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THE RIGHT OF STATES TO USE ARMED FORCE†

*Oscar Schachter**

When the United Nations (UN) Charter was adopted, it was generally considered to have outlawed war. States accepted the obligation to settle all disputes by peaceful means and to refrain from the use or threat of use of force in their international relations. Only two exceptions were expressly allowed: force used in self-defense when an armed attack occurs, and armed action authorized by the UN Security Council as an enforcement measure. These provisions were seen by most observers as the heart of the Charter and the most important principles of contemporary international law. They have been reaffirmed over and over again in unanimous declarations of the United Nations, in treaties and in statements of political leaders.

Yet as we are all acutely aware, there is widespread cynicism about their effect. Reality seems to mock them. Wars take place, countries are invaded, armed force is used to topple governments, to seize territory, to avenge past injustice, to impose settlements. Threats of force, open or implicit, pervade the relations of states. The menace of a nuclear holocaust hangs over all nations, great or small. Collective security, as envisaged in the Charter, has had little practical effect. Our personal lives are deeply affected by the expectation of violence, by the vast resources devoted to armaments, and perhaps most insidiously, by the belief that little can be done to replace force as the ultimate arbiter in conflicts between nations.

It is no wonder that the obligations of the Charter are widely seen as mere rhetoric, at best idealistic aspirations, or worse as providing a pretext or "cover" for aggression. This evaluation, devastating as it may appear for international law, cannot be dismissed or minimized. But there is the other aspect of reality. Never before in history has there been such widespread and well-founded recognition of the costs and horrors of war. That awareness and its objective basis are powerful factors in strengthening the conscious self-interest in avoiding armed conflict.

It does not follow, of course, that rules of law must be seen as an effective remedy. At the present time, peace is often perceived as "secured" by the balance of power between West and East and the deterrent effect of nuclear arms. It is widely maintained that these factors, not the legal rules of the UN Charter, are what count. But even if countervailing power and the fear of nuclear devastation are restraints on use of force, it is abundantly clear that they have not prevented many armed conflicts, nor have

† This Article is written in tribute to Professor Eric Stein, whose scholarship and wisdom have contributed greatly to our understanding of international law and international institutions.

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they led to acceptance of a complete prohibition on the use of force. We do not, for our present purposes, have to consider in detail why this is so. It is sufficient to recognize that in numerous situations governments are not deterred from the use or threat of force by considerations of power, fear of destruction or, for that matter, by law. We generally attribute such decisions to judgments of self-interest and rational assessments of probable gains and costs. We may also recognize that nonrational factors — emotions, drives for power, ignorance — have an important role. There is rather more uncertainty about the influence of law and morality on such decisions. The reasons for this uncertainty do not arise from an absence of reference to legal and moral rules. On the contrary, every time a government uses force or responds to such use by others, it invokes the law along with considerations of morality and humanity. This very fact generates cynicism since it seems possible for every action to find support in law and there appears to be no effective higher authority to settle the matter. These facts understandably lead many to conclude that the legal rules on the use of force may be used to rationalize and justify almost any use of force and, therefore, that they can have little if any influence on the actual decision to use force.

One question raised by these observations is whether the existing rules on the use of force are so vague and uncertain as to allow a state to offer a plausible legal justification for virtually any use of force it chooses to exercise. The present article is devoted primarily to providing a response to that question by analyzing the Charter rules and their application in recent cases.

But before entering into a detailed analysis of the rules and their use, I would like to comment on a related question that is often raised. It is commonly said that the absence of an authoritative body to decide between conflicting positions objectively and to enforce them must mean that the rules, however clear their meaning, are only paper rules, in that they may be disregarded or violated to a degree that renders them no more than nominal. This rather sweeping assertion requires further examination. We need to consider first the rather complicated situation regarding third-party judgments about the use of force. It is true that the absence of compulsory jurisdiction means that the International Court of Justice (or any other nonpolitical tribunal) is not available, in most cases, to decide the legality of the use of force. Exceptions occur, as in the case brought in 1949 before the Court by the United Kingdom against Albania concerning the use of force in the Corfu Channel.¹ The decision of the International Court of Justice in that case remains an important and authoritative ruling on the use of force. On the other hand, it is clear that the UN Security Council is competent under the Charter, particularly under article 39, to render a decision on whether an act of aggression has occurred. The Council is also empowered to adopt enforcement measures under chapter VII against an aggressor, or in fact against any state, if it considers such measures necessary for peace and security. The authority of the Council applies to all states, whether or not they “consent” to it or participate in its proceedings. In that sense, the Council has compulsory jurisdiction. It is, therefore, a

1. The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9).

body with formal authority to pass on violations of the rules on force and to enforce its decisions. Its legal authority is virtually unlimited except for the implicit requirement that it conform to the principles and purposes of the Charter. However, the Security Council can make decisions in non-procedural matters only with the concurrence of the five permanent members,² a requirement which in practice has prevented the Council from reaching many decisions on charges that the Charter has been violated. The veto is a crucial factor — though not the only one — in the Council's failure to exercise the authority given to it under the Charter.

The General Assembly, which may decide important questions by a two-thirds majority, has on occasion adopted decisions that involve judgments on the use of force. These decisions are not binding under the Charter. That does not mean that they lack "authority," for at least in some cases such resolutions will be regarded as expressing the "general will" of the international community and as persuasive evidence of legal obligation.³ It is true that their authority cannot be determined merely by the fact of their adoption. We would need a more complete assessment of many factors, including the intent and circumstances of the resolution's adoption, the composition of the supporting majority, the effect on state behavior both in the short and long run, the impact of attitudes of relevant publics, and so on. There is no simple generalization or formula that enables us to evaluate the effect of such General Assembly decisions, but it is sufficient for our present inquiry to note that they may be (and have been) treated as authoritative in the sense indicated. It may be asked whether a political body may have authority without power. Perhaps not, but in this context it is appropriate to consider their influence as an aspect of power. Thus, when the Assembly has condemned force as illegal in a particular case, its decision may be cited in opposition to that conduct by other governments and nongovernmental entities of some significance. Consider, for example, the effect of the resolution criticizing the use of force by the USSR in Afghanistan⁴ on the positions of Islamic countries and of some European communist parties which had previously been supportive of the Soviet position. One could not say that the resolution itself determined the attitude of these bodies, but the fact that it was used widely to underline and record the condemnation is evidence of its effect. At the very least, it was viewed as a political setback for the USSR with a potentially long-term negative effect on its claim as champion of national sovereignty. An effect of this kind is not always a consequence of a resolution, but it remains a significant indication that such resolutions may have impact irrespective of their formal legal authority.

In sum, the UN political organs provide an institutional mechanism for authoritative judgments on the use of force, but only under some circumstances can they obtain the requisite authority and consequential behavior to endow their decisions with effective power.

2. U.N. CHARTER art. 27, para. 3.

3. See generally Schachter, *Alf Ross Memorial Lecture: The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INTL. RET. 3 (1981).

4. G.A. Res. 37/37, 37 U.N. GAOR Supp. 51 at 25, U.N. Doc. A/Res/37/37 (Jan. 18, 1983).

We may carry our analysis of third-party judgments further by noting that such judgments are not only made in the UN international institutions. They are made as well in a variety of responses by governments and peoples throughout the world. When force is used today in international relations, the issue of its legality and moral justification is invariably raised. Whether or not a UN organ can reach a decision, individual governments do take positions. Their positions may be expressed in a censure, and they may even take measures to impose sanctions on the offending government. Similarly, the public and influential nongovernmental organizations react in words and deeds. This was manifest in the reactions to the shooting down of the Korean civilian aircraft by the USSR in September, 1983, and the armed intervention by the United States in Grenada in October, 1983.⁵ One need only recall the criticism of force used in Hungary, Czechoslovakia, Vietnam, Cambodia, Angola, Afghanistan, Lebanon, and Nicaragua to see that along with, or sometimes without, UN action, the "world" in its diverse parts passes judgment on the legality of force and on the claims seeking to justify its use. Some would consider such judgments of minor significance because they do not effectively restrain illegal conduct. The question then is not whether we have authoritative judgments but whether such judgments are effective. Admittedly, judgments of illegality have not stopped states from continuing the use of force in several important cases. Nor can we assert with confidence that governments have actually refrained from force because they expect such use to be declared illegal by others. But these observations do not fully respond to the question because they give too narrow a focus to the elements of decisions.

