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# Contemporary International Law: Relevant to Today's World?

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TO INTRODUCE THE SUBJECT OF INTERNATIONAL LAW to a readership made up in large part of U.S. armed forces officers, whose education, background, and training condition them to be skeptics and pragmatists, is a daunting task. I hope, however, in a brief space to convey at least that there is such a thing as international law and that it has some relevance not only to the ordering of our international system of sovereign nations but also to the decisions one may be called upon to make in positions of responsibility in the United States government.

This overview addresses, first, the role of international law in today's international system; second, its nature, origins, sources, and functions; and finally, the current trends in international law (as I see them) and where they may lead us during the next few decades.

In the latter section I shall briefly address the role of the United Nations in its peace-keeping function and the impact it has had on the law relating to the use of force.

### A Few Cautionary Statements

One of the most distinguished American international law scholars of this century, Judge Richard R. Baxter (who before his untimely death was the American judge on the International Court of Justice), stated in a talk to the Naval War College while he was a Professor at Harvard Law School that "International law suffers both from its friends and enemies. Its enemies include the geopoliticians, who hear nothing but the surge and crash of great

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international forces; the Kennanites, who rebel against a 'legalistic' approach to international affairs; and the specialists in international relations, who, not knowing very much about the subject, lump international law, as conceived by Hugo Grotius, with the League of Nations, the United Nations, and the control of the white slave trade. The similarity between some of the friends of international law and most of its enemies is that they overstate the pretended case *for* international law. It is then all too easy to demonstrate that, despite the claims made for international law, the world is still in a deplorable state."[1]

The "enemies" have three basic criticisms: the lack of a central law-giving or legislative body, the lack of an independent third-party dispute-settlement mechanism, and the lack of effective sanctions against lawbreakers.

Let us take a commonplace example to illustrate that these deficiencies need not hamstring the functioning of the system. Consider the simple act of mailing a letter from the United States to a foreign address. What makes such a transaction possible? Take, for example, the case of a letter from Newport, Rhode Island, addressed to a person in Geneva, Switzerland. It takes some fairly sophisticated procedures, involving the postal officials of at least two (and perhaps several more) countries, to get the letter to its destination. One buys a United States stamp from a U.S. post office and pays for it in U.S. currency. En route to Switzerland the letter may cross the territory of Canada, Great Britain, and France (and perhaps Belgium and Ireland as well). The postal authorities of some of these countries undoubtedly assist in speeding the letter on its way. Two questions arise:

- What authority or arrangement permits the letter to cross borders of various countries?
- Do the postal authorities of the other countries receive monetary reimbursement from our postmaster general for their help in delivering the letter from the United States? If so, how much?

The answers are provided by *international law*—here in the form of a series of multilateral postal treaties setting up a Universal Postal Union and establishing detailed regulations governing international postal affairs.[2] These treaties, to which some 170 nation-states are parties, were "legislated" in several international conferences.

All very well, but what if one nation violates the treaty? There is no court with compulsory jurisdiction to adjudicate the matter and no sanctioning body to impose penalties. In fact, however, the Convention is almost universally observed—not out of fear of sanctions but because it is in the mutual interest of the parties to observe it. The "law" creates expectations among states as to how other states will behave. If a state repeatedly or continually fails to fulfill its obligations, other states will eventually terminate postal relations with it.

To illustrate, take a second commonplace example, from domestic law: highway traffic rules. In the United States the law requires all vehicles to travel

on the right-hand half of the road under ordinary circumstances. It imposes criminal penalties on those drivers who violate that law. But is it the fear of criminal penalties that causes us to stay to the right in the face of oncoming traffic? Obviously not. It is rather our expectation that approaching drivers will keep their vehicles to the right (as they also expect of us) and that we will be able to pass safely. Granted, there is a criminal penalty if one violates the law, but the principal motivating force behind obedience to it is the mutual well-being of the members of the society. The same is true among the members of the international society, the nation-states that make up the international community. Naval and aerial navigators know that there are similar binding traffic rules for ships and aircraft in both domestic and international waters and air space.

