

## The Relationship between the Right of Self-Defence on the Part of States and the Powers of the Security Council

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ABSTRACT. A great deal of attention has been paid by the writers of international law to the interpretation of Article 51 of the UN Charter. The most frequently canvassed issues have included the question of what is meant by an armed attack and whether self-defence is available only if such an attack occurs. And, the criteria of necessity and proportionality. Central to such matters is the crucial relationship between Article 51 and the rules of customary international law.

It is clear that under customary international law, no reporting does not affect the validity of action taken in self-defence because there is no duty but only an expectation that a state should comply with the Charter requirement. However, Article 51 was introduced into the draft of the Charter of the UN at a late stage at the insistence of Latin American states not to safeguard the right of individual self-defence but to preserve the efficacy of collective security arrangements.

Article 51 was drafted on the assumption that the council would be able to respond rapidly to a situation falling within Article 51, the history of the UN has, for the most part demonstrated the council's incapacity to function effectively. The problem with this assessment is that the actions taken by the council in a particular case are not dictated by legal criteria indicated in Article 51 but by what is politically feasible. It is possible, if not likely there will be a significant gap between the scope of the measures agreed upon by the council and what is regarded as an appropriate objective for the exercise of the right of self-defence from the point of view of the state exercising that right.

### **Introduction**

A great deal of attention has been paid by the writers of International Law to the interpretation of Article 51 of the UN Charter. The most frequently canvassed issues have included the question of what is meant by an armed attack and whether self-defence is available only if such an attack occurs, and the criteria of necessity and proportionality, Central to such matters is the crucial relationship between Article 51 and the rules of Customary International Law.

The two principal aspects of this relationship are apparent from the wording of Article 51, which states that "...Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall immediately be reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security..."<sup>(1)</sup>.

The first matter in any likely sequence of events is the requirement that any measures taken in self-defence shall be immediately reported to the Security Council. The second in any prospective chronology is the prescription that nothing in the provision is to impair the right of self-defence until the Security Council has taken measures necessary to maintain international peace and security. Implicit in the formulation of Article 51, therefore, is the notion that the reporting of measures would normally be a prelude to action of some sort by the Security Council that would bring to an end the need for the State, which has been the victim of an armed attack, to continue to exercise its right of self-defence. It is these two issues, the nature of the reporting requirement which brings the right of self-defence to an end.

### The Reporting Requirement

The use of the words "...shall be immediately reported..." suggests that the State acting in self-defence is under a legal obligation to report its actions to the Security Council<sup>(2)</sup>. Is the requirement mandatory? Does the claim by a State to have acted in self-defence lose its validity if the action is not reported in accordance with Article 51?, or is it only directory? in the sense that non-compliance with the requirement does not invalidate the plea of self-defence.

There is no authoritative statement as to whether the reporting requirement in Article 51 of the UN Charter should be classified as mandatory. Some guidance might be provided by certain aspects of the judgment of the ICJ in the Nicaragua case in which Nicaragua sought to hold the USA responsible for various military and paramilitary activities directed against Nicaraguan territory<sup>(3)</sup>. The USA argued, inter alia, that it was entitled to take such measures on behalf of Honduras, Costa Rica and El-Salvador in the exercise of a right of collective self-defence<sup>(4)</sup>. The USA declaration

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(1) **Brownlie, Ian**, *Basic Document international Law*, Second Edition. Oxford Uni. Press, Oxford 1981. p.16.

(2) **Bowett, D. W.**, *Self-Defence in International Law*. Oxford Un. Press. London 1958. p.197.

(3) *ICJ Report 3*, 1986.

(4) Similar problems arise in the municipal sphere. Legislation might specify the taking of certain procedural steps for the exercise of a power without stating the consequences of a failure to satisfy the prescribed requirements. Deciding whether such a failure renders abortive the exercise of the power, or has some less serious result, is a complex problem. A court will have to attempt to assess the hypothetical international of the legislature with regard to the requirement in question. On the whole, however, there is an increasing reluctance to regard conditions imposed upon the exercise of a statutory power as mandatory.

The trend has been towards treating such conditions as directory in the sense that all that is required of the person seeking to exercise the power is substantial compliance with the conditions imposed, or that the appropriate sanction is something less than invalidity of the act in question. There may be no exact parallel between the approach adopted in municipal law and interpretation to be placed on Article 51. However, it does at least appear likely that as the primary power of judgment with regard to the legality of use of force is vested by the UN Charter in the Security Council, the Council would not wish to regard itself as hampered in carrying out this function by any reading of Article 51 which would treat the reporting requirement as mandatory.

of acceptance of the ICJ's jurisdiction excluded disputes arising under a multilateral treaty unless all parties to the treaty affected by decision are also parties to the case before the court. The court was obliged to reach a decision based upon the rules of customary international law applicable between the parties. One of the crucial issues was the extent to which the existence of the Charter provisions, and Article 51, in particular, though not capable of providing a basis for decision by virtue of the reservation, had affected the content of those rules.

The court was of the opinion that Article 51 had modified the previous law in a number of ways not least in limiting the right of self-defence to a case where an armed attack had occurred. With regard to the procedural requirement in that Article, imposing a duty to report measures taken in self-defence to the Security Council, whether the requirement was mandatory or directory in nature, it could be regarded as a norm of customary international law. In the court's view, the existence of such a report could provide as evidence to the belief of the State concerned that it was entitled to act in self-defence. In this respect the court stated that "... If self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected<sup>(5)</sup>.

It is clear from this passage that, under customary international law, no reporting does not affect the validity of action taken in self-defence, because there is no duty but only an expectation that a State should comply with the Charter requirement. The court did not also answer the question whether, if the Charter provisions were applicable, a failure to comply with the reporting requirement vitiates the action taken in self-defence.

### Collective Self-Defence

The Court imposed two conditions upon the right of collective self-defence, both of which it regarded as of great significance. The first one is that "...the victim of an armed attack must declare itself to have been so attacked..." and the second one is that "...the victim must have requested the assistance of the State which comes to its aid..."<sup>(6)</sup> There are, however, a number of difficulties with the court's approach: it seemed to assume the existence of a right of collective self-defence under customary international law; it also accepted that such a right was based upon the creation of a post-armed attack relationship rather than a pre-existing collective self-defence. In addition, there are issues of whether the two conditions were regarded as mandatory or directory by the court, and whether the answer to this question provides any guidance to the reporting requirement under Article 51.

Article 51 was introduced into the draft of the Charter of the UN at late stage at the insistence of Latin American States, not to safeguard the right of individual self-defence, but to preserve the efficacy of collective security arrangements such as the one provided for in the Act Chapattepec which had been adopted at the Inter American Conference on Problems of Peace and War<sup>(7)</sup>. While this explains why Article 51 contains an express validation of collective action taken in self-defence, it gives no clue as to the requirements for invoking the right. Moreover, although the use of word

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(5) ICJ Repot, *op. cit.*, p. 105.

(6) *Ibid.*, pp. 104-105.

(7) **Schachter, W.**, *The Right of States to Use Armed Forces*, Oceana Publication, Michigan, 1984. p. 82.

inherent provided a ground for incorporating into the law of the Charter pre-existing customary international law with regard to self-defence in general, it could have done so with regard to collective self-defence if there had been any such customary law.

If the concept of collective self-defence emerged from the Act of Chapattepec, then its existence under customary international law must be doubted as the Act dates from the same year as the San Francisco Conference. However, in many ways, the development of the concept of collective security in the Americas had been the history of the Monroe doctrine<sup>(8)</sup>. Throughout the nineteenth century, the notion that European States should not interfere with the affairs of the American Republics provided a moral justification for the assertion of what was in reality a USA sphere of interests policy<sup>(9)</sup>.