If we take the realistic view that governments deciding on the use of force take into account the diverse considerations referred to earlier — the probable costs and benefits, the responses of other states and the public, the effect on future claims by other states, the value of law-compliance to international order — we may conclude that the issue of permissibility under the law is a factor that would normally be considered. That this is often the case is shown, at least in some degree, by the fact that in virtually every case the use of force is sought to be justified by reference to the accepted Charter rules. While such justification may be no more than a rationalization of an action chosen solely on grounds of interest and power, the felt need to issue a legal justification is not without importance. It demonstrates that states require a basis of legitimacy to justify their actions to their own citizens and, even more, to other states whose cooperation or acquiescence is desired. The fact that claims of legitimacy are also self-serving does not mean that they do not influence conduct by the actors or by those to whom they are addressed. Even if we label those claims as hypocritical ("the tribute that vice pays to virtue"), they require credibility and for that reason must be confirmed by action. We need not treat this as a categorical imperative that holds good in every case in order to recognize that in a great many situations there is a link between conduct and the perceived restraints of law. Power and interest are not superseded by law, but law cannot be ex-

5. See, e.g., *Documents concerning Korean Air Lines Incident*, 22 INTL. LEGAL MATERIALS 1109, 1220 (1983) (press release by the Intl. Fedn. of Air Line Pilots' Assns.). On Grenada, see note 26 *infra*.

cluded from the significant factors influencing the uses of power and the perception of interest.

With these general observations on the relevance of law, I return to the first question I raised. Does international law lay down rules on the use and threat of force that are sufficiently clear and precise to enable judgments to be made on the permissibility or impermissibility of force? Or, alternatively, are the principles laid down in the UN Charter so vague and flexible as to enable states to advance a plausible legal basis for virtually any use of force?

I. THE MEANING OF ARTICLE 2(4)

The basic provision restricting the use of force (or its threat) in international relations is article 2, paragraph 4, of the Charter. It reads:

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.⁶

The paragraph is complex in its structure and nearly all of its key terms raise questions of interpretation. We know that the principle was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory or other benefits from another state. Actually, the term "war" is not used in article 2(4). It had been used in the League of Nations Covenant and in the Kellogg-Briand Pact of 1928, but it had become evident in the 1930's that states often engaged in hostilities without declaring war or calling it war.⁷ The term "force" was thus a more factual and wider word to embrace military action.

"Force" has its own ambiguities. It can be used in a wide sense to embrace all types of coercion: economic, political, and psychological as well as physical. Governments represented in the United Nations have from time to time sought to give the prohibition in article 2(4) this wider meaning, particularly to include economic measures that were said to be coercive. Although support has been expressed by a great many states in the Third World for this wider notion, it has been strongly resisted by the Western states. Other instruments (such as the Charter of Economic Rights and Duties of States)⁸ have been used to express opposition to economic coercion directed against sovereign rights, with less emphasis placed on article 2(4). The issue remains but it is marginal to the central problem with which article 2(4) is concerned: the use and threat of armed force.

Even limited to armed force, the term raises questions of interpretation. Some center on the notion of "indirect" force. Is force used by a state when it provides arms to outside forces engaged in hostilities or when it trains troops? Does a state indirectly employ force when it allows its territory to be used by troops fighting in another country? These questions have tended to be treated under the rubric of "intervention," a concept which has often

6. U.N. CHARTER art. 2, para. 4.

7. See Brown, *Undeclared Wars*, 33 AM. J. INTL. L. 538, 538-39 (1939).

8. G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/Res/3281 (XXIX) (1974).

been dealt with independently of article 2(4) and defined as dictatorial interference by a state in the affairs of another state.⁹ However, article 2(4) remains the most explicit Charter rule against intervention through armed force, indirect and direct, and it is pertinent to consider such action as falling within the scope of the prohibition. I shall therefore consider later the question of the indirect use of force by a state in hostilities between other states or internal conflicts.

What is meant by a "threat of force" has received rather less consideration. Clearly, a threat to use military action to coerce a state to make concessions is forbidden. But in many situations the deployment of military forces or missiles has unstated aims and its effect is equivocal. The preponderance of military strength in some states and their political relations with potential target states may justifiably lead to an inference of a threat of force against the political independence of the target state. An examination of the particular circumstances is necessary to reach that conclusion, but the applicability of article 2(4) in principle can hardly be denied. Curiously, it has not been invoked much as an explicit prohibition of such implied threats. The explanation may lie in the subtleties of power relations and the difficulty of demonstrating coercive intent. Or perhaps more realistically, it may be a manifestation of the general recognition of and tolerance for disparities of power and of their effect in maintaining the dominant and subordinate relationships between unequal states. Such toleration, however, wide as it may be, is not without limits. A blatant and direct threat of force, used to compel another state to yield territory or make substantial political concessions (not required by law), would have to be seen as illegal under article 2(4) if the words "threat of force" are to have any meaning.

These interpretive questions concerning the meaning of "force" and "threat of force" are of importance in some situations and they indicate that the precise scope of the article requires further definition. However, they are essentially peripheral questions. They do not raise questions as to the core meaning of the prohibition and do not, therefore, require one to conclude that article 2(4) lacks determinate content.

A more basic question of interpretation is presented by the peculiar structure of the article. It is generally assumed that the prohibition was intended to preclude all use of force except that allowed as self-defense or authorized by the Security Council under chapter VII of the Charter. Yet the article was not drafted that way. The last twenty-three words contain qualifications. The article requires states to refrain from force or threat of force only when that is "against the territorial integrity or political independence of any state" or "inconsistent with the purposes of the United Nations." If these words are not redundant, they must qualify the all-inclusive prohibition against force. Just how far they do qualify the prohibition is difficult to determine from a textual analysis alone.

This problem of interpretation has arisen in regard to two types of justification for use of force. One such justification concerns the use of force solely to vindicate or secure a legal right. Thus it has been claimed that a state is allowed to use force to secure its lawful passage through waters of

9. I OPPENHEIM, *INTERNATIONAL LAW* 305 (Lauterpacht 8th ed. 1955).

an international strait or to compel compliance with an arbitral or judicial award. One may extend this to other cases where a state considers its rights to have been violated. The textual argument based on the qualifying clause of article 2(4) is that such force is not directed against the territorial integrity or political independence of the target state nor is it inconsistent with UN purposes. In its simplest form, it is the argument that force for a "benign" end does not fall within the qualifying language of article 2(4).

This argument, in itself, has found very little support among governments or scholars. One obvious reason is that to accept it would deprive article 2(4) of much of its intended effect. States have numerous occasions when they consider, sometimes with clear justification, that their rights have been violated. The International Court of Justice in the *Corfu Channel Case* of 1949, between Great Britain and Albania, squarely answered this argument by rejecting the British claim that it used naval force for mine-sweeping in order to vindicate its legal right.¹⁰ The court noted that notwithstanding its aim, the British action was a derogation of Albanian territorial sovereignty. It observed that such an alleged right to vindicate legal rights was the manifestation of a policy of force which "from the nature of things" would be reserved for the most powerful states and might easily lead to "perverting the administration of international justice itself."¹¹ This decision was influential in countering any general interpretation that article 2(4) allowed force to secure legal rights. Whatever the intent, the fact that territorial sovereignty had been impaired was sufficient for the application of the rule against forcible intervention. It did not matter in the *Corfu Channel Case* that derogation of territorial sovereignty was limited in time and limited to the aim of securing legal rights.

A different conclusion is reached when a state uses force to resist illegal incursions into its territory. There is no question about the right of a territorial sovereign to enforce its laws, with force if necessary, against an intruding vessel, plane or land vehicle that has violated the national domain. The use of such force is limited, not by the general language of article 2(4), but by customary law principles requiring that force be limited in manner and amount to that reasonable in the circumstances.¹² The sweeping prohibition against force does not apply in such cases of "enforcement" by states, because the act of force does not fall within the proscribed categories of article 2(4).

