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SELF-DEFENCE—A PERMISSIBLE USE OF FORCE UNDER THE U.N. CHARTER

FU-SHUN LIN

PART I. THE CONCEPT OF AN "ARMED ATTACK" WITHIN THE MEANING OF ARTICLE 51 OF THE U.N. CHARTER

The notion of armed attack in its broader sense has long been the central element in the concept of self-defence under customary international law.¹ The practice of States, as one can see from various treaties and the opinion of writers since the formation of the League, has been that acts of force, such as aggression (i.e., armed aggression), attack, and invasion are the main causes against which the victim State may resort to force in self-defence.

In their replies in 1929 to the questionnaires on the right of self-defence presented by the League, Switzerland, Belgium, Bulgaria, Denmark and Czechoslovakia expressed their views that the right of self-defence must be limited to cases of "illegal aggression or attack" only.² Similarly, in its comments on the Dumbarton Oaks Proposals, the British Government expressed its view that while the Proposals contained no provision concerning the right of self-defence, "the right... would of course remain to all members if they were suddenly attacked by another State."³ In the San Francisco Conference, Subcommittee I/1/A, which was in charge of Article 2, Paragraph 4, in its report to Committee I/1 stated that "the right of self-defence against aggression should not be impaired or diminished."⁴ Lastly, the

⁴ See 6 U.N. CONF. INT'L ORG. DORS. NEW YORK, LONDON: UNITED NATIONS INFORMATION ORGANIZATION (hereinafter referred to as U.N.C.I.O.) at 5 (1945–46); Doc. 739, I/1/A/19(a) (1945). June 1, 1945.

concept of self-defence in the municipal legal system is also primarily limited to cases of illegal attack or serious offence involving use of force. Moreover, the underlying principles of the United Nations are that a unilateral use of force by an individual State or group of States should be prohibited and that international peace and security be ensured through collective measures taken under the authority of the Organization. Under these principles, consequently, the resort to force by individual States may be allowed only under exceptional circumstances. It was thus necessary that the cause for which the victim State could resort to force in self-defence be restricted to cases of utmost gravity, and also that the Organization, through the Security Council, be authorized to intervene, if necessary, and review the legality of the acts which have allegedly been undertaken in self-defence.

Thus viewed it was not a surprise that the notion of armed attack was finally introduced in Article 51 as the basic requirement for a lawful exercise of the right of self-defence under the Charter. Enforcement measures aside, the right of self-defence recognized in Article 51 constitutes the only exception to the general prohibition of the threat or use of force provided for in Article 2, Paragraph 4. As an exceptional provision it must be construed strictly so that the general provision will not be deprived of its proper function: *exceptiones sunt strictissimae interpretationis.

As mentioned above, one of the cardinal principles of the Charter is that armed force shall not be used save in the common interest and, in principle, through the collective security machinery acting under the authority of the United Nations. Resort to force by individual States on their own initiative constitutes a departure from this principle. Consequently, such a resort to force shall be permitted only under exceptional circumstances and shall be subject to strict limitations.

5 Art. 53 of the German Criminal Code and Art. 217 of the German Civil Code, for example, referred to "an illegal and actual attack." 6 While the immediate reason why the term armed attack was adopted in the San Francisco Conference has widely been believed to be unknown, it would be an error to maintain that the term was not intended to have any particular bearing on the right of self-defence, or that it was mentioned merely as an example. Senator Vandenberg's original formula for Art. 51 referred to "a violation of this Charter" as the cause against which the right of self-defence may be invoked, and this was rejected and replaced by the present text. See Morris, Nelson Rockefeller, A Biography 220 (1960).
Is an armed attack in Article 51 limited to cases of attack or invasion carried out by regular armed forces of one State against another? It is clear that such acts of force as invasion by armed forces in the territory of another State, attack or bombardment by the land, naval or air forces on the territory, vessels or aircrafts of another State, and naval blockade of the coasts or ports of another State are the most typical forms of armed attack. It is equally clear that "armed attack" in Article 51 is not limited to these types of attack, since a State may be attacked by other types of armed aggression than those enumerated above, as, for example, an invasion or infiltration by armed bands. Nor is an armed attack required to have been committed by regular armed forces of a State against another State. This is so because the right of self-defence is recognized primarily with a view to protecting the victim State from an illegal use of force, and not to establishing the international responsibility of the attacking State. This point is of particular importance in view of the fact that in recent years irregular armed forces, as, for example, armed bands, guerrilla forces or volunteers, have frequently and subtly been employed to invade or attack another State.7

The idea that armed attack in Article 51 shall not be literally and too narrowly construed can further be seen from the fact that unlike the English, Spanish, Chinese and Russian text of that article, which all speak of armed attack, the French text speaks of agression armée.8 The French text thus indicates that Article 51 does not exclude that illegal use of force which can be considered as constituting an act of armed aggression but does not necessarily constitute an armed attack in its ordinary meaning. Supporting armed bands invading the territory of another State, and overthrowing the existing government or infringing the political independence of another State through subversive activities backed by the threat of force may be mentioned as examples.

Does an armed attack require that the attacking State commit such acts with an intention to do so? In his report to the International Law Commission, M. Spiropoulos suggested that an aggression requires

8 The French text of Art. 51 reads "dans un cas où un Membre des Nations Unies est l'objet d'une agression armée..."
both objective and subjective elements. This theory has been, to a varied degree, supported by most Western Powers, but severely attacked by the Members of the Soviet bloc.

If the subjective element means an *animus aggressionis* on the part of the attacking party, such an element cannot be accepted as a requirement for an armed attack. Just as in the case of *animus belligerendi*, an aggressor may always disclaim such an intention on its part and thus evade its responsibility for what is actually an act of armed attack. However, if the subjective element means, as M. Spiropoulos rightly pointed out, that the attacking State has acted deliberately and not committed the act through a genuine error, then such an element would seem to be desirable.

This is so not because a subjective intent on the part of the offending State is legally required but because an act committed through a genuine error is normally not serious enough to warrant the offended State to invoke the right of self-defence. The subjective element is relevant in the evaluation of the international responsibility of the State which has committed an act of force in question, but is not essential for the victim State to invoke the right of self-defence. In most cases, an act resulting from such an error or mistake is small in scope and causes little danger. Hence, the State responsible for it will normally not be regarded as an aggressor.

It seems proper to say, consequently, that the question whether a given act of force constitutes an armed attack and thus gives rise to the right of self-defence for the victim State shall be determined by the objective facts—acts of force, their magnitude and consequences—in the light of each case.

Apart from the question of the subjective element of armed attack, the concept of armed attack should also be considered from the viewpoints of its qualitative and quantitative elements. Not every illegal resort to force or act of aggression constitutes an armed attack and

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9 G.A.O.R., (VI) (1951), Sixth Comm., 279th Mtg., Para. 8. Spiropoulos further pointed out that intention is different from motive; motive is the reason for which an act of aggression has been committed, but intention exists only when the State committing the act in question has acted deliberately.


justifies the victim State to resort to force in self-defence. Resort to force in self-defence will be allowed only in case of absolute necessity. It is, therefore, necessary to consider under what degree of danger and urgency should the victim State of an illegal resort to force be entitled to resort to force in self-defence in accordance with Article 51.

