USE OF FORCE AND INTERNATIONAL LAW

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INTRODUCTION

The First World War had just marked the end of the balance of power systems. It had also resulted in efforts to reconstruct international affairs upon the basis of a general institution which would oversee the conduct of the world community to ensure that an aggression of such magnitude would not happen again. The reaction of the League of Nations reflected a completely different attitude to the problems of force in the international arena.  

The covenant of the League of Nations stated that members should submit disputes likely to lead to an outbreak to arbitration or judicial settlement or inquiry by the Council of the league. In no circumstances were members to resort to war until three months after the arbitral award or judicial decision or report by the Council had been declared. This was intended to provide a cooling-off period for passions to subside and reflected the view that such a delay might well have broken the seemingly irreversible chain of tragedy that linked the assassination of the Austrian Archduke in Sarajevo with the outbreak of general war in Europe. League members would agree not to go to war with members complying with such an arbitral award or judicial decision or unanimous report by the Council.  

The League of System did not, as should be noted, prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels. It was a constant challenge of the inter-war years to close the gaps in the covenant in an effort to achieve the total prohibition of war in international law and this resulted ultimately in the signing of the 1928 General Treaty for the Renunciation of War (the Kellogg-Briand Pact). The parties to this treaty condemned recourse to war and agreed to renounce it as an instrument of national policy in their relations with one another.

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2 Brownlie, Use of Force, chapter 3. But note Hague Convention II of 1907, which provided that the parties would not have recourse to armed forces for the recovery of contract debts claimed from the government of one country by the government of another as being due to its nationals.
3 Brownlie, Use of Force, chapter 4. See especially articles 10-16 of the Covenant.
4 See e.g. Dinstein, War, chapter 4; A.K. Skubiszewski, ‘The Use of Force by States’ in Sorensen, Manual of Public International Law, pp. 739, 742-4, and Brownlie, Use of Force, pp. 74-92
5 Article I.
In view of the fact that this treaty has never been terminated and in light of its wide spread acceptance,\(^6\) it is but obvious that prohibition of the resort to war is now a valid principle of customary international law. It is no longer possible to set up the legal relationship of war in international society. Thus, for example, it is unnecessary to declare war in order to engage legitimately in armed conflict.\(^7\)

However the prohibition on the resort to war does not mean that the use of force in all circumstances is illegal. Reservations to the treaties by some states made it apparent that the right to resort to force in self defence was still a recognised principle in international law.\(^8\) Whether in fact any other measures short of war such as reprisals were also prohibited or were left untouched by the treaty’s ban on war was unclear and subject to conflicted interpretations.\(^9\)

THE UNITED NATIONS CHARTER AND FORCE

Article 2(4) of the UN Charter declares, ‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’ This provision is regarded as a principle of customary international law and as such is binding upon all states in the world.\(^10\)

Article 2(4) was incorporated and elaborated on as a principle of international law in the 1970 Declaration on Principles of International Law;

1. Wars of aggression constitute a crime against peace for which there is responsibility under international law
2. States must not threaten or use force to violate existing international frontiers or to solve international disputes
3. States are under a duty to refrain from acts of reprisal involving the use of force.

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\(^6\) It came into force on 24 July 1929 and is still in effect. Many inter-war treaties reaffirmed the obligations imposed by the Pact: see e.g. Brownlie, *Use of Force*, pp. 75-6


\(^8\) See e.g. Cmnd 3153, p.10


4. States must not use force to deprive people of their right to self-determination and independence.

5. States must refrain from organising, instigating, assisting or participating in the acts of civil strife or terrorist acts in another state and must not encourage the formation of armed bands for incursion into another state’s territory.

Many of these items, while being crucial, still remain ambiguous. Although the Declaration in itself does not constitute a binding document, it is significant as an interpretation of the Charter.\(^{11}\)

Article 2(6) of the Charter provides that the UN ‘shall ensure that states that are not members of the United Nations act in accordance with these Principles as far as may be necessary for the maintenance of international peace and security. In fact, many of these resolutions that have been drafted are simply addressed to ‘all states’.

