Chapter II demonstrates that attempting to preserve minimum public order in the Gulf during the Tanker War involved many participants with varying (sometimes multiple) perspectives in different arenas and situations with numerous coercive and persuasive strategies at their command.1 This and succeeding chapters examine claims to authority in the effective power process as part of the ongoing global social process.2 As McDougal and his associates have noted, international law as the effective global power process is subject to claims by participants to optimize their goals in that process.3 In some instances these claims are part of the civic order, i.e., private orderings or private claims, as opposed to public order norms or claims to public order.4 But civic order claims, as will be seen, may have serious and strong impact on public order claims and claimants. For example, attacks on merchant ships caused phenomenal increases in insurance rates; these in turn affected global oil prices, and rising oil prices undoubtedly influenced government decisionmakers.5 By the same token, decisions of governments, based in their perception of law, undoubtedly influenced their considerations on assisting one or both belligerents and their attitudes toward private parties who had dealings with belligerents. The tilt toward supporting Iraq that grew throughout the war, and a corresponding decline in support of Iran, although there were cross-currents the other way, is an example of this interrelationship.6 Although Jessup argued for an interstitial transnational law,7 more recently Lowenfeld has made the point, as law of war manuals have for a sliding scale of conflict between war and peace,8 that there is a sliding scale relationship between public law and transnational law that governs matters between private actors and between private actors and States, sometimes an actor’s own country and sometimes another nation.9 And while the Chapter III-VII analysis in this volume concentrates on public law analysis, the incidence of civic order relationships, i.e., transactions governed by transnational law, must be borne in mind.

Because of the Charter’s trumping effect on treaty law,10 and its strong influence on customary norms,11 and because several participants in the Tanker War, e.g., France and the United Kingdom, believed that the Charter and not the LOAC governed,12 analysis begins with study of Charter-related claims, particularly issues of self-defense and neutrality. This Chapter ends with an examination of the law of treaties and its relationship with crisis and armed conflict.
Part A. UN Charter Norms; Related Issues

The history of the Charter, and its drafting and record of negotiations, have been well-documented. The general contours of practice under the Charter have also been chronicled. This is not the place to mine anew these lodes. What follows is a statement of provisions of the Charter, followed by summaries of claims and counterclaims under the Charter and related sources of law, with conclusions (outcomes) as to the current state of the law.

1. Norms Stated in the Charter

Five parts of the Charter are relevant to the Tanker War: its Preamble, Purposes and Principles; self-defense and related concepts in the Charter era; lawmaking under the Charter; pacific settlement of disputes; and action under the Charter to deal with threats to the peace, breaches of the peace, and acts of aggression. A half century of practice under the Charter has developed in some instances. In other cases pre-Charter norms still have force.

a. The Preamble, Purposes and Principles of the Charter. The Charter Preamble initially expresses Member States’ determination:

   to save succeeding generations from the scourge of war[;] ... to reaffirm faith in fundamental human rights, ... in the equal rights of ... nations large and small [;] to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained [;] and to promote social progress and better standards for life in larger freedom.

To achieve these goals, UN Members have pledged:

   to practice tolerance and live together in peace ... as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for [promoting] economic and social advancement of all people[.]

All Persian Gulf States, and all countries that were Tanker War participants, although perhaps as States not parties to the conflict, are UN Members. Iran and Iraq are original Members.

Little use of the Preamble’s statements have been made since 1945. One recent example, however, occurred during the Tanker War itself, when the Security Council noted “that Member States pledged together to live together in peace with one another as good neighbors in accordance with the Charter ...” The Preamble in other cases “reinforces, without being essential to, the propositions [founded on other parts of the Charter] being advanced” There have been occasional uses of
the Preamble in other Council and General Assembly resolutions relevant to this study, however. The General Assembly's Uniting for Peace (UFP) Resolution discussions in 1950 referred to the Preamble. The General Assembly's Friendly Relations Declaration of 1970 also employed Preamble language. To the extent that these resolutions have been incorporated by practice, e.g., by subsequent General Assembly-recommended peacekeeping operations under a UFP precedent, or have been incorporated by reference in later resolutions or authoritative pronouncements, the Preamble has had added vitality.

In any event, the drafters intended that all Charter provisions "being ... indivisible as in any other legal instrument, are equally valid and operative." Each provision must be construed and applied together.

(a) The "Preamble" introduces the Charter and sets forth the declared common intentions which brought us together in this Conference and moved us to unite our will and efforts, and made us harmonize, regulate, and organize our international action to achieve our common ends.

(b) The "Purposes" constitute the raison d'être of the Organization. They are the aggregation of the common ends on which our minds met; hence, the cause and object of the Charter to which member States collectively and severally subscribe.

(c) The chapter on "Principles" sets, in the same order of ideas, the methods and regulating norms according to which the Organization and its members shall do their duty and endeavor to achieve the common ends. Their understandings should serve as actual standards of international conduct.

Thus the Preamble is an integral part of the Charter as a statement of "motivating ideas and purposes," although it does not define UN Members' obligations. These ideas and purposes can be, and have been, used to evidence the Charter's ideas and purposes in considering the articles of the Charter. In effect, the Preamble is a series of pledges, fulfillment of which are in the Charter's Purposes, Principles and constitutive provisions.

i. Purposes of the Organization: Articles 1(1), 1(2). Although the United Nations as contemplated under the Charter is "a multipurpose organization, ... maintenance of [international] peace and security is the primary purpose of the Organization and takes priority over other purposes." The order of listing the UN's Purposes, Charter article 1(1) stating the goal of international peace and security first, supports this view.

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to
the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.27

Goodrich and his collaborators note the difference between Article 1(1)'s language, *i.e.*, the United Nations may “take effective collective measures” to prevent and remove threats to the peace, to suppress aggression or other breaches of the peace, the “measures” language of Articles 39, 41 and 42, Article 50’s “preventive or enforcement measures,” Article 5’s “preventive or enforcement action,” and the “enforcement measures” Article 2(7) mentions. This language difference has been cited as authority for the UFP Resolution; the Council might have a duty to take “measures” or action, but the General Assembly’s responsibility and powers under Article 10 should be determined by Article 1(1)’s twofold injunction for “effective collective measures” to maintain or restore peace.28 Article 1(1) also assumes that resolution of a dispute or situation will be in accordance with international law and “justice,” a provision inserted to protect small States,29 a corollary to the sovereign equality of all UN Members.30 Implementing Article 1(1), at least in terms of the Charter language, has been through Articles 2(3), 2(4), and Chapter VI-VIII. Therefore, analysis of the use of Article 1(1) will be deferred until later.31

Another of the UN’s Purposes is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”32 Most analysis has focused on elevating self-determination to a human right,33 sometimes in multilateral conventions,34 and often invoked in efforts to end colonialism, the Declaration on Granting of Independence to Colonial Countries and Peoples being a watershed.35 A collateral effect has been developing the idea that self-determination includes permanent sovereignty over natural resources36 and a State’s right to freely dispose of its natural wealth and resources.37

Assembly and Council interpretations of Article 1(2) played a background role in naval matters after World War II. In the Algerian Civil War (1957-59) the Assembly referred to “the right of the Algerian people to self-determination”38 after France gave Algerians the right to determine their status.39 The resolution passed after the French interdiction campaign40 and had no impact on claims of legality of that operation. Assembly Resolution 1514, declaring all peoples including those under colonial rule have self-determination rights, was incorporated by reference in Council resolutions on Rhodesia (1965-80).41 In this case the Royal Navy enforced Council-directed interdiction of Beira-bound tankers loaded with oil invoiced to Rhodesia.42

Article 1(2) played no stated role in the Tanker War; self-determination was not an issue. However, the issue of “the inalienable right” of all States “freely to
dispose of their national wealth and resources," was behind the desires of States like Kuwait and Saudi Arabia to export petroleum, part of their "natural wealth," through their ports and all sea lanes. Shipping flagged under other States was engaged in lifting petroleum from these ports and otherwise in legitimate trade within the Gulf. The Council condemned hostilities in "sea-lanes, navigable waterways, harbour works, terminals, offshore installations and all ports with direct or indirect access to the sea..." The Council later reaffirmed "the right of free navigation in international waters and sea lanes for shipping to and from all ports and installations of the littoral States... not parties to the hostilities[...]." Iran had attacked commercial shipping en route to and from Kuwaiti and Saudi ports. To the extent that these attacks frustrated the rights of Kuwait, Saudi Arabia, and other Gulf States not parties to the war to dispose of their natural wealth, attacks on shipping carrying these exports could be seen as a violation of Article 1(3) as interpreted by the Assembly and the Council.

ii. Principles in the Charter: Articles 2(3), 2(4). The principle expressed in Article 2(3) is a logical corollary of the principle of Article 2(4), which prohibits threat or use of force against a State's territorial integrity or political independence, or in any manner inconsistent with the Purposes of the United Nations. Article 2(3) requires UN Members to settle their international disputes by peaceful means so that international peace and security, and justice, are not endangered. A legacy from the League Covenant era, the language of Article 2(3) has been incorporated in many international agreements. Its substance, mingled with Articles 33-36's parallel policies, has been restated in many UN resolutions, including Security Council Resolution 479, the first Council action in the Iran-Iraq war.

Article 2(4) of the Charter "lays down one of the basic principles of the United Nations," incorporating by reference Article 1's Principles and declaring, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Article 2(4) must be interpreted in the context of other Charter norms; i.e., it may be tempered by other rights (e.g., of self-defense) under the Charter or general international law under a number of theories. The point of difference is the relative scope of the right of self-defense and the extent to which the right of self-defense qualifies Article 2(4), an analysis deferred for consideration in the context of self-defense and related issues.

Definition of terms lies beneath the problem of interrelationships between Article 2(4), which at least restates a customary rule, and other claims. Two views have developed on what "threat or use of force" means: Does "force" mean only "armed force," or does it include economic or political pressure? Most commentators say force means only armed force and does not include economic or political
pressure. Recent treaty negotiations support a narrow definition of "force." States have negotiated separate provisions prohibiting coercive economic or political methods. Proponents of a clause to include economic coercion with military coercion as a ground for voiding a treaty, failed in the Vienna Convention on the Law of Treaties negotiations. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations also lacks such a provision. Although the General Assembly has adopted resolutions calling upon States to refrain from economic or political coercion, neither the Assembly nor the Council has determined that such coercion equates with use of force under Article 2(4). The Assembly may have come close with the 1970 Friendly Relations Declaration, but analysis reveals that the line has not been crossed. Other examples are consensus approval of a definition of aggression and the Charter of Economic Rights and Duties of States (NIEO).

Similar to the US position that aggression "cannot be so comprehensive as to include all cases . . . and cannot take into account the various circumstances which might enter into the determination of aggression in a particular case[,]" the Resolution definition of aggression parallels Article 2(4): "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter . . . , as set out in this Definition."

A State's first use of armed force in violation of the Charter is *prima facie* evidence of an act of aggression, although the Security Council may determine that, under the circumstances, no act of aggression has been committed. The Definition considers the following as acts of aggression whether or not there has been a war declaration:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. 67

The list is not exhaustive. 68 Article 5(1) is the only direct reference to economic strategies: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." 69 Thus economic need cannot justify aggression, but that does not mean that a coercive economic strategy is aggression.

As with the 1970 Friendly Relations Declaration, NIEO Article 32 proclaims that "No State may use or encourage ... economic, political or any other ... measures to coerce another State ... to obtain ... subordination of the exercise of its sovereign rights." 70 Because of the vote on NIEO (118-6-10) and developed States' solid opposition, and NIEO's status as not being a first measure of codification and progressive development, 71 it is unlikely that Article 32 recites custom. State practice under the Vienna Convention confirms this view. 72

One issue, for which there are no clearcut answers in Charter practice, is whether the "territorial integrity" phrase in Article 2(4) includes the "floating territory" of a vessel flying a State's flag. 73 The Corfu Channel Case settled the issue for warships; the judgment included an award for damage to the UK ships and for personnel injured or killed. 74 Security Council resolutions affirmed freedom of navigation in the 1967 Arab-Israeli conflict 75 and in the Tanker War; 76 in the past other resolutions approved interdiction of Beria-bound merchantmen as part of sanctions action against Rhodesia. 77 The freedom of navigation resolutions confirmed vessels' right to be free of belligerent interference; the Rhodesia interception resolution can be seen as a derogation on a right of "floating territorial integrity" in the sense of Article 2(4). 78

Even if a ship might not be considered part of a State's territory and therefore not subject to Article 2(4), attacks on individual merchant ships are acts of aggression and are subject to self-defense response(s) under Article 51. This issue was particularly relevant for the Tanker War.

Although Article 2(4) does not cite aggression specifically, it does prohibit Members from acting "in any other manner inconsistent with the Purposes of the United Nations" in their international relations. Article 1(1) states the UN's primary 79 Purpose as maintaining international peace and security through collective action to "suppress ... acts of aggression or other breaches of the peace ...." Therefore, UN Members have an obligation to refrain from acts of aggression against other States. And, as also developed under the self-defense analysis, 80 the Nicaragua Case adopted the broader French-language version of the Charter, Article 51. Article 51's English language version reads:
Nothing in the ... Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the ... Council and shall not in any way affect the authority and responsibility of the ... Council under the ... Charter to take at any time such action as it deems necessary ... to maintain or restore international peace and security.

The French version reads:

Aucune disposition de la ... Charte ne porte atteinte au droit naturel de legitime defense, individuelle ou collective, dans le cas ou un Membre des Nations Unies est l'objet d'une agression arme, jusqu a ce que le Conseil de Securite ait pris les mesures neccaires pour maintenir la paix et la securite internationales. Les mesures prises par des Membres dans l'exercice de ce droit de legitime defense sont immediatement portees a la connaissance du Conseil ... et n'affectent en rien la pouvoir et le devoir qu'a le Conseil, en vertu de la ... Charte, d'agir a tout moment de la maniere qu'il judge necessaire pour maintenir ou retablir la paix et la securite internationales.81

The right of self-defense, however defined,82 arises when there is an “armed attack,” under the English language version, or under the French version when there is an “agression armee,” which connotes a broader range of activity or situations triggering a right of self-defense.83

Both versions and those in the Chinese, Russian and Spanish languages are equally authentic.84 However, since the languages in which the drafting was done were English and French, Goodrich and his associates argue that more weight should be given the English and French texts and, if there is a discrepancy between the two, the interpretation most likely to be correct would be that based on the language of the text that was originally adopted.85 Under this view, since Article 51 is the result of a UK, i.e., English language, proposal,86 the “armed attack” phrase of the English language version should prevail.

Linnan has advocated using the Vienna Convention on the Law of Treaties to guide analysis of the relationship between Articles 2(4) and 51.87 The same approach might be taken for the situation of equally authoritative texts where words chosen for versions in differing languages have different meanings. The Vienna Convention, article 33, provides in pertinent part:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language. . . .
2. The terms of the treaty are presumed to have the same meaning in each authentic text.
3. When a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning
which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Articles 31 and 32 of the Convention provide:

31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for interpreting a treaty shall comprise, in addition to the treaty and annexes,

3. There shall be taken into account, together with the context...

- any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- leaves the meaning ambiguous or obscure; or
- leads to a result which is manifestly absurd or unreasonable.

There have been several theories for interpreting treaties, but Jimenez de Arechaga says Vienna Convention principles declare existing law. Although other approaches have appeal, the Convention’s mainstream approach will be the principal path of analysis.

Article 31(1) “establishes ... the ‘golden rule’ of interpretation[.]” Give a treaty its ordinary meaning in its context and in the light of its object and purpose. Article 31(2) further defines the context to include the treaty preamble. Along with the context these are relevant, for this purpose: subsequent practice establishing the parties’ agreement as to its interpretation, Article 31(3)(b); and relevant applicable rules of international law, Article 31(3)(a); and a special meaning to a term if the parties agree to such, Article 31(4). Therefore, the first task is to examine intrinsic evidence; the second is a gradual progression from this center to more peripheral evidence, with a concession to parties’ specific intent “if it is established,” convincingly, “that the parties ... intended” such. The last qualification does not apply, since the problem lies with the meaning of Article 51’s wording, for which there is no terminological consensus. The problem in terms of Vienna Convention
The Tanker War

Article 31 analysis boils down to an issue of subsequent practice and relevant, applicable international law rules.\textsuperscript{95}

The most recent authoritative pronouncement on the meaning of "armed attack"—"agression armee" in Article 51 is the Nicaragua Case. The ICJ accepted the broader French-language Article 51 version, stating in \textit{dictum} that the Definition of Aggression Resolution, Article 3(g), stated a customary rule; sending armed bands, irregulars or mercenaries across a border would be armed attack justifying self-defense. (The Court went on to say, however, that supplying arms or other logistics across a border was not aggression and that therefore a US collective self-defense claim under Article 51 was not admissible.)\textsuperscript{96} And since the same word—"agression"—is used in Article 1(1) and Article 51,\textsuperscript{97} the same meaning should be imported into Article 1(1) as incorporated by reference in Article 2(4).

The narrow question is whether there can be armed aggression against ships. The Definition of Aggression Resolution, Article 3, declares: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter . . . as set out in this definition."\textsuperscript{98} Although it could be argued that "territorial integrity" in Article 1 includes the "floating territory" of ships, the negotiators did not address this possibility; they voted down amendments to refer to the territorial sea and airspace, although one State (Indonesia) added it by interpretative statement. Article 1 only covers armed aggression, and not economic or political coercion; it does not cover threat of force, as distinguished from use of force.\textsuperscript{99} Article 2 declares a first use of force in violation of the Charter to be \textit{prima facie} evidence of aggression, but that the Security Council may determine that no aggression has occurred, perhaps because the act(s) or consequence(s) are not that serious.\textsuperscript{100} The Definition also recites certain \textit{per se} principles, subject to Article 2's first-use and \textit{de minimis} principles, in Article 3, which provides in part:

\begin{quote}
Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

\begin{itemize}
\item (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State . . .
\end{itemize}
\end{quote}

Article 3(c) says that blockading coasts or ports by armed forces is aggression.\textsuperscript{101} The ICJ has stated that article 3(g), denouncing sending armed bands across a border, states custom; one commentator says all of Article 3 probably restates custom, although others disagree.\textsuperscript{102} The Article 3 list is nonexclusive.\textsuperscript{103} An ambiguity remains as to the phrase "marine and air fleets." Does this include a single merchantman flagged under a target State’s flag? Article 3(d) covers attacks on a warship, a warship formation, or a group of merchantmen, \textit{e.g.}, a fishing fleet.\textsuperscript{104} Attacking a single neutral warship is never permitted in territorial
waters, and by well-established custom on the high seas as well. Choice of the expression "fleets" for article 3(d) was done "advisedly, . . . to exclude from the purview of the Definition the use of force [by an attacking State] against a single or a few commercial vessels . . . , especially when they enter [attacking State] jurisdiction," according to Dinstein, who cites Broms, chair of the UN committee that produced the Definition. Dinstein concludes that "A reasonable degree of force (in the form of search and seizure) may be legitimate against foreign merchant ships even on the high seas." However, Broms did not refer to merchant ships generally; he and the Committee referred only to fishing vessels and fleets. Dinstein's view appears inconsistent with what the Committee actually decided. It is also clear that coastal States, engaged in legitimate policing of their coastal waters (e.g., territorial sea, contiguous zone, EEZ) do not commit aggression under article 3(d) when they pursue, and possibly attack, merchant ships for violations.

The Dinstein view is inconsistent with what the UN Committee actually decided. The UK Committee delegate pointed out during negotiations that Article 3(d) would not impugn coastal State action "in accordance with international law for the legitimate enforcement of its authority." A saving clause describing coastal State rights had been omitted from Article 3(d). Including it would risk that such a clause might be taken to imply that any vessel . . . which ventured within the jurisdiction of another State might be subjected to any degree of force—even an armed attack—that the State might choose to inflict on it in the exercise of its own authority, which was not the . . . Committee's intention.

Thus, far from indicating that attacks on independently-sailing merchant ships could not trigger a self-defense response, the Committee was trying to avoid the problem of unlawful attacks in the first place. There is no indication that the Committee even considered self-defense in this context. The Committee did not intend to exclude attacks on independently-steaming merchantmen from the Definition, for which self-defense or other legitimate response(s) might be appropriate.

As incidents like the Mayaguez seizure demonstrate, to say that not all attacks on merchant ships can result in an aggression claim justifying a self-defense response is dangerous business indeed. Even as a self-defense response that is not proportional can become aggression, not every attack on an independently-sailing merchantman should be shielded from an aggression claim. Some merchant ships, e.g., passenger liners, are forbidden targets in any case; even with modern commercial shipping's highly automated nature, and the resulting relatively low size of crews, a deliberate attack on a single cargo merchantman can involve many people's lives. The liner exception does not cover the situation of other vessels carrying hundreds of passengers, e.g., ferries or work-boats transporting employees of offshore drilling rigs, nor does it cover a common situation of cargo vessels with a
small passenger manifest. Moreover, the reality of merchant traffic on the seas is that no merchant ships, unless they are fishing vessels or tugs and tows, ever sail in company. A view that all independently-sailing merchant ships could be attacked without the attacking State risking being branded an aggressor would mean that no merchant ship would be safe, under any circumstances, since all sail independently. Presumably an all-out, simultaneous, world-wide attack on all ships flagged under the target State would qualify for Dinstein, but that hypothetical lacks reality.

The "fleets" expression does not follow the principles of prior treaty law, whether ratified or not. These agreements point to coverage of attacks on single ships as enough to trigger a risk of a charge of aggression if the act or its consequences are serious enough, under the Definition Resolution formula. Charter era State practice buttresses this conclusion. The Resolution includes blockade as a qualified per se instance of aggression. As a practical matter, blockade runners do not try to avoid interception in groups. If it is assumed that the law of blockade still includes an ultimate right to attack and destroy merchant vessels trying to evade blockade, and it is submitted that this remains the case, then illegal use of blockade includes the illegal destruction of blockade runners as part of unlawful aggression. And if such be true in the context of blockade, then it is likewise true that illegal destruction of a single merchantman, sailing independently, would be likewise susceptible to condemnation, if the situation is serious enough, under the Resolution formula. Even if attacking a single merchant ship does not come under Article 3(d)'s "marine... fleets" principle, prior treaty law and State practice since 1945 points toward a strong potential of a finding of aggression for such an attack.

The record of treaties negotiated before the Charter era and immediately after 1945 is mixed as to whether attacks on shipping constitute aggression; no recent agreements have been concuded on the issue. Some multilateral and bilateral agreements categorize them as acts of aggression; many do not. For purposes of this analysis, however, it is most significant that Iran bound itself twice, and Iraq once, to multilateral agreements specifically defining attacks on "vessels or aircraft of another State" as acts of aggression. Did "vessels" include merchantmen as well as State ships? Contemporary USSR proposals in the League of Nations, similar to the Definition list without the latter's nonexclusivity clause, spoke of "knowingly attacking the naval or air forces of another State." Applying general principles for interpreting ambiguous treaty terms, it would seem that the unmodified words, "vessels" or "ships," meant not only State vessels, i.e., warships, but merchantmen as well. The Vienna Convention on the Law of Treaties, Article 31(1) restates a customary rule: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms... in their context and in the light of its object and purpose."
of “ship” or “vessel,” undorned by an adjective, is just that—it connotes all seagoing conveyance, military or commercial. This is reinforced by the context of the era. The USSR, a primary promoter of an aggression definition, was a socialist, command economy, in which the State owned all commercial ships through trading companies. At the time the USSR claimed an absolute theory of sovereign immunity, as distinguished from capitalist countries’ acceptance of modified, restricted forms of immunity. Although the USSR might have advocated a more narrow theory for aggression in League debates, when treaties were negotiated with other, often capitalist, States, these conventions’ coverage was broad enough to cover all ships. Other countries’ positions cannot be determined with certainty, but Comments to the Harvard Draft Convention on Rights and Duties of States in Case of Aggression, proposed exclusively by US (and therefore capitalist) commentators, support a view that “vessel” or “ship” meant all vessels or ships, regardless of relationship with a registry State. Moreover, including attacks on merchantmen within a definition of aggression would further the treaties’ policies in minimizing opportunity for legally-sanctioned violence.

Language of multilateral agreements contemporaneous with the Charter were inconclusive or would appear to have drifted toward a view that only attacks on warships would constitute acts of aggression; however, examples given were non-exclusive. Thus there is some support in treaties for a view that States have considered attacks on single merchantmen an act of aggression; this is particularly true for Iran and Iraq, whose treaty record is clearer than that of most States. To be sure, the law of treaties says that treaties cannot create rights for third States unless these States accept them, but treaty rules can state custom.

State practice since 1945 supports a view that attacks on single ships can amount to aggression. During the 1973 Yom Kippur War, the Syrian navy seized Romantica, an Italian liner, later released upon the Italian ambassador’s intervention. Loss of the neutral Venus Challenger, sunk with all hands as a victim of an Indian missile during the 1971 India-Pakistan conflict, has been severely criticized. The United States protested and responded with force to Cambodia’s seizure of the US-flag Mayaguez in 1975, claiming self-defense. A US Court of Appeals found Argentina liable for its attack on Liberian-flag Hercules outside a declared war zone during the 1982 Falklands/Malvinas War.

If today diminished in value because of failure of ratification or acceptance of the final text, draft multilateral treaties or single-action proposals carry some weight as a secondary source because of their authors’ eminence as scholars. These sources support a view that “vessels” include merchantmen sailing alone. In this regard the 1933 USSR proposal is interesting; it would have said the first attack on another State’s “naval or air forces” was an act of aggression. The full League Committee’s 1933 draft Act Relating to the Definition of the Aggressor changed this to the first attack on another State’s “vessels or aircraft,” some indication of
accepting a broader definition of targets that could trigger a claim of aggression. The 1939 Harvard Draft Convention on Rights and Duties of States in Case of Aggression says that a single merchantmen, if attacked, could trigger a claim of aggression. Few Charter era commentators have expressed a view, independently of the “fleets” expression in Definition of Aggression, Article 3(d), perhaps because it is now obvious that an initial attack on a neutral merchant ship, traveling alone, can be an act of aggression. If we presume availability of the 1977 Hague Recueil or its equivalent in Baghdad and Tehran when the Tanker War began, the legal rationale for destruction and loss of life may be predicated on this view, at least in part.

Appraisal. Although the record of claims and counterclaims is not clear, it is submitted that an attack on a merchant ship, steaming independently on lawful purposes, can be an act of aggression that can merit a self-defense response. An attack on a man-of-war, sailing alone, can also be an act of aggression. Attacks on a formation of warships, or on a fleet of merchantmen (e.g., a fleet of fishing trawlers) can be aggression that will support a self-defense response. As McDougal and Feliciano and others have shown, not every “attack” is serious enough to merit a self-defense response, and a self-defense response must be necessary and proportional in any event. A target State may choose to make no response, or to counter with retorsions or non-force reprisals, perhaps in connection with self-defense measures. Moreover, some attacks may be subject to defenses, e.g., mistake, as in the Stark and Airbus cases. Any proportional self-defense response to an assault perceived at the time as an aggressive armed attack is legitimate.

Thus, the logical corollary of the principle in Article 2(4), prohibiting the threat or use of force against the territorial integrity or political independence of a State, or in any manner inconsistent with the UN’s purposes, is the principle expressed in Article 2(3): “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” A legacy from the League Covenant era, Article 2(3)’s language has been restated in many international agreements. The substance of Article 2(3), commingled with the parallel policies of the Charter, Chapter VI, Articles 33-36, has also been restated in the Friendly Relations Declaration.

b. The Inherent Right of Self-Defense Under Article 51; Other Concepts. As noted above, Article 51’s French language version (agression arme) connotes a broader meaning than the English language phrase, “armed attack.” (Both versions, along with the other official languages, are equally authentic but a commentator’s analysis may point to the English language version as the one to follow.) Another difference in meaning between Article 51’s two versions is the English language phrase, “inherent right of... self-defense,” which in French becomes “droit naturel,” i.e., the connotation of “natural right.” Thus there is an “inherent” or
"natural" right to self-defense by a State whenever there is armed aggression against that State. The problem is compounded by use of English in important treaty negotiations for 20 years before the Charter negotiations.

During negotiations leading to the Pact of Paris, which outlaws war as an instrument of national policy, US Secretary of State Frank B. Kellogg sent identical notes to participants, stating that the draft Pact did nothing to "restrict or impair in any way the right of self-defense inherent in every sovereign State and implicit in every treaty." Self-defense was characterized as "inalienable" and a "natural right," which "[e]very nation is free at all times and regardless of treaty provisions" to exercise. Great Britain had expressed a similarly broad view of the matter earlier, as had other States. Ultimately all parties accepted or "noted" the US interpretation when the Pact was signed August 27, 1928.

About a year earlier the PCIJ had decided the Lotus Case, which strongly recognized States' sovereignty to act as they chose in the absence of law. (State sovereignty, although occasionally assailed by some, remains a fundamental principle of international law.) Under Lotus, States should have been as free to act within the law of self-defense as it then stood when their sovereignty was threatened by an act of war that was a violation of law; i.e., there was no law to support the act. Thus if it be assumed that the self-defense gloss on the Pact of Paris carries over into the UN Charter drafting less than a generation later, there is at least the possibility of a latent ambiguity, if Article 51's English or French version carries with it a different and broader right of self-defense than the other, a right extending back into pre-Charter understandings of the scope of the right. The same issue lurks in the difference between "armed attack"—with its connotation of actual, physical assault—and "aggression armée," "armed aggression," connoting a lower threshold for triggering a right of self-defense.

We have seen how Linnan's analysis, employing interpretation methods in the Vienna Convention on the Law of Treaties, was helpful in determining the meaning of "armed attack"—"agression armée" in Article 51. Since the same issues are at stake with respect to the point on the "inherent right"—"droit naturel" dichotomy, that method will be employed to determine the meaning of this phrase.

The most recent authoritative pronouncement on the meaning of "inherent right"—"droit naturel" in Article 51 is the Nicaragua Case, where the ICJ accepted the broader French version of Article 51 to state that the right of individual or collective self-defense is a matter of customary international law, as evidenced in the Friendly Relations Declaration interpretation of Article 51. Sohn has convincingly noted the similarity of language between the understandings to the Pact of Paris and the "droit naturel" language of the French text of Article 51. The Court accepted the broad view of "inherent right" advocated by Bowett and others. With respect to the "armed attack"—"aggression armée" issue, the Court agreed with the Definition of Aggression that sending armed bands, irregulars or mercenaries
across a border was aggression, where this amounted to an actual armed attack by regular forces.\textsuperscript{172} The Case involved incursions across land borders, but it is reasonably clear that the Court accepted the French text’s slightly broader definition.\textsuperscript{173} Therefore, it may be inferred that other forms of armed attack listed in the Definition, \textit{e.g.}, naval blockade,\textsuperscript{174} also declare customary law. And if this is so, there may be other forms of aggression that customary law now defines as such\textsuperscript{175} in a particular context to justify a self-defense response. The Court did hold, however, that cross-border assistance to rebels in providing weapons, logistics, or other support was only a threat of use of force or perhaps intervention into the affairs of another State, and therefore not enough to be characterized as an aggression so as to justify action by the target State in self-defense.\textsuperscript{176} Two dissents pointed out that some situations involving logistics might be characterized as an armed attack, \textit{i.e.}, aggression.\textsuperscript{177} The Court declined to consider anticipatory self-defense issues; the parties had agreed it was not an issue.\textsuperscript{178}

Although the Court’s opinion is a secondary source and has no precedential value in the common-law sense,\textsuperscript{179} its recitation of customary principles is, however, entitled to great respect. Other Charter era instances of customary claims for national self-defense, particularly in the context of naval warfare, are ambiguous.

The Definition of Aggression does not enlarge or contract the right of self-defense: "Nothing in this definition shall be construed as \ldots enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."\textsuperscript{180} States may respond to aggression in self-defense or by other appropriate means,\textsuperscript{181} \textit{e.g.}, retorsion or nonforce reprisals.\textsuperscript{182}

There is no evidence of a special meaning given Article 51 by the intent of the parties.\textsuperscript{183} Thus recourse to supplementary means of interpretation under Vienna Convention Article 32 is necessary, \textit{i.e.}, examining preparatory works. To be sure, use of preparatory works should not be considered as a second phase or as a resort when ambiguity or obscurity remains,\textsuperscript{184} but they do assume increased importance when Vienna Convention Article 31 analysis yields mixed results.\textsuperscript{185}

The Charter drafters negotiated against a background of the League of Nations Covenant and the interwar years. The Dumbarton Oaks Proposals for the Charter had no equivalent to Article 51,\textsuperscript{186} and the negotiating history of the conference that produced the Charter stated in part that "The unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self defense remains \textit{admitted and unimpaired}."\textsuperscript{187} (The Nicaragua Case\textsuperscript{188} has demolished the opposing argument, that the right of self-defense is wholly confined to Article 51 which preempts any customary norm.)\textsuperscript{189}

If the right remains "admitted and unimpaired," reference must be had to the latest major agreement before the Charter concerned with the issue, \textit{i.e.}, the Pact of Paris still in force with about 69 parties as of January 1, 1998,\textsuperscript{190} and negotiations, including general understandings, before signature and ratification.\textsuperscript{191}
were no reservations concerning self-defense attached to the Pact; diplomatic correspondence constituting part of that treaty’s preparatory works were interpretations, i.e., understandings.\(^{192}\) Resort to analysis by analogy under the Vienna Convention on the Law of Treaties \(^{193}\) confirms that the diplomatic correspondence \(^{194}\) on the Pact contained understandings, not reservations. The Vienna Convention, Article 2(1)(d), says a reservation is “a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions . . . in their application to that State.” The US notes to prospective parties were transmitted June 23, 1928, two months before signature of the Pact.\(^{195}\) Ratifications were exchanged much later.\(^{196}\) Moreover, since self-defense was not mentioned in the Pact, the diplomatic notes, even if they might otherwise be considered reservations, could not “exclude or modify the legal effect of the treaty . . . .” In effect, then, the notes were “clarification[s] of the State[s]’ position,” or “declarations of a purely explanatory character.”\(^{197}\) The contemporary position of two US Secretaries of State was that the self-defense corollary to the Pact was an understanding, not a reservation.\(^{198}\)

**Appraisal.** The Nicaragua Case confirms that a separate customary norm for self-defense may exist alongside the Charter recitation in Article 51.\(^{199}\) Article 51 says the right of individual and collective self-defense is “inherent,” the same word used in the reservations \(^{200}\) for the Pact of Paris.\(^{201}\) Such being the case, whether Article 51 applies to a situation, or whether a customary norm applies, the result is the same. The right of individual and collective self-defense as understood and practiced before ratification of the Charter continues unabated, subject to application of conditioning factors, e.g., developing custom, perhaps stated in resolutions (the Definition of Aggression \(^{202}\) comes to mind); treaties, and other sources of law,\(^{203}\) including jus cogens norms.\(^{204}\) If the right of individual and collective self-defense has risen to the status of a jus cogens norm, as some have claimed, e.g., it takes priority over other treaty norms like Charter provisions not having jus cogens status.\(^{205}\) If another jus cogens norm, e.g., the right to territorial integrity and political independence recited in Charter Article 2(4), is involved, a jus cogens right of self-defense must be balanced against the other jus cogens norm(s).\(^{206}\)

i. Individual Self-Defense. When commentators’ views and Article 51’s interpretation through treaty canons analysis are considered,\(^{207}\) a relatively broad right to self-defense has developed. “U.N. practice in Art. 51, composed as it is of scanty, vague and contradictory elements, says nothing, or at least nothing clear, about the grounds for self-defense.”\(^{208}\) Besides maritime conflicts, only a handful of situations have involved published self-defense claims by a participant. In one of these, the Security Council rejected Israel’s anticipatory self-defense claim for its raid on an Iraqi nuclear reactor.\(^{209}\)
In the *Corfu Channel Case*, referred to the ICJ by the Council,\(^{210}\) the Court said a second passage of UK warships, ready for action if Albania again tried to use force to oppose passage, was not illegal because of Albania’s prior Channel mining and resulting loss of British lives and ships.\(^{211}\) Waldock interpreted the Court’s approving UK readiness for Albanian attack as legitimate preparation for imminent threat of attack.\(^{212}\) Using force to defend the formation would have been legal.\(^{213}\) (The case also decided that the United Kingdom could not invoke forcible self-help, *i.e.*, necessity, to justify use of force; this was held not legitimate in the Charter era.)\(^{214}\) The decision did not mention Article 51,\(^{215}\) probably because Albania was not a UN Member when the Court’s jurisdiction was invoked.\(^{216}\) The decision was based entirely on customary law. Although this aspect of the case was little noticed, *Corfu Channel* predicted the Nicaragua Case result three decades later, when the case confirmed a parallel customary self-defense norm, in the latter decision coterminous with Article 51.\(^{217}\)

In 1948 the Security Council heard Jewish Agency for Palestine claims, before Israel became a State, that Transjordan and Egypt were guilty of aggression. Transjordan (now Jordan) and the Arab League claimed self-defense to protect Jordanian and Arab nationals and to restore peace, security and law and order. Belgium raised self-defense in the Council. Council resolutions did not mention self-defense.\(^{218}\) This was also true for Indian and Pakistani self-defense claims in the 1948 Jammu and Kashmir dispute.\(^{219}\)

The beginning of the Korean War in 1950 again illustrates the point, in the collective security context. Although Council resolutions condemned North Korean aggression as a breach of the peace and called upon UN Members to assist UN forces and refrain from assisting North Korea,\(^{220}\) the Council did not mention the right of self-defense. Similarly, the General Assembly’s Uniting For Peace Resolution, passed when the USSR’s return to the Council and subsequent Soviet vetoes made Council decisionmaking impossible, does not mention self-defense.\(^{221}\) (Article 51 provides for a right of collective as well as individual self-defense, and the United States ordered its forces to come to the aid of South Korea before the Council acted.\(^{222}\) Hence, the Council could have, but did not, approve, disapprove or define South Korea’s self-defense rights and other States’ self-defense efforts for South Korea.)

In 1951, the Council rejected Egypt’s self-defense claim for closing the Suez Canal to, and asserting a right of visit and search of, Israeli merchantmen over two and a half years after hostilities had ceased. The resolution also noted that restrictions of passage of goods through the Suez Canal to Israeli ports were denying valuable supplies to nations not connected with the conflict, and that these restrictions, together with Egypt’s sanctions on ships that had visited Israel ports "represent[ed] unjustified interference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab States and Israel[.]"\(^{223}\)
Commentators debate whether a right of visit and search during an armistice exists. The resolution was not supported; there were more seizures and protests. The USSR vetoed a second Council resolution. Five years later the United Kingdom justified its Suez Canal intervention on self-defense, to protect its nationals; France, who combined with Britain in the sea-land operation, did not do so. The justification seemed to lack factual foundation; it has been said General Assembly rejection of the UK argument "cannot be regarded as conclusive to its validity in law."

From February-April 1957, however, US destroyers patrolled the Gulf of Aqaba and the Straits of Tiran to successfully prevent Egyptian interference with US flag merchantmen bound for Israel; other US warships evacuated US citizens and "friendly nationals" on a space-available basis from Haifa, Israel, and Alexandria, Egypt. During 1958-59 UK warships escorted and protected British fishing trawlers in waters Iceland claimed as territorial sea. The United Kingdom eventually withdrew from the "Cod War," and diplomacy resolved the issue. In 1960 Belgium claimed a right to use force, but not based on self-defense, to extract its nationals from the strife-torn Congo.

During the Algeria civil war France's self-defense claim for intercepting and boarding or diverting vessels whose cargoes were suspected to be bound for Algerian rebels was protested vigorously by States whose flag the ships flew. France had declared a 20 to 50 kilometer (11-28 mile) customs zone off Algeria, but high seas interception occurred off Algeria; 45 miles off Casablanca, Morocco; in the Atlantic Ocean; and in the English Channel. It is not clear whether protests were directed at interceptions wherever occurring, or for those outside the zone, i.e., in the Atlantic and the Channel. Although a large-scale operation (4775 ships visited, 1330 searched, 192 rerouted, 1 arrested in 1956), ships whose cargoes were seized were smuggling arms to the rebels. Although arms were imported from the sea off the Algerian coast, others were brought overland through Libya, Morocco or Tunisia, and then across the Algerian border, perhaps through a third State, e.g., Tunisia. Sometimes bogus shipping documents were used. Fishermen smuggled in arms. The Council did not pass a resolution related to the matter.