With the present century, however, American politicians felt the need to rationalise their attitudes in legal terms. This change in approach apparently occurred over a relatively short period of time, and owed much to President Wilson<sup>(10)</sup>. Article 21 of the Covenant of the League of Nations brought legal respectability to this aspect of USA policy by expecting from the effects of other obligations of the covenant regional understandings like the Monroe doctrine<sup>(11)</sup>. However, it was not until the advent of the Second World War that the notion of self-defence acquired an additional, essential collective aspect. The 1940 Declaration of Havana stated that "...any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign this declaration..."<sup>(12)</sup>. This concept of collective security was reiterated in the Act of Chapattepec of 1945<sup>(13)</sup>, and later in Article 6 of the Rio Treaty of 1947<sup>(14)</sup>.

It would seem, therefore, that the notion of collective self-defence in 1945 when the UN Charter was drafted related specifically to the inherent right of States to enter into alliances with whatever other States they wished and thus form a collective self-defence alliance. Therefore, it could hardly have been suggested that self-defence as collective was an inherent right, had been long established in customary international law, the idea that an attack against one member of an alliance was expressly deemed, by the treaty of alliance, to constitute an attack against all others was, at the time, a recent phenomenon. Nonetheless, because it provided the cause for concern that led to the inclusion of Article 51, with its specific reference to collective self-defence, in the UN Charter, the strong inference is that Article 51 must be interpreted in the light of that recent practice. The collective was represented by a group of States identified by a common interest in the security of one another<sup>(15)</sup>. In the absence of an obvious geographical connection, such as two States having common borders, the most obvious

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(8) **Moore, John Bassett**, *Digest of International Law*. Vol. 6, 1944, pp. 401-403.

(9) **Bemis, S. F.**, *The Latin American Policy of The USA*. Oceana Publication, New York, 1943. pp. 70-71.

(10) **Hackworth, L. J.**, *Digest of International Law*. Vol. 5, 1980, p. 441.

(11) At the Paris Peace Conference, President Wilson explained that the Covenant provides that the members of the League will mutually defend each other in respect of their political and territorial integrity. This Covenant is therefore, the high tribute to the Monroe Doctrine.

(12) **Hackworth, L. J.**, *Digest of International Law*, Vol. 5, 1980, p. 467.

(13) **Whiteman, P. J.**, *Digest of International Law*, Vol. 12, 1979, p. 79.

(14) *Ibid.*, pp. 456-457.

(15) **Oppenheim, E. I.**, *International Law*, 7th Edition (1952) Vol. 2, Sevens Ltd, London. 1945, p. 155

manifestation of a community of interest would have been a treaty of alliance declaring the collective interest which each party had in the security of the others<sup>(16)</sup>.

This explanation of the legal position in the year immediately after 1945 is prevailed by the practice of States. The signing of the Rio Treaty in 1947 containing a collective security provision in Article 6 might have been ascribed to the particular approach and concerns of American States. While, it was an objective that was openly expressed by others as defensive alliances, Article 5 of the North Atlantic Treaty provided that an armed attack against one or more parties to the treaty in Europe or North America<sup>(17)</sup>, "...shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defence recognized by Article 51 of the UN Charter will assist the party or parties so attacked by taking forthwith, individual and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area..."<sup>(18)</sup>.

Moreover, Article 4 of the dissolved Warsaw Pact 1955 between the former Soviet Union and other States of Eastern Europe was in substantially similar terms<sup>(19)</sup>. Thus the attitude of States during this early period of the UN's existence seems to have coincided with the perception of collective defence as requiring some real element of self-involved with the notion of defence alliance<sup>(20)</sup>.

Despite the strength of this evidence, the proposition was, nevertheless, advanced that any State is entitled to go to the aid of another State whether or not it had been requested to do so by the latter, provided that the latter had been the victim of an armed attack. It was certainly the view of some writers of International Law that the request or consent of the victim of the original attack was irrelevant, there was a customary right or more precisely a power, to aid third States which have become the object of an unlawful use of force<sup>(21)</sup>. This was based upon the proposition that, whether the uncertainties that existed at the time the Charter was drafted, Article 51, in effect created a new right, or at least extended the existing right of self-defence. It is the opinion of some writers of International Law that the word "collective" does not appear to have been intended to cover only contractual system of self-defence but any assistance to a member of the UN engaged in legitimate self-defence appears to be authorised by Article 51<sup>(22)</sup>.

However, there remained a degree of unease about the extent to which the wording of Article 51 was open to this interpretation. Professor Kelsen appeared to endorse the wider interpretation in the following passage Article 51 "...extends this right, in so far as it authorises not only the attacked State, but any member of the UN to use armed force against a State guilty of an armed attack. This means that any member of the UN is authorised by the Charter to assist with its force the attacked State against an

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(16) **Fawcett, R. C.**, *Intervention in International Law*, A Study of Some Recent Cases, Stevens, London, 1961, pp. 347-368.

(17) North Atlantic Treaty signed at Washington in April 4, 1949.

(18) Text of the Treaty in (1949), Vol. **43**, *AJIL*, P.159.

(19) This Treaty was signed at Warsaw in May 14, 1955. Text of this Treaty in 1955, Vol. **49**, at *AJIL*, p. 194.

(20) See Judge Jennings' opinion in the Nicaragua case (1986) *ICJ Report* (3) at 545.

(21) **Brownlie, Ian**, *International Law and the Use of Force by States*, Oxford Un. Press London, 1963. p.330.

(22) **Waldock, C. H.**, *The Regulation of the Use of Force by Individual States in International Law*, Freedoms. London. 1962. pp. 445-504.

aggressor. This is implied in the provisions recognising not only the right of individual self-defence but also the right of collective self-defence..."<sup>(23)</sup>.

However, Professor Kelsen did admit that the use of the term self-defence was rather problematical because, it was correctly applied only to the State which is the victim of the armed attack, while the other members of the UN which assist the attacked State, act in the defence of the latter, but not in self-defence<sup>(24)</sup>.

Another possibility was that whatever the doubts as to the interpretation to be placed upon Article 51<sup>(25)</sup>, in the decade or so after the Charter came into existence, the broader view became established by practice as representing the attitude of States towards the provision's application. Despite the confidence with which assertions have been made, it can not be claimed that the practice said to exist provides cogent evidence for the proposition being advanced<sup>(26)</sup>. Thus, Professor Schachte's explanation was more a matter of intuition than empirical assessment<sup>(27)</sup> "...We are bound to conclude that the collective security system of the UN Charter has now been largely replaced by the fragmented collective defence 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 defence but only whether the State receiving aid is a victim of an external attack..."<sup>(28)</sup>.

Despite the reference in this quotation to "attack by external forces..." most of the relevant examples seem to be cases where the victim was the target of an insurrectionist movement operating within its territory, though allegedly supported from outside<sup>(29)</sup>. This was certainly true with regard to the USA action in Nicaragua, most notably its support for the Contras operating from the territory of El-Salvador, which the USA sought to justify on the basis of a right of collective self-defence exercised in conjunction with El-Salvador<sup>(30)</sup>. However, as many of the examples of collective action that would, in the absence of justification amount to an illegal intervention have in recent years involved a number of States in different parts in the world, the practice of States would seem to favour, rather than to negate, the need for some sort of nexus between the victim and the State or States coming to its aid in order for Article 51 to apply<sup>(31)</sup>.

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(23) Collective Security and Collective Self-Defence under the Charter of the UN 1948<sup>42</sup>, *AJIL.*, pp.783-792.

(24) *Ibid.*, p.783.

(25) **Stone J.** on the other hand, was dismissive of the existence of any earlier customary law on the ground that by reserving a pre-existing right of collective self-defence. Article 51 presents such insoluble problems that it may seem better to treat the term inherent so otiose and regard. Article 51 as itself conferring the liberties there described.

(26) **Dinstein, Y.**, *War, Aggression and Self-defence*, Mortin. London., 1988. p.234.

(27) 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. 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.

(28) **Schachter, W.**, *The Right of States to the Armed Force*. Oceana Publication, Michigan. 1984. p. 82.