Mr. Röling of the Netherlands tried to formulate this qualitative element in the following ways: an armed attack will justify the victim State for invoking the right of self-defence only when that State's survival was at stake; in cases where the danger was less pressing, the victim State would still be bound to bring the matter to an appropriate organ of the United Nations. He further elaborated this idea in the following formula: An armed attack must be of such a nature and magnitude as to leave the victim State no room to wait for a United Nations action, and to compel it to have no recourse other than to resort to armed force in order to preserve its territorial integrity or political independence. Thus, according to Röling, the decisive factor for determining the gravity of an armed attack is the fact that the attack leaves the victim State no alternative but to take up arms to defend its territorial integrity or political independence.

While the requirement of "no choice of means" is undoubtedly one of the most important requirements for a lawful exercise of the right of self-defence, it is unacceptable to limit the objects of an armed attack only to the rights of territorial integrity and political independence. The bases for the above view are that these two rights are the most essential ones for the very existence of a State and that Article 2, Paragraph 4, provides, in their opinion, that the Member States may resort to force only when necessary for protecting their territorial integrity and political independence. But there is nothing


13 Röling explained that the phrase "no room to wait for United Nations action" was only an attempt to find "a general criterion which might assist in determining the circumstances when self-defence was the only means of preserving territorial integrity and political independence," and that "Time might not be the only factor involved; the Security Council might be paralysed by the veto or some other deadlock might preclude immediate United Nations action." REPORT OF THE 1956 SPECIAL COMMITTEE ON THE QUESTION OF DEFINING AGGRESSION, U.N. Doc., A/AC.77/SR. 12, 3; id., SR. 8, 9, and SR. 13, 17. The Report may be found in G.A.O.R., (XII), Supp. No. 16, (A/1374).

in the Charter which may be construed as having limited the right of self-defence to the protection of the above-said two rights; nor does Article 2, Paragraph 4, authorize the Member States to resort to force if necessary for protecting these rights.

It is true that the rights of territorial integrity and political independence are most essential for a sovereign State, and that armed attack has in fact often been committed against these two objects. But an armed attack will not cease to be so even though its object is something else, as, for example, against a territory under an international control or against a substantial number of lives or property of nations of a State residing abroad.\textsuperscript{15}

This limitation, however, has gained little support among the Member States; it has been criticized or even attacked by many other delegates, including those of the United States, the United Kingdom, China and the Soviet Union, on the grounds that Article 51 does not contain such a limitation and the right of self-defence does not require it.\textsuperscript{16}

The decisive factor in this respect is not the category of the rights to be protected, but rather the gravity and the magnitude of the danger of the act of attack (which means the necessity of self-defence from the viewpoint of the attacked State). In the case of the Israeli invasion of Egypt in October–November 1956, Israel argued that the long and uninterrupted series of encroachments, consisting of infiltration and invasion in the territory of Israel by the \textit{fedayeen} units from Egypt, constituted an armed attack against Israel. The overwhelming majority members of the General Assembly were, however, unable to accept this interpretation of the term armed attack, because in their view such infiltration or raids on the part of the \textit{fedayeen} units, though illegal, were not of such a serious nature or on such a large

\textsuperscript{15} Art. 9 of the Inter-American Treaty of Reciprocal Assistance provides that an unprovoked attack against the people or the land, sea, or air forces of another State should be characterized as aggression.

\textsuperscript{16} See, for example, the remarks of Hsu, the delegate of China, that there was no reason for restricting the objects of armed attack to these two rights only. Such a restriction was not consistent with Art. 2, Para. 4, and was illogical. G.A.O.R., (IX) (1954), Sixth Comm., 412th Mtg., Para. 26. Similarly, the delegate of the United States expressed doubts as to whether a State was entitled to act in self-defence only when its territorial integrity or political independence was attacked; he pointed out that this might seriously prejudice the right of self-defence under Art. 51. \textit{REPORT OF THE 1956 SPECIAL COMM., op. cit. supra} n. 13, SR. 13, at 4–5.
scale as to warrant Israel to launch a large-scale attack against Egypt in self-defence.\textsuperscript{17}

In short, an act of armed attack must have seriously endangered an essential right of the State against which it has been directed (of these essential rights, territorial integrity and political independence are the most typical ones), and must be of such a grave nature as to leave the victim State no recourse, including waiting for a United Nations action, but to take necessary military measures on an urgent basis in order to defend the right in question.

Turning to the question of the quantitative element of an armed attack, it may be asked: How many soldiers or how large a scale of an armed attack are required for the victim State to retaliate by resort to force in self-defence? No answer in terms of a fixed mathematical figure can be given.

In its 1933, 1951 and 1954 draft definitions of aggression the Soviet Union proposed that frontier incidents may not be used as a justification for an act of aggression as defined in the proposals. To take military measures in self-defence against an armed attack which constitutes a frontier incident will, therefore, itself be regarded as an act of aggression. This exception has severely been criticized and attacked by most delegates from the Western bloc as well as from non-aligned States on the grounds that a potential aggressor might provoke a series of serious frontier incidents with impunity, and that it would be absurd to prohibit the victim State from defending itself or to brand it as an aggressor if it takes any military measures.\textsuperscript{18}

With regard to Article 51, Röling said that a frontier incident of a less serious nature and on a small scale was not covered by Article 51, and that the parties involved will not be justified in taking military measures in self-defence; instead, they may take such local actions as might be necessary to contain the acts in question.\textsuperscript{19} From the point of view of the right of self-defence, however, there is no juridical or practical reason to differentiate frontier incidents from other instances of armed attack; as the past experience shows, a frontier incident may be as serious and dangerous as any other act of armed attack.

Nor can we accept an argument which maintains that against any


\textsuperscript{18} See, for example, the position of the United Kingdom, G.A.O.R., (IX) (1954), Sixth Comm., 416th Mtg., Para. 19, and that of the Netherlands, \textit{id.}, 417th Mtg., Para. 5.

\textsuperscript{19} Report of the 1956 Special Comm., \textit{op. cit. supra} n. 13, SR. 12, at 4–5.
illegal resort to force constituting an armed attack, even though on a small scale or of little seriousness, the victim State is automatically entitled to the right of self-defence on the ground that Article 51 does not require the conditions of necessity or proportionateness.\textsuperscript{20}

The question must be considered from the point of view of the quantitative element of an armed attack, without regard to whether the attack takes place on a frontier or somewhere else. The question is, therefore, of a general nature; it is whether the scale or magnitude of an act of armed attack, as distinct from its qualitative consideration, is substantial enough to warrant the victim State to act in self-defence. If the act of armed attack is of little significance or on a small scale, or if it may be settled or contained by some other means than a resort to force in self-defence, there would be no justifiable ground for taking measures in self-defence. Infiltration of a small group of armed or unarmed bands or an attack on a fishing boat on the high sea may be mentioned as examples.

The quantitative consideration of an act of armed attack has also some bearing on the amount of seriousness of the measures to be undertaken in self-defence, since the latter must not be out of all proportion with the former and must be kept within the necessity of self-defence.\textsuperscript{21}

Just as the concept of aggression, the concept of an armed attack within the meaning of Article 51 is extremely difficult to define. No definition of it, whether by the enumerative, general or mixed methods, can claim to be complete or exhaustive or can be applied automatically to all actual cases. The question whether an act constitutes an armed attack shall be determined by a competent organ of the United Nations in each case in the light of the whole circumstances of the case. In the past, however, the Security Council and the General Assembly have encountered little difficulty in determining, explicitly or impliedly, that a particular resort to force has constituted an armed attack.\textsuperscript{22}


\textsuperscript{22} E.g., the Korean Question, S.C. Resolutions of 25 and 27 June, 1950; the Suez Canal Question, in which the majority members of the Assembly recognized that the invasion on the part of Israel, the United Kingdom and France constituted an armed attack; the Hungarian Question in which the draft resolution submitted by the United States (A/3286) and the G.A. Resolution 1004 (ES-II) condemned the Soviet armed intervention in Hungary and characterized it as an armed attack.
Röling proposed in the 1956 Special Committee on the Question of Defining Aggression that the concept of aggression may be ascertained through a definition of the concept of *armed attack* within the meaning of Article 51. He thereupon formulated the following draft definition:

Armed attack . . . in Article 51 is the use of armed force which leaves the State against which it is directed no other than military means to preserve its territorial integrity or political independence. . . .