The *Corfu Channel Case*, it may be noted, involved a claim of self-protection (or self-help) rather than self-defense under article 51 or customary international law. The British minesweeping actually took place after the explosion of mines in Albanian waters had killed forty-four British sailors and damaged naval warships. The British did not charge Albania with an armed attack but with failure to remove the dangerous mines. The minesweeping was said to be a self-help measure to obtain evidence to support the British claim for damages and therefore as an aid in administering jus-

10. The *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of April 9).

11. The *Corfu Channel Case*, 1949 I.C.J. at 35.

12. Thus even apart from treaty obligations applicable to international aviation, it is an unreasonable use of force to shoot down a civilian airplane that has intruded on a state's territory and failed to heed instructions to land.

tice.¹³ The court rejected such self-help because it violated Albanian sovereignty. No reference was made to self-defense.

II. TERRITORIAL DISPUTES

One of the most controversial issues concerning the meaning of article 2(4) has arisen in some territorial disputes. In such cases, states have used force or have threatened force in order to take territory which they considered rightfully theirs. Their legal position in respect to article 2(4) has been that the use of force is not against the territorial integrity of the target state for the simple reason that the area taken by force is part of the state using the force. Thus, when in 1961 India sent its troops into Goa, then under Portuguese authority, it maintained that it was merely moving its troops into a part of India that had been under illegal domination for 450 years. The Indian representative in the Security Council said, "There is no legal frontier — there can be no legal frontier — between India and Goa."¹⁴ A similar argument was made by Argentina in 1982 in support of its use of troops to "recover" the Malvinas-Falkland Islands.¹⁵ Iraq also took this position in 1981 to support its forcible attempt to regain an area it considered unlawfully taken by Iran in 1937.¹⁶ In all of these cases, article 2(4) was at least impliedly argued to be inapplicable on the ground that the forcible taking of the territory did not violate the other state's territorial integrity. It was not necessary on this theory to assert self-defense as a justification. Nevertheless, an argument based on self-defense was also made as a subsidiary point. It was contended that the allegedly illegal occupant had maintained his authority by armed force and that this should be regarded as a continuing "armed attack" against the rightful sovereign.

In view of the considerable number of territorial disputes in the world at present, the claim that article 2(4) does not apply to the use of force to recover territory (at least not by the rightful owner) would, if sustained, go a long way toward reducing the scope of the prohibition against force. It is therefore of some importance to consider whether the international community, as a whole, has accepted the legal position asserted by Argentina, India and Iraq. The record is not free of ambiguity. Many states expressed sympathy for the territorial claims advanced by the states using force. Some, like Venezuela and Guatemala, had similar irredentist claims. Others had political ties or strong anticolonial views. Nevertheless, a substantial number of them deplored the use of force and many among them asserted the inconsistency with article 2(4).¹⁷ It cannot be said, therefore,

13. The Corfu Channel Case, 1949 I.C.J. at 34.

14. 16 U.N. SCOR (987th mtg.) at 10-11, U.N. Doc. S/PV.987 (1961); see also L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 284 (1980).

15. See generally Argentine statement in UN General Assembly, 37 U.N. GAOR (51st mtg.) at 7, U.N. Doc. A/37/PV. 51 (prov. ed. 1982); see also J. GOEBEL, *THE STRUGGLE FOR THE FALKLAND ISLANDS* (1982).

16. MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF IRAQ, *THE IRAQI-IRANIAN DISPUTE* (1980); T. ISMAEL, *IRAQ AND IRAN* 24-27 (1982).

17. See 37 U.N. GAOR (2363d mtg.), U.N. Doc. S/PV.2363 (prov. ed. 1982); see also Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 *AM. J. INTL. L.* 109 (1983).

that most states would agree that the prohibition against force does not apply when a state seeks to recover territory that may be considered to have been illegally taken from it. Such cases are regarded by most states as disputes which, under article 2(3) of the Charter, should be settled by peaceful means; even if such means are unsuccessful, there is no right to use force to rectify the wrong. Underlying this interpretation is a general awareness among governments that an exception for recovering "illegally occupied" territory would render article 2(4) nugatory in a large and important group of cases involving threats of force.

To avoid the ambiguity arising from conflicting territorial claims, it would be useful to make clear in authoritative instruments that the expression "territorial integrity" in article 2(4) refers to the state which actually exercises authority over the territory, irrespective of disputes as to the legality of that authority. A qualification to the generality of that rule would have to be made for situations in which actual authority over a disputed area has resulted from hostilities that are still taking place. In such cases, territorial sovereignty has not been established and therefore the use of force against the occupant should not be regarded as "against the territorial integrity" of the state.

It is evident from the interpretation put forward that in cases of conflicting territorial claims the prohibition against force is a strong normative support of the status quo. The aggrieved claimant finds "justice" sacrificed to "peace" especially when peaceful means of resolving the territorial issues have been exhausted or are futile. We are probably more conscious of this today than we were in 1945, when it seemed as though the United Nations and the International Court (supplemented perhaps by arbitral settlement) would be generally effective in resolving such disputes. That they have not been successful in the cases that burst into violence has undoubtedly influenced the tendency to regard article 2(4) as an ineffective restraint. Clearly, article 2(4) cannot in itself restrain force when deeply felt rights to territory are claimed and peaceful means of dispute settlement have been unavailing. Yet unfortunate as this may be it cannot be an argument for opening up a large exception to article 2(4). That would legitimize the use of force on a scale that cannot be tolerated when force tends to escalate and spread. On the whole, the international community has recognized this. The most recent events show no significant support among states for so far-reaching an exception to article 2(4).

III. HUMANITARIAN INTERVENTION

Another broad exception to the prohibition in article 2(4), one for humanitarian interventions, has been proposed by some international lawyers. The argument has been made that, in cases of large-scale atrocities or acute deprivation, armed intervention by outside states would be a justifiable exception to the article 2(4) prohibition.¹⁸ The argument rests not on the interpretation of "territorial integrity" and the other qualifying phrases but

18. See Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229-51 (J. Moore ed. 1974). For an opposing view, see Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, *supra* at 217-28.

on an overriding need to act in the interest of basic humanitarian values. It is accepted that such necessity arises only when effective peaceful measures are unavailable. The argument has a powerful emotional appeal, especially when large-scale genocide occurs or innocent persons are tortured or killed as hostages. The brutalities of the last decade have often seemed to cry out for effective humanitarian intervention through the use of force.

Nonetheless, governments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals of another country from atrocities carried out in that country. An exception was the intervention of Indian troops to protect Bengalis in East Pakistan during the 1971 civil war in Pakistan. India's ethnic links and the refugee influx into its own territory, as well as hostility toward Pakistan, were factors influencing its military intervention. It is interesting that despite considerable sympathy for the oppressed Bengalis, a large number of the UN General Assembly called on India to withdraw its forces.¹⁹

The reluctance of governments to legitimize foreign invasion in the interest of humanitarianism is understandable in the light of past abuses by powerful states. States strong enough to intervene and sufficiently interested in doing so tend to have political motives. They have a strong temptation to impose a political solution in their own national interest. Most governments are acutely sensitive to this danger and show no disposition to open article 2(4) up to a broad exception for humanitarian intervention by means of armed force.

But a somewhat different position has been taken when a state has used force to rescue or protect its own nationals in imminent peril of injury in a foreign country. Such action has sometimes been called a type of humanitarian intervention, although it is much more circumscribed than the broad principle discussed above. Examples of such rescue of nationals in danger include: the Belgian action in Stanleyville in 1961, the U.S. moves in the Dominican Republic in 1965, the Israeli rescue effort in Entebbe, the unsuccessful U.S. attempt in 1980 to liberate the hostages in Iran, and the more successful "rescue" of Americans in Grenada in 1983. In all these cases the use of force was criticized as a violation of territorial sovereignty, but jurists and many governments accepted a general legal justification for such use of force.

