; text of draft resolution , Doc. S/13735, S.C.O.R. 35th yr. Suppl. for Jan.-March 1980, pp. 10-11.

[48bis] Keesing's 1980, p. 30531.

[49] Doc. S/13908, S.C.O.R. 35th yr. Suppl. for April-June 1980, pp. 28-29.

[50] Keesing's 1989, p. 37112.

The right of self-defence is exercised according to Article 51 of the Charter and customary international law only if there is an "armed attack" against a State[51] . A use of armed force in violation of Article 2(4) and of the rule of non-use of force does not automatically constitute an armed attack. That use of force is an armed attack which is of such "scale and effects" that it is prejudicial to the international standing of a State as a sovereign, political, territorial and economic entity. To say that a forcible act against the nationals of a State constitutes an "armed attack" would imply that force is used against the totality or overwhelming majority of the population of the State[52] . Furthermore, the argument that an attack on the citizens of a State is an attack against the latter appears to award to the nationals of a State a standing that individuals are not thought to possess in international law[53] . This is so because an armed attack is an event which State practice and the United Nations Charter (by virtue of Articles 2(4) and 51 considered in conjunction) view as an act committed by a State and directed against another State. To use the same term to connote a situation where the lives of a State's nationals are threatened by another State and immediately assert an *ipso facto* attack against the State of nationality is a process which requires further explanation which, unfortunately, is not forthcoming in most works of authority. Thus, Fawcett is right in claiming that:

> " ... To regard the mistreatment of nationals or the infringement of property rights as an "armed attack" within the scope of Article 51 would be to empty that expression of all its real meaning and is plainly inadmissible ..."[54]

Moreover, the identification of the nationals with their State begs the question of whether a certain numerical minimum of nationals must exist as requirement for the use of military force for their protection. In the cases of the *Mayaguez* , Entebbe and the U.S. mission in Iran there were less than one hundred individuals to be rescued. By contrast, in the cases of the Congo, the Dominican Republic and Panama the persons to be protected were several thousand. Schweisfurth has rightly pointed that in

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[51] *Nicaragua Case (Merits)*, I.C.J. Rep. 1986, p. 14, at p. 103, para 195.
[52] Farer, 142 *H.R.C. 297 (1974 II)*, pp. 392-393; Higgins, *37 B.Y.I.L. 269 (1961)*, p.316; Jeffery, *30 I.C.L.Q. 717 (1981)*, p. 724; Ronzitti op. cit. *supra* n. 16, p. 11 but *cf*. p. 12; Raby, *30 C. de D. 441 (1989)*, p. 477; Schweisfurth, *23 G.Y.I.L. 159 (1980)* , pp. 163-164; Quigley, The Legality of the United States Invasion of Panama, 15 Yale J.I.L. 276 (1990), pp. 292-4; I.C.J. Rep. 1980 (*per Judge Morozov*), pp. 56-57, para 8; ibid. (*per Judge Tarazi*), pp. 64-65; the Entebbe incident, S.C.O.R. 31st yr. 1942nd mtg paras 39 (Romania), 146 (India).
[53] Akehurst, *5 Int. Rel. 3 (1977)*, p.17.
[54] Fawcett, *103 H.R.C. 347 (1961 II)*, p. 404.

the absence of any such established criterion it is the decision-maker that not only decides to use force for the protection of nationals, but rather " ... decides in advance whether this right does exist at all ..."[55] . Bowett has argued that the point where a threat to the nationals implies a threat to the State is not to be judged by "counting heads"; instead he proposes, first, " ... the principle of relativity of rights which demands a weighing of one State's right to territorial integrity against other States' right of protection [of their nationals] ..." and, secondly, the principle of proportionality[56] .

It is submitted that the above view reinforces the question-begging nature of the argument used as a basis for considering protection of nationals as exercise of self-defence. To argue on the ground of the principle of proportionality indicates that the necessity of self-defence, a contingency that has to be separately and conclusively established, already exists, without any prior explanation. The assertion , then, of a "a right of protection" places the argument for the establishment of a necessity of self-defence with regard to threats to nationals on the very concept that needs to be proven. Moreover, it also misplaces the point at issue, which is not a right of forcible protection, but rather the *a priori* obligation to refrain from the use of armed force except for the existence of a necessity of self-defence[57] .

The formula propounded by Waldock has been expressly adhered to by the U.K. Government during the Suez crisis[58] and the Israel Government during the Security Council debate on the Entebbe incident[59] . This view is open to the criticism expressed by the present author *supra* when dealing with the concept of individual self-defence against an armed attack; namely, that it is pointless to try to establish the content of contemporary customary law on self-defence by invoking a precedent that took place at a time when force was not prohibited in international relations and regarding it as the conclusive statement of the law by ignoring the State practice from the middle of the 19th century until 1945[60] .

The practice of States with regard to the protection of nationals as an exercise of the right of self-defence and, especially, the Entebbe incident

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55 Schweisfurth, 23 *G.Y.I.L. 159 (1980)*, p. 164.
56 Bowett, *Self-Defence in International Law, 1958*, pp. 93-94; id. loc. cit. in Cassese (ed.) op. cit. *supra* n. 6, p. 43.
57 Schweisfurth, 23 *G.Y.I.L. 159 (1980)*, p. 169.
58 *Supra* n. 24.
59 S.C.O.R. 31st yr, 1939th mtg para 115.
60 See *supra* Part Two , Ch. 9, First Title.

and the U.S. mission to Iran, come very close in supporting a theory, albeit very tenuously, of admissibility of defensive action on the part of a State that is consummated in the rescue of its nationals that are in mortal danger[60bis].

It is submitted *de lege ferenda* that the basis of lawfulness of such military action is not self-defence against an armed attack but rather the concept of proportionate counter-measures "analogous to self-defence"[61], against a use of force short of an armed attack. The main issue at this point is whether the imminent danger to the lives of a State's nationals constitutes a use of force against that State in the sense of Article 2(4) of the Charter. It is submitted that if the nationals of a State are seized by another State or by groups of individuals with the complicity or material support of another State and a threat is put on their lives by which the State of nationality is blackmailed to committing an act or omission, then the force threatened or used against its nationals is in reality force directed against the State[62]. For if a State is blackmailed by way of coercion against the lives of its nationals to act in a way that compromises or deprives it of the freedom of sovereignty to do or not to do something, then it is a coercion directed against the State. What brings this activity within the ambit of Article 2(4) of the Charter is, first, that this coercion is perpetrated directly or indirectly by another State, and, secondly, the fact that that armed violence is used against individuals that are linked with bond of nationality to another State in order to achieve certain ends on the part of the latter by paralysing its sovereign discretion to act or not in relation to a certain contingency.

This is illustrated by both the Entebbe incident and the U.S. action in Iran. In both cases Israeli and U.S. nationals had been seized hostage and certain demands had been made to both Israel and the U.S.A. failing the satisfaction of which the hostages would perish[63]. In both cases the State where the hostages were held was implicated by supporting the hostage takers. In the case of the Iran this has been held by the Court in the *Hostages Case* to be established. There has been no such positive affirmation in the case of the Entebbe incident. The great length of the

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[60bis] See *infra* section on the Evaluation of State practice, p. 416 et seq.

[61] *Supra* , Part Two , Ch. 9, Second Title. See also *supra* n. 60bis.

[62] Schachter, 53 *Univ. Chic. L.R. 113 (1986)*, p. 139 n. 107; Dinstein op. cit. *supra* n. 20, p. 214.

[63] This is definitely the case with regard to the Israeli hostages at Entebbe. It is not certain whether the U.S. hostages in Tehran faced an imminent threat to their lives. See Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1632.

Israeli argument about the complicity of the Ugandan Government[64] and the persistent denial by the latter of the Israel allegation[65], are of considerable significance. During the debate at the Security Council on the Entebbe incident the representative of the U.S.A. made the following statement with regard to the position of Israel:

> " ... That Israel might have secured the release of its nationals by complying with the terrorists' demands does not alter these conclusions ... No State is required to yield control over persons in lawful custody in its territory under criminal charges ..."[66]

What appears to make this contingency plausible is the fact that Governments are always sensitive with regard to the well-being of their citizens, notably when the latter have a "genuine link" with the State whose nationality they bear[67]. It is the view of this author that a case of defensive action by way of counter-measures weakens considerably in situations of nationals of a State that effectively reside and have their livelihood in another State. This could be arguably be the case about Europeans that remained in former colonies after their independence - e.g. the Congo. Admittedly the concept of nationality has not been conclusively defined in international law[68]; however, what matters is not that a State is to be given a general right to use force because the lives of its nationals are in mortal danger, but, rather, a situation where a State itself is the victim of coercion in defiance of its sovereignty. The danger to the lives of the State's nationals appears to constitute the means rather than the sole and final object of coercion. It is thus appropriate in the opinion of this writer to establish a "genuine link" between individuals and the intervening State in every specific instance that use of force has been resorted to in such circumstances. Such link, however, is to be a link of nationality and not a link on religious or ethnic grounds between the intervening State and the individuals in mortal danger[69].

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[64] S.C.O.R. 31st yr. 1939th mtg. paras 92-97; 1942nd mtg. paras 80-91.
[65] Ibid. 1939th mtg. paras 34-35.
[66] Ibid. para 80; also see 1943rd mtg. para 44 (France).
[67] *Nottebohm Case*, I.C.J. Rep. 1955, p. 4, at pp. 31-33.
[68] See Brownlie, *International Law and the Use of Force by States, 1963*, p. 300.
[69] *Cf*. The assertion in statements of the Israeli Government of a general right to resort to force for the protection of Jews generally, as opposed to Jews of Israeli nationality. See statement by Mr. Herzog before the S.C. during the debate on the Entebbe incident, S.C.O.R. 31st yr. 1939th mtg. paras 81-83, 112; statement by Mr. Netanyahu during the S.C. debate on the Israel air strike on the P.L.O. Headquarters in Tunis (1985), U.N. Chronicle, vol. XII, nos 10/11, Nov./Dec. 1985, p. 4.

(3) *That there is an autonomous right to use force for the protection of nationals .*

It has been suggested both in the practice of States and the works of certain jurists that the use of force for the protection of nationals abroad is admissible under the United Nations Charter and customary international law as an autonomous right[70] .

The Government of the U.S.A. justified its military action in Grenada on this basis. According to the U.S. Department of State, " ... [P]rotection of nationals is a well-established, narrowly drawn ground for the use of force which has not been considered to conflict with the United Nations Charter ..."; moreover, it has been expressly stated that in the case of Grenada the U.S.A. avoided relying on the right of self-defence under Article 51 " ... for the same reasons as in the Cuban missile crisis ..."[71] .

Akehurst[72] has suggested on the basis of the Entebbe incident that a narrow exception to Article 2(4) of the Charter may be envisaged in the case of nationals of the intervening State being led involutarily to the territory of another State.

The present author considers the above views unsatisfactory for the following reasons. First, simply to say that protection of nationals is admissible under the Charter simply begs the very question whether this is so. The text of the Charter contains no such stipulation and it is indeed interesting to know on the basis of which exception to Art. 2(4) the alleged right is established. Secondly, the view expressed by Akehurst initially appears commendable in that it aspires to restricting resort to force for the protection of nationals only to cases of abduction of the citizens of a State by another State or individuals having the support of another State. However, it is not explained on the basis of an existing exception to the rule of non-use of force. Akehurst considers cases where "... a State (or individuals for whose acts the State is responsible) brings the nationals of another State on to its territory and in violation of international law ..."[73] . In this case he contends that the State of nationality may use force to rescue its citizens and that the State where they are held " ... cannot invoke

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[70] Akehurst, *5 Int. Rel. 3 (1977)*, pp. 21-22; Henkin, *216 H.R.C. 19 (1989 IV)*, p. 153; *cf*. Raby, *30 C. de D. 441 (1989)*, pp. 476, 477 et seq.
[71] Letter from Mr. D.R. Robinson to Prof. Gordon, *18 Int. Lawyer 381 (1984)*, p. 385.
[72] Loc. cit. *supra* n. 70; also see Henkin loc. cit. *supra* n. 70.
[73] Akehurst loc. cit. *supra* n.70, p. 21.

its territorial sovereignty ... when the presence of nationals in its territory was the result of its own violation of the territorial sovereignty of the State from which the individuals were abducted ..."[74] . As it stands, the above suggestion would only apply to cases of abduction of a State's nationals from within the latter's territory - a contingency unsupported by State practice[75] . In fact, the Israeli nationals that were rescued at Entebbe had not been abducted in Israel but in Greece. In addition, Akehurst's view in effect enlarges the scope of exceptions to Article 2(4) by suggesting military action to rescue captured nationals as an autonomous ground for unilateral resort to force[76] .

Finally, an examination of State practice points to the opposite conclusion with regard to the existence of an autonomous right of protection of nationals under the United Nations Charter. With the exception of the U.S. action in Grenada, all other instances of use of armed force for the protection of nationals abroad were justified either on the basis of the right of self-defence[77] or a state of necessity[78] or the consent of the target State[79] .

(4) *That protection of nationals is a form of protection of human rights .*

Schweisfurth[80] has articulated a theory according to which there is a conflict of obligations for a State when its nationals are in mortal danger, namely, the obligation to refrain from the threat or use of force and the obligation to protect the human rights of its citizens[81] . He then argues that the power to protect human rights of individuals depends on the nationality of the latter, and that the advancement of the law with regard to such protection has strengthened the bond established by nationality between a State and its citizens to the point that the former may lawfully

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[74] Ibid.
[75] See Ronzitti op. cit. *supra* n. 16, p. 14.
[76] See Schweisfurth, *23 G.Y.I.L. 159 (1980)*, p. 165.
[77] See Suez (1956), *The Mayaguez* (1975), Entebbe (1976), U.S. action in Iran (1980), Panama (1989).
[78] See the Belgian action in the Congo (1960)
[79] See Lebanon (1958), Stanleyville (1964), The Dominican Republic (1965), Mogadishu (1977), Kolwezi, Zaire (1978), Grenada (1983), Malta (1985), Somalia (1988,1991), Liberia (1990), Kinshasha, Zaire (1991).
[80] Schweisfurth, Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights, *23 G.Y.I.L. 159 (1980)* .
[81] Ibid. pp. 169, 170-173.

protect the human rights of the latter extraterritorially, even by the use of force[82] . Schweisfurth contends that only the intransigence of a State in not respecting the human rights of the citizens of another State would legitimise the latter in undertaking a rescue operation by military means. Moreover, he argues that on balance the obligation to respect human rights should prevail over the obligation not to use force for in the case of a rescue operation the latter obligation is only temporarily breached[83] .

The present author feels bound to disagree with the above view. First, "a balance of values" is not supported in the practice of States. No State that has resorted to force to protect its nationals, has ever justified its action on the basis of a superior obligation to support the human rights of its citizens[84] . Indeed, this view appears to overlook the character of the prohibition of the use of force as a rule of *jus cogens* [84bis] . Secondly, Schweisfurth's theory extends the scope of what has traditionally been the object of protection, namely, the lives of nationals against mortal danger. Finally, there is no basis in contemporary international law for the exercise of extraterritorial jurisdiction by the use of force for the protection of the human rights of the citizen's of a State. The obligation of a State to protect human rights appears to extend only within its own jurisdiction and not beyond. To say that the opposite is admissible would gravely endanger international peace and security[85] .

The Question of Protection of Property of Nationals .

Authority has generally treated the issue either with extreme scepticism[86] or with outright rejection[87] . Bowett, an eminent supporter of the lawfulness of the use of force for the protection of the lives of nationals, approaches the matter cautiously by remarking at the outset that

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[82] Ibid. pp. 174-179. By Human Rights Schweisfurth means "fundamental human rights" which he designates by reference to the non-derogable rights under the U.N. Covenant on Civil and Political Rights. See Article 4 of the Covenant.
[83] Ibid. p. 178.
[84] *Cf*. statement by the Italian representative during the S.C. debate on the Belgian action in the Congo, S.C.O.R. 15th yr. 873rd mtg. paras 120-121.
[84bis] See I.C.J. Rep. 1986, p. 14, pp. 100-101, para 190.
[85] *Contra* , Schweisfurth loc. cit. *supra* n. 80, p. 176.
[86] Brownlie op. cit. *supra* n. 68, p. 300; Farer, Humanitarian Intervention. The View From Charlottesville, in Lillich (ed.) *Humanitarian Intervention and the United Nations, 1973*, p. 155.
[87] Akehurst, *5 Int. Rel. 3 (1977)*, p.19; Paust, *85 Yale L.J. 774 (1976)*, p. 800.

" ... one hesitates to place the same value on property as one does on human life ..."[88] . He, nevertheless, feels inclined to admit the exercise of forcible action towards this end in case of threat to property the destruction of which cannot be met with compensation or *restitutio* , or property relevant to the security of the State, such as military hardware[89] .

There is paucity in State practice with regard to the issue. States that have resorted to force for the protection of nationals have consistently given primacy to the protection of their lives and either have not expressed any claim of a right to protect their property or made collateral reference to it.

On 2 August 1946, during riots that had broken out in Abadan, seat of the Anglo-Iranian Oil Co. in southern Iran, the U.K. Government dispatched troops from India " ... in order that they may be at hand for the protection, should circumstances demand it, of Indian and British lives, and in order to safeguard Indian and British interests in South Persia ..."[90]

In the aftermath of the nationalisation of the Anglo-Iranian Oil Co. in 1951, the U.K. Government again contemplated military action for the protection of British lives in Iran[91] . It is significant that Foreign Secretary H. Morrison, when asked in the House of Commons whether the undertaking to protect British nationals also applied to the British installations and property, he treated the protection of property as "a different matter"[92] .

Exactly the opposite view was taken in the speeches made by Foreign Secretary Selwyn Lloyd and the Lord Chancellor to the House of Commons and the House of Lords respectively during the Suez crisis. The Foreign Secretary stated on 31 October 1956 that:

> " ... It has certainly been argued that there is a great distinction between the prevention of the loss of human lives and the protection of property. Yet if the interests concerned are sufficiently vital and if the damage which threatens them is sufficiently great, then, I believe that action to protect our interests is also justified ..."[93]

The Lord Chancellor took the view that:

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[88] Bowett loc. cit. in Cassese (ed.) op. cit. *supra* n. 6, p. 48; id. op. cit. *supra* n. 15, p. 100.
[89] Id. loc. cit. in Cassese (ed.) op. cit. pp. 48-49; op. cit. p. 103.
[90] Keesing's 1946-1948, p. 8084.
[91] Keesing's 1950-1952, pp. 11575, 11602.
[92] Hansard Parliamentary Debates, H.C. , 5th series, vol. 489, col. 1189.
[93] Ibid. vol. 558, col. 1566.

" ... if really valuable and internationally important foreign property is in danger of irreparable injury, through the breakdown of order, entry by a foreign State for the sole purpose of securing the safety of that property is excusable ..."[94]

In the case of the rescue of the Mayaguez and her crew there was no reference to the importance of the vessel to the U.S. Government.

In June 1990 the U.S.A. dispatched six warships with a contingent of 2,000 Marines off the coast of Liberia, which had been in a state of civil war since December 1989 and where the rule of the Government of President Doe had totally collapsed[95] . The U.S. Government contemplated the landing of troops for the protection of U.S. nationals in the capital Monrovia as well as the protection of sophisticated information gathering and submarine detection detection installations therein; while U.S. nationals were airlifted in mid-June 1990 from Monrovia, no action appears to have been taken with regard to the installations[96] .

It is submitted that the practice of States does not support the existence of any right to protect the property of nationals abroad. The U.K. practice is somewhat inconsistent in that while no reference was made to the forcible protection of the assets of Anglo-Iranian Oil Co. in 1951, a totally different position was adopted with regard to the Suez Canal in 1956. Furthermore, what makes the latter claim even more doubtful in law is that it appears to be based on a general right of self-preservation for the protection of the "vital interests" of the State. Finally, in so far as Public Contract Debts are concerned the use of force for their collection is expressly prohibited by virtue of the Hague Convention I, 1907 [97] .

Evaluation of State Practice .

It is rather controversial to establish with finality whether resort to force for the protection of nationals constitutes part of contemporary international law. Eminent authority is either opposite or very sceptical about the lawfulness of such use of force[98] . Moreover, State practice does

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[94] Ibid. H.L., vol. 199, col. 1349.
[95] Keesing's 1990, p. 37601.
[96] Ibid.
[97] U.K. Treaty Series 1909-1911, vol. 2, no 7, 1179.
[98] See Wehberg, L' Interdiction du Recours à la Force. Le Principe et les Problèmes qui se posent, *78 H.R.C. 7 (1951 I)*, p. 71; Fawcett, *103 H.R.C. 347 (1961 II)*, pp. 404-405; Higgins, *37 B.Y.I.L. 269 (1961)*, pp. 316-317; id. Intervention and International Law, in Bull (ed.) *Intervention in World Politics, 1984*, p. 38; Brownlie op. cit. supra n. 68, pp. 298-301; id. The

not appear to be conclusive, because every instance of the use of force under the justification of the protection of nationals has not been left unopposed.

The dispatch of U.K. forces to Basra on 2 August 1946 in contemplation of intervention in Abadan in Southern Iran, encountered the protest of the Iranian Government. It was stated on 5 August 1946 by Prince Firouz, the Minister of Labour and Propaganda, that there had not been the "slightest legal justification" for the sending of British troops, that this act constituted breach of Iran's sovereignty and that it was contrary to the United Nations Charter[99].