Apart from the question whether the concept of aggression can be ascertained by the notion of armed attack, the above formula contains a number of loopholes. It seems to limit the concept of armed attack to a direct use of force and to cases where the act of force has actually taken place; it does not include use of force in an indirect way or an imminent threat of attack. Furthermore, by limiting the objects of an armed attack to the rights of territorial integrity and political independence, it excludes a State from taking measures of self-defence when its other rights of vital importance have become the objects of an armed attack.

As expected, this formula has also been severely criticized by many other delegates, including those of the United States, the Soviet Union and China, on various grounds—some of them were, however, obviously of a political nature.

The concept of armed attack is not of a fixed and unchangeable nature; rather, it inevitably changes as the methods of warfare, various means of aggression or intervention and the technology in modern weapons develop and change. Certainly the emergence of nuclear weapons, long-range missiles or rockets and the recent exploration and advancement in outer space have a profound bearing on the concept of armed attack.


24 For the criticism of the representative of China, see id., SR. 14, at 3. The representative of the Soviet Union remarked that Röling's definition did not specify what types of acts are envisaged as acts of a military nature, that it did not mention the role of the Security Council, and that it was limited only to the territorial integrity and political independence, although Art. 51 did not so require. Id., SR. 10, at 6.

25 In its first report to the Security Council, the Atomic Energy Commission pointed out:

"In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Art. 51 of the Charter. . . ." U.N. Doc. AEC/18/Rev. 1, at 24; A.E.C. Special Supp. (1946), Part III, at 19; also in 16 DEP'T STATE BULL. 112 (1948), 112.
nature of the concept of armed attack (and of aggression) that an attempt at the San Francisco Conference to insert a definition of aggression in the Charter failed, and all subsequent efforts which have been made since 1951 to define aggression within the framework of the United Nations have been unsuccessful. The view outlined here has been shared, explicitly or tacitly, by the majority of the Member States—particularly those of the Western and non-aligned blocs—as well as by the Secretary-General. In his instructions to the United Nations forces in the Congo operation, the Secretary-General pointed out that the U.N. forces should not fire unless for the necessity of self-defence; he, however, added that any attempt to use force for compelling the U.N. forces to withdraw should be regarded as an act of armed attack and could be resisted by force in self-defence.

In determining whether an act constitutes an armed attack, the methods or weapons used, its danger and the defensibility against it, among others, should be taken into consideration. As a general rule, however, an armed attack must involve an element of threat or use of force, whether direct or indirect and whether actual or imminent, which is of such a grace and urgent nature as to endanger the essential rights of the State thus attacked.

PART 2. THE LEGAL INTERPRETATION OF ARTICLE 51 OF THE CHARTER

A. IS THE RIGHT OF SELF-DEFENCE UNDER ARTICLE 51 LIMITED TO CASES OF AN ARMED ATTACK ONLY?

Article 51 of the Charter, on the one hand, provides that "nothing in the present Charter impairs the inherent right of individual or collective self-defence" and continues with the proviso, on the other hand, "if an armed attack occurs" against a Member State. If the right of self-defence is an inherent or natural right of States, then it cannot be impaired, divided or deprived of by a treaty, and, consequently, that right as it was recognized under customary international law should have remained unchanged in the Charter.

However, the term inherent in that provision does not have any particular legal significance but is merely an expression of the natural-law thought of the draftsmen of the Charter with regard to the


27 U.S. Doc. S/4389/Add. 1–6 at 15; see also S/4451, Para. 6.

28 See GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 301 (1952).
right of self-defence. The majority members of the International Law Commission were of the same view; when discussing the Panamanian draft of Declaration of Rights and Duties of States, they deleted the word inherent in the article concerning the right of self-defence.

The proviso "if an armed attack occurs," however, seems to mean that under Article 51 the right of self-defence has been limited to cases where an armed attack has been committed; there can be no self-defence without an armed attack. Should the draftsmen of the Charter really have not had such an intention, they would not have inserted this unambiguous proviso in the text of Article 51. This interpretation is fully in accord with the principle of interpretation of treaties that the text of a treaty should not be construed as meaningless. It is also supported by the legal canon, expressio unius est exclusio alterius. Furthermore, there is nothing in the travaux préparatoires of the Charter to indicate that the draftsmen of the Charter did intend that the proviso should have no restrictive effect on the right of self-defence.

It has been argued by some that Article 51 was adopted in the San Francisco Conference because of the necessity of giving members of regional arrangements an assurance to undertake measures in self-defence and recognizing the right of collective self-defence, and not with a view to restricting the right of self-defence as it was recognized under customary international law. Consequently, they contend, Article 51 should not be construed as having any restrictive effect on the right of self-defence to which the Member States were entitled under customary international law prior to the Charter. However, as the World Court has repeatedly held, the travaux préparatoires of


30 See Y. B. Int'L L. Comm'n (1949); 14th Mtg., Para. 61, the vote was 9 to 2.

31 In the course of the San Francisco Conference, France proposed that in case the Security Council fails to reach a decision, the Member States should be entitled to "the right to act as they may consider necessary" for defending their rights and justice. 3 U.N.C.I.O., at 379, Doc. 2, G/7(o), Part II, at 2-3. This proposal was rejected by the Conference.

32 See, for example, Bowett, The Use of Force in the Protection of Nationals, 43 TRANSACT. GROT. SOC'y 111, 115-16 (1957); Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 RECUEIL DES COURS II 455, 496-97 (1952).
a treaty shall not be used to change the meaning of the text of the treaty when the text is itself reasonably clear.\footnote{ Accord, Kunz, \textit{Individual and Collective Self-Defence in Art. 51 of the Charter of the United Nations}, op. cit. supra n. 29 at 873. See P.C.I.J., Ser. B, No. 11, at 39; \textit{Hudson, World Court Reports} (1922–1926), \textit{Washington}; \textit{Carnegie Endowment for International Peace} 466 (1934); \textit{I.C.J. Reports} 63 (1947–1948).} Furthermore, parties to a treaty should be presumed to have intended to put a certain effect in the text of a treaty and not to make it meaningless; an interpretation which would make the text of a treaty meaningless or ridiculous is not admissible.

In the course of the debate on the question of defining aggression in various sessions of the General Assembly Sixth Committee and the 1953 and 1956 Special Committees, the views of various Member States on the question under discussion were aired and may be summarized as follows:

All members of the Soviet bloc strongly insisted that under Article 51 the right of self-defence is permissible only in cases of armed attack; against any other types of illegal use of force, the victim State could only resort to other means of peaceful settlement, but is not allowed to resort to force in self-defence.

Almost all of the non-aligned and most of the Western bloc members were substantially of the same view, although some of the Western bloc members, in particular the United States, the Netherlands, Greece and France, were inclined to have a rather flexible and broad interpretation of the term \textit{armed attack}.

Only the United Kingdom and China maintained that Article 51 did not limit the right of self-defence to cases of armed attack and that that right, as it was recognized and understood under customary international law prior to the Charter, remained unaffected.