Force finds its presence in both international and domestic arenas of international law. Internationally the provisions governing the resort to force do not affect the right of a state to take measures to maintain peace and order within its jurisdiction. Accordingly, such a state may forcibly suppress or rather control riots. In the event of any hurt or damage to any alien person or property, the state may be required to make reparation to the state of the alien concerned\(^{12}\), but apart from this the prohibition on force in international law is not in general applicable within domestic jurisdictions. In order for force to be legitimate, it must fall within one of the exceptions which are either the right to self-defence or enforcement action mandated by the United Nations Security Council.

One point of discussion that has come up in the past\(^{13}\) and which from time to time keeps coming into consideration is whether the term ‘force’ in article 2(4) of the UN Charter includes only armed force\(^{14}\) but other forms of force, for example, economic force.\(^{15}\) Does the


\(^{12}\) Chapter 14, p. 582, of the Draft Articles on the Effects of Armed Conflicts on Treaties

\(^{13}\) An attempt by Brazil to prohibit ‘economic measures’ in article 2(4) itself was rejected, 6 UNCIO, Documents p. 335. See also L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations*, 3rd edn, New York, 1969, p. 49.

\(^{14}\) See e.g. the mining of Nicaraguan harbours by the US, the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 128; 76 ILR, p. 349

\(^{15}\) See Simma, *Charter*, p. 208
imposition of boycotts or embargoes against particular states or group of states come within article 2(4), so rendering them illegal? 16 Although that provision is not modified in any way, the preamble to the Charter does refer to the need to ensure that ‘armed force’ should not be used except in the common interest, while article 51, dealing with the right to self-defence, specially refers to armed force, although it is not of itself conclusive as to the tolerability of other forms of coercion.

The 1970s Declaration on Principles of International Law recalled the ‘duty of states to refrain... from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state and the International Covenants on Human Rights adopted in 1966 emphasised the right of all people to freely pursue their economic, social and cultural development. This approach was underlined in the Charter of Economic Rights and Duties of States, approved by the General Assembly in 1974, which particularly specified that ‘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.’ The question of the legality of the open use of economic pressures to induce a change of policy by states was reviewed with renewed interest in the light of the Arab oil weapon used in 1973-4 against states deemed favourable to Israel. 17 It does seem, however, that there is at least a case to be made in support of the view that such actions are contrary to the United Nations Charter, as interpreted in numerous resolutions and declarations. It is also to be noted that article 2(4) covers threats of force as well as use of force. 18 This issue was addressed by the International Court in its Advisory Opinion to the General Assembly on the Legality of the Threat or Use of Nuclear Weapons. The Court stated that a ‘signalled intention to use force if certain events occur’ could constitute a threat under article 2(4) where the envisaged use of force would itself be unlawful. Examples given include threats to secure territory from another state or causing it

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17 Paust and Blaustein, Arab Oil Weapon.
to ‘follow or not follow certain economic paths’. The Court appeared to accept the argument that the mere possession of nuclear weapons did not of itself constitute a threat. If the anticipated use of weapons was intended as a means of defence and this would be a consequential and necessary breach of the principles of necessity and proportionality, this would suggest that a threat contrary to article 2(4) exists.

The fundamental nature of international relations, as was concluded by the International Court of Justice in the Corfu Channel case, lay in the respect by independent states of each other’s territorial sovereignty. In addition, the Eritrea-Ethiopia Claims Commission took the position that recourse to force would violate international law even where some of the territory connected was territory to which the state resorting to force had a valid claim. It noted that ‘border disputes between states are so frequent that any exception to the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.’ Intervention and, depending on the circumstances, aggression may also take place when foreign forces legitimately in the country act beyond the permitted conditions governing their stay or beyond the ending of the particular agreement in question (article 3(e) of the Definition of Aggression). For example Russian forces legitimately in the Crimean region of Ukraine under the treaty of 1997 (extended in 2010) exceeded their permitted bases and areas to take control, directly or indirectly, of the peninsula in late February, early March 2014 following a period of upheaval in Ukraine which culminated in the President fleeing the country and a new government taking control.

