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THE EXCULPATORY EFFECT OF SELF-DEFENSE IN STATE RESPONSIBILITY

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I. INTRODUCTION

Under contemporary international law, the use of force in interstate relations is prohibited except in the case of self-defense. Thus, a state which uses force against another state violates a pre-existent legal obligation, namely, that of refraining from the use of force, and can be exonerated from this violation only if it is able to demonstrate that it acted in self-defense in a case justifying such action within the limits imposed by law. It is important to note that prior to the period between World Wars I and II, and more definitely prior to the outlawing of the use of force in the Charter of the United Nations, the concept of self-defense related more to the law of armed conflict than to the law of state responsibility. Consequently, while the concept of self-defense in the context of armed conflict was thoroughly explored, the precise relationship between self-defense and state responsibility was never closely examined. In the new world legal order, self-defense has become merely a defense against responsibility for the violation of the obligation to refrain from use of force; therefore, its role as an exculpatory factor calls for a more precise definition.

This article will attempt to analyze matters which, in the available literature, often have been dealt with only narratively or casuistically, with little concern for systematization and no special reference to state responsibility. The two main purposes of the article are first, to define more precisely the situation which can lawfully give rise to self-defense, and second, to trace the contours of what constitutes a proper response in self-defense. In so doing, the exculpatory effect of self-defense will be explained, as well as the degree to which that effect may be restricted because of the non-observance of the limitations on self-defense. It is hoped that this approach will afford a better grasp of the workings of the concept of self-defense in the area of state responsibility.

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II. PRELIMINARY OBSERVATIONS

A. *Historical Perspective*

Because traditional international law did not set any limits on the use of force by states, it contained no rule holding a state responsible for the use of force against another state. War reparations exacted by victorious powers from their vanquished enemies were contractual in nature, founded on the conventional provisions of the relevant peace treaties and not on any general rules of international law. Only gradually did the principle of responsibility for the use of force become accepted in international law. The seed was sown when the first Convention with Respect to the Laws and Customs of War on Land (The Hague, 1899) recognized that, between the contracting parties, "the right of belligerents to adopt means of injuring the enemy is not unlimited."[1] The Regulations annexed to the Convention prohibited certain forms of the use of force but did not explicitly provide any sanction for the disregard of this prohibition. However, the second Convention Respecting the Laws and Customs of War on Land (The Hague, 1907), provided in Article 3, that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation."[2] The principle of responsibility for the use of certain forms of force was thus acknowledged, albeit hesitantly, as suggested by the qualifying phrase "if the case demands." It was expected that the first major conflict which occurred after the ratification of the second Convention of The Hague would give rise to the implementation of the responsibility provided for in Article 3. Such was not the case, however, in World War I, even though all of the belligerents were parties to the Convention. The relevant provisions of the Treaty of Versailles (articles 231 and 232) read in part: "[t]he Allied and Associated Governments *affirm* and Germany *accepts* the responsibility of Germany and her allies for causing *all* the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."[3] These are conventional war reparations in the traditional sense, exacted by one party and agreed to by another outside the purview of any

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[1] TEXT OF THE PEACE CONFERENCE AT THE HAGUE, 1899 AND 1907, 59 (Scott ed. 1908). The reference is to Article 22 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Convention.

[2] *Id.* at 206.

[3] UNITED STATES DEP'T OF STATE, THE TREATY OF VERSAILLES AND AFTER 413, 425 (1947) (emphasis added).

pre-existing general rule of international law. The responsibility of Germany for *all* losses and damages is a further indication that those reparations were not based on the rule contained in Article 3 of the second Convention of The Hague, since the rule provides for the payment of compensation only for the violation of a prohibition on certain forms of the use of force, not for all the consequences of the use of force.[4] The Covenant of the League of Nations (1919) and the General Pact for the Renunciation of War (1928) did not significantly affect the status of responsibility for the use of force.[5] This explains why the use of force was not dealt with by writers of the period under the heading of state responsibility. Literature on the topic consisted mostly of discussions relating to the treatment of aliens. In general, it was confined to instances of responsibility in peacetime and rarely, if ever, extended to responsibility arising out of armed conflict.

It is therefore not surprising that international lawyers in pre-Charter years could not agree whether the concept of self-defense had a place in international law. No one doubted the permissibility or legality of the use of force in the name of self-defense. But some argued that there was no need for an exception permitting the use of force on grounds of self-defense when there were no limits perscribed by international law on the use of force. There was unanimity, therefore, on the permissibility and the legality of resort to force by a state claiming that it was acting in self-defense, but disagreement over whether the legality of such use of force by the state was the rule or a special case calling for a particular justification. Whatever theoretical merit this discussion may have had, it could not be of much help in defining the concept of self-defense in contemporary law, since it related to a legal order where there were no constraints on the use of force as an instrument of the national policies of states.[6] The discussion con-

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[4] *See* note 1 *supra*.

[5] Article 12 and the following articles of the Covenant of the League subjected the use of force to prior formalities intended to promote a peaceful settlement of the dispute without, however, outlawing the eventual use of force *per se*. If a state resorted to force without observing those provisions, its responsibility would have been for failure to comply with procedural prerequisites and not for the use of force as such. Force still appeared to be the ultimate arbiter of inter-state disputes.

[6] Representatives of the view that there was no place in the international law of the period for the category "self-defense" are: D. ANZILOTTI, COURS DE DROIT INTERNATIONAL 506 (1929), Giraud, *La Théorie de la légitime Défense*, [1934] III ACADEMIC DE DROIT INTERNATIONAL, RECUEIL DES COURS 715, and Ago, *Le Délit International*, [1939] II ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 537-539. Representatives of the opposite view are: I. SPIROPOULOS, TRAITÉ THEORIGUE ET PRATIQUE DE DROIT INTERNATIONAL PUBLIC 287

tained, however, the seeds of the subsequent development of international law. As Ago pointed out:

> One cannot, therefore, speak of self-defense in international law except in the context of a particular international law which consensually precludes—or at least restricts—the right of self-protection. According to Kelsen, the proper and specific institution of self-defense is not conceivable except under a particular international law where the application of coercive measures would be centralized the way it is within the State. But he concedes that an analogous legal form could possibly emerge where there is only a mere consensual limitation of the privilege of responding to injuries inflicted. In such instances self-defense could in fact operate in the following manner: a State which has renounced in general the use of force as a means of protecting its rights would not, nevertheless, be committing any tortious act in resorting to the use of force for the purpose of repelling an actual and illegal aggression.[7]

Precisely such a development as foreseen by Kelsen and Ago took place when the nations of the world adopted or later acceded to the Charter of the United Nations, renouncing the use of force in their relations[8] and providing for self-defense only in the case of armed attack.[9] In view of the centrality of the Organization in the international order (Articles 2.6 and 103) and its present virtual universality of membership, the law of the Charter reflects the current state of general international law rather than the particular stance of a convention.[10] It can therefore be maintained that it

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(1933), BASDEVANT, *Régles du Droit de la Paix*. [1936] IV ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 540, and DE BUSTAMENTE Y SIRVEN, DROIT INTERNATIONAL PUBLIC 526-552 (1936).

[7] Ago, *supra* note 6, at 539.

[8] U.N. CHARTER, Art. 2.4.