A similar protest was levelled by the Iranian Government towards the dispatch of British forces in the area in 1951, in the aftermath of the nationalisation of the Anglo-Iranian Oil Co. Mr. Kazemi, the Iranian Foreign Minister, stated that the U.K. action aimed at intimidating Persia and demanded that the Government of Iraq, where the U.K. forces were stationed, take "all appropriate steps" to rectify the situation[100].

The Belgian action in the Congo on 10 July 1960 raised considerable opposition by both the Government of the Congo, that requested United Nations military assistance to meet the Belgian intervention[101] and by third States. During the debate at the Security Council the representative of Tunisia expressly stated that the acts of violence against Belgian and other European nationals in the Congo appeared to have been sparked off by the very Belgian military intervention that was supposed to offer protection against such acts[102]. Moreover, the representatives of Poland and the U.S.S.R. took the view that the Belgian use of force constituted "aggression"[103]. The above contention seems to have been established on the basis of the allegation that the real aim of the Belgian Government was the support of the secession of Katanga, the south-eastern province of the Congo. The secession took place subsequently to the Belgian

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Principle of Non-Use of Force in Contemporary International Law, in Butler (ed.) *The Non-Use of Force in International Law, 1989*, pp. 23-24; Akehurst, *5 Int. Rel. 3 (1977)*, p. 16 et seq. ; Farer, *142 H.R.C. 297 (1974 II)*, pp. 392-393, but *cf*. id. Panama: Beyond the Charter Paradigm, *84 A.J.I.L. 503 (1990)*, p. 505; Quigley, The United States Invasion of Grenada: Stranger than Fiction, *18 Miami U. Inter-Am. L.R. 271 (1986-87)*, p. 303; D' Angelo, 21 Va. J.I.L. 485 (1981), 519; Ronzitti op. cit. *supra* n.16, p. 64; Milenhoviç, *29 Review of International Affairs (Belgrade) 33 (1978)*, p. 35.

[99] Keesing's 1946-1948, p. 8084.

[100] Keesing's 1950-1952, p. 11603.

[101] Keesing's 1959-1960, 17642.

[102] S.C.O.R. 15th yr. 873rd mtg. paras 81-86.

[103] Ibid. paras 103 (U.S.S.R.), 156, 158 (Poland).

intervention ,that mainly occurred in that province, and where vast quantities of mineral wealth existed that were exploited by Belgian nationals during the years of colonial administration. Indeed, the attitude of the Belgian Government towards the Katangese secession appeared to be very equivocal. Prime Minister Eyskens stated with regard to the secessionist authorities in Katanga that he preferred the presence of such a Government " ... which seems to be taking decisions in certain fields, has a Parliamentary majority, and is trying to re-establish order ..."[104]. Furthermore, during the debate at the Security Council, the Belgian representative suggested that the military intervention by his country's forces was carried out with the consent of " ... the head of the provisional Government of Katanga ..."[105] . Finally, the Belgian Government rendered technical and economic assistance to the secessionist movement in Katanga[106] .

The U.S. action in the Dominican Republic on 28 April 1965 was justified as having been undertaken at the request of the local authorities and for the protection of the lives of U.S. and other nationals[107] . Two facts, however, are significant. First, that the U.S.A. immediately sought endorsement of her action by the O.A.S. and, secondly, that it was stated by the U.S. Government both within and without the United Nations that the operation aimed at "preventing another communist State" in the Western hemisphere[108] . The speed with which the U.S. Government had recourse to the O.A.S. and sought to transform an act of unilateral use of force to an act of collective regional security, has been interpreted as suggesting that the U.S. Government did not consider the justification offered as tenable on the basis of the facts[109] . The Cuban representative in the Security Council treated the U.S. justification of protection of nationals as merely a "pretext" and concluded that:

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[104] Keesing's 1959-1960, p. 17639.
[105] S.C.O.R. 15th yr. 873rd mtg. paras 186 et seq.
[106] Keesing's 1959-1960, pp. 17645-17646.
[107] See Letter dated 29 April 1965 from the representative of the U.S.A. to the President of the Security Council, Doc. S/6310, S.C.O.R. 20th yr. Suppl. for April-June 1965, pp. 55-56; statement before the S.C. for the U.S.A. by Mr. A. Stevenson, S.C.O.R. 20th yr. 1196th mtg. para 67.
[108] See Television broadcast of 2 May 1965 by U.S. President L. Johnson, Keesing's 1965-1966, pp. 20813-20814; S.C.O.R. 20th yr. 1196th mtg paras 64-66, 82, 92-93; id. 1202nd mtg para 19 (China).
[109] Brownlie, Thoughts of Kind-Hearted Gunmen, in Lillich (ed.) *Humanitarian Intervention and the United Nations*, 1973, p. 139.

" ... if a powerful country can land troops on the territory of a small country in which some of its citizens happen to live or to own property, no weak country anywhere will be able to enjoy sovereignty or independence ..."[110]

Moreover, the representative of Jordan stated:

" ... What happened was a swift armed intervention by the U.S. in response to a report or an appraisal of the situation from the United States authorities in Santo Domingo. The question that one is bound to ask in such a case is whether any Government under similar circumstances in any other country could feel free to take similar action. That course, if condoned, will undermine the basic principles of the sovereignty of States and international order ..."[111]

An interesting statement was made by the representative of France; he said that:

" ... We fully understand that with the onset of a situation of civil war and the violent clashes taking place, the Government of the United States should have been concerned for the safety of its nationals and should have wished to see to their evacuation.

However, as in many similar cases in the past, such operations should be limited in their objective , in their duration and in the scope of the measures applied. Should this not be the case we would have to recognise that, owing to the dispatch and landing of a considerable number of United States troops, we are faced with a genuine armed intervention the necessity of which is not apparent ..."[112]

The U.S. military operation for the rescue of the *S.S. Mayaguez* and her crew was met with protests from the Cambodian and Algerian Governments that considered the U.S. action as an act of "aggression", while the Chinese Government protested by claiming that the *Mayaguez* was seized in Cambodia's territorial sea and that the U.S. had committed an "act of piracy"[113] .

The Israeli operation at Entebbe in 1976 was condemned by Uganda as "aggression" and "invasion"[114] . Other States pointed at what they considered as the unlawfulness of the Israeli action but refrained from

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110 S.C.O.R. 20th yr. 1196th mtg para 126.
111 Ibid. 1200th mtg para 8.
112 Ibid. 1198th mtg paras 111-112.
113 Ronzitti op. cit. *supra* n. 16, p. 36.
114 See Letter dated 5 July 1976 from the representative of Uganda to the President of the Security Council, annexing a message dated 4 July 1976 from the President of the Republic of Uganda to the Prime Minister of Mauritius, Current Chairman of the O.A.U., to the President of the Security Council, and to the Secretary General, Doc. S/12124, S.C.O.R. 31st yr. Suppl. for July-Sept. 1976, p. 3. Statement by the Foreign Minister of Uganda to the S.C. , S.C.O.R. 31st yr. 1939th mtg para 37. Several representatives of third States took the same view. See statements, 1939th mtg paras 47 (Mauritania), 148-160 (Kenya), 168-170 (Qatar), 209-222 (Cameroon), 224 (China), 232-250 (Libya); 1940th mtg paras 28 (Guinea), 84 (Guyana); 1941st mtg paras 9 (Benin), 30 (Somalia), 65 (Yugoslavia), 127,134 (Pakistan), 160, 162 (U.S.S.R.).

condemning the operation[115] . The representative of Guyana considered the Israeli operation as "gun-boat diplomacy" which would make small and weak States " ... hostage to the dictates of naked power ..."[116] . The representative of Tanzania characterised the Israeli action unlawful on these grounds:

> " ... Israel has no case in international law as it exists now. Whatever might have been the law in the past, and whatever writers and jurists of the past have seen as law with regard to the right of a State to protect its nationals abroad, such is no longer the case now. The advent of the law of the Charter did away with all the traditional methods for a State to obtain satisfaction on a unilateral basis by employing measures short of war which were being resorted to in the past .....
> ..... The Israeli military action at Entebbe cannot be taken lightly. It is a dangerous precedent which if allowed to go uncontested, would usher in a new era in international relations, an era of lawlessness ..."[117]

Finally, the representative of Panama, after stating that the Israeli action could not be in self-defence because Israel had not been the victim of an armed attack by Uganda[118] , said that:

> " ... Some delegations have invoked as justification for Israel's action the right of that State to protect its nationals who had been kidnapped on foreign territory. We must point out, however, that the International Court of Justice in the Hague, though admitting that it is an elementary principle of international law that a State has the authority to protect its nationals who have been harmed by acts contrary to international law committed by another State, at the same time limits that right to the exercise of diplomatic or international judicial action and, in any case, to the means of the peaceful settlement of disputes laid down in Article 33 of the Charter.
> The military action taken by Israel is not, therefore, characteristic of the right of a State to protect its nationals, as this right is envisaged in the Charter among the peaceful means for the settlement of disputes, but rather becomes an act of armed intervention such as those frequently resorted to by powerful countries against weaker countries ..."[119]

The U.S. abortive operation in Iran in 1980 was condemned by the U.S.S.R. and the Arab countries except Egypt as "aggression"[120] . The Iranian Government denounced the action as tantamount to an act of war[121] .

The military in intervention in Grenada in October 1983 was condemned by the majority of States at the Security Council as unlawful

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115 S.C.O.R. 15th yr. 1940th mtg paras 122-123 (Sweden); 1942nd mtg paras 57-58 (Japan).
116 Ibid. 1940th mtg para 85.
117 Ibid. 1941st mtg paras 104, 109. See also paras 105-107.
118 Ibid. 1942nd mtg para 27.
119 Ibid. paras 30-31; also see Letter dated 9 July 1976 from the representative of Mexico to the President of the Security Council, Doc. S/12135, S.C.O.R. 31st yr. Suppl. for July-Sept. 1976, p. 14.
120 Keesing's 1980, p. 30534; *cf*. Ronzitti op. cit. *supra* n. 16, p. 46.
121 Keesing's 1980, p. 30533.

intervention in the internal affairs of another State. With regard to the U.S. plea of protection of nationals, the Nicaraguan representative considered it as a relic of the 19th century power politics[122]. The representatives of Colombia and Mexico treated the U.S. action as a threat to international peace and security[123], while the Chinese representative said that the U.S. operation under whatever pretext was "absolutely inadmissible"[124]. By far the most important statement, however, came from the representative of France, a country that has been in principle in support of military action for the protection of nationals, that indicates a certain scepticism as to the admissibility of unilateral resort to force in cases other than under a request by the Government of a country or by way of authorisation by the Security Council[125]. The representative of The Netherlands took the view that the U.S. operation was incompatible with the principles of the United Nations Charter[126]. Finally, the representative of the U.S.S.R. condemned the U.S. action by drawing a parallel with the operation in the Dominican Republic[127].

Furthermore, the U.S. military intervention in Panama in 1989 was also met with considerable international condemnation[128].

State practice, notably, the attitude of the target State and third States towards the use of force for the protection of nationals, and authority, reveal that the opposition to the principle is established on two considerations: First, the likelihood of abuse and secondly the dangerous situation that such military action might create for international peace and security.

The likelihood of abuse as an argument is based on two grounds. First, that protection of nationals constitutes a use of force which is the privilege of powerful Western States, and, secondly, that it has been used as a pretext for the advancement of those States' political and economic interests[129]. The argument with regard to abuse finds support in the

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[122] U.N. Chronicle vol. XX, No 11, Dec. 1983, p. 16. Also see statements by the representatives of Grenada, p. 17 and Cuba, pp. 17-18.
[123] Ibid. pp. 19, 20.
[124] Ibid. p. 21.
[125] Ibid.
[126] Ibid.
[127] Ibid. p. 22.
[128] Keesing's 1989, p. 37112.
[129] See Wehberg loc. cit. *supra* n. 98; Brownlie op. cit. *supra* n. 68, p.300; Higgins, *37 B.Y.I.L. 269 (1961)*, p. 317; Akehurst, *5 Int. Rel. 3 (1977)*, p. 6; Gilmore, *The Grenada Intervention, 1984*, pp. 60-64; Farer, loc. cit. in Lillich (ed.) op. cit. *supra* n. 86, pp. 155-156;

famous *dictum* of the International Court in the *Corfu Channel Case* in relation to the lawfulness of intervention as "manifestation of force"[130]. The contention that only a specific group of States has resorted to armed force for the protection of nationals is largely true but not absolute. Whereas the majority of these States have been militarily or politically powerful it is not the case of a monopoly of the Western States any more.

Some States that were traditionally considered as the target of such intervention have invoked the right themselves. Egypt has used force for the protection of nationals on two occasions, in Cyprus (1978)[131] and Malta (1985)[132], while it expressly supported the U.S. action in Iran[133].

The ECOMOG, the peace-keeping force consisting of contingents of Nigeria, Ghana, The Gambia, Guinea and Sierra Leone, that was dispatched by the Economic Community of West African States (ECOWAS) to Liberia on 25 August 1990, evacuated 7,000 citizens of Nigeria, Ghana and Guinea that had been attacked by one of the warring factions in the Liberian civil war[134].

It is submitted that it is not the kind of States that undertake action for the protection of nationals but rather the aim of the action that matters, considered on the basis of the facts of the case[135]. If the military action is launched due to the mere presence of the intervening State's nationals in the target State rather than because of an existing imminent danger against their lives, then a case of abuse can be said to exist. The U.S. action in the Dominican Republic, Grenada, Panama, the Gulf of Siam (*The Mayaguez*) and the U.K. action in Suez constitute illustrations. In these cases there was no threat to the lives of nationals and it appears that the action taken was inspired by considerations of geopolitical interest. In

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id. 84 A.J.I.L. 503 (1990), pp. 504, 506 et seq. ; Fawcett, *103 H.R.C. 347 (1961 II)*, pp. 404-405; Gordon et al. , International Law and the United States Action in Grenada. A Report, *18 Int. Lawyer 331 (1984)*, p. 379; Joyner, Reflections on the Lawfulness of an Invasion, *78 A.J.I.L. 131 (1984)*, pp. 134-135; Vagts, International Law under Time Pressure: Grading The Grenada Take-Home Examination, *78 A.J.I.L. 169 (1984)*, pp. 169-170; Nanda, *14 Cal. W. I.L.J. 395 (1984)*, p. 423; id. *84 A.J.I.L. 494 (1990)*, pp. 496-497; Quigley, *18 U. Miami Inter-Am. L.R. (1986-87)*, pp. 275-305; Paust, *85 Yale L.J. 774 (1976)*, pp. 800-802; Ronzitti op. cit. *supra* n. 16, p. 64; Schachter, *82 Mich. L.R. 1620 (1984)*, pp. 1630-1631 but *cf*. at p. 1632; Milenhoviç, *29 Review of International Affairs (Belgrade) 33 (1978)*, p. 35. *Cf*. Bowett op. cit. *supra* n.15, pp. 104-105.

130 I.C.J. Rep. 1949, p. 4, at p. 35.

131 Keesing's 1978, p. 29305.

132 Keesing's 1986, p. 34326.

133 Keesing's 1980, p. 30534.

134 Keesing's 1990, p. 37644.

135 See Higgins loc. cit. in Bull (ed.) op. cit. *supra* n. 98, p. 38; cf . Ronzitti op. cit. *supra* n. 16, p. 64.

fact the danger to the lives of nationals was either totally absent - viz. Suez, Grenada[136] , Panama[136bis] - or was created by the policies of the intervening State towards the target State - viz. Panama[137] - or by the very action aiming at their protection - viz. Suez[138] , *The Mayaguez* [139] , Grenada[140] , Panama.

The suggestion of likelihood of abuse, however, is somewhat problematic for it presupposes the existence of a right to protect nationals. The argument of abuse of a right does not imply the *a priori* absence of the right in law. It is submitted that in so far as an autonomous right of protection of nationals is asserted or one based on the concept of necessity, the impact of Article 2(4) of the Charter on the practice of States militates against such an assertion. Therefore, considerations of abuse could only be raised *de lege ferenda* .

This writer has submitted *supra* that the operation at Entebbe and the U.S. abortive action in Iran[141] could be relied on in support of the view that protection of nationals may constitute a case of exercise of proportionate counter-measures against a use of force short of an armed attack. The abuse in this case would consist of the fact that resort to military force is had in order to promote geopolitical interests of the intervening State by way of armed force. In other words, what might be sought is an effective regression of the law to the 19th century doctrines of self-preservation and self-help. The above view, however, is extremely tenuous due to opposition by third States.

Moreover, although the Israeli action at Entebbe appears to fulfil the requirement of proportionality, this is regrettably not the case in a large number of cases of resort to force for the protection of nationals. The Belgian intervention in the Congo, the U.S. operations in the Dominican Republic, Grenada, Panama, and the Anglo-French action in Suez involved the use of overwhelming force and occupation of the territory of

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136 Gilmore op. cit. *supra* n. 129, p. 61.
136bis See Henkin, *29 Col. J. Trans. L. 293 (1991)*, p. 296.
137 Farer, *84 A.J.I.L. 503 (1990)*, p. 506.
138 *Supra* n. 27.
139 Paust, *85 Yale L.J. 774 (1976)*, pp. 801-802.
140 Doswald-Beck, *31 N.I.L.R. 355 (1984)*, p. 362; Quigley, *18 U. Miami Inter-Am. L.R. 271 (1986-87)*, pp. 297-300.
141 The latter with the reservation of the Court's *obiter dictum* in the *Hostages Case* . See *supra* pp. 419-421.

the target State[142]. A further objection to resort to force for the protection of nationals as counter-measure in the sense of the *Nicaragua Case* is the possibility of widespread casualties among the individuals to be rescued[143]. It may be argued that the casualties caused by the Israeli operation at Entebbe were reasonable, and that casualties are an integral part of any defensive operation. The experience of the Egyptian rescue operation at Malta airport in 1985, as a result of which 60 of the 92 passengers of the *Egypt'Air* airliner to be rescued were killed[144] does not dispense with the above objection. Indeed, if such casualties are to be incurred, and they are very likely to, if the armed or security forces of the target State mount considerable resistance against the rescuers, then the pertinence of such operations may extremely doubtful[145].

Apart from the casualties among the nationals to be rescued by military intervention, the population of the target State may be severely affected. In the case of the U.S. action in Panama, the United Nations Committee on Economic, Social and Cultural Rights noted in its draft report of 6 December 1991, that large numbers of Panamanian citizens were affected by the U.S. operation, mainly by being made homeless due to the U.S. bombing of Panama City[145*].

By far more dangerous is the possibility of a serious breach of peace and the outbreak of serious armed conflict between the intervening and the target States[145bis].

The incident at Larnaca airport is a pertinent illustration. On 18 February 1978 two gunmen seized a number of Egyptian nationals hostage and held them at Larnaca airport[146]. On 19 October 1978 a force of Egyptian commandos landed at Larnaca and attempted to rescue the hostages. As a result of the Egyptian operation heavy fighting broke out between the commandos and the Cypriot national guards with considerable casualties

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[142] See Brownlie op. cit. *supra* n. 68, p. 300; Nanda, *14 Cal. W.I.L.J. 494 (1990)*, p. 497; Henkin, The Invasion of Panama Under International Law: A Gross Violation, *29 Col. J. Trans. L. 293 (1991)*, p. 306.

[143] See Brownlie loc. cit. in Butler (ed.) op. cit. *supra* n. 98, pp. 23-24.

[144] Keesing's 1986, p. 34326.

[145] See Brownlie supra n.142; Akehurst, 5 *Int. Rel. 3 (1977)*, p. 18; Paust, *85 Yale L.J. 774 (1976)*, pp. 801-802; Milenhoviç *supra* n. 129.

[145*] See Doc. E/C.12/1991/CRP. 1/Add. 3, 6 December 1991, p. 12, paras 42, 43. The Committee emphasised the contradiction between the report of the Panamanian Government referring to 3,000 persons affected by the bombing and " ... all other sources ... which placed the figure between 12,500 and 20,000 persons ..."

[145bis] See Brownlie op. cit. *supra* n. 68, p. 300.

[146] Keesing's 1978, p. 29305.

and resulting in the break-off of diplomatic relations between Cyprus and Egypt. It appears, however, that in the case of successful and proportionate rescue operations the intervening State is unlikely to be condemned as the aggressor at the United Nations - viz. the Israeli operation at Entebbe[147] .

There seems to be consensus only on one aspect of the use of force for the protection of nationals, namely, that it is admissible by the consent of the Government of the State on the territory of which the operation takes place[148] . State practice appears to support the above contingency.

With the exceptions of the rescue of the *Mayaguez* , the Iran operation and Panama, the practice of the United States has been to launch operations for the protection of U.S. nationals on the basis of the consent of the territorial sovereign - viz. the dispatch of U.S. troops to Lebanon (1958), the Dominican Republic (1965), the Congo (Stanleyville, 1964) and Grenada (1983).

The U.S. Secretary of State, Mr. J. Foster-Dulles stated on 20 May 1958 with regard to the civil unrest in Lebanon that:

> " ... 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 ..."[149]

The undertaking of action without the consent of the Government of the States concerned in the three instances referred to above seems to have occurred because of the manifest hostility of the Governments of Cambodia, Iran and Panama towards the U.S.A. and does not appear to constitute a change of policy.

It is significant that the Belgian Government attempted to justify the introduction of troops in the Congo in 1960 on the basis of the consent of both the regional government in Katanga and the central Government of the State[150] . Subsequent practice of Belgium shows a consistent preference for receiving prior consent of the territorial sovereign for action aiming at the protection of Belgian nationals - viz. dispatch of Belgian troops to Congo/Zaire in 1964 (Stanleyville), 1978 (Kolwezi) and 1991 (Kinshasha).