In 1964 no Council resolution responded to a US self-defense claim in the Gulf of Tonkin (Maddox-Turner Joy) incident. From the US perspective, other aspects of the Vietnam War were actions in collective self-defense.

No Council decisions were in resolutions related to Israeli actions against Syria (1964, 1966) and Jordan (1966). Israel was condemned for attacks on Jordan (1966, 1969) and Lebanon (1968-82), however. Although draft resolutions were presented, the Council took no position during the 1967 Six-Day War. During that war Egypt's submarines sank innocent Greek freighters in the Mediterranean Sea, one off Alexandria and another further west. Britain warned it would join other States to assure Straits of Tiran right of passage. A UK
carrier group and the US Sixth Fleet were concentrated in the Eastern Mediterranean, and a second UK carrier was in the Red Sea, but nothing came of the show of force. *U.S.S. Liberty*, a warship on the high seas in the eastern Mediterranean monitoring Israeli transmissions during the Egyptian phase of the war, was damaged in an Israeli PT boat and aircraft attack. Israel later compensated the United States for loss of life, crew injuries and damage to *Liberty*, without admitting fault. *Liberty* was configured like a merchant cargo ship but flew a US ensign, was painted haze grey like all US warships in the Mediterranean, and had traditional US white pendant numbers on the bow and stern. The attack occurred during daylight. US forces were not allowed to retaliate. Israel had declared an imprecise exclusion zone, warning ships to keep away from "the coasts of Israel during darkness." As to what coasts (e.g., conquered territory also?), the warning was less than clear. An informal private warning also had been given the United States.242 No self-defense claims were raised. The *Liberty* attack might be compared with the sinking of the Israeli destroyer *Eilat*, a belligerent warship steaming on the high seas, during resumption of hostilities in October 1967 *Eilat* was destroyed by Styx missiles fired from an Egyptian patrol boat in Port Said harbor.243 The difference was that the *Eilat* attack occurred during a period of hostilities, whereas the *Liberty* incident came out of the blue.

In 1968 North Korea seized *U.S.S. Pueblo*, another electronic reconnaissance warship, on the high seas, outside of claimed territorial waters. The crew was returned 11 months later. Other than diplomatic overtures, there was no US response,244 and the United Nations did not act.

In the 1965 India-Pakistan conflict, Pakistan declared war, published lists of absolute and conditional contraband, and established a prize court, asserting these measures were lawful exercises of self-defense. India’s position was ambivalent; it responded with an absolute contraband list, but it is not clear as to whether India acknowledged existence of a war. Since India responded with its contraband lists,245 this at least indicated that India considered itself an object of an armed attack (if Pakistan would be considered the aggressor), or entitled to respond to Pakistan’s actions, if the latter is taken as a self-defense response to Indian actions. Late in 1966 the General Assembly called on the belligerents to observe the rules of warfare.246 Apparently there were no self-defense claims.

The 1971 India-Pakistan war was over in two weeks;247 this conflict also resulted in attacks on and destruction of innocent merchantmen. After dark, neutral vessels were not allowed to approach the Pakistan coast closer than 75 miles. The Indian Navy sought to capture or destroy Pakistani merchant ships. More than 115 neutral ships were inspected; India diverted neutral vessels to Calcutta if they carried cargo of military significance after India discovered that ship markings and names had been changed. Three Pakistani merchantmen were captured; a Liberian and a Spanish ship were also sunk. Two merchantmen were destroyed by
Indian surface to surface missiles while at anchor in Karachi roadstead, and the neutral inbound Venus Challenger was hit and sunk by a missile 26.5 miles off Karachi. All hands were lost. A Pakistani destroyer also went to the bottom that night, the target of a Styx missile attack. The cause of destruction of Venus Challenger was probably the missiles' "capricious behavior" and malfunction or inadequate operation of guidance systems. A week after destruction of Venus Challenger, the Bengal Chamber of Commerce published its 40-mile dawn to dusk warning. Again, apparently there were no self-defense claims.

During the 1973 Arab-Israeli Yom Kippur War, international shipping was warned about entering the region of conflict, which first comprised Egyptian and Israeli territorial waters, but later further parts of the sea plus Egyptian, Libyan and Syrian ports. In October the Syrian navy captured and diverted a Greek liner, Romantica, which was released the next day after the Italian ambassador's intervention. No further such incidents occurred, perhaps because of international protests, although Egypt regularly stopped, visited and searched neutral merchantmen. Third States' reactions varied. African countries unilaterally suspended or ended diplomatic relations with Israel; Arab countries boycotted oil exports to Israel and the United States. Britain embargoed arms, and this largely affected Israel; except for Portugal, other Western European nations refused to allow use of their territories for supplying or assisting any belligerent. Arab navies adopted a tactic of sheltering beside merchant ships in their harbors after firing missiles at Israeli warships. Egypt declared a blockade in the Red Sea and attacked but missed an Israel-bound tanker. In the Gulf of Suez Egypt acted to blockade the Abu Rudiers-Eilat route used by Israeli-chartered tankers carrying oil from the Israeli-occupied Sinai fields to Eilat. Responding to Egypt's blockade of the Straits of Bab el Mandeb, Israel counter-blockaded the area. Protests regarding Syria's attack on Romantica are an indicator that States considered the attack a delict and perhaps also subject to self-defense reaction by Greece if Greece had chosen to respond with proportional force.

In 1972 Iceland asserted a 50-mile fishing zone and cut a UK fishing boat's trawl wires. A UK frigate deployed outside the zone. The next year UK frigates entered the zone after continued Icelandic harassment. Incidents involving UK and German trawlers continued through 1973. In 1972 Britain had sued Iceland in the International Court of Justice, the Court indicated interim measures in 1973, and in 1974 the Court held that Iceland could not bar Britain from historic waters. The parties were admonished to negotiate differences. At about the same time US fishermen experienced seizures of boats and crews, mostly off Latin America's west coast and in the Gulf of Mexico, by States claiming territorial seas or economic zones beyond those claimed by the United States. The US reaction was an insurance system to secure crews' and boats' releases, coupled with US diplomatic
protests. Some countries' fishing boats were attacked in Western Hemisphere waters. There were no claims of self-defense in responses.

In 1973, responding to US assistance to Israel during the Yom Kippur War, Libya declared the Gulf of Sidra below 32 degrees 30 minutes North latitude (the "Line of Death") as Libyan internal waters. The United States and other countries protested; only a few States have recognized the claim since then. The United States began challenging the claim by warships' use of the Gulf, establishing a formal Freedom of Navigation (FON) program in 1979. During a 1981 FON exercise, two Libyan air force jets launched missiles against Navy aircraft, which dodged the missiles and downed the Libyan planes. The United States asserted a right of self-defense. Libya escalated threats against US warships and praised terrorists who hijacked the Italian liner Achille Lauro in 1985. Further US FON exercises were undertaken in the Gulf, including one below the Line of Death. US NOTMARs and NOTAMs published these exercises. In 1986, after Libyan land-based missiles were launched against Navy aircraft flying in international airspace but below the Line, and Libyan aircraft penetrated an announced exercise area, the FON force commander declared any Libyan military forces leaving Libyan territorial waters or airspace and threatening US forces would be considered hostile. Thereafter, when Libyan missile patrol boats headed toward US forces, and Libyan shore-based target acquisition radars were activated “with the evident object of firing upon U.S. aircraft,” the boats and radars were destroyed or damaged. The boats were not attacked when seeking refuge alongside a neutral merchantman or engaging in search and rescue operations. The United States claimed a right of anticipatory self-defense.

Although the United States notified the Security Council of its self-defense responses in the 1975 Mayaguez incident, when US naval aircraft were attacked by Libyan aircraft over the Gulf of Sidra in 1981, and in 1986 when the United States responded to Libyan patrol boat advances, the Council passed no resolutions on the situations.

In 1981 US forces operated under the recently revised Peacetime Rules of Engagement (ROE), which provided “word picture[s]” giving commanders listings of military indicators of hostile intent to consider in self-defense, i.e., when there was a demonstration of a hostile intent to attack that could justify response in anticipatory self-defense. Although ROE might authorize units to respond to the limits of principles of self-defense, including anticipatory self-defense, reaction in a given situation might not rise to the line of permissible responses under the law of self-defense. To the extent permitted by law, national policy and operational plans and orders, force commanders also have discretionary judgment to make other responses. Although US ROE have been classified in most cases, it is commonly known that US force commanders always have the obligation to defend their unit(s). Failure to observe restrictive national ROE in protecting a unit under
a legitimate claim of self-defense cannot result in a counterclaim of a violation of the law of self-defense.\textsuperscript{258} In other words, ROE-based responses may articulate a claim of self-defense; if the ROE response is more restrictive than the law of self-defense might permit, practice under the ROE cannot be interpreted as setting the boundaries of self-defense. ROE and the law of self-defense are therefore independent variables, although ROE cannot exceed the boundaries of the law.

During the 1982 Falklands/Malvinas war, although the United Kingdom based its military operation on Art. 51, no Council resolutions passed on the conflict took a clear position on the point.\textsuperscript{259} On April 7, 1982 the United Kingdom declared a 200-mile Maritime Exclusion Zone (MEZ), to be effective April 12, for Argentine shipping around the Falklands/Malvinas. On April 23 the United Kingdom established a Defensive Sea Area (DSA) or “defensive bubble” around its task force, warning that approach by Argentine civil or military aircraft, warships or naval auxiliaries would be dealt with “appropriately.” On May 1, when fighting started in the islands, the MEZ was changed to a Total Exclusion Zone (TEZ) for ships supplying the Argentine war effort. MEZ coverage was extended May 7 to sea areas more than 12 miles off the Argentine coast. Argentina had declared a 200-mile Defense Zone (DZ) off its coast and around the Falklands/Malvinas on April 13, after having protested the UK action. MEZ enforcement capability came on the day it was effective, April 12.\textsuperscript{260} Presumably Argentina could have enforced its DZ if it chose to do so, but after the cruiser General Belgrano sinking, Argentine naval forces, except land-based naval aviation and possibly submarines, did not figure in the war. On May 11 Argentina declared all South Atlantic Ocean waters a war zone, threatening to attack any UK vessel therein. Apparently the only neutral-flag ship attacked by Argentina in the war zone was Hercules, a Liberian-flag, US interests-owned tanker in ballast. Although the USSR belatedly protested lawfulness of the UK TEZ, it did apparently not object to the Argentine DZ and observed the UK TEZ.\textsuperscript{261} The United States had published warnings to US vessels and ships owned by US interests, e.g., Hercules, two days before she was hit.\textsuperscript{262} On July 12, 1982, active hostilities in the war ended, but the UK TEZ and economic sanctions were continued. Ten days later the TEZ was lifted, but the United Kingdom warned Argentina to keep military ships and aircraft away from the islands, declaring a 150-mile Protection Zone.\textsuperscript{263} The TEZ was relatively successful, although Argentina succeeded in airlifts to the islands until the last days of the war. Apparently Argentine sealift efforts failed.\textsuperscript{264}

In the Iran-Iraq war, although the Security Council recognized the right of freedom of navigation and called for protection of the marine environment\textsuperscript{265} in a context of belligerent and other States' self-defense claims,\textsuperscript{266} there was no Council action to take charge of the conflict by decision, as the Charter provides.\textsuperscript{267} Both belligerents declared defense, war or exclusion zones,\textsuperscript{268} and aside from Council resolutions calling for recognition of freedom of navigation rights and protection
of the environment, the Council did not purport to regulate these. No Council resolution explicitly determined the validity of the self-defense claims of Iran or Iraq.

Thus, at least in 1986 when Combacau’s analysis was published on Security Council practice in defining self-defense, “whatever the official pretence, and perhaps the legal situation, the international community is ... back where it was before 1945; in the state of nature; and ... the notion of self-defense makes no sense there.” The latter part of Combacau’s conclusion is overblown, for we may at least draw upon the understandings of the Pact of Paris, as its concepts were carried forward into Article 51. The 1990-91 Gulf War, the most serious challenge to the Council since the Korean conflict, shed no light on the issue. Council Resolution 661 merely confirmed the right of individual and collective self-defense as stated in the Charter. As Combacau intimates, much of this is due to the structure and powers of Charter institutions. Action by the Council must be taken with permanent members’ concurrence, and the Soviet veto was a regular feature of Cold War politics. However, other countries (including the United States) vetoed resolutions when allies, friends or interests were involved. Mindful of this, and the “sovereign equality of [UN] ... Members,” it is no wonder that self-defense has not figured strongly in Council resolutions, which nearly always have been nonmandatory recommendations or calls for action.

The General Assembly record is also relatively meager. Except for certain competences not relevant here, the Assembly’s function is recommendatory and subordinate to the Council on matters related to international peace and security. Article 12(1)’s requirement, that the Assembly cannot make a recommendation on a matter relating to international peace and security while the Council is seized of it, explains the Assembly record in part. Usually States will complain to the Council first, as the Charter provides. While the Council debates the matter, the Assembly is impotent. If the Council acts, even through nonmandatory calls for action or recommendations instead of binding decisions under Articles 25 and 48, it remains seized of the matter. If vetoes stop Council action on a particular crisis, it may still remain seized of the matter, depending on its prior resolutions. On the other hand, if the matter comes to the Assembly first, the Assembly may make recommendations until the Council takes it up.

The Assembly’s nonmandatory resolutions may recite, and therefore strengthen, customary and treaty norms, or may lead to development of new norms, however. Certain of these resolutions have asserted claims relative to self-defense. General Assembly Resolution 378 (1950), companion to the Uniting for Peace Resolution passed during the Korean War, recites these recommendations:

(a) That if a State becomes engaged in armed conflict with another State or States, it take all steps practicable in the circumstances and compatible with the right
of self-defence to bring the armed conflict to an end at the earliest possible moment;

(b) In particular, that such State shall immediately, and in any case not later than twenty-four hours after the outbreak of the hostilities, make a public statement wherein it will proclaim its readiness, provided that the States with which it is in conflict will do the same, to discontinue all military operations and withdraw all its military forces which have invaded the territory or territorial water of another State or crossed a demarcation line, whether on terms agreed by the parties to the conflict or under conditions to be indicated to the parties by the . . . United Nations;

c) That such State immediately notify the Secretary-General, for communication to the Security Council and to the Members of the United Nations, of the statement made in accordance with [(b)] . . . and of the circumstances in which the conflict has arisen;

d) That such State, in its notification to the Secretary-General, invite the appropriate organs of the United Nations to dispatch the Peace Observation Commission to the area in which the conflict has arisen, if the Commission is not already functioning there;

e) That the conduct of the States concerned in relation to the matters covered by the foregoing recommendations be taken into account in any determination of responsibility for the breach of the peace or act of aggression in the case under consideration and in all other relevant proceedings before the appropriate organs of the United Nations.281

That same year the “Peace through Deeds” resolution “reaffirm[ed] that . . . any aggression . . . is the gravest of all crimes against peace and security” and “That prompt united action be taken to meet aggression wherever it arises.”282 The 1970 Friendly Relations Declaration again condemned the threat or use of force, declared a war of aggression to be a crime against peace, and added that “States have a duty to refrain from acts of reprisal involving the use of force.” The Declaration added, however, that “Nothing in [its terms should] be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful,”283 i.e., in self-defense.284

Specific situations occurring in the Charter era offer little additional guidance to the meaning of self-defense. The 1950 UFP Resolution has been discussed.285 In 1966 the Assembly belatedly called upon India and Pakistan to observe the rules of warfare, but only as the war wound down.286 The Assembly condemned the USSR Afghanistan invasion in 1982287 and US action in Grenada the next year.288

Thus it might be said, apart from occasional forays into the field or general statements, e.g., the Friendly Relations Declaration, that General Assembly practice, even during the UFP Resolution era occasioned by permanent Council member vetoes, has been spotty. The result is that the definition of self-defense remains as it was in 1945 when the Charter was negotiated in the context of the Pact of Paris and other midcentury agreements. We are thus left with arguments from history, analysis of commentators, and rhetoric from some of the latter.
ii. Collective Self-Defense. Article 51 of the Charter permits collective self-defense under the same terms as the right of individual self-defense. Certain aspects of collective self-defense differ from the issue of individual self-defense. However, if the foregoing analysis for the right of individual self-defense is correct, i.e., that ultimate resort to the context of the Charter’s drafting is necessary, then similar analysis is necessary to appraise collective self-defense.

Unlike individual States’ right of self-defense, which is of ancient lineage, the notion of collective self-defense in the sense of the Charter began with the Congress of Vienna system (1815) established at the end of the Napoleonic wars and continues on a parallel path to this day. Although there have been numerous collective self-defense agreements concluded since 1945, none of these were directly at issue in the Tanker War. North Atlantic Treaty countries operated together during the conflict, but the territorial limits of the Treaty meant they operated under principles of “informal” self-defense, analyzed below. Similarly, two ANZUS Pact members, Australia and the United States, were Tanker War participants; ANZUS did not apply, covering only Pacific area defense. Warsaw Pact countries were participants, the USSR through naval deployments, aid and diplomacy and other Soviet Bloc nations through weapons sales to belligerents, but there was no perceived direct threat to or attack on any Pact party except for attacks on USSR-flag merchantmen, and the Pact was not invoked. Many Arab League States were involved in the war, but a combination of internal dissension within the League, at least at the beginning of the Tanker War, and an apparent interpretation that this regional defense treaty pointed only toward outside aggressors resulted in its not being invoked against either belligerent. The Arab League seems to have functioned during the Gulf War as a regional arrangement that attempted to maintain international peace and security pursuant to Article 52 of the Charter. Although late in the Tanker War the Gulf Cooperation Council Summit approved a comprehensive security strategy that some have said amounts to a collective self-defense pact, there has been no formal publication of this arrangement as a treaty. The strategy can be viewed as an example of informal collective self-defense, also permissible under the Charter.

The Charter thus “contains the first real attempt to reconcile the imposition of duties to maintain international peace and security with the problem posed by the freedom which each sovereign State normally would have[,] to decide when and how such a duty may be fulfilled.” Given the context of the preparation of Article 51 while the Act of Chapultepec was going forward to signature, McDougal and Feliciano are correct in saying that the essence of the right of collective self-defense lies in maintaining international peace and security through collaborative arrangements among States.
I. Other Regional Organizations: Article 52 of the Charter. The structure of the Charter and practice since 1945 confirm the McDougal-Feliciano view. Article 52(1) of the Charter provides:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Thus, "the Charter basis of collective self-defense arrangements in Article 51 does not exclude the possibility that other provisions of the treaties and activities of the agencies in question came under Article 52." Indeed, "[f]rom the discussions leading up to the approval of the Charter, ... regionalism was considered primarily in connection with the maintenance of international peace and security."

Although formed for other purposes in 1981, the Gulf Cooperation Council had moved from its initial stated goal of cooperation to protect internal security to a policy of cooperating in economic and defense security by the end of the war. By the end of the war GCC members were cooperating among themselves for mine suppression and other measures, and with other States with navies in the Gulf. The Arab League also partook of a collective defense treaty and economic cooperation system.

II. Practice During the Charter Era; "Informal" Collective Self-Defense. Prior practice confirms the view that a right of informal self-defense, besides Article 51's confirmation of the inherent right of collective self-defense, exists in the Charter era. Although there was some objection to the concept of regional defense arrangements, a number of these agreements, articulating the principle that an attack on one member is an attack on all, have been concluded and remain in force. State practice has also confirmed regional arrangements, sometimes ad hoc, to deal with threats to the peace, aggression or other forms of breaches of the peace. There have also been bilateral or multilateral assertions of collective self-defense, often without formal prior treaty arrangement.

Lack of a definition of self-defense by the Council or the Assembly in the Korean War has been noted. If it is assumed that UN operations (primarily US directed) after Soviet vetoes began in 1950 could not have been grounded in the UFP Resolution, since General Assembly resolutions have no binding effect, one theory of the multilateral operations in Korea after the USSR veto is "informal" collective self-defense, i.e., cooperating countries pooled forces to resist North Korea's continued aggression and the PRC incursion. The same might be said for contemporaneous US naval operations between Taiwan and the China.
For the United States and South Korea or Taiwan, bilateral defense treaties replaced informal arrangements in 1953 and 1954 respectively. The 1951 ANZUS Pact was memorialized Australia-New Zealand-US practice after World War II and during the Korean War, another example of informal collective self-defense.

In 1962, OAS countries, under US leadership, relied on Charter Article 52, which permits regional organization resolution of disputes, to enforce a naval quarantine around Cuba during the Missile Crisis. The US proclamation establishing the quarantine, besides citing the Rio Treaty, also relied on a US Congressional resolution recognizing the threat. The proclamation was specific as to cargoes to be halted, e.g., missiles, bombs, bomber aircraft, warheads, and support equipment, “and any other classes of material hereafter designated by the Secretary of Defense [to] effectuate” the proclamation. It exempted other cargoes, e.g., foodstuffs and petroleum, and declared neutral rights would be respected. No blockade was declared, and the proclamation limited use of force to situations where directions under the quarantine were disobeyed if reasonable efforts were made to communicate directions to an interdicted vessel, “or in case of self-defense.” (The Rio Treaty authorized “partial or complete interruption of economic relations or of ... sea communications; and use of armed force[,]” among other measures, paralleling Charter Articles 41-42). While some said self-defense was the proper claim, and others later asserted that the Nicaragua Case would have held the quarantine action a matter of anticipatory self-defense, the OAS-US 1962 claim was based on Article 52 and not Article 51. The point is that Article 52 organizations can organize for informal collective self-defense in situations threatening regional security without benefit of an Article 51 collective self-defense treaty. The Missile Crisis thus might arguably be further precedent for informal self-defense under the Charter.

The 1964 attacks on U.S.S. Maddox and Turner Joy (the Gulf of Tonkin Incident) have been analyzed. The conflict connecting these incidents, the Vietnam War, is an example of a claim of informal collective self-defense. The US position during the Vietnam War was that it and South Vietnam (RVN) were jointly resisting North Vietnamese aggression and therefore were acting in self-defense. (There were other views; e.g., it was a civil war.) During the conflict, patrol areas for Operation Market Time, which sought to deny seaborne supplies to RVN opponents, was extended to 30 miles off the South Vietnamese coast. Initially Market Time operations took place in a 12-mile defensive sea area. North Vietnam used small coastal fishing vessels to support military logistics in the South. Fishermen and coastal traders were allowed to pass when on legitimate business. In 1972 a mine quarantine program in North Vietnamese waters sought to seal North Vietnam ports. Its antecedent had been the RVN’s attempted quarantine to stop sealifted supplies coming to the Viet Cong through the Gulf of Siam and the Mekong Delta.
A RVN destroyer sank a North Vietnamese trawler, believed to be carrying ammunition, in 1972 during these operations.323

During the war the United States used Military Sealift Command vessels, US flag charters and occasionally foreign-flag vessels to deliver war material. Several ships were hit; two were sunk by Viet Cong attacks while in South Vietnamese coastal waters. The Viet Cong seem not to have discriminated between vessels carrying war material and civilian-oriented cargoes, e.g., cement.324 US antisubmarine protection was given high value ships, e.g., troop carriers.325 While some have claimed SEATO may have applied, and its formal treaty obligations remain in effect, its supporting organization had been dismantled by 1975,326 and US assistance to South Vietnam might be characterized as another example of informal collective self-defense.

On the face of it, the Tanker War was a bilateral conflict. However, as analyzed above,327 some States or groups of States acted to favor one (or in some cases both) of the belligerents throughout the war. As in the case of the Falklands/Malvinas War (1982) and unilateral US help for Britain and the multilateral EC embargo on Argentine goods,328 this kind of participation arguably could be said to recognize an interim state of nonbelligerency in the Charter era.329 The same sort of informal participation and influences or attempted influences came through organizations aligned along geographic lines (the Gulf Cooperation Council), common defense interests elsewhere (NATO), common economic interests (the EC and the Group of Seven), and ethnic or religious commonality (the ICO and the Arab League).330 States also had informal arrangements among themselves. Italy's bilateral mine clearing agreements are an example.331 The US statement that US Navy protection was available to third-State merchantmen, upon request and if US naval commitments permitted, is another.332 The clearest example of informal self-defense arrangements was the December 1987 comprehensive security strategy adopted by the Gulf Cooperation Council.333 The belligerents also made arrangements that did not rise to the level of a formal Article 51 self-defense agreement or an Article 52 regional arrangement, at least on the public record. A notable example was the belligerents' financing their war through petroleum sales and their importing war goods through third countries.334 Arms and other sales to belligerents335 might be seen as another example of an informal arrangement. Below these governmental efforts were the effects of organizations, e.g., the General Council of British Shipping, seafarers' unions, and the marine insurance industry.336

III. Appraisal for the Tanker War. No formal agreements like the multilateral or bilateral defense treaties of the Cold War era were involved in the Tanker War. However, as with prior conflicts since 1945, e.g., Falklands/Malvinas, States or groups of States aided one side or the other. When States that were not belligerents
concerted together, these amounted to informal collective defense assistance ar-
rangements, sometimes with a belligerent and sometimes among other countries
not party to the conflict. There was precedent for this action before and during the
Charter era. It is arguable, for example, that the 1990-91 coalition assembled
against the Iraqi invasion of Kuwait was governed by principles of informal
self-defense, to the extent that there were no formal collective self-defense treaties
among coalition countries, before the Security Council authorized force in November
1990. After and to the extent the Council became seized of the matter, coalition
actions were governed by Security Council decisions.

Whether claims of informal collective self-defense amount to a resurgence of
the pre-Charter concept of an interim legitimate stage of nonbelligerency, between
belligerency and neutrality, is an open question. Many States recognize only
neutraliy or belligerency. It would seem, however, that it is possible that
nonbelligerency may have crept in through the door of practice under the Charter
between 1945 and 1988, before the end of the Cold War. Whether this will continue
with revitalization of the Security Council since 1989 and the USSR's collapse is
only a guess. If the Council continues relatively powerless, by the veto or adoption
of nonbinding recommendations or calls for action, or if the UFP Resolution pro-
cedure is revived with a veto-paralyzed Council, that door remains open.

It would seem, however, that a distinction between belligerency and neutrality
can be retained by referring to informal collective self-defense for some situations,
e.g., US and EC support of Britain during the Falklands/Malvinas War. Whether
informal collective self-defense can sustain actions in all situations must be left to
speculation. The problem lies in a definition of the contours of the doctrine. It is
fairly clear, for example, that there is a customary right for formal treaty partners to
consult before action, and that consultation can include preparation for anticipa-
tory collective self-defense. It is also fairly clear that the inherent right to collective
self-defense includes a right of anticipatory self-defense, however that might be
limited by principles of necessity, proportionality and admitting of no alternative
in a particular situation. Presumably informal collective self-defense includes a
right of consultation, but does it include a right of anticipatory response? If the re-
cord of informal collective self-defense is sparse in the Charter era, claims to a right
of anticipatory response appear to be even more scarce. There are few reports of it
in the century and a half of prior practice; there may be many, particularly in the
maritime arena since 1914, but the record of State practice is not clear on the
point. Lack of media interest, space considerations and relative importance in di-
gests of national practice like Whiteman, lack of commentary by scholars, or na-
tional security, may have resulted in no or only episodic reportage.

There is one critical difference between collective self-defense claims, whether
anticipatory or otherwise, published in treaties and those asserted under a right of
informal self-defense. Today most treaties are published, perhaps first in informal
sources, e.g., *International Legal Materials*, but nearly always later in national series, e.g., *United States Treaties and Other International Agreements*, and perhaps in the *United Nations Treaty Series*, although *International Legal Materials* is selective in publication and the latter two may be decades behind in printing. Some agreements are never published, due to national security considerations, and these may often deal with defense issues. However, at least for published treaties, there is some public notice of their terms, perhaps qualified or explained by practice. By definition, there is no similar method of notice by publication of informal collective self-defense arrangements, except what might be deduced from government notices or the media. It would seem, however, that to avoid claims of unprovoked aggression under Article 2(4) of the Charter, States should notify informal collective arrangements except where security considerations militate against publicity. Notices to Mariners (NOTMARs) and Airmen (NOTAMs) were employed during the Tanker War to publicize defense, war or exclusion zones and warnings of self-defense action. Even as a requirement of treaty publication is qualified today, e.g., for national security considerations, States in informal collective self-defense arrangements should consider publishing their terms.

iii. Reporting Self-Defense Measures to the Security Council. The Charter also requires that “Measures taken by Members in [the exercise of this right of] self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the ... Council under the ... Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” There is little ambiguity in this requirement, which is not part of customary international law, according to the Nicaragua Case, which added that failing to report “may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense.” The question might be raised, particularly in view of the Court’s position that a parallel customary law of self-defense has developed alongside Charter criteria in Article 51, how reporting could be a “factor” for a customary law of self-defense if the reporting requirement is not a part of customary law. Use of “this right of self-defense” in Article 51 underscores requiring reporting only in Article 51-governed situations. Whether an Article 51 reporting requirement applies in cases of informal collective self-defense, also permissible under the Charter, is not known and perhaps depends on whether a State claims a right to informal collective self-defense under Article 51 or under customary law.

In any event, the Article 51 reporting requirement appears to have been honored more in the breach. A commentator has argued, however, that failure to report at least indicates that measures taken are not defensive in nature.
iv. Anticipatory Self-Defense. The Caroline Case is the classic statement of the right of anticipatory self-defense, *i.e.*, a target State may resort to self-defense before an actual armed attack where the necessity for that defense is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” The action then taken must not be unreasonable or excessive, *i.e.*, it must be proportional to the threat; it must also be necessary. The Tokyo and Nuremberg tribunals recognized a right of anticipatory self-defense, holding the Netherlands could rely on it to justify attack on Japan before a formal war declaration but that Germany could not rely on it to justify attack on Norway.\(^{357}\)

Does the right of anticipatory self-defense carry forward into the Charter era, or must a State “take the first hit” before responding in self-defense, *i.e.*, is only “reactive” self-defense permitted? Commentators\(^{358}\) and countries\(^{359}\) divide sharply on the issue. Commentators\(^{360}\) and countries\(^{361}\) may also divide on when self-defense, anticipatory or reactive, is appropriate. The Charter is silent on the point, except to say that UN Members retain the “inherent” right of individual and collective self-defense.\(^{362}\) The Nicaragua Case did not rule on the issue.\(^{363}\) Some commentators,\(^{364}\) and undoubtedly some States, have seemed to change views. Others have taken no clear position.\(^{365}\)

If the methodology of treaty interpretation is employed, practice under Article 51 has been ambiguous. Bowett notes the UN Atomic Energy Commission’s initial report, which said a right of self-defense would arise where a party to a nuclear arms treaty committed a “grave” violation of the treaty.\(^{366}\) He also cites the Security Council discussion over the Kashmir invasion, justified by Pakistan on anticipatory defense grounds, where only India argued against the view.\(^{367}\) In 1952 the UN Sixth Committee heard four States argue that a State threatened with impending attack might be justified to respond in self-defense.\(^{368}\)

The Definition of Aggression resolution includes specific examples not involving armed attack on a State but which are nevertheless considered aggression under the Charter: blockade of ports or coasts which, if complied with, results in no use of force, merely a threat of use of force; “use” of armed forces of a State, within a host State’s territory by the host’s agreement, but contravening conditions in the agreement initially entitling the visiting armed forces to be there, which might result when such forces are “used” in nonforce situations.\(^{369}\) The enumeration is not exclusive and could include other circumstances involving threat of force that could trigger a potential for self-defense response. If acts of aggression can justify a proportional self-defense response, it is implicit in the Assembly’s approval of these as *per se* acts of aggression by which an anticipatory self-defense response could be triggered.

The case of blockade is illustrative. When blockade is declared against a target State, no armed attack will occur if there are no ships to intercept. There is no way to determine the blockade’s effectiveness until interceptions occur or ships
successfully evade blockade. If a target State acts to end the blockade before its goal—intercepting and possibly destroying target State ships—occurs, a target State would be exercising anticipatory self-defense. Thus if armed aggression—the French version of "armed attack" in Article 51—includes blockade as customary law, then target State action to end a blockade may include anticipatory self-defense.

The division of commentators and countries on admissibility of anticipatory self-defense as an option has been recited. Dinstein offers an intermediate position of "interceptive" self-defense, permitted if a State "has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike [i.e., anticipatory self-defense] which is merely 'foreseeable' (or even just 'conceivable') an interceptive strike counters an armed attack which is 'imminent' and practically 'unavoidable.' He cites a scenario based on the Japanese task force ordered to attack Pearl Harbor in 1941:

[h]ad [it] been destroyed on its way to Pearl Harbor, this would have constituted not an act of preventive war but a miraculously early use of counter-force.... [P]ut... another way, the self-defence exercised by the United States (in response to an incipient armed attack) would have been not anticipatory but interceptive in nature.

Dinstein thus justifies Israel's first opening fire in the 1967 Arab-Israeli conflict. The hypothetical interception to end a naval war in 1941, before the Charter era, is undoubtedly true today, if the Japanese task force was past the point of no return (i.e., it could not be recalled) and it was reasonably clear from facts available to the United States at the time. The same can be said of Israel's 1967 attack on Egypt.

Dinstein's analysis does not mention Israel's 1981 raid on the Iraqi nuclear reactor, condemned by the Security Council and others, arguing that the raid came during a continuing state of war between Iraq and Israel, nor does he mention two tactical aspects of the Arab-Israeli conflicts, the Israeli attack on the U.S.S. Liberty, and destruction of the Israeli destroyer Eilat by missiles. Liberty was a US warship operating in international waters of the Mediterranean Sea, gathering intelligence for the United States, when it was attacked by Israeli aircraft and PT boats. The attack clearly violated international law and, as an act of aggression, could have subjected Israel to US proportional self-defense responses.

Eilat's loss, also on the high seas, due to an Egyptian gunboat's Styx missiles launched in Port Said harbor occurring during a resumption of the conflict, illustrates the change in naval warfare between 1941 and 1967. (This attack could not raise the self-defense issue, since it occurred during hostilities, rather than at the beginning of hostilities.) Rather than a battleship and carrier formation steaming at 20-30 knots to a position off Hawaii where it could launch raids flown by
aircraft with top speeds of 400 miles an hour, thus giving days or at least hours for a target State to anticipate and deliver an interceptive strike, missile attacks from the same range come in minutes. Moreover, a missile attack is nearly always fatal. One can compare Eilat's loss in 1967, the sinking of Venus Challenger and a Pakistani destroyer during the 1971 India-Pakistan war, losses of H.M.S. Sheffield and other ships during the Falklands/Malvinas war, and U.S.S. Stark's near loss during the Tanker War, with survival of many ships during the World War II Kamikazi attacks, where hundreds of manned Japanese suicide planes crashed US warships. Aside from aircraft carriers and battleships, World War II men-of-war were smaller and equally fragile, yet they took many hits before sinking, and most survived. New occasions teach new duties and responsibilities, and if international law is to remain credible, it must parallel technical developments. (That, of course, is the function of custom as opposed to a potentially rigidified treaty regime.)

Dinstein's interceptive defense theory seems but another phrase for anticipatory self-defense in the Pearl Harbor attack hypothetical. He is less than clear about the situation of an anticipated attack on an independently-steaming warship before armed conflict begins. However, as events in the Tanker War and previous incidents demonstrate, some States have asserted a right of anticipatory self-defense or interceptive defense as Dinstein would formulate it.


In 1973, responding to US assistance to Israel during the Yom Kippur War, Libya declared the Gulf of Sidra below 32 degrees 30 minutes North latitude (the "Line of Death") as Libyan territorial waters.

The United States challenged the claim by warships' use of the Gulf of Sidra, establishing a formal Freedom of Navigation (FON) program in 1979. In 1981, during a FON exercise, two Libyan air force jets launched missiles against Navy aircraft, who dodged the missiles and downed the Libyan aircraft with missiles. Under anyone's view of the right of self-defense, the Navy aircraft had a right to fire in response to the prior Libyan missile attack; it was an example of reactive self-defense.

Tensions again mounted in 1985-86. Libya escalated threats against US warships and praised the terrorists who had hijacked the Italian liner Achille Lauro. New US FON exercises were ordered off Libya, including one below the Line. US NOTMARs and NOTAMs publicized the operations. After Libya launched land-based missiles against Navy aircraft flying over international waters below the Line, and Libyan aircraft penetrated the announced exercise area in international waters, the FON force commander declared that Libyan military forces leaving Libyan territorial waters or airspace and constituting a threat to US units
would be considered hostile. Thereafter, when Libyan missile patrol boats headed toward US forces, and Libyan target acquisition radars activated with a likely object of firing on US aircraft, the Libyan boats and radars were attacked and damaged or destroyed. In these cases the US claim was anticipatory self-defense, *i.e.*, taking action to protect ships or aircraft after hostile intent (*e.g.*, closing US ships in an attack profile or illuminating US aircraft with target acquisition radar) was manifested. There was, of course, no obligation for US forces to attack or desist from attacking the Libyan vessels or aircraft, but there was the option to do so, subject to limitations of self-defense, *i.e.*, necessity and proportionality. Indeed, US forces did not fire on Libyan missile patrol boats when they sought refuge alongside a neutral merchantman or were engaged in legitimate search and rescue operations, which illustrate these principles.

In April 1986 US Navy and Air Force planes bombed terrorist operations centers in Libya after two US citizens were killed in a Berlin disco terrorist bombing. The US hard evidence was that Libya was responsible for the disco bombing and was planning further terrorist attacks on US military and diplomatic facilities in Europe. The United States claimed self-defense conditioned by necessity and proportionality as the basis for the operation. French, UK and US vetoes blocked a Security Council resolution condemning the raid.

**II. The Tanker War.** The Tanker War produced numerous examples of reactive self-defense, *i.e.*, self-defense after an initial attack, as well as anticipatory self-defense, both individual and informal collective self-defense. Iraq responded to Iran's shelling of Iraqi towns in 1980 with a three-front invasion of Iran, claiming self-defense. If it is true that the shelling was not responsive to Iraqi invasions, Iraq's claim of self-defense was legitimate. On the other hand, if Iranian shelling responded to prior Iraqi acts of aggression, the shelling was a proper self-defense response by Iran, and the Iraqi invasion could not be claimed as self-defense. In the latter situation, the invasion was a clear violation of Charter Article 2(4). Use or threat of use of force in response to legitimate self-defense action cannot be claimed as self-defense. Since UN Security Council Resolution 479 was a "call" for cessation of hostilities, and not a "decision," there was a strong political, but not a legal, obligation on the belligerents to comply. Both belligerents declared war zones. After the Iraqi invasion, Iran declared its coasts a war zone, closed the Shatt al Arab, refused access to Iraqi ports, and warned of retaliation if other countries gave Iraq facilities. Iran said the zone declaration was for defense and for safety of shipping. Iraq's war zone was north of 29-30N in the Gulf and was reportedly reprisal, or retaliation, for the Iranian war zone declaration.

Iran's war zone declaration was legitimate for Iran's coasts, which were part of its territory. Although the Shatt al-Arab and Iraqi ports were part of the area of
conflict, unless Iran had occupied the area or they were vital to its defense, Iran
could not lawfully announce their closure to States not party to the conflict. Still
less could Iran issue a generalized warning of retaliation against these States if they
gave Iraq facilities, unless States were parties to a collective defense agreement or
arrangement with Iraq and employed this treaty arrangement to assist Iraq as the
aggressor. Since Iraq had withdrawn from the Baghdad Pact, and was not a GCC
member, Iran could not claim that these regional arrangements were assisting
Iraq. Iraq was a party, with Bahrain, Kuwait, Qatar, Saudi Arabia and other Arab
States, to the Arab Joint Defense Treaty, and it may have been to this Treaty ar-
rangements that Iran directed its warning. It would have been entirely legitimate, if
Iran committed aggression by shelling Iraqi communities, for the Treaty States to
have collaborated with Iraq in collective self-defense. Although Iran could warn
of retaliation, this did not deprive the Treaty States of their right to assist Iraq with
collective self-defense responses. The Treaty States might have paid consequences,
e.g., by bombing raids on their territory if they did, but they could not be deprived
of their treaty obligation by the Iranian warning. On the other hand, if Iraq was the
aggressor, e.g., by invading Iran, the Treaty States could not aid Iraq pursuant to
the Treaty. Under no circumstances could Iran claim a right of retaliation
against States not party to any defense treaty or other similar arrangement with
Iraq, e.g., States whose shipping sailed the Gulf, or whose shipping interests used
the Gulf, e.g., France, Liberia, Panama, USSR, the United Kingdom, and the
United States.