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19 This was cited by approval by the arbitral tribunal in Guyana v. Suriname, award of 17 September 2007, paras 439 and 445, where an order by Surinamese naval vessels to an oil rig to leave the area within twelve hours or face the consequences was deemed to constitute such a threat.
21 See the Nicaragua Case, ICJ Reports, 1986, pp. 14, 109-10; 76 ILR, pp. 349, 443-4, and see further p. 820
CATEGORIES OF FORCE

Since the establishment of the Charter there are basically three categories of compulsion open to states under international law. These are retorsion, reprisal and self-defence.24

RETORSION25

Retorsion is the adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a way of retaliation against the injurious legal activities of another state. Retorsion is a lawful method of showing displeasure in a way that hurts the other state while remaining within the boundaries of legality. The Hickenlooper Amendments at the American Foreign Assistance Act are often quoted as an instance of retorsion since they required the United States President to suspend foreign aid to any country nationalising American property without proper compensation. This procedure was applied only once, as against Ceylon (now Sri Lanka) in 1963, and has now been effectively repealed by the American Foreign Assistance Act of 1973.26

REPRISALS27

Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state; the classic case dealing with the law of reprisals is the Nautilaa dispute28 between Portugal and Germany in 1928. This concerned a German military raid on the colony of Angola, which destroyed property, in retaliation for the mistaken killing of three German lawfully in the Portuguese territory.

The tribunal in discussing the Portuguese claim for compensation emphasised that before reprisals could be undertaken, there had to be sufficient justification in the form of a previous act contrary to international law. If that was established, reprisals had to be preceded by an unsatisfied demand for reparation and accompanied by a sense of proportion between the

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24 As to the use of force by the UN, see below, chapter 22, p. 908
28 2 RIAA, p. 1011 (1928); 4 AD, p. 526. See also G. Hackworth, Digest of International Law, Washington, 1943, vol. VI, p. 154
offence and the reprisal. Those general rules are still applicable but have now to be interpreted in the light of the prohibition on the use of force posited by article 2(4) of the United Nations Charter. Reprisals as such undertaken during peacetime are thus unlawful, unless they fall within the framework of the principle of self-defence.29

THE RIGHT OF SELF-DEFENCE

The traditional definition of the right of self-defence in customary international law arose out of the Caroline case.30 This dispute revolved around an incident in 1837 in which British subjects seized and destroyed a vessel in an American port. This had taken place because the Caroline had been supplying groups of American nationals, who had been conducting raids into the Canadian territory. In the correspondence with the British authorities which followed the incident, the US Secretary of State laid down the essentials of self-defence. There had to exist ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’ Not only were such conditions necessary before the act of self-defence became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, ’since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.’ These principles were accepted by the British Government at that time and are accepted even today as part of customary international law.31

Article 51 of the Charter provides that:

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 the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and

31 See e.g. the Legal Adviser to the US Department of State, who noted that 'the exercise of the inherent right of self-defence depends upon a prior delict, an illegal act that presents an immediate, overwhelming danger to an actual and essential right of the state. When these conditions are present, the means used must then be proportionate to the gravity of the threat or danger', DUSPIL, 1975, p. 17
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.

In order to be able to resort to force in self-defence, a state has to be able to prove that it has been the victim of an armed attack and it bears the burden of proof.\textsuperscript{32} The Court has noted in previous cases that it is possible that the mining of a single military vessel might suffice,\textsuperscript{33} but an attack on a ship owned, but not flagged, by a state will not be equated with an attack on that state.\textsuperscript{34} However, it is essential to show that the state seeking to resort to force in self-defence had itself been intentionally attacked. In a series of incidents discussed by the Court in the \textit{Oil Platforms} case, it was noted that none of the attacks appeared to have been aimed specifically and deliberately at the US.\textsuperscript{35} In seeking to determine how serious an attack must be in order to validate a self-defence response, the Court in the \textit{Nicaragua} case\textsuperscript{36} distinguished ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’ and this was reaffirmed in the \textit{Oil Platforms} case.\textsuperscript{37}

In many cases, however, it might be easier said than done to determine the moment when an armed attack had commenced in order to conform to the requirements of article 51 and the resort to force in self-defence. For example, it has been argued that with regard to actions against aircraft, an armed attack begins at the moment that the radar guiding the anti-aircraft missile has ‘locked on’.\textsuperscript{38} Further, one argument that has been made with regard to Israel’s first strike in June 1967 is that the circumstances were such that an armed attack could be deemed to have commenced against it.\textsuperscript{39}

Another aspect of the problem as to what constitutes an armed attack is the complexity of classifying particular uses of force for these purposes. For instance, would an attack upon an embassy or diplomats abroad constitute an armed attack legitimating action in self-defence?