[9] U.N. CHARTER, Art. 51.

[10] On this last point, *see* P. JESSUP, A MODERN LAW OF NATIONS 168 (1948), Tunkin, *Co-Existence and General International Law*, [1958] III ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 1, 65, A. MCNAIR, THE LAW OF TREATIES 217 (1961), Reuter, *Principles de Droit International Public*, [1961] III ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 622, I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 120, 280 (1963), Skubiszewski, *Use of Force by States, Corrective Security, Law of War and Neutrality*, in MANUAL OF PUBLIC INTERNATIONAL LAW 767 (M. Sorensen ed. 1968), P. LAMBERTI ZANARDI, LA LEGGITMA DIFESA NEL DIRITTO INTERNAZIONALE 301-306 (1972), and Zourek, *La Notion de Légitime Défense en Droit International*, [1975] ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 55. *See also* the legal memorandum entitled "The Legality of U.S. Participation in the Defense of Viet-Nam" submitted by the U.S. Department of State to the Senate Committee on Foreign Relations in March 1966, where the following statement is to be found in footnote 3:

> [W]hile nonmembers . . . have not formally undertaken the obligations of the United Nations Charter as their own treaty obligations, it should be recognized

was with the Charter that self-defense acquired the status of an autonomous concept of international law having a specific legal content and, more specifically, that it became one of the circumstances precluding wrongfulness in state responsibility.

The term "self-defense" was in wide use in the nineteenth and the early twentieth centuries, at a time when there were no legal constraints on the use of force by states, because of the general onus of aggression even in a world order which did not prohibit the use of force. Self-defense was being freely invoked in a variety of situations in justification of many state actions, not on specific legal grounds but on political or moral grounds. The vagueness of the concept at the time and its lack of any real legal content are exemplified by such statements as: "*[u]ne nation qui veut faire la guerre est toujours en état de légitime défense*," made by Clémenceau, and a statement attributed to James Williams[11]: "[a]s for a war of aggression, we will never wage it except in self-defense."[12]

Despite the lack of a necessary link between self-defense, as it was then conceived, and the prior use of force against the state invoking it, self-defense has commonly appeared in the context of the use of force since the days of the League. In state practice, both before and after the Second World War, resort to force in self-defense has been associated almost without exception with the idea of reaction against the use of force. After decades of being invoked loosely by governments and diplomats in justification of various state actions which were nothing but manifestations of forcible self-help, the term "self-defense" acquired a more restricted and obvious meaning not far removed from its meaning in municipal law. For at least forty years it has appeared in state practice principally as a reaction to the use of force against the territorial domain or the physical entity of a State.[13] Article 51 of the Charter obviously supports this restricted concept of self-

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that much of the substantive law of the Charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the charter provisions bearing on the use of force . . . Thus it seems entirely appropriate to appraise the actions of [a non-Member State] in relation to the legal standards set forth in the United Nations Charter. 60 AM. J. INT'L L. 565, 569 (1966).

[11] 1796-1869, U.S. diplomat and later Confederate representative and propagandist in Europe.

[12] Both cited by Zourek, *supra* note 6, at 3.

[13] *See* J. BROWNLIE, *supra* note 10, at 252, 255; D. O'CONNELL, INTERNATIONAL LAW 318 (2d ed. 1970).

defense since it relates self defense to the occurrence of an "armed attack." It is unlikely that a state can now meaningfully invoke self-defense in any other context, particularly in connection with its failure to honour any international legal obligation requiring a particular positive action on its part or any obligation requiring it to abstain from a particular action other than the use of force (see subsection C below).

The pre-1945 attitude toward self-defense was so entrenched that it carried over to the post-Charter period. As an example, the work of the United Nations International Law Commission on state responsibility was restricted, in its first phase ending in 1961, to the study of questions relating to responsibility of the state for injuries caused in its territory to the person or property of aliens. In 1963, however, the Commission adopted a new approach to the subject, marking a break with the traditional treatment of state responsibility. While not neglecting the experience and material gathered in certain special sectors, particularly that of responsibility for injuries to the person or property of aliens, the commission agreed that priority should be given to the definition of the rules governing the international responsibility of states, with special emphasis on the possible changes caused by new developments in international law. Thus, non-use of force as a possible source of responsibility and self-defense as a possible exonerating cause became integral parts of the newly redefined field of state responsibility. It was indeed under the Charter of the United Nations that states became bound for the first time by a general unqualified obligation to refrain from the threat and use of force. Having assumed such an obligation in international law states would, in principle, face responsibility for any breach of that obligation. This was reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (resolution 2625 (XXV))[14] and in Article 5.2 of the Definition of Aggression (resolution 3314 (XXIX)),[15] with specific reference to "responsibility under international law" and to "international responsibility."[16] The principle having thus been established, a state wishing to avoid responsibility for the use of force would have to prove that it did not take the initiative in the

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[14] G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) 128, U.N. Doc. A/8028 (1970).

[15] G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 19), U.N. Doc. A/9619 (1974).

[16] *Id. See also* Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L AND COMP. L. 29 (1980).

use of force but used it only in reaction to a prior use of force by the other state. It is in this sense that self-defense is now a circumstance precluding wrongfulness in state responsibility.

B. *Self-defense in municipal law*

There are pitfalls resulting from the indiscriminate transplanting of concepts of municipal law into international law. There are, however, principles and general concepts which are common to both legal orders. Even writers who refuse to recognize any interaction between municipal law and international law admit that certain general legal principles such as self-defense are to be found in both municipal law and international law, although they stress that the content of these principles need not be the same.[17] The rationale for self-defense is in fact the same in municipal law and in international law. Therefore, the normative regulation of the institution is quite similar in both systems. A review of self-defense in municipal law thus can shed some light on the corresponding concept in international law.

Self-defense is invoked in municipal law by the author of an act otherwise entailing responsibility, in order to exonerate himself from that responsibility. A more precise description of the effect of a successful plea of self-defense would be that it removes the wrongful character of the respondent's act so that no responsibility can ensue from it. The act per se committed by the respondent is invariably an objective breach of a pre-existing general obligation to abstain from acts causing death or injury to a person or (in certain countries) destruction or damage to property. However, because the act was committed under circumstances of self-defense it does not retain its delictual nature and the perpetrator is relieved from responsibility.

The above characteristics of self-defense in municipal law are common to many countries. For example, in the United States, self-defense, if successfully invoked, "exonerates its beneficiary from criminal responsibility for acts arising out of the defense, provided these acts are properly performed within the scope of the defense."[18] Consequently, "a person is relieved from criminal responsibility when, during the exercise of this lawful right in a reasonable manner, he or she causes harm to others or damage to

[17] V. Koretsky, *General Principles of Law*, in INTERNATIONAL LAW (1957), reviewed by O.J. Lyssitzyn, 53 AM. J. INT'L L. 202 (1959).