The argument in favor of rescue attempts contains three elements: (1) an emergency need to save lives; (2) legitimate self-defense; and (3) non-derogation of territorial integrity or political independence of the state in whose territory the action occurred. Waldo, writing in 1952, formulated the conditions under which a state may use force in another state, "as an aspect of self-defense," as follows:

There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them

19. GA Res. 2793 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 3, U.N. Doc. A/Res/2973 (XXVI) (1971). The resolution called on both India and Pakistan to withdraw troops from the other's territory but it was clearly directed against the Indian forces in East Pakistan. India strongly opposed the resolution but it was carried by 104 to 11.

against injury.²⁰

In a later exposition he stated:

Cases of this form of armed intervention have been not infrequent in the past and, where not attended by suspicion of being a pretext for political pressure, have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect.²¹

The Israeli rescue action in Entebbe, Uganda, has been the clearest example of the application of these principles, since there was no doubt as to the imminent peril of death of the Israeli captives, it was clear that the forcible capture was intended as an attack on Israel, and there was no reason to consider the rescue as a pretext for political interference in Uganda.²²

The U.S. representative in the UN Security Council (then Governor Scranton) summed up the legal position, as he saw it, as follows:

Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally such a breach would be impermissible under the Charter of the United Nations. However, there is a well-established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located either is unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.²³

It may be noted that in three of the other cases, Stanleyville,²⁴ the Dominican Republic,²⁵ and Grenada,²⁶ questions were raised whether the interventions, though originally justified by necessity, became tainted with illegality through subsequent interference in the affairs of the territorial state. We need not explore the complexities of these charges beyond noting the issue of principle. Clearly, an action that may be legal in its inception

20. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 467 (1952).

21. Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 240 (1962).

22. See generally Green, *Rescue at Entebbe — Legal Aspects*, 6 ISRAEL Y.B. ON HUMAN RIGHTS 312 (1976); Paust, *Entebbe and Self-Help*, 2 THE FLETCHER FORUM 86 (1978).

23. 1976 DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 150-51.

24. 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 475 (1965). The Stanleyville rescue may have been authorized by the Central Government of the Congo (as it was then) but this was disputed.

25. 12 M. WHITEMAN, *supra* note 24, at 733-49 (1971); Meeker, *The Dominican Situation in the Perspective of International Law*, 53 U.S. DEPT. OF STATE BULL. 60 (1965).

26. See Statement of K.W. Dam, Deputy Secretary of State, to Committee on Foreign Affairs of U.S. House of Representatives, Nov. 2, 1983, excerpted in Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INTL. L. 200 (1984); see also *Hearings Before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 3-6 (1983) (statement of Kenneth W. Dam, Deputy Secretary of State). The Grenada rescue also followed a request by the Governor-General of that country, but his authority to make that request was disputed. See Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INTL. L. 131, 137-39 (1984); Moore, *Grenada and the International Double Standard*, 78 AM. J. INTL. L. 145, 159-61 (1984).

could become illegal through prolonged intervention. Dangers of abuse are an important consideration in adopting the position that such action may be taken only when there are no other means of protection and the peril is grave and imminent. Under this principle, one would have to reject the contention of the United Kingdom that its armed intervention in Egypt in 1956 was a permissible intervention to protect its nationals.²⁷

The aborted U.S. attempt in 1980 to rescue the hostages in Tehran raised several questions as to its legality which merit consideration. Two relate to the requirement of necessity: namely, (1) had peaceful means been exhausted or were they still available? and (2) were the hostages in imminent danger of losing their lives or suffering serious injury?

It will be recalled that the hostages were seized in Tehran in November, 1979, that the Security Council had adopted a resolution condemning the seizure as illegal and urging immediate release of the hostages, that the International Court of Justice had issued an Order in December calling for release, and that efforts of various intermediaries and a UN Fact-Finding Commission had not succeeded in resolving the crisis.²⁸ Iran ignored the Security Council resolution; it failed to cooperate with the UN Fact-Finding Commission; and it refused to comply with the Order of the International Court of December 15th calling for the release of the hostages. However, the case was still before the International Court "on the merits" and the United States had pressed the Court for an early decision. One could plausibly maintain that this showed that peaceful means had not been exhausted at the time the United States undertook the military rescue action. But the critical question was whether the hostages were in imminent danger, notwithstanding judicial proceedings. It is not possible to answer this question even with hindsight. Yet it is not unreasonable to conclude that the United States could not be assured of the safety of the hostages simply because judicial proceedings were pending. The emotional atmosphere in Tehran and the public threats that the hostages might be executed were grounds for apprehension. The Iranian regime did nothing to allay the anxiety of the United States. Under these circumstances, it is hard to say that the U.S. military action was unnecessary simply because the Court case was still pending. As a matter of principle, exhaustion of remedies cannot be required when the "remedies" are likely to be futile. The state whose nationals are in peril must be given latitude to determine whether a rescue action is necessary; there is no international body or third party in a position to make that judgment. The rescue action cannot therefore be characterized as illegal under international law. Whether it was wise in a political and military sense is a different matter.

The U.S. use of force in Grenada was justified only in part as a rescue mission. The Americans on the island were not hostages and threats had not been made against them. Whether they would have been seized as hostages to forestall a U.S. invasion or subjected to hostile military action remains conjectural. Several U.S. Congressmen, at first skeptical, concluded,

27. See W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 339 (1964).

28. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (Judgment of May 24).

after a visit to the island, that there were reasonable grounds to have feared that the Americans were in danger.²⁹ But most other countries did not find that a convincing ground and apparently considered it a pretext for the action. The condemnation of the United States by the General Assembly for flagrantly violating the Charter had the support of an overwhelming majority, including virtually all of the allies and usual supporters of the United States.³⁰ If the U.S. action had been limited to an emergency rescue (on the Entebbe model), there surely would have been less doubt as to its justification.

The fact that U.S. forces acted to expel Cubans and others and remained on the island to restore "law and order" and democratic political institutions placed this action in a different light. Justification for those measures would have to be found in legal principles other than the protection of U.S. nationals. We will consider them below. The present question is whether these other grounds for the U.S. action vitiated the legality of the rescue action. As a matter of law and logic, they should not have done so. But they understandably contributed to skepticism as to whether the essential motive for the U.S. action was the emergency rescue and, in effect, subordinated that legal issue to the more controversial question of the continuing occupation.

It has been maintained (as indicated in the quotations from Waldock and Scranton) that intervention to protect nationals can be self-defense, presumably on the premise that it involves an "armed attack" on the protecting state or an imminent threat of such attack. This has plausibility when the nationals are attacked because of political antagonism to their government (as in the Tehran hostages case). Reliance on self-defense as a legal ground for protecting nationals in emergency situations of peril probably reflects a reluctance to rely solely on the argument of humanitarian intervention as an exception to article 2(4), or on the related point that such intervention is not "against the territorial integrity or political independence" of the territorial state and not inconsistent with the Charter. Many governments attach importance to the principle that any forcible incursion into the territory of another state is a derogation of that state's territorial sovereignty and political independence, irrespective of the motive for such intervention or its long-term consequences.³¹ Accordingly, they tend to hold to the sweeping article 2(4) prohibition against the use or threat of force, except where self-defense or Security Council enforcement action is involved.

Before entering into an analysis of self-defense, I would revert to the question I put earlier in this paper, namely whether the prohibition in arti-

29. See Moore, *supra* note 26, at 149-50.

30. G.A. Res. 38/7, 38 U.N. GAOR Supp. 47, at 19, U.N. Doc. A/Res/38/7 (Nov. 3, 1983); Joyner, *supra* note 26.

31. See references to governmental positions in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (app. B, 209-19) (R. Lillich ed. 1973). Legal scholars opposed to forcible humanitarian intervention as a general exception to article 2(4) include: R. FALK, LEGAL ORDER IN A VIOLENT WORLD 339 (1968); Brownlie, *supra* note 18; Giraud, *L'Interdiction du Recours à la Force*, 67 REV. GEN. DR. INT. PUBL. 501, 512-13 (1963); Jimenez de Arechaga, *General Course in Public International Law*, 159 Hague Acad. Intl. L. Collected Courses 1, 111-16 (1978).

cle 2(4) is so uncertain or malleable as to allow states to construe it as they please. Admittedly, the article does not provide clear and precise answers to all the questions raised. Concepts such as "force," "threat of force" or "political independence" embrace a wide range of possible meanings. Their application to diverse circumstances involves choices as to these meanings and assessments of the behavior and intentions of various actors. Differences of opinion are often likely even among "disinterested" observers; they are even more likely among those involved or interested. But such divergences are not significantly different from those that arise with respect to almost all general legal principles.

The foregoing analysis shows that article 2(4) has a reasonably clear core meaning. That core meaning has been spelled out in interpretive documents such as the Declaration of Principles of International Law, adopted unanimously by the General Assembly in 1970.³² The International Court and the writings of scholars reflect the wide area of agreement on its meaning. It is therefore unwarranted to suggest that article 2(4) lacks the determinate content necessary to enable it to function as a legal rule of restraint.