On 7 August 1998, the US embassies in Kenya and Tanzania were bombed, causing the loss

\begin{footnotes}
\item[33] \textit{Ibid.}, p. 195
\item[34] \textit{Ibid.}, p. 191
\item[35] \textit{Ibid.}. The incidents included missile attack from a distance that meant it could not have been aimed at a particular vessel (The \textit{US Sea Isle City}) as distinct from ‘some target in Kuwaiti waters’; an attack on a non-US flagged vessel; the alleged firing on US helicopters from Iranian gunboats that the Court found unproven; and mine-laying that could not be shown to have been aimed at the US, \textit{ibid.}, pp. 191-2. However, this requirement for a deliberate and intentional attack on the target state, rather than merely an indiscriminate attack, is controversial and open to question.
\item[37] ICJ Reports, 2003, pp. 161,187; 130 ILR, pp. 323, 346
\item[38] See \textit{Gray, Use of Force}, p. 128, note 57.
\item[39] See below, p. 825
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of over 250 lives and appreciable damage to property. On 20 August, the US launched a series of cruise missile attack upon installations in Afghanistan and Sudan associated with the organisation of Bin Laden deemed responsible for the attacks, in so doing, the US declared itself to be acting in accordance with article 51 of the Charter and in exercise of its right of self-defence. In the Nicaragua case, the court did not accept that the right to self-defence did not apply to situations where a third state had provided assistance to rebels in the form of provision of weapons or logistical or other support, although this form of assistance could constitute a threat or use of force, or amount to intervention in the internal or external affairs of the state.

The International Court in its advisory opinion in the Construction of a wall case appeared to adopt what at first sight seemed to be a very restrictive and narrow approach by noting that article 51 recognised, ‘the existence of an inherent right of self-defence in the case of armed attack by one state against another state’ and declaring that this provision did not apply with regard to Israel’s actions since these were taken with regard to threats originating from within the occupied territories and not imputable to another state. However this cannot be understood to mean that self-defence does not exist with regard to an attack by a non-state entity emanating from a terrorist outside of the control of the target state. Further, the legal source of Israeli actions in the occupied territories, whether or not they legitimated the construction of the wall would seem to lie rather in the laws or armed conflict (international humanitarian law) and the ability of an occupying state to take action to maintain public order and protect its own forces.

The day after the 11 September 2001 attacks upon the World Trade Centre in New York, the Security Council adopted resolution 1368 in which it specifically referred to ‘the inherent right of individual or collective self-defence in accordance with the Charter’. Resolution 1373(2001) reaffirmed this and acting under Chapter VII, adopted a series of binding decisions, including a provision that all states shall ‘take the necessary steps to prevent the commission of terrorist acts’. Such binding Security Council resolutions declaring terrorism to be a threat to international peace and security with regard to which the right of self-defence

40 See ‘Contemporary Practice of the United States’, 93 AJIL, 1999, p. 161. The US stated that the missile strikes ‘were a necessary and proportionate response to the imminent threat of further terrorist attacks against US personnel and facilities’, ibid, p. 162 and S/1998/780
41 ICJ Reports, 1986, pp. 103-4; 76 ILR, pp. 437-8
43 See article 43 of the Hague Regulations 1907. See further below, chapter 21, p. 855
is operative as such, lead to the conclusion that large-scale attacks by non-state entities might amount to ‘armed attacks’ within the meaning of article 51 without the requirement to attribute them to another state and thus justify the use of force in self-defence by those states so attacked. On 7 October 2001, the US notified the Security Council that it was exercising its right of self-defence in taking action in Afghanistan against the Al-Qaeda organisation deemed responsible for the 11 September attacks and the Taliban regime in that country which was accused of providing basis for the organisation. The members of the NATO coalition invoked article 5 of the NATO Treaty and the parties to the Inter-American Treaty of Reciprocal Assistance, 1947 invoked a comparable provision. Accordingly the members of both these alliances accepted that what had happened on 11 September constituted an armed attack within the meaning of article 51 of the Charter.