[18] M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 462-63 (1978).

property."[19] In French law, the Penal Code itself makes it quite clear that where there is self-defense there is no wrongful act. The opening words of Article 328 of the French Penal Code read: "Il n'y a ni crime ni délit . . . ."[20]

It may therefore be said that in municipal law, the plea of self-defense has the following two characteristics: 1) it follows a positive act committed by the respondent; and 2) the said act is a violation of an obligation to abstain from doing something. Self-defense is intended to ward off an actual and immediate danger to person or to property. It has an essentially defensive or preventive purpose. It is always a reaction and not an initial action. The rationale behind the exonerating effect of self-defense is that an injury to another person inflicted solely for the purpose of averting an equal or greater injury to oneself does not retain its original tortious character and thereby becomes lawful. Because of its particular nature, self-defense can never be invoked in justification of failure to perform a positive obligation to do something whether it is an obligation or diligence or an obligation to achieve a certain result. Self-defense pertains primarily to the field of criminal responsibility. A plea of self-defense can be relevant to civil responsibility in connection with a claim for damages based on murder, assault or destruction of property. In such cases, the findings of the criminal court are binding on the civil court.

C. *Self-defense and other exculpatory circumstances*

Self-defense is only one of several defenses available to preclude state responsibility. It is neither the most important nor the one most likely to be invoked. The restricted applicability of self-defense as a bar to responsibility is due to the fact that it is relevant only to the violation of one specific obligation, that of refraining from the use of force. The excuse of self-defense cannot be invoked in any other context. In Kelsen's words, there can be self-defense only "against a specific violation of the law, against the illegal use of force, not against other violations of the law."[21]

Responsibility in interstate relations may result from the non-performance or violation of any obligation binding on the state

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[19] *Id.*

[20] *See* PETITS CODES DALLOZ, CODE PENAL 180 (76th ed. 1978-79).

[21] Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 784 (1948).

regardless of its nature, its content, or its source. Especially important are obligations requiring the state to carry out a certain action or to abstain from a certain action other than the use of force, whether the source of such obligations lies in a treaty, in some other instrument, or in customary international law. Responsibility resulting from the non-performance or violation of these obligations cannot be avoided by a plea of self-defense. Other exculpatory circumstances that could apply include *force majeure*, fortuitous event, state of necessity or consent of the injured state. These common causes of exoneration from state responsibility merit a short explanation.

Force majeure is an unpredictable and irresistible event external to the state invoking it and generally not attributable to human agency, which prevents the state from performing a pre-existent obligation. Fortuitous event is a similar concept which is often used interchangeably with *force majeure*. Irresistibility is the main characteristic of *force majeure* while unpredictability is the dominant ingredient in fortuitous event. The latter is an event which, had it been foreseen, could have been averted. This distinction, it should be noted, carries no legal consequences as far as exoneration from responsibility is concerned. *Necessity* is a defense arising wherever a state, by reason of circumstances beyond its control, is compelled to act or to abstain from action in violation of a pre-existing legal obligation to which it is bound. Necessity differs from both *force majeure* and fortuitous event in that the unlawful conduct of the state results from a voluntary decision taken as the only way to protect a threatened vital interest considered higher than the violated obligation; the other two are reactious to external forces which operate independently of the will of the state. Finally, *consent* of the injured state is approval by it of an act or an omission by another state which, in the absence of such approval, would have been a violation of a pre-existent obligation. In such a case, the other state's responsibility cannot be asserted: *volenti non fit injuria.*

Force majeure, fortuitous event, necessity and consent of the injured state can be invoked to preclude state responsibility for failure to perform any type of binding legal obligation, regardless of its nature or source. Self-defense can be so invoked only in connection with a single general obligation of negative content, namely non-use of force. Self-defense can only be invoked to rebut a responsibility arising in conditions of armed conflict whereas the other circumstances precluding wrongfulness apply to all in-

stances of responsibility arising in the course of peaceful relations between states. Thus, with respect to most international obligations a plea of self-defense is of no relevance. There is only a partial overlap between the concept of self-defense and the scope of state responsibility; the former is much narrower than the latter. As a result, self-defense is of limited usefulness as a cause of exoneration from state responsibility and in practice is likely to be of lesser incidence as a circumstance precluding wrongfulness than other circumstances of wider application.

III. SELF-DEFENSE UNDER THE U.N. CHARTER

As discussed earlier in this Article, the absolute prohibition of the use of force is currently an exclusive provision of general international law, binding on the whole community of nations, not a consensual provision in a particular international law co-existing with a different norm of general international law. The absolute and definitive break with the past did not immediately win universal acceptance. Accordingly, different opinions concerning what the scope of self-defense should be under the Charter were expressed.

Soon after the adoption of the Charter, two views developed concerning the extent to which Article 51 was meant to restrict the right of self-defense. One view maintained that "the provisions of Article 51 do not necessarily exclude the right of self-defence in situations not covered by this Article."[22] The reasoning behind this position was that States "have those rights which general international law accords to them except and insofar as they have surrendered them under the Charter."[23] The assumption, therefore, was that although Article 51 confirmed the right of self-defense in one particular situation, that of an armed attack, it did not thereby deny the said right in other situations where it had been recognized in customary international law. According to this view, Article 51 did not lay down new norms and was only declaratory of the pre-existing customary law in one instance of self-defense without affecting the rules of customary law permitting self-defense in other instances.[24] Members of the International

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[22] L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, 301 (2nd ed. 1949).

[23] D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, 185 (1958).

[24] For an exhaustive listing of authors supportive of this view, *see* P. LAMBERTI ZANARDI, *supra* note 10, at 204 n.47; and *see* the author's discussion of the topic at 204-224. *See also* ZOUREK, L'INTERDICTION DE L'EMPLOI DE LA FORCE EN DROIT INTERNATIONAL 98, n.134 (1974).

Law Commission of the United Nations embraced the opposite view as early as 1949, stating in no uncertain terms that under the Charter self-defense was permitted only against armed attack and that no residual right of self-defense under customary law was to be preserved.[25] It should be added, however, that some members of the commission did, in fact, favor the continued existence of a right of self-defense which had a wide scope and was based on customary law.[26] The restrictive view based on a strict construction of Article 51 has gained wide doctrinal support.[27] One writer has summed up the argument by explaining that "the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defense."[28] Others have claimed that those who hold the view that a customary right of self-defense exists outside the purview of Article 51 "assume that the customary law became static by 1920 or earlier, and ignore the possibility that the customary right may have received some more precise delimitation in the period between 1920 and 1945."[29] Thus it may be said that the Charter, rather than modifying the customary right of self-defense, "simply expresses a change which that right had already undergone" by the time the Charter was adopted.[30]

It is an axiom of legal interpretation that where a general prohibitive norm is established, any permissive exceptions to it must be provided for explicitly. By no process of reasoning can there validly be any further encroachment on the general prohibition. Those who indulge in such an exercise are creating new rules under the guise of interpreting the existing law. This is particularly objectionable when the premises of such reasoning are derived from a pre-existent situation from which the newly enacted general prohibitive norm was intended to mark a significant and definitive break. What the proponents of a "liberal" interpretation of Article 51 are wittingly or unwittingly justifying is

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[25] [1949-I] Y.B. INT'L L. COMM'N 108, para. 68, 69, 146-47, para. 63, 64 (United Nations 1956); [1951-I] Y.B. INT'L L. COMM'N 115, para. 141 (United Nations 1957); [1951-II] Y.B. INT'L L. COMM'N 37, para. 35, 36 (United Nations 1957).

[26] [1951-I] Y.B. INT'L L. COMM'N 115, para. 142 (United Nations 1957).