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147 *Supra* n. 115.
148 See Brownlie *supra* n. 142; see *supra Introduction* n. 27.
149 38 Dept. of State Bulletin, No 989, p. 947.
150 S.C.O.R. 15th yr. 873rd mtg paras 186-190.

The practice of France (Kolwezi, 1978 and Kinshasha, 1991), West Germany (Mogadishu 1977)[151] , Egypt (Malta 1985)[152] and Italy (Somalia 1991)[153] of sending troops for the protection of nationals is also based on the consent of the territorial sovereign.

It can be argued in conclusion that the existence of a right to resort to force unilaterally for the protection of nationals is subject to considerable doubt. With the possible exception of rescue operations at the request of the territorial sovereign, operation under the justification of such a right have been met with persistent opposition on the part of a large part of the international community. It is submitted, albeit *de lege ferenda* , that the Israeli operation at Entebbe and the U.S. rescue mission in Iran may serve as the basis for the admissibility of such a right as an exercise of proportionate counter-measures in the sense of the Nicaragua Case . This justification offers, in the opinion of this writer, the best basis for the undertaking of operations for the protection of nationals abroad because it keeps unilateral forcible action within the framework of admissible exceptions to the rule of non-use of force in customary law.

Second Title : THE DOCTRINE OF HUMANITARIAN INTERVENTION .

The use of military force under the justification of humanitarian intervention aims at the protection of nationals, not of the intervening State, but of the target State, that suffer human rights deprivations at the hands of their Government.

The concept is largely the offspring of jurists' minds rather than the practice of States. It appears to have been articulated towards the end of the 19th century on the basis of instances of intervention by European Powers in the Ottoman Empire during periods when atrocities were perpetrated against the Christian populations of the Empire[1] .

Support for the doctrine of humanitarian intervention is found in the writings of publicists of the period after the introduction of the United

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151 Keesing's 1978, pp. 28918-9.
152 Keesing's 1986, p. 34326.
153 Keesing's 1991, p. 37947.
1 See Rougier, Théorie de l' Intervention d' humanité, *17 R.G.D.I.P. 472 (1910)* ; Stowell, *Intervention in International Law, 1921*, pp. 51 et seq.

Nations Charter and this is mainly based on the considerable advances of contemporary international law in the field of human rights[2] .

It is submitted that the exercise of humanitarian intervention by way of unilateral resort to force does not constitute part of contemporary international law[3] for the following reasons.

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[2] See Oppenheim, *International Law, vol. i, 8th ed. by Lauterpacht, 1955*, pp. 312 et seq. ; Lauterpacht, *An International Bill of the Rights of Man, 1945*, p. 120; Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality, 1988* ; id. Le Peuple, C' Est Moi! The World Court and Human Rights, *81 A.J.I.L. 173 (1987)* ; Reisman, Humanitarian Intervention to Protect the Ibos, in Lillich (ed.) *Humanitarian Intervention and the United Nations, 1973*, pp. 167-195; Lillich, Forcible Self-Help by States to Protect Human Rights, *53 Iowa L.R. 325 (1967)* ; id. Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Moore (ed.) *Law and Civil War in the Modern World, 1974*, p. 229; Moore, The Control of External Intervention in Internal Conflict, *9 Va J.I.L. 209 (1969)* ; id. Grenada and the International Double Standard, *78 A.J.I.L. 145 (1984)*, p. 156; D' Amato, Nicaragua and International Law : The "Academic" and the "Real" , *79 A.J.I.L. 657 (1985)*, pp. 660-1; id. The Invasion of Panama was a Lawful Response to Tyranny, *84 A.J.I.L. 516 (1990)* ; Sornarajah, Internal Colonialism and Humanitarian Intervention, *11 Ga. J. Int. and Comp. L. 45 (1981)* ; Chilstrom, Humanitarian Intervention under Contemporary International Law, *1 Yale Studies in World Public Order 93 (1974)* ; Chaterjee, Some Legal Problems of Support Role in International Law: Tanzania and Uganda, *30 I.C.L.Q. 755 (1981)* ; Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its current Validity under the United Nations Charter, *4 Cal. W.I.L.J. 203 (1974)* . *Cf*. Verwey, Humanitarian Intervention under International Law, *32 N.I.L.R. 357 (1985)*, p. 418.

[3] In support, see Brownlie, *International Law and the Use of Force by States, 1963*, pp. 338-342; id. Thoughts on Kind-Hearted Gunmen, in Lillich (ed.), *Humanitarian Intervention and the United Nations, 1973*, p. 139 et seq. ; id. Humanitarian Intervention, in Moore (ed.), *Law and Civil War in the Modern World, 1974*, p. 217 et seq. ; id. The Principle of Non-Use of Force in Contemporary International Law, in Butler (ed.) *The Non-Use of Force in International Law, 1989*, pp. 25-26; Zourek, *L' Interdiction de l' Emploi de la Force en Droit International, 1974*, pp. 123-124; Akehurst, *5 Int. Rel. 3 (1977)*, pp. 10-16; id. Humanitarian Intervention in Bull (ed.) *Intervention in World Politics, 1984*, p. 99; Bowett, The Use of Force for the Protection of Nationals Abroad, in Cassese (ed.) *The Current Legal Regulation of the Use of Force, 1986*, pp. 49-51; id. The Interrelation of Theories of Intervention and Self-Defence, in Moore (ed.) op. cit. *supra*, pp. 44-46; Higgins, Intervention and International Law in Bull (ed.) op. cit. *supra* , p. 38; Farer, *142 H.R.C. 297 (1974 II)*, p. 393 et seq. ; id. Humanitarian Intervention. The View from Charlottesville, in Lillich (ed.) op. cit. *supra* , pp. 150-153; id., An Inquiry into the Legitimacy of Humanitarian Intervention, in Damrosch & Scheffer (eds.), *Law and Force in the New International Order, 1991*, pp. 188-198, but *cf*. pp. 198-9; V. Kartashkin, Human Rights and Humanitarian Intervention, in ibid., pp. 202-210; Meron, Commentary on Humanitarian Intervention, in ibid., pp. 212-214; Beyerlin, Humanitarian Intervention, *Encyclopaedia of Public International Law, vol. 3*, pp. 212-213; Doswald-Beck, *31 N.I.L.R. 355 (1984)*, pp. 364-365; Verwey, *32 N.I.L.R. 357 (1985)*, pp. 404-412, but *cf*. p. 412 et seq. ; Pogany, Humanitarian Intervention in International Law: The French Intervention in Syria Re-Examined, *35 I.C.L.Q. 182 (1986)* ; Jhabvala, Unilateral Humanitarian Intervention and International Law, *21 I.J.I.L. 208 (1981)*, p. 217 et seq. ; Thomas & Thomas, The Dominican Republic Crisis 1965, *The Ninth Hammarskjöld Forum, 1967*, pp. 20-22; Arangio-Ruiz, Human Rights and Non-Intervention in the Helsinki Final Act, *157 H.R.C. 207 (1977 IV)*, p. 303; Remarks by L. Henkin, Biafra, Bengal and Beyond: International Responsibility and Genocidal Conflict, *66 A.S.I.L. Proceedings 89 (1972)*, p. 96; Chimni, Towards a Third World Approach to Non-Intervention : Through the Labyrinth of the Western Doctrine, *20 I.J.I.L. 243 (1980)*, p. 259; Franck-Roddley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, *67*

(1) The prohibition of the unilateral resort to force by virtue of Article 2(4) of the Charter precludes resort to force on the grounds of humanity.

(2) The practice of States does not support the existence of a doctrine of humanitarian intervention.

(3) Even as a concept *de lege ferenda* military intervention on the grounds of humanity would be undesirable.

(1) *The Doctrine of Humanitarian Intervention is Inadmissible under Article 2(4) of the Charter .*

The text of the Charter contains no express exception justifying resort to force on grounds of humanity. Action in self-defence under Article 51 of the Charter cannot be invoked to justify humanitarian intervention for there is no necessity of self-defence on the part of the intervening State. The plausible argument for the admissibility of protection of nationals as exercise of the right of self-defence is impossible to be argued for the protection of the nationals of another State[4] . Indeed, in the present state of the international community that is largely composed of sovereign States, the general area of the law on the use of force is applicable exclusively between States. Hence, the right of self-defence is recognised as admissible for the protection of the entirety of a territorial, political populated community - the State[5] .

By contrast, the assertion of a right to forcibly protect the citizens of another State against their Government, is based on the concept of protection of human rights that is pertinent to individuals and appears to be irreconcilable with the State-based nature of the law on the use of force[6] .

The claimant of a right of use of force for the protection of human rights of the citizens of another State has the difficult task of surmounting the provision of Article 2(4) of the Charter. Two arguments have been

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A.J.I.L. 275 (1973) ; Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, 1985, pp. 108-109; Dinstein, *War, Aggression and Self-Defence, 1988*, pp. 88-89; Donelly, *37 J. Int. Affairs 311 (1984)*; Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1629. Also see *supra* Chapter 2.

[4] See Akehurst, loc. cit. *supra* n. 3, p. 15; Bowett, loc. cit. in Moore (ed.) op. cit. *supra* note 3, p. 44;

[5] Kahn, From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law, *12 Yale J.I.L. 1 (1987)*, p. 47.

[6] Ibid. p. 48.

formulated and tend to be invoked in concert. First, that humanitarian intervention is not force against the territorial integrity or political independence of the target State. Secondly, it is claimed that humanitarian intervention is a use of force that is consistent with the purposes of the United Nations, and more specifically the undertaking to respect human rights as a means of international cooperation and peaceful relations between States[7] .

The present writer has dealt with the first argument *supra* [7bis] . It is important, however, to remark that the the three instances of State practice that are referred to as illustrations of humanitarian intervention in the post-Charter era point to the opposite conclusion.

Thus, the Indian intervention in East Pakistan/Bangladesh (1971), the Viet- Namese intervention in Cambodia (1978) and the Tanzanian intervention in Uganda (1978-1979), resulted, all three of them, in the territorial inviolability of Pakistan, Cambodia and Uganda. In the case of Pakistan, the Indian action resulted in the secession of the Eastern province, namely, in the permanent territorial impairment of the country. In the cases of Cambodia and Uganda it resulted in the violent overthrow of the Governments of these countries. It is indeed interesting to know what constitutes force against the territorial integrity or political independence of a State if the above instances do not.

The second argument of consistency with the purposes of the United Nations is open to serious objection.

Does it imply that every purpose of the United Nations stated in Article 1 of the Charter can be pursued by unilateral resort to force? This involves questions of hierarchy of the purposes of the United Nations[8] or of equality of their standing. Whatever be the answer to the issue, it is immaterial. It is submitted that no purpose of the United Nations can be realised by resort to unilateral force[9] . An illustration of the above submission is the universal condemnation of the joint Anglo-French action in Suez that purported to restore international peace and security in the area by unilateral means.

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[7] See Articles 1(3), 55, 56 of the U.N. Charter.
[7bis] See supra p. 407, n. 19 bis.
[8] See Tesón op. cit. *supra* n. 2, pp. 132-134.
[9] Akehurst, *5 Int. Rel. 3 (1977)*, p. 16; Farer, *142 H.R.C. 297 (1974 II)*, p. 388.

This is probably the reason why certain jurists have taken the view of the supremacy of human rights over State sovereignty, in international law[10] .

The view that human rights constitute the *ultima ratio* of contemporary international law has nuances of natural law and the Grotian tradition, in that it regards the concept of the State as merely an artificial unit composed of individuals[11] . This conception of the international community is reflected in the argument put forward by Teson that the use of force in self-defence is in reality the use of force in defence of human rights[12] - a position which is totally untenable in view of the present composition of the international community, which mainly consists, regrettably or not, of sovereign States.

What is frequently disregarded is that the desirable advance of international law in the field of human rights , as well as the implementation of the protection of the latter, is the object of treaty obligations that have been voluntarily incurred by sovereign States towards other States. In other words, the duty under international law of a State to safeguard, respect, and protect the human rights of its citizens within its territory, is a duty owed to the other States Parties to the treaty. Insofar as respect for certain basic human rights is an obligation under customary law, according to the Judgment of the Court in the *Barcelona Traction Case* this duty is owed to the entire international community with regard to certain human rights[13] .

A breach of this obligation would entitle the States to which the obligation is owed to take measures to meet the breach *in accordance* with international law in force, which prohibits in explicit terms the unilateral resort to force. It is submitted that an *a priori* admissibility of humanitarian intervention is nothing more than an attempt to implement an obligation under treaty or customary international law by means constituting a violation of the duty of peaceful settlement of disputes. Furthermore, it is a fact of international relations that many

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[10] See D' Amato loc. citi *supra* n. 2; Chilstrom loc. cit. *supra* n. 2, p. 99; Bazyler, *23 Stanford J.I.L. 547 (1987)*, pp. 570-571. Tesón goes further and in effect advocates the total abolition of State sovereignty in international law; op. cit. *supra* n. 2, Part I, and Part II p. 146 et seq. ; *cf*. D' Amato, *84 A.J.I.L. 516 (1990)*, p. 516 n. 2.

[11] For an analysis and critique of this view see Kahn loc. cit. *supra* n. 5, p. 48 et seq.

[12] Op. cit. *supra* n. 2, pp. 113-4.

[13] I.C.J. Rep. 1970, paras 33-34.

States are reluctant to undertake obligations under human rights treaties[14], and in many cases it is themselves that are the perpetrators of violations of human rights. How is it then plausible to argue that States which tend not to become internationally bound to respect human rights within their territories, would be given the right to defend other peoples' rights in another State?[15]

Far from being a destruction of State sovereignty the duty to respect human rights is a self-imposed limitation on that sovereignty; it is " ... a qualitative step forward in the content of international law not a qualitative step in the structure of international law ..."[16].

It is not surprising, therefore, that certain proponents of humanitarian intervention, whose views fall short of advocating the demise of State sovereignty, have resorted to the arbitrary and highly subjective assertion that certain regimes are by definition violators of human rights and hence constitute a threat to the "world order"[17]. These regimes are never Western-style democracies, and the argument appears to have been aimed at either socialist States, in their entirety, or conservative authoritarian Governments, very selectively. It is the latter case where the argument in support of humanitarian intervention, based on the very sensitive concern about the protection of human rights and their supremacy in contemporary international law, encounters some very embarrassing realities of international relations.

As the Court in the *Nicaragua Case* understood, the Government of the U.S.A. has sought to justify its assistance to the *contra* opposition on claims of violations of human rights by the Sandinista Government of Nicaragua[18]. It is ironic that assistance was rendered to a guerrilla movement which as a political organisation had very little to do, if anything at all, with respect of human rights[19].

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[14] It took the U.S.A. forty years to ratify the Genocide Convention of 1948. Furthermore, the U.S.A. has yet to ratify the U.N. Covenants on Civil, Political, and Economic, Social and Cultural Rights.

[15] Brownlie, loc. cit. in Lillich (ed.) op. cit. *supra* n. 3, p. 141.

[16] Arangio-Ruiz, *157 H.R.C. 207 (1977 IV)*, pp. 289-294.

[17] See Moore, The Secret War in Central America and the Future of World Order, *80 A.J.I.L. 43 (1986)*, pp. 45-46, 117-125; D' Amato loc. citi *supra* n.2; see criticism of this view in Kahn loc. cit. *supra* n. 5, p. 52 et seq.

[18] I.C.J. Rep. 1986, p. 14, at p. 134, para 267. *Cf*. Kahn loc. cit. *supra* n. 5, pp. 46-48.

[19] See Farer, Drawing the Right Line, *81 A.J.I.L. 112 (1987)*, p. 116. Even proponents of humanitarian intervention have expressed doubt with regard to the likelihood that the *contras* would respect human rights. See D' Amato, *79 A.J.I.L. 657 (1985)*, p. 661; Teson op. cit. *supra* n. 2, p. 240 et seq.

The effrontery to everything that the human rights law stands for that has been presented by South Africa, has been met with sanctions very reluctantly on the part of the very States that consider themselves the bearers of the torch of human dignity.

The large-scale killings of communist supporters in Indonesia in 1965[20], and the systematic killing of an estimated 100,000 members of the Hutu tribe by the ruling minority of the Tutsi tribe in Burundi in 1972[21], were met with financial assistance in the case of the former, and outright support of the latter by the O.A.U.[22].

General Noriega, the ruler of Panama, who was deposed as a result of the U.S. operation of 20 December 1989, had only recently fell foul of the U.S. Government the patronage of which he had enjoyed for considerable time.

Finally, the systematic violations of human rights in Iraq were ignored by Western States prior to the invasion of Kuwait. In the aftermath of the use of chemical weapons against Kurdish civilians in northern Iraq in March 1988, the Government of the U.K. extended new trade credits to Iraq, while the Government of the U.S. declined to co-sponsor a resolution of the U.N. Commission oh Human Rights condemning Iraq[23]. It was not until the aggression against Kuwait that Western Governments started to castigate the tyrannical nature of the Iraqi Government.

The above instances in the practice of States reveal what Farer has candidly stated with regard to the Hutu killings in Burundi:

> " ... When the community of nations is unwilling to intervene to end selective genocide in a country as vulnerable as Burundi, it is sending us a message. And that message is that in order to find human rights in the hierarchy of elite values we must keep our eyes on the ground ..."[24]

(2) *State Practice does not Support the Existence of the Doctrine of Humanitarian Intervention .*

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[20] Keesing's 1965-1966, pp. 21039, 21222. It is believed that around 150,000-300,000 people were killed.

[21] Keesing's 1971-1972, pp. 25323-4; Keesing's 1973, pp. 26059-26060.

[22] Farer, *142 H.R.C. 297 (1974 II)*, pp. 398-402; Brownlie loc. cit. in Lillich (ed.) op. cit. *supra* n. 3, p. 147.

[23] See J. Gittings (ed.), *Beyond The Gulf War. The Middle East and the New World Order, 1991*, Introduction, p. 8.

[24] Farer, *142 H.R.C. 297 (1974 II)*, p. 402; also see, Jhabvala, *21 I.J.I.L. 208 (1981)*, p. 219 et seq. ; Doswald-Beck, *31 N.I.L.R. 355 (1984)*, p. 365.

The doctrine of humanitarian intervention that was formulated by jurists on the basis of State practice in the 19th century seems to have been based on a wide variety of factual bases and it, therefore, appears to lack definitional precision within accurately delineated limits[25] .

Thus, Stowell cites no less than seven grounds for resort to humanitarian intervention: (1) Persecution, (2) oppression, (3) suppression of the slave trade, (4) uncivilised warfare, (5) injustice, (6) humanitarian asylum, and (7) foreign commerce[26] . In any case the state of the law prior to the Covenant of the League of Nations and the Pact of Paris that did not contain a general prohibition of resort to force, renders discussion as to the existence of an exception of humanitarian intervention somewhat immaterial.

During the period 1920-1945 there has been a remarkable paucity of practice with only one instance of humanitarian intervention in the Proclamation of a Protectorate over Bohemia and Moravia made by Nazi Germany on 15 March 1939. In it, A. Hitler, the German Chancellor, referred to "assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities"[27] .

Practice in the aftermath of the introduction of the Charter of the United Nations is also very limited [28] .

Moreover, what appears to be important with regard to this practice is that in the three cases of the Indian action in East Pakistan, the Viet- Namese action in Cambodia and the Tanzanian action in Uganda, which have the external marks of humanitarian intervention, there is total lack of *opinio juris* in respect of a customary law right of humanitarian intervention. Instead, in all three cases the right of self-defence was invoked.

The military intervention by India in East Pakistan (present Bangladesh) in December 1971 took place in the course of a secessionist revolt that was being brutally suppressed by the Pakistani armed forces.

During the debate at the Security Council the Indian Government made a brief reference to considerations of humanity as basis of her action

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[25] See Brownlie op. cit. *supra* n. 3, p. 338; id. loc. cit. in Lillich (ed.) op. cit. *supra* n. 3, p. 139-140. Cf . Verwey, *32 N.I.L.R. 357 (1985)*, p. 367 et seq.

[26] Stowell op. cit. *supra* n. 1, pp. 51-257.

[27] Quoted in Brownlie op. cit. *supra* n. 3, p. 340 n. 9.

[28] See references *supra* n. 3.

in East Pakistan. Mr. Sen, the representative of India in the Council, stated that:

> " ... We are glad that we have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering ..."[29]

However, this justification was far from being the central Indian argument for action in East Pakistan, which recurred repeatedly during the debate, that:

> " ... Provocation and aggression of various kinds by Pakistan from 25 March onwards is a reality. As a result, retaliation had followed in exercise of the right of self-defence, and we have warned that we shall exercise this right without hesitation ..."[30]

Representatives of third States made no reference to the Indian argument of using force in order to rescue the Benghali population; on the contrary the majority of the Members of the Council urged India to cease hostilities and withdraw from East Pakistan[31] .

The Viet- Namese action in Cambodia on 25 December 1978 had as a result the overthrow of the *Khmer Rouge* Government that had perpetrated horrific atrocities against the Cambodian population from 1975-1978, and its replacement by a new Government composed of Members of a "Cambodian National United Front" that appears to have been formed under the patronage of the Viet- Namese Government[31] .

At the same time relations between Cambodia and Viet- Nam had been severely strained because of repeated border incidents perpetuated by the Cambodian armed forces since 1975[32] .

During the debate at the Security Council the Viet- Namese representative stated the following:

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[29] S.C.O.R. 26th yr. 1606th mtg. para 185; also see 1608th mtg. para 262; cf. 1606th mtg. para 267 (U.S.S.R.).