A further question is whether a right to anticipatory or pre-emptive self-defence exists. The notion of anticipatory self-defence is of particular relevance in the light of modern weaponry that can launch an attack with remarkable speed, which allows the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small. States have in the past employed pre-emptive strikes in self-defence. Israel, in 1967, launched a strike upon its Arab neighbours, following the blocking of its southern port of Eilat and the conclusion of military pact between Jordan and Egypt. This completed a chain of events precipitated by the mobilisation of Egyptian forces on Israel’s border and the eviction of the United Nations peacekeeping forces from the area by the

44 See the The Separate Opinion of Judge Koojimans and Judge Simma in Congo v. Uganda, ICJ Reports, 2005, pp. 168, 314 and 337 respectively. Further recognition that particular hostile actions by non-state entities could amount to ‘attacks’ may be found in Security Council resolution 1701 (2006), in which both the ‘attacks’ by Hizbollah, an armed militia controlling parts of Lebanon, upon Israel (which precipitated the summer 2006 armed conflict) and Israeli ‘offensive military operations’ were condemned.
46 See www.nato.int/terrorism/factsheet.htm. Article 5 provides that: ‘The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed forces, to restore and maintain the security of the North Atlantic area.
47 Contrast Bowett, Use of Force, pp. 118-92, who emphasises that ‘no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the states capacity for further resistance and so jeopardise its very existence’, and Franck, Fairness, p. 267, who notes that in such circumstances ‘the notion of anticipatory self-defence is both rational and attractive’, with Brownlie, Use of Force, p. 275, and L. Henkin, How Nations Behave, 2nd edn, New York, 1979, pp. 141-5. See also R. Higgins, The Development of International Law through the Political Organs of the United Nations, Oxford, 1963, pp. 216-21; and Franck, Recourse, chapter 7.
Egyptian President. It could of course also be debated that the Egyptian blockade itself constituted the use of force, thus legitimising Israeli actions without the need for ‘anticipatory’ conceptions of self-defence, especially when taken together with the other events. It is noteworthy that the United Nations in its parley in the summer of 1967 apportioned no responsibility for the outbreak of fighting and did not condemn the exercise of self-defence by Israel.

The dilemma, of course, with the concept of anticipatory self-defence is that it involves fine calculations of the various moves by the other party. A pre-emptive strike embarked upon too early might constitute an aggression. There is a difficult line to be drawn. One suggestion has been to distinguish anticipatory self-defence, where an armed attack is foreseeable, from interceptive self-defence, where an armed attack is imminent and unavoidable so that the evidential problems and temptations of the force are avoided without dooming threatening states to make the choice between violating international law and suffering the actual assault. As per this approach, self-defence is legitimate both under customary law and article 51 of the Charter under which an armed attack is imminent. It would then be a question of evidence as to whether that was an accurate estimation of the situation in the light of the information available at the relevant time. This would be rather easier to demonstrate than the looser concept of anticipatory self-defence and it has the merit of being reliable and steady with the view that the right to self-defence in customary law exists as expounded in the Caroline case. In any event much will depend upon the characterisation of the threat and the nature of the response, for this has to be proportionate.

The concept of necessity and proportionality are at the heart of self-defence in international law. Exactly what will be necessary and proportionate will depend on the circumstances

49 Note that Gray writes that Israel did not argue that it acted in anticipatory self-defence, but rather in self-defence following the start of the conflict, Use of Force, p. 161. See also Dinstein, War, p. 206-7
50 See Dinstein, War, pp. 191-2. Note also that the Institute De Droit International Resolution on Self-Defence 2007, paragraph 3, provides that, ‘the right of self-defence arises for the target state in case of an actual or manifestly imminent armed attack’, and that it may be exercised ’only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack’, www.idi-iil.org/idiE/navig_chon2003.html
51 See above, p. 820
52 However, note that the Report of the Un High Level Panel on Threats, Challenges and Change, A/59/565, 2004, at para. 188, declared that ‘a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means could deflect it and the action is proportionate’. The response of the UN Secretary General, In Larger Freedom, A/59/2005, para. 124 also stated that imminent threats were covered by the right to self-defence.
53 See e.g. Brownlie, Use of Force, p. 279, footnote 2; J. Graham, Necessity, Proportionality and the Use of Force by States, Cambridge, 2004; Gray, Use of Force, pp. 148 ff., and Dinstein, War, pp. 230 ff. See also
of the case. The necessity criterion raises important evidential as well as substantive issues. It is important to demonstrate that, as a reasonable conclusion on the basis of facts reasonably known at the time, the armed attack that had occurred or was reasonably believed to be imminent required the response that was proposed. In the *Oil Platforms* case\(^57\), the Court held that it was not satisfied whether the US attacks on the oil platforms in question were necessary in order to respond to the attack on the *Sea Isle City*, noting in particular that there was no evidence that the US had complained to Iran of the military activities of the platforms (contrary to its conduct with regard to other events such as mine laying and attacks on neutral shipping). Further the US had admitted that one attack on an oil platform had been a ‘target of opportunity’. It has been argued since then that, ‘necessity is a threshold, and the criterion of imminence can be seen to be an aspect of it, in as much as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack.’\(^58\)