Whether the Iraq war zone declaration was a legitimate reprisal, or was legal in
terms of area, duration, etc., is addressed later in this chapter and in Part F of
Chapter V. If Iran was the aggressor when it shelled Iraqi communities, then the
Iraq war zone, later named the Gulf Maritime Exclusion Zone (GMEZ), was a le-
gitimate self-defense measure, subject to proportionality, etc., considerations. The same is true for the zone’s extension, again subject to the same limitations. On the other hand, if Iraq was the aggressor, then the war zones, and the GMEZ, were not legal self-defense measures.

The GCC’s establishment in 1981, with a goal of coordinating, integrating and
interconnecting, inter alia self-defense, among its six western Gulf littoral mem-
ers, was legitimate under Charter Articles 51-52, even though its self-defense
terms were never spelled out like most collective defense treaties. This too is an ex-
ample of a legitimate “informal” multilateral collective self-defense arrange-
ment. Similarly, it was legitimate for Saudi Arabia to request US Air Force
AWACS aircraft surveillance, and for the United States to agree to the operation,
in 1981. This is an example of a legitimate informal bilateral self-defense ar-
angement. In neither case, however, could these informal arrangements be
used to aid an aggressor.
The shuttle convoys carrying oil as part of Iran's warfighting, war-sustaining effort down Iran's Gulf coast and through the Iraqi zone were given Iranian naval protection. These vessels were entitled to self-defense protection by Iran. If Iran was correct in asserting that it was a target of Iraqi aggression, these fleets of vessels, if attacked by Iraq, were also targets of aggression. Even if they sailed alone, perhaps with naval escort or perhaps independently, these vessels would be considered targets of Iraqi aggression, if Iraq is deemed to have been the aggressor at the beginning of the war. If, on the other hand, Iran was the aggressor, the attacks were subject to the law of naval warfare.

The same analysis applies for Iranian visits, searches and diversions or attacks on vessels bound for Iraq with military equipment, e.g., the Danish flag vessel Elsa Cat, or from Iraq with warfighting or war sustaining cargo (i.e., oil) aboard, if Iraq was the aggressor. Similarly, if Iraq was the aggressor, and if Kuwait was assisting Iraq, and if, e.g., a Kuwaiti survey vessel was assisting the Iraqi war effort, it was properly subject to search, seizure or detention as part of Iranian self-defense. These ships were also subject to search, seizure or detention as part of the law of naval warfare if Iran was the aggressor.

Security Council Resolutions 514, 522 and 540 of 1982 and 1983, calling for a ceasefire, refraining from any action that might endanger peace and security, cessation of military operations against civilian targets, observing humanitarian law, and affirming the right of freedom of navigation, were not Council decisions pursuant to Articles 25 and 48 of the Charter. They did not speak to the self-defense issue. The effect of incorporation of humanitarian law, etc., by reference in these resolutions elevated them to Charter law. At least insofar as conflicts between treaties and the resolutions and practice under them, and perhaps insofar as there was a difference between custom paralleling the treaties, the Charter practice held primacy. The same is true of other resolutions; they may have condemned action, advocated observance of the LOAC, freedom of navigation, or protection of the environment, but in no case did they remove a State's right of self-defense, which under the Charter trumped any treaty law and perhaps also customary norms.

In January 1984 the United States announced new defensive measures for its warships in NOTAMs and NOTMARs. These procedures, a "defensive bubble" or "cordon sanitaire" around the ship(s) for a stated distance on the surface of the sea and above the vessel(s) in the air, were justified on self-defense grounds when Iran protested. The UK Armilla Patrol, deployed in the lower Gulf since the beginning of the war, never published use of a defensive envelope. In terms of self-defense, the US cordon sanitaire was legitimate; although other navies' warships did not have benefit of a defensive bubble declared by their governments, they could take self-defense measures if threatened or attacked. If a US warship proceeded independently or in formation without an announced cordon sanitaire, which was the situation early in the war, that ship and the formation could also take self-defense
measures. The US *cordon sanitaire's* validity in terms of area, duration, *etc.*, is considered separately.

The Armilla Patrol accompanied UK flag merchantmen in the lower Gulf from the beginning of the war; these merchantmen were on their own as they proceeded northward. In October 1985 France began defending French-flag merchantmen. A French warship positioned itself between the *Ville d'Angers* and an Iranian warship, warning the Iranian that if it attempted to intercept *Ville d'Angers*, the warship would use force to prevent the interception. (French ROE declared French warships would fire on forces refusing to break off attacks on neutral merchantmen under attack; the result was a drop in attacks near French men-of-war.) In January 1986 the United Kingdom stated that a right of visit and search of neutral merchantmen, believed carrying cargo to or from a belligerent port, was an aspect of self-defense under Article 51 of the Charter. In March 1986 the United States recognized a basis in international law for belligerent searches of neutral merchantmen. Nevertheless, in April 1986 a US destroyer warned an Iranian warship off what may have been a planned boarding of *President McKinley*, a US flag merchantman. When the Soviet flag *Pyotr Emtsov*, bound for Kuwait with arms ultimately destined for Iraq, was fired upon, stopped and searched by an Iranian warship in September 1986, the USSR protested.

The apparent divergence of views among States depends on the law deemed applicable to the interception, or the interpretation of it. If Article 51 and Charter law in general applied, and if Iraq was the aggressor, Iran could intercept, search and under some circumstances attack third-flag State unarmed merchant ships bound for Iraq, and believed to have warfighting or war-sustaining goods aboard as a self-defense measure. Treaty law to the contrary would be trumped by the Charter. The only general treaty applying to visit, search and diversion or destruction of merchantmen is the London Protocol, which provides in Article 22 that

... The following are accepted as established rules of international law:

1. In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
2. In particular, except in the case of persistent refusal to stop on being duly summoned, or active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The Tanker War belligerents were party to the treaty, and among naval powers operating in the Gulf, Belgium, France, Italy, Saudi Arabia, USSR, the United
Kingdom and the United States were also parties.\footnote{434} No other GCC States were party.\footnote{435} Although the London Protocol bound many naval powers in the Tanker War, it could not supersede the Charter\footnote{436} and its Article 51 self-defense norms, particularly if Article 51 states a \textit{jus cogens} norm.\footnote{437} However, the Protocol, or principles similar to it, could inform the content of self-defense under Article 51.\footnote{438} Whether the Protocol applies as customary law or has been superseded by practice since 1936, at least insofar as an unqualified duty to place those aboard a merchantman in safety is concerned, has been debated by commentators and governments,\footnote{439} and since the Charter does not address the issue of custom conflicting with a Charter provision, the question arises as to whether practice is sufficient to offset specific London Protocol rules as custom. The issue also arises if there is a parallel, and different, customary self-defense standard to be applied, the situation in the Nicaragua Case.\footnote{440} The \textit{San Remo Manual} would restate the rule:

Merchant vessels flying the flag of neutral States may not be attacked unless they:

\begin{itemize}
  \item [(f)] otherwise make an effective contribution to the enemy's military action, \textit{e.g.}, by carrying military materials and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.
\end{itemize}

The \textit{Manual} permits attacks on enemy-flag merchantmen as a legitimate military objective if, \textit{inter alia}, they “otherwise mak[e] an effective contribution to military action, \textit{e.g.}, [by] carrying military materials.”\footnote{441} Whether flying an enemy flag or flying a neutral flag but characterized as enemy because of its activity, \textit{e.g.}, carrying war materials to aid the enemy, both classes of merchantmen are subject to rules of discrimination, military objective and proportionality.\footnote{442} Certain merchant ships, \textit{e.g.}, coastal fishermen, are exempt from attack unless they lose exemption by aiding the enemy.\footnote{443} This standard, whether observed in the context of informing the content of self-defense or as a law of naval warfare norm, is appropriate. It balances realities of modern technologies available to merchant ships, which might decide to advise the State whose war cargo it carries of an attacker’s presence, entitling an attacking platform to treat a ship as directly aiding the enemy and subjecting it to destruction on that account,\footnote{444} and Protocol humanitarian considerations.

If Charter law did not apply to a State’s actions, the same rules should have been applied as the law of armed conflict.\footnote{445} This would be the case for Iraq, if Iraq was the aggressor; even though perhaps guilty of aggression, Iraq was bound to apply the LOAC in prosecuting its actions. If the reverse is true, \textit{i.e.}, Iran was the aggressor and Iraq properly asserted self-defense, the result is the same. Iraq would be governed by the law of self-defense as applicable to its actions against merchant shipping, and Iran was required to apply the LOAC even though it might be guilty of aggression. If neither party was entitled to claim self-defense for these actions,
i.e., because Charter law including the law of self-defense did not apply, LOAC principles applied to both belligerents. Depending on the view of the Tanker War by States not party to the conflict, i.e., whether the Charter applied or not, these States were also required to apply the LOAC as incorporated into Charter law, if they perceived that the Charter applied, or the LOAC if their view was that the law of armed conflict, and not Charter law, applied.

These principles apply to States' protection of their flag shipping on the high seas that was destined for other than belligerents' ports. It was therefore legitimate for the United States to organize convoys of reflagged tankers or to escort single merchantmen, for France and the United Kingdom to accompany UK flag merchantmen, and for France to interpose its warships against belligerents' threatened hostile action against these merchant ships if they were not carrying goods to sustain a belligerent's war effort. If Iran had attacked escorted or convoyed merchantmen as it threatened, convoying or escorting men-of-war could have responded in self-defense. It was legitimate self-defense for these States to operate, individually or perhaps informally as a collective group, to protect against or remove the mine menace from the high seas of the Gulf. It was legitimate for the United States to remove the Iran Ajr as a minelaying menace for this reason; mines threatened merchantmen and warships alike, as damage to U.S.S. Samuel B. Roberts attests. The United States attacked Iranian platforms used as a gunboat base in response to the Iranian missile attack on the US-flagged Sea Isle City with US nationals in the crew, and Iranian gunboats that had attacked a Panama-flag, Japanese-owned tanker with US nationals among the crew. This followed from the policy behind the 1986 Libya raid, mounted to destroy State-supported terrorist bases in Libya after two US nationals were killed in a Berlin disco. If the US view is correct, that self-defense measures against those who attack American nationals is lawful, these were legitimate excercises of self-defense. The Sea Isle City response, like the response to the Berlin disco bombing, was anticipatory self-defense, in that more threats from these sources could reasonably be expected in the future. The reactive response to the Panama-flag vessel attack and the Sea Isle City response involved US nationals aboard, and Sea Isle City was US flagged. The United Kingdom committed to a similar response if a vessel, although foreign flagged, had more than half UK beneficial ownership. Foreign-flag vessels could request US protection, which would be given if US forces were in the area and operational commitments allowed it. This too was a legitimate exercisè of self-defense, i.e., informal collective self-defense. The request and acceptance was enough to complete a collective self-defense arrangement. However, the practice of some masters in tailing convoys or simulating a convoy would not have entitled those vessels to self-defense protection by warships of other nations unless it had been agreed upon.
Warship protection was also subject to the law of self-defense. The collective and individual States’ responses to mines has been noted. It was proper for US and other countries’ warnings to declare a defensive bubble or *cordon sanitaire* around their warships to respond to attacks on them. It was also proper for Gulf naval forces to cooperate, perhaps informally as the UK Armilla Patrol did, with other navies for mutual protection. It was proper for the United States to respond to attacks on its seaborne helicopters, to the platform-based attack on *Sea Isle City* as a possible threat to its combatants in the Gulf, and to the mining attack on *Samuel B. Roberts*. Although a US helicopter did not return fire when a Greek flag tanker shot at it, returned fire might have been appropriate if that would have been necessary and proportionate under the circumstances, which are less than clear from the record.

There were several examples of mistaken fire in the Gulf War. The first was the *Stark* attack. US forces fired on several small boats or dhows after the defensive bubbles were announced. The reason for these latter errors can be attributed to the real and continuing threat of Iranian small boat attacks on merchantmen and warships. The *U.S.S. Vincennes* mistakenly shot down Iran Air Flight 655. In the *Stark* and Airbus cases claims were paid and settled without admitting liability. The United States expressed regret over the other losses and probably compensated for injuries, loss of life and damage. Whether the attacking Iraqi aircraft observed proper qualifying principles of discrimination and proportionality is unknown; therefore, whether this was a proper exercise of self-defense is sealed in Baghdad’s archives. Whether US forces observed discrimination or proportionality principles in firing on the small boats is likewise not clear from the record; certainly if the commanders reasonably believed that these were Iranian Revolutionary Guard speedboats, they were correct in opening fire to protect their ships. The same is true for the Airbus tragedy. However, if these were reasonably perceived threats, the attacking platforms could fire in self-defense. On the other hand, if the targets were reasonably perceived to be carrying warfighting or war-sustaining goods, they were legitimate targets under the law of naval warfare.

The Tanker War thus strengthens the case that a right of anticipatory self-defense exists in the Charter era as before. To be sure, States are not unanimous in this position, but at the least under the principle of sovereignty States adhering to the use of anticipatory self-defense may continue to advocate it until there is an authoritative decision to the contrary. This is particularly true if, as analyzed above, Iran had a right of visit and search as a means of self-defense. If Iran had the right to stop and search a ship under a self-defense theory to check for warfighting/war-sustaining goods that might not be used for some time against Iran, this could only be under a theory of anticipatory self-defense, as distinguished from reactive self-defense. The same can be said for Iraqi attacks on ships.
carrying warfighting/war-sustaining goods for Iran. These interceptions were subject to self-defense limitations, e.g., necessity and proportionality. And if such be the case, then those States protecting, escorting, accompanying or convoying these ships also had a right of self-defense, including anticipatory self-defense, if Iran or Iraq chose to attack instead of visiting and searching merchantmen not carrying warfighting/war-sustaining goods to a belligerent. These States’ warships also had a right of self-defense, including anticipatory self-defense, of their units.

The Tanker War strengthens the precedent for informal collective self-defense among States opposed to the belligerents’ sink-on-sight policies. Gulf naval forces developed these ad hoc coalitions to clear mines, to protect each other, and to protect merchantmen flagged by States other than their own.

The foregoing has proceeded on a theory that the Charter governed these interactions. As will be seen in Chapter V, if certain aspects of the Tanker War were not governed by the law of the Charter, e.g., Iranian visit and search procedures, those procedures were strengthened through practice.

v. Necessity. As noted above, a criterion for invoking self-defense, whether in the anticipatory defense mode or in the reactive mode after armed attack, is whether a response with force is necessary, i.e., admitting of no other alternative. Necessity is an accepted principle of international law conditioning the right of self-defense. It applies to war at sea. Alternatives to self-defense run the gamut from nonforce reprisals, retorsions, diplomatic protests or other diplomatic initiatives, use of an adjudicative strategy, or perhaps doing nothing at the time, to await a more propitious moment for asserting a claim, perhaps along with others, in a general adjudicative, diplomatic or other resolution. The difficulty with these choices is that an inappropriate signal may be sent to the initial actor or other participants in the world community. The strategy of force, or alternatives to it, may be used alone, in combination, and in varying degrees. Today the general principle is that self-defense through force is justified only if a goal of compelling compliance with international norms violated in the initial attack cannot reasonably be achieved by other means, i.e., “[F]orce should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile.” As the San Remo Manual expresses it,

The effect of these principles [of necessity and proportionality] is that the State which is the victim of an armed attack is entitled to resort to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals as repelling the attack, recovering territory and removing threats to its future security.
Commentators differ on whether Charter self-defense norms apply after war begins. However, since LOAC and Charter law necessity principles are virtually the same, and LOAC principles may inform Charter standards if the principles are in a treaty or if Article 51 states jus cogens norms, the analysis assumes that standards are the same, or should be, in any case.

Brownlie and Dinstein advance a hypothetical case of a target State's submarine depth-charged by another State's destroyer on the high seas, stating that necessity permits immediate counterattack by the submarine. The same would be true for a destroyer against whom a submarine fires a torpedo, and for neutral merchantmen attacked while under individual or collective defensive warship protection, e.g., while convoyed or steaming independently and being accompanied or escorted, the analysis assumes that standards are the same, or should be, in any case.

Brownlie and Dinstein advance a hypothetical case of a target State's submarine depth-charged by another State's destroyer on the high seas, stating that necessity permits immediate counterattack by the submarine. The same would be true for a destroyer against whom a submarine fires a torpedo, and for neutral merchantmen attacked while under individual or collective defensive warship protection, e.g., while convoyed or steaming independently and being accompanied or escorted, the analysis assumes that standards are the same, or should be, in any case.

On the other hand, if a destroyer drops a hand grenade—if reasonably perceived by a submarine as an unfriendly irritant and not an attack—or if a frigate tickles a submarine hull with sonar as an unfriendly but nonthreatening act, no right of self-defense by a submarine would arise.

By the opposite token, if a frigate indicates hostile intent to a submarine, e.g., by using active, attack-mode sonar and maneuvers demonstrating reasonable probability of attack, or if a submarine behaves similarly, e.g., by setting up a firing solution flooding torpedo tubes and opening torpedo tube doors, the target could take immediate self-defense action as a matter of necessity.

These hypothetical cases illustrate necessity in a case of anticipatory self-defense and are similar to Dinstein’s hypothetical, justifying interceptive self-defense to destroy the Japanese task force headed toward Pearl Harbor. As with Israel’s 1981 raid on the Iraqi nuclear reactor, a critical anticipatory self-defense issue is the qualification of necessity. The submarine-destroyer hypotheticals, where no weapon has been fired when self-defense action is taken, are relatively easy cases, and fall into the same category as situations involving missiles, including the over-the-horizon variety. If anticipatory self-defense (or interceptive self-defense as Dinstein has it) is a principle of international law, then target ship(s) can respond if necessary for self-preservation.

The Japanese task force, as Dinstein recites it hypothetically, may or may not have been subject to destruction in self-defense. Other alternatives, e.g., interposing a superior US fleet between it and Hawaii at a point beyond flying range of its targets on the high seas, might be considered a reasonable alternative, at least in the 1941 context. If the task force, known to be bound for an attack on Hawaii, would have proceeded onward after warning, the US fleet would have been justifying in destroying it in anticipatory self-defense. If the Japanese task force intentions were not known or there was no reason to believe that attack on Hawaii was planned, there would be no necessity for anticipatory self-defense. When its intentions became known, e.g., through positive intelligence, and there was no reasonable
alternative to forestall attack, the US fleet would have been justified in acting in anticipatory self-defense.

The fleet hypothetical also articulates the problem of national, as opposed to unit, self-defense. Although beyond the scope of the Tanker War analysis, the problem of national survival (as distinguished from survival of a destroyer, for example) may call forth different considerations of necessity. Nations’ survival, because of their need for Gulf oil, was a policy behind the Carter Doctrine. Destruction of single tankers could not be pegged on national survival, but necessity could be predicated on a need to save human life endangered during illegal attacks. Accumulating these “pinpricks” to justify a massive attack on a belligerent might have provoked claims of disproportionality.

What distinguishes one situation from another in the context of the necessity component is considering all relevant factors known to the target at the time, e.g., participants, their perceived goals, methods of attack and response, conditions at the time, and probable effects. “The most important condition . . . is the degree of necessity as that necessity is perceived and evaluated by the target-claimant and incorporated in the pattern of its expectations—which, in the particular instance, impels the claimant to use intense responding coercion,” i.e., military force. The necessity standard—“great and immediate,” “direct and immediate,” or “compelling and instant”—has been carried over from customary law into the Charter era.

The Tanker War illustrates several examples of necessity in the self-defense context.

US announcements of a defensive bubble or *cordon sanitaire* were cases of putative necessity. The warning area was advance announcement that unidentified vessels or aircraft not responding to warnings and threatening US warships were subject to being destroyed out of necessity for a ship’s self-protection.

Applying the principle of self-defense to Iranian visits and searches of merchantmen suspected of carrying warfighting or war-sustaining cargoes for Iraq is another example of necessity. It was necessary for Iran to visit and search on the high seas if the offending goods were to be seized; once the cargo was ashore, it would be difficult to stop its delivery to Iraq. Attempts to bomb truck convoys in Iraq might have resulted in collateral destruction and more deaths and injuries than in a properly executed visit and search. Iraq, which had no effective navy, resorted to air attacks on shipping moving Iranian warfighting or war-sustaining cargoes. The choice was to permit the cargoes to arrive or to attack on the high seas. A case can be made that the Iraqi attacks were necessary. The same can be said for Iranian attacks on Iraq-bound cargoes. Whether the belligerents exercised proper target discrimination or proportionality is another issue. Whether viewed from a self-defense or LOAC perspective, the standards were the same as under the LOAC for visit and search or attacks.
Convoying and other protective measures for innocent merchantmen were also necessary, in view of repeated belligerent attacks on these ships, regardless of cargo or flag.

Another example of necessity was the US capture and destruction of Iran Ajr. Given repeated illegal mining in Gulf shipping lanes, it is clear that Iran would have continued to lay mines. A sure way to end the problem was to end a source of mines, Iran Ajr. The same considerations justified States' mine clearance operations, necessary to remove the mine menace, regardless of origin.

Operation Praying Mantis, the destruction of Iranian frigates employed in attacks on neutral merchantmen and of offshore oil platforms serving as a base for speedboats preying on merchant shipping and warships, was also a case of necessity. If the frigates were allowed to continue their deprivations, merchant shipping would continue to suffer attacks, and if the oil platforms were not destroyed, they would have continued as a haven for the boats. Likewise, firing on attacking speedboats engaged in shooting up merchantmen was necessary. If there had been no such response, it is ludicrous to think that other action by naval powers (e.g., verbal radio warnings) would have stopped an ongoing attack. Diplomatic protests, often long after the fact, would have availed nothing to resurrect dead crewmen, restore a burnt-out hull, or raise a sunken ship.

Given evidence of a strong possibility of an Iranian suicide plane or conventional attack on US warships engaged in self-defense at the time, Vincennes' destruction of Flight 655 was necessary from a self-defense perspective, if tragically mistaken in result.

The same might be said for US responses to Libyan attempts to forcibly intercept US ships, or to shoot down US aircraft. It takes little logic to justify force responses if missile have been deployed, or hostile intent has been clearly demonstrated, under the circumstance of Libya's challenges to freedom of navigation.

vi. Proportionality. In both anticipatory self-defense and self-defense after armed attack (reactive self-defense) response must be proportional.

(I) Introduction. The limiting principle of proportionality, like necessity, in a self-defense response is well established in custom. It applies to naval warfare. The proportionality principle applies whether self-defense responds to armed attack or other armed aggression, or whether self-defense measures are anticipatory to imminent armed attack or other armed aggression. However, “responsibility... for a war of aggression may be incurred by the target State, should it resort to comprehensive force in over-reaction to trivial incidents.” This is a decisionmaker dilemma when confronted with an event that reasonable evaluators would say is an act of aggression. The problem is further compounded by a view that a single so-called trivial act may be rolled into a collection of other pin-pricks, with the result that a self-defense response against the sum of them all
may be proper. Responses with force that seem disproportionate to a present pin-prick carry a risk that the target of the response might argue that the response is disproportionate, is in effect an armed reprisal, and is therefore an armed attack by the responding State. \(525\) “Genuine on-the-spot reaction [would have closed the] incident,”\(526\) and may be a preferable course in many, if not most, situations. “The effect . . . is that a State which is the victim of an armed attack is entitled to resort to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals as repelling the attack, recovering territory, and removing threats to its future security.”\(527\)

The analysis for necessity, i.e., whether Charter self-defense principles and limitations on them govern throughout a war, or whether the LOAC applies once a war has begun so that different standards are then employed, also applies to proportionality issues. If proportionality principles are in treaties, the Charter’s clause paramount provision trumps them. If self-defense norms are \textit{jus cogens}, they trump custom or treaty based proportionality norms. Whether a customary proportionality norm can supersede a Charter norm is not clear. Customary and treaty based proportionality norms can, and should, inform any binding Charter or \textit{jus cogens} norms.\(528\) This analysis takes the position that proportionality norms limiting a right of self-defense and those developed under the LOAC should be the same.

\textbf{(II) The Elements or Indicia of Proportionality.} The foregoing comments on a self-defense measure’s relative position on a time-line between attack (or imminence of attack, for anticipatory self-defense) and the defensive measure(s) taken is but one index of whether the action is proportional under the circumstances.

Another major factor is the methodology and intensity of the coercion.\(529\) Besides the now threadbare (and refuted) argument that a massive conventional attack cannot be met by a non-conventional (e.g., nuclear) response, i.e., there must be response in kind,\(530\) there are finer gradations of the problem. US destruction of \textit{Iran Ajr} in response to Iranian minelaying in shipping lanes\(531\)—in effect, going to the source of the illegality and eliminating it—is one example. Another example is destruction of the oil platforms from which Iranian speedboats had operated.\(532\) There need not be identical or even similar response to satisfy the proportionality requirement.

Moreover, such proportional response, as Ago and others have pointed out, need not necessarily be proportional in response to force used in the initial aggression or attack.

The requirement of the proportionality of the action taken in self-defence . . . concerns the relationship between that action and its purpose, namely—and this can never be repeated too often—that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct
constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered.533

Put another way, force used in self-defense, including anticipatory self-defense, must be "strictly confined to the object of stopping or preventing the infringement [of the target State’s rights] and reasonably proportionate to what is required for achieving this objective."534 Or, as Dinstein comments in a context of full-scale war, once a war has started, "it can be fought to the finish.535 ... An aggressor State may lose its appetite for continuing ... hostilities, but the defending State need not be accommodating."536 Individual or collective self-defense may carry responses to the source of the aggression, beyond driving the aggressor back to the line (whether geographic or theoretical) until there is total victory 537 if necessary to achieve proportional response in the sense of achieving the objective of ending the source of aggression.538

Thus, it was proper under pre-Charter law, for US insistence on Japan’s unconditional surrender.539 It was likewise proper for the Netherlands, which declared war on Japan on December 8, 1941 as anticipatory defense with invasion of the Dutch East Indies imminent,540 to also insist on Japan’s unconditional surrender. It would have been proper for Iran, if invaded by Iraq in 1980 to start the war, to have carried the war to the complete destruction of Iraq,541 if this were a proportional response necessary to force Iraq to comply with the law.542 The same is true with respect to Iraqi responses to Iran, if Iran was the aggressor.543 (As events had it, both sides agreed to a UN-sponsored ceasefire, effectively ending the conflict, including its Tanker War aspects.)544 Proportionality applies to all levels and intensities of conflict or potential conflict, from anticipatory response to pin-pricks to general war.545

O’Connell and Greenwood advance a view that self-defense must occur in the theater of operations generating the claim. In a regional confrontation, a target State would be limited to responding there. For example, in the Falklands/Malvinas War, Britain would have been limited to attacks on military units in the South Atlantic Ocean; a lone Argentine frigate in the Pacific could not have been attacked unless it gave clear evidence of launching an attack.546 The US Navy could not have responded to North Korea’s Pueblo seizure except by attacking North Korean assets in Korean waters.547 Under this view, Iran could not have attacked the Iraqi frigates in the Mediterranean Sea, or perhaps the Atlantic and Indian Ocean off South Africa if after being launched in Italy 548 they had sailed through the Mediterranean and either through Suez or around Africa.

This thesis, while appealing in simplicity and symmetry, lacks reality. To be sure, proportionality means an amount of force necessary to achieve a goal of preventive (i.e., anticipatory) self-defense or repulsing attack.549 A hypothetical case from the 1982 Falklands/Malvinas War illustrates the fallacy of the position.
If a UK warship encountering an Argentine frigate in the Pacific, thousands of miles from the 1982 Falklands/Malvinas War theater of operations, in terms of ship-to-ship combat, what would have stopped the Argentine—as USSR men-of-war might have during the Cold War—from tailing the other and firing later (e.g., after dark or in bad weather), when the UK warship could not sense a potential for attack? To take the other extreme, from either antagonist's geopolitical world view, a frigate represented a potential asset, wherever located, for prolonging (and perhaps enlarging) the conflict. It might be argued the frigate could only be attacked when it was apparent it was proceeding to contribute to the war. The first question is how that could be determined, since most belligerents do not willingly hand over intelligence, or they may distribute disinformation; recall the cruise of the Goeben into Turkish waters during World War I. The second is a surveillant power's problem: Must it follow the frigate once located across the Pacific to be sure it does not reappear at the scene of hostilities? To borrow a phrase, “Use it or lose it”; if ordnance is not used on the frigate in hand, the opportunity (and the frigate) will be lost, only to reappear in a theater of operations. Despite satellite and similar reconnaissance advantage for certain countries (e.g., the United States), not all States are so equipped for worldwide tracking, and in a world of smaller navies and nations less attuned to alliances and friendships, such a State (even if it is the victim of aggression in the first place) may find itself in a situation worse than Britain's attempt to locate surface raiders in World Wars I and II or a wounded Leviathan like Bismarck during World War II. And if targets should be limited in a full-scale war, how can other military aspects of proportionality—geographical scope, weapons used, etc.—be limited? It is incongruous that worldwide economic sanctions were asserted against Argentina—some of which had clear reprisal overtones—and yet military options would be limited territorially under the proposed analysis.

The third practical aspect deals with the nature of wars as belligerents have seen them. Most since 1945 have been symmetrical, two-State affairs where belligerents had about the same quality and quantity of forces. Most conflicts since 1945 have not been wars of national survival. A problem for proportionality, from a military perspective, arises when some or all of these conditions do not exist. What may be a routine, middle to low-level conflict for one belligerent may be a war for national survival for the other, particularly if two or more middle-level States' forces are opposed to one State's forces, which might have been able to contend with some but not all opponents. For the sole State, the war is a high-intensity conflict; for its opponents, it may be low or medium intensity. During the Korean War, given other States' overt and covert relationships with North and South Korea, it was initially a war of national survival for the South, and then for the North. Israel, nearly always surrounded by opponents, has claimed its wars were matters of national survival; it is doubtful whether its opponents always perceived
them thus. The 1980-88 Iran-Iraq conflict, of which the Tanker War was a part, was a war of national survival, or nearly so, for both sides. These might be compared with, e.g., Falklands/Malvinas,\textsuperscript{555} or the India-Pakistan conflicts,\textsuperscript{556} where neither side seriously considered it was involved in a war of national survival. If one side—perhaps because of allies arrayed against it, or for other valid reasons—would validly consider it was fighting a war of national survival where destroying every warship of opponent(s) would make a difference, would this mean that in the hypothetical of the frigate in the Pacific,\textsuperscript{557} one side could shoot on sight because it had to do so to survive, while the other would have to wait for evidence of imminent attack, because it had a low-intensity conflict on its hands? The situation is even more egregious if the force-heavy State was a target of aggression and would have to await another “first hit” from a State initially in the wrong.

In terms of international law, the theater of operations view may be correct from a perspective for force proportionality, but if proportionality is considered in terms of the object,\textsuperscript{558} i.e., righting the wrong, then the analysis is askew. If rectifying the situation—i.e., inducing end to aggression—means destroying the Pacific Ocean frigate, then the frigate is fair game for that reason alone. In terms of a war of national survival by a target State, proportionality with respect to the object sought—maintaining political independence and territorial integrity of equal, sovereign States, all Charter Purposes\textsuperscript{559}—necessarily rises to an ever-higher level of permitted violence to preserve these Charter goals for the State affected. Moreover, in a collective self-defense context, the level of military coercion the Charter permits is that necessary to assure survival of a State threatened with annihilation by aggression. Thus in the 1990-91 Gulf War self-defense agreements with the United States,\textsuperscript{560} it was the force necessary to assure Kuwaiti survival, not survival of the United States, Kuwait’s alliance partner.

There is no precedent for the theater of operations argument.\textsuperscript{561} Iran could have attacked the Iraqi warships, once launched and on their way to Iraq through the Mediterranean Sea and either the Red Sea and Indian Ocean or the Atlantic and Indian Oceans. Conversely, Iraq could have attacked Iranian military assets wherever it found them. During the last year of the Tanker War, Iranian speedboats and military aircraft operated in the lower Gulf and the Strait of Hormuz, near the Arabian Sea, a part of the Indian Ocean. Iraq could have attacked these platforms in the Indian Ocean as well as striking oil facilities near the entrance to the Persian Gulf.\textsuperscript{562}

The proportionality principle was demonstrated during the Tanker War.

Announced US defensive measures that could be expected if an unidentified aircraft or ship ventured within the defensive bubble for US warships\textsuperscript{563} were proportional. The only object of response would be the intruder, and the warning area—up to five miles on the surface and relatively low altitude—was minimal. To be sure, there were mistakes, e.g., when US ships fired on small boats that wandered
into the bubble, but if they appeared to display hostile intent, the US response was proportional under the circumstances. The United States expressed regret over these accidents and undoubtedly offered compensation.

Iranian visit and search procedures for merchantmen suspected of carrying cargo for Iraq’s war effort were also proportionate, in that the ship would be released if no offending goods were found. However, it is not clear whether adjudicatory procedures were established for detained vessels until late in the war. Whether Iran could detain ships after the ceasefire depended on terms of the ceasefire and practice under it. For detained ships, the response may not have been proportionate in terms of time. On the other hand, the belligerents' indiscriminate firing at or mining merchantmen and neutral warships alike, or neutral military helicopters, where there was no evidence that they were aiding the enemy, lacked any semblance of proportionality.

Belligerents' attacks on ships in neutral territorial waters or neutrals' oil facilities were clear violations of the Charter. Either the littoral State or the State of the vessel's flag could respond proportionally in self-defense. The coastal State could respond proportionally for attacks on its facilities.

Belligerents' attacks on their opponent’s oil tanker convoys, oil platforms and coastal petroleum facilities in self-defense were legitimate, since belligerents' oil sales financed the war. However, attacks had to be proportional; it is doubtful whether some (e.g., Nowruz) were.

US destruction of Iran Ajr and the offshore oil platforms were also proportional. Iran Ajr was caught laying mines, and its destruction eliminated a source of Iran's illegal action. Oil platforms supported the Iranian speedboats attacking merchantmen; while the response may not have destroyed the same platforms that supported a particular attack or mode of attack in the case of their destruction in response to the Silkworm attack on Sea Isle City, this response was also legitimate; it was confined to the kind of platform that could have launched the attack and was in response to attack on only that tanker. Proportionality contemplates responses parallel in intensity to an initial aggression and designed to discourage future attacks. If the launch platforms were destroyed, there could be no future attacks from them. There was no need to respond to the particular platform that launched the attack on Sea Isle City.

Defense against Iranian speedboats or warships attacking merchantmen, US military helicopters or US warships was also proportional. As in the case of the announced defense measures, the only targets were the attacking craft or their bases, the oil platforms. The United States was not required to respond, as it chose not to do in the case of the Stark attack. Any response to the Stark attack would have had to have been proportional in nature, however. From a self-defense perspective, laying aside the mistaken identity issue, Vincennes’ destruction of Flight 655
was proportional. The perceived threat was an aircraft, mistakenly thought to be an F-14; only the aircraft was targeted, and only the aircraft was brought down.

Responses to the Libyan aircraft that fired at US aircraft, or electronically locked on to them, and to Libyan missile boat forays, were also proportional. Only those aircraft or boats were targeted and hit. Similarly, the 1986 raid on Libyan terrorist bases was proportional. To be sure, there was collateral damage as in any bombing operation, but the targets were the terrorist operations that had caused the Berlin disco bombing.\textsuperscript{579}

(III) Forbidden Targets: \textit{Per Se Disproportionality}. Under the law of warfare (\textit{jus in bello}) certain targets are forbidden objects of attack, no matter how proportionate the response in other respects, and even if proportional armed reprisal is appropriate under the circumstances.\textsuperscript{580} The Corfu Channel Case authoritatively stated that the general principle of humanity condemned mining of an international strait with resultant loss of life and UK naval vessels\textsuperscript{581} when these ships attempted straits transit passage\textsuperscript{582} in a nonwar context. Although the law of naval warfare has developed a relatively concrete list of forbidden targets for armed conflict situations,\textsuperscript{583} there has been little Charter era practice for immunity claims for these targets in the self-defense (anticipatory or otherwise) context. Nevertheless, the Corfu Channel principle should apply to deny amenability of these objects as legitimate targets regardless of how proportional or necessary a self-defense response might otherwise be.\textsuperscript{584} The LOAC should inform the law of self-defense under these circumstances.\textsuperscript{585}

vii. "No Moment for Deliberation." Anticipatory self-defense, unlike reactive self-defense, carries a third requirement, from the Caroline Case: there can be no moment for deliberation.\textsuperscript{586} This principle is often lumped with necessity; the Tanker War illustrates the difficulty of application as a discrete concept. US defensive measures announcements and actions under them\textsuperscript{587} are relatively straightforward examples. Given the relatively high speed of aircraft or small boats, whether carrying shipkilling missiles or on a suicide mission, and a high risk to a warship of small boats carrying Exocets or the like, it is easy to see that there can be no time for deliberation—\textit{i.e.,} careful consideration up a chain of command—before action must be taken.

Where analysis begins to break down under current views of anticipatory self-defense is in the situation of Iranian visits and searches.\textsuperscript{588} If "no moment for deliberation" means time for investigation by other means, then the concept slides semantically into necessity. On the other hand, if the phrase means no other means for investigation, the result is the same. The same comments could be made as to States that ordered or accepted (acquiesced in) convoying or other forms of protection,\textsuperscript{589} if that is considered anticipatory self-defense.
The Vincennes incident, if considered an anticipatory self-defense case, illustrates the weakness (or elasticity) of the concept as a separate requirement. Vincennes' commanding officer had five minutes to deliberate, but was that real "deliberation"? He never knew, due to erroneous information, about Flight 655's true identity; he thought it was an F-14 homing on his ship. In a sense, he had time to deliberate, but only enough time to decide that it was imperative, i.e., necessary, to defend the ship. Under this analysis, there was no moment for deliberation, and Vincennes' downing Flight 655 satisfied the third principle of anticipatory self-defense.

Thus the third principle of anticipatory self-defense, "no moment for deliberation," if it exists as a separate concept, was met in these incidents of the Tanker War.

viii. Rules of Reprisal; Retaliation. Reprisals, i.e., use of force or other methods (e.g., economic coercion) otherwise illegal to confront a State engaging in illegal conduct (e.g., aggression) to force compliance with international norms, has been characterized as a kind of self-help or sanction. Most say that reprisals involving force where States are not engaged in armed conflict are illegal. Post-1945 practice tends to confirm this view. Anticipatory reprisal using force is forbidden.

The Corfu Cannel Canezb Case dismissed the UK argument that directing mine clearance of an international strait was an act of lawful self-help. Israel responded with massive reprisals against Syria for its repeated armistice violations. These too were condemned.

The 1970 Friendly Relations Declaration stated that "States have a duty to refrain from acts of reprisal involving the use of force," which the Resolution asserted was declaratory of international law. "Subject only to the proviso that 'force' ... be taken to mean military force, the Western States [agreed] on the question of reprisals."

Even massive economic coercion does not justify a force response, according to the majority view. On the other hand, nonforce reprisals (e.g., economic sanctions or "economic warfare") remain legitimate in the Charter era. There can be collective nonforce economic reprisals, like those the European Community imposed during the Falklands/Malvinas war. Although many States or their nationals aided one belligerent or the other, or both, there was no apparent declared system of economic reprisals during the Tanker War.