[27] E. JIMÉNEZ DE ARECHAGA, DERECHO CONSTITUCIONAL DE LAS NACIONES UNIDAS 401 (1958); P. VERDROSS, VOLKERRECHT 554 (5th ed. 1964); Zourek, *supra* note 10, at 46, 52-53; R. TAOKA, THE RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW 126 (1978). For a more complete listing of references in support of the strict interpretation of Article 51, *see* P. LAMBERTI ZANARDI, *supra* note 10, at 205-206; ZOUREK, *supra* note 24, at 104, n.160.

[28] I. BROWNLIE, *supra* note 10, at 273.

[29] *Id.* at 274-275, 279-280. *See also* R. TAOKA, *supra* note 27, at 86.

[30] Skubiszewski, *supra* note 10, at 766.

the carrying-over into the legal order of the United Nations,[31] of practices the strict legality of which may not have been contested under a previous, fundamentally different, legal order. In so doing they are disregarding the decisive importance of the prohibition on the use of force in Article 2.4, which opened a new chapter in state relations and ushered a new legal order basically different from the one it was intended to replace.[32] The admittedly less than perfect functioning of the new order in some cases is no justification for continued adherence to aspects of the old order which impede the implementation of the rule of non-use of force. The application of the "liberal" approach would reverse the evolution of international law rather than aid in translating the norms of the new legal order into realities of international relations. That the viewpoint is still championed is attributable either to the continued influence of the old concepts and the stubbornness of established mental habits or to partisan support for national policy positions which lag behind the development of international law reflected in the Charter.

A second canon of construction is that a provision containing an exception from a basic rule must be interpreted restrictively. It is obvious that Article 51 contains an exception, expressed in unequivocal language, from the basic rule of non-use of force set forth in Article 2.4. It is impossible, unless one disregards the above canon of construction and the letter and the spirit of Articles 2.4 and 51, to maintain that there are instances other than an armed attack where resort to force in alleged self-defense would be permissible under the Charter. The meaning of the term "armed attack" is quite clear. It was deliberately used to reduce the discretion of states to determine for themselves the scope of permissible self-defense and to uphold to the utmost the basic rule of non-use of force. It is therefore submitted that any interpretation of Article 51 which would justify recourse to force where the action which triggers the response is not an armed attack is a legally incorrect interpretation.

The permissive interpretation of Article 51 becomes even less persuasive when considered in light of the recent discussion on the issue of *jus cogens* among international scholars. Though the issue has not been fully resolved, writers on the subject have been virtually unanimous in their acceptance of the concept of an inter-

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[31] *See* text at note 10 *supra*.

[32] Zourek, *supra* note 24, at 103.

national *jus cogens*,[33] *i.e.*, peremptory norms which bind subjects of international law absolutely and from which derogation is not possible. Though writers disagree on the precise definition of *jus cogens*,[34] they do agree generally that the principle of prohibition of the use of force is a prime example of it.[35] Thus, the principle of non-use of force in Article 2.4 and the self-defense exception in case of armed attack in Article 51 are widely considered peremptory norms of international law. The Vienna Convention on the law of Treaties[36] defines this as a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[37] A permissive interpretation of Article 51, allowing states to fashion exceptions to the general prohibition of Article 2.4 by unilateral action or even by agreements *inter partes*, would run counter to a fundamental tenet of international *jus cogens*, which states that "[a] treaty contravening a *jus cogens* rule would be void *ab initio* . . . ."[38]

The general question of whether there are instances, other than those explicitly mentioned in the Charter, where the use of force could be lawful and the more specific question of whether instances of self-defense other than the one covered by Article 51 exist have been raised in the debates of the various United Nations bodies. Representatives of a small number of governments have in the past expressed positions supporting an affirmative reply to the two above-mentioned questions, but it is significant that since 1965 such statements of position have not been repeated. The example of the United Kingdom is particularly instructive. Before the Security Council in 1956, the representative

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[33] Suy, *The Concept of Jus Cogens in Public International Law*, in CONFERENCE ON INTERNATIONAL LAW. THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW 48 (1967). For a thorough survey of leading international scholars who have written on this issue, *see id.* at 26-48. *See also* Tunkin, *International Law in the International System*, [1975] IV ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS 1, 85-94 and Whiteman, *Jus Cogens in International Law*, 7 GA. J. INT'L AND COMP. L. 609 (1977).

[34] Two schools of thought have developed on the issue of the definition of *jus cogens* rules. The first defines *jus cogens* by its object. The second defines it by its legal effects. *See* Abi-Saab, *Introduction*, in CONFERENCE ON INTERNATIONAL LAW. THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW 9-10 (1967).

[35] Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT. L. 55 (1966). *See* Suy, *supra* note 33, at 49.

[36] 8 INT'L LEGAL MATERIALS 679 (1969).

[37] *Id.* at Article 53.

[38] Abi-Saab, *supra* note 34, at 11. *See also* Schwartzenberger, *International Jus Cogens?*, 43 TEXAS L. REV. 455 (1965).

of the United Kingdom argued that the co-ordinated Franco-British military operations in Egypt did not violate Article 2.4 because they were not directed against the sovereignty or the territorial integrity of Egypt and because their purpose was not inconsistent with the purposes of the United Nations.[39] During the eighteenth and twentieth sessions of the General Assembly, statements by representatives of the United Kingdom in the Sixth Committee indicated in no uncertain terms their view that Article 51 did not cover the whole content of the right of self-defense under customary law.[40] However, this position was abandoned at subsequent sessions of the General Assembly. More significantly, in its contributions to the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in 1966[41] and in 1967[42] and to the work of the Special Committee on the Question of Defining Aggression in 1969,[43] the United Kingdom concurred with the position that instances of lawful use of force were limited to action by or under the authority of a competent organ of the United Nations (or of a regional organization) and to individual or collective self-defense. Although the proposals did not explicitly cite Article 51, their silence on the extent of the right of self-defense is significant in view of the previously declared position of the United Kingdom and of the virtual consensus rejecting that position.

IV. THE CONSTITUENT ELEMENTS OF SELF-DEFENSE

A state facing a claim in responsibility for the use of force can successfully invoke self-defense as a circumstance precluding wrongfulness only if it can show that the following two elements exist: (a) a prior armed attack by the claimant state; and (b) an im-

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[39] 11 U.N. SCOR, (735th Meeting) 15, para. 89 (1956); 11 U.N. SCOR, (749th Meeting) 4, para. 7, 23-24, para. 139 (1956); 11 U.N. SCOR, (751st Meeting) 10-11, para. 61 (1956). In pronouncements made at home the British Government justified the military operations against Egypt, *inter alia*, by the argument that self-defense comprehends the protection of nationals. I. BROWNLIE, *supra* note 10, 255, 265, 297 and the references cited by the author. The most recent advocacy of this position is to be found in J. LLOYD, SUEZ 1956, at 238 (1979).

[40] 18 U.N. GAOR, C.6 (805th Mtg) 124, para. 7 (1963); 20 U.N. GAOR, C.6 (881st Mtg) 240, para. 15 (1965). Compare the statement by the representative of the same member state before the Security Council in 1951. 6 U.N. SCOR, (550th Mtg) 20 (1951). The political motivation of the two positions, taken in different sets of circumstances, can hardly be contested.