The International Law Commission also discussed this question in the course of its debate on the Draft Declaration on Rights and Duties of States in 1949. Nine members of the Commission, Spiropoulos, Alfaro, Cardova, Hudson, Amado, Brierly, Standström, Kretsky and Scelle were of the view that the right of self-defence under Article 51 has been limited to cases of armed attack. Only one member, Hsü of China, was of the view that the phrase "if an armed attack occurs, in Article 51 was merely an example of instances justifying resort to force in self-defence.\footnote{Y. B. \textit{Int'l L. Comm'n} (1949), 14th Mtg., Para. 92.}"

The Commission finally, by 8 votes to 1, adopted an amendment
proposed by Hudson that the phrase "against armed attack" be inserted in the original Panamanian draft Article 11, which provided that every State should have the right of self-defence, without referring to its causes.\textsuperscript{35}

Similarly, the overwhelming majority of writers are of the view that the right of self-defence under Article 51 has been limited to cases of armed attack only. The Charter, in their view, has imposed that restriction on the right of self-defence under customary international law—which was presumably wider—and, consequently, no right of self-defence may be invoked against an illegal use of force which does not constitute an armed attack within the meaning of Article 51.

While considerably in agreement on this basic point, they are, however, not fully in accord with regard to the interpretation of the nature and scope of the concept of armed attack within the meaning of Article 51.

The majority of this group of writers have maintained a literal and considerably strict interpretation of the term armed attack. The principal proponents of this view are Kelsen, Pompe, Jessup, Wehberg, Hudson and Ninčić.\textsuperscript{36} The main theses of this division, in addition to the points mentioned above, are that the exceptional character of Article 51 and the underlying principles of the Charter require that article to be interpreted strictly, \textit{exceptiones sunt strictissimae interpretations}; that the term \textit{attack} should be interpreted as an attack or invasion by armed force which is the gravest of all acts of aggression; and that, consequently, nothing less than an armed attack should be considered to constitute an act against which the right of self-defence may be invoked—acts, as for example, subversion, ideological or economic aggression and other forms of indirect aggression.

The other division of this group of writers, however, have upheld a considerably flexible and broad interpretation of the term \textit{armed

\textsuperscript{35} Id., 20th Mtg., Para. 71.

attack. Their main arguments are that under the present conditions of international community too literal and strict an interpretation of the concept of armed attack is unrealistic and dangerous; and that the methods of violating the essential rights, in particular the right of political independence, of other States have undergone a substantial change in recent years, and States are susceptible to violation through various means other than an open armed attack or invasion. The principal proponents of this view are Röling, Wright, Scelle and, to some extent, Lauterpacht and Kunz.  

It should be noted that the opinion of the former division was made and prevailed within the first few years of the United Nations; it, however, has lost its support among writers and the public in general during the recent years. Moreover, it has not been supported by, or in accord with, the jurisprudence of the cases dealt with by the organs of the United Nations and the position adopted by the great majority of the Member States. On the contrary, the opinion of the latter division, among them a number of prominent international lawyers, has gained an increasing support among writers and by the jurisprudence of the United Nations organs. The reality of the life in the international community has fully proved that the latter view is more practical and reasonable, and is acceptable to the great majority of the Member States.

A few writers, however, maintained an opposite view: that the right of self-defence of the Member States is not limited to cases of armed attack. Their main bases of argument are that Member States' rights under customary international law remain unchanged under the legal order of the Charter unless they have specifically been prohibited by the Charter or transferred to the United Nations, and that Article 51 was formulated in the San Francisco Conference, not for restricting the right of self-defence, but for clarifying the position of regional arrangements and ensuring the right of collective self-defence. The principal proponents of this view are Bowett, Waldock and Goodhart.  


Still other writers held a compromising and somewhat confusing view. They conceded, in principle, that the right of self-defence under the Charter has been restricted to cases of armed attack only; they, nevertheless, maintained that the Member States' right of self-defence under customary international law has not been withdrawn by the Charter. The Member States still retain that right and may invoke it once the assumptions on which the Charter stands fail to operate or collapse—a situation as, for example, when the Security Council fails to function normally.  

This view, in effect, makes the right of self-defence under the Charter a conditional one. It has been limited to cases of armed attack only when the entire machinery of the United Nations, in particular the Security Council, functions normally and effectively, and also the great Powers maintain smooth cooperation among themselves. Should these assumptions collapse, in their view, the Member States would have automatically been entitled—that is, restored—to their inherent right of self-defence under customary international law. To advance this reasoning to the interpretation of the Charter, consequently, would have resulted in a complete disintegration of the Charter as early as 1946, when the cold war between the Soviet and Western power blocs started and the veto was first cast by a permanent member of the Council.

The practice of the Security Council and the General Assembly with regard to the question under discussion, however, has been fully in accord with the first view mentioned above.

In the case of Israeli invasion of Egypt in 1956, Israel contended that her invasion in the territory of Egypt was a security measure based on the right of self-defence against the previous invasion committed by the fedayeen units from Egypt against Israel, and the aggressive military alliance between Egypt, Syria and Jordan signed shortly before. Regardless of whether these circumstances would have justified a State to resort to force in preventive self-defence under customary international law, the Security Council and the General Assembly, by refusing to accept either that these acts on the part of Egypt constituted an armed attack or that Israel’s invasion could be

justified by these contentions, impliedly upheld the view that a Member State is entitled to resort to force in self-defence only in cases of armed attack.

Prior to the Anglo-French invasion in the Suez Canal area in 1956, the British Government contended, inter alia, that Egypt's nationalization of the Suez Canal constituted an act of aggression in violation of international law, the Anglo-Egyptian treaties of 1888 and 1954 and the spirit of the Charter. Explaining the British position to the House of Commons, the Foreign Secretary pointed out:

Nor would it be claimed that... Her Majesty's Government should take no action to protect the lives of British subjects abroad unless and until they are expressly authorized by the United Nations to do so. Art. 51 of the Charter recognizes the right of self-defence and it would be a travesty of the Charter to say that no intervention can take place until our nationals are actually being attacked and perhaps killed.40

Similarly, the Lord Chancellor made the following statements concerning the Government's position with regard to the right of self-defence under the legal order of the Charter:

Again it is essential to remember that the right of individual self-defence was regarded as automatically excepted from both the Covenant... and the Pact of Paris without any mention of it, and clearly the same would have been true in the Charter... had there been no Art. 51... Art. 51 was not inserted in the Charter for the purpose of destroying the individual right of self-defence, but for the purpose of clarifying the position in regard to collective undertakings for mutual self-defence, particularly the Pan-American Treaty,... known as the Act of Chapultepec. These undertakings were concerned with defence against external aggression and it was natural for Art. 51 to be related to defence against attack.

Art. 51 must be read in the light that it is part of Chapter VII of the Charter and concerned with defence against grave breaches of the peace. It would be an entire misreading of the whole intention of Art. 51 to interpret it as forbidding forcible self-defence in resistance to an illegal use of force not constituting an armed attack.41

To these contentions many members of the Opposition party in both Houses strongly objected on the grounds that under the Charter only in cases of armed attack can a Member State resort to force in self-defence, and that even though the nationalization of the Canal by the Egyptian authorities was illegal, that act could hardly be considered as constituting an armed attack.42

41 199 H. C. DEB. NOV. 1, 1956, COLS. 1333-56, 1359; also 6 INT'L & COMP. L. Q. 329-30 (1957).
42 199 H. C. DEB. NOV. 10, 1956, COLS. 637-1319.
SELF-DEFENCE—UNDER THE U.N. CHARTER

In their arguments before the Council and the Assembly, the United Kingdom and France did not claim that Egypt had committed any act of armed attack against them; instead, they advanced a theory that their invasion was permissible under customary international law as a self-defence or a lawful intervention, and that such act was not prohibited by the Charter.