At this point a skeptic might be tempted to object that though this may be true, we have used only everyday examples far from the central issues of international relations—issues of war and peace, survival of nations, protection of basic human rights, and so forth. Indeed, the ultimate objective of international law is to create an international order in which nations and peoples can live in peace and justice. Like domestic law, however, international law is still an imperfect system. To quote Judge Baxter again, "It is quite clear that man has not been able to legislate war and aggression into defeat or even into retreat, although the institutions which the international community has developed exercise some restraints on the use of force. [International] law cannot cope adequately with the need for peaceful change. If a nation needs more territory or larger markets, the law cannot provide them. It cannot make unhappy people happy; it cannot turn arid desert into a flowering paradise; it cannot bring international tranquility and understanding where discord reigned before. Indeed, it might be safe to say that international law has been most successful in dealing with minor matters and with slighter causes of international friction. Probably it shows a greater facility in preserving the status quo than in doing justice."[3]

This is not surprising. While we would hope that a perfect system of justice would deal with such matters and operate best in times of high tension or crisis, we can note that domestic systems suffer from the same imperfections.

## The Nature, Origins, and Sources of International Law

Accepting for the moment the fact that there is a system called "international law" that functions in the international community (though admittedly in an incomplete and imperfect way), let us turn to a brief examination of its nature, origin, and sources.

To this point we have not tried to define "international law." No single, simple definition is possible, but at the risk of oversimplification, let us state one as follows: "International law is that body of rules or norms that are considered legally binding by states in their intercourse with each other." Note several things about this definition:

- It uses the phrase "rules or norms." In some cases the term "norms" is more appropriate than "rules," since the latter implies more specificity than in fact exists in many situations.
- These rules or norms are "legally binding." That is, states comply with them because they are legally obligated to do so, not because they want to or are merely morally obligated to do so.
- They apply to states—that is, sovereign, independent states. Traditionally and historically these rules have not applied to individuals, or to corporations, or any institutions other than states. (As we shall see, however, the categories of persons and institutions that are governed by international law have been expanding. In some areas, international law can now be said to apply to persons and institutions as well as states.)

***Where Did This System Originate?*** To quote a distinguished former holder of the Stockton Chair of International Law at the Naval War College, Judge Manley O. Hudson of the World Court, "Our system of international law has been developed over a period of more than three centuries. It is distinctly Western and European in origin. In tracing its growth, we usually refer to the Spanish jurist-theologians of the sixteenth century, but we ascribe first place to Hugo Grotius whose great book on 'The Law of War and Peace' was first published in 1625. For a long period, international law was conceived to be not only European, but also Christian, and its application was limited to Christian States. In the course of the nineteenth century, however, we broke ourselves free from such limitations, and in the words of the World Court the principles of international law 'are in force between all independent nations' and 'apply equally' to all of them."[4]

As we shall see, the fact that the roots of international law are European has created problems within recent decades as newly emerging nations assert that many principles of international law were proclaimed by European imperialist powers primarily for the purpose of keeping the colonial states in their state of subjugation.

***What Are Its Modern Sources?*** Since the subjects of international law are states, which are sovereign, independent, and equal, it is obvious that the law's ultimate source (practically as well as philosophically) must be the consent of the states to be governed by it. This consent may be found either in *treaties* to which a state is a party (that is, explicit consent) or in *customary practices* so general as to

have become in effect obligatory (and to which a state, as a member of the community of nations, may therefore be said to have tacitly consented).

In addition to these two primary sources of international law, the Statute of the International Court of Justice (itself a treaty) gives three secondary sources to which the Court may turn to determine the law.[5] They are, first, the *general principles of law* recognized by civilized nations; second, *judicial decisions*; and third, the *teachings* of the most highly qualified publicists (scholars) of the various nations. Let us examine each of these sources, primary and secondary, in order.

***"'The similarity between some of the friends of international law and most of its enemies is that they overstate the pretended case for international law'."***

To make a loose analogy, *treaties* (or conventions, or compacts, or international agreements, by whatever name they are called) are the international counterpart of national legislation. Unlike national legislation, however, which binds even those who dissent from it, treaties are only binding on those states which consent to become parties to them. In this respect they are more like contracts than statutes. But there are some situations in which they may be regarded as binding on non-parties. For example, some parts of the United Nations Charter purport to bind non-parties, and some treaties are declarative of customary international law. The latter may be looked upon as evidence of the customary law and as therefore binding on non-parties as well as parties.

In general, however, *customary law* is created by state practice. To be sure, many authorities argue that even long-continued and consistent practice does not alone create customary international law, but that something more is required: a state's belief that the practice is obligatory. Nonetheless, a long-continued practice acquiesced in by other states may create customary international law irrespective of the intent of states that acquiesce.