[41] A/AC.125/L.22, para. 3.

[42] A/AC.125/L.44, Part I, para. 3.

[43] A/AC.134/L.17, para. 3.

mediate proper response by the respondent state. In Section A, the definition of armed attack and the requirement of priority in time will be discussed. Section B will examine the nature of actions likely to be taken in self-defense, the requirement of immediacy, the requirement of effectiveness, and the requirement of proportionality.

A. *Prior Armed Attack*

1. *Definition*

Perhaps because the meaning of the term was considered to be self-evident, the legislative history of Article 51 does not provide an explanation for what exactly constitutes an armed attack. The presence of the concept of self-defense in the Charter and its relation to the basic rule of non-use of force indicate, however, that armed attack must involve a minimum of illegal[44] use of physical force by the armed forces of the state. The scale of the use of physical force appears to be immaterial. Thus all the following instances should be considered covered by the term "armed attack":

(a) an all-out invasion of the territory of the respondent state;
(b) lesser military operations across frontiers;
(c) incidents where isolated units of the armed forces of the claimant state use physical force against units of the respondent state on land, at sea or in the air; and
(d) incidents where individual agents of the state, *e.g.*, solitary frontier guards, are subjected to physical force by similar elements or by larger units of the claimant state.

It is in the last mentioned situation that self-defense in international law would most resemble the corresponding concept in municipal law.

An interpretation of the term "armed attack" which would be restricted to grave breaches of the peace, even if the difficulty of defining such breaches is disregarded, appears to be inconsistent with the essence and purpose of self-defense. Under the requirement of proportionality, a particular level of an armed attack, must be met by a like force.[45] In order to fully understand what type of use of force may be termed armed attack and what type

[44] Although under the Charter use of force is, as a general rule, illegal by definition, the illegal character of the attack is mentioned here in order to rule out: a) military action taken by or under the authority of a competent organ of the United Nations, against which there can be no self-defense and b) use of force in self-defense, which does not justify further action by the initial attacker in alleged self-defense, thus creating a vicious circle.

[45] *See* subsection B *infra*.

may never be so termed, institutionalized coercion must be distinguished from physical force. States normally use various forms of organized force to carry out their functions and to enforce their laws. Legislative, judicial or administrative measures taken by organs of the state and enforced by its coercive machinery may in some cases affect important interests of another state. Such forcible measures, however, do not qualify as use of force likely to constitute an armed attack. An armed attack must necessarily involve illegal use of physical force by the armed forces of the state against targets not within the state's jurisdiction. This point deserves attention because in the past coercive measures taken by one state in the exercise of its jurisdiction often gave rise to the use of force by another state in alleged self-defense. Past failures to make the distinction between institutionalized coercion and the use of physical force led, at least in one instance, to extensive debates on whether a case for the proper exercise of self-defense could be made.[46]

According to one doctrinal opinion,[47] armed attack, within the meaning of Article 51, is not synonymous to armed aggression. It is explained that armed aggression is more broad in scope than armed attack and that only the most violent and massive forms of armed aggression qualify as armed attack and justify the use of force in self-defense under Article 51. In the light of the requirement of proportionality,[48] the value of this distinction between armed

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[46] The Franco-British military intervention in Egypt, which followed upon the nationalization of the Suez Canal Company in 1956, was denounced by the majority of Member States as being in violation of Article 2.4 and unjustifiable under Article 51. First Emergency Special Session, 10 U.N. GAOR, (502nd Mtg) 15, 37 (1956). *Cf.* Wright, *Intervention 1956*, 51 AM. J. INT'L L. 257, 274 (1957) "Great as the hazards to British welfare may have been in the nationalization of the Canal, those hazards were more distant and speculative than those which international law deems a justification for military acts of self-defense." It should be noted that the British military operation could not qualify as self-defense not merely because the hazards to Great Britain were "distant and speculative" but primarily because the measure taken by the Egyptian Government, namely the nationalization of the Company, could not at all be considered as use of force likely to constitute armed attack. The British response also failed to meet the requirement of immediacy.

[47] P. LAMBERTI ZANARDI, *supra* note 10, at 224-230. At an earlier date (1967), a similar view had been expressed, without much elaboration, by "The Lawyers' Committee on American Policy Toward Viet-Nam," in a legal memorandum on the Viet-Nam war, where it was stated that there is armed attack only "if military forces cross an international boundary in visible, massive and sustained form." *See* CRIMES OF WAR 195 (Falk ed. 1971). Besides the lack of any emphasis on the idea, it must be recalled that the concern of the authors of that document was the war in Viet-Nam, and their purpose was to refute the official U.S. position, not to give an exhaustive definition of what constitutes armed attack within the meaning of Article 51.

[48] *See* subsection B *infra*.

attack and armed aggression in the context of self-defense is questionable. The view under consideration is based on the necessary premise that self-defense can only assume the form of an all-out counter-attack, and that only a prior attack of equal scope and intensity can justify it. This premise is faulty since in each instance of self-defense only force which is reasonably called for to repel the actual peril can be lawfully used. If an isolated unit of the armed forces of state A, on land, at sea or in the air, comes under attack by elements of the armed forces of state B, there is no doubt that the former may lawfully take action against the latter in self-defense. Rejecting the argument of self-defense in such an instance on the ground that the action of the forces of state B, although an armed aggression, did not amount to an armed attack appears to be unsupported by both the letter and the spirit of Article 51. In the context of state responsibility, claims of reparation for death or property destruction in minor incidents involving small units of the armed forces (or even individual agents of the state) may be in practice more frequent than claims based on an all-out armed attack. There appears to be no valid ground for ruling out self-defense as a circumstance precluding wrongfulness in such cases on the basis of the questionable distinction between armed aggression and armed attack and a corresponding artificially narrow interpretation of Article 51.

One author ascribing to the armed aggression-armed attack dichotomy cites border incidents and isolated military actions as examples of armed aggression which fall short of armed attack and would not, in his view, give rise to the right of self-defense.[49] There can be no disagreement that border incidents or isolated military actions cannot justify all-out war in alleged self-defense. Such a reaction would obviously fail to meet the requirement of proportionality. This, however, does not mean that the state which falls victim to such relatively minor armed attacks should not be permitted to use proportionate force to ward off the immediate peril or that if it does so it should be precluded from invoking self-defense in order to avoid responsibility for the consequences of the incident. With regard to state responsibility in particular, the distinction between armed attack and armed aggression, and the legal consequences which would follow if there are restrictions made on the scope of self-defense as a circumstance precluding wrongfulness would appear to be unacceptable. The findings of the International Court of Justice in the *Corfu Channel*

[49] P. LAMBERTI ZANARDI, *supra* note 10.