This Anglo-French argument was definitely rejected by the overwhelming majority of the members of the Council and the Assembly on the grounds that under the legal order of the Charter a Member State is only allowed to resort to force in self-defence in cases of armed attack, and that Egypt did not in the present case commit or threaten to commit such an attack against the United Kingdom or France.\(^4\)

In the Palestine Question, on the other hand, Egypt claimed that it was still at war with Israel and imposed in 1951 a restriction on the passage of ships belonging to or destined for Israel through the Suez Canal. Before the Council, Egypt argued that she deemed herself to be entitled to belligerent rights, including the right to impose the above restriction; that Article 51 of the Charter did not impair the Member States' right of self-defence as it existed under customary international law; and that under the Constantinople Convention and the Armistice Agreement she was entitled to take necessary measures of self-defence for the safety of the Canal.\(^4\)

Only two members of the Council, China and Iraq, supported these Egyptian contentions. The majority members, however, were unable to accept these arguments and held that since there was at that time no armed attack or even an imminent threat of attack on the part of Israel against the Canal, Egypt was not entitled to the right of self-defence under Article 51.\(^4\)

In its resolution adopted on September 1, 1951, the Council firmly rejected the above Egyptian thesis of the right of self-defence, and held that the Armistice Agreement was of a permanent character and that neither party to it could claim any belligerent rights or exercise the right of visit, search or seizure for any legitimate purpose of self-


\(^{44}\) See *Yearbook of the United Nations*, Dep't Pub. Inf. 293–99 (1951).

\(^{45}\) *Accord*, Bowett, *Self-Defence in International Law* 191 (1954). By holding that Egypt was in the present case not entitled to impose the restriction in question, the Council impliedly denied the Egyptian contention that it was entitled to declare was on Israel or exercise the belligerent rights.
defence. It further found that such practice (i.e., the Egyptian restriction) could not, in the prevailing circumstances, be justified on the ground of self-defence. The vote was 8 to 0, with 3 abstentions.\textsuperscript{46}

In the Lebanon and Jordan Question in 1958, the question of the nature and scope of the concept of armed attack was bitterly debated before the Council and the Assembly. Accusing the sending of armed forces by the United States and the United Kingdom to Lebanon and Jordan, respectively, the Soviet Union, the United Arab Republic and Sweden, among some other States, contended that under Article 51 only an armed attack—and a direct, serious and actual one—could justify the victim State to resort to force in self-defence, whether individual or collective. There was in the present case, they contended, no armed attack on the part of any third State against Lebanon and Jordan.\textsuperscript{47}

Against these contentions, all members of the Western bloc and the majority of the members of the non-aligned bloc, in particular the United States, the United Kingdom, China, France, as well as Lebanon and Jordan, maintained that while Article 51 referred to armed attack as a \textit{sine qua non} for a lawful exercise of the right of self-defence under the Charter, it did not specify or require that the attack must be strictly a direct and open one; nor was such a strict and narrow interpretation of the concept of armed attack acceptable, they further contended, in view of the recent practice of indirect and subtle means of aggression.\textsuperscript{48} The position taken by the Western bloc members in the present case was considerably a broad interpretation of the concept of armed attack, a view generally accepted by the great majority of the Member States as well as writers. Significantly, they did not contend that the Member States are still entitled to the right of self-defence under customary international law.

The practice of States, outside the United Nations, with regard to the question under discussion has been that the Member States (as well as non-Member States when they participate in a collective security pact with Member States) are entitled to resort to force in self-defence only in cases of armed attack, even though their inter-


\textsuperscript{47} For the statement of the representative of the Soviet Union, see S.C.O.R., 13th Yr., 827th Mtg., Para. 116; for that of the representative of Sweden, see \textit{id.}, 830th Mtg., Paras. 47–48.

\textsuperscript{48} See, for example, the statement of the representative of Lebanon before the Security Council, S.C.O.R., 13th Yr., 833rd Mtg., Para. 10.
pretations as to the meaning and scope of the term *armed attack* have not necessarily been the same.49

The point that an act of aggression, even though involving the use of force, which does not constitute an armed attack within the meaning of Article 51 could not justify the victim State to exercise the right of self-defence was clearly stipulated in the Inter-American Treaty of Reciprocal Assistance of 1947. Article 3 of that treaty provides that the parties to it are entitled to exercise the right of individual or collective self-defence in cases of armed attack, while Article 6 provides that in case of “an aggression which is not an armed attack” the State which is the object of such aggression may only ask the Organ of Consultation to consider the situation.

Of all the treaties, declarations and understandings concerning mutual security arrangements under the framework of the Charter, however, nothing can be found that explicitly or tacitly stipulates to the effect that the parties to it are entitled to exercise the right of individual or collective self-defence in case of acts of aggression not constituting an armed attack within the meaning of Article 51.

The right of self-defence was subjected to very stringent requirements under customary international law. It was allowed only in case of absolute necessity, and the measures thus undertaken were not to exceed what was most reasonable and essential for that purpose. Normally, no self-defence would be allowed unless the offence involved the element of use of force and was directed against the essential rights of the victim State. Against an offence which did not involve the element of use of force or which was not urgent or serious, the offended State may only resort to other means of remedy or settlement. It would, therefore, be a mistake to maintain that under customary international law a State was entitled to resort to force in self-defence against any offence, without regard to the element of use of force or the urgent nature or seriousness of the offence.

The juridical concept of self-defence was, however, of little practical significance under the international legal order prior to the Covenant. The question whether a war or use of force was resorted

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49 See various treaties of collective security concluded by the United States and other Western Powers, in particular, North Atlantic Treaty of 1949 (Art. 3), Inter-American Treaty of Reciprocal Assistance of 1947 (Art. 3), and South Eastern Asia Treaty of 1954 (Art. 4, Para. 1). The Soviet bloc members have also frequently used the term *armed attack* in their treaties providing for their collective security. See, for example, Warsaw Treaty of Friendship, Cooperation and Mutual Assistance of 1955 (Art. 4).
to in legitimate self-defence or aggression was not so much a legal question as a political one; self-defence was utilized to provide an excuse or justification for a war or use of force which was resorted to as an instrument of national policy without any legally justifiable cause. It was natural, under these circumstances, that the right of self-defence was often invoked to justify acts of force against various forms of offences with different degrees of seriousness and urgency.

The situation is, however, substantially different under the legal order of the Charter. The general and complete prohibition of the threat or use of force, and the maintenance of international peace and security by collective measures under the authority and through the organs of the United Nations are two fundamental principles of the Charter. The right of self-defence, under these circumstances, constitutes an exception to the general principle of the prohibition of use of force. The Member States may lawfully resort to force only under the circumstances envisaged in Article 51. It is both natural and necessary for the Charter to impose strict restrictions on that right—viz., to allow that right only under the most strictly limited and serious circumstances. This is indeed a necessary conclusion from the interpretation of the Charter with regard to the right of self-defence.