Even if justified, reprisals cannot be inflicted against third States. The Cysne arbitration held that although Germany might have been justified in reprisals against Great Britain during World War I, Germany could not destroy a neutral Portuguese vessel carrying goods covered by the reprisal declaration to Britain.
All reprisals are subject to three requirements, carried forward from the pre-Charter era and stated in the Nautilus Arbitration and the Cysne Case: previous deliberate violation of international law by the other State, an unsuccessful demand for redress, and the reprisal must be proportional to the injury suffered.\(^{603}\) Some objects cannot be an object of reprisals, whether economic or otherwise; commonly these are considered in the context of the LOAC (jus in bello) and will be analyzed in that situation.\(^{604}\) However, such reprisals are subject to the general principles of humanity in the context of "peacetime" reprisals, discussed here, on the same theory that these objects are barred as self-defense targets.\(^{605}\)

Security Council decisions can, at least in theory, go beyond customary limitations for sanctions amounting to reprisals.\(^{606}\) A State not injured by illegal actions of another state might be directed to apply sanctions. Sanctions that some might perceive as disproportionate to an illegal action might be imposed. Third States might be harmed by Council decisions, although Charter Article 50 allows a State confronted with special economic problems arising from carrying out those measures a right to consult with the Council for solution of those problems.\(^{607}\) The Council can be informed by humanity principles and other sources of law, but it can override treaties to the contrary, and its resolution might state a \textit{jus cogens} norm.\(^{608}\)

Sanctions against South Africa, which began in 1977, are an example of the potential for overriding general reprisal sanction principles.\(^{609}\) The earlier Rhodesian embargo, which had law of naval warfare overtones, is another example. In 1965-66, as part of the governance transition from Southern Rhodesia to independent, majority-rule Zimbabwe, the Council passed a series of resolutions, denouncing the white Rhodesian government as illegal, and calling on States to refrain from assisting the white minority regime and to institute an oil embargo. One resolution requested that the United Kingdom enforce the embargo. Because the resolution only spoke in terms of embargo and did not authorize blockade or similar measures, the Royal Navy could not order tankers inbound for the Mozambican port of Beira, Rhodesia's access to the sea, to divert. A later resolution specifically authorized diversion, and the Royal Navy ordered diversion when other tankers tried to call at Beira.\(^ {610}\) While the oil interdiction operation had an entirely laudatory purpose, if it is assumed that Rhodesia had no additional petroleum sources, and there were essential needs of the civilian population—\textit{e.g.}, gasoline for ambulances, diesel oil for hospital emergency generators, etc.—a violation of humanitarian law principles might have occurred, and interdictions might be said to have gone beyond customary LOAC rules.\(^ {611}\)

The 1990-91 Gulf War, which erupted after the Tanker War ended, is a third situation where Council sanctions overrode customary law.\(^ {612}\) Resolution 665 authorized Coalition interception of vessels bound for Iraq or occupied Kuwait on August 15, 1990, without reciting humanitarian exceptions.\(^ {613}\) A month later,
Resolution 670 imposed an air embargo but permitted food and medical supplies shipments, subject to Council supervision. At least in theory, the Council could be said to have overridden humanitarian principles denouncing deprivation of the civilian population of food and medical supplies by the omission in Resolution 665. (It was partly cured a month later by Resolution 666, permitting foodstuffs shipments under certain conditions, but the Resolution said nothing about medical supplies.)

ix. The Temporal Problem: When Does Liability Accrue? Convictions at Nuremberg and Tokyo were based on what the defendants knew, or should have known, when they made decisions to invade other States. Since then there has been no authoritative statement on whether liability accrues on what decision-makers knew, or should have known, when a state responds in reactive or anticipatory self-defense. Commentators seem to have been tempted to justify opinions, at least in part, on evidence available after a self-defense decision, perhaps years later.

The developing law for *jus in bello* confirms that the appropriate time for predating liability is what a decisionmaker knew, or should have known, at the time an operation is authorized. Hindsight can be 20/20; decisions at the time are often clouded with the fog of war or crisis.

Four countries' declarations of understanding to Protocol I to the 1949 Geneva Conventions state that as to protection of civilians in Article 51, protection of civilian objects in Article 52, and precautions to be taken in attacks, stated in Article 57, a commander should be liable based on a commander's assessment of information available at the relevant time, i.e., when the decision is taken. Two of the 1980 Conventional Weapons Convention's four protocols have similar terms, i.e., a commander is only bound by information available when a decision to attack is made.

Protocol I, with its understandings, and the Conventional Weapons Convention are well on their way to wide acceptance among States. These treaties' common statement that commanders will be held accountable based on information they had at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The *San Remo Manual* has recognized it as the standard for naval warfare, and in 1999 the Second Protocol to the 1954 Hague Cultural Property Convention also adopted this standard. It can be said with fair confidence that this is the customary standard for *jus in bello*. It should be the standard for *jus ad bellum*. A national leader directing a self-defense response, whether it be reactive or anticipatory in nature, should be held to the same standard. That leader should be held accountable for what he or she, or those reporting to him or her, knew or reasonably should have known, when a decision to respond in self-defense is made.
There is no public record of what those who initiated self-defense measures, whether in reaction to an attack or in anticipation of one, knew or should have known, as was the case in the Nuremberg or Tokyo trials. Therefore, there can be no appraisal of whether the temporal standard was met during the Tanker War.

2. Related Issues

a. State of Necessity and Self-Preservation in the Charter Era. State of necessity and the now-outmoded concept of self-preservation have often been confused, sometimes with the notion that necessity as a component of self-defense or the LOAC may be so intense that in a situation involving survival of the State that necessity overrides all other factors to permit any action by the target State. This claim of self-preservation, or self-help, is now inadmissible. A state may, however, respond in self-defense.

There is, however, a separate, distinct concept of necessity, apart from a similar term that is a conditioning factor for self-defense or the LOAC, in that in a separate claim of state of necessity, a State against whom action is taken ("a third State") has committed no wrong against a State that takes the action (an "acting State"), and an acting State does not consider itself the third State's target. In self-defense, a target State seeks to defend against aggression by a country in the position of a third State, i.e., the aggressor. State of necessity can be invoked "to preclude the wrongfulness of conduct adopted in certain conditions . . . to protect an essential interest of the [target] State, without the latter's existence being in any way threatened. There remain cases "where a . . . [right] of a [third] State can be sacrificed for the sake of a vital interest of the [target] State which would otherwise be obliged to respect that right."

Not all commentators agree on the state of necessity doctrine today. However, LOS Convention, Article 221 allows States "to take [proportionate] measures, in accordance with international law, beyond the limits of the territorial sea" to protect their coastline "or related interests, including fishing, from grave and imminent danger" from pollution or the threat of pollution. The Intervention Convention is to the same effect. These provisions would have vindicated UK action in bombing the derelict Torrey Canyon after that Liberian-registered vessel grounded off Britain, threatening the English coast and its population. Although frequently decided on other grounds, ICJ decisions and international arbitrations have recognized the doctrine in many contexts.

The record of State practice and other sources is thus less than clear, but the International Law Commission Special Rapporteur summarizes state of necessity and its scope today, provided a target State invoking state of necessity acts proportionally to a peril:
Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

   (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
   (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

   (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
   (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
   (c) if the State in question has contributed to the occurrence of the state of necessity.

The Commission draft also says: "Wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter..." Tanker War participants did not claim state of necessity for their actions, but they could have.

The primary example is US and other States' protecting third-State crews from attacks by Iranian speedboats and aircraft. Self-defense permitted protecting vessels flagged under the ensign of a covering warship or aircraft or protection of nationals of the same State and, upon request, third-State crews. States have a general obligation to act to preserve life at sea, independent of an ongoing armed conflict. This obligation carries with it a right to engage in necessary and proportionate response, in the nature of self-defense, with respect to such ships and personnel. The right to respond could also be based on a theory of state of necessity.

A clearer case involved the Nowruz oil slick created by Iraqi attacks in 1983. Although the slick dissipated without any State's having taken action, littoral countries threatened with loss of coastal fisheries or desalination plants could have acted proportionally with force to eliminate the leakage from Iranian platforms. Similarly, if petroleum leakage from vessels hit on the high seas of the Persian Gulf
was serious enough and threatened a coastal State's shore or other interests, that State could have acted to intervene. Precedent for this is clear. During the 1990-91 war, US aircraft, as a defensive measure, bombed oil manifolds at terminals in occupied Kuwait opened by Iraq. Besides risk to coalition warships, there was risk to western Gulf coastal fisheries and desalination plant intakes. Kuwaiti permission was undoubtedly given, but if it had not, the strikes could have been justified by the state of necessity doctrine.

b. Retorsion. A retorsion, or retortion, is a lawful but unfriendly response of a target State to another state's unfriendly practice or act whether illegal or not, to coerce the latter to discontinue that practice or act. Commentators agree that a retorsionary response must be proportional.

During the Tanker War, the US defensive bubble or cordon sanitaire warnings in NOTAMs or NOTMARs may have seemed unfriendly acts, but they were legitimate warnings of the right of self-defense if an aircraft or vessel came within range. Accompanying, escorting or offering protection to merchantmen not carrying warfighting or war-sustaining goods to belligerent ports, including outbound cargoes of Kuwaiti or Saudi petroleum, may have seemed unfriendly, if legal, acts to the belligerents, particularly Iran. Iran's naval maneuvers in its territorial sea were legal, but they may have seemed unfriendly acts to its neighbors or to some navies. These retorsions were proportional.

Part B. UN Mechanisms for Breaches of the Peace, Threats to the Peace, and Aggression

If there has been uneven development of Charter norms as a coherent body of law for States' individual or collective responses to breaches of the peace, threats to the peace, or aggression, the UN record as an Organization has been even less clear. This Part first examines the methodology of UN lawmaking and then sketches the organizational framework for UN lawmaking and in other groups permitted by the Charter in the context of situations involving the law of naval warfare.


Aside from General Assembly competence for UN Membership, the budget and trust territories, the only source of positive, primary-source norms is the Security Council. Under Charter Articles 25 and 48, Members agree to carry out "decisions," particularly those related to action to maintain international peace and security. However, the Charter also gives the Council authority to make nonbinding "recommendations" for pacific settlement of disputes, and "recommendations" on issues involving breaches of the peace, threats to the peace or aggression. It may "call upon" parties to resolve a dispute, whether it threatens the peace or not, and it can "call upon" Members for measures to assist in enforcing
decisions. Recommendations and authority to “call upon” Members for action are nonbinding, although “call upon” connotes a stronger prescriptive principle than recommendations; if a call for action is coupled with a decision, the call is binding. A further restriction on Council practice is that Article 25 decisions can only be taken under Chapter VII, dealing with breaches of the peace, threats to the peace and aggression, and with an Article 39 determination to that effect. Thus although Article 25 appears in the Charter just before Chapter VI, stating the Council role in pacific dispute settlement, it has been used along with Article 48 for Chapter VII decisions.

The narrow problem is whether the Council has made a decision. The Namibia opinion declared principles of resolution interpretation; there must be reference to “terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution . . .” In other words, when is a Council resolution a binding decision? Or, perhaps more important for this analysis, when is what appears to be a binding decision nothing more than a nonbinding recommendation, although not so styled?

Analysis of Council decisionmaking—in the broad, nontechnical sense of the word—reveals a trend toward establishing norms affecting law of naval warfare standards.

a. The Korean War. Bailey has aptly summarized Council actions for the Korean War: “The . . . Council decisions on military enforcement . . . were not binding and, indeed, were only possible because of the fortuitous absence of the Soviet Union.” Resolution 82, calling for ceasing hostilities, calling upon North Korea to withdraw north of the 38th parallel and calling upon Members to assist the United Nations, was recommendatory, being issued under Articles 39-41. The Secretary-General felt there had been only a threat to the peace, the United States charged aggression had occurred, and the Council toned down the Resolution to find a “breach of the peace.” Resolution 83 followed two days later, recommending that Members assist South Korea “to repel the armed attack and to restore international peace and security in the area,” finding North Korea had breached the peace. Besides welcoming assistance given South Korea, and “Recommend[ing]” that Members make forces and assistance available to the United States as head of a unified command, Resolution 84 followed the pattern. The only decision of the war was a Council invitation to the PRC to be present for its discussion of a UN Korean command special report. With the USSR’s return and its veto in the Council, UN lawmaking potential shifted to the Assembly.

b. Arab-Israeli Conflicts. The Arab-Israeli conflicts generated positive lawmaking before and after the Korean War.
After hortatory resolutions based on Articles 39 and 40, Resolution 50 (1948) called upon Governments and authorities to stop importing or exporting war material into or to Palestine, Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan or Yemen during a recommended ceasefire. It “Decide[d]” that if this resolution were rejected, or later repudiated or violated, “the situation . . . [would] be reconsidered with a view to action under Chapter VII,” i.e., for possible measures involving force. This, the Council’s first attempt to define and regulate warfighting/war-sustaining material, was only recommendatory. The only decision was for further action if the parties rejected the resolution’s terms. Later resolutions “Order[ed]” a cease-fire, “Decide[d]” the belligerents’ responsibility under the ceasefire, and “Decide[d]” on an armistice. After a recommendatory call upon the belligerents for a ceasefire late in 1948, the Council “Reaffirm[ed]” its prior “order” for ceasefire and obeying armistice agreements. These were binding in nature. When fighting broke out again in 1951, the Council called upon parties for a ceasefire, reminding them of Chapter VI obligations to settle disputes by peaceful means. In September 1951 Resolution 95 “not[ed] . . . present practice of [Egypt’s] interfering with the passage through the Suez Canal of goods destined for Israel” and “[found] further that such practice [was] an abuse of the exercise of the right of visit, search and seizure.” The Resolution “Further [found] that the practice in the prevailing circumstances cannot be justified on the ground that it is necessary for self-defence[.]” and noted that...

The Resolution concluded by “Calling upon Egypt to terminate the restrictions on the passage of goods through the Suez Canal to Israel ports are denying to nations at no time connected with the conflict in Palestine valuable supplies required for their economic reconstruction, and that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified interference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab States and Israel[.]”
using Lake Tiberias by Syria in violation of the armistice. In 1962, after exchanges of fire between Syria and Israel, Resolution 171 "call[ed] upon the two Governments... to comply with their obligations under... the Charter by refraining from the threat as well as the use of force." The Council reaffirmed its prior resolution condemning retaliatory breaches of the armistice, and determined that Israel's attack on March 16-17 was "a flagrant violation of that resolution." A "grave Israel military action" in southern Hebron against Jordan in 1966 earned Israel a censure. The Council "Emphasize[d]... that... military reprisal cannot be tolerated and that, if... repeated, the... Council [would] consider further and more effective steps as envisaged in the Charter to ensure against the repetition of such acts." When the 1967 war broke out, the Council called upon the belligerents for a ceasefire and ceasing military activities, on the model of the opening of the Korean War. Later resolutions "Demand[ed]" a ceasefire and observance of it. Resolution 237 only "Recommend[ed]" compliance with the Third Convention, but Resolution 242 "Affirm[ed]... the necessity... [f]or guaranteeing freedom of navigation through international waterways in the area[.]". Resolutions 248 and 256 condemned the "large-scale and massive" or "large scale and carefully planned" attacks on Jordan in response to Jordanian violations of the ceasefire in 1968. A 1969 resolution condemned similar "preplanned" Israeli air attacks on Jordanian population centers as a "flagrant" violation of the Charter and the cease-fire resolutions. It repeated a previous resolution's warning, that the Council would meet again "to consider further and more effective steps as envisaged in the Charter to ensure against repetition of such attacks." The 1973 war precipitated a Council call for ending hostilities and a ceasefire. In 1981, while Iraq was heavily committed in its war with Iran, Israeli aircraft struck an Iraqi nuclear facility near Baghdad. Israel claimed a right of anticipatory self-defense in that the facility was manufacturing nuclear weapons to be used against Israel. Upon Iraq's complaint, the Council cited Charter Article 2(4) and "[s]trongly condemn[ed]" the military attack by Israel in clear violation of the Charter and the norms of international conduct." The Council called upon Israel to refrain from any such acts or threats in the future and stated that Iraq was entitled to "appropriate redress, responsibility for which has been acknowledged by Israel." In 1982, the Council "[d]emand[ed]" that... Israel lift immediately the blockade of the city of Beirut... to permit the dispatch of supplies to meet the urgent needs of the civilian population and allow the distribution of aid" by UN agencies and nongovernmental organizations, particularly the ICRC. The resolution referred to other resolutions citing the 1949 Geneva Conventions and "regulations attached to the Hague Convention of 1907."
c. Rhodesia: 1965-79. The Rhodesia decolonization process, which included embargo and maritime interdiction before Zimbabwe independence was assured, began with General Assembly action. Assembly resolutions noted "a threat to freedom, peace and security in Africa," and called upon States to refrain from rendering assistance to Rhodesia. Rhodesia unilaterally declared independence, and the Assembly "[i]nvite[d]" the United Kingdom to implement the Assembly resolutions and "Recommend[ed that] the . . . Council . . . consider [the] situation as a matter of urgency." 695

Condemning the independence declaration, the Council first "*[d]ecide[d] to call upon all States . . . to refrain from rendering any assistance to this illegal regime." 697 Resolution 217 called upon the UK Government to quell the rebellion and "to take all other appropriate measures which would prove effective in eliminating the authority of the usurpers . . ." The Council also called upon States to desist from providing arms to Rhodesia and to break economic relations, "including an embargo on oil and petroleum products." Continuance of the rebellion was determined to be "in time a threat to international peace and security." 698 Thereafter the United Kingdom declined to intercept Beira-bound tankers. 699 The Council then passed Resolution 221, which "*[c]all[ed] upon" Portugal to deny pier and pumping facilities and "*[c]all[ed] upon all States" to divert their vessels "reasonably believed to be carrying oil destined for . . . Rhodesia which may be en route for Beira." The Council also "*[c]all[ed] upon" the United Kingdom "to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for . . . Rhodesia." Specific authority was given to arrest and detain Joanna upon departure from Beira if she discharged petroleum cargo there. 700 The United Kingdom acted upon this resolution, stopping possible blockade runners. 701

A month later the Council, "Acting in accordance with Articles 39-41" of the Charter, determined the Rhodesia situation was a threat to international peace and security. The Council "*[d]ecid[ed] that . . . Members . . . shall prevent:"

(a) The import into their territories of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather originating in . . . Rhodesia and exported therefrom after the date of the present resolution;

(b) Any activities by their nationals or in their territories which promote or are calculated to promote the export of these commodities from . . . Rhodesia and any dealings by their nationals or in their territories in any of these commodities originating in . . . Rhodesia and exported therefrom after the date of the present resolution, including in particular any transfer of funds to . . . Rhodesia for such activities or dealings;

(c) Shipment in vessels . . . of their registration of any of these commodities originating in . . . Rhodesia and exported therefrom after the date of the present resolution;
(d) Any activities by their nationals or in their territories which promote or are calculated to promote the sale or shipment to ... Rhodesia of arms, ammunition of all types, military aircraft, military vehicles, and equipment and materials for the manufacture and maintenance of arms and ammunition in ... Rhodesia;

(e) Any activities by their nationals or in their territories which promote or are calculated to promote the supply to ... Rhodesia of all other aircraft and motor vehicles and of equipment and materials for the manufacture, assembly, or maintenance of aircraft and motor vehicles in ... Rhodesia; the shipment in vessels ... of their registration of any such goods destined for ... Rhodesia; and any activities by their nationals or in their territories which promote or are calculated to promote the manufacture or assembly of aircraft or motor vehicles in ... Rhodesia;

(f) Participation in their territories or territories under their administration or in land or air transport facilities or by their nationals or vessels of their registration of any such goods destined for ... Rhodesia; notwithstanding any contracts entered into or licenses granted before the date of the present resolution.[]

Members were “[r]emind[ed]” of obligations under Article 25; the resolution also “[c]all[ed] upon” them to carry out “this decision of the ... Council.”

Resolution 253 followed in 1968; “[r]eaffirming its determination that the ... situation in ... Rhodesia constitute[d] a threat to international peace and security [and a]cting under Chapter VII of the Charter ...,” the Council “[d]ecide[d] that ... Members ... shall prevent”:

(a) The import into their territories of all commodities and products originating in ... Rhodesia and exported therefrom after the date of this resolution (whether or not the commodities or products are for consumption or processing in their territories, whether or not they are imported in bond and whether or not any special legal status with respect to the import of goods is enjoyed by the port or other place where they are imported or stored);

(b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from ... Rhodesia; and any dealings by their nationals or in their territories in any commodities or products originating in ... Rhodesia and exported therefrom after the date of this resolution, including ... transfer of funds to ... Rhodesia for the purposes of such activities or dealings;

(c) The shipment in vessels ... of their registration or under charter to their nationals ... of any commodities or products originating in ... Rhodesia and exported therefrom after the date of this resolution;

(d) The sale or supply by their nationals or from their territories of any commodities or products (whether or not originating in their territories, but not including supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material and, in special humanitarian circumstances, food-stuffs) to any person or body in ... Rhodesia or to any other person or
Members were again reminded of Article 25 obligations. The Council established a Committee to receive reports and obtain information. In 1970 the Council "[d]ecide[d]," in accordance with Article 41, "that Members would inter alia, sever all trade and transportation ties with Rhodesia; the Council" "[r]equest[ed]" the UK government to rescind all trade, etc., agreements with Rhodesia and "[R]equest[ed]" that Members "take all possible further action under Article 41 of the Charter [i.e., options not involving the use of force],... not excluding any... measures provided in that Article[.]

In 1972 Resolution 314 deplored the failure of States to abide by the embargo sanctions and declared that any national legislation to the contrary "would undermine sanctions and would be contrary to the obligations of States." In 1973 Resolution 333 "[c]all[ed] upon" States to enact legislation "providing for the imposition of severe penalties" for evasion or breach of sanctions. It also

5. Request[ed] States, in the event of their trading with South Africa and Portugal, to provide that purchase contracts with those countries should clearly stipulate, in a manner legally enforceable, the prohibition of dealing in goods of... Rhodesian origin; likewise, sales contracts with these countries should include a prohibition of resale or re-export of goods to... Rhodesia;
6. Call[ed] upon States to pass legislation forbidding insurance companies under their jurisdiction from covering air flights into and out of... Rhodesia and individuals or air cargo carried on them;
7. Call[ed] upon States to undertake appropriate legislative measures to ensure that all valid marine insurance contracts contain specific provisions that no goods of... Rhodesian origin or destined to... Rhodesia shall be covered by such contracts;
8. Call[ed] upon States to inform the Committee established in pursuance of resolution 253 (1968) on their present sources of supply and quantities of chrome, asbestos, nickel, pig iron, tobacco, meat and sugar, together with the quantities of these goods they obtained from... Rhodesia before the application of sanctions.

The economic noose was tightened further in 1976 by Resolution 388, decided under Chapter VII of the Charter, that Members would ensure that their nationals and persons in their territories did not insure:
(a) Any commodities or products exported from ... Rhodesia after the date of the present resolution in contravention of ... resolution 253 (1968) which they know or have reasonable cause to believe to have been so exported;
(b) Any commodities or products which they know or have reasonable cause to believe to be destined or intended for importation into ... Rhodesia after the date of the present resolution in contravention of resolution 253 (1968);
(c) Commodities, products or other property in ... Rhodesia of any commercial, industrial or public utility undertaking in ... Rhodesia, in contravention of resolution 253 (1968).[.]

The Council also decided that ... Member States shall take appropriate measures to prevent their nationals and persons in their Territories from granting to any commercial, industrial or public utility undertaking in ... Rhodesia the right to use any trade name or from entering into any franchising agreement involving the use of any trade name, trade mark or registered design in connexion with the sale or distribution of any products, commodities or services of such an undertaking[.]

The same approach (graduated embargo, Committee reporting system) under Chapter VII of the Charter was employed with respect to South Africa. Majority rule came in 1979, and the sanctions were lifted that year.

The General Assembly also played a role in the transition to Zimbabwe. Besides passing nonbinding resolutions within its sphere, the Council cited the Assembly's prior law-declaring resolutions, e.g., the Declaration on Granting of Independence to Colonial Countries and Peoples.

d. India-Pakistan: 1965, 1971. The 1965 naval war was part of a renewed conflict between India and Pakistan. The Security Council, as in other situations, "[c]alled" upon the belligerents to take steps for a cease-fire and to respect the frontier line at issue. The 1971 war was over so quickly that Council Resolution 307 only noted the Pakistani agreement to a cease fire and "[d]emand[ed]" compliance with it.

e. Falklands/Malvinas: 1982. Two Council resolutions impacted this relatively brief conflict. Resolution 502 was stronger than many initial responses to a crisis. Finding "a breach of the peace," the Council "[d]emand[ed]" immediate cessation of hostilities and withdrawal of Argentine forces from the Falklands/Malvinas and "[c]all[ed] on ... Argentina and the United Kingdom ... to seek a diplomatic solution ... and to respect fully the purposes and principles of the Charter." The second resolution "[u]rged" parties to cooperate with the Secretary-General's good offices efforts.

f. The Iran-Iraq Conflict and the Tanker War, 1980-88. As Charter era conflicts went, the Iran-Iraq war was a long, eight-year affair with heavy losses all around.
Security Council action was relatively minimal: 17 resolutions in that time. Several bear upon the Tanker War and the law of naval warfare.

Resolution 479 (September 23, 1980, issued shortly after the war began) "[c]all[ed] upon" the belligerents to refrain immediately from further use of force and to settle the dispute "by peaceful means and in conformity with international law," echoing Charter Article 33. The resolution "[u]rge[d]" Iran and Iraq to accept mediation, conciliation, resort to regional agencies or arrangements or other peaceful means. It "[c]all[ed] upon" States to exercise restraint and to refrain from anything to further escalate and widen the conflict. The Secretary-General's offer to suggest good offices was supported. Although it did not mention freedom of navigation, Japan and the United States stressed the primary importance of that principle. Iraq accepted Resolution 479, denying it had any territorial ambitions; Iran rejected it, demanding condemnation of Iraqi aggression. In October, however, Iraq rejected a UN good offices offer to allow merchantmen trapped in the Shatt al-Arab by the war to depart under a UN or perhaps an ICRC flag; Iran accepted the proposal.

Nearly two years later, Resolution 514 again "[c]all[ed] for" a ceasefire and belligerent forces' withdrawal. The Council "[d]ecid[ed]" to dispatch a team of [UN] observers to verify, confirm and supervise the ceasefire and withdrawal." Continuing Secretary-General mediation efforts was "[u]rge[d]." Other States were again asked to abstain from action that might contribute to continuation of the conflict. An October 4, 1982 resolution was in the same vein, and welcomed a "part[y]'s" (Iraq's) acceptance of Resolution 514's terms and "call[ed] upon the other [Iran] to do likewise[.]"

Resolution 540 (1983) deplored mutual destruction of civilian lives, cities, property and economic infrastructures. The Council condemned violations of humanitarian law, particularly that stated in the First through the Fourth Conventions, and called for "cessation of all military operations against civilian targets, including city and residential areas[.]" Resolution 540 "[a]ffirm[ed]"

... the right of free navigation and commerce in international waters, call[ed] on all States to respect this right and also call[ed] upon the belligerents to cease immediately all hostilities in the region of the Gulf, including all sea-lanes, navigable waterways, harbour works, terminals, offshore installations and all ports with direct or indirect access to the sea, and to respect the integrity of the other littoral States[.]

It also "[c]all[ed] upon both parties to refrain from any action that [might] endanger international peace and security as well as marine life in the region of the Gulf:" In June 1984 Resolution 552 responded to a letter from the GCC States (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, UAE) complaining of Iranian acts of aggression on the freedom of navigation to and from their ports. Although Iran
justified its attacks on reaction against aid to Iraq by States in the region and on other bases, the Council heard States and the Arab League's complaints concerning ship attacks and the right of freedom of navigation,\textsuperscript{727} and passed Resolution 552. The Council,

\begin{quote}
\textit{Noting} that Member States pledged to live together in peace with one another as good neighbours in accordance with the Charter . . . ,
\textit{Reaffirming} the obligations of Member States with respect to the principles and purposes of the Charter,
\textit{Reaffirming also} that all Member States are obliged to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State,
\textit{Taking into consideration} the importance of the Gulf region to international peace and security and its vital role to the stability of the world economy,
\textit{Deeply concerned} over the recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia,
\textit{Convinced} that these attacks constitute a threat to the safety and stability of the area and have serious implications for international peace and security,
1. \textit{Call[ed] upon} all States to respect, in accordance with international law, the right of free navigation;
2. \textit{Reaffirm[ed]} the right of free navigation in international waters and sea lanes for shipping en route to and from all ports and installations of the littoral States . . . not parties to the hostilities;
3. \textit{Call[ed] upon} all States to respect the territorial integrity of the States . . . not parties to the hostilities and to exercise the utmost restraint and to refrain from any act which may lead to a further escalation and widening of the conflict;
4. \textit{Condemn[ed]} the recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia;
5. \textit{Demand[ed]} that such attacks should cease forthwith and that there should be no interference with ships en route to and from States . . . not parties to the hostilities;
6. \textit{Decide[d]} in the event of non-compliance with the present resolution, to meet again to consider effective measures . . . commensurate with the gravity of the situation . . . to ensure the freedom of navigation in the area[.]
\end{quote}

The Council requested the Secretary-General to report on progress in implementing the resolution.\textsuperscript{728}

Resolutions 540 and 552 had no lasting effect. In February 1986 Resolution 582 \textit{"[d]eplore[d] . . . escalation of the conflict, especially . . . attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict and, in particular, the use of chemical weapons contrary to . . . the Geneva Protocol."} It also \textit{"[c]all[ed] upon . . . Iran and Iraq to observe an immediate cease-fire, a cessation of all hostilities on land, at sea and in the air,"} to withdraw their forces behind their borders, and called upon the belligerents to submit the conflict to mediation or other peaceful settlement methods. The now-familiar
provision, calling upon other States to refrain from escalating or widening the conflict, was also included. Resolution 588 (October 1986) expressed alarm over the continuing and intensifying conflict and called upon the belligerents to implement Resolution 582.

Resolution 598 (July 1987) again "[d]emand[ing] that ... Iran and Iraq observe an immediate cease­fire. . . ." Other States were admonished not to escalate or widen the war. The Secretary-General was requested to explore, in consultation with the belligerents, entrusting an impartial body with inquiring into responsibility for the conflict and a report to the Council. This was the first time the Council cited Chapter VII of the Charter (threats to the peace, etc.) during the war. Iraq accepted Resolution 598 almost immediately. The European Community, the Arab League, NATO countries and the GCC passed resolutions supporting Resolution 598, the GCC urging the Security Council to implement it. The US Secretary of State and other foreign ministers referred to the binding nature of Resolution 598.

During 1987 a UN naval force was discussed; Italy and the United States had supported the idea, the United Kingdom was unenthusiastic, and the United States was willing to consider it but only if a collective action concept was spelled out clearly. The United States would not support a UN force replacing US and US-aligned forces. The idea got nowhere.

Resolution 612 again condemned chemical warfare in May 1988. Iran accepted Resolution 598 in August 1998, and a ceasefire ended hostilities. Subsequent resolutions, 1988-91, condemned use of chemical weapons, called upon States to control export of such to the belligerents, established the UN Iran-Iraq Military Observer Group (UNIIMOG) to supervise the ceasefire, and disbanded UNIIMOG in 1991 with intensification of the crisis over Kuwait.

g. Appraisal of Security Council Lawmaking. Security Council intervention with binding or recommended norms affecting war at sea has been episodic and often limited. There are several reasons for this.

Use of the veto, at first largely by the USSR and later by other permanent Council members (France, Great Britain, United States), has affected lawmaking for some maritime conflicts. Permanent members filed vetoes on these maritime incidents or wars: Corfu Channel, 1947; Korean War; Arab-Israeli conflicts; India-Pakistan, 1971; Rhodesia; Falklands/Malvinas. In some cases, Council agenda items have been withdrawn, or the problem has disappeared with time. Time has been a critical factor in some, but not all, modern conflicts; the Arab-Israeli Six-Day War and the 1971 India-Pakistan conflict are two examples where military
action was over within weeks.\textsuperscript{741} Even though the Council may be “organized \ldots to function continuously,”\textsuperscript{742} perhaps with the most modern telecommunications facilities, the relatively rapid pace of events can outstrip deliberation, debate and resolution negotiations and drafting.\textsuperscript{743}

Whether the Council can consider a matter depends on discretion of UN Members (whether Council members or not), countries that are not UN Members, the General Assembly, or the Secretary-General, in bringing matters involving international peace and security to the Council’s attention. The Council can initiate its own investigation, but that involves discretion before acting on a resolution.\textsuperscript{744} The Secretary-General could perhaps report through his or her inherent power as head of the UN Secretariat.\textsuperscript{745} And while this list may seem impressive, there is nothing to stop individual States from attempting to settle a dispute by means other than Council action, perhaps by negotiations with agreement that the issue not be presented to the Council, or referral to a regional organization, the latter of which occurred during the Cuban Missile Crisis.\textsuperscript{746}

The implications of a veto may have influenced the relative strength of resolutions. For example, the Korean War resolutions were only recommendatory in nature.\textsuperscript{747} More recently, however, the Council has demonstrated the capacity to approve decisions under Articles 25 and 48, at least where permanent members concur with the action, must abstain,\textsuperscript{748} or choose to abstain.\textsuperscript{749} The latter has occurred occasionally in situations related to armed conflict or the potential for armed conflict.\textsuperscript{750}

A more serious problem has been the language of resolutions. Obviously, if a resolution recommends certain action, that course is optional with UN Members. There have been many affecting the law of naval warfare.\textsuperscript{751} Equally obviously, if the Council “decides” that a State “shall” take certain action, that resolution is mandatory. There have been few of these.\textsuperscript{752} Is a resolution “calling upon” Members mandatory? Respectable authority has differed on the point,\textsuperscript{753} and the record of compliance is mixed. For example, the United Kingdom complied when called upon to interdict tankers during the Rhodesia transition,\textsuperscript{754} but the record is equally clear that Iran largely ignored Council calls during the Tanker War, perhaps until forced to comply by outside pressures.\textsuperscript{755} (To be sure, Iran accepted Resolution 598 after prior Iraqi acceptance of it, with a resulting ceasefire.\textsuperscript{756} Iraq’s “acceptance” record of these resolutions was better,\textsuperscript{757} but “accepting” them connoted their nonmandatory nature to the belligerents. In the near term, immediately after passage of a call for action, about the only sure method is to observe what States do with the call for action and whether they appear to respond out of a sense of legal obligation. This choice, like Council decisions that are clearly mandatory under the Charter, is not an option for a military commander.\textsuperscript{758} A commander must await the executive decision to comply with the call, and how Council calls for action and decisions will be implemented, since they are frequently imprecise,
and deliberately so, as the Council is addressing a conglomeration of over 180 countries with widely varying resources.

Since the UN's earliest days Council resolutions have been involved with maritime and law of naval warfare issues. Although nearly all of these resolutions have not carried the binding authority of decisions under Articles 25 and 48, they do have a sort of "soft law" weight, which when implemented over an undetermined amount of time, may ripen into custom, the oldest source of international law. Moreover, to the extent that the Council can act in relative concert and in confidence that there will be no veto threat, the future may see more strongly worded resolutions that are nonmandatory in nature, or decisions that bind all UN Members. The result in the future is that these resolutions, general as they often are, may dictate the content of naval warfare in the case of Council decisions, or be informed by it, much as self-defense considerations may be informed by the content of naval warfare.

2. Making the Rules and Stating the Principles: The General Assembly

The Charter gives the General Assembly only recommendatory powers in the international peace and security arena, and then only to the extent that the Council is not seized of a matter. Two practices have developed: recommendations under the Uniting For Peace (UFP) Resolution, and concurrent action with the Security Council.

a. The UFP Resolution. When the Soviet Union returned to the Council and began vetoing resolutions connected with the UN Command in Korea's prosecuting that war, the United States led passage of the UFP Resolution, which provides that if the Council,

because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . where there appears to be a threat to the peace, breach of the peace, or act of aggression, the . . . Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including, in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security.

The Resolution also established a Collective Measures Committee (CMC) to report to the Assembly. On at least five occasions after the Korean War, the Council resolved to call emergency Assembly sessions, or refer claims to it. Egypt's nationalizing the Suez Canal (1956), revolt in Hungary (1956), Lebanon (1958), the Congo crisis (1960), and the India-Pakistan war (1971). Although it was argued that UFP was not legitimate under the Charter, most find for its legality; East
and West have invoked it in referring disputes from the Council to the Assembly.\textsuperscript{766}

UFP was employed in several cases. Assembly Resolution 498 found the PRC had committed aggression during the Korean War.\textsuperscript{767} Resolution 500 recommended a weapons and strategic materials embargo directed at the PRC and North Korea.\textsuperscript{768} Resolution 997, voted by the Assembly during Britain, France and Israel's 1956 Suez Canal intervention, did not determine that a threat to or breach of the peace had occurred but did note that these States' forces had penetrated, or were operating against, Egyptian territory. They were urged to withdraw forces and cease hostilities.\textsuperscript{769}

Castenada, Higgins and others have analyzed these situations, along with those in Hungary and the Congo.\textsuperscript{770} Castenada argues for development of a new customary law arising from acquiescence of UN Members.\textsuperscript{771} Whether these five examples of conflict can amount to a new found custom is, of course, highly debatable. Castenada formulates this system of rules from the UFP experience; it is typical of arguments for Assembly lawmaking:

1. The \ldots Council, having determined that there is a threat to the peace, a breach of the peace, or an act of aggression, may recommend the adoption of enforcement measures, including the use of armed force, on behalf of the United Nations, and directed against states or de facto governments, without following the procedures and observing the requirements established in Chapter VII of the Charter for \ldots armed force. This means that members can make available to the Council armed forces in accordance with procedures different from the special agreements contemplated in Article 43; that plans for the use of such armed forces need not be drawn up with the assistance of the Military Staff Committee, as provided in Article 46; and that the strategic direction of armed forces made available for enforcement action need not necessarily be the responsibility of the \ldots Committee, as set forth in Article 47.

2. The \ldots Assembly can recommend, when there is lack of unanimity among the Permanent Members \ldots, and when there has arisen in the Assembly's opinion a threat to the peace, breach of the peace, or act of aggression, the adoption of enforcement measures, including \ldots armed force in the event of an armed attack or an act of aggression, on behalf of the United Nations and directed against states or de facto governments, also without observing the procedures and requirements of Chapter VII for \ldots armed force.

3. Both the \ldots Council and the \ldots Assembly may decide, without a previous determination that a threat to or breach of the peace or an act of aggression exists, to create a United Nations military force to carry out nonenforcement functions, without complying with \ldots Chapter VII for the use of armed force; and they may recommend—but may not legally require—that members contribute contingents to establish it. The functions of a United Nations Force may range from mere observation and supervision to the undertaking of typically military operations, such as engaging in battle with armed groups for \ldots destroying them as combat units, as occurred in the Congo.
Up to the present [1969] there has not been a single instance in the practice of the United Nations that could serve as a legal basis for a new rule authorizing the... Assembly to recommend the use of armed force, without the legal support of the Uniting for Peace Resolution, even for nonenforcement purposes.

The legal effect of the new rule, per se, is the broadening of the competence of both the Council and the Assembly to act in a manner different from that originally contemplated in the Charter. The degree to which this competence was enlarged is indicated by the three principles suggested above. It is possible to speak of a legal effect because there has been a modification of a pre-existent legal situation, although, from a different point of view, the change in the competence of the organs constitutes not the effect but the very content of the new rule created by the practice of the Organization.