Customary international law results from a process in which one state makes a claim and another state accommodates it; if the process is repeated often enough, a customary rule is created. That is why, in international practice, we find frequent resort to "diplomatic protests"; they serve to keep claims by other states from ripening into legal rights. Paper protests, however, may not be sufficient to sustain a position in the face of long-continued practice to the contrary. This is the principle underlying the U.S. Navy's "Freedom of Navigation" program, under which the navy conducts routine air or sea operations (usually transits) through areas that a foreign state claims as territorial seas or exclusion zones but are not recognized as such by the United States government.

Since customary international law is "unwritten," where do we find evidence of what it is? We look to diplomatic history, to collections of diplomatic documents, and to writings of scholars on these matters.

The *general principles of law* recognized by civilized nations are recognized as a source of international law by the Statute of the International Court of Justice. The effect of this provision is to allow resort to national legal systems. This device is necessary because international law is not as complete and well-developed a body of law as that of most nations; use of these general principles permits the gaps in the international system to be filled by principles of law that have attained near universality in national legal systems—such principles as, for example, that one shall honor his contractual obligations, or that one should compensate for unjustified injury caused to another. In a recent decision, a United States court of appeals faced with a decision involving international law looked to the laws of a number of nations to aid its determination that torture of a citizen by governmental authorities was contrary to international law.[6]

The most important *judicial decisions* are judgments of the International Court of Justice, sitting at The Hague, and its predecessor, the Permanent Court of International Justice. The decisions of arbitral tribunals also constitute judicial decisions in this sense, inasmuch as these bodies are in fact judicial institutions and render their decisions on the basis of law and not as attempted compromises of conflicting claims. In addition, the opinions of national courts on questions of international law are entitled to considerable weight, even though one might expect them to take a somewhat more one-sided view of the law than would a truly international tribunal.

The *teachings*, or scholarly writings, of the most highly qualified publicists of the various nations perform a valuable service. Not only do they criticize and clarify ambiguities in the law, they also synthesize vast amounts of treaty law, state practice, and judicial decisions and reduce them to manageable proportions. However, one must exercise a degree of caution in using such material. Scholars may be subject to personal as well as national biases, and in their works it is often difficult to be sure whether they are talking about what the law *ought* to be or what it *is*. I personally prefer to consider this fifth "source" as not really a source at all but rather *evidence* of what the law is.

## Contemporary Trends in International Law

With this much as background, let us now turn to some of the current developments and trends in international law.

***The Expanding "Reach" of International Law.*** Our definition of international law stated that it is a body of rules or norms governing the legal relationships between *states*. The emphasis on states as such is certainly consistent with the environment in which the body of rules originally developed. That world was made up of independent, equal, and sovereign states, the only actors in the international arena. In the international arena, unlike in domestic societies,

individuals (unless representatives of states) had no role to play and no standing to assert a legal right. An individual obtained rights only derivatively, by virtue of the protection afforded him or her by nationality.

As an example, one of the firmly established rules of international law is that an alien residing in a foreign state is entitled to the protection of the state where he or she resides. If that state fails to live up to its obligation (as, for example, by arbitrary seizure of property or imprisonment without a fair trial), then it has violated this international norm, and the state of nationality has a right to bring a claim for reparation. But it is the state, technically, that does so, not the individual; under the international legal system, it is the state of nationality that has been wronged, not the individual. Thus the state of nationality has absolute control over the claim, and it may if it chooses refuse to assert the claim, or dismiss it, or compromise it—all without the consent of the individual.

One of the contemporary developments in international law is a gradual recognition that individuals themselves may, under certain circumstances, be "subjects" of international law; that is, they may have rights (and obligations) flowing directly from international law and not merely derivatively from their state of nationality. This recognition probably began between the world wars with the establishment of the International Labor Organization and its constitution, recognizing that working persons have certain minimum rights with respect to working conditions. The concept received a major thrust forward at the end of World War II with the adoption of the United Nations Charter and its emphasis on the rights of human beings. At the same time, the acceptance of the so-called Nuremberg principles recognized that individual Nazi leaders, not just the Nazi state, were criminally responsible for war crimes, crimes against humanity, and crimes against peace, and could be tried by an international tribunal convened by the allied states. The crimes for which they were tried, including atrocities against nationals of their own states, were considered to be international crimes.