Moreover, the Member States have assumed under the Charter obligations not to threaten or use armed force, and to settle their disputes by peaceful means, including a settlement through the Security Council or the General Assembly. The Member States have assumed these obligations by accepting a multilateral treaty of greatest importance, which has the character of a law-making treaty. Article 103 of the Charter provides that the obligations under the Charter shall prevail over any other obligations of the Member States which may conflict with the former. Similarly, in case of conflict between the rights of the Members with their obligations under the Charter, the latter shall prevail over the former; in such a case the Member States have renounced their rights, to the extent to which these rights are inconsistent with their obligations under the Charter, when they accepted the Charter.

For these reasons, the view that the right of self-defence which the Member States had under customary international law was not affected by the Charter is not acceptable. The above-said argument based on the legislative history of Article 51 in the San Francisco Conference does not support the view in question.
Nor can we accept the view that under customary international law the right of self-defence was so broad as to cover an illegal act which did not involve the element of use of force or, even when it involved such an element, was of little seriousness or urgency. Such a description was not true under customary international law, and much more so under the legal order of the Charter.

Nor can we share the view that the obligations of the Member States under the Charter are of a provisional or conditional nature. No basis for this theory can be found in the Charter or international law. A State is not entitled to reduce or relieve itself from its obligations under a treaty to which it is a party, unless specifically so provided in the treaty itself or in accordance with the principles of international law. This is especially so when the treaty is a law-making one and has been generally accepted by virtually all States in the international community.

On the other hand, neither is an interpretation acceptable which construes the term \textit{armed attack} in Article 51 in its narrowest possible and extremely literal sense—viz., an open, direct and actual attack or invasion committed by regular armed forces of a State against another State. This interpretation would, in effect, have made the right of self-defence under the Charter an empty gesture and Article 51 a dead provision. It would also have prohibited the victim of an act of aggression, which does not constitute a typical armed attack but is dangerous enough to violate its essential rights, from taking any measures of self-defence.

The conclusion is that the term \textit{armed attack} within the meaning of Article 51 of the Charter should be interpreted and determined in the light of the actual conditions of things in the international society. Among others, the methods of aggression or other illegal acts violating essential rights of another State, the qualitative and quantitative elements of the act in question, the urgent nature of the situation, and the availability of the effectiveness of the Council or the Assembly should be taken into consideration.\footnote{Schwarzenberger, \textit{The Fundamental Principles of International Law}, op. cit. supra n. 39 at 339.}

From the above observations, it becomes clear that virtually all Member States have accepted the view that the right of self-defence under the Charter has been limited to cases of armed attack. Those few States which contended, when they had resorted to force in
violation of Article 51, that the right was not so restricted did so entirely out of political considerations in order to justify their own acts in question. Even these States did not really support that view consistently; they have frequently changed that position whenever they found themselves to be on a different side of the issue.51

While the overwhelming majority of writers and the Member States are equally of the view described above, they are less in accord with regard to the question whether Article 51 permits self-defence in cases of an imminent threat of attack and whether the right may be exercised against acts of indirect aggression.

B. IS THE RIGHT OF SELF-DEFENCE IN ARTICLE 51 LIMITED TO CASES WHERE AN ARMED ATTACK HAS ACTUALLY TAKEN PLACE?

Article 51 further provides that the inherent right of self-defence may be exercised "if an armed attack occurs . . ." This wording makes it possible to interpret that the provision intended further to limit the right of self-defence only to cases where an armed attack has actually taken place; no right of self-defence can be invoked against a mere threat or preparation of an armed attack.

This interpretation has been strongly adhered to by all members of the Soviet bloc.52 Few States outside that bloc supported that view; they include Iran, Mexico and few other non-aligned members.53 The reasons in support of this view are that the provision of Article 51 clearly provides that the right of self-defence may be exercised "if an armed attack occurs . . .," which means after an armed attack has already taken place and is still in progress; that a threat of attack is after all different from an armed attack itself, and, under the Charter the threatened State has the right and assumes an obligation to bring the matter to the Security Council or to settle it by peaceful means; and that to permit the use of force in self-defence against a threat of attack, as distinct from an actual attack, would be tanta-

51 See, for example, the position taken by the United Kingdom, France, Egypt (U.A.R.) and Israel in various cases in which they were involved.


mount to permitting potential aggressors to engage in a preventive war or even outright aggression under the cloak of self-defence.\(^\text{54}\) This interpretation of the right of self-defence under the Charter, however, has strongly been opposed by the majority Members of the United Nations, in particular the United States, the United Kingdom, France, China, Belgium, the Netherlands, Greece, Norway and Denmark.\(^\text{55}\) Their main points of arguments are as follows: While Article 51 has restricted the right of self-defence to cases of armed attack, it has not required that the attack must have actually taken place. The right of self-defence against an imminent threat of attack or invasion was traditionally recognized under customary international law, as has recently been upheld by the Nuremberg and Tokyo International Military Tribunals, as well as under all municipal legal systems. The most important function of the right of self-defence, in their view, is to prevent a real and imminent threat of attack from taking place, and not merely to resist or suppress an attack which has already taken place; consequently, to prohibit self-defence against such a threat of attack would have resulted in depriving that right of its essential function and rendering it virtually meaningless. They further point out that the discovery of nuclear and other modern weapons of mass destruction and the advancement in modern technology have made it imperative for the threatened State to take necessary measures in self-defence once the threat of an armed attack is real and imminent, without the necessity of waiting for the first blow from such an attack.\(^\text{56}\)

In the International Law Commission, when it discussed this question in 1949, the opinion was rather divergent. The majority mem-

\(^\text{54}\) See the statement of the Soviet member in the International Law Commission (Koretsky), Y. B. Int'l L. Comm'n, (1949), 14th Mtg., Para. 103. Beside the provision that any State which first commits an act of aggression would automatically be regarded as an aggressor, each version of the draft definition of aggression submitted by the Soviet Union (1933, 1951 and 1953) provides that in case of a threat of aggression, such as mobilization or concentration of armed forces in the frontier, the threatened State may only have recourse to peaceful means or take similar measures of a military nature without crossing the frontier.

\(^\text{55}\) Speaking before the 1953 Special Committee on the Question of Defining Aggression, the representative of the United States pointed out:

[I]t would be impossible to adhere strictly to the chronological criterion . . . if the United States had learned that the Japanese were preparing to bomb its fleet at Pearl Harbor it could, without thereby committing an act of aggression, have struck first to destroy the Japanese aircrafts before they had carried out their mission . . .


\(^\text{56}\) See Part 1, p. 16 supra.
bers were, however, in favor of the latter view. An amendment proposed by Hudson that the words "if an armed attack occurs . . ." be inserted in the Panamanian draft concerning the right of self-defence was rejected by the Commission because, they feared, the word occurs might be interpreted as requiring an armed attack to have actually taken place before the right may be invoked. After that word was deleted, the amendment was finally adopted by a vote of 8 to 1.\textsuperscript{57} Similarly, in its report in 1951, the Commission expressed its view that threat of force should be included in the concept of aggression.\textsuperscript{58}

The International Court of Justice, though indirectly, upheld the same view in the Corfu Channel Case.\textsuperscript{59}

Those States and writers who are in favor of the second view, however, do not claim that any threat of attack should justify the threatened State to act in self-defence; it is only a real and imminent or impending threat of attack or invasion of a grave nature and urgency that is contemplated. But what is an imminent threat of attack? Röling of the Netherlands explained that only "an imminent threat of attack in which the threatened State had no time for any other action than immediate self-defence" could justify self-defence under Article 51.\textsuperscript{60} He further elaborated that an imminent threat of attack should be specifically and clearly directed against another State and that it must be on the point of being carried out.\textsuperscript{61}

A mere fear of apprehension of a possible attack without clear and present danger or without any concrete ground to substantiate it, or a remote and uncertain possibility of an attack, would not be sufficient to constitute a real and imminent threat of attack justifying the threatened State in taking measures of self-defence in accordance

\textsuperscript{57} See Y. B. INT'L L. COMM'N (1949), 14th Mtg., Para. 107, and 20th Mtg., Para. 71. Scelle stated in this connection that while he was in favor of adding the words "against armed attack," he opposed the proposal made by Hudson. "It was advisable to allow States some latitude when it came to deciding at which moment self-defence should come into operation," he said. Id., 20th Mtg., Para. 69.