Quite what response would be regarded as proportionate is difficult to quantify. This brings us to the issue as to what exactly is the response to be proportionate to. Is it the actual attack or the threat or likelihood of further attacks? And what if the attack in question is part of a continuing series of such attacks to which response has this far been muted or non-existent? In *Congo v. Uganda*,\(^59\) the Court, while ruling that the preconditions for the exercise of self-defence did not exist in the circumstances, stated that ‘the taking of airports and towns (by Ugandan forces) many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of trans-border attacks. It claims had given rise to the right of self-defence, nor to be necessary to that end.’ Proportionality as a criterion of self-defence may

\(^{54}\) See judge Ago’s Eight Report on State Responsibility to the International Law Commission, where it was noted that the concept of necessity centered upon the availability of other means to halt the attack so that ‘the state attacked...must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force’, *Yearbook of the ILC*, 1980, vol. II, part 1, p. 69

\(^{55}\) Judge Ago noted that the correct relationship for proportionality was not between the conduct constituting the armed attack and the opposing conduct, but rather between the action taken in self-defence and the purpose of halting and repelling the armed attack, so that ‘the action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered’, *ibid* p. 69. See also J.G. Gardam, ‘Proportionality and Force in International Law’, 87 AJIL, 1993, p.391.

\(^{56}\) Note that the UK declared that Turkish operations in northern Iraq in 1998 ‘must be proportionate to the threat’, UKMIL, 69 BYIL, 1998, p. 586

\(^{57}\) ICJ Reports, 2003, pp. 161,198

\(^{58}\) The Chatham House Principles on International Law on the Use of Force in Self-Defence, 55 ICLQ, 2006, pp. 963, 967

\(^{59}\) ICJ Reports, 2005, pp. 168,223.
also require consideration of the type of weaponry to be used. The International Court in the *Legality of the Threat or Use of Nuclear Weapons* case took the view that the proportionality principle may ‘not in itself exclude the use of nuclear weapons in self-defence in all circumstances’, but that ‘a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirement of the law applicable in armed conflict’. In particular, the nature of such weapons and the profound risks associated with them would be a relevant consideration for states ‘believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality’.  

It is also important to highlight that article 51 requires that states report ‘immediately’ to the Security Council on any action taken in the exercise of their right to self-defence and that action so taken may continue ‘until the Security Council has taken the measures necessary to maintain international peace and security’.

**PROTECTION OF NATIONALS ABROAD**

In the nineteenth century it was clearly understood to be lawful to use force to protect nationals and property situated abroad and many incidents occurred to demonstrate the acceptance of this position. Since the adoption of the UN charter, however, it has become more controversial since the necessity of ‘territorial integrity and political independence’ of the target state is infringed, while one interpretation of article 51 would deny that ‘an armed attack’ could occur against individuals abroad within the meaning of that provision since it is the state itself that must be under attack, not specific persons outside the jurisdiction. The most famous incident was the rescue by Israel of hostages held by Palestinian and other terrorists at Entebbe, following the hijack of an Air France airliner. The Security Council debate in this case remained inconclusive. Another instance was when the US conducted a bombing raid on Libya on 15 April 1986 as a consequence of alleged Libyan involvement in an attack on US servicemen in West Berlin. This was justified by the US as an act of self-