[30] Ibid. 1608th mtg. para 272. The provocations referred to were according to the Indian Government the bombing of Indian airfields, troop positions and border towns by the Pakistan armed forces. See ibid. 1606th mtg. paras 154, 163, 175.

[31] See Ibid. 1606th mtg. paras 193-194 (U.S.A.)[The U.S. representative treated the Indian action as armed intervention contrary to the U.N. Charter], 237 (China)[The Chinese representative stated that "...the Government of India using the question of East Pakistan as a pretext, has committed an act of aggression against Pakistan ..."], 201-213 (Italy), 215-219 (Somalia), 220-227 (France), 228-234 (Japan), 279-292 (Belgium), 293-299 (Burundi), 311-321 (Argentina), 325-330 (U.K.); 1608th mtg. paras 225-226 (Saudi Arabia).

[31] Keesing's 1979, p. 29613 et seq.

[32] Keesing's 1978, pp. 29269-29272; id. supra n. 31.

" ... In order to draw a clear picture of the problem of Kampuchea, it is appropriate to make a clear distinction between two wars: one, the border war ... against Viet- Nam, which the Viet- Namese people have been forced to deal with; the other, the revolutionary war of the Kampuchean people against the dictatorial rule of the Pol Pot - Ieng Sary clique .....

.....

..... Like any other country in a similar situation, Viet- Nam is determined to exercise its right of legitimate defence recognizes by the Charter of the United Nations and by International law in order to defend its independence, sovereignty and territorial integrity ..."[33]

After distinguishing the action of his country from that of the Cambodian people the representative of Viet- Nam referred to the reasons that prompted the alleged uprising one of which was that " ... the regime was abhored and detested by the entire people of Kampuchea ..."[34] .

It is significant that, with the exception of the U.S.S.R. and Czechoslovakia, the other Members of the Council considered the Viet-Namese action as unlawful intervention and some representatives expressly argued against the use of force for the protection of human rights.

Mr. Algard, the representative of Norway, stated that:

" ... The Norwegian Government and public opinion in Norway have expressed strong objections to the serious violations of human rights committed by the Pol Pot Government. However, the domestic policies of that Government cannot - we repeat cannot - justify the actions of Viet- Nam over the last days and weeks. The Norwegian Government firmly rejects the threat or use of force against the territorial integrity and political independence of any State and wishes to emphasize the obligation of Member States under the Charter to resolve disputes by peaceful means ..."[35]

Mr. Leprette of France argued that:

" ... The notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgment of their neighbours ..."[36]

Furthermore, the representative of Singapore stated that:

" ... No other country has a right to topple the Government of Democratic Kampuchea, however badly that Government may have treated its people. To hold to the contrary principle is to concede the right of a foreign Government to intervene and overthrow the Government of another country ..."[37]

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[33] S.C.O.R. 34th yr. 2108th mtg. paras 115, 126.
[34] Ibid. para 136; also see paras 148-155 (U.S.S.R.).
[35] S.C.O.R. 34th yr. 2109th mtg. para 18
[36] Ibid. para 36.
[37] Id. 2110th mtg. para 49; also see paras 27, 29 (Portugal), 58 (N. Zealand).

Finally, the representative of the U.K. took the view that:

" ... Whatever is said about human rights in Kampuchea, it cannot excuse Viet-Nam, whose human rights record is deplorable, for violating the territorial integrity of Democratic Kampuchea, an Independent State Member of the United Nations ..."[38]

The use of armed force by Tanzania against Uganda in 1978-1979 has similarities with the Viet- Namese action in Cambodia. The two countries had a territorial dispute over the Kagera salient[39] . On 31 October 1978 the Ugandan Army invaded and occupied the salient and on 1 November President Amin proclaimed its annexation to Uganda[40] . On 15 November 1978 the Tanzanian Army entered the Kagera salient, expelled the Ugandan occupation forces and subsequently invaded the territory of Uganda[41] . The Tanzanian troops were joined by a force of dissident exiles already operating inside Uganda against the Government of President Amin and on 11 April 1979 captured the capital Kampala and overthrew the Ugandan Government[42] . On 23 February 1979 President Nyerere of Tanzania stated that " ... It is not my responsibility to overthrow Amin. That is the responsibility of the Ugandans. It was my task to chase him from Tanzanian soil. I have done so ..."[43]

The action by Tanzania was met with virtually no opposition at all, presumably because of the general international antipathy towards the tyrannical regime of President Amin. However, on 17 July 1979 during the 16th annual summit of the O.A.U. in the Liberian capital Monrovia, President Nemery of Sudan, the current Chairman of the O.A.U. , criticised Tanzania for interfering in the internal affairs of Uganda in violation of O.A.U. principles[44] . Moreover, President Obasanjo of Nigeria stated on 19 July 1979 that the Tanzanian action constituted a dangerous precedent for Africa and argued that a distinction should be drawn between the overthrow of a tyrant from within the country and an attack from outside[45] .

The statement by President Nyerere of 23 February 1979 clearly indicates an argument similar to that raised by the Viet- Namese

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38 Ibid. para 65; also see paras 72-74, 76, 79 (U.S.A.).
39 See Brownlie, *African Boundaries, 1979,* pp. 1014-1015.
40 Keesing's 1979, p. 29669.
41 Id. p. 29670.
42 Id. pp. 29671-2.
43 Id. p. 29671.
44 Id. pp. 29840-1.
45 Id. p. 29841.

Government at the Security Council; namely, that there had been "two wars" in Uganda: one was in self-defence on the part of Tanzania and the other was an internal revolt by the Ugandan people against the Government of President Amin.

Finally, the U.S. Government claimed that it deliberately refrained from invoking " ... a broad doctrine of humanitarian intervention ..." in justification of its action in Grenada[46] .

The doctrine of humanitarian intervention is also repudiated by the jurisprudence of the International Court. In so far as the doctrine connotes a species similar to an *actio popularis* in international law, whereby every State has a legal standing against another State with regard to the latter's practice in the field of human rights, the judgment of the Court in the *South-West Africa Cases (Second Phase)* militates against any such general rule[47] .

Moreover, the protection of human rights by way of unilateral resort to force has been dealt with by the Court in the *Nicaragua Case* in relation to the U.S. argument that the policies of the *Sandinista* Government in Nicaragua amounted to violating human rights therein. The Court ruled that, " ... where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring respect for human rights as one provided for in the conventions themselves ..."[48] . The Court then went on to find that Nicaragua had indeed made political pledges to the O.A.S. concerning respect for human rights and by ratifying the Inter-American Convention on Human Rights; therefore, the Court concluded, that by submitting herself to the procedures of those mechanisms for respect for human rights , the O.A.S. was in a position to assess the Nicaraguan policies on human rights[49] .

The Court, then, ruled:

> ... In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually

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[46] Letter from Mr. Robinson to Prof. Gordon, *18 Int. Lawyer 381 (1984)*, p. 386.
[47] I.C.J. Rep. 1966, p. 6. The Court dismissed the case brought before it by Ethiopia and Liberia against South Africa [with regard to the violations by the latter of its obligations under the League of Nations Mandate over S.W. Africa] on the grounds that neither of the plaintiffs had a legal interest with regard to the claim. See Brownlie, loc. cit. in Lillich (ed.) op. cit. *supra* n. 3, p. 147.
[48] I.C.J. Rep. 1986, p. 14, at p. 134, para 267.
[49] Ibid.

taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again, with the training, arming and equipping of the *contras* . The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any way be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence ...[50]

The Judgment of the Court indicates that while respect and protection of human rights under a treaty or not constitute an obligation the breach of which cannot be pursued with impunity[51] the meeting of the violation is to be effected either by making use of the monitoring procedure provided for by the treaty, or, in the absence of a treaty, by means that do not involve the use of force[52] . It is submitted that such means would include unilateral or collective economic or diplomatic measures against the recalcitrant State, but *never* the use of armed force.

(3) *The Undesirability of Humanitarian Intervention De Lege Ferenda* .

The reference in the Judgment of the Court in the *Nicaragua Case* to the incompatibility of the United States conduct in Nicaragua with any notion of humanitarianism, points at the great likelihood of abuse of the doctrine should it be admissible in international law[53] . The risk of abuse appears to stem from the generality and vagueness of definitions of humanitarian intervention.

Lauterpacht defines humanitarian intervention as the resort to forcible self-help " ... in cases where a State maltreats its subjects in a manner which shocks the conscience of mankind ..."[54] .

Tesòn[55] has suggested that humanitarian intervention constitutes the " ... proportionate transboundary help, including forcible help, provided by a Government to individuals in another State who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive Government ...".

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[50] Ibid. pp. 134-135, para 268. Also see Kahn loc. cit. supra n. 5, pp. 46-48.
[51] Ibid. p. 134, para 267.
[52] *Cf*. Tesón op. cit. *supra* n. 2, pp. 203-4, 240-1.
[53] See *supra* references in n. 3.
[54] Lauterpacht, *International Law and Human Rights, 1950*, p. 32; Oppenheim op. cit. *supra* n. 2, p. 312.
[55] Op. cit. *supra* n. 2, p. 5.

Other jurists refer to "inhumane treatment"[56] , "protection of minorities"[57] , "protection of human rights" with emphasis on the right to life[58] , " compliance with a minimum international standard of human rights"[59] , " functional enforcement of international human rights in certain extreme situations"[60] , as bases for the exercise of humanitarian intervention. The lack of precision with regard to situations for this kind of intervention is extremely likely to lead to an easy fabrication of humanitarian grounds on the basis of which armed force could be resorted to[61] . Moreover, the problem of abuse is exacerbated by the wide spectrum of human rights the protection of which is not universally agreed - viz. the distrust of "free market" polities to the protection of social, economic and cultural rights and the corresponding opposition of socialist States to the protection of civil and political rights. The admissibility of humanitarian intervention may lead to a host of interventions according to every State's political orientation.

Finally, geopolitical and economic interests of States have played a major role in resorting to force in humanitarian intervention. This is illustrated by the fact that the series of interventions by European States in the Ottoman Empire in the 19th century were inextricably linked with the special status of certain ethnic minorities [that had been conceded by the Ottoman Government in peace treaties and by way of *capitulations* agreements] which served the economic interests of the European powers[62] . But the "self-interest" factor is more blatantly manifested by the cases where humanitarian intervention was *not* resorted to[63] .

Proponents of humanitarian intervention have proposed *de lege ferenda* a series of guide-lines that aspire to formulating a framework of lawful humanitarian intervention. Lillich has suggested the following criteria for forcible unilateral humanitarian intervention:

(1) Immediacy of violation of human rights.
(2) Extent of violation of human rights.
(3) Invitation to use forcible self-help by the *de jure* Government of a State.
(4) Degree of coercive measures employed.

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56 Bazyler, *23 Stanford J.I.L. 547 (1987)*, p. 548.
57 Sornarajah, *11 Ga. J. Int. & Comp. L. 45 (1981)* .
58 Moore, *9 Va J.I.L. 209 (1969)*, p. 264.
59 Chilstrom, *1 Yale Studies in World Public Order 93 (1974)*, p. 95
60 Fonteyne, *4 Cal. W.I.L.J. 203 (1974)*, p. 258.
61 See Remarks by Henkin *supra* n. 3.
62 See Pogany loc. cit. *supra* n. 3.
63 See Farer, *142 H.R.C. 297 (1974 II)*, pp. 400-2.

(5) Relative disinterestedness of the intervening State.[64]

The objection to the above formula is that it is simply unworkable in practice.

Criterion (3) begs the question in cases of different States recognising different Governments in the target State[65] . Moreover, even if problems of recognition do not arise it is ludicrous to believe that the very Government that violates the human rights of its citizens would invite an armed intervention against it.

Criterion (4) points at the principle of proportionality which is totally unworkable. While proportionality in the case of protection of nationals could be plausibly argued in the sense of evacuating the endangered nationals out of the territorial State, it is impossible to "transport" the entire population of the State in cases of gross violations of human rights[66] . The only tangible solution towards eliminating human rights abuse would be the elimination of the source of the violation, namely, the Government of the target State, by overthrowing it or by separating the territory where the oppressed individuals live from the rest of the State[67] . Furthermore, protection of the human rights of the victims of an oppressive Government may require a complete change of the administrative and political structure of of the target State and this may involve a long-term military presence of the intervening State - viz. the military occupation of Germany after the end of the Second World War. The possibility of armed resistance by the recalcitrant Government and its allies[68] may escalate into a disastrous armed conflict and may lead to much greater loss of life than the one aspired to be protected[69] .

Finally, criterion (5) is contradicted by historical fact. Far from being altruistic, States that have resorted to what appears to be humanitarian intervention have manifested a large degree of expediency and self-interest[70] .

The protection of human rights holds a prominent position in international law. It is submitted that this can be effected by strengthening

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[64] Lillich loc. citi *supra* n. 2; Tesón op. cit. *supra* n. 2, pp. 111-123; Reisman loc. cit. *supra* n. 2; Verwey loc. cit. *supra* n. 2.

[65] *Cf*. Thomas & Thomas loc. cit. *supra* n. 3, p. 22.

[66] Farer, loc. cit. in Lillich (ed.) op. cit. *supra* n. 3, p. 153.

[67] See Brownlie loc. cit. in Lillich (ed.) op. cit. *supra* n. 3, p. 146; Jhabvala loc. cit. *supra* n. 3, p. 217.

[68] The Ugandan Government was assisted by Libyan troops against the Tanzanian Army.

[69] Brownlie, loc. cit. in Moore (ed.) op. cit. *supra* n. 3, p. 224.

[70] See Brownlie, *supra* n. 69, pp. 224-5; Franck & Roddley, *67 A.J.I.L. 275 (1973)*, pp. 302-4.

the machinery of protection provided for in human rights treaties, by resorting to the United Nations collective security procedures or by unilateral counter-measures short of the use of armed force.

The unilateral resort to force as an alternative is destructive of international peace and security, inheres the danger of great loss of life and links the protection of human rights, as State practice reveals, to very suspect motives of individual States.

CHAPTER 12

THE USE OF ARMED FORCE ON THE BASIS OF STATE CONSENT

Introduction

In this section the present author will deal with the event of use of armed force by a State on the territory of another State by virtue of the latter's consent[1] .

The practice of States acknowledges two situations where such use of force may take place:

(1) The dispatch of military forces on the territory of a State at the invitation of the legitimate Government of that State in order to assist it to suppress internal armed opposition against its authority.

(2) The introduction of troops in the territory of a State under the provision of a treaty whereby the intervening State is given by the territorial sovereign of a State a general right to resort to force on its territory.

The sending of armed forces into the territory of another State on the basis of its consent has been treated as an act that is *prima facie* compatible with the rules of non-intervention and non-use of force. Thus, it is considered on the basis of the principle *volenti non fit injuria* that the consent of the territorial sovereign deprives the dispatch of foreign troops of the character of "dictatorial interference" that signifies technically an unlawful intervention[2] .

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[1] It is generally accepted that the armed forces of a State may enter and be stationed on the territory of another State on the basis of its consent - viz. the various U.S. military bases in other countries. Indeed, Article 3 (e) of the 1974 Definition of Aggression appears to recognise this contingency in a negative fashion . See G.A. Res. 3314 (XXIX) , G.A.O.R. 29th session, Suppl. No 31, p. 142.
See *supra* Part Two , Ch. 9, *First Title* ; G.A. Res. 36/103 of 9 December 1981; Doswald - Beck, The Legal Validity of Military Intervention by Invitation of the Government, *56 B.Y.I.L. 189 (1985)*, p. 189.

[2] See Oppenheim, *International Law, vol. i, 8th ed. by Lauterpacht, 1955*, p. 305; Garner, Questions of International Law in the Spanish Civil War, *31 A.J.I.L. 66 (1937)*, p. 68; Fitzmaurice, The General Principles of International Law, *92 H.R.C. 5 (1957 II)*, pp. 177-8; E. Lauterpacht, The Contemporary Practice of the United Kingdom in the Field of International Law; Intervention by Invitation, *7 I.C.L.Q. 102 (1958)*, p. 103; Fawcett, Intervention in International Law, *103 H.R.C. 347 (1961 II)*, pp. 366-7; Comment by O'Connell, Le Principe de non-intervention dans les guerres civiles (Huitième Commission), *56 Ann. I.D.I. 119 (1975)*, p. 139; R. Ago (Special Rapporteur), Eighth Report on State

Moreover, this Chapter shall focus on issues arising out of the actual dispatch of military forces on to the territory of another State, as opposed to "assistance" in general to the Government of that State. This latter contingency covers a broad spectrum of aid rendered to the Government of a State by third States which includes, apart from the actual sending of troops, the supply of economic aid, military equipment, logistical support, intelligence information, training for the armed forces and administration of the State. There is no doubt that this type of assistance constitutes a very common phenomenon of international relations. In relation to the specific context of civil strife within the recipient State, authority appears to be generally in agreement with regard to the lawfulness of such assistance to the Government of the State[3] .

First Title . THE USE OF ARMED FORCE AT THE INVITATION OF THE LEGITIMATE GOVERNMENT OF THE STATE .

The situations contemplated under the above rubric concern the request by the Government of a State for military assistance on the part of third States in order to help it put down an uprising against its authority. The setting for this kind of action is a situation of civil strife within the territory of the requesting State.

The practice of States in the period prior to the League of Nations supports the admissibility of such action[4] . In 1826 British troops were sent to Portugal at the request of the Portuguese Government to assist in preventing a successful rebellion by Don Miguel and in 1849 Russian troops assisted the suppression of a rebellion in Hungary at the request of

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Responsibility, Doc. A/CN.4/318 and Add. 1-4, I.L.C. Ybk. 1979, Vol. II, Part One, pp. 30-31, 32, paras 56-57, 60; Report of the I.L.C. , Doc. A/34/10, I.L.C. Ybk. 1979, Vol. II, Part Two, pp. 110-112, paras 5, 10-11; Brownlie, The United Nations Charter and the Use of Force, 1945-1985, in Cassese (ed.), *The Current Legal Regulation of the Use of Force, 1986*, p. 491 at p. 501; Joyner, *78 A.J.I.L. 131 (1984)*, p. 138; Letter from Mr. Robinson to Prof. Gordon , *18 Int. Lawyer 381 (1984)*, p. 382; Quigley, *18 Miami Inter-Amer. L.R. 271 (1986)*, p. 345; Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, 1985*, p. 77.

[3] Farer, Intervention in Civil Wars: A Modest Proposal, *67 Col. L.R. 266 (1967)*, pp. 274-6; Moore, Legal Standards for Intervention in Internal Conflicts, *13 Ga. J. Int'l & Comp. L. 191 (1983)*, p. 196; Doswald-Beck, *56 B.Y.I.L. 189 (1985)*, p. 244; Akehurst, *A Modern Introduction to International Law, 6th ed. 1987*, pp. 287-8; D.L. Khairallah, *Insurrection under International Law, 1973*, pp. 269-270. *Cf* . Bowett, The Interrelation of Theories of Intervention and Self-Defence, in Moore (ed.), *Law and Civil War in the Modern World, 1974*, p. 38 at pp. 42-3. See *infra* n. 64.

[4] See Brownlie, *International Law and the Use of Force by States, 1963*, p. 321.

the Austrian Government . Moreover, the Treaty of the Holy Alliance contemplated intervention as a means of preserving the monarchic *status quo* in Europe and, indeed, this was materialized in the suppression of a rebellion in the Kingdom of the Two Sicilies in the 1820s.

Writings of Publicists .

Works of authority reveal three theories pertinent to the issue.

(1) That foreign military assistance is admissible on the side of the Government but not on the side of the rebels.

(2) That foreign military assistance is inadmissible on either side in the civil strife.

(3) That foreign military assistance is admissible on both sides.

(1) Military aid to the Government but *not* to the rebels .

What is perceived to be the position under classical international law is stated in Garner[5] :

> " ... There is no rule of international law which forbids the government of one State from rendering assistance to the established government of another State with a view of enabling it to suppress an insurrection against its authority. Whether it shall render such aid is entirely a matter of policy or expediency and raises no question of right or duty under international law. If assistance is rendered to the legitimate government it is not a case of unlawful intervention as is the giving of assistance to rebels who are arrayed against its authority ..."[6]

The practice of States appears to support the above view. The operation which was undertaken in Stanleyville, the Congo, by Belgian and U.S. forces in November 1964 was aimed according to both intervening States at rescuing Belgian, American and other European nationals whose lives were in mortal danger. The operation was launched under the consent of the central Congolese Government which was faced at that time with a large-scale insurgency against its authority. In fact the

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[5] Garner, *31 A.J.I.L. 66 (1937)*, p. 68.

[6] Also see, Whiteman , *Digest of International Law, vol. 12*, p. 235; Fawcett, loc. cit. *supra* n.2; Farer, Drawing the Right Line, *81 A.J.I.L. 112 (1987)*, p. 114 but *cf* . id. *67 Col. L.R. 266 (1967)*, p. 271 et seq. ; Joyner, loc. cit. *supra* n. *2; 56 Ann. I.D.I. 119 (1975)*, p. 139 (O'Connell); Castrén, *Civil War, 1966*, pp. 20-21 but *cf* . id. in *56 Ann. I.D.I. 119 (1975)*, pp. 134-135; Quigley, loc. cit. *supra* n.2, p. 345; Dinstein, *War, Aggression and Self-Defence, 1988*, p. 10; Schwarzenberger, *International Law as Applied by International Courts and Tribunals, vol. ii, 1968*, p. 675; Fitzmaurice, loc. cit. *supra* n. 2, p. 178;Brownlie, loc. cit. in Cassese (ed.) op. cit. *supra* n. 2 and *cf* . id. op. cit. *supra* n. 4, pp. 326-7; Ronzitti op. cit. *supra* n. 2; Ago (Special Rapporteur) loc. cit. *supra* n. 2, pp. 30-32, 34-35, paras 56-57, 59-60, 66, 68; Report of the I.L.C. loc. cit. *supra* n.2.