(29) **Higgins, R.**, *The Development of International Low Through the Political Organ of the UN*. Oceana Publication. New York, 1963. p. 209, Et Seq.

(30) *ICJ Report 3*, 1986, p. 102, Et Seq.

(31) **Feliciano, F. P.**, *Low and Minimum World Public Order*, Mortin. London. 1961. pp. 248-250.

### The Requirements Imposed by ICJ

When the ICJ came to consider the nature of collective self-defence in the Nicaragua case, the court adopted what appears to be something of an intermediate position. While rejecting the need for a prior and objective identification of the collective upon which the right of self-defence could be based, the primary means of identification of the necessary collective, in the court's view, is the combination of the declaration by the victim that it has been subject to an armed attack and a request for assistance from that State to the State coming to its aid. This can be read in the court's own words the court finds that in customary international law, whether of a general kind or that particular to the Inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked..."<sup>(32)</sup>.

Given the dearth of evidence supporting these requirements, either by way of State practice or in the literature, doubts must be entertained as to their existence in customary international law. This scepticism is increased by the fact that the only basis addressed by the ICJ for the need for a request for assistance by the victim State was the reference in Article 3 Paragraph (2) of the Rio Inter-American Treaty of Reciprocal Assistance of 1947. The Article states that "...on the request of the State or States directly attacked and until decision of the Organ of Consultation of the Inter-American System, each one of the contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The Organ of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of collective character that should be taken..."<sup>(33)</sup>.

This slender authority for the existence of a rule of customary international law or for the development of such a rule, parallel to Article 3 Paragraph (2) could be found in the court's following explanation. Therefore, it is difficult to understand why such a rule of customary law should more easily develop, concerning the reporting requirement, from Article 51 of the UN Charter. The court stated that Article 51 had no counterpart in customary law, would also seem to be equally applicable to Article 3 Paragraph (2) of the Rio Treaty<sup>(34)</sup>.

This supposition is prevailed by the very wording of Article 3 Paragraph (2) of the Rio Treaty which interpreted in the context of Article 3 Paragraph (1) of Inter-American System in which it appears the translation of Article 51 of the UN Charter<sup>(35)</sup>. The remaining paragraphs of Article 3<sup>(36)</sup> of the Inter-American System relate to the

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(32) *ICJ Report*, 1986, p. 105.

(33) Text of this Treaty could be found in *AJIL*, Vol. 43, 1949, p. 53.

(34) *ICJ Report* (3), 1986, p. 105, *Supra*, p. 109.

(35) Article 3 Paragraph (1) reads "...the contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and consequently each one of the said contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the UN Charter..."

(36) The Paragraphs read as follows "... (3) The provisions of this Article shall be applied in case of any armed attack which takes place within the region described in Article (4) or within the territory of an =

procedures and institutions established for the implementation of Paragraph (1) while Paragraph (2) concerning with the need for the request of the State or States directly attacked. This is given equality of treatment with the procedures relating to the Organ of Consultation which maintained in Article 3 Paragraph (2) of the Rio Treaty. This is similar to the regionalism to which Article 51 applied and the relationship with the Security Council. Moreover, the fact that Paragraph (3) limits the operation of Article 3 hemispherically makes it less likely that it can be regarded as of a fundamentally norm-creating character as far as general international law is concerned<sup>(37)</sup>.

### **The Legality of the Requirement**

The ICJ, in the Nicaragua case, regarded the two requirements that for a right of collective self-defence to arise there should have been both a declaration by the victim that it had been attacked and a request by that State for assistance from the State intervening on its behalf, as having great significance. However, the question has to be asked whether it really considered such requirements as being mandatory in effect so that a failure to satisfy either condition rendered illegal the action taken by the defender's ally. Given the fragile basis for these requirements as outlined in the previous section, it would be most unsatisfactory if they were regarded as of such crucial importance. It has to be admitted, however, that the court's position on this issue was not altogether clear.

The section in the court's judgment in which the two requirements for collective self-defence were dealt with made reference to the need to define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred<sup>(38)</sup>. The court then turned to the issue of an armed attack upon which Article 51 was based and which the court regarded as equally essential under customary international law. In case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this requirement.

In contrast, the same Paragraph from the judgment ended with an equivocation with regard to the need for a declaration by the victim State. It states that "...it is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack..."<sup>(39)</sup>.

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= American State. When the attack takes place outside of the said areas, the provisions of Article (6) shall be applied. (4) Measures of self-defence provided for under this Article may be taken until the Security Council of the UN has taken the measures necessary to maintain international peace and security...".

(37) North Sea Continental Shelf Case, 1969. *ICJ Report* 3, p. 42.

(38) *ICJ Report*, 1986. p.103.

(39) *Ibid*, p. 104.



### **The Requirements as Mandatory**

The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. The use of the word "whether the lawfulness suggests that both requirements are mandatory a proposition further prevailed by the conclusion. In the latter conclusion the court explained that "... at all events, the court finds that in customary international law, whether of a general kind or that particular to the Inter- American Legal System, there is no rule permitting the exercise of collective self- defence in the absence of a request by the State which regards itself as the victim of an armed attack. The court concludes that the requirement of a request by the State which is victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked<sup>(40)</sup>.

### **The Requirement as Directory**

Despite the apparent intention of the court to treat these requirements as mandatory, there are a number of convincing reasons for rejecting this interpretation of the judgement. Some of these relate to the requirements themselves, others concern the reporting aspect of Article 51.

As far as the two requirements were concerned, when the court came to apply them to the facts of the case, its attitude was more ambivalent. This could be seen in the following passage which stated that "...The exercise of the right of collective self-defence presupposes that an armed attack has occurred and it is evident that it is the victim State being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to it its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the court is entitled to make account, in judging the asserted justification of the exercise of collective self-defence by the USA, of the actual conduct of E-Salvador, Honduras and Costa Rica at the relevant time, as indicative of the belief by the State in question that it was the victim of an armed attacked by the Nicaragua, and of the making of a request by the victim State to the USA for help in the exercise of collective self-defence..."<sup>(41)</sup> if, in the practice of State, it is the victim, which is likely to draw general attention to its plight and which will normally make an express request that it is seeking aid from other States, it would seem to be extremely doubtful that either the drawing attention or the request should be regarded as a *sin qua non* of the validity of an act of collective self-defence.

A similar deduction can be made from the court is consideration of the timing of a declaration by a victim of an armed attack. If the making of a declaration is mandatory, it must be proximate in time to the armed attack of which the State concerned is complaining. If it is only declaratory or evidentiary, then the timing of the declaration is not conclusive but is only one of a number of factors which have to be assessed. When the court came to consider the relevance of a declaration made by El-Salvador in 1984 to the situation in 1981, it had this to say "...Similarly, while no legal conclusion may be drawn from the date of El-Salvador's announcement that it was the victim of an armed

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(40) *Ibid*, p.105.

(41) *Ibid*, p.120.

attack and the date of its official request addressed to the USA concerning the exercise of collective self-defence, those dates have a significance as evidence of El-Salvador's view of the situation, the declaration and the request of El-Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for the USA activities which began in the second half of that year. The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the USA to Nicaragua, without actually constituting such an attack, were, nevertheless, the most accentuated, they did so behave only at a time when these facts fell furthest short of what would be required for the court to take the view that an armed attack existed on the part of Nicaragua against El-Salvador"<sup>(42)</sup>.

In the court's view, therefore, the condition *sine qua non* required for the exercise of the right of collective self-defence by the USA is not fulfilled in this case<sup>(43)</sup>.

### **The Duty to Report to the Security Council**

The non-mandatory case is sharpened when the two requirements by the court as being obligatory which are related to the duty to report to the Security Council which are contained in Article 51 of the UN Charter. It has already been mentioned that the latter were regarded by the court as being mandatory, if at all under the Charter and not under customary international law, as the court later said that "...at no time, up to the present, has the USA Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the UN Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the UN does not exist. It does not therefore, treat the absence of a report on the part of the USA as the breach of an undertaking forming part of the customary international law applicable to the present dispute..."<sup>(44)</sup>.