The second effect is of a diverse nature. Actually, it is a question here of a legal effect directly produced by the resolutions adopted by the... Council or... Assembly on the basis of the customary rule created by their practice, rather than a direct effect of that rule as such. This effect consists in the temporary suspension of the Charter obligation of members to refrain from the use of force against any state, in conformity with Article 2(4). That certain Council or Assembly recommendations concerning the use of force should have as an effect the suspension of the Charter obligation not to use it, is a consequence of the new rule created by the practice of the organs.772

While this statement is useful, it is submitted that Castenada errs in two respects. First, it remains clear after the 1990-91 Gulf War that the Council may also “decide” on the use of force and authorize its agent—the Coalition in the Gulf War—to proceed.773 Moreover, it is highly questionable whether the Assembly may “decide”—in the sense of the Charter, Articles 25 and 48—on anything, such that States would be compelled to obey its commands.774 If the Castanada view is accepted, that States' acquiescence is enough to create a customary norm, that may be true.775 However, that is not what the Charter says, and any international agreements that conflict with the Charter are trumped by the latter.776 Treaties, of course, have been a regular feature of peacekeeping operations, whether under UFP authority or the Council.777

Moreover, most commentators and courts have said recommendatory resolutions can only restate or evidence customary law. Even Castenada has this view for declaratory resolutions.778 The Assembly has promoted many LOAC-related norms through the years; some state rules of law, some do not (at least according to some countries), and some are purely aspirational.779

b. Concurrent Action with the Council. In several cases the Assembly and the Council have issued resolutions during crises or conflicts.780 Where a Council decision adopts a norm stated in an Assembly or Council recommendation, it becomes a binding rule of law. Where a nonbinding Council resolution adopts such a norm, it is further evidence of customary law, unless, of course, the original
resolution declared custom, in which case the Council resolution also restates a customary rule.\textsuperscript{782}

c. Appraisal for the Tanker War. The Council was seized of the Iran-Iraq war from the beginning; therefore, the Assembly had no jurisdiction over the conflict.\textsuperscript{783} However, countries involved in a Council-seized conflict may try to bring matters before the Assembly, which should reject consideration of them.\textsuperscript{784}

The Assembly did promote projects whose subject is applicable to the Tanker War, notably the Third UN Conference on the Law of the Sea (UNCLOS III) which created the LOS Convention.\textsuperscript{785} The same procedure was followed for the Conventional Weapons Convention and its Protocols, a product of ICRC conferences.\textsuperscript{786} The Council, by citing and incorporating by reference freedom of navigation, the law of armed conflict, and occasionally specific treaties, e.g., the 1925 Geneva Gas Protocol or the 1949 Geneva Conventions,\textsuperscript{787} thereby gave further evidence of these agreements or customary law as norms. Since no binding Article 25 or 48 decisions incorporated them, these bodies of law did not become mandatory norms, but Council citation increased the strength of their applicability. Although the issue is not free from doubt, Resolution 598 may have clarified the debate as to the status of Article 40-based resolutions calling for action, which may be binding if the views of the US Secretary of State and other foreign ministers are correct.\textsuperscript{788}


Sub-Parts B.1 and B.2 of this Chapter have sketched development of norms of conduct by the Council and the Assembly. This Sub-Part examines the methodology of implementation of these norms by the Organization and by regional organizations, also contemplated by the Charter.

a. Implementation: Original Intent and Trends. The Charter contemplates that UN Members will agree to make armed forces, assistance and facilities, including rights of passage, available to the Council so that it can maintain international peace and security.\textsuperscript{789} These agreements have not materialized.\textsuperscript{790} The Charter also provides for a Military Staff Committee (MSC) to plan for applying armed force when the Council directs. The MSC consists of permanent Council members' chiefs of staff and would have strategic direction of forces at Council disposal.\textsuperscript{791} Owing to the Cold War and other factors such as the lack of Article 43 agreements, the MSC atrophied.\textsuperscript{792}

Alternatives to the Charter system have been suggested or implemented. One was the “agency” principle, by which the Council has requested a State or a group of States to take leadership and command of an operaton on the Council's behalf. The United States had this role in Korea, the United Kingdom for Rhodesia, and a Coalition in the 1990-91 Gulf War.\textsuperscript{794} UFP-based operations have used a
Collective Measures Committee for data reporting and dissemination. Some peacekeeping operations have been given to the Secretary-General for leadership. In interdiction/embargo operations for Rhodesia, South Africa, and Iraq in the 1990-91 Gulf War, the Council appointed a Committee to review these processes.

No peacekeeping forces were active in the Gulf area during the 1980-88 war; UNIIMOG served after the ceasefire and until the 1990-91 Gulf War. The Secretary-General reported on the conflict, at Council direction, but did not administer forces. Neither the Council nor the Assembly authorized forces’ intervention similar to the situation in Korea, Rhodesia or Kuwait. The Iran-Iraq conflict and its Tanker War component were governed by traditional inter-State relations and the law of self-defense.

b. Regional Arrangements Under the Charter. Article 52 permits regional arrangements or agencies to deal with matters relating to maintaining international peace and security “appropriate for regional action.” Members of these arrangements or agencies should “make every effort to achieve pacific settlement of local disputes” through these institutions before referring claims to the Council. The Council must encourage developing pacific settlement of regional disputes through these institutions, whether a matter is referred to the Council or a regional institution first. The Council can use these arrangements or agencies for enforcement under Council authority. It must be kept informed of action taken “or in contemplation” by regional institutions, as distinguished from post-attack reporting required in self-defense situations.

What constitutes an Article 52 regional arrangement or agency has not been resolved; the Arab League, the OAS and the Organization of African Unity (OAU) qualify. Not all regional organizations are Article 52 dispute resolution agencies; those whose function is self-defense get authority from Article 51’s inherent right of collective self-defense provision. There has been use of Article 52 as an alternative to Council or Assembly dispute resolution. For example, the United States referred the Cuban Missile Crisis issue to the OAS, obtained a resolution denouncing introduction of the missiles, and proceeded with quarantine. As Article 54 requires, the Council was notified. A regional organization resolution was also used in the Grenada crisis.

Four organizations, one with Article 52 status (the Arab League), the GCC, which may have that status, the WEU, and the ICO, which may also have that status, were involved in the Tanker War. Although hampered from time to time by internal dissension, the Arab League Summits’ resolutions condemned freedom of navigation violations and urged resolution of the conflict by the parties. The Arab League governor-general appeared before the Council in connection with debate on Council Resolution 552, brought by the GCC States,
complaining of attacks on freedom of navigation to and from their ports. The GCC played an active role in the war, evolving from an internal security organization to promoting joint action for mutual security. The WEU, concerned with European security, was cover for several States' Gulf maritime operations. The ICO attempted to serve as a mediator, particularly through GCC support.

Other regional organizations that could be said to have dispute resolution capability today, e.g., the European Community, passed resolutions but were not involved because the Tanker War occurred outside their geographic competence. Other governmental organizations not enjoying Article 52 status, e.g., the Group of Seven, also passed resolutions in connection with the war. None of these made law for the conflict, but their "soft law" status further evidences the strength of claims they advanced, e.g., freedom of navigation in the Gulf.

c. The Work of Nongovernmental Organizations and the Tanker War. The principal nongovernmental organization contributing to the law of the Tanker War was the International Committee of the Red Cross (ICRC), a Swiss corporation that sponsored conferences leading to 1977 Protocols I and II to the 1949 Geneva Conventions. The ICRC also sponsored conferences leading to adoption of the Conventional Weapons Convention and its protocols in 1980. The Security Council cited to the law of armed conflict generally and to the Geneva Conventions specifically, the work of the ICRC was cited in a Council resolution. Early in the war Iran accepted and Iraq rejected a proposal to move, under the Red Cross or UN flag, 70 ships caught in the Shatt by opening hostilities. The standards of ICRC-sponsored treaties had impacted norms applicable to the war, regardless of citation by the Council.

The International Transport Workers Federation (ITF), International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) expressed concerns over attacks on merchant shipping, and these were transmitted to belligerents by the UN Secretary-General.

Part C. Maritime Neutrality in the Charter Era

"There is nothing new about revising neutrality; it has undergone an almost constant process of revision in detail," Jessup concluded in 1936. He also believed that

... nothing could be more fallacious than the attempt to test the application of rules of neutrality by the principles of logic. Since they are products of compromise and of experience, logic has found practically no place in their development and cannot properly be used in their application.

Over half a century into the Charter era, little would change these observations. New considerations have appeared, including the Charter itself; the process of
analyzing the law of neutrality defies a straightforward, positivist, black-letter approach. Indeed, principles of neutrality for maritime warfare have been seen to be less rigid, from an historical perspective, than those for air or land warfare.\textsuperscript{832}

Some assert that neutrality is in "chronic obsolescence."\textsuperscript{833} A major reason, according to those who say that future applications of the law of neutrality will be minimal, is the argument that the Charter has ended the rights and duties of the old law of neutrality.\textsuperscript{834} Another argument is that since the Charter has outlawed war,\textsuperscript{835} therefore there can be no state of war, and therefore there is no need for a law of neutrality.\textsuperscript{836} (The latter position might be considered in light of the Pact of Paris (1928), which outlawed aggressive war.\textsuperscript{837} World War II began a decade later.)

Many others, reflecting State practice and claims in the Charter era, have maintained that the law of neutrality continues to exist. The \textit{San Remo Manual} recognizes maritime neutrality.\textsuperscript{838} The 1992-96 International Law Association Conferences received reports from its Committee on Maritime Neutrality, and the 1998 ILA conference accepted the Committee's final report.\textsuperscript{839} Individual researchers assert that neutrality remains a valid legal concept, albeit modified by the impact of the Charter and other considerations.\textsuperscript{840}

Like the reports of Mark Twain’s passing, accounts of the demise of neutrality in the Charter era have been greatly exaggerated, as the ensuing analysis demonstrates.

The law of neutrality before World War II and the Charter era has been traced in detail by Jessup, his associates and others,\textsuperscript{841} more analysis is needlessly repetitive. However, two groups’ research during 1919-39 is worthy of note, particularly for their collection and summary of State practice. They had considerable impact on State practice as the war widened but before it became global in 1941 with entry of the United States and other American countries into the war.

\textbf{1. Neutrality, 1928-41, and in the Charter Era; "Non-Belligerency"}

In 1928 the Pact of Paris was concluded. Subject to later agreements such as the Charter, the Pact remains in force today.\textsuperscript{842} The understanding concerning the inherent right of of self-defense under the Pact applies in the Charter era and can be claimed today, subject to principles of necessity, proportionality, and for anticipatory self-defense, a situation admitting of no other alternative.\textsuperscript{843} Neutrality principles also carried forward into the Charter era, subject to modification by Charter law and the usual processes of change in the law Jessup saw in 1936.\textsuperscript{844}

The Pact did not address the neutrality issue, although other agreements contemporaneous with it stated the term without defining it,\textsuperscript{845} except for the Havana Convention on Maritime Neutrality, with eight American countries party, including the United States,\textsuperscript{846} and the five-State 1938 Nordic Rules of Neutrality,\textsuperscript{847} not a formal treaty but published in the \textit{LNTS} series.\textsuperscript{848}
182 The Tanker War

The ILA 1934 meeting approved the *Budapest Articles of Interpretation* of the Pact of Paris. They provide in part:

1. A signatory State cannot, by denunciation or non-observance of the Pact, release itself from its obligations thereunder.
2. A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.
3. A signatory State which aids a violating State thereby itself violates the Pact.
4. In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:
   a. Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;
   b. Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;
   c. Supply the State attacked with financial or material assistance, including munitions of war;
   d. Assist with armed forces the State attacked.
5. The signatory States are not entitled to recognise as acquired de jure any territorial or other advantages acquired de facto by means of a violation of the Pact.
6. A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals.
7. The Pact does not affect such humanitarian obligations as are contained in general treaties....

Although some States and commentators said when the *Articles* were approved that no State had adopted them as policy, in 1941 the US Congress heard former Secretary of State Stimson's testimony on the pending Lend-Lease Bill; he interpreted the Articles as an authoritative statement of the law. He echoed views of Secretary of State Cordell Hull and Attorney General Robert H. Jackson on the point, that since Axis nations had breached the Pact of Paris, the United States could resort to self-defense. Besides self-defense, under the *Budapest Articles* States could adopt a status of nonbelligerency, i.e., decline to observe neutrality toward a Pact violator. States could supply a State that was a target of a Pact violator with "financial or material assistance, including munitions of war." (Put differently, Pact parties could engage in reprisals involving force or other modalities or retorsions. In the Charter era, reprisals involving use of force by States not party to a conflict are inadmissible. In the pre-Charter era assisting victims of aggression or armed attacks was styled as nonbelligerency, an intermediate step between neutrality and belligerency.)

The Lend-Lease Bill was enacted. Congress, by enacting Lend-Lease in this context, can be said to have stated US practice at that time, and the *Budapest Articles* as part of that practice. It is submitted that when the Allies and other neutrals
accepted Lend-Lease through bilateral agreements, they ratified and accepted this practice. The 1940 UK-US destroyers-for-bases agreements were also examples of the United States’ assuming nonbelligerent status. These, however, were only bilateral arrangements, although the US general pro-Allied stance was then apparent.

The United States was not the only country to assume a nonbelligerency posture during 1939-45. For example, Norway’s November 1939 charter arrangement for 1.5 million tons of tankers with Britain favored the United Kingdom against the Axis. Others officially or unofficially adopted policies tending to favor one side or the other, sometimes before becoming belligerents (e.g., Italy, which supported Germany, or American States participating in US Lend-Lease agreements before declaring war) and in other cases staying out of the war but keeping nonbelligerent status (e.g., Spain). This World War II practice tends to add support for recognizing nonbelligerency as an intermediate position, under international law, between neutrality and belligerency.

The ILA was not the only group of scholars in the interwar years with a view that there could be gradations or stages between belligerency and neutrality. The 1939 draft Harvard Aggression Convention differentiated among aggressors; defending and co-defending States, entitled to all rights of self-defense; and “supporting States,” entitled to discriminate against an aggressor by other than armed force. A supporting State was entitled to “rights which, if it were neutral, it would have against a belligerent.” An aggressor retained its duties to those entitled to neutrality status. Other States would have had these rights under Articles 12 and 13:

A State which is not an aggressor, a defending State, a co-defending State, or a supporting State, does not, in its relations with the aggressor, have the duties which, if it were neutral, it would have to a belligerent, but, against the aggressor, it has the rights which, if it were neutral, it would have against a belligerent.

Subject to ... Article 7 and 8, a State which is not an aggressor, a defending State, a co-defending State, or a supporting State, has, in its relations with a defending State, a co-defending State or a supporting State, the duties which, if it were neutral, it would have to a belligerent; and has against those States the rights which, if it were a neutral, it would have against a belligerent.

The Comment to the “supporting State” definition elaborates on the term in the Draft Convention:

... “[S]upporting State” is used in a special way. A “supporting State” might give to a defending State even greater assistance than was given by a “co-defending State” but it would do so without use of armed force.

The action taken by a supporting State to assist a defending State would take the form of some kind of discrimination against the aggressor or in favor of the defending
State. The State may take such action and assume such status for a variety of reasons but presumably its reasons will include a desire to deter, restrain or even perhaps to punish an aggressor. The discriminatory action may take the form of economic or financial embargoes directed against the aggressor. It might be restricted to a withdrawal of diplomatic and consular representatives from that State or to participation in the determination that the State violated its obligation not to resort to force. It might not take the form of any measures directly against an aggressor but might rather be in the form of aid—financial, economic or otherwise—to the defending State.

Recitations of State and League of Nations practice demonstrates that there was support among States, great and small, for the form of nonbelligerency not involving direct use of force. In effect, the Draft Convention's definition of supporting State comes close to the armed neutralities of the Seventeenth and Eighteenth Centuries and the Napoleonic Wars when neutrals cooperated to get cargoes through. This was also almost precisely the circumstance of the United States in the destroyers-bases deal, its convoy operations in the North Atlantic before entry into World War II, and Lend-Lease. It was the US posture during the Tanker War when it convoyed neutral merchantmen to and from Kuwait. The same was true for States other than belligerents that accompanied or escorted merchantmen flying flags of States other than the belligerents, regardless of who was the aggressor during the Tanker War. At least one commentator has stated that the Budapest Articles principle of aid against an aggressor, or its correlative of supporting State action under the Draft Convention, applies in the Charter era.

Most recent commentators say there is no intermediate position between belligerency and neutrality, i.e., there is no legal foundation, or perhaps need, for nonbelligerency. Unlike the Harvard Draft Convention view, nonbelligerents can claim no rights from that status. However, the problem may lie more in defining neutrality, according to Tucker. If neutrality is defined as non-participation in hostilities, i.e., as a belligerent or nonbelligerent, a non-participant neutral incurs belligerent responses only when, and to the extent, favoritism is shown. Belligerents can respond by non-force reprisals or retorsions. If it is assumed that the United States and others connected with Gulf commerce in the Tanker War favored one belligerent over the other, (e.g., Iraq over Iran), Iran could impose proportional non-force reprisals after due notice and opportunity for correction necessary in the situation. Iraq could do the same, and either could employ retorsions too. Iran could not, even under this theory of neutrality, move straightway, without notice, to forcible response, e.g., attacks on and destruction of neutral shipping.

Besides the US position before entry into World War II and its stance during the Iran-Iraq war, nearly every conflict of reasonable duration during the Charter era has involved situations of nonbelligerency in maritime warfare. This was true for the Korean War, with its UN law overtones. It was also true for the Arab-Israeli
conflicts. The India-Pakistan conflicts were less clear on the point. The United States materially assisted the United Kingdom in the Falklands/Malvinas war, supplying fuel and intelligence; the United States and other countries, through economic sanctions, also indirectly assisted the United Kingdom. Moreover, if the view is taken that negative preferences for one belligerent over another, e.g., cutting off arms supplies to one side as opposed to aiding one belligerent while embargoing the other, amounts to nonbelligerency, during the Tanker War many States had nonbelligerent status: France, most of the Arab States, and the USSR. The United Kingdom, with its 1987 export credit agreement with Iraq despite its asserting even-handed strict neutrality, might be said to fall into this category.

Regardless of the commentators' position, the record of armed conflicts since World War II has been that if the confrontation is of any length, States may declare and practice strict neutrality, declare neutrality and act as nonbelligerents, or do nothing, perhaps ignoring (or being unaware of) the situation. The law of neutrality has been applied in the Charter era, perhaps not consistently, and claims for a right to act as a nonbelligerent, i.e., favoring one or more belligerents at the expense of others, persist.

Is nonbelligerency a violation of the law of neutrality, or a status without legal standing between the traditional roles of neutrality and belligerency? The response today lies not in the traditional analyses, stretching back centuries, but in the developing norms under the Charter. The old principles of neutrality have been modified by the advent of the Charter. The same is true for nonbelligerency, where an overlay of Charter law helps define these situations and can give them legitimacy, not as an exception to traditional rules of neutrality, whether stated in treaties or custom, but as application and interpretation of the Charter.

Responses to aggressors can include proportional reprisals not involving use of force and retorsions, and States that are not belligerents whose interests have been damaged by belligerent action can invoke these, along with state of necessity. These alternatives remain as options in the Charter era, and taking such actions could demonstrate favoritism for one belligerent because of actions taken against the other. In effect, the actor State would have the appearance of being a nonbelligerent by so acting.

Examples from recent conflicts illustrate the point. During the Falklands/Malvinas War, States in Europe attempted to isolate Argentina economically, most likely in violation of international obligations. These reprisal actions were justified against the aggressor in that war. If actions of the United States and other countries supplying economic assistance, intelligence and other information to the United Kingdom would be deemed unlawful, those actions were also appropriate nonforce reprisals under Rio Pact mutual security for Argentina's violation of territorial integrity. Governments' actions to convoy, escort or offer protection
to neutral ships not carrying warfighting/war-sustaining goods to belligerent ports during the Tanker War were retaliatory in nature. These were unfriendly acts directed toward a belligerent thought to have violated international law.

In essence, the principles of law applicable to the intermediate status between belligerency and neutrality need not necessarily depend on development of a customary practice recognized as law however the trend may seem to have been since 1939 and continuing into the Charter era, or upon resolution of the debate among the commentators. The Charter-governed norms apply to fill the void to permit non-force reprisals and retorsions by neutrals that might have evoked claims of nonbelligerency before 1945, neutrals that retain an inherent right of self-defense. Moreover, principles of treaty-based informal self-defense arrangements, which also continue in the Charter era, permit responses by States not party to a conflict involving use of force, provided other criteria, e.g., necessity and proportionality, are met. One problem with informal self-defense arrangements, like the problem of aid to a country which is a target of aggression, is the stance the purported aggressor may take. If the purported aggressor says, rightly or wrongly, that the target is the aggressor, then the aiding State may subject itself to claims, and worse, of aiding the aggressor. Another problem with relatively clandestine material aid, or with informal self-defense, is notice. Although security treaties sometimes are not published, many are, and all can see who is aligned with whom. This is not the case with clandestine aid to a target or informal collective self-defense agreements. These kinds of transactions carry with them the same kinds of risks of misinterpretation and accusations when States act pursuant to them without notifying other States of the reasons for their actions. States so acting must take these factors into account when assisting target States pursuant to these modalities.

2. The Law of Neutrality in the Context of UN Action Under the Charter

Sub-Part C.1 has demonstrated that neutrality, primarily as practiced in the Nineteenth Century, has been modified in the Charter era, although the general concept of neutrality remains. The further question is the impact that UN actions, particularly by the Security Council, may have on this corpus of law. As recited earlier, decisionmaking options under the Charter, and practice under the Charter, demonstrate that there has been and will be ample room for claims of neutrality or nonbelligerency.

First, although the Council may make legally-binding decisions under Articles 25 and 48 of the Charter, and therefore may obligate UN Members under Articles 41-42 to take action that might be inconsistent with traditional neutrality principles, the Council also may make nonbinding "call[s] upon" Members under Articles 40-41. It also may make nonbinding recommendations under Articles 39-40. These recommendations have no more force of law, unless they restate custom,
general principles or treaty-based norms, than General Assembly recommendations under Articles 10-11, 13 and 14. 890

Thus, Council decisions may compel a State to behave inconsistently with traditional neutrality practice, either in requiring what would otherwise be belligerent acts or in restricting rights traditionally enjoyed by neutrals. 891 Article 50, invoked by the Council for States affected by the Council-directed embargo of Iraq during the 1990-91 Gulf War, 892 allows it to consult with States finding themselves with “special economic problems” arising from carrying out Council-decided preventive or security measures. Thus even if Jordan and like-status States would have lost some or all of their rights and duties as neutrals through initial Council decisionmaking in that war, an Article 50 reprieve could have restored some or all of these rights and duties. Council action under Article 50 could result in greater rights, or lesser duties, than under the traditional law of neutrality.

Second, Council decisions when first taken may include exemptions that would, in effect, allow reversion to traditional neutrality law. For example, sea and air embargoes against Iraq in the 1990-91 war and against the former Yugoslavia beginning in 1991 had exemptions for medical supplies, humanitarian supplies, and foodstuffs notified to the Council’s Sanctions Committee, which includes representatives from all Council members 893. To that extent, and except when otherwise controlled by other effects of Council decisions—e.g., the Committee—the traditional law of neutrality would apply to such shipments. This exception has been most apparent when the Council has decided to embargo only a single commodity—e.g., petroleum, weapons or military equipment 894—followed by recommendations on, calls for, or decisions on, enforcement. In that situation the law of the resolution would apply to selected commodities, while neutrality rules would be in force as to other goods if armed conflict is involved. Thus far that situation has not arisen. The classic case was Rhodesia (1965) which did not involve international armed conflict, and only selective enforcement as to one commodity, petroleum. 895 As to commodities not stated in a selective Council decision, neutrality principles would apply. If Article 42 measures approve use of force for some circumstances but not for others, and use of force is appropriate in those other circumstances, the law of neutrality will apply in those circumstances. 896 For example, if the Council decides on an air-land campaign against an aggressor, with no decision on maritime aspects of the crisis, the maritime law of neutrality applies to maritime aspects of the situation to the extent that the Council decision’s impact does not overlap into maritime issues. An example might be air flights over the seas. If an air-land related resolution is in force, it would apply to ocean overflights to and from the affected State, except as to purely maritime-oriented flights, e.g., helicopter resupply from ship to ship.

The third point is the relative infrequency of application of mandatory Council decisions. Of the hundreds of crises since 1945 that have involved a potential for
armed conflict or actual conflict and which could be said to risk a "threat to the peace, breach of the peace, or act of aggression," mandatory Council decisions have governed only a handful. In terms of the potential for or actual warfare at sea, six crises have produced Council decisions: Rhodesia (1965), the Gulf War (1990-91), the disintegration of Yugoslavia (1991), Angola (1992), Liberia (1992) and Haiti (1993). Even the Korean War evoked only Council calls or recommendations for action before the USSR vetoes, and thereafter General Assembly recommendations under the UFP Resolution. To be sure, some calls for action and recommendations were well-supported, but they did not carry the force of decisional law. When the Council approves other than decisions, resulting resolutions, although confessedly highly persuasive and authoritatively stated from political and policy perspectives, are nonetheless recommendatory as a matter of law. In the latter case—the overwhelming bulk of resolutions the Council has voted to date—there has been and will be full opportunity for the law of neutrality to operate. Widespread compliance with calls for action or recommendations could eventually mature into custom, but it is doubtful whether State practice under them would be of sufficient duration, assuming States accept the action as law. (Sanctions practice against Iraq and the former Yugoslavia may be candidates for congealment into custom, however.) In any event, neutrality principles would exist between the precipitating event, e.g., breach of the peace, and Council action.

Even if the Council decides on action, the enforcement mechanism has not been the Military Staff Committee and special forces the Charter contemplates. Rather, it has often used an agency principle, choosing a State or group of States to respond to the crisis, with one nation perhaps chosen for a leadership role—the United States for Korea, the United Kingdom for Rhodesia, and a coalition for the 1990-91 Gulf War. In these situations agent State(s) might be involved in enforcing the law of neutrality, even though there are overarching Council resolutions. Such was the case for Korea, where the US-declared blockade involved observing neutral vessel rights to visit nearby USSR ports and a right of USSR warships to proceed to North Korean ports. In recently-ordered embargo operations, the Council has not designated a leader, resulting in confusion.

The Security Council's Tanker War resolutions fell into the first and third categories of exceptions, i.e., no State including the belligerents was obligated to obey a Council resolution, except through calls for action, demands, or recommendations. Thus the principles of neutrality had full potential play for that war. Other conflicts, particularly the ongoing situation that began with the Gulf War of 1990-91 and disintegration of the former Yugoslavia, demonstrate that gaps in Council decisions, or its methodology of taking action, leave copious opportunities for applying neutrality principles. These principles may well not be the same as those before the Charter era, since actions in individual and collective self-defense must be factored in, but neutrality as a concept continues to exist.
Moreover, the Council appears to have approved *sub silentio* the concepts of neutrality and perhaps nonbelligerency as well. International agreements concluded since 1945, including the 1949 Geneva Conventions, the most widely accepted multilateral treaties of any, have continued to use the terms "neutral" and, more rarely, "nonbelligerent." These conventions were cited by the Council during the Tanker War, and again during the 1990-91 Gulf War. The Council referred to "states not party to the hostilities" in Tanker War Resolution 552. Furthermore, there is nothing in practice under the Charter to indicate that earlier conventions dealing with neutrality are invalid under the Charter. To the extent that earlier treaties have crystallized into custom, they exist in that mode as a valid source of law.

3. Appraisal of Neutrality in the Charter Era

Undeniably neutrality as a general concept has as much vitality today as in the pre-Charter era. The claim, that there is a customary right to assert an intermediate status of nonbelligerency between traditional neutrality and belligerency, may have been strengthened since 1945. The precedents in some cases are almost identical with those in the last two centuries. Even if nonbelligerency cannot be asserted as a customary norm, the overlay of principles of retorsion, reprisals not involving use of force, and state of necessity, apply to support actions at variance with a practice of strict neutrality in the traditional sense. Because of options under the Charter for nonbinding resolutions by the Security Council and perforce the General Assembly, the potential for exceptions even with a binding Council decision, and the relative scarcity of Article 25/48 Council decisions, the opportunity for claims of neutrality—perhaps modified by the new nonbelligerency of the Charter era—remains large. "Far from being moribund, these traditional rights [of neutrality and self-defense] apply logically in conditions of limited wars"—the type of conflicts that have beset the planet since 1945—"even more rigorously than in conditions of total war."

Part D. Sources of the Law, Principles of the Law of Treaties and Treaty Succession

This Chapter has integrated Charter interpretation principles, notably the supremacy of the Charter over treaties, the problem of custom or general principles of law contrary to the Charter, and the possibility that parts of the Charter may restate *jus cogens* norms, however that concept may be defined. This Part examines principles of the law of treaties and treaty succession, with a closer review of the effect of war on treaties generally, and the relationship between the LOS Convention and the law of armed conflict.

Principles of treaty interpretation, treaty succession, and acquiescence in or objection to custom have been noted. The possibility of coercion, e.g., threat or use of force contrary to Article 2(4) of the Charter, to which might be added various forms of error or corruption, has been cited. (If a treaty is negotiated in connection with a State's aggression in violation of the Charter, i.e., an armistice or surrender by the aggressor, coercion principles do not apply. Economic coercion, e.g., sanctions imposed as nonforce reprisal or retorsion, does not invalidate a treaty either. If the Security Council decides on sanctions, or calls for them, Charter law also trumps a target State's economic coercion claims.)

Other assertions of the inapplicability of treaties can arise because of claims of material breach, impossibility of performance, or fundamental change of circumstances. Desuetude and state of necessity may vitiate a treaty. In the view of some, unequal treaties can also negate a treaty's effectiveness.

A treaty may be subject to severability. Part of it may remain in force, part may be suspended, part may be terminated, all may be suspended, or all may be terminated, depending on the nature of the treaty's terms.

Against these must be balanced the principle of pacta sunt servanda—treaties should be observed. Moreover, even though a treaty may not be in force, perhaps because a State is not a party to it, it may restate a customary rule or a general principle of law. These analyses must be considered in addition to the factorial approach for sources of law. Whether these doctrines, e.g., fundamental change of circumstances, apply to a given situation, is determined in the United States by the executive and not the courts. In general, a military commander should refer these matters to an operational law specialist, who can check with higher authority; however, commanders should be aware of these doctrines' implications.

2. War and Termination or Suspension of Treaty Obligations

The Vienna Convention on the Law of Treaties takes no position on the effect of war on treaties; the issue is left to customary rules. War might possibly raise a claim of fundamental change of circumstances, or perhaps other bases, e.g., impossibility of performance.

Treaties establishing an international organization, such as the United Nations, are not affected by conflicts of the parties. States may suspend a treaty's operation when they exercise the inherent right of individual or collective self-defense in accordance with the Charter. If complying with a Council resolution dealing with action on threats to the peace, breaches of the peace or acts of aggression conflicts with a treaty or a treaty requirement, States may suspend or end the treaty's operation to the extent treaty performance is incompatible with the resolution. The Institut de Droit International has stated that an aggressor shall not terminate or suspend operation of a treaty if it would benefit thereby.
There is no general rule as to when or which treaties continue in operation during armed conflict.945 A treaty may be subject to severability in this context, i.e., all of it may remain in force, part may be suspended, part may be terminated, all may be suspended, or all may be terminated.946 Treaties may provide for continued operation during war; the Chicago Convention explicitly says so.947 Because of their nature or purpose, some treaties are regarded as operative during armed conflict, those governing humanitarian law or neutrality being prime examples.948 In other cases, e.g., the Treaty of Rome or NAFTA, a treaty may be suspended during armed conflict or when a State's vital national interests are at stake.949 A treaty may declare it does not apply during war.950 As noted above, these principles may well be subject to the Charter's clause paramountcy.951

3. The LOS Conventions and the Law of Armed Conflict: “Other Rules” Clauses952

The 1958 and 1982 LOS Conventions953 include clauses, sometimes overlooked in analysis or commentary, stating the rights under these treaties are subject to “other rules of international law,” as well as terms in the particular convention. For example, LOS Convention, Article 87(1), which declares high seas freedoms, adds that “Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.” The overwhelming majority of commentators—including the International Law Commission, a UN General Assembly agency of international law experts955—has stated that the Conventions’ other rules clauses refer to the law of armed conflict,956 a component of which is the law of naval warfare. Provisions such as Article 88 of the 1982 Convention state a truism, i.e., the high seas are reserved for peaceful purposes.957 However, high seas usage can be subject to the LOAC, when Article 87(1)'s other rules clause is read with Article 88. As in the case of the 1958 Conventions,

That provision does not preclude . . . use of the high seas by naval forces. Their use for aggressive purposes, which would . . . violate . . . Article 2(4) of the Charter. . . . is forbidden as well by Article 88 of the 1982 Convention. See also LOS Convention, Article 301, requiring parties, in exercising their rights and performing their duties under the Convention, to refrain from any threat or use of force in violation of the Charter.958

This analysis is buttressed by the Charter's trumping clause; no treaty, including the LOS conventions, can supersede the Charter.959 The peaceful purposes language in Article 88 and other Convention provisions cannot override Charter norms, such as those in Article 2(4), but also those in Article 51, i.e., the inherent right of individual and collective self-defense.960 Of course, naval forces of States not involved in armed conflict may use the oceans for military purposes, although
these forces may be restricted in some maritime zones, e.g., the territorial sea.\textsuperscript{961} The other rules clauses in the LOS conventions come into force for States engaged in armed conflict.

To the extent that the LOS conventions recite customary norms—and such is the case for the High Seas Convention\textsuperscript{962} and the LOS Convention’s navigational articles\textsuperscript{963}—the other rules clauses are part of custom and are therefore in force for countries not party to one or the other of the Conventions. For those States party to the 1958 Conventions or LOS Convention, the customary status of the other rules clause is doubly in force.\textsuperscript{964} The LOS conventions may inform, i.e., give content to gaps in the LOAC, much as the law of self-defense may be informed by the LOAC. The law of the sea also can inform the content of Charter law, e.g., Security Council resolutions.\textsuperscript{965}

The conclusion is inescapable that the 1958 Conventions’ other rules clauses, carried forward into the 1982 Convention, means that these treaties’ terms are subject to the law of armed conflict, of which the law of naval warfare is a part. Since the High Seas Convention, parts of the other 1958 Conventions and the 1982 Convention’s navigational articles are part of customary law,\textsuperscript{966} the other rules clause is also part of customary law governing oceans law during armed conflict. Moreover, the other rules clauses can also inform, i.e., give content to, Charter law, e.g., Council resolutions and the law of self-defense.\textsuperscript{967}

Part E. Conclusions

The UN Charter has been invoked in many armed conflicts since the Charter was signed in 1945. In some ways this has changed options available to States. Under the majority view, a State cannot use reprisals involving use of force during time of peace.\textsuperscript{968} The doctrine of necessity, i.e., a State may take what action it deems necessary for self-preservation, may be of questionable validity today.\textsuperscript{969} Article 103 of the Charter declares that all treaties are subject to it; whether customary law is equally subject to the Charter is open to question.\textsuperscript{970} The Charter condemns armed attacks and aggression, and Article 51 permits self-defense against armed attacks and aggression, in the French text.\textsuperscript{971} This permits responses for attacks on merchant ships at sea, including those sailing independently, as most do.\textsuperscript{972} The Charter also permits the Security Council to make binding decisions that have the force of treaty law for UN Members.\textsuperscript{973} The Council and the General Assembly may also call upon States for action, or recommend it; these resolutions have no intrinsic force but may restate law, and practice under them may develop into custom.\textsuperscript{974}

Article 51 preserves the inherent right of individual and collective self-defense; these options have the same content and scope today as they did before World War II.\textsuperscript{975} States may respond in individual or collective anticipatory self-defense, so long as the response is necessary, proportional and admitting of no other option, as
perceived by the decisionmaker at the time of response.976 States may also react, individually or collectively, in self-defense to attack or aggression, i.e., after the attack or aggression has occurred, so long as the response is necessary and proportional.977 States also may respond with retorsions, i.e., action that is unfriendly but lawful, or they may reply with reprisals not involving use of force.978 Rather than requesting Security Council action, States may also employ regional organizations to maintain international peace and security.979

Besides Charter standards, an independent, customary norm of the right to self-defense exists alongside Article 51.980 The right to self-defense may have jus cogens status today.981 Collective self-defense may be asserted through bilateral or multilateral treaties, but nothing in the Charter forbids more informal arrangements.982 If Article 51 supersedes, through Article 103, treaty norms, e.g. those in the law of armed conflict, any Article 51 response should receive its content from the LOAC.983 By parity of reasoning, any self-defense claims based on custom and not on Article 51 as part of a treaty, i.e., the UN Charter, should also receive their content based on the LOAC.984

Besides the appealing symmetry of logic behind this approach, there are practical policy reasons for following law of armed conflict standards in any self-defense claim. These are illustrated by the Tanker War.

First, both Iran and Iraq claimed the other was guilty of aggression and that therefore the response was in self-defense. Even today, despite the opinion of some States through their reactions that Iran was the aggressor, the issue remains unresolved, and may remain unresolved for a long time. However, the peripheral legal consequences flowing from the initial acts by these States in 1980—e.g., attacks on merchant ships—had impact on third States, who had only one known standard to observe, i.e., the LOAC. Ultimately, only one State, Iran or Iraq, was guilty of aggression, and only one State, Iran or Iraq, could legitimately claim self-defense. The aggressor was bound by LOAC standards.985 Since the issue was and is in doubt, the only standard for measuring self-defense was the LOAC. This was how the United States behaved with respect to destruction of Iran Ajr and the oil platforms and in convoy operations. The Iran Ajr crew was repatriated, following humanitarian law standards; oil platforms occupants were warned and given an opportunity to leave, paralleling Hague IX.986

Second, this approach is congruent with the longstanding rule, in place long before the Charter, that humanitarian law treaties or those governing neutrality remain in effect during war.987 As a theoretical matter, given Charter supremacy under Article 103, a State could act under Article 51 independently of these norms. The Security Council held the view that these standards should be observed, regardless of who had a legitimate self-defense claim, in its resolutions condemning attacks on civilian centers, merchant ships and in citing the Geneva Conventions and the Geneva Gas Protocol.988 Any self-defense claim should be conditioned by
LOAC standards and humanitarian law standards in particular, whether that self-defense claim is based on Article 51 as treaty law or whether it is grounded in custom. The policy, public relations and practical considerations are obvious; that is what States and people expect today, regardless of the niceties of legal analysis.

Third, observing LOAC treaty norms in the context of Article 51, treaty-based self-defense claims is consistent with the policy of *pacta sunt servanda*, itself a policy of the Charter, Article 2(2).989

The law of neutrality remains in full force and vigor in the Charter era, albeit perhaps conditioned by Charter law in given situations. For example, a Security Council decision could alter traditional contraband rules.990 Practice of States since World War II calls to mind the historic claims for the intermediate state of nonbelligerency, between neutrality and belligerency, although whether this has ripened into custom is an open question. It could be said that this practice amounts in some cases to informal collective self-defense, which is permitted under the Charter. In other situations a debate remains as to whether international law recognizes an intermediate status between belligerency and neutrality. Most countries, including the United States, say that there is no intermediate stage of non-belligerency.991

Charter considerations apart, decisionmakers must continue to take into account traditional principles of sources of law, treaty interpretation including the impact of war, and treaty succession.992 The LOS conventions' other rules clauses mean that the conventions are subject to the law of armed conflict.993

NOTES


2. See e.g. McDougall et al., Law and Public Order, n. 1, 94-95; McDougall & Burke 36; McDougall, Lasswell & Chen 161-62; see also Myers S. McDougall, The Hydrogen Bomb Tests, 49 AJIL 357-58 (1955); McDougall et al., Theories, n. 1.35, 202-03; McDougall et al., The World, n. 1, 256-57; Moore, Prolegomenon, n. 1.35, 667; Suzuki, n. 1.35, 19, 30-34; Walker, Sea Power, n. 1.35, 309.

3. Id. at 309; see also McDougall, The Hydrogen, n. 2, 357-58.


5. See, e.g., nn. II.215 and accompanying text.


7. See generally Philip C. Jessup, Transnational Law 2 (1956).

8. Cf. McDougall & Feliciano 339-40; NWP I-14M Annotated ¶5.1 n.4 & fig. A5-1; NWP 9A Annotated ¶5.1 n.3 & fig. SF6-1.


10. UN Charter, art. 103; see also Nicaragua Case, 1984 ICJ 440; Vienna Convention, art. 30(1); SIMMA 1119-23; Francis Deak, Neutrality Revisited, in Transnational Law in a Changing Society: Essays in Honor of Philip C.
JESSUP 137, 143 (Wolfgang Friedmann et al. ed. 1972). The later-in-time rule of Vienna Convention, art. 59, states the same principle as to the Charter and pre-1945 treaties, but UN Charter, art. 103, says the Charter supersedes later treaties as well. To the extent that the Charter, and actions pursuant to it, would be considered customary law, undoubtedly the later custom would triumph on inconsistent customary obligations under the older treaties. Nicaragua Case, 1986 ICJ at 31-38, 91-135. Customary Charter law would also weight heavily in the balance under traditional source analysis, e.g., ICJ Statute, art. 38(1) and RESTATEMENT (THIRD) §§ 102-03, as to “new,” post-Charter custom, whether derived from contrary State practice or from, e.g., restatements in international agreements or resolutions of international organizations. To the extent that Charter-stated norms have ascended to jus cogens status, they prevail. Commentators differ widely on the scope of jus cogens. See generally Vienna Convention, art. 64; T.O. ELIAS, THE MODERN LAW OF TREATIES 177-37 (1974); 1 OPPENHEIM §§ 2.642, 653; RESTATEMENT (THIRD) §§ 102 r.n. 6, 325 cmt. b, 331(2), 338(2); Sinclair 17-18, 85-87, 94-95, 160, 184-85, 218-26, 246 (Vienna Convention, art. 64 considered progressive development in 1984); SIMMA 1118-19; GRIGORI I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans. 1974); Levian Alexidze, Legal Nature of Jus Cogens in Contemporary Law, 172 RCADI 219, 262-63 (1981); John N. Hazard, Soviet Tactics in International Lawmaking, 7 DENV. J. INT’L L. & POL’L. 9, 25-29 (1977); Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, 159 RCADI 1, 64-69 (1978); Walker, Integration and Disintegration 60, 63, Mark Weisbord, The Empinity of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina, 17 MICH. J. INT’L L. 1 (1995). Nicaragua Case, 1986 ICJ at 100-01 held UN Charter, art. 2(4) was customary law having the character of jus cogens.