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60 ICJ Reports, 1996, pp. 226,245; 110 ILR, p. 163.  
61 Note that the Court pointed out in *Congo v. Uganda*, ICJ Reports, 2005, pp. 168, 222, that Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence. See Dinstein, *War*, p. 241, who argues that failure to report measures taken in exercise of the right of self-defence ‘should not be fatal, provided that the substantive conditions for the exercise of this right are met’  
62 There is, of course, a different situation where the state concerned has consented to the action or where nationals are evacuated from a state where law and order has broken down; see Gray, *Use of Force*, pp. 159-60.  
63 See e.g. Brownlie, *Use of Force*, pp. 289 ff.  
64 See e.g. Brownlie, *Use of Force*, pp. 289 ff.  
65 See e.g. Akehurst, ‘Use of Force’; Green, ‘Rescue at Entebbe’, and Shaw, ‘Legal Aspects’.
 defence. On 26 June 1993, the US launched missiles at the headquarters of the Iraqi ministry intelligence in Baghdad as a consequence of an alleged Iraqi plot to assassinate former US President Bush in Kuwait. It was argued whether the resort to force was justified as a means of protecting US nationals in the future. On balancing and considering the opposing principles of saving the threatened lives of nationals and the preservation of the territorial integrity of states, it would seem preferable to accept the validity of the rule in carefully restricted situations consistent with the conditions laid down in the Caroline case. Whether force may be used to protect property abroad is less controversial. It is universally accepted today that it is unlawful to have resort to force merely to save material possessions abroad.

**COLLECTIVE SELF-DEFENCE**

Historically the right of states to take up arms to protect them from external force is well established as a rule of customary international law. Article 51 also refers to ‘the inherent right of ... collective self-defence’ and the question that therefore comes up is exactly as to how far one state may resort to force in the defence of another. The idea of collective self-defence however, is rather ambiguous. It may be regarded merely as a pooling of a number of individual rights of self-defence within the framework of a particular treaty or institution, as some writers have suggested, or it may form the basis of wide-ranging all-inclusive regional security system. If the former were the case, it might lead to legal difficulties should Iceland resort to force in defence of Turkish interests, since actions against Turkey would in no way justify an armed reaction by Iceland pursuant to its individual right of self-defence.

In fact, state practice has adopted the second approach. Organisations such as NATO and the Warsaw Pact were established after the Second World War, specifically based upon the right of collective self–defence under article 51. By such agreements, an attack upon one part is treated as an attack upon all, thus deriving to the conclusion that collective self-defence is

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66 See President Reagan’s statement, *The Times*, 16 April 1986, p. 6. The UK government supported this: see *The Times*, 17 April 1986, p. 4. However, these are problems with regard to proportionality in view of the injuries and damage apparently caused in the air raid. One US serviceman was killed in the West Berlin action. The role of the UK in consenting to the use of British bases for the purposes of the raid is also raised. See also UKMIL, 57 BYIL, 1986, pp. 639-42 and 80 AJIL, 1986, pp. 632-6, and C.J. Greenwood, ‘International Law and the United States’ Air Operation Against Libya’, 89 *West Virginia Law Review*, 1987, p. 933


68 See e.g. article 5 of the NATO treaty, 1949
something more than a collection of individual rights of self-defence, but another creature altogether.\textsuperscript{69}

This approach finds support in the \textit{Nicaragua} case.\textsuperscript{70} The Court stressed on the right to collective self-defence and that is was established in customary international law but added that the exercise of that right depended upon both a prior declaration by the state concerned that it was the victim of an armed attack and an appeal by the victim state for assistance.\textsuperscript{71} In addition, the Court emphasised that ‘for one state to use force against another, on the ground that the 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’.\textsuperscript{72}

\textbf{AID TO AUTHORITIES OF A STATE}

It would appear that in the general outside air to the government authorities, to repress a revolt\textsuperscript{73} is perfectly legitimate\textsuperscript{74}, provided of course, it was requested by the government. The difficulty of defining the government authority permitted to request assistance was raised in the Grenada episode. In that situation, the appeal for the US intervention was allegedly made by the Governor-General of the island,\textsuperscript{75} but controversy exists as to whether this fact did take place prior to the invasion had whether the Governor-General was the requisite authority to issue such an appeal. The issue resurfaced in a rather different form regarding the Panama invasion of December 1989. One of the legal principles identified by the US Department of State as the basis for the US action was that of assistance to the ‘lawful and democratically elected government in Panama’.\textsuperscript{76} The problem with this was that the particular government has been barred by General Noriega from actually taking office and the issue raised was