(Merits) Case[50] strongly indicate that the concept of self-defense applies also to situations which do not constitute an all-out armed attack likely to endanger the territory or the political independence of a state.[51]

In the course of the debates which preceded the adoption by the General Assembly of the resolution on the definition of aggression, some representatives pointed out that the definition should distinguish clearly between aggression and the legitimate use of force.[52] It was observed that the Charter expressly provided in Article 51 for the exercise of the right of self-defense in the event of armed attack.[53] Other representatives maintained that the Special Committee's terms of reference did not entitle it to embark on a definition of the right of self-defense and that any attempt to do so would simply place an insurmountable obstacle in its way.[54] There was also disagreement on whether to mention the requirement of proportionality, or the limits of self-defense.[55] As it emerges, the resolution did not deal with these questions and referred to self-defense only indirectly in Article 6 of the definition which reads: "[n]othing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."[56] Thus, the resolution leaves unaffected the meaning of the term "armed attack" in Article 51.

Nothing in the resolution can be taken as an indication that each one of the acts of aggression listed in its Article 3 constitutes armed attack within the meaning of Article 51. It is clear, however, that the acts mentioned under (a), (b) and (d) of Article 3 (namely, invasion or attack and occupation or annexation, bombardment or other use of weapons and attacks by the armed forces of a state on those of another) constitute obvious cases of "armed attack" because all involve the illegal use of physical force by the armed forces of one state against another. Blockade, men-

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[50] Corfu Channel Case, [1949] I.C.J. REP. 4.

[51] *Id.* at 31. Although the Albanian shore battery did not fire on the United Kingdom warships, the incident had the potential for such an attack. The finding of the Court regarding the preparations aboard the United Kingdom ships necessarily leads to the conclusion that, had there been firing from the shore, the United Kingdom would have been justified in responding in kind to an attack which would have obviously fallen short of an all-out armed attack.

[52] *See* U.N. GAOR, (29th Sess.), Supp. (No. 19), U.N. Doc. A/9619 & Corr. I (1974).

[53] U.N.Y.B. 772 (1969).

[54] U.N.Y.B. 600 (1971).

[55] U.N.Y.B. 836 (1968); U.N.Y.B. 653 (1972).

[56] G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 19), U.N. Doc. A/9615 (1974), *reprinted in* 69 A.J.I.L. 480 (1975).

tioned under (c), also should raise no special difficulties if it is enforced by the use of force against the vessels of the coastal state, although the requirements of effectiveness and of proportionality would probably lead to the conclusion that only such action which was required to lift the blockade would be justified in self-defense.

The position of the three remaining acts of aggression listed in Article 3 with regard to self-defense is not clear. It is difficult to determine whether, if the situation mentioned in paragraph (e)[57] is not accompanied by military action involving actual use of weapons by the forces of occupation, it would be possible to maintain that violation of treaty provisions by change of purpose or by extended presence constitutes in itself armed attack justifying the use of force by the territorial state in self-defense. Also, where a state which allows its territory to be used by another state for perpetrating an act of aggression against a third state, as provided in paragrah (f), and does not itself use physical force, the question arises as to whether the latter is justified in using force against the former in self-defense. A negative answer to these two questions appears to be more in line with the generally accepted meaning of armed attack in Article 51. The third act of aggression for which the characterization as armed attack would probably be wrong is mentioned in paragraph (g) of Article 3 of the definition, which deals with the sending of armed bands to carry out acts of armed force against another state "of such gravity as to amount to the acts listed above" or substantial involvement therein. This is the often discussed question of so-called "indirect aggression."[58] In recent state practice, collective self-defense was invoked in the following instances to justify military intervention in the territory of the state which was the target of armed bands of "volunteers" or insurgents aided and abetted by another state, and not in justification of the use of force directly against the latter: Greece, 1944-1946;[59] Korea, 1951;[60] Hungary, 1956;[61] Lebanon and Jordan,

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[57] *Id.* Para. (e) reads as follows: "[t]he use of armed forces of one State which are within 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."

[58] *See* I. BROWNLIE, *supra* note 10, at 325-327, 369-373; P. LAMBERTI ZANARDI, *supra* note 10, at 248-261.

[59] During the debate in the Security Council on 30 January 1946, the United Kingdom representative cited as a decisive argument the fact that it was the Greek Government that had requested his Government to keep its troops in Greece. He added: "Surely an Allied country . . . is entitled to have troops in a country if invited by that country's Government." 1 U.N. SCOR (1st Meeting) 81, 83, 86, 88, 89 (1946).

[60] G.A. Res. 498, 5 U.N. GAOR, Supp. (No. 20A) 1, U.N. Doc. A/1775/Add. 1 (1957).

[61] The representative of the USSR, speaking in the Security Council on 2 November

1958.[62] The state's right to use force in self-defense against the actual combatants, whatever they may be called, is beyond any doubt a matter of internal jurisdiction, as is its right to seek and receive help in this regard from other friendly states. The real test to determine whether activities of armed bands or irregulars sent by another state constitute armed attack in interstate relations would come in connection with the use of force against the state accused of sending or supporting those attackers. Recent state practice does not provide any guidance in this respect. While sending or assisting armed bands, irregulars or mercenaries is without question an illegal interference in the internal affairs of the target state and now has been officially characterized as an act of aggression if of sufficient gravity,[63] it remains to be determined whether such actions constitute armed attack on the part of the accused State and whether such action justifies the use of force against that state under Article 51. The absence of any use of force by the armed forces of the last-mentioned state and the restrictions imposed on the right of self-defense by the double requirement of effectiveness and proportionality would indicate that the target state should not use force in alleged self-defense directly against the state accused by it of sending or supporting the bands of irregulars. The reverse conclusion would raise the risk of major breaches of the peace resulting from supposedly defensive action based on mere allegations or vague evidence of foreign complicity in civil strife or in actions of limited importance by infiltrators said to have been sent by another state.

1956, stated that the dispatch of Soviet troops to Hungary was at the request of the Hungarian People's Government, with a view to assisting the Hungarian People's Army and the Hungarian authorities to restore order in Budapest. 11 U.N. SCOR (752nd Meeting) 24 (1956).

[62] During the debate in the Security Council on 17 July 1958, the representative of the United Kingdom stated: "In these circumstances, what could be more natural than the appeal of His Majesty King Hussein and the Government of Jordan for assistance from friendly Governments in maintaining their country's independence? My Government was one of those to whom this appeal was made and we have responded to it." 13 U.N. SCOR (831st Meeting) (1958). At a previous meeting of the Security Council, the representative of the United States stated that "the President of Lebanon has asked, with the unanimous authorization of the Lebanese Government, for the help of friendly Governments so as to preserve Lebanon's integrity and independence. The United States has responded positively and affirmatively to this request in the light of the need for immediate action." 13 U.N. SCOR (827th Meeting) 6 (1958).

[63] *See* G.A. Res. 3314, *supra* note 56.

2. *Priority in time*

In self-defense an on-going physical act of aggression perpetrated against a potential victim is countered by a similar act on the victim's part designed to prevent the perpetrator's act from achieving its injurious end. Parallelism in kind and sequence in time are essential to the concept of self-defense. It is only because the potential victim's act follows upon the perpetrator's act that the former is purged of its delictual content, although both acts are intrinsically of the same nature. If the sequence in time between the two acts is disregarded, the line of demarcation between aggression and self-defense would be blurred beyond recognition. It would become conceptually impossible to distinguish one act from the other and there would ensue an inconclusive dispute in which the best arguments invoked would be subjective judgments on how insidious the other party's innermost intentions could have been. The wording of Article 51 fully supports the adoption of these classic elements of self-defense. Since the use of force in self-defense is lawful only "if an armed attack occurs," it follows that the start of an armed attack must precede the exercise of the right of self-defense. This is what is meant by the requirement of priority in time. The state subjected to an armed attack need not wait until the attack has fully developed. The very first use of physical force would justify action in self-defense. It may even be said that the sooner the action in self-defense is taken the more likely it is to be successful in preventing the attack from achieving its unlawful ends.