12. By contrast, the US position was that the law of armed conflict (LOAC) should be applied during the conflict. See n. II.84.

13. GOODRICH et al.; RUTH B. RUSSELL & JEANETTE E. MITHUR, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945 (1958) are the best general contemporary accounts; see also SIMMA 2-23. Revisionist analyses, e.g., ROBERT C. HILDEBRAND, DUNBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS (1990) have appeared, now that classified documents and private papers have been opened.

14. GOODRICH et al. ix summarizes practice through January 1, 1966. SIMMA’s trend studies run through late 1993; see also Repertoire of Practice of the Security Council; Repertory of Practice of United Nations Organs; and Yearbook of the United Nations. GOODRICH et al. ix.


16. UN Charter, Preamble; see also SIMMA 45-48.

17. GOODRICH et al. 650; SIMMA 157-58. See also UN Charter, art. 110; GOODRICH et al. 648-49; SIMMA 1191-95. Id. art. 4 declares procedures by which new members are admitted. See also GOODRICH et al. 85-96; SIMMA 158-75.
18. Compare S.C. Res. 552 (1984), in WELLINS 473, with UN Charter, Preamble. Resolution 552 condemned Iranian attacks on commercial shipping en route to and from Gulf Cooperation Council ports during the Tanker War. See also n. II.258 and accompanying text.

19. GOODRICH et al. 21; cf. SIMMA 48.


21. Friendly Relations Declaration, in 9 ILM 1292 (1970); see also SIMMA 48.


23. E.g., Definition of Aggression, in 69 AJIL 480, 483 (1975), incorporating by reference Friendly Relations Declaration. The AJIL Definition of Aggression version omits id., art. 3(d):

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2 (of the Resolution), qualify as an act of aggression.

... 

(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State....


24. GOODRICH et al. 28, citing Doc. 644, I/34(1), 6 UNCIO 446-47 (1945); see also RUSSELL & MUTHER, n. 13, 911.

25. GOODRICH et al. 20; SIMMA 48.

26. Id. 25-26; Certain Expenses of the United Nations, 1962 ICJ 151, 213-15 (Fitzmaurice, J., sep. opin.). SIMMA 50-52 does not assign any priority to UN Charter, art. 1(1).

27. UN Charter, art. 1(1).

28. GOODRICH et al. 28; compare UN Charter, art. 1(1), with id., arts. 2(7), 5, 39, 41-42, 50; see also n. 14 and accompanying text.

29. GOODRICH et al. 28, citing Doc. 644, n. 24, 453.

30. UN Charter, art. 2(1); see also SIMMA 73-74. National sovereignty, although diminished and eroded in some situations, remains a fundamental principle of international law. LOS Convention, art. 157(3); Vienna Convention, preamble; S.S. Lotus (Fr. v. Turk.), 1927 PICJ (ser. A), No. 10, at 4, 18; S.S. Wimbledon (UK v. Ger.), 1923 id., No. 1, at 15, 25; Friendly Relations Declaration, in 9 ILM 1292 (1970); U.N. Secretary-General, An Agenda for Peace: Report of the Secretary-General on the Work of the Organization, UN Doc. A/47/277, S/2411 (1992), in 31 ILM 956, 959 (1992); MICHAEL AEKURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 21-23 (Brian Chapman ed., 3d ed. 1977); BRIEFLY 45-49; BROWNLIE, INTERNATIONAL LAW ch. 13; MCNAIR 754-66; GOODRICH et al. 36-40; RESTATEMENT (THIRD), Part I, ch. 1, Introductory Note, 16 &17; SIMMA 79-87; R.P. Anand, Sovereign Equality of States in International Law, 197 RCADI 9, 22-51 (1986); Boutros Boutros-Ghali, Empowering the United Nations, FOREIGN AFF. 89, 98-99 (Winter 1992); Jonathan I. Charney, Universal, n. 1,32, 530; Gerald Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 RCADI 1, 49-50 (1957); Louis Henkin, International Law: Politics, Values and Functions, 216 id. 9, 46, 130 (1989); Oscar Schachter, International Law in Theory and Practice, 178 id. 9, 32 (1982); Humphrey Waldock, General Course on Public International Law, 106 id. 1, 156-72 (1962).

31. See nn. 47-157 and accompanying text.

32. UN Charter, art. 1(2); see also SIMMA 53.


34. E.g., UN Charter, art. 1(2).
36. GOODRICH et al. 31-32.
37. Covenant on Civil & Political Rights, art. 1; Covenant on Economic, Social & Cultural Rights, art. 1.
39. GOODRICH et al. 32.
40. See Walker, State Practice 141.
41. S.C. Res. 202, 217 (1965); 221, 232 (1966); 253 (1968); 277, 288 (1970); 314, 318, 320 (1972); 333 (1973); 388 (1976); 409 (1977); 437 (1978); 460 (1979); 485 (1980), in WELLINS 125-50; see also nn.— and accompanying text.
42. See Walker, State Practice 142-43.
43. See n. 37 and accompanying text.
44. See generally, e.g., nn. II.218, 251 and accompanying text.
45. S.C. Res. 540 (1983), in WELLINS 451; see also nn. II.216-18 and accompanying text.
46. S.C. Res. 552 (1984), in WELLINS 473; see also nn. II.251-60 and accompanying text.
48. GOODRICH et al. 42-43; see also nn. II.437-45 and accompanying text.
49. S.C. Res. 479 (1980), in WELLINS 449 (calling on Iran, Iraq to refrain from any further use of force and to settle their dispute by peaceful means and in conformity with principles of justice and international law); see also, e.g., these resolutions in the Arab-Israel conflicts, S.C. Res. 44 (1948), 344 (1973), 350 (1974), in id. 633, 682, 685; the Egypt-Israel conflict, S.C. Res. 211, 215 (1965), in id. 428, 430; the Falklands-Malvinas war, S.C. Res. 502 (1982), in id. 594; Walker, State Practice 133-38, 143-45, 153-54.
50. GOODRICH et al. 43.
53. See nn. 158-60 and accompanying text.
54. BOWETT, SELF-DEFENCE 29; BROWNIE, USE OF FORCE 113; PHILIP C. JESSUP, A MODERN LAW OF NATIONS 135, 168 (1956); McNair 216-18; Grigorii I. Tunkin, Co-Existence and International Law, 95 RCADI 1, 63-66 (1959). Nicaragua Case, 1986 ICJ 98-102, might be construed to go further, i.e., to elevate it to jus cogens status, as Tunkin, International Law in the International System, 147 RCADI 98 (1975) seems to do.
55. GOODRICH et al. 48-49 present the issue.
56. BOWETT, SELF-DEFENCE ch. 6 (discounting including "economic aggression" within the definition); GOODRICH et al. 48; ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGSANS OF THE UNITED NATIONS 176 (1963); McDougAL & FELICIANO 193-96.

57. E.g., OAS Charter, n. 47, arts. 16-17, 2 UST 2394, 119 UNTS 56, as amended by Protocol, n. 47, art. 5, 21 UST 622 (separate provisions denouncing economic or political coercion and condemning forcible occupation of territory).

58. ELIAS, n. 10, 170-76; SINCLAIR 177-81; Richard D. Kearney & Robert E. Dalton, The Treaty on Treaties, 64 AJIL 495, 532-35 (1970); but see LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 42-49 (1974)(arguing for including economic or political pressure as grounds for treaty invalidity). Some States have tried to reinsert economic coercion by reservation or declaration; this has been opposed vigorously. SINCLAIR 65-68.


60. GOODRICH et al. 49-50; McDougAL & FELICIANO 194-95 nn.165-69.


65. Compare Definition of Aggression, n. 62, art. 1, 13 ILM 712, with UN Charter, art. 2(4). "State" includes groups of States and is used without prejudice to recognition issues or whether a State is a UN Member. Explanatory Note, 13 ILM 713.

66. Definition of Aggression, n. 62, art. 2, 13 ILM 713.

67. Id., art. 3, 13 ILM 713-14.

68. Id., art. 4, 13 ILM 714.

69. Id., art. 5(1), 13 ILM 714. Id., art. 7, 13 ILM at 714, says nothing in the Definition prejudices the right to self-determination, freedom and independence in the Friendly Relations Declaration. The latter does state, inter alia: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State... to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." Friendly Relations Declaration, 9 ILM 1295 (1970). Although id. ¶ 3, 9 ILM 1297, declares that "The principles of the Charter... embodied in this Declaration constitute basic principles of international law..." whether economic coercion is a Charter principle is open to question particularly when it had been rejected by the Vienna Convention negotiators and by subsequent practice under that Convention. See n. 59 and accompanying text. Law-stating resolutions, e.g., Friendly Relations, are no more than evidence of a source of international law. Assembly resolutions are not binding in and of themselves. UN Charter, arts. 10-11, 14; BROWNLIE, INTERNATIONAL LAW 14, 698-99; GOODRICH et al. 125-27, 144; 1 OPPENHEIM § 16; RESTATEMENT (THIRD) § 103(2)(d) & n.2; SUMA 236-40.

70. Compare NIEO, n. 63, art. 32, 69 AJIL 493, with Friendly Relations Declaration, 9 ILM 1295.


72. See n. 60 and accompanying text.


75. S.C. Res. 242 (1967), in WELLENS 669; see also Walker, State Practice 133-38.

76. S.C. Res. 540 (1983), in WELLENS 451; S.C. Res. 552 (1984), in WELLENS 473 (also calling on States to respect territorial integrity of States not party to conflict); see also nn. II.216-17, 250-59 and accompanying text.

77. S.C. Res. 221, ¶¶ 4-5 (1966), in WELLENS 127; see also Walker, State Practice 142-43.
78. Definition of Aggression, n. 62, arts. 1, 3, 13 ILM 713-14, is largely concerned with aggression against land territory, but the catchall art. 4, id. at 714, covers floating territorial jurisdiction situations. For discussion of the “floating territorial” principle, see Restatement (Third) §§ 402, cmt. h & r.n.4; 502(2), cmt. d & r.n.3.

79. See n. 20 and accompanying text.

80. See nn. 96-97 and accompanying text.


82. See nn. 207-88 and accompanying text.

83. UN Charter, art. 51, 59 Stat. 1076. For analysis of the Resolution, see generally Dinstein ch. 5; 1-2 Ferencz, Defining, n. 62; McClae, The Definition, n. 62, 299.

90. Jimenez de Arechaga, n. 10, 42.

91. E.g., Myers S. McDougall et al., Interpretation of Agreements and World Public Order (1967); but see Gerald Fitzmaurice, War Victis, or Wise to the Negotiators, 65 AJIL 358 (1971). Simma 35 says that “The interests and intentions of the founders remain secondary. Instead, the organizational purpose and the interests of the actual members gain the constitutive and decisive legal power and are the primary means for the solution of textual divergences.”

92. Jimenez de Arechaga, n. 10, 43.

93. Id. 43-44.

94. See nn. 207-88 and accompanying text.

95. Vienna Convention, arts. 31(3)(b), 31(3)(c).

96. Nicaragua Case, 1986 ICJ 102-03.


98. “State” can mean a group of States and States that are not UN Members. Definition of Aggression, n. 62 art. 1 & explan. note, 13 ILM 713. For analysis of the Resolution, see generally Dinstein ch. 5; 1-2 Ferencz, Defining, n. 62; Riaaft, n. 23; Stone, Conflict, n. 23; Broms, The Definition, n. 62, 299.


100. Definition of Aggression, n. 62, art. 2, 13 ILM 713; see also 2 Ferencz, n. 62, 31-33; Broms, The Definition, n. 62, 344-47 (prima facie culpability rule a compromise).

101. Definition of Aggression, n. 62, art. 3, 13 ILM at 713. Some reprinted versions of art. 3 omit art. 3(d); compare id. with versions in 69 AJIL 482 (1975) and Riaaft, n. 23, 324; see also n. 23 and accompanying text.

102. Nicaragua Case, 1986 ICJ 103, citing Definition of Aggression, art. 3(g), 13 ILM 713; Dinstein 130 (citing no authority but saying art. 3 is codified custom); Broms, The Definition, n. 62, 385-88, writing earlier, did not say Article 3 restates custom. Broms chaired the UN committee that drafted the Definition. 2 Ferencz, n. 62, 50-53, does not suggest that Article 3 has passed into customary law. Definition critics argue that it does not state custom. See, e.g., Stone, Conflict, n. 23, ch. 9. Draft Code of Crimes Against Peace and Security of Mankind, art. 12, adopted Definition principles in 1988, but Report of the International Law Commission on the Work of its Fortieth Session, UN Doc. A/49/10 (1988), in 1988 Y.B. Int'l L. Comm'n 1, 71-73 (1990), says inter alia that Article 3 was “an instrument intended
to serve as a guide" to the Security Council. There was no agreement on what might be included in a penal code. It may be, therefore, that Dinstein may be wide of the mark in including all of Definition, art. 3, as custom. Many provisions undoubtedly are. For commentary on the Nicaragua Case and its impact on the LOAC, see W. Michael Reisman & James E. Baker, Regulating Covert Action 78-98 (1992).

103. Definition of Aggression, n. 62, art. 4, 13 ILM 714. Dinstein 195-96 notes use of "armed attack" in the Hostage Case, n. II.12, 1980 ICJ 29, 42; see also Nicaragua Case, 1986 id. 292 (Schwebel, J., dissenting). Unless the language, "invasion or attack . . . of the territory of another State, or any military occupation," in Definition of Aggression, art. 3(a), 13 ILM 713, or the expression in id., art. 3(d), 13 ILM 713, concerning "attack . . . on the land . . . forces . . . of another State" (US Marines were among the US nationals held) includes this situation, assault on the US embassy, was a nonenumerated act of aggression contemplated by id., art. 4, 13 ILM 714. Rifaat, n. 23, 267, doubts whether the Council, charged by the Definition with defining acts of aggression, could denounce acts not involving use of force under the Definition, since Art. 1 is restricted to acts involving the use of force. It is submitted that the Council may also act on situations not involving use of force that are threats to the peace or breaches of the peace under the Charter. See UN Charter, arts. 25, 31-42, 48, 50, 103; Stone, Conflict, n. 23, 144; see also nn. 10, 651-62 and accompanying text.

104. The drafters meant to include this at Japan's insistence. Broms, The Definition, n. 62, 350-51, 365.

105. However, unless they have surrendered, enemy warships may be attacked on the high seas and in territorial waters of their flag State, belligerent allies or the enemy. See Definition of Aggression, art. 3(d), 13 ILM 713 ("attack . . . on the . . . sea . . . forces"), supporting the view that neutral warships may not be attacked in territorial waters; see also Parts IV.B.1, IV.B.4, IV.C.4, IV.D.1, IV.D.3, IV.D.5, V.C.1, V.J.3, which inter alia recite the principle that a neutral warship has a right of self-defense if attacked in neutral waters or on the high seas.

106. However, unless they have surrendered, enemy warships may be attacked on the high seas and in territorial waters of their flag State, belligerent allies or the enemy. See Parts IV.B.1, IV.B.4, IV.C.4, IV.D.1, IV.D.3, IV.D.5, V.C.1, V.J.3, which inter alia recite the principle that a neutral warship has a right of self-defense if attacked in neutral waters or on the high seas.


110. Rifaat, n. 23, 272; Stone, Conflict, n. 23, 166; see also LOS Convention, art. 111; High Seas Convention, art. 23; 1 Brown 135-38, 258-59; 3 Nordquist ¶¶ 111.1-111.9(3); 2 O'Connell, Law of the Sea 1075-93 (hot pursuit).

111. UN GAOR, 6th Comm., 1477th mtg., UN Doc. A.C.G.SR.1477, at 71 (1974) (remarks of Mr. Steel, UK delegate); see also Stone, Conflict, n. 23, 117.

112. Compare Dinstein 198; Pautz, n. 108, 795, 800, asserting US self-defense measures after Mayaguez's seizure were not justified. Dinstein 184 seems to contradict himself by saying, "At times, an armed attack [i.e., an act of aggression] occurs beyond the boundaries of all States [as when a . . . battleship sinks a vessel [type unspecified] on the high seas.]" In 1965 Burundi characterized unjustified boarding and seizing of ships as aggression. UN Doc. A/A.C.914, at 3 (1965), cited in Bengt Broms, The Definition of Aggression in the United Nations 83 (1968). See also n. 108.

113. Dinstein 129; Rifaat, n. 23, 270.

114. Besides liners, which are protected under customary law, so long as they are not carrying warfighting or war-sustaining goods or persons, e.g., troops, these classes of merchant ships, even if flying an enemy flag, are likewise protected: hospital ships; small craft used for coastal rescue operations and other medical transports; cartel ships; vessels on humanitarian missions; ships carrying cultural property under special protection; scientific research or environmental protection vessels; coastal traders; coastal fishing ships; vessels designed or adapted exclusively for response to pollution incidents in the marine environment; ships that have surrendered; life rafts and life boats. They may lose protection if not used in their normal role, do not submit to identification and inspection when required, intentionally hamper combatant movements or do not obey orders to stop or move out of the way when required. NWP 1-14M Annotated ¶ 8.2.3; NWP 9A Annotated ¶ 8.2.3; San Remo Manual ¶¶ 47-48; see also Parts V.B.1, V.C.1, V.J.2, V.J.3.

115. For an example of how worldwide communications route and reroute merchant ships as they sail independently, see Dominant Navig. Ltd. v. Alpine Shipping Co., 1982 AMC 1241 (Bauer, Arnold & Berg, arbs.).

Admiralty Foreign Sovereign Immunities Act, appearing to take the prewar approach, but see, e.g., Comment, 33 AJIL 781-90; but see, e.g., see also 199; but see, e.g., 132. Act of Chapultepec, Mar. 6, 1945, Part I(3), 60 Stat. 1831, 1839; Rio Treaty, n. 47, arL 9, 62 LNTS 393, 396-97 (general policy statement). League of Nations Covenant, art. 10, denounced aggression generally without defining it, as does Sanvedra Lamas Treaty, Oct. 10, 1933, 49 Stat. 3365, 3375, 163 LNTS 393, 405; see also BROWS, THE DEFINITION, n. 112, 23-25; RIFAAT, n. 23, 91-93; BROWS, THE DEFINITION, n. 62, 312-14, for analysis of these and similar agreements.

122. See, e.g., Treaty of Non-Aggression & Pacific Settlement of Disputes, Jan. 21, 1932, Fin.-USSR, art. 1(2), 157 LNTS 393, 396-97. Compare Saadabad Pact, July 8, 1937, art. 4, 190 LNTS 21, 25 (“The following shall be deemed acts of aggression: ... attack... on... vessels or aircraft of another State”), to which Iran and Iraq were original parties, with Convention for Definition of Aggression, July 3, 1933, art. 2(3), n.107, to which Iran was an original party; see also BROWS, THE DEFINITION, n. 112, 27; RIFAAT, n. 23, 91-92, 94-95.


129. See n. 115 and accompanying text.


131. Id., art. 1(e), 33 AJIL SUPP. 827 (defining aggression without elaborating examples); id., art. 1(h), 33 AJIL SUPP. 827 (defining vessel to include aircraft). Although the Comment to art. 1(h) is unenlightening, art. 1(c)'s citing of some of the agreements, nn. 121-22, shows the Harvard drafters were aware of the distinction and chose a broad "vessel" definition to include merchantmen. Draft Convention internal evidence supports this view. See, e.g., art. 2, Comment, 33 AJIL SUPP. 886 ("hostility" to warships); art. 3, Comment, id. 886-87 ("warship" capture of "vessel"); art. 10, Comment, id. 902 (capture of "ship," further reference to "battleships").

132. Act of Chapultepec, Mar. 6, 1945, Part I(3), 60 Stat. 1831, 1839; Rio Treaty, n. 47, arL 9, 62 id. 1702, 21 UNTS 99; but see, e.g., Treaty of Brotherhood & Alliance, Apr. 14, 1947, Iraq-Transjordan, art. 5, 23 UNTS 147, 156-58, appearing to take the prewar USSR position; see also nn. 121-22 and accompanying text.

133. See nn. 121-23 and accompanying text.

134. Vienna Convention, arts. 34-38; BROWNLIE, INTERNATIONAL LAW 11-15, 622-25; 1 OPPENHEIM §§ 10, at 28; 11, at 32-36; 583; 589; 626-27; RESTATEMENT (THIRD) §§ 102(3) & cmts. f, i; 324; SINCLAIR 98-106.

135. Walker, State Practice 137.

137. 1975 Digest 13-15, 423-26, 766, 777-83, 879-86; Thomas E. Behuniak, The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of United States Claims, 82 Mil. L. Rev. 41 (1978), 83 id. 59 (1979); Christopher Greenwood, Comments in Dekker & Post 212, 214; Eleanor McDowell, Contemporary Practice of the United States Relating to International Law, 69 AJIL 861-63, 874-79 (1975); U.S. Recovers Merchant Ship Seized by Cambodian Navy, 72 Bulletin 719 (1975); Walker, State Practice 146. Greenwood 214, analogizes The Red Crusader (Den. v. UK), 35 ILR 485 (Comm'n of Enquiry, 1982) in the same category as the Mayaguez seizure. The Crusader case facts are different, however, in that the UK flag trawler was fired on, hit and visited, and crewmen were detained briefly, on grounds of its fishing on the Danish side of a Denmark-UK treaty line, for which Denmark conceded liability. Denmark withdrew charges of interference by H.M.S. Troubridge in the Danish warship's returning Crusader crew to their trawler; the Commission of Enquiry found that the Royal Navy made every effort to avoid recourse to violence between the Danish ship and the trawler, such "attitude and conduct [being] impeccable." 35 ILR 500. There was no self-defense claim, but as Greenwood notes, the incident is some evidence to support a view that States may use force to defend individual merchantmen—even single small fishing ships—flying their flag.

138. US interests beneficially owned Hercules, a tanker. The Supreme Court of the United States reversed Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 423-24 (2d Cir. 1987) on sovereign immunity grounds. 488 US 428 (1989). See also Walker, State Practice 153-55. Although cases have secondary source or evidentiary status for deriving international law, they can restate or reinforce customary norms. ICJ Statute, arts. 38(1), 59; Brownlie, International Law 19-24; 1 Oppenheim § 13; Restatement (Third) § 103.


140. ICJ Statute, art. 38(1); Brownlie, International Law 24-25; 1 Oppenheim ¶ 14; Restatement (Third) ¶ 103.

141. Stone 34, quoting 5 League of Nations, n. 124; see also n. 122 and accompanying text.

142. Stone 211, quoting draft Act Relating to the Definition of the Aggressor, 1933.

143. See nn. 130-31 and accompanying text.

144. Bowett, Self-Defence, ch. 11; Brownlie, Use of Force, chs. 19-22; McDougal & Feliciano 61-62, 143-216, Nicholas Nyiri, The United Nations' Search for a Definition of Aggression (1989); Thomas & Thomas, The Concept, n. 121; S.M. Schwebel, Aggression, Intervention and Self-Defence in Modern International Law, 136 RCADI 411 (1972) were concerned with broader policy perspectives and not narrow definitional issues.

145. But see Dinstein 197-98 citing inter alia Broms, The Definition, n. 62, 351; see also n. 95 and accompanying text.

146. E.g., Thomas & Thomas, n. 121, 15, recall that under the last century's defensive alliances, "any first attack might constitute an aggression obligating other contracting states . . . to come to the assistance of any state attacked who was also a contracting party." That absolute position has changed with the Charter era, although UN Charter, art. 51 preserves the inherent right of individual and collective self-defense. See also nn. 289-302 and accompanying text.


148. McDougal & Feliciano 148-206; Stone passim; Stone, Conflict, n. 23, passim. Dinstein 129, citing Broms, The Definition, n. 62, 346, makes the graphic point that a few stray bullets across a border cannot be invoked as aggression: ["R"]esponsibility for a war of aggression may be incurred by the target State, should it resort to comprehensive force in over-reaction to trivial incidents."

149. See nn. 485-579 and accompanying text. For anticipatory self-defense, recognized by the United States and many States, a third limitation is there must be no means for deliberation. See nn. 586-616 and accompanying text. Some objects are disproportionate per se, i.e., are not targets in any case. See nn. 580-85 and accompanying text.

150. See nn. 592-616, 646-49 and accompanying text.

151. See nn. II. 338-41, 459-65 and accompanying text.

152. See nn. 617-30 and accompanying text.

153. Goodrich et al. 41.

154. UN Charter, art. 2(3).

155. Goodrich et al. 42.

156. See nn. 47-49, 652 and accompanying text.

157. Summa 99; see also nn. 61-69 and accompanying text.
158. See nn. 81-86 and accompanying text.

159. UN Charter, art. 111; see also nn. 85-86 and accompanying text.


162. UK note to the United States, May 19, 1928, 1928(1) FRUS 66, 67.

163. BROWNLIE, USE OF FORCE 236-37; see also 5 HACKWORTH 144-45. Most say the US action was "authentic and binding commentary on and interpretation of the...[Pact of Paris]." ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND FACT 192-200 (1968); see also ALEXANDROV 58; 3 HYDE ¶ 596A, 1683; DAVID HUNTER MILLER, THE PEACE FACT OF PARIS: A STUDY OF THE BRAND-KELLOGG TREATY 111 (1928); Philip Marshall Brown, The Interpretation of the General Pact for the Renunciation of War, 23 AJIL 374, 377-78 (1929); but see Quincy Wright, The Interpretation of Multilateral Treaties, id. 94, 104 (1929); Wright, The Meaning of the Pact of Paris, 27 id. 39, 43 (1953).


166. See UN Charter, art. 2(1) (United Nations is "based on the sovereign equality of all its Members"); see also n. 30.

167. See nn. 87-97 and accompanying text.


169. Sohn, The International Court, n. 11, 872-73; see also Linnan, Self-Defense, n. 51, 63-64.

170. BOWEtt, SELF-DEFENCE ch. 9; McDougal & Feliciano 140-43; Waldock, The Regulation, n. 52, 451; compare, e.g., Badr, The Exculpatory, n. 52, 10-14.

171. Definition of Aggression, n. 62, art. 3(g), 13 ILM 713-14.


173. See n. 83 and accompanying text.

174. Definition of Aggression, n. 62, art. 3(c), 13 ILM 713; see also Parts V.E, V.J.3.

175. Cf. Definition of Aggression, n. 62, art. 4, 13 ILM 714; see also Broms, The Definition, n. 112, 150.


177. Id. 543 (Jennings, J., dissenting); id. 331-47 (Schwebel, J., dissenting).

178. Id. 94, 103; see nn. 586-90 and accompanying text.

179. ICJ Statute, arts. 38(1), 59; see also RESTATEMENT (THIRD) § 103.

180. Definition of Aggression, n. 62, art. 6, 13 ILM 714.

181. 2 Ferencz, n. 62, 45-46; Broms, The Definition, n. 62, 358.

182. See nn. 591-616, 646-49 and accompanying text.

183. Cf. Vienna Convention, arts. 31(3)(b), 31(3)(c), 31(4); see also nn. 80-81 and accompanying text.


185. This brings us almost full circle for Article 51 analysis to treaty interpretation methods advocated by McDougal et al., INTERPRETATION, n. 91, and decried by Fitzmaurice, Vae Vicis, n. 91, and perhaps Sinclair 114.

INTERNATIONAL LAW: THE REGULATION OF 48 id. deemed to interpret it. 190. TIF 430-31(status of Czechoslovakia, USSR, Yugoslavia in doubt because of treaty succession issues); see also Symposium, State Succession; Walker, Integration and Disintegration.

191. See nn. 160-63 and accompanying text.

192. See nn. 160-63 and accompanying text. For States not participating in the conference that produced the Pact, see TIF 430-31, the published understandings as preparatory works are equally binding unless acceding States reject them. RESTATEMENT (THIRD) § 313 cmt. g; Report of the International Law Commission on the Work of Its Eighteenth Session, UN Doc. A/6309/Rev. 1 (1966) (ILC Rep.), in 1966(2) Y.B. INT'L. L. COMMN 169, 172, 223, rejecting Territorial Jurisdiction of International Commission of the River Oder, 1929 PCIJ, Ser. A, No. 23, at 5, 41 (Aug. 2, 1929 Order (preparatory work for disputed articles of Treaty of Versailles, June 28, 1919, 225 CTS 188, not admissible because three States did not participate in conference producing treaty). Since the Report is available as part of the Vienna Convention, this interpretation binds parties to the Convention. As a later authoritative statement, it prevails over River Oder. ICJ Statute, art. 38(1)(d); RESTATEMENT (THIRD) § 103.

193. The Convention applies to agreements concluded after it enters into force for a party. Vienna Convention, art. 4. However, to the extent the Convention restates custom, it may be used to analyze the Pact of Paris, n. 160. Brownlie, INTERNATIONAL LAW 11-15; 1 OPPENHEIM §§10, at 28; 11, at 33; RESTATEMENT (THIRD) §§ 102(3) & cmt. i, r.r.5.

194. See nn. 161-62 and accompanying text.

195. Other correspondence occurred well before signature. See nn. 161-62 and accompanying text.

196. It went into force July 24, 1929; the US ratification was in January 1929. 2 BEVANS 732.

197. Gerald Fitzmaurice, Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points, 33 BYBIL 203, 273 (1957); see also D.W. Bowett, Reservations to Non-Restricted Multilateral Treaties, 48 id. 67, 72-73 (1976). Earlier commentators said the Pact self-defense notes were reservations if they would be deemed to interpret it. See n. 163 and accompanying text.

198. See n. 163 and accompanying text (Kellogg, Simson).

199. See nn. 168, 189 and accompanying text.

200. See n. 163 and accompanying text.

201. See n. 160 and accompanying text.

202. See nn. 98-110 and accompanying text.

203. ICJ Statute, art. 38(1); RESTATEMENT (THIRD), §§ 102-03.

204. See nn. 10, 54 and accompanying text.


206. Cf. ICJ Statute, art. 38(1); RESTATEMENT (THIRD), §§ 102-03.

207. See nn. 79-95, 167-79 and accompanying text.


212. Waldock, The Regulation, n. 52, 500; see also ALEXANDROV 122-23; BROWNLIE, USE OF FORCE 285.


210. S.C. Res. 22 (1947), in WELLENS 34.
A Legal Perspective, sandy shores of World War II battles (Benghazi, Tobruk).  

sea limit then was generally 3 miles, and we were close enough to Africa to have the Commanding Officer point out the sandy shores of World War II battles (Benghazi, Tobruk).

Robert E. Stumpf, My destroyer, further proviso may broaden Act coverage.

71 AJIL has taken of offshore jurisdictional over. PALIT, n. 245.

deployed to deter India from its victory over Pakistan. The USSR deployed an anti-carrier group. CABLE 198-99.

The task force may have been deployed to deter India from “pushing to extremes” its victory over Pakistan. The USSR deployed an anti-carrier group. CABLE 198-99.


247. Fred Greene, The Indian-Pakistan War and the Asian Power Balance, 25 NWCR Rev. 16 (No. 3, 1973). A US Navy task force to facilitate evacuating US nationals from Bangladesh, formerly East Pakistan, arrived after hostilities were over. Falt, n. 245, 144-50; 2 von Heinegg, n. II.177, 31; Walker, State Practice 145. The task force may have been deployed to deter India from “pushing to extremes” its victory over Pakistan. The USSR deployed an anti-carrier group. CABLE 198-99.


The United States resupplied Israel by air. Cable 200; 2 von Heinegg 29; Walker, State Practice 137.

Fisheries Jurisdiction (UK v. Icc.), 1972 ICJ 12 (interim measures); 1973 id. 3; 1974 id. 4 (merits); Cable 199-200.


253. Roach & Smith 79.

254. Dennis Mandsager, The U.S. Freedom of Navigation Program: Policy, Procedure, and Future, in Liber Amicorum 113. My destroyer, U.S.S. Hyman, sailed these waters during a 1960-61 Mediterranean Sea deployment; the territorial sea limit then was generally 3 miles, and we were close enough to Africa to have the Commanding Officer point out the sandy shores of World War II battles (Benghazi, Tobruk).


256. See nn 112-15 and accompanying text.

258. See generally Hayes, Navy Rules, n. II.341; O'Connell, Influence of Law 169-80; Duncan, n. II.341; Grunawalt, The JCS, n. II.341; Roach, Rules of Engagement, n. II.341; Shearer, Rules of Engagement, n. II.341. See nn. II. 341-49, 391, 452-53 and accompanying text for descriptions of Tanker War ROE.


263. 3 Cordesman & Wagner 260; 2 O'Connell, Law of the Sea 1112.

264. 3 Cordesman & Wagner 250-51, 334, 336.


266. See nn. II.88, 200, 227, 298, 303-05, 344-49, 368, 370, 391-95, 410, 451, 469-70, 522 and accompanying text.

267. UN Charter, arts. 25, 48, 51. S.C. Res. 598 (1987), in Wellens 454, invoked UN Charter, arts. 39-40 and called on parties to end the war; it was hortatory, not mandatory as a decision would have been. See also nn. II. 376-78, 405, 414-18, 454, 479, 482, 489, III. 651-62 and accompanying text.

268. See nn. II.89, 102-03, 109-10, 141-42, 199-201, 240, 255, 288, 301, 411, 420, 447, 520 and accompanying text. For further analysis of these and other wartime zones, see Parts V.F, V.J.6.

269. S.C. Res. 540, 552 (1984), in Wellens 451, 473; see also nn. II.216-18, 251-59 and accompanying text; Chapter VI.

270. Combacau, n. 208, 32.

271. See nn. 160-63, 190-206 and accompanying text.

272. S.C. Res. 661 (1990), in Wellens 528; see also Walker, Crisis Over Kuwait 30-34.

273. UN Charter, art. 27; see also Goodrich et al. 227-29; SIMMA 463-67.

274. See generally Goodrich et al. 215-31.

275. UN Charter, art. 2(1); see also n. 30 and accompanying text.

276. UN Charter, arts. 33(1) 36-41; compare the effects of mandatory decisions under id., arts. 25, 48; see also nn.— and accompanying text.

277. UN Charter, arts. 10-12, 14; see also n. 69 and accompanying text.
278. UN Charter, art. 35(1), authorizing States to bring a dispute to the Assembly’s attention, subject to id., art. 12(1)’s primacy rule. The Assembly may also bring disputes to the Council’s attention. Id., art. 11(3). See also Goodrich et al. 270-77; Simma 527-31.

279. This occurred during the 1990-91 Gulf War. The Council had been seized of the crisis since the August 1990 invasion. Cf. S.C. Res. 660 (1990), in Wellens 527. The Assembly steering committee rejected Iraq’s attempt to bring the matter before it in November 1990. Walker, Crisis over Kuwait 34.

280. See n. 69 and accompanying text.


284. Other aspects of the Declaration are in similar vein, e.g., “Nothing in the foregoing paragraphs [relating to nonintervention] shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.” States have a duty to “co-operate with other States in the maintenance of international peace and security.” The Declaration elaborates on the territorial integrity and sovereign equality of States, closing by reciting a disclaimer, “Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Members under the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in this Declaration. . . . The principles of the Charter . . . embodied in this Declaration constitute basic principles of international law.” Id., 9 ILM 1295-97.

285. See n. 281 and accompanying text. The Assembly has approved measures related to self-defense, e.g., its 1951 call for embargo on war materials and petroleum shipped to the PRC during the Korean War, but there was no attempt to define, expand or limit the concept except by inference. Practice under this resolution, if the embargo had continued long enough, could have ripened into custom. Restatement (Third) ¶ 103 & cmt. c. On the embargo, see Howard J. Taubenfeld, International Actions and Neutrality, 47 AJIL 377, 393-94 (1953).


287. G.A. Res. 37/37 (1982), in 83 Bulletin 80 (Jan. 1983); see also Jean J. Kirkpatrick, Call for Soviet Withdrawal from Afghanistan, id. 78 ...


290. North Atlantic Treaty, n. II.457, arts. 5-6, 63 Stat. at 2243-44, 34 UNTS at 246, as modified by Protocol, n. II.457, art. 2, 3, UST 44, 126 UNTS 350; see also n. II.437 and accompanying text.

291. See n. II.437 and accompanying text.


October 23, 1962 resolution passed under Rio Treaty, n. 47, arts. 6, 8, 62 Treaty, (1983); GRENVILLE denounced in 1979 when the Ph.D. Manchester, The Tangled Web: The Baghdad withdrew from the STUDIES CHURCHILL’S PEACETIME ADMINISTRATION Defence Treaty, nominally covering the Gulf area, was never invoked because of internal dissension and perhaps other reasons. UNTS modified by art. 4, 3 219 UNTS 30, abrogated by Protocol, Sept. 8, 1954, art. 4, 6 UST 81, 83, 209 UNTS 28, 30 (SEATO Treaty); Warsaw Pact, n. 47, art. 4, 219 UNTS 30, abrogated by Protocol, Mar. 31, 1991, BOWEN & HARRIS 196 (11th Cum. Supp. 1995). The Arab Joint Defence Treaty, nominally covering the Gulf area, was never invoked because of internal dissension and perhaps other reasons. See nn. II.93-99, 184-85, 192-93, 248-58, 283-84, 405, 478, 508, 534, 543-45 and accompanying text. See, e.g., nn. II.382, 386 and accompanying text. See also n. II.31 and accompanying text.

302. McDougal & Feliciano 248-53, in effect adopting the second theory of Bowett, SELF-DEFENCE 202-05; id. 205-07; Kelsen, THE LAW, n. 189, 792; and Stone 245 believed the right of collective self-defense did not extend to a State wishing to associate itself in defending a State already acting in self-defense. Bowett’s first theory, that the right of collective self-defense is based on the right of a “protector” of a group, i.e., a family, perhaps family servants, was also rejected by him. Bowett 200-02. Nevertheless, the theme has been seen in UN practice where the “agency” principle has been used. Cf. Walker, Crisis Over Kuwait 49.

303. Goodrich et al. 357.

304. Id. 356; see, e.g., Russell & Muther, n. 13, 102-09, 229-34, 472-76, 555-56, 693-706.


306. See, e.g., n. II.382, 386 and accompanying text.

307. See also n. II.31 and accompanying text.

308. Goodrich et al. 357, citing early UN General Assembly committee and plenary session meetings and good practices.


310. See nn. 220-22, 281-84 and accompanying text.

311. UN Charter, arts. 10-12, 14; see also n. 69 and accompanying text.

312. See nn. 284-85 and accompanying text.


314. STARKE, n. 292, 98-99; see also nn. 292, 309 and accompanying text.

315. See nn. 802-20 and accompanying text.


319. See nn. 233-34 and accompanying text.


322. In 1965 the US Joint Chiefs of Staff had considered and rejected a blockade of North Vietnam as being a belligerent act. 2 Marolda & Fitzgerald, n. 321, 320-32; 18 Keessen 25338 (1972).


325. O'Connell, THE INFLUENCE 110; Fenrick, Military Objective, n. II.202, 256.

326. Bowman & Harris 196; Buszynski, n. 309, ch. 6.


328. This war was not the only example of unilateral or multilateral assistance without a formal defense treaty. E.g., there was unilateral US aid to Israel and other countries’ assistance to Arab States during the Arab-Israeli wars. See nn. 249, 253, 259 and accompanying text.

329. See nn. 828-89 and accompanying text.


331. See n. II.456 and accompanying text.

332. See nn. II.447, 470 and accompanying text.

333. Simma 706; see also nn. II.167, 415 and accompanying text.
334. See, e.g., nn. II.112-14, 313, 475-76 and accompanying text.