The very fact that states have turned to self-defense to justify the use of force indicates that the text of article 2(4) is not so loose or uncertain as to allow credible self-serving interpretation in all cases. The question then arises whether self-defense provides a wide-open legal loophole in the prohibition against force and whether its apparent availability as a legal justification in recent cases has deprived article 2(4) of much of its significance.

The readiness of states to justify their use of force on the basis of self-defense indicates the importance of defining that "inherent" right in order to limit the latitude of states to interpret it freely in their interest. In the comments that follow, we will consider the principal legal issues that have arisen in regard to legitimate self-defense.

IV. THE REQUIREMENT OF AN ARMED ATTACK AND ANTICIPATORY DEFENSE

Our first question — whether self-defense requires an armed attack or whether it is permissible in anticipation of an attack — has given rise to much controversy among international lawyers. The text of article 51 does not answer the question directly. It declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs." On one reading this means that self-defense is limited to cases of armed attack. An alternative reading holds that since the article is silent as to the right of self-defense under customary law (which goes beyond cases of armed attack), it should not be construed by implication to eliminate that right. The drafting history shows that article 51 was intended to safeguard the Chapultepec Treaty which provided for collective defense in case of armed attack.³³ The relevant commission report of the San Francisco Conference declared "the use of arms in legiti-

32. G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/Res/2625 (XXV) (1970).

33. *See* D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 183 (1958).

mate self-defense remains admitted and unimpaired."³⁴ It is therefore not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter. The main interpretive difficulty with this is that the words "if an armed attack occurs" then become redundant, a conclusion which should not be reached without convincing evidence that such redundant use was in keeping with the drafters' intention. The link with the Chapultepec Treaty provides a reason for the inclusion of the words "if an armed attack occurs" and explains why it was not said that self-defense is limited to cases of armed attack.

Much of the debate in recent years has focused on the consequences of adopting one or the other interpretation, especially in the light of the apprehension over nuclear missiles. Even as far back as 1946, the U.S. Government stated that the term "armed attack" should be defined to include not merely the dropping of a bomb but "certain steps in themselves preliminary to such action."³⁵ In recent years, the fear that nuclear missiles, could, on the first strike, destroy the capability for defense and allow virtually no time for defense has appeared to many to render a requirement of armed attack unreasonable. States faced with a perceived danger of immediate attack, it is argued, cannot be expected to await the attack like sitting ducks.³⁶ In response to this line of reasoning, others argue that the existence of nuclear missiles has made it even more important to maintain a legal barrier against preemptive strikes and anticipatory defense. It is conceded by them that states facing an imminent threat of attack will take defensive measures irrespective of the law, but it is preferable to have states make that choice governed by necessity than to adopt a principle that would make it easier for a state to launch an attack on the pretext of anticipatory defense.³⁷

Both of the foregoing positions express apprehensions that are reasonable. It is important that the right of self-defense should not freely allow the use of force in anticipation of an attack or in response to a threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation. It does not seem to me that the law should leave such defense to a decision *contra legem*. Nor does it appear necessary to read article 51 in that way — that is, to exclude completely legitimate self-defense in advance of an actual attack. In my view it is not clear that article 51 was intended to eliminate the customary law right of self-defense and it should not be given that effect. But we should avoid interpreting the customary law as if it broadly authorized preemptive strikes and anticipatory defense in response to threats.

The conditions of the right of anticipatory defense under customary law were expressed generally in an eloquent formulation by the U.S. Secretary of State Daniel Webster in a diplomatic note to the British in 1842. The

34. *Id.* at 182 (quoting Report of the Rapporteur of Committee I to Commission I, 6 UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 459 June 13, 1945).

35. JESSUP, A MODERN LAW OF NATIONS 166-67 (1948) (quoting U.S. Memorandum No. 3 of July 12, 1946).

36. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INTL. L. 57 (1963).

37. See L. HENKIN, HOW NATIONS BEHAVE 141-45 (2d ed. 1979).

note responded to a British claim that they had a legal right to attack a vessel (the *Caroline*) on the American side of the Niagara River (in 1837) because the vessel carried armed men intending to use force to support an insurrection in Canada. Secretary Webster denied the "necessity" of self-defense in those circumstances, asserting in his note that self-defense must be confined to cases in which "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."³⁸

The Webster formulation of self-defense is often cited as authoritative customary law. It cannot be said that the formulation reflects state practice (which was understandably murky on this point when war was legal), but it is safe to say it reflects a widespread desire to restrict the right of self-defense when no attack has actually occurred. A recent case in point concerns the Israeli bombing of a nuclear reactor in Iraq in 1981, which the Israeli government sought to justify on the ground of self-defense. Israel cited the Iraqi position that it was at war with Israel and claimed that the reactor was intended for a nuclear strike. Many governments and the UN Security Council rejected the Israeli position. In the debates in the Security Council on this question, several delegates referred to the *Caroline* Case formulation of the right of anticipatory defense as an accepted statement of customary law.³⁹ We may infer from these official statements recognition of the continued validity of an "inherent" right to use armed force in self-defense prior to an actual attack but only where such an attack is imminent "leaving no moment for deliberation."

V. THE REQUIREMENTS OF NECESSITY AND RECOURSE TO PEACEFUL MEANS

The requirement of necessity for self-defense is not controversial as a general proposition. However, its application in particular cases calls for assessments of intentions and conditions bearing upon the likelihood of attack or, if an attack has taken place, of the likelihood that peaceful means may be effective to restore peace and remove the attackers. As a matter of principle, there should be no quarrel with the proposition that force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile. However, to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defense. One is compelled to conclude that a state being attacked is under a necessity of armed defense, irrespective of probabilities as to the effectiveness of peaceful settlement. We reach a similar conclusion in the case of an imminent threat involving danger to the lives of persons coupled with unreasonable demands for concessions. It would be hard to deny the necessity for forcible action in that case on the ground that a peaceful means might succeed.

The question of necessity was also at issue in the U.S. rescue action in

38. 2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 890-91 (1980).

39. 36 U.N. SCOR (2285-88th mtg.), U.N. Docs. S/PV.2285-88 (1981).

Iran in 1980. Let us assume for the present purpose that the attack on the U.S. Embassy in Tehran and the seizure of hostages was an armed attack on the United States. From the very outset, the United States was faced with the question whether an armed rescue action was necessary to liberate the hostages. For about six months (November, 1979 to April, 1980) the United States sought without success to bring about release of the hostages through peaceful means. The fact that such efforts were futile was cited as evidence that armed action was "necessary" to effectuate a rescue. Does this mean that any time after the seizure of the embassy and hostages, the United States was free to use armed force to liberate them? Note that the phrase "at any time" raises two separate questions. First, the question arises whether the attacked state has a right to use force immediately or soon after the attack or whether it must seek peaceful solutions first. This issue was clearly presented in the Tehran hostages case after the seizure.⁴⁰

The second question related to the timing of defense is whether the right remains available for a substantial period after the attack, where peaceful means have failed to achieve a solution acceptable to the attacked state. This issue was also presented by the Tehran hostages case and, in a much more far-reaching way, by the Argentine claim to a right to use armed force to recover the Malvinas-Falkland Islands. It is interesting that the issues concerning the "temporal" aspects of self-defense had received little attention in the legal writings prior to these events. They are of some importance, as we can now see, and they merit further analysis.

We can begin with the proposition that, when an attack occurs against a state (and I would include in that category attacks against state instrumentalities such as warships, planes and embassies), armed force may be used to repel the attack. Such force must, of course, be proportional (we will consider this requirement later) but except for very unusual circumstances the "necessity" of defense to an armed attack requires no separate justification. It is enough for armed defense to be permissible that an attack take place. One could not say that a warship or a frontier guard is prohibited to repel an attack on the ground that there is no necessity for such defense because diplomatic steps might be taken to undo the wrong. There is no legal rule that a state must turn the other cheek because of its obligation under article 2(3) to seek peaceful settlement.