If the Charter provision has no counterpart as a mandatory element in customary international law, it would be curious indeed if the requirements based upon regional rules of international law and no general State practice should have that status.

There is the additional interpretative difficulty arising from this part of the court's judgement. If the inference is correct that the requirements imposed by the court are intended to be mandatory, it would seem to follow that the reporting requirement under Article 51 should also be mandatory under the Charter, even though not so under customary international law. This was the distinction drawn by the court between the position under customary law and, by inference, that under the Charter which led Professor Dinstein to conclude that... the court implied that when the use of force is governed by the law of the Charter, a State is precluded from invoking the right of self-defence, if it fails to comply with the requirement of reporting to the Council. When put

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(42) *Ibid*, p.122.

(43) *Ibid*, p.122.

(44) *Ibid*, p.122.

in this light, the duty of reporting becomes a substantive condition and a limitation on the exercise of self-defence...<sup>(45)</sup>.

There is a number of cogent reasons for rejecting this conclusion, two of which are related to the absurdity of having two parallel rules of differing content in such circumstances. In the first place, it hardly seems possible to have a mandatory provision in the Charter, to which there is no counterpart in customary international law, relating to the exercise of a power available under both sources. Generally speaking, the provisions of the Charter have primacy over other bases of obligations. It is true that Article 103 of the Charter speaks of the obligations under the Charter prevailing only in the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement<sup>(46)</sup>. The same must be equally true with regard to rules derived from the practice of States<sup>(47)</sup>, except in so far as, such practice has brought about a modification of the prescription contained in the Charter<sup>(48)</sup>.

The second, and more fundamental reason for rejecting mandatory interpretation of the reporting requirement in Article 51 is that it would produce a crucial difference between the Charter provisions and the rules of customary international law which would be totally inconsistent with the court's approach to the multilateral treaty reservation in the USA Declaration of acceptance of the court's jurisdiction. This reservation excluded from that jurisdiction "...dispute arising under a multilateral treaty unless (1) all parties to the treaty affected by the decisions are also parties to the case before the court, or (2) the USA specially agrees to the jurisdiction...". The USA argued, *inter alia*, that as the case concerned critical issues relating to the use of force as defined particularly in the Charters of the UN and of OAS, the multilateral treaty reservation excluded the court's jurisdiction.

The court rejected this contention on the ground that it could decide the case by reference to the rules of customary international law independently of the conventional provisions.

The USA had attempted to meet this line of reasoning by countering that the court can not properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred, the court then decided to adjudicate those rights and obligations by standards other than those to which the parties have agreed to conduct themselves in their actual international relations<sup>(49)</sup>. The court acknowledged the strength of this argument, but explained why it was not prepared to accept it in the ensuing paragraph from its judgement, which read in the following part "...the question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the UN Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise,

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(45) **Dinstein**, *op. cit.*, p.197.

(46) **Kelson**, **H.**, *The Law of the UN*. South Western Legal Foundation. New York, 1951, pp. 111-112.

(47) **Greig**, **D. W.**, *International Law*, Second Edition, Butterworths. London. 1976, pp. 744-751.

(48) **Greig**, **D. W.**, *The interpretation of Treaties and Article IV. (2) of the Nuclear Non-Proliferation Treaty*. August 6, 1978, *YBIL*, (77), pp.97-98.

(49) *ICJ Report*, 1986, p. 96.

however, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment no susceptible of compliance or execution..."<sup>(50)</sup>.

It is true that a divergence between the status of the reporting requirement would not have affected the decision reached by the court, whether applying customary law, or if it had been able to rely upon the Charter provisions, the USA actions would still have regarded as illegal. Nevertheless, it would have been a bizarre possibility if the consequence of the court deciding a case by reference to one source of law, to the exclusion of another, could have been a different conclusion from that which it would have reached if all the sources had been relied upon. Indeed, it is arguable that such a possibility is excluded by the specific wording of Article 38 Paragraph (1) of the Statute of the court, whereby the court is enjoined to apply all the sources enumerated therein. More particularly, the court shall apply international conventions and international custom. It is arguable that any attempt to restrict the court's choice of sources in disputes submitted to it as involving a conflict with the statute, thus rendering the attempt invalid<sup>(51)</sup>.

Despite the court's acknowledgment in the Nicaragua case that two legal sources were sufficiently similar for the exclusive application of one of them alone to produce a result that was not in conflict with the rules prescribed by the other, how this was achieved was more a matter of inference than of explicit statement. At one stage, the court admitted that on a number of points the areas governed by the two sources of law do not overlap and substantive rules in which they are framed are not identical in content<sup>(52)</sup>. While the non-overlapping would not constitute a reason for applying the multi-lateral treaty reservation, the same would not necessarily hold true as far as the non-identity of the rule is concerned.

With regard to the overlapping issue, the court was merely identifying the fact that the UN Charter by no means covers the whole area of the regulation of the use of force in international relations. Hence, the right of self-defence in Article 51 could be interpreted only in the light of customary international law. For instance, the definition of an armed attack was a matter of customary, not conventional law, while the requirement of proportionality constituted a rule well established in customary international law<sup>(53)</sup>.

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(50) *Ibid*, p. 96.

(51) In the Norwegian loans case. in answer to the question. what is the result of the fact that a reservation or part of it is contrary to the provisions of the Statute? Judge Lauterpacht said that the reservation or that part of it is invalid.

(52) *ICJ Report*, 1986. p. 94.

(53) *Ibid*, P. 94.

Given that the court rejected the possibility of the existence of a wider right of self-defence under customary international law than under Article 51, the only area of possible difference between the two sources would seem to be in relation to the requirement contained in that provision and the declaration and request by the victim conditions imposed by the court as part of customary international law. It has already been pointed out that the status of these latter requirements was not made altogether clear by the court. If they were mandatory in the court's view, then they would also have to exist alongside the conventional rules. Otherwise, there would be a major discrepancy between the two sources. The same would be true in reverse with regard to the reporting requirement. If it were mandatory under the Charter, there would be a clear divergence between that requirement and the position under customary international law, the court held that there was no parallel rule in customary international law<sup>(54)</sup>.

There is thus strong reason for supposing that this particular Charter requirement was only directory or evidentiary in nature. This conclusion is not without support in part of the court's judgment. Having stated that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it should have been followed, the court continued as follows..." on the other hand, if self-defence is advanced as a justification for measures which would, other-wise, be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be expected that the conditions of the Charter should be expected. Thus for the purpose of inquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence "<sup>(55)</sup>.

#### **Non-Compliance to Report can not Destroy the Validity of Self-Defence**

There is no reason why the same conclusion should not be drawn with regard to the position under the Charter. Compliance with reporting requirement is evidence of the genuineness of a State's belief in its right to act in self-defence, while non-compliance might tend to point in the opposite direction. In addition, the failure to report constitutes a breach of the obligation referred to in Article 51, which, being directory only, can not of itself destroy the validity of the claim to be entitled to act in self-defence.

This interpretation of Article 51 may be justified on a number of other grounds. In a case of blatant aggression the aggressor could hardly complain at the failure by its victim to report. In such a situation, the only substantive wrong would be constituted by the breach of the duty owed to the international community to report the matter to the Security Council. In the Nicaragua case the court expressed the position as follows "...there is nevertheless, a violation of an important provision which is designed to permit the Security Council to exert its supervening authority in a timely way. Even if Nicaragua, by reason of its prior and continuing acts of covert intervention and aggression, may reasonably be deemed to be debarred from complaining of responsive

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(54) *ICJ Report*, 1986. pp. 102-103.