336. See nn. II.269, 360, and accompanying text.

337. See nn. 308-28 and accompanying text.


339. UN Charter, arts. 25, 48, 51, 103; see also nn. 10, 350-56, 652-62 and accompanying text.


341. E.g., NWP 1-14M Annotated ¶ 7.1-7.2.2; NWP 9A Annotated ¶ 7.1-7.2.2 (US position).

342. See n. 259 and accompanying text.

343. See generally Walker, Anticipatory, n. 289.

344. See generally id., Parts I-III for examples uncovered in research on treaties from 1815-1945.

345. E.g., CABLE reports hundreds of maritime incidents since 1914; the actors most assuredly had other nations’ informal backing in some of these. The historical record, 1815-1914, must have more. Many are shrouded in diplomatic reports, e.g., FRUS, or in detailed historical accounts; other recent examples probably are unpublished due to national security considerations.

346. While the Covenant of the League of Nations, art. 18, required League Members to submit all agreements for publication, this requirement was soon ignored. FERRELL, n.163, 54-61. Countries, e.g. the United States, not League Members, were under no international obligation to submit treaties for League publication or to publish them in national series, although, e.g., the United States did publish most of its international agreements in the Statutes at Large or the Executive Agreement Series. Most League Members did, but there were exceptions, particularly as war clouds loomed in the late Thirties, and the League collapsed. See Walker, Anticipatory, n. 289, Part II. UN Charter, art. 102 admonishes Members to submit treaties for registration; a consequence for nonfulfillment is that an unregistered treaty cannot be invoked before a UN organ, e.g., the Security Council or the ICJ. See GOODRICH et al. 610-14; SIMMA 1103-16. Security agreements are often not published. RESTATEMENT (THIRD) § 312 r.n.5 (1987). See also 1 USC § 112a(b) (1994). National legislation may require publication of agreements or notifying the national legislature of all international agreements. See e.g., id § 112b (1994).

347. Before the coming of the Covenant, treaties were often not published. Even so, their terms were leaked as an “engine . . . of publicity.” A.J.P. TAYLOR, THE STRUGGLE FOR MASTERY IN EUROPE: 1848-1918, at 264 (1954). Many but not all agreements between 1648 and 1920 have been reprinted in the Consolidated Treaty Series. Walker, Anticipatory, n. 289, Part I reports some of the few omissions.

348. Governments publish NOTMARs and NOTAMs for many purposes, including routine warnings of navigation hazards, e.g., floating derelicts, extinguished navigation aids, etc., besides warnings of high seas military exercises; war, exclusion or defense zones; warnings of other countries’ proclamations of zones; or self-defense actions that might be taken upon approach of aircraft or ships, as the United States and other nations published them during the Tanker War. See nn. II.89-90, 101, 141-42, 176, 224, 288, 305, 311, 346-48, 420, and accompanying text.

349. See n. 348 and accompanying text.

350. UN Charter, art. 51; see also SIMMA 676-77.

351. Nicaragua Case, 1986 ICJ at 105, 121.

352. Id. at 96-99.

353. UN Charter, art. 51.

354. See nn. 308-22 and accompanying text.


356. HIGGINS, THE DEVELOPMENT, n. 56, 207.

straddling the fence. SAN with a reactive view because of a statement in COMM'N 13,66-70, UN.

The action was not an appropriate exercise of that right under the circumstances. KELSEN, NWP

Aggression in the Israel rightly claimed it for raid). and Drug Trafficking, in THE INTERNATIONAL LEGAL

INTERNATIONAL LAW, n. 165, 121-22; RIFAAT, the

C. permissible as long as principles of necessity observed); Walker, self-defense under

ALEXANDROV, 296 (although anticipatory self-defense appropriate, Israel could not claim it in


NWP 1-14M Annotated ¶ 4.3.2-4.3.2.1; NWP 9A Annotated ¶ 4.3.2-4.3.2.1. Iran recognized a right of reactive self-defense during the Tanker War; this was the USSR view. See n. 370 and accompanying text; Kolosov, Limiting, n. 358, 234.

Comparing the United States claims a right of anticipatory self-defense. NWP 1-14M Annotated ¶ 4.3.2-4.3.2.1; NWP 9A Annotated ¶ 4.3.2-4.3.2.1. Iran recognized a right of reactive self-defense during the Tanker War; this was the USSR view. See n. 370 and accompanying text; Kolosov, Limiting, n. 358, 234.

631. Compare, e.g., ALEXANDROV 296 (although anticipatory self-defense appropriate, Israel could not claim it in Iraqi nuclear reactor raid); with McCORMACK, n. 209, 122-44, 238-39, 253-84, 302 (anticipatory self-defense appropriate, Israel rightly claimed it for raid).

631. Compare, e.g., ALEXANDROV 296 (although anticipatory self-defense appropriate, Israel could not claim it in Iraqi nuclear reactor raid); with McCORMACK, n. 209, 122-44, 238-39, 253-84, 302, with S.C. Res. 487 (1981), in WELLER 441-42, adopted unanimously, i.e., including the United States. Cf. UN Charter, arts. 23(1), 27. The United States adheres to a right of anticipatory self-defense.

NWP 1-14M Annotated ¶ 4.3.2-4.3.2.1; NWP 9A Annotated ¶ 4.3.2-4.3.2.1; see also n. 359 and accompanying text. The US vote to condemn Israel meant that although anticipatory self-defense was a legitimate response, the Israeli action was not an appropriate exercise of that right under the circumstances.

632. UN Charter, art. 51; see also nn. 158-206 and accompanying text.

633. The parties declared it was not an issue. Nicaragua Case, 1986 ICJ 103.


635. Cf., e.g., GOORICH et al. 342-53; Addendum to the Eighth Report on State Responsibility, 1980 2(1) Y.B. INT'L L. COMM'N 13, 66-70, UN Doc. A/CM.47318/ADD.5-7. McCORMACK, n. 209, 122, says Goodrich et al. are among those with a reactive view because of a statement in id. 353, but reading id. 342-53 for UN Charter, art. 51, seems to have id. straddling the fence. SAN REMO MANUAL ¶ 3, Commentary 3.2 says the Manual takes no position.
368. Id.
369. Definition of Aggression, arts. 3(c), 3(e), 13 ILM 713.
370. Id., art. 4, 13 ILM 714; see also nn. 98-152 and accompanying text for further analysis of the Resolution.
371. See nn. 80-86 and accompanying text.
372. Dinstein 130 says all of Definition of Aggression, art. 3, 13 ILM 713, may be custom, and this would include blockade. Not all would go so far. See n. 102 and accompanying text. Many have considered blockading coasts as aggression in the League and Charter eras. Treaties listing acts of aggression include blockade. See, e.g., Convention for Definition of Aggression, July 3, 1933, art. 2(4), 147 LNTS 67, 256-57; Convention for Definition of Aggression, July 4, 1933, art. 2(4), 148 id. 211, 215; Balkan Entente, Feb. 9, 1934, Protocol-Annex, 153 id. 153, 157; Convention for Definition of Aggression, July 5, 1933, Lith.-USSR, art. 2(4), id. 79, 83; Saadabad Pact, July 8, 1937, art. 4, 190 id. 21, 25. UN Charter, art. 42, lists blockade as an option the Security Council may choose if nonforce alternatives are inadequate, an inference being that blockade is not open to UN Members unless in self-defense or with Council approval. Blockade was consistently in the USSR drafts enumerating acts of aggression. Julius Stone, Aggression and World Order 34-35, 46-77 (1958); Stone, Conflict, n. 23, chs. 2-3.
373. See nn. 358-361 and accompanying text.
374. Dinstein 190, citing Joyner & Grimaldi, n. 11, 659-60.
375. Dinstein 190.
376. Id. 190-91. Stone, Conflict, n. 23, 58, 199 n.3; Rosalyn Higgins, The Attitude of Western States Toward Legal Aspects of the Use of Force, in Cassesse, n. 208, 435, 443, characterize Israel's action as anticipatory self-defense.
377. Dinstein 191; see also Ben Cheng, General Principles of Law as Applied by International Courts and Tribunals 90 (1983); nns. 617-30 and accompanying text.
379. See also nn. 242-43 and accompanying text.
380. See n. 243 and accompanying text.
381. See nn. 243, 248 and accompanying text.
382. See nn. 259-64 and accompanying text.
383. See nn. II.338-41 and accompanying text.
384. The same is true for some missile attacks. Eilat sank after two waves of them, and Stark survived two Exocet missiles; Sheffield may have been lost more due to her construction than the missiles. See nn. II.338-42, III.243, 259-64.
386. Horace B. Robertson, Modern Technology and the Law of Armed Conflict at Sea, in Robertson 362; Robertson, New Technologies and Armed Conflicts at Sea, 14 Syracuse J. Int'l L. 699 (1980) argues persuasively that it is futile to legislate weapons control through treaties because treaties will nearly always be irrelevant before the ink is dry.
387. Custom, although perhaps uncertain in parameters, has inherent flexibility and is likely to be a dominant future source of law. W. Michael Reisman, The Cult of Custom in the Late 20th Century, 17 Cal. W. Int'l L.J. 133 (1987); see also Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 3-10 (1989). The law of naval warfare is mostly custom-based. San Remo Manual 61-62. Moreover, custom is not subject to treaty rules of construction, e.g., breach, fundamental change of circumstances, impossibility, etc. See nn. 927-29 and accompanying text.
388. See nn. 357-65 and accompanying text.
389. Id.

392. Although specific events are cited, refer to Part II.B for the full factual context.

393. See n. II.88 and accompanying text.

394. S.C. Res. 479 (1980), in WELLENS 449; see also n. II.96 and accompanying text.

395. UN Charter, arts. 25, 48; see also n. 652 and accompanying text.

396. For analysis of war zones, defensive sea zones and similar ocean areas in terms of area, duration, notice, etc., see Part V.F; see also nn. II.89, 103-04, 109-10, 141-42, 199-201, 240, 255, 288, 301, 411, 420, 447, 520 and accompanying text.

397. LOS Convention, art. 2; Territorial Sea Convention, art. 1; see also Parts IV.B.4 and V.D.3 for analysis in the LOS context.

398. See n. 309 and accompanying text.

399. See nn. II.21-27 and accompanying text.

400. See nn. II.31, III.309 and accompanying text.

401. Arab Joint Defence Treaty, n. II.31, art. 2, 157 BFSP 669-70, 49 AJIL SUPP. 51; see also nn. 309, 400 and accompanying text.

402. UN Charter, arts. 2(4), 51; Definition of Aggression, art. 3(f), 13 ILM 714; nn. 50-157 and accompanying text.

403. See nn. 591-616 and accompanying text.

404. See nn. 485-585 and accompanying text.

405. Id.


407. See nn. 308-36 and accompanying text.

408. See n. II. 80 and accompanying text.

409. See nn. 308-36 and accompanying text.

410. See nn. II.103, 201 and accompanying text.

411. Definition of Aggression, art. 3(d), 13 ILM 713; see also nn. 98-152 and accompanying text.

412. Definition of Aggression, art. 4, 13 ILM 714; see also nn. 103, 116, 120 and accompanying text.

413. See Parts V.C.3, V.C.5, V.J.3.

414. Iraq's navy was bottled up in the Shatt al-Arab for the duration of the war; her new frigates sat out the war in Italy, where they had been built. See n. II.130 and accompanying text. Iraq could not conduct traditional maritime visit and search operations. Iran had a navy that was significant in size for Gulf operations. Both belligerents had land-based air attack capability.

415. See n. II.177 and accompanying text.

416. See n. II.177 and accompanying text.

417. See Parts V.B.-V.D and V.J.2-4.

418. UN Charter, art. 103; S.C. Res. 514, 522 (1982), 540 (1983), in WELLENS 450-51; see also nn. II.189, 216-17, III. 10 and accompanying text.


420. The United States published the warnings within days after releasing its report on the US Marine headquarters building bombing at Beirut International Airport in 1983. See nn. II.224-27 and accompanying text.
421. See n. II.229 and accompanying text. The United Kingdom had declared a similar defensive bubble during the Falklands/Malvinas War. See nn. 259-64 and accompanying text.

422. UN Charter, arts. 51, 103; see nn. 10, 158-288 and accompanying text.


424. See n. II.360 and accompanying text.

425. See nn. II.295, 361 and accompanying text.

426. See n. II.298 and accompanying text.

427. See nn. II.296-97 and accompanying text.

428. See n. II.299 and accompanying text.

429. See n. II.306 and accompanying text.

430. This was the UK and apparently the French view. Other States, including the United States, saw the Tanker War as a traditional war, to which LOAC principles applied. See n. II.84 and accompanying text.

431. UN Charter, art. 103; see also n. 10 and accompanying text.

432. Nyon Arrangement, ¶¶ 1, 4-7, and Nyon Supplementary Agreement, ¶¶ 2-3, which also addressed attacks on merchantmen by submarines and surface ships, applied only to the Mediterranean Sea during the Spanish Civil War. The Nyon treaties permitted attacks on ships that attacked or might attack neutral merchant vessels and said nothing about the attacking ship's duties, referring to the London Protocol for standards. To that extent the Nyon treaties might be said to repeat whatever customary norms are in the London Protocol.

433. London Protocol, art. 22; see also Parts V.C.1, V.C.5, V.J.3 for analysis of the Protocol in the law of naval warfare context.

434. TIF 429-30; SCHINDLER & TOMAN 885.

435. Turkey acceded to the Protocol in 1937, SCHINDLER & TOMAN 885, long after the predecessor State, the Ottoman Empire, had been stripped of its Gulf territories through the League of Nations mandate system. The law of treaty succession could not apply to the GCC States; when Turkey became a Protocol party, these countries were not part of Turkey.

436. UN Charter, art. 103; see also n. 10 and accompanying text.

437. See n. 205 and accompanying text.

438. The SAN REMO MANUAL does not consider the Charter supremacy issue, noting some participants challenged a view that the Charter applies during armed conflict, arguing that jus ad bellum rules apply only until outbreak of an armed conflict. "Once a State became engaged in armed conflict, it was argued, that State was subject only to the [LOAC]. This is because the [LOAC] contains its own principles of necessity and proportionality," citing NWP 9A, Annotated § 5.2. SAN REMO MANUAL ¶ 4, Commentary 4.3. All MANUAL participants accepted that "the fact that an act may be a necessary and proportionate measure . . . cannot justify it if it involves a violation of the laws of armed conflict." Id. ¶ 4, Commentaries 4.2(b), 4.3. If this means a Charter-based norm can be superseded by a norm based on a treaty governing the LOAC, however laudatory and beneficial to humanitarian standards the intention might be, the Commentary appears not to have taken UN Charter, art. 103 into account. If SAN REMO MANUAL, ¶ 4, Commentaries 4.2(b), 4.3 mean the LOAC recited in treaties should be the same as a norm developed under UN Charter, art. 51, much as necessity and proportionality are customary limitations on the inherent right of self-defense, nn. 485-585 and accompanying text, the MANUAL is correct on the point. Whether the Charter as a treaty can supersede custom is debatable, and to that extent the MANUAL is also correct. See n. 10 and accompanying text. If, on the other hand, Article 51 restates a jus cogens norm, n. 205 and accompanying text, then LOAC norms may be in conflict but cannot supersede it. See n. 10 and accompanying text.

439. Commentators continue to debate the point. Compare, e.g., MALLISON 106-23 (Protocol still a valid principle); Dieter Fleck, Comments on Howard S. Levie's Paper: Submarine Warfare: With Emphasis on the 1936 London Protocol, in Grunawalt 78, 83-84 (same); Howard S. Levie, Submarine Warfare: With Emphasis on the 1936 London Protocol, in id. 28, 59 (same, but States will find reasons to justify noncompliance); Sally V. Mallison & W. Thomas Mallison, The Naval Practices of Belligerents in World War II: Legal Criteria and Developments, in id. 87, 99-102 (Protocol still valid law, enhanced by Fourth Convention, art. 18(1) duty to search for survivors after battle at sea); Edwin I. Nowogugu, Commentary, in LAW OF NAVAL WARFARE 353, 363-64 (Protocol still valid law); Horace B. Robertson, Jr., U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and Practice, in Grunawalt 338, 343, 352-53 (same, but inapplicable in most circumstances) with, e.g., STONE (Protocol violated in World War II, apparently
Chapter V addresses these attacks. Annotated

8.1.1. Notable exception, are parallel custom means that, unless Article 51 is given 117.5.1-7.5.2; 8.2.2.2, at 8-12. Competing with, and perhaps offsetting, the Charter-based norm. If the independent norm has jus cogens status, there may be a different customary norm competing with, and perhaps offsetting, the Charter-based norm. If the independent norm has jus cogens status, it may negate the Charter norm. See n. 10 and accompanying text.

440. See Nicaragua Case, 1986 ICJ at 92-93. UN Charter, art. 2(6) requires the United Nations to “ensure that states ... not Members ... act in accordance with [the] Principles [of the Charter] so far as may be necessary for the maintenance of international peace and security.” Although the Security Council and the General Assembly have not referred to Article 2(6), their resolutions have declared law applicable to all States. Most commentators say Article 2(6) does not bind non-Members to Charter law. Vienna Convention, art. 38; Goodrich et al. 58-60; Summa 134-39; contra, Kelsen, The Law, n. 189, 107. Article 2(6) is almost a dead letter today, since nearly all countries, Switzerland being a notable exception, are UN Members. However, the Nicaragua Case recognition of the possibility of an independent, parallel custom means that, unless Article 51 is given jus cogens status, there may be a different customary norm competing with, and perhaps offsetting, the Charter-based norm. If the independent norm has jus cogens status, it may negate the Charter norm. See n. 10 and accompanying text.

441. San Remo Manual ¶¶ 60(g), 67(d); compare NWP 1-14M Annotated ¶¶ 8.2.2.2, at 8-10, 8-12; NWP 9A Annotated ¶¶ 8.2.2.2, at 8-10, 8-12.

442. San Remo Manual ¶¶ 61, 68, referring to id. ¶¶ 38-46; compare NWP 1-14M Annotated ¶ 8.1.1; NWP 9A Annotated ¶ 8.1.1.


444. Id. ¶¶ 60(c), 60(g), 67(d); compare NWP 1-14M Annotated ¶¶ 7.5.1-7.5.2; 8.2.2.2, at 8-12; NWP 9A Annotated, ¶¶ 7.5.1-7.5.2, 8.2.2.2, at 8-12.

445. Protocol I, preamble; San Remo Manual, ¶ 6 & Commentary 6.1. The United States and other Gulf naval powers had the view that the Tanker War was a war in the traditional sense and that the LOAC, of which the law of naval warfare is a part, applied. See n. 391 and accompanying text. Chapter III concentrates on Charter principles; Chapter V addresses LOAC principles. See Parts V.A.-V.D., V.F.2, V.F.5, V.G, V.J.1-V.J.4, V.J.6-V.J.7 for analysis of these attacks.

446. Cf. nn. II.97, 192 and accompanying text.

447. See nn. II.97, 192-93 and accompanying text.


449. See n. II.146 and accompanying text.

450. See nn. 207-88, 308-36 and accompanying text.


452. See II.368-70 and accompanying text.

453. See n. II.430 and accompanying text.

454. See nn. II.393-399 and accompanying text.

455. See n. II.469 and accompanying text.

456. See n. 391 and accompanying text.

457. See nn. II.394-96, 469 and accompanying text.

458. See n. II.449 and accompanying text.

459. See n. II.447 and accompanying text.
460. See nn. 308-36 and accompanying text.
461. See n. II.412 and accompanying text.
462. See nn. 308-36 and accompanying text.
463. See n. II.386 and accompanying text.
464. See nn. 308-36 and accompanying text.
465. See nn. II.391-92 and accompanying text.
466. See n. II.393-95 and accompanying text.
467. See n. II.430 and accompanying text.
468. See n. II.363 and accompanying text.
469. See n. II.338-40 and accompanying text.
470. See nn. II.367 (warning shots), II.410 and accompanying text.
471. See nn. II.364, 373, 391, 400, 406, 410-13, 434, 446, 463-64, 468-70, 472, 520 and accompanying text.
472. See nn. II.459-68 and accompanying text.
473. See n. II.339, 468 and accompanying text.
474. See, e.g., n. II.410 and accompanying text.
475. Necessity, proportionality and other qualifications of the right to self-defense are analyzed at nn. 485-590 and accompanying text.
476. See Parts V.A.-V.D., V.F.2, V.F.5, V.G, V.J.1-V.J.4, V.J.6-V.J.7
477. UN Charter, art. 2(1); S.S. Lotus (Fr. v. Turk.), 1927 PCIJ, Ser. A, No. 10, at 4, 18; see also n. 30 and accompanying text.
479. See nn. 485-590 and accompanying text.
480. Id.
481. Id.
482. See nn. II.437-42, 454-56 and accompanying text.
483. See nn. II.437-41 and accompanying text.
484. See nn. II.446-53 and accompanying text.
485. See n. 357 and accompanying text.
486. Legality of Threat of Nuclear Weapons, 1996 (1) ICJ 226, 245; Nicaragua Case, 1986 ICJ 94; NWP 1-14M Annotated, ¶ 4.3.2; NWP 9A Annotated ¶ 4.3.2; RESTATEMENT (THIRD) § 905(1)(a) & cmt. c r.n. 3; San Remo Manual ¶ 3 & Commentary 3.3. NWP 1-14M Annotated ¶ 4.3.2.1 departs from NWP 9A Annotated, stating that in today's world of modern lethal weapon systems, the Caroline Case formula for necessity, n. 357 and accompanying text, is too restrictive. Commentators have criticized the Caroline Case formula as outdated. See, e.g., McDougall & Feliciano 217-18; Lowe, The Commander's, n. 318, 127-30; Mallison & Mallison, Naval, n. 261, 263; Abraham D. Sofaer, Terrorism, The Law, and the National Defense, 126 Mil. L. Rev. 89 (1989). Others continue to espouse this aspect of anticipatory self-defense, however. See generally nn. 356-57 and accompanying text. For this reason, and because NWP 1-14M Annotated was not published until after the Tanker War, analysis proceeds on the basis that the Caroline Case formulation of necessity was part of anticipatory self-defense requirements for the conflict.
488. See nn. 591-616 and accompanying text.
489. See nn. 646-49 and accompanying text.
490. Many States protested belligerents' actions during the Tanker War, and the belligerents protested actions by their opponent or third States. See, e.g., nn. II.177, 225, 234, 333, 379, 432-33, 492 and accompanying text.
491. E.g., the United States settled with Iraq for the Stark claims and with Iran for the Airbus tragedy. See nn. II.339, 468 and accompanying text.
492. The United States invoked ICJ jurisdiction to resolve the Iran hostage situation, Hostage Case, n. II.12, and Iran claimed against the United States for the Rostum attack and the Airbus tragedy, the latter being settled. See nn. II.395, 432-34, 468 and accompanying text.

493. E.g., a State could keep a "ledger [for] an aggression of pin-prick attacks" and respond proportionally to all in the future. Dinstein 226; Roberto Ago, Addendum to Eighth Report on State Responsibility, UN Doc. A/ CN.4/318 & Add. 1-4 1979(2)1 Y.B. INT’L L. COMM. 13, 69-70 (1981). Responding with force in self-defense that seems disproportionate to the latest prick carries a risk that a target of the response or others may argue the response is disproportionate and therefore an aggressive armed attack by the pricked State. Dinstein 225. "Genuine on-the-spot reaction [closes] the incident." Id. 214. This is wiser than accumulating them for future action, as Israel appears to have announced for SCUD attacks on it during the 1990-91 Gulf War. Whether a State collects such hurts for future action, or whether it approves immediate response, notice must be given clearly to the other State and the general international community to avoid counterclaims of aggression, etc. If a response could be construed to apply to more than one prick, and is intended for a particular harm, that too should be underscored. The United States did this in the Sea Isle City response. See nn. II.394-98 and accompanying text.

494. E.g., the 1979-80 hostage situation involved several strategies: judicial and military (i.e., the aborted Tehran raid), Hostage Case, n. II.12, 1980 ICJ 3; diplomacy and claims resolution through arbitration, Declarations of Algeria Concerning Commitments and Settlement of Claims by the United States and Iran with Respect to Resolution of the Crisis Arising Out of Detention of 52 U.S. Nationals in Iran, with Undertakings & Escrow Agreement, Jan. 19, 1981, TIAS ——, in 20 ILM 224 (1991); economic, cf. Dames & Moore v. Regan, 453 US 654 (1981). Dames also shows that strategies may be carried out in different arenas. The case was litigated in the US national courts, as distinguished from judicial strategies in the ICJ Hostage Case, and by different levels of participants, i.e., private litigants invoking US courts’ jurisdiction to attack Iranian assets, some in private hands and some State-owned. States were parties in the Hostage Case. Cf. ICJ Statute, art. 34.

495. Oscar Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1635 (1984); see also Dinstein 202-03 who, id. 244-45, would inject a "beyond reasonable doubt" standard for armed bands crossing a border, perhaps reflecting Definition of Aggression, n. 62, art. 3(g), 13 ILM 714, cautionary language. Even if a heightened standard is appropriate to counter such aggression, it is not a requirement for responding to other acts of aggression.

496. San Remo Manual ¶ 3, Commentary 3.3.

497. Id. ¶ 4, Commentary 4.3.

498. Cf. id., citing NWP 9A Annotated ¶ 5.2, restating LOAC standards. See also id. ¶ 56.2.5.2, which says US military tribunals have applied the same rules for a military necessity defense to individuals and nations. Military necessity allows measures necessary to compel an enemy's submission but does not permit destruction of life and property beyond the necessities of war. See 3 Hyde ¶ 655; McDougal & Feliciano 72, 528; NWP 1-14M Annotated ¶ 5.2; Stone 352.

499. UN Charter, art. 103; see also n. 10 and accompanying text, particularly as to the potential role of customary norms in superseding the Charter.

500. See n. 205 and accompanying text.

501. Brownlie, Use of Force 355; Dinstein 214; see also Nyon Arrangement; Nyon Supplementary Agreement.


503. These acts might violate incidents at sea agreements (INCSEA), however, and give rise to a diplomatic claim. See nn. IV.19, IV.22 and accompanying text.

504. Dinstein 190; see also nn. 374-77 and accompanying text.

505. See n. 378 and accompanying text.

506. See Bunn, n. 358, 69-70.


508. See nn. II.74-80 and accompanying text.


510. See n. 493 and accompanying text.

511. See nn. 617-30 and accompanying text.
World Public Order 219

512. McDougal & Feliciano 230.

513. Nicaragua Case, 1986 ICJ 94; McDougal & Feliciano 231-41, citing inter alia T.J. Lawrence, The Principles of International Law 118 (2d ed. 1897); John Westlake, International Law 300 (1904); NWP 1-14M Annotated ¶ 5.2; NWP 9A Annotated ¶ 5.2; San Remo Manual ¶ 3, Commentary 3.3; 4, Commentary 4.3; Georg Schwarzenberger, The Fundamental Principles of International Law, 87 RCADI 195, 334 (1955). McDougal & Feliciano continue analysis by criticizing commentators' narrow views, e.g., Kunz, Individual, n. 189, on self-defense's scope in the Charter era, but regardless of a position taken on scope, necessity qualifies all self-defense claims.

514. See nn. II.224-27, 305, 345-47 and accompanying text.

515. See nn. 521-85 and accompanying text.

516. See nn. II.368-72 and accompanying text.

517. See nn. II.264, 336, 354-55, 357, 374, 384-87, 437-42, 454-56 and accompanying text.

518. In 1992 Iran sued the United States in the ICJ for the attacks on the oil platforms; in 1997 the Court held for jurisdiction. See nn. II.432-34 and accompanying text.

519. See n. II.459-76 and accompanying text.

520. See n. 253-55 and accompanying text.

521. Legality of Threat of Nuclear Weapons, 1996 (1) ICJ 245; Nicaragua Case, 1986 ICJ 94. Commentators agree, whatever their view on anticipatory self-defense or if the restrictive Caroline Case formulation of necessity is a component of anticipatory self-defense. See, e.g., Bowett, Self-Defence 269; Brome, The Definition, n. 112, 129-30; Dinsein 202-03; McDougal & Feliciano 241-44; NWP 1-14M Annotated ¶ 4.3.2; NWP 9A Annotated ¶ 4.3.2; Rifat, n. 23, 127; Restatement (Third) § 905(a)(b) & comment d, n. 2; San Remo Manual ¶ 3 & Commentary 3.3; Ago, n. 493, 69-70; Christopher Greenwood, Self-Defence and the Conduct of International Armed Conflict, in International Law, n. 11, 273, 274; Waldock, The Regulation, n. 52, 463.

522. NWP 1-14M Annotated ¶ 4.3.2; NWP 9A Annotated ¶ 4.3.2; San Remo Manual ¶ 4.

523. Dinsein 129; see also San Remo Manual ¶ 3, Commentary 3.3; 4, Commentaries 4.1, 4.4-4.5.


525. Dinsein 225-26; Rifat, n. 22, 270-71.


527. San Remo Manual ¶ 3, Commentary 3.3.

528. UN Charter, art. 103; see also nn. 10, 205 and accompanying text.

529. McDougal & Feliciano 228, 241-44.

530. Id. 244; San Remo Manual ¶ 3, Commentary 3.3.

531. See nn. II.368-72 and accompanying text.

532. See nn. II.429-333 and accompanying text.


535. Dinsein 232. He adds a parenthetical "(despite any ultimate lack of proportionality)" after id. Since he follows with Ago, n. 493, 69 ("It would be mistaken ... what matters is the result to be achieved by the 'defensive' action and not the terms, substance and strength of the action itself"). Dinsein 232 cannot be understood to mean that in all-out war proportionality goes overboard. What he undoubtedly means is that the key is not proportionality of response in terms of reaction force(s) but proportionality in terms of result achieved, i.e., "stopping or preventing the infringement." Ago 69; Waldock, The Regulation, n. 52, 464.

536. Dinsein 233.

537. Id. 234, citing Kunz, Individual, n. 189, 876.

538. Accord, San Remo Manual ¶ 3, Commentary 3.3; 5, Commentary 5.1; but see id. ¶ 5, Commentary 5.2.
539. DINSTEIN 234.
540. McDougall & Feliciano 231-32, citing Judgment of International Military Tribunal for the Far East 964-66, 976-78, 994-95; see also n. 357 and accompanying text.
542. Cf. UN Charter, art. 2(4), requiring respect for States’ territorial integrity; see also nn. 47-157 and accompanying text.
543. See nn. II.97, 192 and accompanying text.
544. See nn. II.378, 484-502 and accompanying text.
546. Greenwood, Self-Defence, n. 521, 277; see also nn. 259-64 and accompanying text.
547. O’Connell, The Influence 65; see also n. 244 and accompanying text.
548. Iraq had ordered frigates in Italy; they were being built there as the war started. They sat out the war there. See n. II.130 and accompanying text.
550. See n. 259 and accompanying text.
551. See nn. 591-616 and accompanying text.
552. The Korean War and the 1990-91 Gulf War are notable exceptions. See nn. II.501-14, III.220-22, 281-84, 310-13 and accompanying text.
553. See nn. 220-22, 281-84, 310-13 and accompanying text.
554. See nn. 235-43, 249 and accompanying text.
555. See nn. 259-64 and accompanying text.
556. See nn. 245-48 and accompanying text.
557. See n. 550 and accompanying text.
558. See nn. 533-38 and accompanying text.
559. UN Charter, arts. 2(1), 2(3); see also nn. 30, 47-157 and accompanying text.
560. See Walker, Crisis Over Kuwait 30 n. 27.
561. San Remo Manual ¶¶ 3, Commentary 3.3 refutes this view; see also nn. 546-51 and accompanying text.
562. See n. II.457 and accompanying text.
563. See nn. II.224-17 and accompanying text.
564. See nn. II.367 (warning shots), 410 and accompanying text. The United States had concerns over attacks from Iranian speedboats. See nn. II.364, 373, 391, 400, 406, 410-11, 434, 446, 463-64, 468-70, 472, 520 and accompanying text.
565. See nn. II.144, 177, 274-78, 422-23 and accompanying text.
566. See nn. II.491-92 and accompanying text.
569. UN Charter, art. 2(4); see also nn. 45-157 and accompanying text.
570. UN Charter, art. 51; see also nn. 158-288 and accompanying text.
572. See nn. II.210-14 and accompanying text.
573. See nn. II.368-72 and accompanying text.

574. See nn. II.393-402 and accompanying text.

575. See nn. 546-51 and accompanying text.

576. See nn. II.391-92, 429-33, 459-68 and accompanying text.

577. See nn. II.338-40 and accompanying text.

578. See nn. II.459-68 and accompanying text.

579. See nn. 546-51 and accompanying text.

580. See nn. 591-616 and accompanying text.


582. Now restated inter alia in LOS Convention, art. 38; see also nn. IV.522-619, V.70-71 and accompanying text.

583. Sec generally, e.g., SAN REAIO MANUAL 111147-66; see also Parts V.c, V.D and V.G.

584. Protocol I, preamble; SAN REAIOMANUAL, 116 & Commentary 6.1; see also nn. 485-579 and accompanying text.

585. UN Charter, arts. 51,103; see also n. 10 and accompanying text.

586. See 357 and accompanying text.


588. See 414-17 and accompanying text.


593. E.g., Gabeikovo-Nagymaros Project (Hung. v. Slovak.), 1997 ICJ 7, 54; Nicaragua Case, 1986 id. 127; Friendly Relations Declaration; Bowett, Self-Defence 13; BRIERLY 401-02; Brownlee, USE OF FORCE 281; Goodrich et al. 340-47; Higgins, The Development, n. 56, 217; 2 OpPEINheim §§ 43; 52a, at 152-53; SimMa 105; Stone 286-87; Ago, n. 493, 42; Roberto Barsotti, Armed Repri3als, in CasSesse, n. 207,79; D.W. Bowett, Repri3als Involving Recourse to Armed Force, 66 AJIL 20 (1972); Higgins, The Attitude, n. 376, 444; Tucker, Repri3als, n. 358, 586-87; cf. NWP 1-14M Annotated § 6.2.3; NWP 9A Annotated § 6.2.3, contra, Dinstein 215-26; Lawrence T. Greenberg et al., INFORMATION WARFARE AND INTERNATIONAL LAW 26-27 (1997).

594. NWP 1-14M Annotated § 6.2.3.1, at 6-18; NWP 9A Annotated § 6.2.3.1, at 6-19.


597. Friendly Relations Declaration, n. 69.


600. Air Service Agreement Between France & United States (Fr. v. US), 18 UNRlAA 417, 446 (Arb. 1978); Ago, n. 493, 43.

601. See nn. 259-64 and accompanying text.


603. Ago, n. 493, 41, citing Responsibility of Germany for Acts Committed in Portuguese Colonies in the South of Africa (Port. v. Ger.) (Nauiilaa Arbitration), 2 UNRlAA 1012, 1025-26 (Arb. 1928) (Nauiilaa Arbitration); Cysne Case, n. 602; see also NWP 1-14M Annotated § 6.3.2.1; NWP 9A Annotated § 6.2.3.1; Higgins, The Attitude, n. 376, citing Nauiilaa Arbitration.
apparently anachronistic statements. The same kind of error-laden, after-the-fact justification or criticism can occur
in self-defense situations, especially for anticipatory self-defense issues.

reason why it may not have been necessary for Israel to bomb the reactor. In both cases the supposed precipitating
1994, or security-covered

necessary guarantee of security under the
not be supported by self-defense because of a 1994 debate on imposing sanctions on North Korea rather than using

208, 227-28, 230 (embargo on arms sales to South Africa, followed by prohibition on UN Members' buying South African
arms, etc.); Members urged to adopt measures, e.g., suspending new investment, prohibiting South African coin sales,
restricting sports and cultural relations, suspending guaranteed export loans, prohibiting new contracts for nuclear
facilities and computer equipment sales to South African army, police, etc.). A US response, after issuing executive
orders, was Comprehensive Anti-Apartheid Act of 1986, 22 USC §§ 5001-5117 (1988). See also Nico Schrijver, The Use
of Economic Sanctions by the UN Security Council: An International Law Perspective, in INTERNATIONAL ECONOMIC LAW
AND ARMED CONFLICT 123, 131-32 (Harry H.G. Post ed. 1994).

1994 debate on imposing sanctions on North Korea rather than using force because of the danger of nuclear weapons.
McCormack, n. 209, 98-99, derides a claim Israel had been given a necessary guarantee of security under the US Star Wars program, developed later in the Reagan Administration, was a reason why it may not have been necessary for Israel to bomb the reactor. In both cases the supposed precipitating event occurred after the 1981 raid. Of course, there may have been security-guarded debates over North Korea before 1994, or security-covered Star Wars discussions in 1981 or earlier, but this is what the public record reveals as to these apparently anachronistic statements. The same kind of error-laden, after-the-fact justification or criticism can occur in self-defense situations, especially for anticipatory self-defense issues.


RESTATEMENT (THIRD), § 313 cmt. b analyzes declarations and understandings:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not
purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such a . . . declaration is not a
reservations if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

In relation to a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all contracting parties, they need only acquiesce. If, however, some contracting parties share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. See [RESTATEMENT (THIRD), § 313(2)(c), dealing with reservations]. . . . However, some contracting parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

See also Vienna Convention, arts. 19-23, ILC Rep., n. 192, 189-90; Bowett, Reservations, n. 197, 69; nn. 192, 197 and accompanying text for reservations to multilateral agreements.


623. Protocol I, art. 51. Id., art. 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations such as those civilians who take up arms, restate customary law. AFP 110-31 ch. 14; Both et al. 299 & n.3; NWP 1-14M Annotated ¶ 6.2.3.2 (noting protections also under Fourth Convention, art. 33), 11.2 n.4, 11.3; NWP 9A Annotated ¶ 6.2.3.2 (same),11.2 n.3, 11.3; 4 PICTER 224-29; SAN REMO MANUAL ¶ 39; STONE 684-732; Matheson, Remarks 423, 426; William G. Schmidt, The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions, 24 AIR FORCE L. REV. 189, 223-35 (1984); Waldemar A. Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 AM U.J. INTL. L. & POL. 117, 130-31 (1986). Civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that may terrorize them are permissible. Specific intent to terrorize gives rise to liability. NWP 1-14M Annotated ¶ 11.2 (noting protections under Fourth Convention, arts. 28, 33), 11.3; NWP 9A Annotated ¶ 11.2 (same), 11.3; Hans-Peter Gasser, Prohibition of Terrorist Attacks in International Humanitarian Law, 1985 INTL. REV. RED CROSS 200; Hague Air Rules, art. 22; Matheson 426; Schmidt 227. Article 51 rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack, generally restate custom. Both et al. 309-11, 359-67; Frits Kalshoven, Constraints on the Waging of War 99-100 (1987); McDougal & Feliciano 525; NWP 1-14M Annotated ¶ 5.2 & n.7, 8.1.2.1; NWP 9A Annotated ¶ 5.2 & n.6, 8.1.2.1; SAN REMO MANUAL ¶ 39-42 & Commentaries; STONE 352-53; W.J. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 MIL. L. REV. 91, 125 (1982) (questioning whether proportionality is an accepted customary norm); Matheson 426; Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989, 7 BSFHV 170-71 (1991); Schmidt 233-38; Solf 131; G.J.F. van Hegelsom, Methods and Means of Combat in Naval Warfare, 8 BSFHV 1, 18-19 (1992).

624. Protocol I, art. 52, states a general customary norm, except the prohibition on reprisals against civilians in art. 52(1), for which there are two views. See generally Bothe et al. 320-27; Colombos §§ 510-11, 524-25, 528-29; NWP 1-14M Annotated ¶ 6.2.3.2 & n.36, 6.2.3.2 (protection for some civilians from reprisals under Fourth Convention, art. 33), 8.1.1 & n.9, 8.1.2 & n.12; NWP 9A Annotated ¶ 6.2.3.2 & n.36, 6.2.3.2 (same), 8.1.1 & n.9, 8.1.2 & n.12 (US view that Protocol I, art. 52(1) "creates new law"); 2 O'Connell, LAW OF THE SEA 1105-06; 4 PICTER 131; Pilloud, Commentaries ¶ 1994-2038; Matheson, Remarks 426; Frank Russo, Jr., Targeting Theory in the Law of Naval Warfare, 30 NAV. L. REV. 1, 17 n.36 (1992) (rejecting Protocol I, art. 52(2) applicability to sea warfare); Solf, Protection, n. 623, 131.