The issue becomes more complicated if the attack succeeds in the capture of territory, property or persons. Must we then consider whether available peaceful means offer the possibility of a just solution and, if so, conclude that there is no necessity for armed force as defense? The answer may seem to be implied by the question — namely, if peaceful solutions are available, there would be no need for armed force to rectify the wrong. The logic may be compelling but experience suggests caution in accepting the full conclusion. History and common sense tell us that an aggressor, having seized the territory of people, might enjoy the fruits of his aggression while forestalling peaceful solutions through dilatory tactics or unreasonable conditions. The absence of compulsory adjudication on a general basis may be cited as a reason for this, but even when compulsory judicial settlement is

40. Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis*, 37 J. INTL. AFF. 231 (Winter 1984).

legally required (as in the Tehran hostages case by virtue of treaties in force), it is possible for the recalcitrant state to avoid effective compliance. It is true that, under article 39 conditions, the Security Council may seek to bring about compliance by requiring the aggressor to yield up the fruits of his aggression and to provide reparations for his wrong, but the prevailing political differences and the requirement of unanimity of the permanent members of the Council render such enforcement measures unlikely.

These considerations indicate the legal dilemma faced in cases where an attack has already occurred and the victim state has a choice between using force and seeking redress through peaceful means. In my view, a categorical answer to the problem is not warranted. It would be unreasonable to lay down a principle that armed action in self-defense is never permissible as long as peaceful means are available. It would also be unreasonable to maintain that self-defense is always a right when an attack has occurred, irrespective of the availability of peaceful means or the time of attack. The difficulty in proposing a general rule does not mean that a reasonable answer cannot be given in particular cases. In a case involving imminent danger to the lives of captured persons, as in Entebbe or arguably in Tehran, it would be unreasonable to maintain that the continued pursuit of peaceful measures must preclude armed rescue action. In contrast, the "necessity" of armed action to recover long-lost territory (as in the Malvinas-Falklands Case) does not have a similar justification. In such cases, there is no emergency (as evidenced by the danger of irreparable injury), nor can it be said that all reasonable avenues of settlement have been exhausted.

VI. THE REQUIREMENT OF PROPORTIONALITY

Proportionality is closely linked to necessity as a requirement of self-defense. Acts done in self-defense must not exceed in manner or aim the necessity provoking them. This general formula obviously leaves room for differences in particular cases. But uncertainties in some situations do not impair the essential validity of the principle or its practical application in many conflicts. Governments, by and large, observe the requirement when they are faced with isolated frontier attacks or naval incidents. The "defending" state under attack generally limits itself to force proportionate to the attack; it does not bomb cities or launch an invasion. We tend to see such restraint generally as political or prudential, but that does not detract from its legal relevance. Thus, when defensive action is greatly in excess of the provocation, as measured by relative casualties or scale of weaponry, international opinion will more readily condemn such defense as illegally disproportionate. Some of the Security Council decisions that declared the use of force to be illegal reprisal rather than legitimate defense noted the much higher number of casualties resulting from the defense in relation to those caused by the earlier attack.⁴¹

Geography may also be a significant factor in determining proportionality. An isolated attack in one place — say, in a disputed territorial zone — would not normally warrant a defensive action deep into the territory of the

41. For a list and analysis of Security Council decisions on reprisals, see Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INTL. L. 1, 33-36 (1972).

attacking state. However, the situation may change when a series of attacks in one area leads to the conclusion that defense requires a counterattack against the "source" of the attack on a scale that would deter future attacks. Thus, the United States responded to attacks on its naval vessels in the Gulf of Tonkin by strikes deep into North Vietnam.⁴² When Israel extended its "Peace for Galilee" action in 1982 deep into Lebanon rather than limiting it to a 40 kilometer zone (as originally announced), it asserted its right to self-defense to eliminate the PLO in Beirut and other cities as the "source" of the continuing PLO attacks on northern Israel.⁴³ International opinion, as expressed in the UN, rejected the Israeli contention.⁴⁴ A contrary view maintained that the continued state of hostilities in the area and the declared intent of the PLO and their governmental supporters to destroy Israel justified retaliation beyond the area of attack.⁴⁵

Whether or not the Israeli action was excessive in execution, it does not seem unreasonable, as a rule, to allow a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attacks (with substantial military weapons) from the same source. Such action would not be "anticipatory" because prior attacks occurred; nor would it be a "reprisal" since its prime motive would be protective, not punitive. When a government treats an isolated incident of armed attack as a ground for retaliation with force, the action can only be justified as self-defense when it can be reasonably regarded as a defense against a new attack. Thus, "defensive retaliation" may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action. However, a reprisal for revenge or as a penalty (or "lesson") would not be defensive. UN bodies or their states may legitimately condemn such retaliatory actions as violations of the Charter.

VII. COLLECTIVE SELF-DEFENSE

The right of "collective self-defense," recognized in article 51, has given rise to much controversy among legal scholars, but it has nonetheless emerged as a major legal justification for military action by states outside of their own territories. It is also the declared legal basis of the principal military alliances, NATO and the Warsaw Pact, as well as a significant element in regional security arrangements. Some jurists (notably Kelsen) considered collective self-defense a contradiction because in their view the right of self-defense could only be the right of the attacked or threatened state.⁴⁶ Others (for example, Bowett) accepted the basic premise of self-defense as an individual right and concluded that collective self-defense properly ap-

42. Letter of President Johnson to Senator Jackson, Mar. 1, 1967, reprinted in *THE VIETNAM WAR AND INTERNATIONAL LAW* 604-07 (Falk ed. 1968).

43. Communication of Israel to Security Council, 37 U.N. SCOR, U.N. Doc. S/15271 (1982).

44. U.N. Docs. S/Res 508, 509, 517 (1982); G.A. Res., U.N. Doc. A/RES/ES-7/9 (Sept. 24, 1982).

45. See Levenfeld, *Israeli Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 *COLUM. J. TRANSNATL. L.* 1 (1982).

46. H. KELSEN, *LAW OF THE UNITED NATIONS*, 792, 797 (1950).

plied only when two (or more) states act in concert for defense where each of them has been attacked.⁴⁷ In contrast, if only one state has been attacked, another coming to its aid cannot be said to act in collective self-defense, but on the more dubious ground of a common duty to maintain international peace and security.

This narrow view of collective self-defense is at variance with the positions taken by many governments in their declarations and treaties. When article 51 was adopted in 1945, it was intended to legitimize the security arrangement of the Chapultepec Act of 1941.⁴⁸ That treaty declared, in effect, that aggression against one American state shall be considered an act of aggression against all. This was expressly referred to at the San Francisco conference as the reason for collective self-defense in article 51.⁴⁹ In 1949 the North Atlantic Treaty provided that an armed attack on one or more parties would be an armed attack against them all and consequently that action might be taken in accordance with article 51.⁵⁰ Though Bowett has suggested that this still recognizes that the limits of article 51 must apply to the use of force (hence his view that there is no right of armed defense unless that state is attacked or threatened), that interpretation does not seem consistent with the key provision that an attack on one is an attack on all. The Warsaw Pact follows the NATO Treaty in that respect.⁵¹ Thus, the two major military groupings are founded on a liberal interpretation of collective self-defense as allowing armed action by any member state when another member of the group is attacked. Bilateral treaties have also applied the concept of collective self-defense to undertakings by one state to come to the aid of another in case of aggression or armed attack. Such treaties do not require that the state providing aid to a victim of attack must itself be a victim. Moreover, some states have, from time to time, given aid to a government under attack by external forces when there was no existing treaty. In such cases (which have been rare) the two states have had political and strategic links as well as a common perception that the attacking state was a threat to both. It is highly unlikely that state *A* would defend state *B* against an attacker *C*, unless *A* regarded *C*'s attack as a threat.

We are bound to conclude that the collective security system of the UN Charter has now been largely replaced by the fragmented collective defense actions and alliances founded on article 51. When a state comes to the aid of another, the legal issue is not whether the assisting state has a right of individual defense but only whether the state receiving aid is the victim of an external attack.

While NATO and the Warsaw Treaty Organization have a defined geographical scope and in that sense are regional, they are not "regional arrangements" within the meaning of chapter VIII of the UN Charter and they do not inform the Security Council of their activities as required by article 54. The regional arrangements falling within chapter VIII include

47. D. BOWETT, *supra* note 33 at 216-18.

48. Act of Chapultepec, 12 U.S. Dept. State Bull. No. 297 at 339 (Mar. 3, 1945).

49. D. Bowett, *supra* note 33, at 215-216.

50. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243.