(55) *Ibid*, p. 105.

covert measures of the USA, the international community at large, as represented by the Security Council, has an interest in the maintenance of international peace and security which should not be pre-empted by the failure of a State to report its defensive measures to the Security Council...<sup>(56)</sup>.

However, this requirement was approached, it could only be a procedural term, therefore, the court said that "...Of it self it does not, and by the terms of Article 51, can not, impair the substantive, inherent right of self-defence, individual or collective. The measures of the USA in assisting El-Salvador by, among other means, applying force against Nicaragua, are not transformed defensive into aggressive measures by the failure to report those measures to the Security Council..."<sup>(57)</sup>.

The view that the reporting requirement is directory and not mandatory is prevailed by the practice of States. It would seem that the attitude towards the reporting requirement has been neglectful. According to one writer, there has been very little trace of any reference to Article 51 in the records of the Security Council<sup>(58)</sup>, partly because of the reluctance of the council to determine that one of the sides involved in international armed conflict is the aggressor on which partly was entitled to rely upon a plea of self-defence<sup>(59)</sup>.

Even as a matter of treaty interpretation it is difficult to establish that the reporting requirement should be regarded as mandatory. It is true that the use of such words as "shall" and "immediately" suggests such an interpretation.

#### **Who is under the Duty to Report**

It is possible to question who is under the duty to report. The words used in Article 51 require the measures to be reported without specifying any particular party as being under the obligation to report. It is only an assumption that, because the right to act in self-defence lasts until the Security Council takes over the task of dealing with the situation, the reacting State would be responsible for the reporting. It is equally arguable that the failure to identify the reacting State as being under the duty creates an ambiguity which the subsequent practice of States may resolve. Apart from the difficulty in this regard created by the dearth of evidence concerning the employment of Article 51, which has already been referred to such practice as there has been suggests that the target State of the action claimed to have been taken by the victim State in self-defence is at least as likely to have reported the situation to the Council as the victim State<sup>(60)</sup>.

In the Security Council, on the day of Iraq's invasion of Kuwait, the representative of Kuwait declared that its people and sacred land had been subject to attack in an armed military invasion and asked that the Security Council put an immediate halt to this invasion and exercise its duty to ensure by every means available, that Iraq withdraw immediately and unconditionally. Later, the USA and the U.K. notified the President of the Security Council that they were taking measures in individual and

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(56) *Ibid*, p. 376.

(57) *Ibid*, p. 376.

(58) **Combecan, K.**, The Exception of Self-Defence in UN Practice in Cases 1986. the Current Legal Regulation. Of the Use of Force. *C.I.D.s.*, Vol. 1, 1990.

(59) *Ibid*, p. 16.

(60) *Ibid*, p. 16.

collective self-defence by deploying forces in the region at the request, inter, alia, of the Governments of Kuwait and Saudi Arabia<sup>(61)</sup>.

The lack of concern over compliance with this requirement reflects the fact that the decision to involve the Security Council in a particular situation or dispute is a political matter for the various members of the UN. It also suggests that those States do not regard the reporting requirement as mandatory or that a claim to acting in self-defence can be rendered nugatory by a failure to make the report referred to an Article 51<sup>(62)</sup>. Within the framework of the Charter, it is a matter for the Security Council, as the executive arm of the World Community, to determine whether there has been a threat to the peace, breach of the peace, or act of aggression within Article 39, and to decide what measures should be taken to resolve the conflict.

In carrying out this task, there is no evidence to suggest that the issues are in any way predetermined by a failure to report actions that might reasonably or even conceivably be regarded as having been taken in self-defence.

It would seem that the purpose of the requirement is to ensure that the primary responsibility of the Council for the maintenance of international peace and security is preserved. This role can be achieved whichever party to a conflict or indeed if some third party, bring the matter or the measures taken to the attention of the Council. As already pointed out such an interpretation is not inconsistent with the wording of Article 51. Therefore, the duty to report is owed to the international community and not to the alleged aggressor because the latter is not in a position to invoke any invalidity of the action in self-defence arising from a failure to report to the Security Council<sup>(63)</sup>.

It should certainly have been a relevant factor in so far as the ICJ held that the absence of a declaration by a State that it had been the victim of an attack was fatal to the claim by another State that it was assisting the former on the ground of collective self-defence<sup>(64)</sup>.

#### **The Duration of Self-Defence**

Assuming that the action is taken legitimately in self-defence, the issue arises as to how long such action remains legitimate. At what stage does the right of the victim of an armed attack to take defensive ceases?

Article 51 is not altogether helpful, the right of self-defence is not impaired, if an armed attack has occurred, until the Security Council has taken measures necessary to maintain international peace and security. There are a number of problems with this wording, not least being the reference to "maintain" rather than "restore" international peace and security. However, more important in this context is the question whether it is taking the measures along, or their actual efficacy, that is sufficient to terminate the victim's right of action.

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(61) *C.L.D.S.*, Vol. 1, August 1990. pp. 179-180. Letters from the Permanent Representative of the USA submitted on 9, August 1990, and from the Permanent Representative of the U.K. submitted on 13, August 1990 to the President of the Security Council.

(62) According to Judge Schwebel, 1986. *J.C.J. Report*, p. 377.

(63) **Bradbury V.**, Enfield Borough Council. London. 1967, *I.W.L.R.* 131-1324.

(64) Including the Secretary-General acting under Art. 99 of the Charter.

Article 51 was drafted on the assumption that the Council would be able to respond rapidly to a situation falling within Article 51. The history of the UN has, for the most part, demonstrated the Council's incapacity to function effectively<sup>(65)</sup>.

The use of force is still a feature of international relations and in so far as self-defence might be raised in justification, the scope of the right could still be important in defining the circumstances in which, in the absence of Security Council intercession, successful action by the victim itself might bring the right to an end.

The common sense of the situation suggests that a State is not obliged to cease acting in the self-defence against an aggressor which is continuing with its offensive until the measures, its own or those employed by the Security Council, prove effective. The use of the word "necessary" in Article 51, would seem to reinforce such an interpretation. While the Security Council might take measures which it regards as necessary to terminate the armed attack, whether they do have that effect, only time will tell. If they do not have that consequence, then clearly additional measures are necessary. However, deciding upon the efficacy of the steps taken may not be so easily answered. The question whether measures have had the desired effect raises the additional issues of who decides what is the desired objective and whether it has been achieved.

### **The Desired Objectives**

From the wide powers granted to the Security Council under the Charter in general and specifically referred to in Article 51, the issue whether international peace and security has been maintained or restored would seem to be subject to determination by the Council. While the maintenance of peace and security might be the objective of the Council, it does not follow that this will coincide with the objective which a State acting in self-defence might reasonably be entitled to achieve, for instance, recapture of territory seized by the aggressor or guarantee against future attack. Given the apparent subordination of the objectives of the victim State to those of the Security Council, it would seem that it is for the Council to define the scope of the measures required whether in respect of its own actions or with regard to the steps taken by the victim in self-defence.

The problem with this assessment is that the actions taken by the Council in a particular case are not dictated by legal criteria indicated in Article 51, but by what is politically feasible. It is possible, if not likely there will be a significant gap between the scope of the measures agreed upon by the Council and what is regarded as an appropriate objective for the exercise of the right of self-defence from the point of view of the State exercising that right.

More often in the past, political rivalries involved in the conflict were translated into votes in the Council so that designating one side or the other as the aggressor was likely, and the imposition of a settlement by military means under the auspices of the Council was an even more remote possibility. The usual procedure was for the Council to call upon the parties to cease hostilities and then or later to require them to withdraw to their previous positions before the hostilities commenced.

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(65) The tenuous consensus among the permanent members following the invasion by Iraq of Kuwait in August 1990 does not destroy the validity of this comment.