Those who held that Article 51 did not cover all instances of self-defense in customary law, and others who favoured a wider acceptance of the term "armed attack" maintained that preparations for an imminent attack constituted such an immediate threat as to justify anticipatory action in self-defense.[64] One argument adduced in support of this position was that since not only the actual

[64] For reference to those authors and to others who hold that there can be no anticipatory self-defense *see* I. BROWNLIE, *supra* note 10, at 275-276; P. LAMBERTI ZANARDI, *supra* note 10, at 231-232, n.110. *See also* R. TAOKA, *supra* note 24, at 116-119 where the author justifies anticipatory self-defense by a state "if military movements of armed forces of another State have already begun with the object of inflicting damage upon the former" but not if the state merely "believes another harbours intention to make an armed attack against it in the near future." It is to be noted that a determination by state A that the military movements of the armed forces of state B have begun *with the object* of inflicting damage upon it necessarily involves a subjective judgement not much different from the assessment of the mere intention of state B and carries the same hazards to international peace which the prohibition of anticipatory self-defense is meant to obviate.

use of force but also the threat of force was outlawed in Article 2.4, the permission in Article 51 should be interpreted as including the threat of an imminent armed attack. This view not only disregards the particular nature of self-defense mentioned in the preceding paragraph but also contravenes the canons of interpretation referred to in Section III above. Since Article 51 contains an exception of strict construction to the general prohibition of Article 2.4, no valid case can be made for extending the provision of Article 51 to all the instances mentioned in Article 2.4. The latter may proscribe both the threat and the use of force while the former may allow the use of force in one instance only; that of an actual armed attack, as unequivocally provided in the text. A legal justification of anticipatory self-defense must therefore be considered lacking in contemporary international law.

Some meta-juridical arguments based on pseudo-strategic considerations have been advanced in support of the permissibility of anticipatory self-defense. It has been maintained that from a military standpoint, an imminent armed attack can best be countered by a pre-emptive counter-attack. It has been also argued that ruling out the possibility of anticipatory self-defense would ensure for the aggressor the advantage of the first strike and would make his military posture better than that of the victim of his aggression. In reply to such arguments it may be said that modern air power and long-range guided missiles, kept in readiness with the help of electronic reconnaissance, permit such quick and effective responses to an initial attack that the attacker's lead would appear insignificant. As for the military advantage supposedly afforded the attacker, this argument appears to relate to an age when the use of force between states was unfettered and when there was no machinery to control and to sanction the use of force. In the current world legal order, a complaint to the Security Council under Chapter VII of the Charter should be sufficient to deter any armed attack under preparation through: (a) exposure of the potential aggressor's supposedly secret preparations for an armed attack; (b) the censure of international public opinion; and (c) any measures eventually decided upon and enforced by the Security Council. In this era of the United Nations, no state should be permitted to take the law into its own hands by attacking first another state suspected by it of harbouring hostile intentions and of making real or imaginary preparations for an armed attack. Such preparations can be met only with defensive preparations on the other side and with refer-

ral of the threat to the peace to the Security Council for appropriate action under the Charter.[65] When it comes to the confrontation between nuclear powers, which represents the most serious threat to the peace of the world, second-strike capability has been effective, and will conceivably continue to be so, in deterring a first nuclear strike. In this context, in particular, the incalcuable risks involved in the erroneous notion of anticipatory self-defense boggle the imagination.

B. *Immediate Proper Response*

1. *What constitutes self-defense*

The parallelism in kind between armed attack and the action taken against it in self-defense, discussed above, leads to the conclusion that only the use of physical force by the armed forces of a state is justifiable in terms of self-defense. Actions of a different kind taken by the state cannot be explained as having been taken in self-defense. Such other actions may or may not be capable of justification under other rules of international law, but self-defense cannot be successfully invoked. Being an exception to the illegality of the use of force, self-defense can only justify the use of force by the respondent state against the claimant state and serves to rebut a claim by the latter state for compensation or other redress based on state responsibility for the use of force by the former.

Some coercive measures taken by the state in the exercise of its jurisdiction, even when enforced *manu militari* and even if their legality is open to question, do not qualify as use of force within the meaning here intended. Such measures as the visit, search and seizure of neutral ships or their cargo, incarceration of aliens or seizure of their property by way of nationalization etc., must therefore stand on their own merits; a plea of self-defense in respect to them is of no relevance. Obviously, since these measures do not qualify as use of force in self-defense, they also do not qualify as use of force, even less as armed attack, justifying self-defense in reaction to them. In fact, one cannot properly talk of self-defense where there has been no use of physical force either in the initial action by the claimant state or in the reaction to it by the respondent state. Therefore, coercive measures of this

[65] *See* Zourek, *supra* note 24, at 106-107, with reference to the Cuban missile crisis of 1962.

nature cannot be adequately dealt with either supportively or critically, in terms of the proper rules of self-defense.

An example of the confusion engendered by discussing coercive governmental measures under the rules of self-defense is provided by the Security Council debate of July-September 1951 on the restrictions imposed by Egypt on the passage of ships through the Suez Canal. During the consideration of the item, the representative of Egypt invoked Article 51 in justification of the visit and search of neutral ships crossing the Canal and the seizure of Israeli or Israel-bound goods found on board. Other representatives maintained that, under the terms of Article 51, exercise of the right of self-defense was restricted to cases of armed attack and that under the existing circumstances, Egypt's actions did not meet the conditions set forth in Article 51.[66] During the debate it was implicitly assumed that the actions in question could, under different circumstances, constitute acts of self-defense. In paragraph 8 of its decision adopted on 1 September 1951, the Council found that the practice followed by Egypt "cannot in the prevailing circumstances be justified on the ground that it is necessary for self-defense."[67] The qualifying phrase "in the prevailing circumstances" implies that under different circumstances measures under the consideration of the Council such as visit, search and seizure could be justified on grounds of self-defense. No action other than the use of force by the armed forces of the state comes under the strict legal definition of acts liable to be carried out in self-defense. Any other actions undertaken by the state, and in particular coercive measures, even though forcibly implemented, can stand or fall on grounds based on the proper rules applicable to them and should not be examined in the light of the rules of self-defense. This point must be borne in mind when grappling with the *legal* concept of self-defense in an effort to define it as precisely as possible, in order to extract it from the vagueness and confusion which prevailed in the past and which appear to be still lingering in the minds of some. The value of the decision of the Security Council as a legal precedent would have

[66] UNITED NATIONS, REPERTORY OF THE PRACTICE OF THE SECURITY COUNCIL 432 (1951).