European and American nationals' lives were threatened by rebel forces whose headquarters were in Stanleyville. The joint U.S.-Belgian action was censured as unlawful intervention by a number of delegations at the Security Council. In reply to the charge of illegality the Belgian representative stated:

> " ... There is no interference in the domestic affairs of a country when the lawful Government of that country is given the assistance for which it asks.
>
> There is interference in the domestic affairs of a country when support is given to rebellion or revolution against the lawful Government ..."[7]

In a letter from Mr. Robinson of the U.S. State Dept. to Prof. Gordon, the U.S. action in Grenada in 1983 which was justified partly on the basis of request of the lawful Government of Grenada, it was stated that:

> " ... The request of lawful authority is a well established basis for providing military assistance whether the requesting State is seeking assistance in the exercise of its inherent right of self-defence recognized in Article 51 of the United Nations Charter, or for other lawful purposes, such maintenance of internal order ..."[8]

Finally, the Court ruled in the *Nicaragua Case* that:

> " ... Having concluded that the activities of the United States in relation to the activities of the *contras* in Nicaragua constitute prima facie acts of intervention, the Court must next consider whether they may nevertheless be justified on some legal ground. As the Court has stated, the principle of non-intervention derives from customary law. It would certainly loose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State - supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of the opposition. Such a situation does not in the Court's view correspond to the present state of international law ..."[9]

(2) <u>Inadmissibility of Military Assistance to either side</u> .

The second theory advocates complete abstention from assisting either side in a civil war and is supported by eminent authority. In Hall the following passage occurs:

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[7] S.C.O.R. 19th yr. 1173rd mtg. para 73; also see 1176th mtg. para 13 (Nigeria).

[8] *18 Int. Lawyer 381 (1984)*, p. 382; M. Nash Leich, Contemporary Practice of the United States Relating to International Law, *78 A.J.I.L. 200 (1984)*, p. 203.

[9] I.C.J. Rep. 1986, p. 14 at p. 126, para 246. See also id. p. 109, para 209; S.C. Res. 387 (1976) of 31 March 1976, 4th preambular paragraph; Akehurst, Nicaragua v. United States of America, *27 I.J.I.L. 357 (1987)*, p. 374. *Cf. 57 B.Y.I.L. 614 (1986)*, p. 616.

" ... Supposing [the intervention] ... to be directed against the rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is doubt as to which side would ultimately establish itself as the legal representative of the State. If, again, intervention is based upon an opinion as to the merits of the question at issue, the intervening State takes upon itself to pass judgment in a matter which, having nothing to do with the relations of States, must be regarded as being for legal purposes, beyond the range of its vision ..."[10]

This view appears to be supported by the text of G.A. Res. 2131 (XX) of 1965 and G.A. Res. 2625 (XXV) of 1970, both of which stipulate that:

" ... no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State ..."[11]

Furthermore, the practice of States contains instances of either opposition to military action by a State at the request of the beleaguered Government, or of abstention from rendering assistance to a beleaguered Government.

Thus, during the debate at the Security Council on the situation in Hungary (1956) the majority of representatives of the Members of the Council treated the Soviet action as unlawful intervention in the internal affairs of Hungary that resulted in the violation of the right of self-determination of the Hungarian people[12] .

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[10] Hall, *A Treatise on International Law, 8th ed. by P. Higgins, 1924*, p. 347. Also see, Lawrence, *Principles of International Law, 7th ed. 1930*, 131-2; Stowell, *Intervention in International Law, 1921*, pp. 329-345; Hyde, *International Law, vol. i, 2nd ed. 1945*, 253; Bowett loc. cit. in Moore (ed.) op. cit. *supra* n. 3, p. 41 et seq. ; Higgins, Internal War and International Law, in Black & Falk (eds.) *The Future of the International Legal Order, vol. 3, 1971*, Ch. 3, pp. 97, 103; Q. Wright, United States Intervention in the Lebanon, *53 A.J.I.L. 112 (1959)*, pp. 120-3; Vagts, *78 A.J.I.L. 169 (1984)*, p. 171; Friedman, Intervention and the Developing Countries, *10 Va J.I.L. 205 (1970)*, pp. 210-3; Moore, The Control of Foreign Intervention in Internal Conflict, *9 Va J.I.L. 209 (1969)*, p. 272 et seq. ; id. *13 Ga J. Int'l & Comp. L. 191 (1983)*, p. 196; Schachter, The Right of States to Use Armed Force, *82 Mich. L.R. 1620 (1984)*, p. 1642; *56 Ann. I.D.I. 119 (1975)* , comments at pp. 148-151 (Zourek), 136-7 (Chaumont), 138 (Munch), 143-5 (Skubiszewski) but *cf*. pp. 134-5 (Castrén), 142-3 (Rousseau); Perkins, The Right of Counter-Intervention, *17 Ga J. Int'l. & Comp. L. 171 (1987)*, p. 184 et seq. ; Sohn, Gradations of Intervention in Internal Conflict, *13 Ga J. Int'l. & Comp. L. 225 (1983)*, pp. 225-7; Doswald-Beck, *56 B.Y.I.L. 189 (1985)*, pp. 242-3; Akehurst, op. cit. *supra* n. 3, p. 285; Mullerson, Intervention by Invitation, in Damrosch & Scheffer (eds.), *Law and Force in the New International Order, 1991*, 131-133. *Cf*. Jessup, *A Modern Law of Nations, 1947*, pp. 184-7.

[11] However, it is uncertain whether this passage implies any inadmissibility of military assistance to the Government of the beleaguered State; the preparatory works of these resolutions are inconclusive to this respect. See Doswald-Beck, *56 B.Y.I.L. 189 (1985)*, pp. 208-9.

[12] See S.C.O.R. 11th yr. 746th mtg. paras 58 (U.S.A.), 77 (U.K.), 89 (France), 113 (Peru), 179, 182-3 (Belgium); 752nd mtg. paras 50 (U.S.A.), 76 (U.K.), 122 (France). Similar opposition towards the Soviet action has been voiced during the works of the Second

Moreover, the French Government declined to respond to the request of the Government of Chad for military assistance to help suppress an insurgency against it in December 1990. As a result of the insurgency the Government of President Habré was overthrown[13] .

(3) Admissibility of Military Assistance to both sides .

The third theory acquires its importance because it opens the possibility of providing military assistance to the rebels.

Classical international law admitted such contingency provided that the armed opposition against the incumbent Government was awarded recognition of belligerency[14] . The rebels were thought to be entitled to belligerent status if the civil strife fulfilled four conditions:

(1) Existence of civil war and general hostilities.

(2) Occupation and a measure of orderly administration of a substantial part of national territory by the insurgents.

(3) Observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority.

(4) A practical necessity for third States to define their attitude.[15]

Falk has used this traditional approach towards the insurgents as a starting point to formulate a theory of participation in civil conflicts, in the political and strategic context of the so-called "Cold War" and the process of decolonisation in Africa and Asia[16] .

The ideological nature of and the strategic considerations in the relations between the two superpowers set the pattern of treating every civil strife within a State as a potential political and strategic expansion of "one side", namely, the U.S.A. or the U.S.S.R. , to the detriment of the other, in the politics of the "Cold War"[17] .

The political polarisation of international relations during this period has been considered to preclude the applications of the traditional requirements of recognition of belligerency. These were premised upon factual characteristics of the intensity of the civil strife, whereas the period

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Special Emergency Session of the G.A.; see U.N. Review, Dec. 1956, vol. 3, No 6, p. 61 (Australia), p. 63 (Peru).

[13] Keesing's 1990, p. 37907.

[14] See Schwarzenberger op. cit. *supra* n. 6, p. 675.

[15] See Oppenheim, *International Law, vol. ii, 7th ed. by Lauterpacht 1952*, pp. 249-251.

[16] R. Falk, Janus Tormented: The International Law of Internal War, in J. Rosenau (ed.), *International Aspects of Civil Strife, 1964*, p. 185; *Cf* . J.L. Hargrove, Intervention by Invitation and the Politics of the New World Order, in Damrosch & Scheffer (eds.) op. cit. *supra* n. 10, p. 121 et seq.

[17] Ibid. pp. 188-190; also see Farer, *67 Col.L.R. 266 (1967)*, pp. 267-271.

of the "Cold War" was characterised by the pursuit of ideological, political and strategic objectives as well as the desire of both superpowers to avoid a major nuclear conflict[18] . It was concern about the likelihood of such devastating outbreak of force that seems to have elevated internal conflicts from the insulation of domestic jurisdiction and transformed them into the battleground of superpower antagonism[19] .

Hence, Falk has suggested that, in principle, competence to decide intervention to assist either faction in a civil strife should be delegated to the United Nations or a regional organisation, while in case of inability of the latter to act (this was a certainty in relation to the U.N. during the "Cold War" years), then unilateral "neutralizing participation" on either side would be admissible[20] .

In so far as this thesis allows for the possibility of furnishing military assistance to the insurgents, the views expressed by socialist and developing countries in favour of assistance to national liberation movements in their struggle against colonial powers constitute an illustration. The present writer has dealt with the issue *supra* and takes the view that due to persistent objection by a number of States, the absence of direct military support, and denials of general material support to national liberation movements by States advocating its admissibility, has prevented this view from becoming part of customary law[21] .

(4) Some Comments .

All three theories have their merits and disadvantages, each in its proper confines.

The first theory (that allows for military action at the request of the Government) reflects the existing structure of the international community which is largely composed of independent sovereign States that are represented as far as other States are concerned, by their established Governments[22] .

Moreover, what seems to be meant by the terms "established" or "legitimate" Government, is neither a Government that has assumed

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[18] Falk, loc. cit. *supra* n. 16, pp. 206-9;
[19] Ibid. pp. 185-7.
[20] Ibid. p. 209; *cf*. Higgins loc. cit. *supra* n. 10, pp. 118-9.
[21] *Cf*. Brownlie, loc. cit. in Cassese (ed.) op. cit. *supra* n. 2; Khairallah op. cit. *supra* n. 3, p. 262. *Contra* . Farer, The Regulation of Foreign Intervention in Civil Armed Conflict, *142 H.R.C. 297 (1974 II)*, pp. 370-1. See *supra* Part One , Ch. 6.
[22] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals, 1953*, pp. 183-5.

power by constitutional means according to the domestic law of the State[23] nor an entity that is merely recognised as being such[24] (viz. the recognition of the nationalist insurgents as the legitimate Government of Spain by Germany and Italy during the Spanish civil war), or even a regime that has the approval of the population of the State.

The "established" Government of a State is rather the regime that has control of the country without the assistance of another State and commands the obedience of the population of the State[25] . The position of such a regime as the Government of the State is, furthermore, reinforced by the maintenance of diplomatic relations with other States and its representation of the State at the U.N. and regional organisations.

During the debate at the Security Council on the joint U.S.-Belgian operation at Stanleyville in 1964, a considerable number of delegates disputed the authority of the Congolese Government (headed by Mr. Tshombe, the leader of the Katangese secession), that granted its consent for the military action, as the "legitimate" Government of the Congo[26] . The representative of Brazil took a different view and stated that:

> " ...The operation liberating these hostages held by the rebels at Stanleyville was requested by the constitutional Government of the Democratic Republic of the Congo, the only legal Government of that country, recognised by the United Nations as such, and the request was made in the use of its sovereign rights ...
>
> .... the majority of the African countries which have been taking part in the work of the Council recognise the Government of the Democratic Republic of the Congo and maintain normal diplomatic relations with that Government.
>
> Consequently, from the formal juridical point of view, the life-saving operation was completely legitimate, solicited as it was by the Congolese Government itself, in the use of its powers ..."[27]

The second theory of complete impartiality has been established on a presumption against the authority of the Government to represent the State, in cases of loss of *de facto* control of the territory of the country to the rebels. Wright has claimed that " ... a government even if generally recognized, cannot speak for the state if it is not in firm possession of the state's territory. In international law the *de facto* situation is presumed to

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[23] Contra . Dinstein, op. cit. *supra* n. 2.

[24] Bowett, loc. cit. *supra* n. 3, p. 42.

[25] See *The Tinoco Case* , 1 R.I.A.A. 369; D.J. Harris, *Cases and Materials on International Law, 4th ed. 1991*, pp. 142-8; Doswald-Beck, *56 B.Y.I.L. 189 (1985)*, pp. 192-5.

[26] See S.C.O.R. 19th yr. 1183rd mtg. paras 12, 14, 17-18 (Algeria); 1178th mtg. para 18 (Tanzania).

[27] Id. 1177th mtg. paras 88-89; also see 1173rd mtg. paras 74-74 (Belgium); 1174th mtg. paras 99-100 (U.S.A.); 1176th mtg. (Nigeria); 1183rd mtg. (Bolivia).

overrule the *de jure* situation ..."[28] . However, such claim is not supported by State practice. In fact, a Government that has been in control of the territory of the State continues to be regarded as the established Government even if it subsequently has lost such control[29] . The Governments of Chad, Afghanistan (before 1979), Ethiopia, Angola and Lebanon did not cease to be considered as the "established" Governments of these countries during the long civil conflicts therein despite the fact that large parts of the territories of these States had passed under the *de facto* control of the rebels.

The attraction of the impartiality theory seems to lie, instead, in the argument that active military assistance to the Government may constitute use of force against the political independence of the State because it may result in the violation of the right of self-determination of the people of the State[30] . Self-determination in this case is perceived as the "... right of a people to choose its own economic, social and political system ..."[31] . Moreover, what this means is not that the Government of the State should be democratically elected, but, rather, that it should not be imposed by outside intervention[32] .

However, the impartiality theory is subject to two qualifications. First, there must be no external assistance to the insurgents[33] ,and, secondly, that assistance to the incumbent Government must cease *only* in cases where the outcome of the civil war is "uncertain"[34] in the sense that there is a situation of widespread hostilities, as opposed to small-scale riots and disturbances, and the Government forces seem to be losing

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[28] Q. Wright, *57 A.J.I.L. 112 (1959)*, p. 120. Wright admits one exception to his thesis, namely, that the *de jure* situation persists when the *de facto* government is installed as a result of external aggression.

[29] Doswald-Beck, *56 B.Y.I.L. 189 (1985)*, pp. 197-9.

[30] See Hall op. cit. *supra* n. 10; Bowett loc. cit. *supra* n. 3, p. 42; Higgins loc. cit. *supra* n. 10, p. 97; Moore, *9 Va J.I.L. 209 (1969)*, pp. 272-3; id. *13 Ga J. Int'l & Comp. L. 191 (1983)*, p. 196; Schachter, *82 Mich. L.R. 1620 (1984)*, p. 1641 et seq. ; *56 Ann. I.D.I. 119 (1975)*, Comments cited *supra* n. 10; Perkins loc. cit. *supra* n. 10, p. 184 et seq. ; Doswald-Beck loc. cit. supra n. 29, p. 244; Farer, *142 H.R.C. 297 (1974 II)*, p. 365; Akehurst op. cit. *supra* n. 3, p. 185. *Cf*. Brownlie loc. cit. *supra* n. 2.

[31] See Doswald-Beck loc. cit. *supra* n. 29, pp. 200-3.

[32] Ibid. pp. 203-8.

[33] E. Lauterpacht, *7 I.C.L.Q. 102 (1958)*, p. 106; Brownlie op. cit. *supra* n. 4, p. 327; id loc. cit. *supra* n. 2; Higgins loc. cit. *supra* n. 10, p. 94; Farer, *81 A.J.I.L. 112 (1987)*, p. 114 but *cf*. id. *142 H.R.C. 297 (1974 II)*, pp. 365, 370-1; Moore, loci citi *supra* n. 30; Article 2(3) of the resolution of the Institute of International Law, *56 Ann. I.D.I. 119 (1975)*, p. 133 and Comments by Chaumont and Skubiszewski cited *supra* n. 10; Perkins loc. cit. *supra* n. 10 , p. 192, but *cf*. pp. 194-5; Doswald-Beck loc. cit. *supra* n. 29, p. 213 et seq. ; Akehurst op. cit. *supra* n. 3, p. 288.

[34] Hall op. cit. *supra* n. 10; Q. Wright loc. cit. *supra* n. 10, p. 122.

ground to the rebels. It is this latter qualification that creates a lot of controversy as to the precise moment when a civil strife acquires the intensity that signals the advent of the purported obligation to desist from assisting the incumbent Government.

The "uncertainty" of the outcome of the conflict advocated by Hall and Wright, simply begs the question.

E. Lauterpacht has suggested the application by analogy of the criteria of recognition of belligerency, without, however, prior formal recognition of belligerent status to the insurgents[35] .

Moore[36] has articulated a set of criteria according to which assistance to the incumbent Government should stop if (i) the internal strife is aimed at the overthrow of the incumbent Government; (ii) the established Government " ... is obliged to make continuing use of most of its regular armed forces against the insurgents, or a substantial segment of its regular military forces have ceased to accept orders ..."; (iii) the insurgents have prevented the established Government from exercising its authority over a significant part of the population and (iv) a considerably high proportion of the population support and assist the insurgents.

The draft resolution of the Institute of International Law approaches the issue negatively by defining what *does not* constitute a civil war. Article 1(2)(a-b) of the resolution provides that:

> .... 2. Ne sont pas des guerres civiles au sens de la présente résolution:
> (a) les troubles localisées ou les emeutes;
> (b) les conflits armés entre les entités politiques qui sont separées par une ligne internationale de démarcation ou qui, pendant une durée prolongée, ont existée en fait comme des Etats, ni les conflits entre une telle entité et un Etat. .....[37]

Fitzmaurice[38] considers the threshold of cessation of assistance to the incumbents to be established when such assistance has the character of "rescue" of a "seriously endangered government" or when the incumbent Government is "unrepresentative of the people".

Moreover, all of the above views lead to the conclusion that assistance to the established Government is not prohibited at all times and some authority suggest that aid to the incumbents short of the dispatch of military forces to join in the fighting against the rebels is permissible, even

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[35] Id. *7 I.C.L.Q. 102 (1958)*, pp. 104-5.
[36] Id. *9 Va J.I.L. 209 (1969)*, pp. 275-6.
[37] *56 Ann. I.D.I. 119 (1975)*, p. 132.
[38] Id. *92 H.R.C. 5 (1957 II)*, pp. 178-9.

during civil strife of the highest intensity[39] . Furthermore, the fact that the impartiality theory does not admit any assistance to the rebels appears to suggest that this theory operates in effect in favour of the incumbent Government[40] .

Finally, claims for application of the requirements of recognition of belligerency are not supported by the practice of States. Recognition of belligerent status of insurgents has not occurred since the American Civil War, and in any case the criteria of belligerency could be unlikely to be met in contemporary internal conflicts[41] .

The merit of the third theory is that it has placed issues of participation in internal conflict in the politico-strategic context of the "Cold War" that prevailed in international relations from the end of the Second World War until very recently. Its great disadvantage, however, lies in the fact that it totally ignores the rules of international law pertinent to the use of force by States in relation to material assistance to insurgents.

The use of the derelict doctrine of recognition of belligerency as a starting point is, in the opinion of this writer, manifestly incompatible with Article 2(4) of the Charter and the principles of non-intervention and non-use of force. The practice of States in the post-1945 period suggests that any attempt at recognition of belligerency of insurgents (that equates the insurgent community with a State for the purposes of armed conflict) is to be treated as direct violation of the sovereignty of the beleaguered State. An illustration of this is the attitude of the overwhelming majority of the international community towards secessionist movements in other States, and, notably, the cases of the Biafran and Katangese secessions[42] .

Of the three theories formulated by publicists, the first two appear to lay considerable emphasis on the position of the Government as the agent of the State, while the third aspires to subjecting the entirety of State representation to political, strategic and ideological concerns which are being dictated by antagonistic realities of international relations, such as the "Cold War". Emphasis on the status of the Government unavoidably links the whole issue of military action at the request of the Government

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[39] See Moore, *13 Ga J. Int'l & Comp. L. 191 (1983)*, p. 196; Doswald-Beck loc. cit. *supra* n. 29, pp. 221-2, 244; Farer, *67 Col. L.R. 266 (1967)*, pp. 274-6; Akehurst op. cit. *supra* n. 3; Falk (ed.), *The International Law of Civil War, 1971*, Introduction, pp. 22-3.

[40] See Farer, *67 Col. L.R. 266 (1967)* ; id. *81 A.J.I.L. 112 (1987)* .

[41] See Bowett loc. cit. *supra* n. 3, p. 41 n.9; Farer, *142 H.R.C. 297 (1974 II)*, p. 356; Doswald-Beck loc. cit. *supra* n. 29, p. 197 et seq.

[42] See Doswald-Beck loc. cit. *supra* n. 29, p. 197.

with the highly subjective and politicised concept of recognition[43] . Viewed from this angle the issue tends to become an intellectual exercise that avoids addressing the core of the problem of use of force at the request of the Government, namely, whether such use of force contravenes the existing rules of international law on unilateral resort to force by States.

Doswald-Beck is right in principle to place the question of legitimacy of such use of force within the rule of non-intervention, rather than the concepts of recognition and self-determination[44] . But the existence or not of intervention appears to be precisely what is sought to be proven. It does not explain the reasons or circumstances of whether or when such use of armed force partakes the character of unlawful intervention and a violation of the rule of non-use of force. Is such action to be regarded unlawful intervention from the very first moment foreign troops are introduced in the beleaguered State's territory? It is submitted that this issue is best dealt with by considering instances of State practice.