\begin{footnotes}
\item[69] Note article 52 of the UN Charter, which recognises the existence of regional arrangements and agencies dealing with such matters related to international peace and security as are appropriate for regional action, provided they are consistent with the purposes and principles of the UN.
\item[70] ICJ Reports, 1986, pp. 14,103-5; 76 ILR, p. 349,437.
\item[71] See also Institut de Droit International resolution on Self-Defence 2007, paragraph 8, noting that ‘Collective self-defence may be exercised only at the request of the target state’, www idi-iil org/idiE/navig_chon2003.html.
\item[72] ICJ Reports, 1986, p. 110. See also \textit{ibid.}, p. 127; 76 ILR, pp. 444 and 461. This was reaffirmed in the \textit{Oil Platforms (Iran v. USA)} case, ICJ Reports, 2003, pp. 161, 186; 130 ILR, pp. 323, 346
\item[73] See Nicaragua v. USA, ICJ Reports, 1986 pp. 14,126, where the Court noted that intervention is ‘already allowable at the request of the Government of a state’; however, apparently not where the recipient state is forcibly suppressing the right to self-determination of people entitled to such rights: see above, p. 832 note 158.
\item[74] Until recognition of belligerency, of course, although this has been unknown in modern times: see e.g. Lauterpacht, \textit{Recognition}, pp. 230-3.
\item[75] See the statement by Deputy Secretary of State Dam, 78 AJIL, 1984, p. 200.
\item[76] 84 AJIL, 1990, p. 547
\end{footnotes}
whether an elected head of state that is prevented from ever acting as such may be treated as a governmental authority capable of requesting assistance including armed force from another state. The general intention, however, that aid to recognised governmental authorities is legitimate, would be further reinforced where it could be shown that other states were encouraging or directing the subversive operations of the rebels. In such cases, it appears that the doctrine of collective self-defence would allow other states to intervene overtly and lawfully on the side of the government authorities.

CONCLUSION

This article laid emphasis on the major characteristics of the existing legal administration and practice and attempted an evaluation of the following. The outstanding feature of the last half of the century has been the influential change from a legal regime of indifference to the occasion for war, in which it was regarded primarily as a means of settling a private difference, to a legal one which has placed substantial restrictions on the competence of states to resort to force. Two important characteristics of the existing law must be noted apart from the prominently legal principles of criminal responsibility and the function of United Nations organs. Thus we can see that the Use of Force in International Law has its perspective expanded. The widespread on-going parley on the significance of the Article 2(4) on the use of the word ‘force’ is far much from over. The tension in opinions is where in Article 51 uses the term “armed attack” while the use of the term “force” in Article 2(4) is meant to include economic or other forms of coercion that are non-military. Such measures are banned by other provisions. However, this does not seem to accommodate the wider definition of

77 Note that article 20 of the International Law Commission’s Articles on State Responsibility, 2001, provides that ‘Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.’ See also Commentary to ILC article 20, A/56/10, pp. 72 ff. Note in particular, the need to show that consent has been validly given in terms, for example, of the authority requesting intervention and whether or not coercion was involved. See also Congo v. Uganda, ICJ Reports, 2005, pp. 168, 197. As Dinstein notes, War, p. 121, in such circumstances there is a need for ‘thorough scrutiny’ of the claimed consent. See the recent examples of Mali, where French forces at the invitation of the government employed airstrikes against rebels and sent troops to that country. This was welcomed by the Security Council, which set up a peacekeeping mission and authorised French troops to use ‘all necessary means’ to support the mission, see resolution 2100(2013). Russia sought to justify its intervention in the Crimean region of Ukraine on the grounds that it had been invited by the legitimate President of that country, see statement by the Russian Federation Representative at the Security Council on 3 March 2014, S/PV.7125. However, by that time the Ukraine President had long fled the country to be replaced by a new government endorsed by the parliament, see e.g. www.bbc.co.uk/news/world-middle-east-26248275.

78 But in the light of the principles propounded in the Nicaragua case, ICJ Reports, 1986 pp. 104, 120-3; 76 ILR pp. 349,438, 454-7
force, leaving significant, problematic and disputed issues as to what exactly constitutes and what are the elements of force.