[67] *Id.* Another example of such legally incorrect characterization is to be found in the statement by the representative of Syria in the Security Council to the effect that closing down the pipelines and cutting off the oil supply to Western European and American markets was an act carried out "in legitimate exercise of [the] right of self-defense." 22 U.N. SCOR, (1350th Meeting) 16, 17 (1967). It is also to be noted that the said action was not directed against the state responsible for the armed attack (Israel), but against other states suspected of supporting the attack.

been enhanced had the Council stopped at the finding, in paragraph 7, that the practice in question was "an abuse of the exercise of the right of visit, search, and seizure." The problem, in effect, is one of characterization. Actions by the State other than the use of force by its armed forces cannot be correctly characterized as acts of self-defense.

2. *The three requirements of immediacy, effectiveness and proportionality traced to a common source*

When exercised in self-defense, the purpose of the use of force is to frustrate an attack and to prevent it from attaining its intended injurious goals, thus protecting the victim of an attack from the harmful prior action initiated by the attacker. This is one case of the end justifying the means. In view of the overriding importance of the end served by self-defense, the whole normative structure of the institution must be subordinated to it so as not to extend the bounds of legitimate self-defense beyond the strict limits dictated by that all-important end to which the institution owes its existence in the first place. This teleology of the use of forces in self-defense imposes on such use of force a threefold limitation:

(a) Force must not be used before an armed attack starts (hence the requirement of priority) or after the attack has been consummated (hence the requirement of immediacy).

(b) The means of force employed must be such as to be likely to repulse the attack by inflicting on the attacker only such injury as is necessary to achieve that end (hence the requirement of effectivness).

(c) Only such force as is necessary to repulse the attack may be used (hence the requirement of proportionality).

Any use oi force which does not meet this three-part teleological test does not qualify as self-defense and either fails to preclude wrongfulness altogether or has a limited exonerating effect in state responsibility.

3. *The requirement of immediacy*

Since the one and only lawful purpose of self-defense is to repulse an armed attack in progress, action in self-defense must immediately follow upon the start of an attack. In practice there

may be some time-lag between the start of an attack and action taken in self-defense, but in all cases self-defense must be undertaken while the attack is still in progress. Once the attack is consummated and active military operations by the attacker have ceased, there can be no proper exercise of the right of self-defense since the possibility of preventing the attack from realizing its aims no longer exists. Action against the attacker after the attack has been consummated would not serve the purpose of repulsing the attack. It may be intended to avenge the attack or to restore the situation which prevailed before the attack. Clearly the aim of avenging an attack is not covered by the legal concept of self-defense, which serves only to avert an actual peril. The limits of self-defense do not permit the state exercising it to get even with the attacker, to teach him a lesson, or even to prevent a repetition of the attack. There is more justification for the aim of removing the effects of an attack and restoring the pre-existing situation, but, strictly speaking, this also does not appear to be covered by the legal concept of self-defense. Such action is in reality a forcible affirmation of the rights of the state, an autonomous concept of international law having its proper rules, and should therefore not be judged under the rules of self-defense.

4. *The requirement of effectiveness*

Only such forceful means as are likely to frustrate the attacker's aims by repulsing the attack may be used in self-defense. This is because the purpose of self-defense is not to inflict injury for its own sake but to prevent the realization of the objectives of the actual attack in progress. The target of self-defense should be the attack as such and not the state responsible for the attack. Thus, the aerial bombardment of population centers far removed from the scene of operations and without particular importance for the attacker's war effort would not meet the requirement of effectiveness. If a naval blockade involves the use of force against the vessels of the coastal state, only naval and aerial operations intended to lift the blockade would undoubtedly meet the requirement of effectiveness; a counter-attack across land frontiers would probably fail to meet it. If a state is subjected to an attack by land across one frontier, a counter-attack across another frontier of the attacking state would not be effective in repulsing the actual initial attack. The requirement of effectiveness may be said to be a qualitative consideration; the quantitative aspect of acts of self-defense is taken care of by the requirement of proportionality.

5. *The requirement of proportionality*

A state may use in self-defense only such measure of force as is necessary to repel the attack. There is of course no mathematical formula for measuring the relative magnitude of the forceful means used by one side or the other and in any case the exact equivalence of forcible means used on both sides is not what is meant by the requirement of proportionality. As a general rule it may be said that only such disproportion as denotes a manifest intention to inflict injury beyond what is required to repulse the attack would result in a failure to meet the requirement of proportionality. Each case will have to be judged on its own merits after all the facts have been ascertained and evaluated in the light of the particular circumstances of the case. There are, however, cases where there would doubtless be failure to observe the rule of proportionality, such as a massive invasion of the territory of a state in response to a relatively minor border incident. Also, a nuclear strike in alleged self-defense against an attack by conventional weapons would fail to meet the requirement of proportionality. Generally speaking, the means used in self-defense must correspond to its sole purpose—warding off the actual attack and preventing it from attaining its objectives. Again, it may be said that the target of self-defense is the attack as such, and not the state responsible for the attack.

6. *Consequences of failure to meet the above requirements*

In a case of state responsibility where the action taken in self-defense fails to meet the requirement of the priority of an armed attack or that of the immediacy of the response, a plea of self-defense by the respondent state will fail and the said state will remain responsible for all the loss and damage resulting from its unlawful use of force. Where the response fails altogether to meet the requirement of effectiveness, the plea of self-defense will also fail. In the assessment of damages, however, the claimant state's responsibility for the initial attack will be taken into account, thus neutralizing the respondent state's responsibility in the measure of the claimant State's own responsibility for the initial attack. When the response fails only partially to meet the requirement of effectiveness, and when it fails to meet the requirement of proportionality, the respondent state invoking self-defense will remain responsible for the qualitative or quantitative excess of force used by it in self-defense. In this case too, the claimant state's responsibility for the initial attack will be taken into consideration in

assessing the damages, with the result that in certain instances the respondent state's notional responsibility for the use of ineffective or disproportionate force may not entail any practical results in terms of compensation for the claimant state, although it may reduce the liability resulting for it from its own unlawful use of force in the initial attack.

V. CONCLUSION

Self-defense is only one of several defenses available to preclude state responsibility. It is a defense of restricted applicability in today's world, and under the U.N. Charter may only be invoked in those situations where a prior illegal use of force has been asserted against the state alleging self-defense as an exculpatory factor. The absolute prohibition of the use of force thus remains a provision of international law, binding on the whole community of nations.

Article 51 of the U.N. Charter exclusively delineates the scope and content of the right of self-defense, making it an exculpation of state responsibility only when used in response to a prior armed attack. Armed attack in the definitional framework does include a variety of military actions threatening the sovereign integrity of states, but does not include institutional methods of coercion commonly used by states in carrying out their functions and enforcing their laws.

The doctrinal belief that "armed attack" can be distinguished from "armed aggression" is a faulty one, overlooking the important role that the concept of proportionality plays in determining what an appropriate response to various incidents having different degrees of seriousness should be. But neither the proportionality concept nor other meta-juridical arguments based on strategic considerations can justify the use of anticipatory self-defense. Modern electronic surveilance and reconnaissance permits quick, effective response to planned aggressions, and the effective use of international world opinion, not to mention second strike capability where nuclear force is involved, should be sufficient to dispense with the need for "anticipatory" self-defense actions.

Ultimately, any exculpatory self-defense actions must meet the requirements of immediacy, effectiveness and proportionality to receive international imprimatur. The continuity of a viable world order vitally depends on the limitation and circumscription of the use of self-defense as an exculpatory factor in state responsibility.