One writer ascribed this approach to the profound rift between the superpowers<sup>(66)</sup>. While this may be true in most cases, even when American and (former) Soviet Union interests did not obviously clash in relation to a particular conflict, there was a reluctance on the part of the Security Council as a whole to designate one of the parties as the aggressor. Thus in the view of that writer "... when faced with an obvious case of an aimed attack, political considerations may prevent the Council from taking a concerted stand. In the absence of an authoritative determination as to who actually attacked whom, both opposing parties can pretend that they are acting in legitimate self-defence, and the hostilities are likely to go on. To avert further carnage, the Council tends to bring about at least a cease fire..."<sup>(67)</sup>.

In the Iran-Iraq war, despite the obvious fact that it was the armed forces of the latter which were the first to cross the frontier into the territory of the other State, the Council refrained from determining that there had been an act of aggression by Iraq against Iran<sup>(68)</sup>.

It was only the first time that the rapprochement between the permanent members and the co-operation between them manifested in the initial reaction of the Security Council to the invasion of Kuwait by Iraq, signal a change in the potential of the Council to take effective action in the field of international peace and security. These factors have persisted long enough to enable the Council acting under Chapter VI of the Charter of the UN, to authorise member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions to use all necessary means to uphold and restore international peace and security in the area<sup>(69)</sup>.

Assuming that the right of self-defence was validly invoked at the outset, one writer went on to express the opinion that the effect of the Security Council's call for a cease-fire, thus imposing upon the parties a duty to comply, would be that the cessation of the defensive action becomes imperative<sup>(70)</sup>. Despite the assumption in this statement that no further action can be in self-defence, the reality might be different. If the conflict continues, a number of possibilities would have to be considered.

In the first place, both parties might ignore the Council's directive, in which case both would be in breach of obligations owed erga omnes, to comply with the directive issued by the Council on behalf of the international community. If the Council then sought to impose sanctions, in reliance upon its powers under Chapter VII of the UN Charter, with respect to the breaches of the peace committed by the two sides, it could plausibly be argued that neither party would any longer be in a position to plead self-defence in justification of its position.

Another possibility is that, following the Council's call for a cease-fire, one of the parties expressed willingness to comply, but not the other. If the situation was as clear but as that, it might be possible to designate, from then on, the party failing to comply

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(66) **Dinstein**, *op. cit.*, p. 196

(67) **Dinstein**, *op. cit.*, p. 196.

(68) **Amin, S. H.**, International and Legal Problems of the Gulf and the Iran-Iraq Conflict: Legal Implications. *ICLQ*, 1982. p. 167.

(69) For an Account of the Invasion of Kuwait by Iraq see Current Development III, 1991. Vol. 40. *ICLQ*. p. 482.

(70) **Dinstein**, *op. cit.*, p. 197.

as the aggressor, whatever the circumstances that occurred at the outbreak of hostilities, while the other party would thence forward be entitled to act in self-defence. It is more likely in such a case that one, if not both, of the parties would seek to impose conditions upon compliance to which the other party would be unwilling to accede. Such a situation would appear most to resemble a case where the parties simply ignored a Security Council decision, although the legal position might be affected by the reasonableness of the conditions being proposed. For instance, a demand that the alleged aggressor should acknowledge its guilt and or change its Government would hardly be reasonable<sup>(71)</sup>, though a stipulation that a party withdraw from territory recently occupied might not, if it was of no strategic importance, be so unreasonable.

To place this discussion in the context of the question posed<sup>(72)</sup> of who is to determine whether the necessary measures have been taken, the answer would seem to be similar to that which applied at the inception of hostilities. A State has an initial power to qualify its action as being in self-defence, and this classification continues to operate unless the international community determines otherwise, usually through the authority granted to the Security Council. The same is true with regard to the determination of the right to act in self-defence. If despite a call for a cease-fire by the Council, hostilities continue, it is for the community to decide upon the consequence that follows from the failure to abide by the Council's decision, and it may be that the Council itself will determine the issue by designating the continuation of the conflict as the responsibility of one of the parties in particular.

#### **The Desired Objectives have been Achieved**

Despite the suggestion made by one writer that it is for the Security Council to determine whether the right to act in self-defence has come to an end<sup>(73)</sup>, the right must also be open to termination by accomplishment of its objectives. In fact, the concept of proportionality is related, at least in part, to this principle. If a State attains the objectives it might reasonably be entitled to achieve, its right to act in self-defence ceases if the situation can be stabilised at that stage; if the aggressor continues with the hostilities, the victim is still entitled to respond within the ambit of self-defence. If the victim exceeds the degree of response which the circumstances entitle that State to take, it can no longer claim the legal protection afforded by Article 51.

To take a striking example, if we accept for the purpose of illustration the allegative view of Israel of the situation in Northern Israel on the eve of the 1982 invasion of Lebanon, the initial incursion might have some grounds, according to the allegative view<sup>(74)</sup>. But there can be more doubt that Israel's actions went far enough beyond what was reasonable in the circumstances. Israeli forces advanced into the outskirts of Beirut in an attempt to dislodge Palestinian units in heavily populated residential areas of the city. The loss of life and damage to the environs were far greater than could reasonably have been justified by reference to the right of self-defence, they were out of proportion to the objectives that Israel could reasonably have been entitled

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(71) As occurred in the Iran-Iraq war in which Iran's demands included the overthrow of the Ba'thist regime in Iraq.

(72) **Khaddin, M.**, *The Gulf War. ICLQ*. Vol. 31, 1988 Supra Section II.

(73) *Ibid*, p.85.

(74) **Freinstein, Smith**, *The Legality of the Use of Armed Forces by Israel in Lebanon*. June 1982. *ISLR* 1985. Vol. 20, pp. 365-368.

to achieve<sup>(75)</sup>. From this point of view, the right of self-defence came to an end once Israel used a degree of force in excess of that which could be reasonably entitled to employ.

If the victim, without exceeding the amount of force which it was entitled to use, succeeds in attaining the objectives which it was reasonably justified in achieving, it does not necessarily follow that all legal problems are resolved. If the defensive action manages to restore the position of the recognised boundaries that existed at the outbreak of hostilities, a cease-fire might be sufficient to resolve issues arising out of the fact that an armed attack had occurred, though it might not have settled those which led to the use of force in the first place. However, the likelihood is that the cessation of hostilities will leave one or both of the parties in possession of territory belonging to the other party. Return of territory will probably be easier where an exchange can take place. Where one of the parties is clearly the aggressor, then the pressure would be the greater upon that party to return territory over which it is the illegal occupant<sup>(76)</sup>.

Suppose, however, that the party claiming to act in self-defence, in attaining the objectives which it was reasonably entitled to achieve, was left, at the end of hostilities, in possession of significant tracts of land belonging to the other side. The initial possession would not be illegal because it would fall within the compass of Article 51. It would not be lawful to seek to incorporate the territories in question as part of the national territory of the State acting in self-defence against the wishes of the inhabitants of the territories and of the dispossessed sovereign. However, the more difficult question is whether, or for how long, the State acting in self-defence might be entitled to remain in possession of the territories it has overrun.

The problem has arisen in the context of the territories occupied by Israel as a result of the 1967 war<sup>(77)</sup>. In this situation, as in the others that have been considered relating to the termination of hostilities, the Security Council has the authority to act on behalf of the international community. However, although adamant in advocating the principle of the inadmissibility of the acquisition of territory by war, the Council in Resolution 242(XXII) of 22 November 1967, gave ambiguous guidance as to the means whereby the situation was to be resolved. By paragraph 1 of that Resolution the Council affirmed that "...the establishment of a just and lasting peace in the M.E., should include the application of both the following principles: (1) withdrawal of Israeli armed forces from territories occupied in the recent conflict, (2) termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognised boundaries far from threats or act of force..."<sup>(78)</sup>.

The two sides of the conflict have adopted differing interpretations of this formula. The Arab view is that must be implemented before any steps are taken to augment, the Israeli, on the other hand, regard the two requirements as interdependent,

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(75) **Gross, E. G.**, The Legal Implications of Israel's 1982 Invasion into Lebanon. *WILJ*, Vol. **13**, 1983. pp. 458-487.