Consideration of Instances of State Practice .

The practice of States reveals that first, the incumbent Government enjoys a far more privileged status than the rebels in the international community, and, secondly, any material assistance to the rebels constitutes a violation of the rules of non-use of force and non-intervention. It is also revealed that a request by the Government of a State for military assistance on the part of other States is expressed in order to suppress (1) an insurgency that is assisted from abroad by another State or States; or, (2) an insurgency that is of limited proportion in the sense that it is extremely localised or has the character of a military *coup d' état* and (3) an insurgency that constitutes a large-scale popular uprising that involves the support of the majority of the population of the State or aims at the secession of part of the territory of the requesting State.

The instances of State practice where request of the incumbent Government has been invoked in order to justify the dispatch of troops to another State are numerous. The present author proposes to review some of them.

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[43] Moore, *9 Va J.I.L. 209 (1969)*, p. 278; Bowett loc. cit. *supra* n. 3, p. 42; Falk (ed.) op. cit. *supra* n. 40, pp. 7, 13-14; Farer, *142 H.R.C. 297 (1974 II)*, pp. 358-360.
[44] Id. loc. cit. *supra* n. 29, p. 207 et seq.

Hungary 1956; Czechoslovakia 1968; Afghanistan 1979 . The introduction of Soviet armed forces to these countries was justified as undertaken upon the request of their respective Governments. In all three cases it was alleged that Soviet military assistance had been sought in order to counter external intervention and subversion in the affairs of these States[45] .

Lebanon 1958; Jordan 1958 . The dispatch of U.S. troops to Lebanon and U.K. forces to Jordan was justified as made at the request of the Governments of these States on the basis of allegations of subversion by the U.A.R.[46] .

Yemen 1962 . The sending of U.A.R. troops to Yemen in 1962 was justified as undertaken at the request of the republican Government of the country in order to counter the royalist insurgents that were assisted by Saudi Arabia and Jordan[47] .

The Dominican Republic 1965 . The U.S. action was justified as resorted to at the request of the local authorities in order to rescue U.S. nationals. During the debate at the Security Council the U.S. representative claimed the existence of Cuban subversion in the civil strife in the capital Santo Domingo[48] .

Congo 1967 . On 5 July 1967 a mercenary commando force landed at Kisangani (formerly Stanleyville), occupied the airport and attacked positions of the Congolese Army[49] . The Government of President Mobutu alleged that the mercenaries had been recruited with the support of Belgium, Portugal and Spain[50] . At the request of the Congolese Government Ethiopia dispatched units of its air force to the Congo to assist the Government repel the mercenaries[51] .

The Biafra secession . During the Biafra uprising in Nigeria, the French Government expressed political support for the secession, but it strongly denied that it provided the insurgents with arms[51a] . Moreover, on 22 and 24 May 1969 a squadron of Swedish-made aircraft under the command of a Swedish national launched a series of air raids on Federal

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[45] See statements by the Soviet Government with regard to Hungary, S.C.O.R. 11th yr. 746th mtg. paras 14-15, 754th mtg. para 45-51; with regard to Czechoslovakia, S.C.O.R. 23rd yr. 1441st mtg. para 3; with regard to Afghanistan, 34 Ybk. of the U.N. 1980, p. 299.
[46] See *supra* Part Two , Ch. 9, Second Title, notes 96-102.
[47] Keesing's 1963-1964, pp. 19297-19300.
[48] S.C.O.R. 20th yr. 1196th mtg. paras 64-67, 82, 92.
[49] Keesing's 1967-1968, p. 22188.
[50] Id. p. 22189.
[51] Ibid.
[51a] Keesing's 1969-1970, pp. 23161, 23154-5.

airfields; the Swedish Government was swift in dissociating itself from the participation of any Swedish nationals in the fighting on the side of the insurgents against the Nigerian Federal Government[51b] .

Zaire 1977 . On 8 March 1977 a band of 2,000 former Katangese rebels crossed the border into Zaire from Angola. The Government of President Mobutu accused Angola, Cuba and the U.S.S.R. of involvement in the activities of the irregulars and upon its request Morocco dispatched 1,500 troops that assisted the Zairean Army to repel the invaders[52] .

Civil War in Angola . During the long civil war in Angola (1976-1989) Cuban troops actively assisted the Angolan Government in the fighting against the rebel movement UNITA that had been assisted by South Africa. In May 1977 the President of Cuba, F. Castro, stated that " ... [W]e shall remain in Angola as long as necessary, with the agreement of the sovereign Government ... , to contribute to its defence and to the consolidation of its independence against all threats of aggression from wherever they may come ..."[53] . Moreover, the Agreement of 22 December 1988 between the Republics of Cuba and Angola in relation to the withdrawal of the Cuban military contingent from the latter, provided that " ... [T]he conditions have been created which permit the commencement of the return to its homeland of the Cuban military contingent now present in Angolan territory which has successfully fulfilled its international mission ..."[53bis]

Ethiopia . Cuban troops assisted the Ethiopian Government, upon its request, against the Somali irregulars that had been sent by the Somali Government in Ogaden in 1978[54] , but did not take part in the fighting against the Ethiopian opposition during the long civil war in that country. The Cuban Government had regarded the civil conflict between the Ethiopian Government and the Eritrean secessionist movement (E.P.L.F.) as an internal matter[55] . By contrast Soviet naval units assisted the Ethiopian Government in the bombardment of E.P.L.F. positions around the port of Masawa in December 1977[56] .

[51b] Ibid. p. 23648.
[52] Keesing's 1977, p. 28397.
[53] Id. p. 28489.
[53bis] The latter referred to the military assistance to the Government of Angola in the fighting against U.N.I.T.A. in collective self-defence. See *28 I.L.M. 959 (1989)* .
[54] Keesing's 1978, p. 28760.
[55] Keesing's 1989, p. 37063.
[56] Keesing's 1978, p. 28994.

Grenada 1983 . In October 1983 the U.S. and Member States of the O.E.C.S. launched a military operation in Grenada that was justified as aiming at the protection of U.S. nationals and being undertaken at the request of the Governor-General of Grenada.

Civil War in Mozambique . In 1987 army contingents from Zimbabwe and Tanzania assisted the Mozambique Government at its request in the fighting against the rebel movement RE.NA.MO. that was supplied with material assistance by S. Africa[57] .

Chad . Chad is a State where outbreaks of insurgency have been frequent since the middle of the 1960s. On three occasions, in 1968, 1983 and 1986, French troops assisted Government forces in the fighting against the rebels which were supported by Libyan troops[58] . It appears that Libyan involvement on the side of the rebels played a great part in responding to the request of military assistance by the Chadian Government. By contrast, the French Government declined to assist the Government of President Habré in 1990 to crush a rebellion against its authority that appeared to have been mounted without any foreign assistance[59] . However, the U.S. Government alleged that the rebels had received Libyan financial support and on 3 December 1990 it refused to recognize the new rebel Government that had, meanwhile, overthrown President Habré[60] .

Civil War in Sri Lanka . By virtue of clause 2.16 (c) of the Agreement concluded between the Governments of India and Sri Lanka on 29 July 1987, Indian troops that had been sent to Sri Lanka as peacekeeping forces in the civil war between the Government and the Tamil secessionist movement, took part in the fighting against the rebels at the request of the Government of Sri Lanka[61] . It must be noted that there was no evidence that the Tamil insurgents received any assistance from another State.

The Phillipines . In December 1989 a military coup took place at the Phillipines capital Manilla that aimed at the overthrow of the Government of President C. Acquino. Upon the request of the Government units of the U.S. air force assisted loyal troops to the Government to crush the coup[62] .

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57 Keesing's 1988, p. 35685.
58 See *supra* n. 46, notes 124-126.
59 Keesing's 1990, p. 37907.
60 Ibid.
61 *Supra* n. 46, notes 128-130.
62 Keesing's 1989, p. 37120.

Rwanda 1990 . In October 1990 the Government of Rwanda requested and received Zairean troops that assisted the Government forces in fighting a dissident force that invaded the country from Uganda[63] . It must be noted that the dispatch of Zairean forces was effected in execution of a mutual defence agreement between the two States and that, on the other hand, there was no evidence that the irregular force received any assistance from another country.

State practice appears to be consistent in that requests for military assistance in order to suppress internal strife are positively responded to by third States where the insurgents are assisted by another State or where the insurgency creates imminent danger to the intervening State's nationals. In this case military action has been justified by reference to the right of self-defence or, in the opinion of this writer, proportionate counter -measures that are admissible exceptions to the rule of non-use of force. The same may be held with regard to insurgencies that have the character of localised disturbances or a military coup against the authority of the Government.

By contrast, in situations where the insurgents do not appear to receive any assistance by another State, or if they do, but it falls short of being high-level support, (in the sense of provision of arms, training, logistical support or direct participation on the side of the rebels), State practice shows a tendency of declining to provide active military support to the incumbent Government. The positions taken by the Cuban Government in the civil war in Ethiopia and by the French Government in Chad in 1990 are illustrative. In these cases there was some evidence that the E.P.L.F. and the Chadian rebels received financial support by third States. At the same time, however, State practice is not conclusive that abstention from providing direct military support to the incumbent Government constitutes the rule - e.g. the Zairean military assistance rendered to the Government of Rwanda.

In cases of secessionist movements or large-scale popular uprisings State practice is unequivocally in favour of the incumbent Government in terms of providing it with economic assistance and military *matériel* - e.g. the large-scale military and economic aid to the Salvadorean Government

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63 *Supra* n. 46, p. notes 131-133.

by the U.S.A. At the same time assistance to the insurgents is totally denied - e.g. the Biafra secession[64].

Direct military assistance to the incumbent Government, however, is not frequently resorted to in these cases but it is not to be ruled out as the Indian military assistance to the Sri Lanka Government illustrates. There is, in any case, some evidence to suggest that in cases of wide-spread popular insurgencies active military assistance to the beleaguered Government by third States may be regarded as an intervention in the internal affairs of the requesting State or as use of force against its political independence[65]. Doswald-Beck has argued that "... [A] technical plea of invitation is not considered to be the crucial point but rather whether there has in fact been an interference in the affairs of another State and with its people's total independence ..."[66].

State practice reveals, in the opinion of this writer, that there is a very strong presumption in favour of the incumbent Government. Moreover, it becomes clear that the rendering of active military assistance upon request is in principle *not* to be discarded as impermissible *ab initio*. The fact that a request for direct military involvement is not heeded, does not imply conclusively that third States are under any *a priori* duty of abstention because otherwise the political independence of the requesting State will be violated. Such abstention, when it is manifested, rather appears to be on considerations of policy and not of respect for a prohibitive rule to introduce troops in a State upon the request of the Government[67].

It may be argued that the invocation of the grounds of self-defence and of protection of nationals to justify the dispatch of troops to the territory of a State in civil strife, reveals an *opinio juris* that advocates the inadmissibility of military intervention by invitation in order to put down an insurgency.

Indeed, in the majority of instances of State practice the request for military assistance is based on considerations of self-defence and protection of nationals. This preference may be explained, first, as corresponding to the facts of the situation; namely, that the insurgents are assisted by another State or that the lives of the nationals of the intervening State are, in fact, in mortal danger. Secondly, the pleas of self-

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64 *Supra* notes 51a & 51b.
65 See Doswald-Beck loc. cit. *supra* n. 29, pp. 222-238.
66 Ibid. p. 239. This view comes very close to the absolute impartiality theory.
67 See Garner, *31 A.J.I.L. 66 (1937)*, p. 68; E. Lauterpacht, *7 I.C.L.Q. 102 (1958)*, p. 105.

defence and protection of nationals may constitute evidence of a tendency in the practice of States to rely on grounds that preclude a violation of the rule of non-use of force *ab initio* . This is especially evident with regard to self-defence which constitutes the only universally admitted exception to the above rule. Such claims appear to preclude claims of illegality from the very first moment of introduction of foreign troops in the territory of another State.

In a situation of civil strife (other than a national liberation struggle of colonial peoples), the use of force by the incumbent Government against the insurgents constitutes force in the domestic sphere of the State and as such it is not a violation of Article 2(4) and customary law. If this force is compatible with the rule of non-use of force *ab initio* , it is submitted that there is no reason why it should be inadmissible (*ab initio*) if it is exercised in concert with another State at the express request of the beleaguered Government.

This submission is illustrated by the Judgment of the Court in the *Nicaragua Case* in respect of proportionate counter-measures against indirect use of force that does not amount to an armed attack[67a] . The Court held that such action may be pursued by the beleaguered State *individually* only[67b] . It is clear from the Judgment that the *individual* character of proportionate counter-measures is pertinent with regard to force used against the State that assists the insurgency; that is action on the international plane. It can also be inferred from the Judgment that forcible measures against the guerrillas within the territory of the beleaguered State may be undertaken collectively[67c] .

The point to be made is this: Protective action by way of counter-measures against an insurgency that is assisted from abroad is action on the basis of an exception to the rule of non-use of force. However, in this case the defence of the beleaguered State is consummated by the crushing of the insurgency. If military contingents of another State are sent to the beleaguered State at its request to fight against the guerrillas only, then the individual character of counter-measures is not violated because the concerted action occurs within the territory of the beleaguered State and against an entity which is not protected by the rule of non-use of force.

[67a] See *supra* Part Two , Ch. 9, Second Title.
[67b] See I.C.J. Rep. 1986, p. 14, pp. 110, 127, paras 210, 211, 249.
[67c] Id. p. 126, para 246.

A breach of this rule could only occur as between the beleaguered State and the State that dispatched troops to assist it against the insurgents. This is not the case because foreign troops are introduced by virtue of the beleaguered State's consent and are not directed against it but against its internal enemies. If this line of action is admitted with regard to insurgency assisted from abroad, it is, however, executed within the domestic confines of the requesting State and it aims at the crushing of the insurgency, then this writer does not see why it could not be the same, as a matter of law, with regard to an insurgency unsupported by another State.

It is submitted that, violation of the political independence of the requesting State (and, hence, a violation of the rule of non-use of force) may be the case, and, indeed, it has been the case, not because of an existing requirement of the law to abstain from rendering military assistance to the incumbent Government, but, rather, because the request of assistance, when expressed, is not genuine in its merits[67d] . Moreover, even if there is genuine request, the action of the assisting State may result, and it may result only *ex nunc* , in the imposition by the assisting State of a settlement of the internal strife according to its own political interests.

This is illustrated by the attempt of the Belgian Government to justify the action of Belgian troops in the Congo in 1960 as undertaken at the request of the central Congolese Government as well as at the request of the regional authorities of Katanga[68] .

The representative of Tunisia did not dispute the admissibility of the alleged consent by the central Congolese Government (he did so with regard to the Katangese authorities), but he , nevertheless, added that such request could not " ... be used as an argument to justify generalised intervention which is aimed - and this is the most serious consideration - not at rendering the general assistance requested by that independent and sovereign State but at replacing its sovereign independent authority ... by another authority exercising the essential attributes of sovereignty ..."[69] . It is submitted that in such circumstances the use of force by the assisting State degenerates into force against the territorial integrity and political independence of the requesting State.

[67d] Fawcett, *103 H.R.C. 347 (1961 II)*, p. 366; Hargrove loc. cit. *supra* n. 16, pp. 116-119 but *cf*. p. 121 et seq.

[68] S.C.O.R. 15th yr. 873rd mtg. paras 186-190.

[69] Ibid. para 209. The statement appears to imply that the Belgian action aimed at assisting the Katangese secession. Also see, statement by S. Schwebel, I.L.C. Ybk. 1979, Vol. I, Summary Records of the Meetings of the 31st session, 1538th mtg. p. 46, paras 12-14.

There is evidence in State practice that opposition to third States' military action which is purportedly undertaken at the request of the incumbent Government is considered a violation of Article 2(4) of the Charter and of the rule of non-use of force not because of a general rule of impartiality but, rather, because it is the request for assistance itself that, if relied upon, renders the subsequent military action unlawful. Thus, the dispatch of military forces by a State on the territory of another State on the basis of the latter's request constitutes an instance of unlawful use of force in the following cases.

(1) That the request is not given freely and that it is the result of prior threat or use of force[70].

The Judgment of the International Military Tribunal at Nuremberg found that the consent of the Czech Government to the proclamation by Nazi Germany of the protectorate over *Bohemia and Moravia* in March 1939 was given under the threat of use of armed force[71].

The dispatch of Soviet troops to *Hungary* on 4 November 1956 was justified on the basis of the request of the Hungarian Government. The Soviet claim was disputed on the basis of the facts. In the autumn 1956 large popular demonstrations occurred in Hungary and on 23-24 October 1956 fighting broke out. On 24 October 1956 Mr. Nagy became the Prime Minister of Hungary and it was announced that the Government had requested the assistance of the U.S.S.R. to restore order (the appeal seems to have been made by Mr. Gero, the First Secretary of the Hungarian Workers' Party). On 1 November 1956 the Hungarian Government demanded the immediate withdrawal of the Soviet forces from Hungary, repudiated the Warsaw Pact and proclaimed the country's neutrality[72]. Instead of withdrawing the Soviet forces in Hungary were reinforced and on 4 November 1956 they overthrew the Government of Mr. Nagy; the request for the intervention was apparently made by Mr. Kadar, who succeeded Mr. Gero as First Secretary of the Hungarian Workers' Party. The majority of the Members of the Security Council treated the Soviet

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[70] See I.L.C. Ybk. 1979, Vol. II, Part Two, p. 112, paras 12-13; Ronzitti op. cit. *supra* n. 2, p. 84 et seq.

[71] *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, part 22, H.M.S.O. 1950, p. 429.

[72] See Cablegram dated 1 November 1956 from the President of the Council of Ministers to the Secretary General. Doc. A/3251, G.A. (ES-II), Annexes, a.i. 5, p. 10; also see statement by the Hungarian representative in the S.C. , S.C.O.R. 11th yr. 753rd mtg. para 61.

action as a violation of the sovereignty and political independence of Hungary, and of the right of self-determination of the Hungarian people. This view addresses the result of the Soviet action in Hungary, but does not explain why this result had occurred. Only the representative of France attempted to link the unlawfulness of the Soviet intervention with the purported request of the Hungarian Government. He stated that:

> " ... We were told five days ago that the Hungarian Government had asked for this intervention. We already had misgivings on that point. Mr Gero may in fact have asked for the assistance of foreign troops in order to maintain himself in power, but the intervention took place after Mr. Gero had fallen from power and Mr. Nagy had succeeded him. The Nagy Government was thus from the outset subjected to foreign intervention which had been provoked by its predecessor ....
>
> ... In any case even we had any doubts a few days ago ... we have none today. The Hungarian Government, through the President of the Council of Ministers, has officially requested the withdrawal of Soviet troops ....
>
> ... Foreign intervention is taking place in Hungary. This intervention is being carried out against the wishes of the Hungarian people and the Hungarian Government. All this has been made clear in Mr Nagy's communication to the United Nations ..."[73]

Moreover, during the debate at the Second Special Emergency Session of the General Assembly, the U.S. described the Kadar Government as a "small group of Soviet straw men" and then stated that " ... we have seen no passage of government authority from one Hungarian government to another, only the creation of a puppet clique and the overthrow of a liberal socialist government responsive to popular will in its desire to see these troops go ..."[74] .

A similar situation occurred in *Afghanistan* in December 1979. The request for military assistance came from the Government of B. Karmal that took power after the violent overthrow of the Government of President H. Amin which occurred with the assistance of Soviet armed forces. During the debate at the Security Council the representative of Singapore stated that:

> " ... The Soviet Union has argued that its troops are in Afghanistan at the invitation of the Afghan Government ...
>
> .... Unless we assume that the late President Amin had suicidal tendencies, it is reasonable to infer that he would not have invited Soviet troops to enter Afghanistan in order to depose and kill him.
>
> After the coup against President Amin, the Soviet Union brought an Afghan, Babrak Karmal, from exile in Eastern Europe and made him the new President of Afghanistan. The important fact is that at the time of the Soviet intervention, Babrak

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[73] S.C.O.R. 11th yr. 752nd mtg. para 117; 753rd mtg. para 76; see also para 48 (Belgium).
[74] U.N. Review, Dec. 1956, vol. 3, No 6, p. 62.

Karmal was not part of the Government of Afghanistan and therefore had no authority to request the intervention of Soviet troops ..."[75]

A more recent illustration of a request made by a Government that has assumed power as a result of the use of force by the purportedly invited State is the invasion of *Kuwait* by Iraq on 2 August 1990. The Iraqi invasion was justified as being undertaken at the request of "... the Free Provisional Government of Kuwait ... to assist it to establish security and order so that the Kuwaitis would not have to suffer. My Government has decided to provide such assistance, solely on that basis ..."[76]

Mr. Pickering, the representative of the U.S.A., treated the Iraqi justification in the following terms:

" ... while the Iraqi invasion was carefully planned and professionally executed, the Iraqis at one salient point made a serious mistake. Instead of staging their coup d' état and installing this so-called Free Provisional Government before the invasion, they got it the wrong way around: they invaded Kuwait and then staged the coup d' état in a blatant and deceitful effort to justify their action ..."[77]

(2) <u>That the request for assistance is not really established but is only presumed</u> .[78]

This contingency involves questions of the existence of any request at all.

The International Military Tribunal at Nuremberg found in relation to the incorporation of *Austria* in the Third Reich on 12 March 1938, that the purported request of the Austrian Government for the *Anschluss* was in fact never made; instead the statement of consent had been prepared and delivered to the Austrian authorities by the German Government , and not the other way around[79] .