51. Warsaw Treaty, May 14, 1955, art. 4, 219 U.N.T.S. 3.

such organizations as the Organization of American States, the Organization of African Unity and the League of Arab States. With regard to the use of force, these treaty organizations may act under two separate grants of legal authority. They may take armed action in collective self-defense in case of armed attack on a member, whether that attack is by a state within or outside of the region. The Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Treaty) imposes an obligation on its parties to assist in meeting an attack on a member at the request of that member.⁵² The use of force in that event is legally based on the collective self-defense provision of the Charter. However, the treaty also provides that in cases of aggression, threats of aggression and situations that might endanger peace, the parties, through an Organ of Consultation, may take measures in the common defense to meet the danger. Such measures may include, in some circumstances, the use of armed force, even though the aggression is not an armed attack. Such measures would therefore not come within article 51 but would instead be considered as "enforcement action" within the meaning of article 53 of the UN Charter. Such enforcement action is permissible, but only if authorized by the UN Security Council. In the Cuban missile crisis of 1962, the crucial legal issue turned on this article. All states recognized the requirement of such authorization, though differing on whether Council "inaction" constituted an implicit authorization. The United States took the latter position with arguments that were less than convincing to most governments and legal commentators.⁵³

In the Grenada intervention of 1983, the United States responded to a request for assistance from members of the Organization of Eastern Caribbean States acting under various articles of their constituent treaty of 1981.⁵⁴ The OECS members noted the "anarchic conditions, the serious violations of human rights and bloodshed" on Grenada and "the consequent unprecedented threat to the peace and security of the region created by the vacuum of authority in Grenada."⁵⁵ They also declared that foreign military forces were likely to be introduced and that "the country can be used as a staging post for acts of aggression against its members" and posed a threat to the "democratic institutions of the neighboring countries."⁵⁶ The U.S. official statement referred to article 52 of the UN Charter and articles 22 and 28 of the OAS Charter as relevant legal authority for the right of a regional security body to act to ensure regional peace and security. Consequently, "in taking lawful collective action, the OECS countries were entitled to call upon friendly states for appropriate assistance and it was lawful for the United States, Jamaica and Barbados to respond to this request."⁵⁷

The thesis that neighboring states may be entitled to use military force

52. Rio Treaty, Sept. 2, 1947, art. 3, 62 Stat 1681, T.I.A.S. No. 324, 21 U.N.T.S. 77.

53. A. CHAYES, THE CUBAN MISSILE CRISIS (1974); Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INTL. L. 515 (1963); Wright, *The Cuban Quarantine*, 57 AM. J. INTL. L. 546 (1963).

54. Treaty Establishing the Organisation of Eastern Caribbean States, 20 INTL. LEGAL MATERIALS 1166 (1981).

55. Dam, *supra* note 26, at 202.

56. *Id.* at 202.

57. *Id.* at 203.

— and to legitimize military force by others — in order to meet a threat to their security by a country perceived as potentially aggressive and dangerous to the peace goes far beyond the right of collective self-defense or international “peacekeeping” as generally understood. Such action would have been legally valid if undertaken pursuant to a Security Council decision under chapter VII. But a regional arrangement under chapter VIII (including article 52) does not have the right to use armed force coercively, that is against another state, without prior authorization of the Security Council. To maintain that the U.S. action was legitimate because there was “a vacuum of authority” in Grenada (and hence “force” was not used against Grenada) assumes a right of other states to “police” other countries to restore law and order. One may concede that this may be done at the request of the country itself through a legitimate authority. But when armed force is used by outside states in the absence of such a request, it can only be considered a violation of the territorial sovereignty of that state and therefore inconsistent with article 2(4). That its purpose is benign and its effect on the country desirable would not constitute a legal justification under the Charter. If this conclusion is correct, the action in Grenada, insofar as it extended beyond the rescue of Americans, would only be legitimate on the ground that the United States and others responded to a request by the Governor-General who was then considered the “sole source of governmental legitimacy on the island” after the violent overthrow of the previous regime.⁵⁸ Whether such “invitations to intervene” are a sufficient legal basis for an outside state to use force will be considered in the next section on intervention in internal conflicts.

VIII. INTERVENTIONS BY ARMED FORCE IN INTERNAL CONFLICTS

Foreign military interventions in civil wars have been so common in our day that the proclaimed rule of nonintervention may seem to have been stood on its head. Talleyrand's cynical quip comes to mind: “non-intervention is a word that has the same meaning as intervention.” Indeed, virtually all the interventions that occur today are carried out in the name of nonintervention; they are justified as responses to prior interventions by the other side. No state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want, and that this includes the right to revolt and to carry on armed conflict between competing groups. For a foreign state to support, with “force,” one side or the other in an internal conflict, is to deprive the people in some measure of their right to decide the issue by themselves. It is, in terms of article 2(4), a use of force against the political independence of the state engaged in civil war.

The states that intervene do not challenge this legal principle; they generally proclaim it as the basis for their “counter-intervention.” They are often able to do so with some plausibility, because in almost every civil war the parties have sought and received some outside military support. A preeminent difficulty in applying the rule of nonintervention in these circum-

58. *Id.* at 203. For conflicting views on the authority of the Governor-General, see Joyner, *supra* note 26, at 137-39, and Moore, *supra* note 26, at 159-61.

stances arises from the equivocal position of the established government. Other states are free as a general rule (in the absence of contrary treaties) to furnish arms, military training and even combat forces to that government at its request. On the other hand, they may not do the same for an opposing force; that would clearly violate the sovereignty and independence of the state.

Consequently, governments commonly receive foreign military aid and they may request more such aid when faced with an armed insurrection. At that point two questions arise: (1) is there an obligation to cease aid to the established regime because that now involves taking sides in an internal conflict? And (2) if such aid to the government constitutes foreign intervention, does it permit counter-intervention to support the other side? Concretely, if the Nicaraguan Sandinista regime receives Cuban and Soviet military supplies and advisors, is the United States free to support the armed opposition by training, arms and technical advice? An answer to the first question involves an assessment of the particular circumstances and of the presumption that the government is entitled to continued aid. The relevant general principle, in keeping with the concept of political independence and non-intervention, would be that when an organized insurgency occurs on a large scale involving a substantial number of people or control over significant areas of the country, neither side, government or insurgency, should receive outside military aid.⁵⁹ Such outside support would be contrary to the right of the people to decide the issue by their own means. It would be immaterial whether the insurgency was directed at overthrow of the government or at secession (or autonomy) of a territorial unit.

The second and more difficult question is whether an illegal intervention on one side permits outside states to give military aid to the other party (whether government or insurrectionists). Such counter-intervention may be justified as a defense of the independence of the state against foreign intervention; it may then be viewed as "collective self-defense" in response to armed attack. True, it may also further "internationalize" a local conflict and increase the threat to international peace. The Vietnam War is the outstanding example. Despite the danger, the law does not proscribe such counter-intervention. It is not that two wrongs make a right but that the grave violation of one right allows a defensive response.⁶⁰ The political solution is to avoid its necessity by a strict application of a nonintervention rule applied to both sides. To achieve this it is probably essential in most cases to have international mechanisms (peacekeeping forces or observer teams) to monitor compliance with a *cordon sanitaire* and a ban on assistance.⁶¹

A related problem of practical importance is the clarification of what

59. See Resolution of Institut de Droit International on the Principle of Non-Intervention in Civil Wars, 56 ANN. INST. DR. INT. 544-49 (1975) [hereinafter cited as Resolution on Non-Intervention].

60. John Stuart Mill made the point in 1859: "Intervention to enforce non-intervention is always rightful, always moral, if not always prudent." J.S. MILL, *A Few Words on Non-Intervention*, in 21 COLLECTED WORKS OF JOHN STUART MILL 109, 123 (J. Robson ed. 1984).