The ideas of individual rights under international law and of individual obligations flowing from it have developed gradually. The principal impetus has been the United Nations General Assembly—first in the Charter itself, then in the Universal Declaration of Human Rights of 1948, then in a series of treaties adopted over the past several decades. The latter included the Covenant on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, as well as a number of regional conventions of similar content and intent.

A corollary to this idea of individual rights under international law is the elimination of the view that how a state treats its own nationals is not an international concern but merely a domestic matter. As late as 1957, a

preeminent international law scholar could write chillingly in a leading English treatise on international law that how a state treated its own nationals was a matter of "discretion."[7] It is no longer possible to make this statement. A United States court of appeals has held, for example, that the torture of a Paraguayan citizen in Paraguay by an official of the Paraguayan government created a right of redress in the courts of the United States under a statute allowing such actions for violation of the "law of nations."[8]

Another aspect of the expanding reach of international law is the extension of international law to international bodies, such as the United Nations, the International Civil Aviation Organization, the European Community, the International Maritime Organization, and many others. For certain purposes these institutions are regarded as international "persons," as are certain non-governmental organizations (commonly called NGOs). There is even some indication that certain intergovernmental consortia and transnational corporations have some characteristics of international persons; this idea, however, is still in its infancy.

***The Codification of International Law.*** A second major trend in contemporary international law is codification, i.e., rendering unwritten law into formal written form.

As noted, one of the two primary sources of international law is custom (the other being treaties). Customary law is just as valid and binding as treaty law, but it suffers from a number of difficulties and ambiguities. For one, customary practices are often difficult to prove. Also, is a practice, however uniform and long-standing, followed out of obligation (thereby becoming law) or merely from non-binding habit? Further, a general principle may be firmly established by custom, but the details of its content may be incomplete or fuzzy around the fringes. Only a written treaty text can fill in the particulars. These issues have created an impetus to convert customary practices into treaties, thus making them explicit, stable, and definite obligations.

This movement was given additional momentum by the creation by the United Nations, soon after its founding, of the International Law Commission. This Commission, which is made up of legal experts acting in their individual capacities and not as representatives of their states, has as its mission the codification and progressive development of international law. In the more than forty years of its existence it has prepared draft texts in a number of areas that previously had been governed only by customary international law. A number of these draft texts have been submitted to international conferences for negotiation as multilateral treaties, and many have entered into force. The four treaties on the law of the sea adopted in 1958 by the First Geneva Conference on the Law of the Sea are products of this process. Likewise, the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic

Relations, the Vienna Convention on Consular Relations, and several others have resulted from the same approach.

Codification has also proceeded in other ways. The United Nations Conference on the Law of the Sea, which adopted the 1982 U.N. Convention on the Law of the Sea—perhaps the most ambitious undertaking in codification and development of international law ever undertaken—did not originate with the International Law Commission. It resulted from a series of U.N. General Assembly resolutions creating a Seabed Committee that served as a preparatory committee for the Third United Nations Conference on the Law of the Sea.

Another factor behind the movement toward codification is the desire of Latin American, African, and Asian states to have a voice in shaping international law. As stated earlier, international law is principally of European origin. The newly emerging states, mainly former African and Asian colonies of the European powers, have found it difficult to accept a system that they had no part in creating, and particularly one that, in the view of many of them, was shaped in such a way as to keep them in a position of inequality. They see the codification process as a means of influencing contemporary international law in a way more favorable to their interests. Newly emerging states have formed themselves into the so-called "Group of 77" (now with over a hundred members), which uses its large bloc-voting strength in the United Nations General Assembly and international conferences to exercise enormous influence.

***The Institutionalization of International Law.*** A third current trend is the proliferation of intergovernmental (international) institutions. Not only are they instrumental in creating and implementing broad segments of international law, but also they have spawned a special body of international law—the law *of* international institutions. This consists of the constitutions and internal regulations of those bodies as well as of the treaties and agreements that provide the framework for their relations with host governments and with other states in whose territory they operate.

The preeminent international institution, of course, is the United Nations. Its functions are so broad and the reach of its activities is so all-encompassing that a whole new body of international law has grown up around its practices and procedures. It is not, however, the only international institution that affects the growth of international law. A whole host of international organizations create their own bodies of specialized law. Some of these entities are functional, such as the International Maritime Organization (instrumental in developing international rules and regulations governing safety at sea, ship construction standards, and the protection of the marine environment from pollution from ships) and the International Civil Aviation Organization, which is even more pervasive within its functional field.