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[75] S.C.O.R. 35th yr. 2187th mtg. paras 42-43. The representative of Singapore concluded that the Soviet action was a violation of the rules of non-intervention and non-use of force by reference to G.A. Res. 2625 (XXV) of 1970, para 44. Also see ibid. paras 87 (Malaysia), 94 (Costa Rica).

[76] Statement by Mr. Kadrat, the Iraqi representative in the Security Council, S.C.O.R. 45th yr. S/PV. 2932nd mtg. , reproduced in Lauterpacht & others (eds.), *The Kuwait Crisis - Basic Documents, 1991*, p. 100; also see Press Release by the Press Office of the Republic of Iraq, London, 12 Sept. 1990, in ibid. p. 74.

[77] S/PV. 2932nd mtg. in ibid. p. 100; also see statement by the representative of the U.K. , ibid. p. 101.

[78] See loc. cit. *supra* n. 70, pp. 112-3, para 14.

[79] *Supra* n. 71, p. 426.

A similar situation of total absence of consent is illustrated by the presence of the South African Army in southern *Angola* in 1975, prior to the declaration of independence from Portugal. The S. African Government claimed that troops had been introduced at the request of Portugal, that had been the administering power of the colony[80]. The Portuguese Government denied that it had ever expressed any such request[81].

Total lack of consent is also illustrated by the Soviet actions in *Hungary (1956)*, *Czechoslovakia (1968)*[82], and by the invasion of *Kuwait* by Iraq (1990).

(3) <u>That the request has emanated from a body that is not the Government of the State</u>.[83]

A request for military assistance is vitiated if it is expressed by:
(i) The political opposition to the Government or the authorities of a secessionist movement.
(ii) Either of the opposing factions in a civil conflict, that have never been the Government of the State.
(iii) A body that purports to be the Government of the State and has not yet established control over the greatest part of the territory of the State, and, conversely, a body that used to be the Government of the State but has lost control not only of the territory of the State but of the administrative executive machinery of government as well.
(iv) A body or an individual that does not have the constitutional capacity in domestic law to make such request.

State practice contains illustrations for all these instances.

(i) Direct military assistance to the armed opposition of the Government of a State is generally thought to constitute a use of force that amounts to an "armed attack" against the State[84]. The fact that a response for military assistance to the opposition is inadmissible is illustrated by the Viet- Namese invasion of *Cambodia* in 1978 and the Tanzanian action in *Uganda* in 1978-79 that both resulted in the overthrow of the established

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[80] S.C.O.R 31st yr. 1904th mtg. para 100.
[81] Ibid. 1905th mtg. paras 87-88.
[82] See statement by the Czech representative in the S.C., S.C.O.R. 23rd yr. 1441st mtg. para 162.
[83] Loc. cit. *supra* n. 70, p. 113, para 15.
[84] See *supra* Part Two, Ch. 9, First Title.

Governments of the intervened States and their replacement by opposition dissidents. Both the Viet- Namese and the Tanzanian Governments, however, expressly dissociated their actions from the armed insurgencies against the established Governments of Cambodia and Uganda.

The inadmissibility of military action at the request of a secessionist movement is illustrated by the Belgian military operation in the *Congo* in July 1960. The action took place at the same time with the secession of the south-eastern province of *Katanga* . During the debate at the Security Council the Belgian representative claimed that the action in the Congo had been launched with the consent of the Katangese authorities[85] . To this the representative of Tunisia contended that:

> " ... I should like ... to question the legitimacy of the intervention of Belgian troops. In our opinion this intervention cannot be justified by a request for foreign intervention ... made by a regional authority ..."[86]

(ii) In cases of civil strife that erupts after the overthrow of the established Government of a State and involves factions neither of which has ever been the Government of the State, military action at the request either of them has been characterised as unlawful.

This is illustrated by the U.S. action in the *Dominican Republic* in 1965. On 25 April 1965 the three-man *junta* that had governed the country since the overthrow of President Bosch, was itself overthrown by supporters of the former President [87] . The supporters of President Bosch had the support of the Army, but not of the Air Force and the Navy [88] . On 26 April 1965 heavy fighting broke out between the two factions in and around the capital Santo Domingo and by 28 April all organised government authority ceased to exist [89] . On the same day U.S. forces landed in the Dominican Republic. The operation was justified as having been launched at the request of the "local authorities"[90] . It was, however, doubtful that such a request was ever made, and even if it had been made, neither of the factions was treated as the Government of the country by either the O.A.S. or the United Nations [91] .

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[85] S.C.O.R. 15th yr. 873rd mtg. para 186.
[86] Ibid. para 209.
[87] Keesing's 1965-1966, p. 20813.
[88] Ibid.
[89] Ibid.
[90] S.C.O.R. 20th yr. 1196th mtg. para 67.
[91] Doswald-Beck, lo. cit. *supra* n.29, pp. 200, 228-230.

(iii) The third situation refers to conditions of heavy civil strife between the established Government and the opposition, at the early stages of a struggle for the position of Government within the State.

The rule is that in these cases there is strong presumption in favour of the incumbent Government whose overthrow is being attempted. Therefore, the dispatch of troops to assist the rebels is treated with hostility and amounts to the position discussed under (i).

There are certain cases, however, where the rebellion is launched by a part of the executive branch of the State, such as the armed forces, and rapid seizure of the machinery of government and the greatest part of the territory of the State is effected by the insurgents. It is submitted that until the former established Government is totally divested of all governmental functions and until the insurgents succeed it in these functions, direct military assistance to either side is of very doubtful validity. This is so in cases where the rebels take control of the capital, the main urban centres and the security apparatus of the State, and notably, where the former Government has been expelled from the territory of the State.

This, however, cannot be ascertained at the very early stages of the civil strife. It is in this context where the practice of recognition acquires an element of abuse that may lead to different States recognising either the incumbents or the rebels as the Government of the State and furnish both of them with active military support with the danger of escalating the civil conflict into a major inter-State armed conflict.

An illustration of this submission is the situation in the *Yemen* in 1962 [92] . On 27 September 1962 the Royal Government of Imam Mohammed was overthrown in a military coup and Yemen became a Republic. The Imam escaped to Saudi Arabia where he set up a government-in-exile that was recognised as the legitimate Government of Yemen by Saudi Arabia and Jordan. Meanwhile, soon after the military coup a large U.A.R. expeditionary force was dispatched to Yemen in order to assist the republican Government that had been recognised by the U.A.R. as the legitimate Government of Yemen in the fighting against the Imam's supporters.

For the next eight years great tension existed in the relations between the U.A.R. and Saudi Arabia and clashes between the armed forces of both States in Yemen threatened the outbreak of a major armed conflict.

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[92] See Keesing's 1963-1964, p. 19298.

A similar situation has arisen in the process of decolonisation. This is the case where the colonial power has relinquished the administration of the territory and has withdrawn, and fighting breaks out among two or more factions that aim at becoming the Government of the new State. Again, at the early stages of the conflict military assistance to any faction appears to be inadmissible until the point has been reached where on e of them professes the military capacity to establish control on the largest part of the territory of the State.

This is illustrated by the situation in *Angola* following the withdrawal of the Portuguese colonial administration in 1975. Government power was contested by three rival liberation movements : the Popular Movement for the Liberation of Angola (M.P.L.A.), the National Front for the Liberation of Angola (F.N.L.A.) and the National Union for Total Independence of Angola (U.N.I.T.A.). Fighting broke out between the M.P.L.A. on the one hand and the F.N.L.A. and U.N.I.T.A. on the other in late April 1975 [93] . It was only after considerable military successes that the M.P.L.A. was recognised as the legitimate Government of Angola in February 1976 [94] .

There is evidence that during the inconclusive period of internal strife (April 1975-February 1976), the M.P.L.A. was assisted by a contingent of 3,000 Cuban troops. In March 1976 the M.P.L.A. Government of Angola defended before the Security Council the military assistance rendered by Cuba as the sovereign prerogative of Angola to request and receive foreign military assistance in the fighting against the opposition [95] . However, the participation of Cuban troops on the side of the M.P.L.A. prior to its recognition in February 1976 created a presumption of unlawful intervention that persisted throughout the long civil war in Angola. On 31 August 1981 the U.S.A. prevented the adoption by the Security Council of a draft resolution condemning South Africa for a large-scale military incursion in Angola (codenamed Operation *Protea*). The negative vote of the U.S. was justified on the basis of the assertion that the Cuban military presence in Angola was also responsible for the escalation of violence in southern Africa [96] .

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[93] Keesing's 1975, p. 27497.
[94] Keesing's 1976, p. 27661.
[95] S.C.O.R. 31st yr. 1900th mtg. para 19; also see para 76 (Tanzania); S.C. Res. 387 (1976) of 31 March 1976, 4th preambular paragraph.
[96] S.C.O.R. 36th yr. 2300th mtg. para 48. There is, however, authority to suggest that once the M.P.L.A. was recognised as the legitimate Government of Angola, the presence of the Cuban troops therein would be legitimised only *ex nunc* and not for the period prior to

(iv) Uncertainty about the genuineness of the request by the Government of the State for foreign military assistance may arise due to the constitutional competence (according to domestic law) of the organ making the request, to express the will of the State in the international community.

The issue has arisen in connection with the U.S. - O.E.C.S. operation in *Grenada* in 1983. The request for military assistance was claimed to have been made by Sir Paul Scoon, the Governor-General of Grenada. According to the representative of Barbados in the Security Council the Governor-General of Grenada was the sole legitimate authority on the island after the overthrow and execution of Prime Minister Bishop [97].

The U.S. action was censured by the majority of the delegations at the Security Council as unlawful intervention and violation of the sovereignty of Grenada, but no views were expressed about the competence of the Governor-General to request military assistance. Subsequent literature on the events in Grenada cast doubt on the Governor-General's constitutional capacity to make such a request [98]. The I.L.C. has treated the matter constitutional competence somewhat equivocally. It took the view that the issue is to be settled on the basis of "the rules of international law relating to the expression of the will of the State, not to mention the constitutional rules to which, in certain cases, international law may refer"[99].

In the case of Grenada the question is not so much whether the Governor-General could be constitutionally empowered to make a request for military assistance but whether he was competent to do so under the circumstances prevailing in Grenada in October 1983. It must be remembered that at that time there was a Government in Grenada, the one formed by the opponents of the deposed Prime Minister Bishop, that

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February 1976; see loc. cit. supra n. 70, p. 113, para 16; Quigley, *18 Univ. Miami Inter-Amer. L.R. 271 (1986)*, p. 346.

[97] U.N. Chronicle, vol. xx, No 11, Dec. 1983, p. 19; Keesing's 1984, pp. 32614-5; Letter from Mr. Robinson to Prof. Gordon, *18 Int. Lawyer 381 (1984)*, p. 382; Moore, Grenada and the International Double Standard, *78 A.J.I.L. 145 (1984)*, pp. 148, 156, 159-161.

[98] See Gordon & others, International Law and the United States Action in Grenada: A Report, *18 Int. Lawyer 331 (1984)*, p. 345-351; Joyner, *78 A.J.I.L. 131 (1984)*, pp. 138-9; Vagts, *78 A.J.I.L. 169 (1984)*, 170-1; Nanda, *14 Cal. W.I.L.J. 395 (1984)*, 412-4; *cf*. Quigley loc. cit. *supra* n. 96, pp. 329-330.

[99] Loc. cit. *supra* n. 70, p. 113, para 15.

had effective control of the country [100]. It is also true that according to the Constitution of Grenada the Governor-General had largely ceremonial powers and that the State was represented by the Prime Minister and his Government [101]. Since there was a Government in office in October 1983, it seems that competence to request military assistance lay with that Government.

Be that as it may, the fact is that in times of constitutional crisis a lot of uncertainty is created with regard to the genuineness of the plea for military assistance and it is to be expected that third States may not treat such request favourably [102].

(4) That the request is given after the dispatch of military forces by the assisting State.

An *ex post facto* request for assistance is inadmissible. This was the case in relation to the U.S.-O.E.C.S. action in *Grenada* in 1983 [103]. This is so because the dispatch of troops to the territory of a State without its prior consent constitutes a violation of the rule of non-use of force [104].

A point, however, must be made clear. The dispatch of troops to the territory of a State may be contemplated and planned in advance. This is usually the case with regard to situations of protection of nationals abroad. It is submitted that if a decision to to intervene is taken but *is not* carried out prior to the request of the Government of the State, there is no violation of the rule of non-use of force [105].

Concluding Remarks.

The state of the law with regard to the use of military force at the request of the Government of a State may be described as being the following.

(1) Contemporary international law favours the incumbent Government of the State and not the insurgents. Thus, the incumbent

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[100] Quigley loc. cit. *supra* n. 96, pp. 347-350; Gilmore, *The Grenada Intervention, 1984*, p. 73; Davidson, *Grenada, 1987*, pp. 91-101; *cf*. Nanda loc. cit. *supra* n. 98, pp. 413-4.

[101] See *supra* n. 98.

[102] See Brownlie loc. cit. *supra* n. 2, pp. 501-2.

[103] See statement by the representative of Trinidad-Tobago at the S.C., U.N. Chronicle, vol. xx, No 11, Dec. 1983, p. 20; Keesing's 1984, p. 32616; Quigley loc. cit. *supra* n. 96, pp. 337-347.

[104] Loc. cit. *supra* n. 70, pp. 110-112, paras 5, 10-11. *Cf*. *supra* n. 96.

[105] Quigley loc. cit. *supra* n. 96; for an opposite view see S.C.O.R. 19th yr. 1172nd mtg. para 22 (Algeria).

Government may lawfully receive assistance short of actual dispatch of armed forces from other States whereas the rebels may not.

(2) In case the rebels are provided with material assistance or with direct military assistance by another State then the beleaguered Government may lawfully be assisted by another State at its request. This assistance is rendered under the justification of self-defence or proportionate counter-measures.

(3) In the case where the insurgency is not assisted by another State but is largely localised or of low intensity, then it is generally accepted that a State may assist by direct military force the beleaguered Government upon its request[105bis].

Controversy arises in the case of large-scale insurgencies that command popular support. It has been argued that the principles of non-intervention and self-determination [106] of the people of the intervened State would render military assistance to the beleaguered Government inadmissible [107].

It is submitted that although military action by States upon the request of the Government of another State has in a large number of cases constituted a breach of the duty of non-intervention and a violation of the principle of self-determination, this was due to the manner that such military action was undertaken, rather than due to a violation of an existing rule of impartiality in cases of civil strife.

While it is accepted in the practice of States that the request of military action by the Government of a State renders the use of force by another State lawful in principle, illegality is brought about by either the invalidity of this request or , even if the request is genuine, by the subsequent conduct of the assisting State. Both the U.S.A. and the U.S.S.R. made no secret of their geopolitical interests in Hungary, Czechoslovakia, Afghanistan, the Dominican Republic, and Grenada. Even if request of the Governments of these States had been valid, the result might have been the violation of their political independence. However, this cannot be ascertained *ab initio* but only by examining the attitude of the assisting State in the period after the initial introduction of troops.

[105bis] See Statement by the U.K. representative (Mr. Sinclair) in the 1967 Special Committee on Principles of International Law Concerning Friendly Relations etc. U.N. Doc. A/A.C. 125/ S.R. 57, p. 5., 1967 B.P.I.L. 36.

[106] This is not the same as self-determination of colonial peoples. See *supra* Part One, Ch. 6.

[107] Doswald - Beck loc. cit. *supra* n. 29, p. 213 et seq.

Second Title : THE USE OF MILITARY FORCE UNDER THE PROVISION OF A TREATY .

There have been cases of treaties that were concluded prior to the introduction of the United Nations Charter which conferred to a State or a group of States a general right of military intervention in another State[1] .

In this type of treaty belong the so-called treaties of guarantee which establish the "unidirectional" duty of one or more signatories "to do what is in its [or their] power to secure a certain object to the other party" [2] .

The objects of a treaty of guarantee vary and may include, the preservation of State's territory against external aggression, the preservation of a certain form of government within a State, the protection of international waterways, the assistance to a Government to crush internal rebellion [3] .

The unidirectional character of such treaties distinguishes them from collective self-defence agreements that are reciprocal in nature. Moreover, this type of treaty must be distinguished from treaties establishing regional security arrangements and from Chapter VII of the U.N. Charter. The difference between treaties of guarantee and the above instruments lies in the fact that the object of the former is exclusively consummated within the territorial confines of another State and not in relation to the entire planet or a designated geographical region.

The post-1945 practice contains very few instances of conclusion of treaties giving a general right of military intervention .

When *Cyprus* became independent in 1960 a Treaty of Guarantee was concluded between Cyprus, on the one hand, and Greece, Turkey and the United Kingdom, on the other. By virtue of Article I of the Treaty Cyprus undertook the obligation to ensure respect of its constitution, the provisions of which were the subject of the London - Zurich Accords of 1959 (concluded among Greece, Turkey and the U.K.) [4] . Article II of the Treaty stipulated that Greece, Turkey and the U.K. would guarantee the independence, territorial integrity, the security and the fundamental

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[1] See Oppenheim, *International Law, vol. i, 8th ed. by Lauterpacht 1955*, p. 309; Brownlie, *International Law and the Use of Force by States, 1963*, pp. 318-320.

[2] Oppenheim op. cit. *supra* n.1, p. 964; Dinstein, *War, Aggression and Self-Defence, 1988*, p. 244.

[3] See generally, Oppenheim op. cit. *supra* n.1, p. 965; Brownlie op. cit. *supra* n. 1.

[4] See Ehrlich, *Cyprus 1958-1967, Oxford 1974*, p. 37.

provisions of the constitution of the new State. Finally, Article IV of the Treaty provided that:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.
>
> In so far as common or concerted action may not be possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty. 5

It is more likely that the right to resort to armed force under the provision of a treaty is stipulated on the basis of one of the exceptions of the rule of non-use of force.

The Panama Canal Treaty of 1977 between the U.S.A. and Panama provides in Article IV(2) that:

> ... the United States of America shall have primary responsibility to protect and defend the Canal ... 6

Finally, on 29 July 1987 the governments of India and Sri Lanka concluded an Agreement by virtue of which India pledged to ensure that its territory would not be used "... for activities prejudicial to the unity, integrity and security of Sri Lanka ..."; according to clause 2. 16(c) of the Agreement:

> ... In the event that the Government of Sri Lanka requests the Government of India to afford military assistance to implement these proposals the Government of India will cooperate by giving the Government of Sri Lanka such military assistance as and when requested ... 7

In so far as such treaties give a right of unilateral resort to force on the territory of the guarantied State, the question arises whether they are compatible with Article 2(4) of the Charter and the customary law rule of non-use of force 8 . Moreover, the character of of the latter as a peremptory

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5 *382 U.N.T.S. No 5475.*

6 *16 I.L.M. 1022 (1977).*

7 *27 I.J.I.L. 274-8 (1987)* .

8 See generally, Brownlie op. cit. *supra* n. 1, pp. 320-321; Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, 1985,* p. 115 n. 1.

norm of international law (*jus cogens*) creates a very strong presumption against treaties of guarantee [9] ,

If a provision of a treaty of guarantee is interpreted as giving the right to the guarantor power to resort to force unilaterally upon its own assessment of the situation, this inheres the implication that an act contrary to Art. 2(4) of the Charter is permissible by virtue of a treaty.

As such a treaty of guarantee encounters two legal obstacles. First, Article 103 of the Charter provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

This means that such a provision in a treaty of guarantee must be untenable because of the obligation under Art. 2(4) of the Charter and that it can be fulfilled only if its application does not involve the use of armed force [10] .

The second obstacle is the character of the the prohibition of the use of force as a rule of *jus cogens* that renders such a treaty null and void because it purports to contract out of the customary rule of non-use of force [11] .

It is submitted that a treaty of guarantee may be valid in respect of international *jus cogens* and compatible with Article 103 of the Charter if the relevant provision that authorises resort to force is premised upon an exception to the general rule of non-use of force [12] .

Thus, Article IV(2) of the Panama Canal Treaty is premised on the right of self-defence and its concomitant requirements of necessity and proportionality. The Agreement between India and Sri Lanka is to be activated at the request of the Sri Lankan Government without India having the right to furnish military assistance on its own initiative.

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[9] See Art. 53, Vienna Convention on the Law of Treaties, 1969; *Nicaragua Case (Merits)* , I.C.J. Rep. 1986, p. 14, pp. 100-1, para 190; Brownlie, *Principles of Public International Law, 4th ed. 1991*, pp. 513-4; Sinclair, *The Vienna Convention on the Law of Treaties, 2nd ed. 1984*, pp. 203-226.

[10] See Schwelb, Some Aspects of International Jus Cogens as Formulated by the International Law Commission, 61 A.J.I.L. 946 (1967), pp. 958-9. Incompatibility with Art. 103 of the Charter does not imply the invalidity of the treaty. See Waldock, Second Report on the Law of Treaties, I.L.C. Ybk. 1963, Vol. II, pp. 55-6; Fitzmaurice, Third Report on the Law of Treaties, I.L.C. Ybk. 1958, Vol. II, p. 43. *Contra* . McNair, *The Law of Treaties, 1961*, pp. 217-8.

[11] Brownlie op. cit. *supra* n. 9, p. 514.

[12] See statement by Sir Francis Vallat, I.L.C. Ybk. 1979, Vol. I, 1538th mtg. p. 38, para 38.

Indeed, even if a treaty of guarantee purports general licence of unilateral military intervention to the guarantor party, this can logically become operative only if the situation giving rise to the fulfilment of the duty of guarantee occurs in relation to the guarantied party which is the *only* party competent to invoke the relevant provision of the treaty and request the guarantor's assistance [13].