61. On the role of the United Nations, see Schachter, *The United Nations and Internal Conflict*, in LAW AND CIVIL WAR IN THE MODERN WORLD 401-45 (J. Moore ed. 1974).

kinds of military aid qualify as illicit intervention. The UN resolutions on nonintervention leave this to ad hoc judgments, but a strong case can be made for the specification of impermissible acts. Such specification would give more determinate content to the principle of nonintervention and, in that respect, strengthen it. In line with this view, the Institut de Droit International, in its resolution on nonintervention, has designated the following acts as impermissible when done to support either party in a civil war:

- a) sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out;
- b) drawing up or training regular or irregular forces with a view to supporting any party to a civil war, or allowing them to be drawn up or trained;
- c) supplying weapons or other war material to any party to a civil war, or allowing them to be supplied;
- . . .
- e) making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies, as places of refuge, for the passage of regular or irregular forces, or for the transit of war material. The last mentioned prohibition includes transmitting military information to any of the parties.⁶²

The Institut also declared that outside states should use "all means to prevent inhabitants of their territories, whether natives or aliens, from raising contingents and collecting equipment, from crossing the border or from embarking from their territories with a view to fomenting or causing a civil war."⁶³ They also have a duty to disarm and intern any force of either party to a civil war which enters their territory. However, the Institut's resolution does not prohibit humanitarian aid for the benefit of victims of a civil war nor does it exclude economic or technical aid that is not likely to have a substantial impact on the outcome of a civil war. While it cannot be said that these declarations of the Institut are clearly existing law in every detail, they are a persuasive interpretation of the general rule against nonintervention and should influence state practice.

Two additional principles have been proposed for placing limits on counter-intervention. One is that the counter-intervention should be limited to the territory of the state where the civil war takes place. The fact that the prior intervention was illegal (i.e., in violation of the rule of nonintervention) would not justify legally the use of force by a third state in the violator's territory. This territorial limitation on counter-intervention has been observed in nearly all recent civil wars. However, it apparently has been abandoned by the United States insofar as its "counter-intervention" on the side of the El Salvador regime has extended to support of anti-Sandinista forces fighting on Nicaraguan soil. The United States had justified this action under the collective self-defense provision of article 51, presumably on the ground that Nicaragua has engaged in an armed attack on El Salvador. The United States also "counter-intervened" against Nicaragua by mining approaches to Nicaraguan ports. The legality of the U.S. actions has been challenged by Nicaragua in a case brought by it in April

62. Resolution on Non-Intervention, *supra* note 59, art. 2, para. 1.

63. *Id.* art. 2, para. 3.

1984 against the United States in the International Court of Justice.⁶⁴ If the Court takes up the merits of the Nicaraguan complaint (overriding U.S. objections to the jurisdiction of the Court), it will have an opportunity to clarify the limits of collective self-defense and of counter-intervention under the UN charter.

The second limitation arises from the principle of proportionality. It calls for limits on the technological level of weapons used in a counter-intervention. This is essentially a no-first-use rule. High-technology weapons of mass destruction should not be introduced into the internal conflict by any outside intervening state, whatever its right to intervene. On the whole, this rule of restraint has been followed in recent civil wars, though the Vietnam War involved exceptions. There is good reason to consider it as a legal restriction and not merely a prudential principle. It is, however, less clear that state practice conforms to a rule of proportionality in regard to the quantum of military aid on one side or the other. Proportionality would require some rough equivalence between the counter-intervention and the illicit aid given the other side. However, when an established regime faces a strong indigenous insurgency which has some outside aid, the counter-intervening government favoring the regime is likely to be under great pressure to give massive support to that regime, even if relatively minor aid from the outside is given to the insurgents. U.S. military aid to El Salvador is a current example. It demonstrates the difficulty of applying a principle of proportionality in the absence of agreed limits by both sides on the quantum and character of outside aid.⁶⁵

A separate comment is called for by the kind of case presented by the request of the Governor-General of Grenada for military intervention by the United States and neighboring states. That request was premised on the "vacuum of authority" resulting from an attempted coup d'état and a danger of foreign intervention. A factual question was raised as to whether the Governor-General made his request prior to the intervention or whether it was "concocted" after the invasion had been agreed upon and set in motion.⁶⁶ Another question was raised as to whether the Governor-General had the constitutional authority to make such a request. On both these

64. The International Court issued an order indicating provisional measures on May 10, 1984. It rejected the U.S. request to remove the case and left for future decision the question of jurisdiction or any question relating to the merits. The provisional measures ordered the U.S. to refrain from blocking access to Nicaraguan ports and from any military or paramilitary activities that "jeopardized" the sovereignty of Nicaragua in violation of international law on use of force and non-intervention. Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 169 (Order of May 10, 1984), *reprinted in* 78 Am. J. Intl. L. 750 (1984).

65. Regrettably the report of the National Bipartisan Commission on Central America (Kissinger Commission) does not discuss international law or the principle of proportionality in regard to assistance to El Salvador. However, the Contadora group of Latin-American states has proposed reciprocal restraints on outside aid to both sides. *See* 38 U.N. SCOR (2437th mtg.) at 16, U.N. Doc. S/PV.2437 (May 19, 1983); Sec. Council Res. 530, U.N. Doc. S/Res/530 (May 19, 1983).

66. Whether the Governor-General made the request prior to the invasion is disputed. *The Economist* (London) in a special report concluded that the "request was almost certainly a fabrication concocted between the OECS and Washington to calm the post-invasion diplomatic storm. As concoctions go, it was flimsy." *THE ECONOMIST*, Mar. 10-16, 1984, at 34.

points, there was reason to doubt that the Governor-General's "request" constituted an adequate legal justification for the armed intervention. However, apart from these questions specifically related to Grenada, there is the broader issue of principle concerning intervention on invitation of the government. We have already observed that authoritative legal opinion (manifested in the above-mentioned resolution of the Institut de Droit International) considers that intervention on either side in a civil war interferes with the right of the people to decide the issue for themselves. However, in the absence of a civil war, recognized governments have a right to receive external military assistance and outside states are free to furnish such aid. But a problem arises if such outside military force is used to impose restrictions on the "political independence" of the country, as, for example, by limiting the choice of the population in regard to the composition of the government or the policies it should follow. In such cases, we would conclude that the foreign armies, though invited by the government, are using military force to curtail the political independence of the state, and therefore it is an action that contravenes article 2(4). A different conclusion may be reached when a foreign force is invited by the government to help put down an attempted coup or to assist in restoring law and order. This would not violate article 2(4). Recent examples include French and British military support of African governments facing internal disorder. The line between the two situations may not always be easy to draw. An initial intervention of a limited character may evolve into a more protracted use of foreign forces to repress internal democracy and political expression. There is good reason therefore to place a heavy burden on any foreign government which intervenes with armed force even at the invitation of the constitutional authority to demonstrate convincingly that its use of force has not infringed the right of the people to determine their political system and the composition of their government. It cannot be assumed that governments will, as a rule, invite foreign interventions that leave the people entirely free to make their own political determinations, though on occasion this may be the case.

CONCLUSION

Our survey of the law of force has looked at the "hard" cases, those in which sharp differences of judgment have arisen: Lebanon, Grenada, Falklands, Nicaragua, the Tehran rescue attempt, and others. To some degree, these differences rest on conflicting interpretations of the agreed rules, and to a much larger extent, the differences arise from divergent perceptions of facts and motives. Yet underlying the disagreements, there is a considerable area of agreement on the core substantive law. It would be a mistake to conclude that the international law of force is so vague and fragmentary as to allow governments almost unlimited latitude to use force. International texts and the legal positions taken by governments reveal a coherent body of principles that apply to a wide range of conduct involving armed force. These principles are grounded in two major interests, both widely accepted as basic to our international system. The first is the paramount interest in the sovereignty and independence of nation-states. The second is the common interest in restraints on the unbridled exercise of power. Such re-

straints are no longer seen as "mere" ideals. The fear of nuclear war and mass destruction has made them a prime necessity for survival.

It is true that the efficacy of law is limited because the system lacks effective central authority and is characterized by vast discrepancies in the power of states. Fear of nuclear devastation has not eliminated the Hobbesian element in that system. Powerful states may violate international obligations; they may do so with relative impunity or they may pay a price. But they also have a stake in stability and an acute sense of countervailing power. A decentralized legal system can operate because of these factors of self-interest and reciprocal reactions.

Moreover, the system is not wholly decentralized. As we have indicated, collective judgments are continuously being made both within and outside of formal institutions. Decisions of international bodies add both to the specificity and density of agreed law and affect the costs that result from illegitimate conduct. However inadequate this may seem in comparison to a mature national legal system, it should not be scorned as an element in maintaining peace. To consider its inadequacy a reason for ignoring the restraints can only add to the present insecurity. A world in which power and self-interest alone are expected to restrain force would not be a safer world. We may move dangerously in that direction by weakening existing law on the ground that it lacks impartial organs of application and enforcement. The best would then become the enemy of the good.