(76) **Greig, D. W.**, *International Law*. First Edition, Butterworths, London, 1970. p. 887.

(77) **Dinstein, Y.**, The Legal Issues of Para-War and Peace in the Middle East. *Legal Report*. Vol. **44**, 1970, p.466.

(78) **Higgins, R.**, *The Attitude of Western States Towards Legal Aspects of the Use of Force in Cases, op. cit.*, Supra, Oceana Publication. New York. 1970. p. 44.

to be satisfied contemporaneously<sup>(79)</sup>. It is thus, not immediately apparent what, apart from implementation of the two principles, is sufficient to bring to an end the Israel's control over the occupied territories. It is certainly plausible for the Israelis to argue that augmentation of principles is essential to the security interests which led to the hostilities.

Where Israel's position may open to objection is on the ground that it had, though not renewing the conflict with its Arab neighbours, nevertheless, been guilty of constructive aggression in attempting to convert its position as lawful military occupant into one sovereign over the territories in question. The 1974 Definition of Aggression is not entirely clear on the point in that it includes among the act qualifying as an act of aggression any annexation by the use of force of the territory of another State or part thereof<sup>(80)</sup>. It could be argued that, even if possession of territory is acquired by force legally, it is an illegal use of that force to attempt to change the status of the territory in question. Such an act goes beyond the ambit of self-defence. This line of reasoning is relevant to Israel's position only in so far as it could be shown that an attempt has been made to alter the status of the occupied territories.

It is beyond the scope of this Article to deal in detail with the substantial issues arising out of this matter. However, it is worth making a few comments with regard to the situation concerning East Jerusalem and the West Bank of the Jordan River. As for the former, it is difficult to avoid the conclusion that the Knesset law of July 1980, declaring that the complete and unified Jerusalem is the Capital of Israel, constituted an act of annexation<sup>(81)</sup>. With regard to the rest of the west Bank, this had, like East Jerusalem, come into Jordan's possession as a result of the 1948 war and its control was confirmed in the armistice agreements with Israel of 1949. Subsequently, relying upon the claim that it coincided with the wishes of the West Bank population, expressed in the election of a new Jordanian National Assembly in which those people had participated, the Assembly declared its approval to the complete unity between the two Banks of the Jordan and their amalgamation in one single state, the Hashemite Kingdom of Jordan<sup>(82)</sup>. The Political Committee of the Arab League rejected this step as being in violation of the League's policy on Palestine. The matter was resolved at that time by Jordan acknowledging that the issue was without prejudice to the settlement of the Palestine question<sup>(83)</sup>.

This situation was brought to an end when, in the course of the 1967 war, Israel seized the West Bank, including East Jerusalem from the Jordanian army. Leaving aside issues arising out of the nature of Israel's occupation of the West Bank, and in particular the applicability of the Geneva Convention Relative to the Protection of Civilian

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(79) The Arab view seeing that the matter is accompanied by the issue of a separate State for the Palestinians and the right of self-determination once recognised take precedence over termination of hostilities.

(80) Article 3(a) of the Definition contained in: Resolution G.A. 3314(XXIX), Text in 1974, Vol. 13, *ILM*. pp. 710-713.

(81) **Levine, I. M.**, The Status of Sovereignty East Jerusalem and the West Bank. 1972, Vol. 5, *N.Y., U.J.I.L.* p. 485.

- See Crave, Middle East. Status of Jerusalem 1980, Vol. 21. *Harv. I.L.J.*. p.784.

(82) The Text of the Assembly's Resolution of which these were opening words of Paragraph (1) is given in: **Whiteman, Digest**, Vol. 2, p. 1166.

(83) The incorporation of the West Bank as part of Jordan was recognised only by Pakistan and by the U.K. though the latter expressly excepted East Jerusalem from this act.

Persons in Time of war 1949<sup>(84)</sup>, a major pre-occupation has been with the Jewish settlements on the West Bank not just in terms of the laws of military occupation, but as part of a process of absorption by Israel of the occupied territories. Following a report of the Security Council Commission Established to Examine the situation relating to settlements in the Arab Territories occupied since 1967 of 12 July 1979<sup>(85)</sup>, the Security Council resolved in the following terms " ...Determines that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem or any part thereof, have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive just and lasting peace in the M. E..."<sup>(86)</sup>.

Given the attitude of the USA, a more strongly worded resolution would have been vetoed. Hence, there was no possibility of categorising the settlement programme in terms of aggression. The Israeli view remains that, in some cases, it was a question of re-establishing a Jewish presence in place where Jewish communities had lived prior to the 1948 war when they had fled from the Jordanian army, but that overall, the settlements are necessary for security reasons. There might be more substance to a claim to be entitled, in preparing to exercise a right of self-defence on a future occasion, to secure those territories against cross-borders raids and the possibility of a fresh invasion of neighboring States.

The lesson of the history of the occupied territories is that the duration of the right of self-defence is rarely defined with any clarity. Despite the power vested in the Security Council by Article 39 of the UN Charter to determine whether a State is acting in self-defence, and when the right so to act comes to an end, principally in terms of the objective which that state is reasonably entitled to achieve under the umbrella of Article 51, the likelihood is that the Council will not provide any decisive answers.

A similar problem could arise even if action is conducted under the authority of the Security Council. In pursuance of its policy, contained in Resolution 661, of imposing economic sanctions against Iraq following the state's seizure of Kuwait, the Council, by Resolution 665 called upon " ...member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661..." if the Security Council had not later, in Resolution 678, authorised member States to take all necessary steps to effect the removal of Iraq from Kuwait, the question would have arisen as to whether Kuwait and States acting on its requests would have been entitled, in the exercise of the right of collective self-defence, to employ force to achieve that objective. Initially, the assumption would have been that the actions of the

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(84) Geneva Convention IV 75 *U.N.T.S.*, Vol. 153. Text in: **D. Schindler** and **J. Toman** (Eds.), *The Laws of Armed Conflict*. Oceana Publications. New York. 1968(2nd ed. 1981). p.427.

(85) Text in 1980. Vol. 19. *I.L.M.*, p. 46.

(86) Resolution 465 (1980) of March 1980. Text in: *I.L.M.*, 1980, vol. 19, p. 46.

Council determined what measures were necessary to maintain or restore international peace and security. But would a right to act in self-defence have revived if the economic sanctions later proved to be inadequate to achieve their objective, and the Council acted to adopt resolution authorising the use of force.

Even following the authorisation of the use of force in Resolution 678, the scope of the necessary measures has arisen as an issue. To what lengths might the States allied against Iraq go in attempting to force that State to relinquish its hold over Kuwait? There is in this context the added problem of how the Council would be able to resolve this question in light of the fact that some permanent members of the Council might be committed to a far broader interpretation of the mandate than other members of the UN.

It would be for the international community, perhaps expressing its views through the General Assembly or reacting to a situation in a less institutionalised form, to restrain the conduct of the States within the less than precise principles of international law governing the scope of the right of self-defence. Particularly, as far as the duration of that right is concerned, the international community, if deprived of the decision making authority of the Security Council by disagreements among its permanent members, is ill-suited for the task. Overall, the history of the occupied territories provides a number of striking illustrations of the scope of the right of self-defence. They are symptomatic of the consequences of the absence of effective action by the Council if breaches of the peace occur. But, even if the action is taken by the Council, the problem may not be avoided of what constitute measures that are necessary to meet the reasonable needs of a victim of aggression.

### **Conclusion**

The failure of the Security Council in the past to fulfil the role envisaged for it by Chapter VII of the UN Charter has led to an acute political and juridical conflict between those expressing a restrictive interpretation of Article 1 and those promoting a much wider ambit for the right of self-defence. It is not the purpose of this article to enter into that debate.