625. Protocol I, art. 57, whose rules of distinction, necessity and proportionality, with concomitant risk of collateral damage inherent in any attack generally restate custom. See generally Bothe et al. 309-11; Kalshoven, Constraints, n. 623, 99-100; McDougal & Feliciano 525; NWP 1-14M Annotated ¶ 8.1.2.1 & nn.19-20; NWP 9A Annotated ¶ 8.1.2.1 & nn.19-20; SAN REMO MANUAL ¶ 39-42 & Commentaries; STONE 352-53; Fenrick, The Rule, n. 623, 125 (questioning whether proportionality accepted as custom); Matheson, Remarks 426; Results, n. 621, 170-71; Schmidt, The Protection, n. 623, 233-38; Solf, Protection, n. 622, 131; van Hegelsom, n. 622, 18-19.

626. Belgium Declaration, May 20, 1986, in Schindler & Tooman 706, 707; Italy Declaration, Feb. 27, 1986, in id. 712; the Netherlands Declaration, June 26, 1977, in id. 713, 714; UK Declaration, Dec. 12, 1977, in id. 717; see also Bothe et al. 279-80, 310, 363; NWP 1-14M Annotated ¶ 8.1.2.1 & n.19; NWP 9A Annotated ¶ 8.1.2.1 & n.19.


629. SAN REMO MANUAL ¶ 46(b) & Commentary 46.3; Second Protocol, art. 1(f); see also BEN CHENG, GENERAL, n. 377, 90; DINSTEIN 191; McDougall & Feliciano 220.

630. See n. 618 and accompanying text.

631. Corfu Channel (UK v. Alb.), 1949 ICJ 35; BOWETT, SELF-DEFENCE 10; BROWNlie, USE OF FORCE 46-47; 1 OPPENHEIM § 126; HIGGINS, THE DEVELOPMENT, n. 56, 216; Ago, n. 493, 15-17. Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 263, 266 (8-7 adv. op.), citing UN Charter, art. 51, could not decide whether a threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, where a State's very survival is at stake. Legality of Use by a State of Nuclear Weapons in Armed Conflict, id. 66, 84 declined to rule on a World Health Organization advisory opinion request on the same subject. Judge Schwebel, dissenting in the Threat or Use case, wrote: "Far from justifying the Court's inconclusiveness, contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances." See generally VED P. NANDA & DAVID KRIEGER, NUCLEAR WEAPONS AND THE WORLD COURT chs. 6-8.


633. Id. 17, citing Schwarzenberger, The Fundamental, n. 512, 192, 343.


635. Compare, e.g., BOWETT, SELF-DEFENCE 10; BROWNlie, USE OF FORCE 42-48 (no such doctrine exists), teith, e.g., BEN CHENG, n. 377, 31, 69; Ago, n. 493, 48-49; Schwarzenberger, The Fundamental, n. 513, 343; cf. 1 OPPENHEIM §§ 131 n.15, 354. However, in view of the ICJ and the LOS Tribunal opinions, n. 634, it is fairly clear that there is a customary doctrine of necessity today.

636. LOS Convention, art. 221; Intervention Convention, art. 1(1); see also 4 Nordquist ¶¶ 221.1-221.9(b); 2 O'CONNELL, LAW OF THE SEA 1006-08; nn. VI.163-72 and accompanying text.

637. 1 OPPENHEIM § 354; Ago, n. 493, 28-29; BROWNlie, USE OF FORCE 376-77, 432 apparently approves intervention in this situation. See also 4 Nordquist ¶ 221.2; 2 O'CONNELL, LAW OF THE SEA 1006-08; nn. VI. 163-72 and accompanying text.


640. See nn. II.348, 412, 447-52, 469-70 and accompanying text.

641. Third Convention, arts. 12-13; Convention for Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, arts. 8, 11, 212 CTS 178, 183, not applicable to warships and State vessels. The United States is not a party to this treaty. See also NWP 1-14M Annotated ¶ 3.2.1; 3 PICTET 128-42; n. IV.816 and accompanying text.

642. See nn. II.210-14 and accompanying text.

643. See nn. 424-25 and accompanying text.

644. See, e.g., Walker, Oceans Law 185-86.

645. BRIERLY 399; WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 120(A. Pearce Higgins ed., 8th ed. 1924); 2 HYDE § 588; FRITS KALSHOVEN, BELLIGERENT REPRISALS 27 (1971); 7 MOORE § 1090, citing HALL 367 (J. B. Atley ed., 5th ed. 1904); RESTATEMENT (THIRD) § 905 & c.n. 8; SIMMA 104; STONE 288-89; Waldock, The Regulation, n. 52, 458.

Close reading of these sources indicates there is ambiguity in use of the term; there is a view that retorsion includes illegal acts responding to prior illegal acts, see RESTATEMENT (THIRD), and that retorsion can only mean an unfriendly response to a prior unfriendly act, and by inference not to a prior illegal act, see KALSHOVEN. The former kind of responses, i.e., proportional illegal responses to a prior illegal act, have been included under reprisals. See nn. 591-616 and accompanying text. KALSHOVEN's limitation seems unfortunate and not in keeping with a Charter philosophy of resolving disputes by means other than law violation (e.g., nonforce reprisals) or use of force. See UN Charter, art. 33; n. 655 and accompanying text. Allowing a State to respond to a potentially illegal aggressive pin-prick, rather than condemning the respondent to use of force in proportional self-defense, would also be in line with the necessity requirement. See nn. 493, 510 and accompanying text. In a given situation it might only be necessary to invoke a retorsion (e.g., a high seas naval demonstration, 2 HYDE § 588, at 1659) rather than using force in, e.g., the territorial sea.

646. HALL, n. 645, § 120; 7 MOORE § 1090; 2 OPPENHEIM § 135.

647. See nn. II.224-27, 305, 345-48 and accompanying text.


649. See nn. II.365, 379-81 and accompanying text. However, Iran's maneuvers in neutral territorial waters violated the law of the sea and those States' rights under UN Charter, art. 2(4); see n. II.365 and accompanying text and parts IV.C and IV.D.3.


651. 1ICJ Statute, art. 38(1) and RESTATEMENT (THIRD) § 102 list treaties as a primary source for international law. The Charter is a treaty, 59 Stat. 1031, as amended Dec. 17, 1963, 16 UST 1134, 557 UNTS 143; Dec. 20, 1965, 19 id. 5450; Dec. 20, 1971, 24 id. 2225, and principles flowing from Council decisions pursuant to UN Charter, arts. 25, 48, 103 are treaty law binding on all UN Members that override all treaties. W. Michael Reisman, The Constitutional Crisis in the United Nations, 87 AJIL 83, 87 (1993).

652. See generally GOODRICH et al. 207-11, 334-37; SIMMA 410-15. Decisions must be approved by 9 of the 15 Council members, including all permanent members, i.e., those holding veto power, e.g., the United States. UN Charter, arts. 23(1), 27(3). See also GOODRICH et al. 192-94, 215-31; SIMMA 394-95, 434-67. UN Charter, art. 37(2) gives the Council authority to decide on or recommend action to resolve a dispute endangering international peace and security; see also GOODRICH et al. 284-87; SIMMA 553-56.

653. UN Charter, arts. 36(1), 37(1), 38; see also GOODRICH et al. 277-89; SIMMA 538-41, 547-52, 561-65.

654. UN Charter, arts. 39-40; see also GOODRICH et al. 293-310; SIMMA 606-21. It may encourage dispute resolution by a regional arrangement or agency. UN Charter, art. 52(3); GOODRICH et al. 360-64.

655. UN Charter, arts. 33(2), 40; see also GOODRICH et al. 263-65, 302-10. Under Article 40 the Council may state provisional measures and call upon countries to comply with them.

656. UN Charter, arts. 41; see also GOODRICH et al. 311-14; SIMMA 625.


658. UN Charter, arts. 39-51.

660. UN Charter, arts. 33-38; see also nn. 653-55 and accompanying text.

661. Namibia, 1971 ICJ 16, 52-54; see also Bailey & Daws, n. 657, 268-69; compare Vienna Convention, arts. 31-32; see also nn. 88-95 and accompanying text.


664. S.C. Res. 82 (1950), in Wellems 324.

665. See n. 653 and accompanying text.

666. S.C. Res. 88 (1950), in id. 326. Although it “Resolve[d]” to remove the Korean matter from the agenda, S.C. Res. 90 (1951), in id. 327, was probably a decision. S.C. Res. 85 (1950), in id. 326, was recommendatory in its concern for civilian suffering in Korea.

667. See n. 763 and accompanying text.

668. E.g., S.C. Res. 43, 46, 49 (1948), in Wellems 633, 635.

669. S.C. Res. 50 (1948), in id. 636.

670. Cf. San Remo Manual ¶ 60(g), 67(f); NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2; see also Parts V.B-V.E and V.F.2-V.I.5.


673. The only decisions confirmed the right of Arabs removed from their homes in the demilitarized zone to be returned to their homes. S.C. Res. 93, 95 (1951), in id. 646, 648.

674. S.C. Res. 95 (1951), in id. 648.

675. Restatement (Third) § 103 (2)(d) & i.n. 2; see also n. 69 and accompanying text.


688. Introductory Note, id. 441.

689. Cf. UN Charter, art. 35(1).


694. See Walker, State Practice 142-43.


702. States not UN Members (e.g., Switzerland) were “[u]rged[d]” to act in accordance with the embargo provisions. S.C. Res. 232 (1966), in id. 128.

703. S.C. Res. 253 (1972), in id. 130; see also SIMMA 625.

704. The resolution again urged States not UN Members to comply with its terms. S.C. Res. 277 (1970), in WELLENS 133.


707. S.C. Res. 388 (1976), in id. 142. S.C. Res. 409 (1977), in id. 143, forbade use or transfer of funds by Rhodesia or its offices or agents.


710. Cf UN Charter, arts. 10-11, 13-14; see also n. 69 and accompanying text.


712. E.g., S.C. Res. 460, n. 709, citing G.A. Res. 1514, n. 35.


714. S.C. Res. 307 (1971), in WELLENS 433; see also nn. 247-48 and accompanying text.


717. This includes resolutions establishing UNIIMOG (UN Iran-Iraq Military Observer Group), continuing it until the 1990-91 Gulf War, and dealing with post-ceasefire issues. There were less than a dozen Security Council resolutions passed during the war, 1980-88.

718. By then the Arab League and the European Community, regional organizations, had appealed to Iran and Iraq for a ceasefire. The Arab League is structured in two treaties, one for collective self-defense under UN Charter, art. 51, and the other as a regional arrangement under id., art. 52. See nn. II.31, III. 800-17 and accompanying text.

719. S.C. Res. 479 (1980), in WELLENS 449; see also UN Charter, art. 33; nn. II.96, 99 and accompanying text.

720. See n. II.98 and accompanying text.

721. See n. II.96 and accompanying text.

722. See nn. II.153-56 and accompanying text.
228  The Tanker War


725. S.C. Res. 540 (1983), in WELLENS 451. In approving the resolution, the USSR said it would firmly oppose armed intervention in the Gulf for any reason, including protecting freedom of navigation. The GCC supported the resolution, the first time it had gone on record supporting the freedom of navigation principle. The United States, supporting the resolution, reemphasized its freedom of navigation policy when Iran threatened to restrict Gulf shipping or to close the Strait of Hormuz. See also nn. II.216-18 and accompanying text.

726. An Arab League Summit the same month had strongly condemned attacks on Kuwaiti and Saudi tankers. See nn. II.250-56 and accompanying text.

727. See nn. II.252-55 and accompanying text.

728. S.C. Res. 552 (1984), in WELLENS 473. A GCC draft resolution would have branded Iran as an aggressor. See nn. II.258-59 and accompanying text.

729. S.C. Res. 582 (1986), in WELLENS 453; see also UN Charter, art. 52; n. II.300 and accompanying text.

730. S.C. Res. 588 (1986), in WELLENS 454; see also UN Charter, art. 33; n. II.376-77 and accompanying text.

731. See n. II.377 and accompanying text.

732. See nn. II.425-28 and accompanying text.


734. See nn. II.482-83 and accompanying text.


737. Table 14: Decisions and Vetoes by Security Council on Substantive Proposals Regarding Peace and Security, in BAILEY, n. 663, 211; see also id. 209-10.

738. BAILEY, n. 663, 242.

739. See nn. 240, 247-48 and accompanying text.

740. UN Charter, art. 28(1); see also GOODRICH et al. 232-33; SIMMA 472-75.

741. As late as the 1990-91 Gulf War, technology available at the United Nations was less than robust. See generally Walker, Maritime Neutrality 161 n.35.

742. UN Charter, arts. 11(3), 32, 34, 99; see also GOODRICH et al. 127-29, 247-59, 265-70, 589-92; SIMMA 250-51, 515-21, 1048-57.

743. GOODRICH et al. 592-93.

744. UN Charter, arts. 33, 52; see also nn. 653, 800-20 and accompanying text.

745. See nn. 663-68 and accompanying text.

746. UN Charter, art. 27(3); see also BAILEY & DAWS, n. 657, 250-51; GOODRICH et al. 229-31; SIMMA 455-62.

747. See, e.g., n. 705.

748. See nn. 664-68, 671-90, 694-707, 715-33 and accompanying text.

749. UN Charter, arts. 25, 48; see also nn. 700-07 and accompanying text.

750. See nn. 651-60 and accompanying text.

751. See nn. 700-01 and accompanying text.

752. See nn. II.98, 153-56, 216-18, 250-59, 378, 405, 414-15, III.5-6, 10-12, 18 and accompanying text.
756. *See* nn. II.482-83 and accompanying text. Iran also accepted UN good offices, and Iraq rejected them, early in the war for extricating 70 merchantmen trapped in the Shatt. *See* nn. II.153-56 and accompanying text.

757. *See* nn. II.153-54, 193-95, 377, III.6, 9 and accompanying text.

758. *See* nn. 651-60 and accompanying text.

759. *See* n. 751 and accompanying text.

760. *See* nn. 651-52 and accompanying text.

761. *See* n. 585 and accompanying text.


763. *See* UN Charter, arts. 10-14; *see also* n. 69 and accompanying text.

764. *See* nn. 651-60 and accompanying text.


766. *See* UN Charter, arts. 10-14; *see also* n. 69 and accompanying text.

767. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

768. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

769. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

770. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

771. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

772. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

773. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

774. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

775. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

776. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

777. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

778. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

779. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

780. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

781. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

782. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

783. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

784. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

785. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

786. *See* generally, e.g., 1-4 HIGGINS, UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.
785. G.A. Res. 3067 (1973), in 13 ILM 227 (1974). This was the procedure followed for the 1958 LOS Conventions. G.A. Res. 1105 (1957), in Franklin 255; see also Carl M. Franklin, Introduction, in id. 1, 2.


787. See nn. 725, 729, 735 and accompanying text.

788. See n. 733 and accompanying text.

789. UN Charter, art. 43. Id., art. 45 requires Members to have air force contingents available for urgent use. Id., art. 44 provides that if a Member not represented on the Council is called on for forces, it would be allowed to participate in Council decisions concerning employment of its forces. See also GOODRICH et al. 317-29; SIMMA 636-43.

790. GOODRICH et al. 319-24; SIMMA 639, 648.

791. UN Charter, arts. 46-47; see also GOODRICH et al. 329-33; SIMMA 643-51.

792. GOODRICH et al. 324, 332; SIMMA 648.

793. Trygve Lie, the first UN Secretary-General, suggested a UN Guard Force recruited by the Secretary-General and placed at the disposal of the Council or Assembly. He later suggested an International Brigade for Korea and a UN Peace Force. Trygve Lie, in the Cause of Peace 192-93 (1954); Stephen M. Schwebel, A United Nations "Guard" and a United Nations "Legion," in WILLIAM N. FRYE, A UNITED NATIONS PEACE FORCE 195 (1957).


795. CASTENADA, n. 22, 57, 60, 90, 93-94, 96.

796. HIGGINS, THE DEVELOPMENT, n. 56, 251-53.

797. See nn. 703, 708, and accompanying text.

798. See nn. II.484-87, III.21 and accompanying text.

799. The Secretary-General also attempted mediation and called on UN Members for new approaches. See nn. II.99, 190-91, 269, 376 and accompanying text.157

800. UN Charter, art. 52; see also GOODRICH et al. 355-64; SIMMA 683-722; nn. 303-07 and accompanying text.

801. UN Charter, art. 53; see also GOODRICH et al. 364-68; SIMMA 730-38, 748-50.

802. Compare UN Charter, art. 54 with id., art. 51; see also GOODRICH et al. 368-69; SIMMA 753-57; nn. 350-56 and accompanying text.

803. Pact of League of Arab States, n. II.31. League members also belong to a regional self-defense organization authorized under UN Charter, art. 51. Treaty of Joint Defence & Economic Co-operation Between Arab States, with Military Annex, n. II.31. See also HASSOUNA, n. II.31, ch. 1; KHADDURI, THE GULF WAR, n. II.31, 140; MACDONALD, n. II.31; SIMMA 701; Beigr, n. II.31, 181; Khadduri, The Arab League, n. II.31; Walker, Anticipatory, n. 289, LIBER AMICORUM 388-89, 31 CORNELL INT'L J. 363-64; nn. II.31, III. 295-97, 307 and accompanying text.


806. These have been considered for invitations to attend Assembly meetings. GOODRICH et al. 356-57.

807. E.g., NATO; see also n. II.437 and accompanying text.

808. GOODRICH et al. 355-64.

810. See nn. II.31, III.295-97, 307 and accompanying text.

811. SIMMA 706, see also nn. II.21-31, 80, 84, 159-71, III.298-99 and accompanying text.

812. SIMMA 706; see also nn. II.388-89, 437-45, 493, 539-40 and accompanying text.

813. The ICO, formed by Charter of the Islamic Conference Organization, n. II.157, is an inter-regional conference with 44 members in two continents, with dispute settlement authority. Id., arts. 2(b), 12, 914 UNTS 111. SIMMA 706.


815. See nn. II. 21-31, 80, 84, 159-71, 543-45, III.298-99 and accompanying text.

816. See nn. II.388-90, 437-45, 493, 541-42, III.812 and accompanying text.

817. See nn. II.157, 170, 186, 208, 321, III.813 and accompanying text.


820. See nn. II.84, 260, 378, 478-79 and accompanying text.

821. Introductory Note, SCHINDLER & TOMAN 605.

822. Introductory Note, id. 177.

823. See nn. II.216, 300, 308, 377, III.725, 729, 735 and accompanying text.


825. See nn. II.153-56, III.722 and accompanying text.

826. See generally Chapters V-VI.

827. National seafarer unions, in opposing arming merchantmen, also may have influenced national decisionmaking. See nn. II.269, 359 and accompanying text.

828. Portions of this Part were published as Walker, Maritime Neutrality in the Charter Era and were delivered as a paper in Panel on National Security at the 17th Annual Seminar, New National Perspectives on the Law of the Sea Convention, sponsored by the University of Virginia School of Law Center for Oceans Law and Policy, Washington, D.C., Mar. 19, 1993.

829. PHILIP C. JESSUP, NEUTRALITY: TODAY AND TOMORROW 156 (1936).


832. CASTREN, n. 831, 427.


835. Cf. UN Charter, preamble, arts. 2(3)-2(4); see also nn. 47-157 and accompanying text.

836. GABRIEL, n. 831, 69; see also ORVIK, n. 831, 251-56.


840. *E.g.*, COLOMOS § 759; McDougall & Feliciano 197-436; 2 O'CONNELL, LAW OF THE SEA 1141-42; Bothe, Neutrality at Sea, n. 831, 205; Thomas A. Clingan, Jr., Submarine Mines in International Law, in Robertson 351, 352 (argument that neutrality no longer exists is specious); Gioia & Ronzitti, n. 831, 223; Lowe, The Commander's, n. 318, 134-38; McNeill, Neutral Rights, n. II.354, 642-43; Ronzitti, The Crisis, 6-12; Williams, n. 22, 47-48; Wiswall, Neutrality, n. II.295, 619. Even commentators arguing that the force of the law of neutrality has been greatly diminished do not say it has disappeared in the Charter era. See, e.g., ALFORD, n. 833, 326; Janis, n. 831, 153; Norton, n. 831, 311.

841. See, *e.g.*, JESSUP, NEUTRALITY, n. 829; JESSUP & DEAK, n. 830; W. ALISON PHILLIPS & ARTHUR H. REEDE, NEUTRALITY: THE NAPOLeONIC PERIOD (1936); EDGAR TURLINGTON, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1936).

842. See Pact of Paris, n. 160; UN Charter, art. 103; TIF 430-31; nn. 160-63, 837 and accompanying text.

843. See nn. 160-63 and accompanying text.

844. See n. 829 and accompanying text.


847. Stockholm Declaration.


854. Budapest Articles, arts. 4(b)-(d), n. 849, 67.

855. *See* nn. 396-417 and accompanying text.

856. Lend-Lease Act, ch. 11, 55 Stat. 31.


858. Brownlie, *International Law* 5; 1 Oppenheim § 10, at 28. 2 id. § 292Aa, 639 says US practice was resurrected older custom that had not died out. The United States negotiated Lend-Lease agreements with States not at war with the Axis before it went to war. To the extent that these agreements benefited the United States after it was at war, and before the other State declared war, the other State became a nonbelligerent. Examples of nonbelligerent provisions included reciprocal commodity pledges and pledges to supply the United States with "defense articles, strategic or critical materials, or defense information." *See*, e.g., Lend-Lease Agreement, Oct. 1, 1941, Brazil-US, 5 Bevans 905, 906-07. The United States had Lend-Lease agreements with 36 countries, including the USSR. *See* id. 64. As citing Bevans indicates, some agreements were not published and were perhaps not available for consideration as practice until 1968-76, when 1-13 id. were published.

859. Exchange of Notes, Sept. 2, 1940, UK-US, 54 Stat. 2405, 203 LNTS 201, supplemented by Agreement Relating to Defense of Newfoundland, Mar. 27, 1941, UK-US, 55 id. 1560. Bowett, *Self-Defence* 166 characterizes Lend-Lease and the destroyers-bases deal as violating international law in 1958 when he wrote. When viewed in the context of trends, particularly the law of self-defense as then stated, his view is not the law now, and Bowett might have concluded differently in 1958 if all Lend-Lease agreements had been published then. *See* n. 589 and accompanying text.


862. *Id.* 587.

863. *See* nn. 857-58 and accompanying text.
864. CASTREN, n. 831, 450-51, listing Bulgaria, China, Hungary, Italy, Portugal, Romania, Spain and Turkey besides the United States, which pursued these policies, without stating which side Spain favored. Although Francisco Franco’s Spain played both sides, throughout the war it supported the Axis, primarily Germany, providing ports for submarine support, infra-red, radar and sonar listening stations, the Blue Division for the USSR front, civilian labor in Germany, war material, credits and other services. These countries signed a Treaty of Friendship on March 31, 1939, and a Secret Protocol on February 12, 1943, which was not implemented; US Department of State, The Spanish Government and the Axis (1946); PAUL PRESTON, FRANCO: A BIOGRAPHY, chs. 13-21. Italy later joined the Axis as a cobelligerent.


867. JESSUP, NEUTRALITY, n. 829, 7, 160-62, 181, referring to JESSUP & DEAK, n. 830, 44, 109, 117, 160; PHILLIPS & REEDE, n. 841, ch. 4. The United States was among the maritime powers recognizing the 1780 armed neutrality; that of 1800 collapsed with the Danish fleet’s defeat. COLOMOS §§ 700-01; 2 OPPENHEIM § 290. Bilateral treaties, no longer in force, restated these principles during the 19th century. See, e.g., Treaty of Peace, Friendship, Commerce & Navigation, Dec. 12, 1828, Brazil-US, art. 22, 8 Stat. 390, 395; TIF 29.

868. Wright, The Transfer, n. 852, 689, cited the Convention for legitimacy of the destroyers-bases deal, n. 859 and accompanying text.


870. Norton, n. 830, 262-63. The short duration of the conflicts was a factor.

871. E.g., E.C. Council Regulation, n. 259; E.C.S.C. Council Decision, n. 259; Statement Concerning Assistance to and Sales to Argentina, n. 259; 3 CORDESMAN & WAGNER 260-63, 270, 280-81, 331-32; see also n. 259 and accompanying text.


873. For a record of other conflicts through 1975, see Norton, n. 830, 268-75 (Vietnam, 27 civil wars); see also CASTREN, n. 831, 452.

874. To the extent that these older treaty obligations conflict with Charter obligations, the Charter prevails. Deak, Neutrality, n. 10, 143, citing UN Charter, art. 103. The later in time rule states the same principle for newer agreements to assist an aggression victim with aid. Vienna Convention, art. 30. To the extent that the Charter, and action pursuant to it, is considered customary law, or perhaps jus cogens, later custom or jus cogens would trump an inconsistent earlier customary obligation or perhaps an older treaty. See n. 10 and accompanying text.
neutrality.

Convention, arts. 4, 9

JAMES GIOIA, Neutrality, from the UN New

appears to be otherwise. The UN command center for peacekeeping operations has been relatively spartan, running on a shoestring budget also

PRC).

national command centers, the Organization has a way to go and is likely to rely on the agency concept in the future.

S.C. Cases); accompanying

rule under the

831,252.

Committee was appointed in all cases except Liberia. Schrijver, n. 609, 129-32, 146-47; n. 708 and accompanying text.

Rhodesia also illustrates the interplay of General Assembly and Security Council resolutions. See generally O’CONNELL, THE INFLUENCE 137-38, 174-75; Schrijver, n. 609, 129-30; Walker, State Practice 142-43; nn. 695-707 and accompanying text.

CASTREN, n. 831, 435.

UN Charter, art. 39; see also nn. 651-56 and accompanying text.

“Neutral” "neutral or non-belligerent powers," see also

"neutral," "neutral or non-belligerent powers," "neutral power"; Fourth Convention, arts. 4, 9 ("neutral," "belligerent"); see also 1 PICTET 86-98; 2 id. 78-82, 112-16; 3 id. 69-70, 121-22; 4 id. 45-51, 8-89. Moreover, Protocol I, arts. 2(a), 9(2), 22(2), 30(3), 37(1)(d), 39(1), 64(1) consistently uses phrases, e.g., "neutral or other State not party to the conflict." See also Desk, Neutrality n. 10, 443; Norton, n. 831, 254-56. "Neutral"
or "neutrality" have been employed in post-World War II armistices and other settlements. See, e.g., Agreement Concerning Military Armistice in Korea, July 27, 1953, arts. 36-50, 4 UST 234, 248-53; Temporary Agreement Supplementary to Armistice Agreement in Korea, July 27, 1953, ¶ 1, id. 346; Declaration on Neutrality of Laos, July 18, 1962, 14 id. 1105; Agreement on Ending the War & Restoring Peace in Viet-Nam, Jan. 27, 1973, art. 20, 24 id. 115, 130.


912. Norton, n. 831, 256, analyzing UN Charter, art. 103, points out that the then current 1976 TIF still listed the 1907 Hague Conventions, replete with citations to neutrality, that the United States has ratified, and which is binding unless expressly superseded by later treaties. This is still the case. TIF 432-34. There have been few accessions since World War II. See LAW OF NAVAL WARFARE 93-95, 111-13, 129-30, 149-50, 173-74, 193-94, a compilation during the Tanker War. State succession to treaties may mean the Conventions have more applicability than the LAW OF NAVAL WARFARE lists would suggest. See generally Symposium, Treaty Succession; Walker, Integration and Disintegration.

913. Nicaragua Case, 1986 ICJ at 31-38, 91-135; see also North Sea Continental Shelf Cases, 1969 ICJ 28-29, 36-45; Baxter, Treaties, n. 139, 36. Norton, n. 831, 256-57, argues that including neutrality rules in military manuals indicates the continued vitality of the concept. See also BROWNLIE, INTERNATIONAL LAW 5. However, manuals' disclaimer clauses tend to blunt or eliminate their impact as evidence of custom. See, e.g., NWP 1-14M Annotated, at 1, 2; NWP 9A Annotated, Preface.

914. See nn. 606 and accompanying text.

915. O'CONNELL, LAW OF THE SEA 1142.

916. UN Charter, art. 103; see also n. 10 and accompanying text.

917. IJC Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; see also n. 10 and accompanying text.

918. See n. 10 and accompanying text.

919. Vienna Convention, arts. 31-33; see also nn.88-95 and accompanying text.

920. See generally Symposium, Treaty Succession; Walker, Integration and Disintegration.

921. See n. 1.33 and accompanying text.


923. See nn. 58-59 and accompanying text.

924. Vienna Convention, art. 75; see also ILC Rep., n. 192, 268; 1 OPPENHEIM § 641, at 1292; Walker, Integration and Disintegration 63.

925. ELIAS, n. 10, 172-75; SINCLAIR 177-81; Kearney & Dalton, n. 58, 532-35; Walker, Integration and Disintegration 63.

926. UN Charter, art. 103; see also nn. 58-59 and accompanying text.

927. The breach must be material and go to the heart of the agreement. Vienna Convention, art. 60, reciting special rules for multilateral agreements; see also Gabčíkovo-Nagymaros Project (Hung. v. Slovak.), 1997 ICJ 39 (art. 60 a customary norm); Jurisdiction of ICAO Council (India v. Pak.), 1972 id. 46, 67; Namibia, 1971 id. 4, 47; BROWNLIE INTERNATIONAL LAW 622-23; 1978 Digest § 4, 741, 767; ILC Report, n. 191, 253-55; McNair ch. 36; 1 OPPENHEIM § 649; RESTATEMENT (THIRD) § 335; SINCLAIR, 20, 166, 188-90.

928. Impossibility of performance can be invoked where the destruction of a certain object of the treaty occurs. Vienna Convention, art. 61; see also Gabčíkovo-Nagymaros Project (Hung. v. Slovak.), 1997 ICJ 39 (art. 1 a customary norm); BROWNLIE, INTERNATIONAL LAW 619; ELIAS, n. 9, 128-30; ILC Rep., n. 192, 255-56 (noting rarity of practice); 1 OPPENHEIM § 650; RESTATEMENT (THIRD) § 336 & cmt. c r.n. 3; SINCLAIR 190-92; Walker, Integration and Disintegration 65-66. McNair 685 does not recognize a separate doctrine, but some of his examples are impossibility situations and might be cited as such. Some treaties, e.g., Treaty of Rome, n. 819, arts. 225-26, 298 UNTS at 88-89, require

930. Desuetude is the discontinuance of use of a treaty through an extended period of time. Mere time passage does not vitiate treaty obligations, however; treaty relationships have lasted for centuries. Brownlie, *International Law* 617-18; McNair 516-18; (International Law Commission view that Vienna Convention, art. 54[b] covers desuetude); Richard Pender, *The Role of Consent in the Termination of Treaties*, 57 BYBIL 133, 138-45 (1986); Walker, *Integration and Disintegration* 72. For a US practice example, see 5 Hackworth § 506, at 302. Horace B. Robertson, Jr., *Commentary, in Law of Naval Warfare* 161, 169-70 considers Hague IX, analyzed in Part V.G.1, to be in desuetude except for its military objective principles. Similarly, Hague Declaration (XIV) Prohibiting Discharge of Projectiles & Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439, might be considered in desuetude. Both remain in force for the United States. TIF 433-34.

931. The amorphous state of necessity doctrine, akin but different from military necessity, or the necessity component of self-defense, is similar to a claim of fundamental change of circumstances or impossibility; it focuses more on circumstances affecting existence of a State claiming excuse from nonperformance of a treaty. Walker, *Integration and Disintegration* 71; see also nn. 485-520, 631-44 and accompanying text.


933. Vienna Convention, art. 44; Harvard Draft Convention on the Law of Treaties, n. 922, art. 35(c), at 665; Restatement (Third) § 338 cmt. e; Walker, *Integration and Disintegration* 70.


935. Brownlie, *International Law* 5, 13-14; 1 Oppenheim § 10, at 28; Restatement (Third) § 102(3) & cmt. f.

936. ICJ Statute, art. 38(1); Restatement (Third) §§ 102-03.


940. Restatement (Third) § 336 cmt. e & r.n. 4; see also n. 929 and accompanying text.

941. Institut de Droit International, *The Effects of Armed Conflicts on Treaties*, Aug. 28, 1985, art. 6, 61(2) Annaire 278, 280 (1986); id., *Regulations Regarding the Effect of War on Treaties*, 1912, art. 2(1), in 7 AJIL 153 (1913); Walker, *Integration and Disintegration* 70.

942. Institut, *The Effects*, n. 941, art. 7, 280-82; Walker, *Integration and Disintegration* 70. If the inherent right of self-defense under UN Charter, art. 51, is considered a jus cogens norm, it supersedes treaty and customary norms.
Even if self-defense is not a *jus cogens* norm, id., art. 103 declares that the Charter, which includes art. 51, trumps other treaties. See n. 10 and accompanying text.

943. Institut, *The Effects*, n. 941, art. 8, at 282; Walker, *Integration and Disintegration* 70. This restates the rule insofar as Council decisions under UN Charter, arts. 25, 48 are concerned. See also n. 652 and accompanying text.

944. Institut, *The Effects*, n. 941, art. 9, at 282; see also Vienna Convention, art. 75. This is a correlative of the UN Charter, art. 103 rule imposed on States complying with Security Council decisions; see n. 10 and accompanying text. An aggressor cannot compound advantage gained by being an aggressor by wriggling out of treaty obligations. The principle parallels those stating that a party causing a treaty breach, or conditions giving rise to claims of fundamental change of circumstances or impossibility, cannot assert these claims to suspend or end a treaty. Vienna Convention, arts. 60(1), 60(2)(b), 60(2)(c), 61(2), 67(2)(b); see also nn. 927-29 and accompanying text. *I.e.*, a party cannot benefit by its own wrong. Chorzow Factory (Pol. v. Ger.), 1927 PCIJ, Ser. A, No. 9, at 4, 31. Commentators reflect the uncertain law on the issue, e.g., *Brownlie, International Law* 616-17.

945. See nn. 938-44 and accompanying text.

946. Vienna Convention, art. 44; see also nn. 938-44 and accompanying text.

947. ICAO Convention, art. 89.


951. UN Charter, art. 103; see also n. 10 and accompanying text.

952. This analysis has been adapted from Walker, *Oceans Law* 190-92.

953. Chapter IV analyzes the law of the sea, Chapter V analyzes the LOS in the context of naval warfare issues raised during the Tanker War, and Chapter VI analyzes the LOS and the law of naval warfare in the context of the maritime law of the environment.

954. Compare, e.g., LOS Convention, preamble, arts. 2(3) (territorial sea), 19, 21, 31 (territorial sea innocent passage), 34(2) (straits transit passage), 45 (straits innocent passage), incorporation by reference of arts. 19, 21, 31, 52(1) (archipelagic sea lanes passage), 58(1), 58(3) (EEZs), 78 (continental shelf; coastal State rights do not affect superjacent waters; coastal State cannot infringe or interfere with “navigation and other rights and freedoms of other States as provided in this Convention”), 87(1) (high seas), 138 (the Area), 303(4) (archaeological, historical objects found at sea, “other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature”), with, e.g., High Seas Convention, art. 2; Territorial Sea Convention, art. 1. Two 1958 LOS conventions do not have other rules clauses but state they do not affect status of waters above as high seas in Continental Shelf Convention, arts. 1, 3; or other high seas rights in Fishery Convention, arts. 1-8.


957. LOS Convention, art. 88. Area use is reserved for peaceful purposes; marine scientific research must be for peaceful purposes. Id., arts. 141, 143(1), 147(2)(d), 155, 240(a), 242(1), 246(8). This analysis is not confined to art. 88. These conclusions apply to other peaceful purposes provisions in e.g., Antarctic Treaty, Dec. 1, 1959, art. I(1), 12 UST 794, 795, 402 UNTS 71; Treaty on Principles governing Activities of States in Exploration & Use of Outer Space, Including the Moon & Other Celestial Bodies, Jan. 27, 1967, 18 Id. 2410, 2413-14, 610 UNTS 205, 207 (Space Treaty); EMOD Convention, art. 3(1); Convention on International Maritime Satellite Organization, Sept. 3, 1976, art. 3(3); 31 UST 1, 4 (INMARSAT Organization shall act exclusively for peaceful purposes); Agreement Governing Activities of States on the Moon & Other Celestial Bodies, Dec. 5, 1979, art. 3(1), 1363 UNTS 3, 22.

958. RESTATEMENT (THIRD) § 521, cmt. b, citing UN Charter, art. 2(4); UNCLOS, arts. 88, 301 and referring to RESTATEMENT (THIRD) § 905, cmt. g; accord, Legality of Threat of Nuclear Weapons, 1996 (1) ICL 244; 3 Nordquist ¶¶ 87.9(1), 88.1-88.7(7); Russo, Targeting, n. 624, 8; see also Helsinki Principle 1.2; Bocek, Peaceful, n. 956; Oxman, The Regime, n. 956, 814; John E. Parkinson, Jr., International Legal Implications of the Strategic Defense Initiative, 116 MLR 67, 79-85 (1987). Bin Cheng, Studies in International Space Law 368, 413, 513-22, 528, 533, 650-52 (1997), arguing that the US and other States' view that the space treaties' peaceful purposes language means only a prohibition on aggression in space is wrong and that the treaties' peaceful purposes clauses mean no military use of space or space objects, concedes the clauses are not clear and need definition, perhaps in a future agreement. Nowhere, however, does Cheng consider the impact of UN Charter, art. 103 and the right of self-defense under id., art. 51. See also n. 959 and accompanying text. Nor does he adequately analyze contrary authority construing other peaceful purpose clauses; see nn. 956-57 and accompanying text.

959. UN Charter, art. 103; see also n. 10 and accompanying text.

960. Id., arts. 2(4), 51; see also nn. 47-590, 617-30 and accompanying text.

961. 3 Nordquist ¶ 87.1(i), citing LOS Convention, arts. 19(2)(b), 19(2)(f), 52(2) (innocent passage). High Seas Convention, art. 2, has been interpreted to include freedoms to undertake scientific research, to explore or exploit high seas subsoil resources and to test nuclear weapons. See also RESTATEMENT (THIRD) § 521 cmt. b; n. 958 and accompanying text.

962. Many but not all of the other 1958 LOS Conventions' terms reflect custom. See High Seas Convention, preamble, declaring it restates customary law; NWP 9A Annotated ¶ 1.1 at 1-2 n. 4; cf. 1 O'Connell, Law of the Sea 385, 474-76.

963. NWPL 14-M Annotated Part I ¶ 1.1; RESTATEMENT (THIRD), Part V, Introductory Note, 3-5; cf. John Norton Moore, Introduction to 1 Nordquist xxviii; Bernard H. Oxman, International Law and Naval and Air Operations at Sea, in Robertson 19, 29; see also President Reagan, United States Ocean Policy, Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983); but see 1 O'Connell, Law of the Sea 48-49. O'Connell researched through 1978 using LOS Convention drafts but died before a final version was available. Ivan A. Shearer made changes and additions,

964. ICJ Statute, art. 38(1); *Restatement (Third)* §§ 102-03.
965. See nn. 725-28 and accompanying text.
966. See nn. 962-63 and accompanying text.
967. See nn. 158-590, 617-30 and accompanying text.
968. See nn. 593-94 and accompanying text.
969. See n. 631 and accompanying text.
970. See n. 10 and accompanying text.
971. See nn. 79-103 and accompanying text.
972. See nn. 104-57 and accompanying text.
973. See nn. 650-61 and accompanying text.
974. See nn. 69, 657 and accompanying text.
975. See nn. 158-590, 617-30 and accompanying text.
976. Id.
977. Id.
978. See nn. 591-616, 645-49 and accompanying text.
979. See nn. 303-307, 800-17 and accompanying text.
980. See nn. 168,199 and accompanying text.
981. See nn. 10, 202-06 and accompanying text.
982. See nn. 289-302, 308-36 and accompanying text.
983. See n. 438 and accompanying text.
984. See n. 440 and accompanying text.
985. See nn. 445-47 and accompanying text.
986. See nn. 448-68, V.677-78, VI.231-38 and accompanying text.
987. See n. 948 and accompanying text.
988. See nn. 10, 725, 729, 735, 823 and accompanying text.
989. See n. 934 and accompanying text.
990. See nn. V.697-709, VI.268-271 and accompanying text.
991. See nn. 828-915 and accompanying text.
992. See nn. 919-51 and accompanying text.
993. See nn. 951-67 and accompanying text.