\textsuperscript{59} I.C.J. REPORTS, 30–31 (1949). See Waldock, The Regulation of the Use of Force by Individual State in International Law, \textit{op. cit. supra} n. 32 at 500–01, where the author deduced the position of the Court concerning the right of self-defence as regarding it is "enough if there is a strong probability of armed attack—an imminent threat of armed attack" and that it "did not take a narrow view of the inherent right of self-defence reserved by Art. 51." Accord, Bowett, Self-Defence in International Law, \textit{op. cit. supra} n. 45 at 187–93.

\textsuperscript{60} G.A.O.R., (IX) (1954), Sixth Comm., 410 Mtg., Para. 43.

\textsuperscript{61} REPORT OF THE 1956 SPECIAL COMM., \textit{op. cit. supra} n. 13, SR. 13, at 17.
with Article 51. While the actual situation of an imminent threat of attack or invasion takes a variety of forms and degrees and develops gradually, the essential factors of such a threat of attack, for the purpose of invoking the right of self-defence, are as follows: Substantial or essential preparatory steps of such an attack must have been completed, and the act of attack or invasion is being commenced or is going to be commenced at any moment—a state of readiness. The preparatory measures thus made and the act of attack being commenced must be of a grave nature, and the situation must be so urgent that the threatened State would have no alternative means nor any room to wait for any other remedy but to resort to measures of self-defence in order to protect itself from the attack.\(^2\) When these conditions are met, the measures taken would constitute a lawful exercise of the right of self-defence, even though no soldier has yet crossed the frontier and no aircraft or long-range missile has yet taken off or been fired; the chronological order of events is, therefore, immaterial in determining the legality of the acts in question.\(^3\)

Although the Soviet bloc members maintain that a threat of attack cannot justify self-defence, they do not mean that the threatened State must wait idle for the first blow before it can be allowed to retaliate in self-defence. The Soviet delegate (Morozov) in the 1953 Special Committee on the Question of Defining Aggression, explaining what his country meant by the term threat of attack, said that as

\(^2\) See Wright, United States Intervention in the Lebanon, op. cit. supra n. 37 at 117, in which the author says: “[T]he term ‘armed attack’ in Art. 51 should be broadened to include an imminent threat of armed attack . . . . It is clear, however, that threats justifying . . . self-defence cannot be extended beyond situations presenting an immediate danger of ‘armed attack.’ They cannot be extended, for example, to attacks upon a State by propaganda, infiltration, subversion or other acts sometimes called ‘indirect aggression’ . . . .

\(^3\) The so-called principle of priority (i.e., whoever hits first shall be regarded as an aggressor and the victim of the first blow as a State resorting to force in legitimate self-defence) has been upheld by those States which favor the above said restrictive view (all members of the Soviet bloc and a few members of the non-aligned bloc); the Western Powers and most members of the non-aligned bloc, which maintain that the right of self-defence may be allowed against an imminent threat of attack, have strongly opposed that view. The main thesis of the first view is that to refute that principle would amount to permitting potential aggressors to conduct a preventive war or aggression by arguing that they were acting in self-defence against an imminent threat of attack. See the statement of the representative of the Soviet Union, Report of the 1953 Special Comm., op. cit. supra n. 55, SR. 9, at 15. Opposing this Soviet view, Röling pointed out that the major factors in this connection are “the nature and magnitude of the act of aggression,” and not the chronological order of the acts of force taken by one or the other side. Report of the 1956 Special Comm., op. cit. supra n. 13, SR. 8, at 8-9.
soon as the intention to attack has been translated into action, that is, when acts constituting an armed attack had been committed, the threatened State may take measures of self-defence. Thus, the Soviet delegate seemed to distinguish an uncertain and remote threat or preparation of attack from a real and imminent threat of attack in which some constituent act or acts of an attack has been initiated, though the prospective victim State has not yet actually been attacked. A mobilization or concentration of troops within a State's own territory normally belongs to the former category, while a case in which bombers intending to attack a neighboring State have taken off from the base but have not crossed the border line belongs to the latter category.

Thus analysed, it appears that the discrepancy between the above two opposing views is a matter of difference in degree and not difference in substance.

Unlike the question discussed in "A" above, the difference of opinion of various writers on the question under discussion has been much more acute. Generally speaking, those writers who maintain a strict interpretation of the term armed attack equally insist on a strict interpretation of the phrase if an armed attack occurs; those writers who favor a flexible and broad interpretation of the term armed attack and, of course, those writers who hold that the right of self-defence has not been affected by the Charter are of the view that Article 51

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64 Report of the 1953 Special Comm., op. cit. supra n. 13, SR. 9, at 15.

65 The principal figures of this category are: Kelsen, Limitation on the Functions of the United Nations, op. cit. supra n. 29 at 1010; Wehberg, L'Interdiction du recours à la force. Le Principe et les problèmes qui se posent, op. cit. supra n. 11 at 82-83; Hudson, Y. B. Int'l L. Comm'n (1949), 14th Mtg., Para. 81; Nintić, Report on Some Aspects of Self-Defence in the Charter of the United Nations, op. cit. supra n. 36 at 69; Jessup, Beckett, Pompe and McNair.

66 The principal figures of this category are: Röling, The Question of Defining Aggression, op. cit. supra n. 7 at 316; Brierly, Y. B. Int'l L. Comm'n (1949), 14th Mtg., Para. 94; Wright, United States Intervention in the Lebanon, op. cit. supra n. 37 at 117; and to a less extent, 2 Oppenheim, INTERNATIONAL LAW 190 (7th ed. 1952); Scelle, Y. B. Int'l L. Comm'n (1949), 20th Mtg., Para. 69; and McDougal.

67 The principal figures of this category are: Bowett, Self-Defence in International Law, op. cit. supra n. 45 at 191-92; also Nintić, Report on Some Aspects of Self-Defence in the Charter of the United Nations, op. cit. supra n. 36 at 49; Goodhart, The North Atlantic Treaty, op. cit. supra n. 39 at 202-03; Waldock, The Regulation of the Use of Force by Individual States in International Law, op. cit. supra n. 32 at 497-99; Hsu, Y. B. Int'l L. Comm'n (1949), 14th Mtg., Paras. 89, 94; Stone, Aggression and World Order, op. cit. supra n. 39 at 94; Goodrich & Hambro, CHARTER OF THE UNITED NATIONS, op. cit. supra n. 39 at 300; and Schwarzenberger, The Fundamental Principles of INTERNATIONAL LAW, op. cit. supra n. 39 at 333.
does not require an armed attack to have already occurred before the right of self-defence may be lawfully invoked.