What can not be denied is that the result of the Council's shortcomings has rendered aspects of Article 51 difficult to apply. The requirement that measures taken in self-defence shall be immediately reported to the Security Council makes little sense if the Council is likely to prove helpless to deal with the situation, a possibility which might influence member States of the UN to withhold the matter entirely from the Council's agenda. It remains to be seen whether the Kuwait consensus will make any difference in this regard by providing a precedent for future co-operation in the maintenance or restoration of international peace and security under the aegis of the Council.

To an extent, therefore, argument on whether the reporting requirement is mandatory or directory would seem to be sterile. The problem with regarding the debate as academic is that it ignores the very real problems raised by the court's less than satisfactory judgement in the Nicaragua case. As has already been explained, it is far from clear whether the court was treating the reporting requirement under the Charter as mandatory. Similar uncertainty arises as to the status of the two requirements said by the court to be necessary for the valid exercise of a right of collective self-defence,

namely a declaration by a victim that it has been attacked and a request by the victim for assistance to be the State purporting to be acting collectively on behalf of the victim. The absence of any clear indication of whether these conditions are mandatory to the valid exercise of the right leaves the way open to States to adopt whichever interpretation suits their own cause. The point of the criticism is sharpened by the fact that these were matters on which there should have been no reason left for doubt.

The conditions imposed by the court had no support from either side in the juristic controversy over what constituted the collective nature of self-defence. For one side, the collective could be objectively ascertained by alliance, community of interest or geographical factors. For the other, the whole notion of collective security stemmed from a common membership of the UN and the powers and obligations arising under that instrument.

A member State could, therefore, take action of its own volition, in pursuance of the objects and purposes of the UN, on behalf of a victim of an armed attack. It made little sense for the court to adopt as an alternative to either of two plausible interpretations of the Charter, both having substantial support in the literature, a view of collective self-defence so devoid of substance in theory or practice.

Nor is the court's view of these conditions for the exercise of collective self-defence easily reconcilable with its ambivalence with regard to the reporting requirement in Article 51. The significance given to the conditions imposed by the court, suggesting that they might be mandatory, and the care with which the court avoided the application of the reporting requirement under customary law, together give the impression that, under the Charter, the reporting of the measures to the Security Council should be mandatory.

Even to have left this impression to have countenanced the possibility of a different rule operating under the Charter compared with customary international law, is unsatisfactory. A number of the objectives have already been discussed, but the final and decisive criticism is that it would be absurd to have a situation where an action in self-defence could be valid under the customary law, the reaction to an armed attack being obviously justifiable though never reported to the Security Council, and invalid under the Charter, because the reporting had not taken place as required by Article 51.

Even if one accepts that, under the original framework of coercive action by the Council, the intention was that the reporting of Article 51 was mandatory, that interpretation can not have survived the events of subsequent years. The Security Council's role was diminished and even its selection as a forum became a matter of political convenience rather than legal obligation. Though the wording of Article 51 was to suggest the existence of an obligation, the nature of that obligation was not identified nor was the question of to whom it was owed answered. Subsequent conduct by members of the UN must, in such circumstances, be a highly relevant factor in applying the relevant answers. The one thing to which the practice of States undoubtedly pointed was the non-mandatory view of that aspect of Article 51.

The diminution of the Council's role was also a highly relevant factor in the context of the duration of the right of self-defence. As envisaged by Article 51, the only answer was that the right persisted until the Security Council had taken the action necessary to maintain international peace and security.

The difficulties inherent in this terminology are of little significance compared with those resulting from the fact that the Council has seldom been able or prepared to determine the issues upon which a proper judgement can be made of whether the right of self-defence has come to an end.

At the outset of a use of force, the Council rarely determined that an act of aggression had occurred. Hence the balance between Article 2 Paragraph (4) and Article 51 of the Charter, so crucial to the patterns of conduct envisaged by the framers of the Charter, became distorted in practice. The duration of the right of self-defence is not therefore, covered by the intention expressed in Article 51 that it should last only until the Council takes the necessary action. Though the duration can be prescribed by the Council, the more likely situation today is for States to make their own assessment of the extent of the lawful exercise of the right. Even if the Kuwait experience were to presage a new international political environment of co-operation, a proposition which must be opened to considerable doubt, there is no guarantee that the Council will provide suitable forum in which to make such determination.

In some circumstances, the Security Council, or indeed the General Assembly, will provide only guidance. Acts such as the de jure or de facto annexation or territory, captured in the legitimate exercise of the right of self-defence, would normally be regarded as going beyond the ambit of what was justifiable, a proposition reinforced by UN practice in relation to Israeli occupied territories. On the other hand, retention of territory might not be unlawful in the absence of an adequate *qui pro quo* for relinquishing it, a supposition supported by Security Council Resolution 242.

In a situation in which the guidance of the Council is lacking, it will be for individual States to make their own judgment on the legality or otherwise of a particular action.

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## العلاقة بين حق الدفاع الشرعي من جانب الدول وصلاحيات مجلس الأمن

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**المستخلص:** ركز كتاب القانون الدولي على تفسير المادة (٥١) من ميثاق الأمم المتحدة وأن الإجماع الغائب في هذا الخصوص قد شمل السؤال المتعلق بماذا يعني الهجوم الحربي، وهل بالإمكان أن يكون الدفاع الشرعي مشروعاً في حالة وقوع هذا الهجوم، ونوعية حق الضرورة ونسبة الردع في حالة اتخاذ حق الدفاع الشرعي من قبل الدولة المهاجمة. وعليه فإن هذه الأمور تعتبر جوهرية في العلاقة الحاسمة بين المادة (٥١) وقواعد العرف الدولي .

إن الموضوعين الاثنان أساسيان لهذه العلاقة والتي تعتبر واضحة المعالم من منطوق المادة (٥١) التي تنص على أنه لا يوجد في الميثاق الحالي أي شيء يمكن أن يعيق الحق المتأصل في الدفاع الشرعي الفردي والجماعي، إذا حدث هجوم حربي ضد أحد أعضاء الأمم المتحدة، وحتى يتخذ مجلس الأمن الإجراءات الضرورية للحفاظ على السلم والأمن الدوليين، وعليه فإن الإجراءات التي تتخذ من قبل الأعضاء في حالة ممارسة حق الدفاع الشرعي يجب أن تبلغ في الحال إلى مجلس الأمن، وبأي طريقة. لا تؤثر على صلاحيات ومسؤوليات مجلس الأمن، وفقاً للميثاق الحالي في اتخاذ العمل المناسب في أي وقت إذا ارتأ أنه ضروري لأجل المحافظة أو إعادة السلام والأمن الدوليين .

وعليه فالبحث يعالج حق الدفاع الشرعي من جانب وصلاحيات مجلس الأمن في هذا الخصوص، وقد أشار إلى موضوع متطلبات الإبلاغ لمجلس الأمن في حالة الدفاع الفردي أو الجماعي. وقد تضمن نظرة محكمة العدل الدولية في هذا الشأن عند نظر قضية نيكاراغوا والولايات المتحدة، عندما حاولت تحميل أمريكا مسؤولية أضرار بعض الأعمال العسكرية التي حدثت في أراضيها، وقد ناقشت المحكمة أهمية الإبلاغ إذا كان إلزامياً أو عملاً إجرائياً، وهل بالإمكان أن يلغي القوة القانونية لحق الدفاع الشرعي في حالة عدم الإبلاغ لمجلس الأمن. وفي هذا المجال توصلت المحكمة إلى أن الإبلاغ عمل إلزامي، ولكن لا يلغي حق الدفاع الشرعي في حالة عدم القيام به، لأن حق الدفاع الشرعي حق متأصل في العرف الدولي، وليس شرطاً اتفاقاً منصوصاً عليه في الميثاق. وقد عالج البحث على من يلزم الإبلاغ لمجلس الأمن والقوة القانونية لحق الدفاع الشرعي والأهداف المرجوة منه.