It is not possible to argue that consent, once given, constitutes a compromise in perpetuity of the consenting State's sovereignty, when it subjects the consenting State to conduct which is contrary to the prohibition of the use of force and which becomes operative solely at the discretion of and determination of the guarantor power [13a].

It is for these reasons that Article IV(2) of the 1960 Treaty of Guarantee of the Republic of Cyprus is very problematic. The above provision was invoked by Turkey in justification of its military action in Cyprus on 20 July 1974. It appears that the situation that provoked the Turkish intervention was the military coup of 15 July 1974 which was incited by the military Government of Greece and led to the overthrow of the Government of Archbishop Makarios [14]. The Turkish plea of Article IV(2) of the Treaty of Guarantee was expressly disputed by the Government of Cyprus. Mr. Rossides, the representative of Cyprus in the Security Council, stated that:

" ... We are told that the justification is the so-called Treaty of Guarantee. Turkey says "I am using my right to intervene under the Treaty of Guarantee". Hence, the meaning of the Treaty of Guarantee must be made clear ...

... What does the relevant Article of the Treaty of Guarantee say about intervention? It says that in the event of a breach of the provisions of the Treaty the three guarantors undertake to consult together. And with respect to what? With respect of invading or attacking or using napalm bombs on Cyprus? No, with respect to representations or measures necessary to ensure observance ... For to attack and to bomb is contrary to the Charter. The provisions of the Treaty of Guarantee do not provide for such attacks. ..."[15]

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[13] Oppenheim op. cit. *supra* n. 1, p. 366.

[13a] See Doswald-Beck, *56 B.Y.I.L. 189 (1985)*, p. 246; *contra* . Necatigil, *The Cyprus Question and the Turkish Position in International Law, 1989*, p. 110.

[14] See statements by the representative of Turkey in the S.C. S.C.O.R. 29th yr. 1780th mtg. paras 55, 57-58;

[15] S.C.O.R. 29th yr. 1782nd mtg. paras 41-42.

Several other delegates disapproved of the Turkish action [16], albeit without expressing themselves on Art. IV(2) of the Treaty of Guarantee [17].

The question of whether this provision entitles the three Guarantor Powers to resort to force in fulfilment of the guarantee has been a matter of controversy. Cyprus has consistently argued against the admissibility of the use of force under the Treaty. Greece has expressly denied that it had a right to resort to force under Article IV(2) [18]. The U.K. appears to have taken the opposite view [19], while Turkey, as the events of July 1974 have shown, has considered that it has a right of military intervention.

This author believes that Article IV(2) of the Treaty, as it is phrased, is incompatible with Art. 103 of the Charter and contrary to international *jus cogens* by virtue of Articles 64 and 71(2) of the 1969 Vienna Convention [20]. A possible admissibility of use of force under Article IV(2) would have been conceivable if Cyprus had requested for military assistance on the part of Turkey.

Furthermore, the Turkish action in 1974 begs some very interesting questions. Even if it is *arguendo* assumed that military intervention was indeed permissible under the Treaty of Guarantee, then Turkey has never explained satisfactorily why, instead of withdrawing after the restoration of the constitutional order on the island [21], which its action purported to achieve, it occupied one third of Cyprus; claimed that the 1960 constitutional arrangements were inoperative; and allowed the Turkish-Cypriot community in the occupied territory to secede in 1983, thus impairing the territorial integrity of Cyprus which it has undertaken to guarantee.

Indeed, this practice reveals a manifest contradiction, and hence inconsistency, with regard to a right to use force under a general guarantee provision which when resorted to destroys the very object it purports to guarantee [22].

It, moreover, reveals the danger of abuse a treaty of guarantee may be subject to by a guarantor power, to the detriment of the guarantied

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[16] See ibid. 1786th mtg. paras 50, 55 (India); U.N. Monthly Chronicle vol. xi, No 8, Aug.-Sept. 1974, pp. 16 (U.S.A.), 18 (Costa Rica, Austria), 19 (Australia).

[17] Only the representative of France stated that the Turkish action was in violation of the Treaty of Guarantee, see U.N. Monthly Chronicle loc. cit. supra n. 16, p. 16.

[18] S.C.O.R. 19th yr. 1097th mtg. para 169.

[19] Ibid. 1098th mtg. paras 66-68.

[20] Sinclair op. cit. *supra* n.9, p. 225; *contra*. Ronzitti op. cit. *supra* n. 8, p. 133; Necatigil op. cit. *supra* n. 13a, p. 110.

[21] *Cf*. Polyviou, *Cyprus, the Tragedy and the Challenge, 1975*, pp. 69-70.

[22] Ibid. pp. 72-3.

State, if licence is given for military intervention in relation to a wide spectrum of objectives, and this is left to the absolute discretion of the former [23] .

[23] See Henkin, Comment in Ehrlich op. cit. *supra* n. 4, pp. 129-130; Dinstein op. cit. *supra* n. 2, pp. 245-6.

CONCLUSIONS

The aim of this section is to present this writer's submissions on the current state of customary international law of the use of force by States, and attempt an evaluation of the influence of this law on the conduct of individual States in their international relations.

The international law on the use of armed force is pertinent to States in their international relations. This is as true at present as it was in 1945, when the United Nations was established, and prior to that date. Statehood is the main component of the international community and permeates contemporary international law. Furthermore, the concept of State sovereignty, the juridical manifestation of Statehood, continues to play a major role in international relations. State sovereignty, however, has come a long way to become subject to the rule of law that was generated through its exercise in the practice of States. The phenomenon of the use of armed force has been one of the most important areas of international relations where State sovereignty has been voluntarily subjected to the rule of law.

Resort to armed force has constituted throughout human history an ugly and deplorable condition. It entails a manifestation of social individualism which is established on the premise that the promotion of the interests of a Member of the international community is effected by violent means through the destruction of part or the entirety of another Member of this community.

The history of mankind is full of instances of resort to violence. It was, however, the immense destruction that came as a result of the two World conflicts of 1914-18 and 1939-45 that became the catalyst for the initiation of the current rule of the prohibition of the use of force by States.

The two World Wars during this century and the mobilisation of scientific technology and industrial production as part of the conduct of armed conflict have expanded the ambit of "targets" of military action. These came to include, apart from the military capability of an opponent, its entire economic infra-structure as well. This contingency brought armed conflict to bear on the belligerent States as a whole, rather that solely on the contending armies on the battlefield.

The repercussions of war on the totality of the State gave rise to the need of introducing some kind of restrictions upon the unlimited right of States to to resort to force in classical international law.

The establishment of the League of Nations in the aftermath of the First World War aspired to regulating "resort to war". In this sense resort to force remained legitimate but only as part of a procedure of which it constituted only the final stage. Peaceful settlement of disputes by way of arbitration, adjudication or use of the Council of the League, should always precede resort to violence. During this period, however, State practice evolved beyond mere regulation of resort to force to the total prohibition of armed force. The turning point was the conclusion of the General Treaty for the Renunciation of War as an Instrument of National Policy, 1928, (The Kellogg-Briand Pact or the Pact of Paris). The Pact of Paris prohibited all resort to war except in self-defence.

The reference to "war" in the text of the Covenant of the League and the Pact of Paris has been problematic. "War" as a term of art connoted a formal state of affairs, rather than strictly acts of armed force, and its existence was dependent upon the will of the disputing States. The practice of States, however, especially subsequent to the Pact of Paris, evinces a total prohibition of the use of armed force which culminated in the adoption of the Charter of the United Nations, and Article 2(4) thereof.

This has set the pattern of contemporary customary international law which is submitted to be the following:

1. Resort to armed force or the threat thereof is totally and unequivocally prohibited. This implies the following:

1.1 The prohibition extends to threats of force. A threat of force exists if there is an explicit or implicit indication of the intention to use force by one State against another that is not factually premised on an exception to the rule of non-use of force. A threat of force must be treated as a violation of the prohibition of force by being viewed against the background of a specific dispute between two States and all relevant circumstances.

1.2 The prohibition of resort to armed force is phrased in broad terms. As such it covers the use of force irrespective of a "state of war", and more specifically it entails the inadmissibility of armed reprisals and instances of resort to force by proxy of armed individuals that do not belong to the armed or security forces of a State. With the exception of political support and humanitarian assistance to armed bands any other material support is a violation of the rule of non-use of force if it is such as to amount to a direct link between the provision of *matériel* and the ability of the guerrillas to use force against another State.

1.3 The prohibition of the use of force applies to action by a State to deprive a colonial people of their right of self-determination. This is pertinent to two situations:

1.3 (i). The administering Power which is debarred from adopting forcible measures, individually or in concert with another State, against the population of the territory that reveal a systematically organised attempt at destroying the colonial people's right to self-determination.

1.3 (ii). Neighbouring States that assert a claim on the colonial territory irrespective of the wishes of the population thereof.

By contrast there is no prohibition in international law that forbids a colonial people to rise in revolt against the colonial Power. At the same time this revolt is totally outside the sphere of international law and entitles the armed forces of the administering Power to defend themselves against specific instances of attack. What it does not entitle the colonial Power to do is to embark upon a policy of suppression that deprives the people of the the colony of self-determination. Other States may support the struggle of self-determination but short of direct military intervention on behalf of the insurgents or by providing them with material or financial assistance.

The use of force on the part of a colonial Power with respect to self-determination is a use of force in "international relations" only as far as the conduct of the colonial Power or neighbouring States is concerned towards the people of the territory. The reverse is not the case. A revolt by the latter does not constitute force "in international relations". Finally, minority groups that do not qualify for the status of colonial peoples may become the target of State use of force provided that the territory where they reside is not under military occupation or in dispute between successor ethnic groups after the withdrawal of an administering Power.

1.4 The prohibition of force refers to the territorial integrity and political independence of another State. This implies that:

1.4 (i). The acquisition of territory or the creation of a State by way of the use of force by another State is unlawful. The practice of non-recognition since the 1930s constitutes evidence in customary law of this contingency.

1.4 (ii). The phrase "territorial integrity and political independence" does not purport to restrict the rule of non-use of force. On the contrary, it must be read as referring to the territorial sovereignty of the State: Namely, the physical element of land, maritime, and air space, and the

political competence of the State therein. Thus, force is prohibited in the sense of mere violation of the boundaries of a State.

1.4 (iii). The non-violabilty of frontiers extends to the inviolability of demarcation lines in territory disputed by two States. This development incurs the advantage of not subjugating the rule of non-use of force to the merits of a territorial dispute with respect to opposing claims of territorial sovereignty.

1.5 The rule of the prohibition of force refers to armed force. Thus, political and economic coercion is in principle compatible with the rule of non-use of force. They can be harmful for the State they are directed against but this is not always discernible *ab initio* . It remains to be assessed in the course of such conduct. It is, therefore, more appropriate to view such policies according to the manner they progress, and it is better to consider them as instances of intervention rather than violations of the rule of the prohibition of the use of force.

1.6 The prohibition of force extends to the promotion of the purposes of the United Nations (as they are stated in Article 1 of the U.N. Charter) by way of unilateral violence. Thus, claims of resort to force for the promotion of international peace or protection of the human rights of the population of a State, are unlawful in contemporary customary international law.

1.7 The practice of States since the 1930s has upheld the prohibition of the use of force as a rule of customary law. This is manifested by the tendency, even by States intent upon violating the law, to justify resort to force by reference to exceptions of the rule of non-use of force. There is no instance in State practice that the rule of the prohibition of armed force has been abandoned in favour of the 19th century unlimited right of resort to force. Claims by a minority of jurists that the United Nations Organisation has been proven ineffective and that, hence, the prohibition of the use of force has in effect been repudiated are not shared by Governments. The International Court of Justice in its Judgment in the *Nicaragua Case* pointed at this contingency and held that the rule of non-use of force was not only part of customary law, but also, a peremptory norm of international law (*jus cogens*)

The unilateral resort to force by States is not totally restricted. The law allows for exceptions to the rule of non-use of force.

1. *Defensive Action* constitutes the only universally undisputed occasion of unilateral resort to force. "Self-defence" has been presented, in the overwhelming majority of literature, as a general concept that entitles States to resort to force in protective action (should the necessity arise) which must be proportionate to the threat to be repelled. Little attention has been given to the precise factual situations that give rise to such action.

Self-defence is admissible in cases of extreme urgency in which the violation of the law can be best countered by unilateral rather than community action. It is not a case of an *a priori* conceptual admissibility of unilateral forcible action irrespective of the degree of urgency and intensity of the situation that gives rise to it. Otherwise, there is the danger that States are recognised considerable freedom to rely on a theoretical formula which may be easily adapted to the facts of a situation instead of the other way around: Namely, that it is the factual situation on the ground that warrants or does not warrant a forcible response, its kind, its intensity, its being undertaken in concert with another State. The Judgment of the Court in the *Nicaragua Case* has dealt with the problem from precisely this angle.

What is perceived as "self-defence" is an activity between two States that arises with regard to an actual use of force. Thus, the concepts of anticipatory self-defence and pre-emptive strike are inadmissible in contemporary international law.

The fact that gives rise to protective action is the occurrence of a use of armed force. It is the latter that constitutes the centre around which the right of self-defence revolves.

1.1 If the unlawful use of force against a State is of such magnitude, in terms of intensity and/or territorial scope, as to be prejudicial to the international standing of the State as a territorial political and economic entity, there exists a case of armed attack. Self-defence may be resorted to both individually and collectively according to customary law and the U.N. Charter (viz. Article 51). The extremity of the danger against the victim State is such as to excuse a breach of international peace of considerable intensity.

1.2 By contrast, if the use of force against the victim State is not such as to pose a danger to its existence as a whole, then defensive action is lawfully undertaken against the precise source of the use of force. If the latter is situated on the territory of another State, then defensive action

must be carried out individually only. While the necessity of protection is acknowledged it is not such that must extend to the point of creating a serious breach of peace. This kind of action was labelled by the Court in the *Nicaragua Case* as action in proportionate counter-measures.

1.3 With regard to collective self-defence, apart from the existence of an armed attack against the victim State, there must exist a statement that the latter is the victim of an armed attack and an express request for assistance.

1.4 Defensive action is exceptional only and it must cease if the necessity that gave rise to it disappears or if the Security Council of the United Nations has adopted effective collective measures for the maintenance of international peace and security.

2. State practice provides evidence of certain other grounds which are purported to allow for lawful unilateral resort to force.

2.1 *Protection of Nationals* . It is doubtful that there is a general right allowing for the protection of a State's nationals abroad. This justification has been met with persistent objection whenever it was undertaken without the consent of the State where the rescue operation takes place. Unilateral forcible action for the protection of nationals has often been presented as self-defence. It is not an exercise of the right of self-defence due to the lack of the requirement of armed attack. It could be, however, as a *de lege ferenda* proposition, an exercise of proportionate counter-measures. This contingency should arise only in cases where violence is threatened against individuals that are associated with a State through a genuine link of nationality in order to coerce the State into an act or omission which is within its sovereign discretion to commit.

2.2 *Humanitarian Intervention* . The resort to force on the territory of a State in order to protect its citizenry from gross abuses of human rights by their Government is unlawful by virtue of total lack of *opinio juris* in the practice of States.

2.3 *The Use of Military Force on the Basis of the Consent of the Government of a State in situation of Civil Strife* .
In such cases international law favours the incumbent Government but not the rebels. The latter are not entitled to any form of material assistance to pursue their armed struggle.

The provision of assistance by a State to the Government of another State in the form of economic aid and material supplies is generally considered to be lawful.

Some controversy arises with regard to the dispatch of troops to the territory of another State at the invitation of the Government in order to assist it to suppress internal rebellion. Such action is generally considered lawful if the insurgents are assisted by another State.

In the case where the rebels do not receive outside material support two situations must be distinguished:

2.3 (i). If the insurgency is highly localised or of low intensity it is considered lawful to assist the incumbent Government to suppress the uprising.

2.3 (ii). If the insurgency is wide-spread and commands popular support, then it is being argued by considerable authoritative opinion that active military assistance to the incumbent Government is unlawful as violating the principles of self-determination and non-intervention.

This writer has suggested a different approach. The introduction of troops at the invitation of the incumbent Government is in principle lawful. This is so because the consent of the territorial sovereign deprives the introduction of troops to be violative of the territory of the requesting State. As such it does not breach the rule of non-use of force that refers only to external force in relation to the requesting State. The violation of the rule of non-use of force exists, rather, because of a defect of the request, or, even if this not the case, because of the subsequent conduct of the assisting State. The latter would consist of imposing a solution to the internal conflict against the wishes of the incumbent Government and beyond the terms of the invitation.

2.4 *Military Intervention under the Provision of a Treaty* . So long as the licence to intervene which is embodied in the text of the treaty is premised on one of the exceptions to the rule of non-use of force there is no violation of the law. However, if the right to intervene is conferred in general terms and the putative intervenor is given a general mandate to judge the circumstances in which military action is to be undertaken, then there is violation of the law. Such contingency would amount to the effective abolition of the constraint imposed by the rule of non-use of force and a derogation from a rule of *jus cogens* that would render embodying this right null and void.

International relations from 1945-1992 have witnessed frequent resorts to force and a tendency on the part of some States to pursue forcible action that appeared to disregard the constraints of the law.

The main factors that caused resort to force during this period could be said to be: (1) The polarisation of international relations during the "Cold War" period (e.g. the U.S. and Soviet interventions in other countries). (2) The stubborn disinclination to accept change and relinquish colonial or mandatory administration of territories in Africa (e.g. the conduct of Portugal and South Africa). (3) The greed for political and territorial expansion (e.g. the actions of India in Goa, Indonesia in East Timor, Morocco in Western Sahara, Argentina in the Falkland Islands, Iraq against Iran, Iraq against Kuwait). (4) The promotion of economic interests (e.g. the invasion of Kuwait by Iraq). (5) The refusal to admit the creation of a new State in a specific region (e.g. the attitude of the Arab States towards the State of Israel). (6) The option of the new State to impose its existence and extract admission in the region on its own terms (e.g. the attitude of Israel towards the Arab States after 1967).

The significant factor of the above situation is that use was made of concepts that are in principle exceptions to the rule of non-use of force. The practice of the States that have resorted to armed force constituted an attempt either at expanding the scope of the exceptions to the rule of non-use of force or simply using these exceptions as caveat to conceal policies of aggression.

While the option for the exceptions rather than the repudiation of the rule of the prohibition of the use of force is implicit of the primacy of the rule, the abuse or broad interpretation of concepts such as self-defence, protection of nationals and State consent, may have the effect of eroding the rule of non-use of force. This is not the case for two reasons:

First, the persistent objection on the part of the majority of the international community towards such claims has prevented them from becoming rules of customary law.

Secondly, the States that themselves have resorted to force made opposite claims in upholding the law and the restrictive application of its exceptions when their politically rival States resorted to force. Now, this manifests a fundamental inconsistency of practice that prevents such claims from being consolidated as a rule of customary law.

Moreover, the International Court of Justice in the *Nicaragua Case* treated the phenomenon of the use of force in the context of the legal

claims of its authors (as opposed to claims of policy and "national security") and interpreted the exception of self-defence very restrictively. The combined effect of the overwhelming majority of State practice and the statement of the law in the *Nicaragua Case* is that the prohibition of the use of force is firmly established, unilateral resort to force is an *exceptional* circumstance and it should not be allowed to be destructive of general international peace.

In 1945 the victorious Allies against the *Axis* established the United Nations Organisation in order to divest individual States of the instrument of armed violence and to constitute the use of armed force a means of community reaction against aggression. The advent of the so-called "Cold War" rendered the latter very important action of the Organisation unworkable in practice. At the same time the Kuwait crisis of 1990-1991 manifested the power of the collective security machinery of the United Nations and may lead to optimistic forecasts of the future of the international community. The present author does not deem appropriate to speculate in that direction.

What must be pointed out is this: Irrespective of the workability or effectiveness of the United Nations, the underlying factors of unilateral resort to force are and shall always be present. Unilateral forcible action when military, political, economic potency exists is a temptation that, sadly, has penetrated and often moulded the decision-making of many a Government. It is for this reason that a restrictive theory on the exceptional circumstances of unilateral resort to force becomes indispensable. For if force is to be used only in cases of the utmost emergency, then international peace and security will be served. The Unite Nations is an important means in that process but it is not an end in itself. In the latter case every failure, whether big or small, will be interpreted as impotence of the enforceability of the law at large. As such it may be used to persuade Governments of States to espouse the sinister option of unilateral resort to force in order to safeguard their interests at the expense of other Members of the international community.

History reveals that such conduct is detrimental to its perpetrator politically and sometimes materially, whether it be a great or a weak Power: The experience inflicted upon Nazi Germany, pre-1945 Japan and, forty-five years later, on Iraq, illustrates this point. The political damage done to the U.S.A. and the Soviet Union because of their interventions has been considerable. Portugal and South Africa have been the political

pariahs of the international community for a long time. Israel has not found peace and security throughout its forty-four years of existence despite several attempts at securing its acceptance in the region by way of unilateral resort to force.

It is also detrimental to the international community as a whole. An armed conflict between two States can degenerate quickly into a conflict involving a great number of States. Inter-State commerce, the environment, the human rights of individuals are often victim of initiation of violence. Armed force as an instrument of national policy is the vehicle of inflicting upon another State or States one's own perception of how things ought to be. It is the hope of this writer that the experience of the past forty-five years and especially of the Kuwait crisis shall function as an impediment on intentions of pursuing one's own interests by way of the use of force.

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