In addition to the practical reasons summarized above, the former group of writers (the restrictive view) base their reasoning on a strict and literal interpretation of the text of Article 51, and the principle *exceptiones sunt strictissimae interpretationis*. They further point out that the rules of customary international law with regard to the right of self-defence are no longer relevant, since they are clearly inconsistent with Article 51 of the Charter and have, therefore, been repealed by the Charter. The fact that the Security Council and the General Assembly have on many occasions been unable to function effectively in accordance with the Charter should not, in their view, be used as a ground for impairing the general validity of Article 51 or to detract the right of self-defence under the Charter of its exceptional and restricted character.⁶⁸

The main legal arguments advanced by the latter group of writers (the flexible view) are that the right of self-defence under customary international law has not been affected by the Charter,⁶⁹ and that law must be interpreted in such a way as not to lead to an unreasonable or ridiculous conclusion. To interpret that the Member States have been prohibited from taking measures of self-defence against an imminent threat of armed attack is, in their view, both unreasonable and unrealistic.

The question, it is submitted, should be considered from the viewpoints of the interpretation of the term *occur* in the context of Article 51 and the application of the right of self-defence in the reality of international life. Just as the term *armed attack*, the term *occur* should also be interpreted in such a way as not to render the provision of Article 51 entirely unreasonable or ridiculous.

The term *occur* does not necessarily mean that an act must have already taken place and reached its full-fledged stage; even at its very initial stage, the act may still be considered to have occurred. Furthermore, from the viewpoint of international as well as criminal law, whenever an armed attack has been fully prepared with a view to specifically attacking a particular State and is ready to be launched at any moment, the very attack may be regarded as having occurred,

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⁶⁸ See Ninić, *Report on Some Aspects of Self-Defence in the Charter*, op. cit. supra of Czechoslovakia, see id., 418th Mtg., Para. 44.

⁶⁹ See Bowett, *Self-Defence in International Law*, op. cit. supra n. 45 at 49.
since the state of readiness constitutes a serious threat of attack toward the threatened State; in such a case the armed attack has been committed through an omission, as distinguished from an active commission.

The right to act in self-defence against an imminent threat of attack has been recognized as an integral part of the right of self-defence under customary international law as well as the municipal legal systems. In view of the inadequate nature of the machinery under the legal order of the Charter to prevent or suppress an illegal use of force, and the fact that the modern weapons of mass destruction and the development in technology have made it extremely dangerous for the threatened State to wait for the first blow, the right to resort to force in self-defence when the armed attack is imminent is both imperative and reasonable. To deprive the Member States of this right would be tantamount to a virtual denial of the very right of self-defence and would, furthermore, be inconsistent with both general international law and the Charter.

PART 3. ACTS OF INDIRECT AGGRESSION AND THE RIGHT OF SELF-DEFENCE

With regard to the question against what kinds of acts of indirect aggression and under what circumstances may the victim State invoke the right of self-defence, the general principle is that only against those acts of indirect aggression which involve the element of threat or use of force and are serious and urgent enough to endanger the essential rights of the victim State, can that right be invoked. Against those acts of indirect aggression which do not involve such an element or, even when they involve such an element, the acts themselves are not serious and urgent enough, the victim State will not be allowed to take military measures in self-defence.

On this question, again, the position of various Member States has been considerably in disagreement. The question furthermore presents some confusion and uncertainty because the nature and scope of the concept of indirect aggression itself are to a large extent uncertain and have been the subject of controversy among the Member States as well as writers.

As to the right of self-defence against acts of supporting armed bands in a State with a view to invade the territory of another State, the prevailing view has been that against acts of active support of such armed bands the victim State is entitled, if other requirements are also satisfied, to take military measures in self-defence. This view
has generally been upheld by most Western and non-aligned members, most writers and the practice of the United Nations organs, and not seriously contested by the Soviet bloc members.\textsuperscript{70}

As mentioned above, against a mere failure on the part of the authorities of a State, in whose territory the armed bands organized themselves and from which they started their invasion, to exercise due diligence in taking necessary measures to prevent the bands from invading another State or to suppress them, the invaded State may not invoke the right of self-defence. On this point, there seems to be a tacit but general acceptance among the Member States.

As to the right of self-defence against various forms of subversive activities, the positions taken by the Soviet and Western blocs have been seriously in conflict. While the Soviet Union added various acts of indirect aggression, including subversive activities and fomenting civil strife, in its draft definition of aggression submitted in 1953, its position has remained that against such acts of indirect aggression no right of self-defence under Article 51 of the Charter may be invoked; the main ground is that such acts cannot be regarded as constituting an armed attack within the meaning of Article 51. An examination of the debates in various bodies of the United Nations on the question of defining aggression in recent years reveals that the Soviet Union and other members of the Soviet bloc are strongly of the view that against any and all acts of indirect aggression (not including support of armed bands), no right of self-defence may be invoked; this is so without regard to whether or not the acts involve the element of threat or even use of force.\textsuperscript{71}

On this particular question, however, most members of the Western bloc and the majority of the non-aligned members maintain virtually an opposite position. In their opinion, acts of indirect aggression may be divided into two categories, one involving the element of threat or use of force and the other not. Against acts belonging to the latter category, no military measure in self-defence may be allowed, since such acts can hardly be regarded as acts of armed attack, even under a broad interpretation of the term. Acts, as for example, so-called economic or ideological aggression, hostile radio propaganda, and

\textsuperscript{70} The Soviet Union for the first time in 1951 added the item of support of armed bands organized in a State's own territory which invaded the territory of another State among acts of aggression. See U.N. Doc. A/C.6/L.208.

\textsuperscript{71} See the statements of the representative of the Soviet Union, G.A.O.R., (IX) (1954), Sixth Comm., 403d Mtg., Paras. 7-20, and 414th Mtg., Para. 36; for the position of Czechoslovakia, see id., 418th Mtg., Para. 44.
fomenting civil strife in another State without substantial assistance in war materials or personnel belong to this type of indirect aggression. Against those acts of indirect aggression which involve the element of threat or, particularly, use of force, the victim State may be allowed to take appropriate military measures in self-defence provided the acts in question are serious and the situation urgent enough to warrant such measures.\(^2\)

In view of the fact that the concept of indirect aggression itself remains uncertain and no definition branding it as aggression has been accepted by States, it seems to be of little practical value to elaborate upon the question of the right of self-defence against such acts in terms of indirect aggression. The question, however, should be considered from the point of view of the general principles governing the right of self-defence under the Charter as discussed in the present study.

**CONCLUSION**

In short, the right of self-defence under the Charter is not created by, or to be determined solely in terms of, the Charter. It is a right under general international law to which the Charter explicitly refers to as not having been “impaired” by the latter. In its interpretation and application to an actual case, however, that right should be interpreted and applied in such a way as not to lead to an unrealistic, unreasonable or ridiculous conclusion. In interpreting or applying that right, consequently, it is essential to take into consideration the meaning of that right under customary international law and under the provision of the Charter, as well as the objective situation of the international community in general and the circumstances of the actual case in particular. Like the concept of aggression, that of self-defence is inherently difficult to define. With a rapidly changing society of nations, the interpretation and application of the right of self-defence in factual cases is not an easy task. It is, in the last analysis, a competent organ of a judicial or quasi-judicial nature of the international community which should be called on to carry out this task. In performing this task, the various factors and criteria discussed above should be taken into consideration.

\(^2\) See the statement of the representative of the Netherlands, G.A.O.R., (IX) (1954), Sixth Comm., 410th Mtg., Para. 37; for the statement of the representative of China, who was the strongest supporter of this Western view, see id., 409th Mtg., Paras. 6-13, especially at 10; for the position of the United Kingdom, see G.A.O.R., (VI) (1951), Sixth Comm., 281st Mtg., Para. 9.
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