Other international organizations are regional, such as the European Community, established by the Treaty of Rome. The E.C. has its own legislative, executive, and judicial branches, which in some cases have the authority to override national decisions. The activities of this organization are so pervasive with respect to member states that some international scholars are beginning to wonder when it will have assumed so many aspects of statehood that its members can no longer be considered states and the Community itself will have become one super-state.

***The Enforcement of International Law.*** At the outset we observed that one of the principal criticisms of international law is that there is no means of enforcing sanctions against those who breach it. Without retreating from the rejoinder offered earlier—that for the most part international law *is* obeyed and that even in domestic legal systems the principal motivating force for obedience is not the fear of sanctions—we may note nevertheless that some small steps are being taken toward creating and making use both of third-party adjudicative mechanisms for international disputes and of means for enforcing their judgments. In so noting them I do not mean to overemphasize the role of third-party dispute settlement in the international arena, since the traditional methods of diplomatic negotiation, good offices, conciliation, and mediation remain the cornerstones of peaceful settlement of disputes between states.

Nevertheless, the hope following World War I was that the newly created Permanent Court of International Justice would serve as a judicial forum to which states would take their international disputes. This, unfortunately, proved a false hope. In the entire life of that court and of its successor, the International Court of Justice, only a handful of cases has been submitted and most of these have involved matters of little consequence. The principal reason, of course, is that a nation cannot be brought before the court without its consent, and states are reluctant to submit matters of great national significance to third-party adjudication. Additionally, proceedings before the Court are long and tedious, which is not very helpful when speedy resolution of a controversy is needed. The Court has recently revised its rules to make it somewhat easier for states to submit cases and receive relatively quick decisions. Whether as a result of this change or because of other factors, the Court now has on its docket a record number of cases awaiting decision.

A number of initiatives have been taken in other areas to create mechanisms for peaceful settlement of disputes:

- The European Community has a well-developed court system, whose decrees are enforced in the courts of member states.
- The World Bank has negotiated a treaty providing a process for arbitration of international investment disputes.[9] This treaty has gained wide acceptance and adherence both among capital-importing and capital-exporting states. A

unique aspect of the treaty is that it elevates disputes between states and private investors (usually multinational corporations) to the international plane, giving the latter equal status with states before this international arbitral tribunal. In addition, its judgments are enforceable in the domestic courts of any states that are parties to the Convention.

• The United Nations has sponsored a multilateral treaty that obligates member states to enforce other international arbitral awards in their domestic courts.[10] This treaty has enabled some American foreign investors to enforce international arbitral awards against foreign states even when the state has refused to participate in the arbitration.

• Some recent multilateral law-making treaties contain dispute settlement provisions. A leading example is the 1982 Convention on the Law of the Sea, which contains extensive provisions for compulsory conciliation, arbitration, or ultimately adjudication.[11] This was a real breakthrough because it marked the first time that the Soviet Union was willing to accept any form of third-party dispute settlement.

• Finally, there is the United Nations Security Council, which has the authority, if all other methods fail, to impose sanctions, including the use of armed force, on a wrong-doing state whose actions it believes constitute a threat to peace, a breach of peace, or an act of aggression.

As all are aware, until recently effective action by the Security Council in such situations was prevented by the "veto"—that is, the requirement for unanimity among the five permanent members of the Council (China, France, the United Kingdom, the former U.S.S.R., and the United States).[12] With recent events (including replacement of the Soviet Union by Russia) making unanimity possible under certain circumstances (as, for example, the recent Iraqi invasion of Kuwait), it is appropriate that we address the methods the Security Council may employ and the procedures it may follow in adopting them. We shall also examine a state's right of self-defense and how this doctrine fits in with any enforcement action that may be taken by the Security Council. A caveat is in order, however: the latter issue is a complicated subject and one about which there is great disagreement among international lawyers. In discussing it in this small space a great deal of over-simplification is necessary.

## Self-Defense and the Role of the United Nations Security Council

The Security Council's principal powers with respect to the settlement of disputes and dealing with threats to peace are stated in Chapters VI and VII of the United Nations Charter. Chapter VI deals with the pacific settlement of disputes and empowers the Security Council to investigate any international dispute or "situation which might lead to friction or give rise to a dispute, in

order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." It can do this either on its own initiative or at the request of one of the parties to the dispute. If it determines that a dispute or "situation" (as characterized above) exists, the Security Council may under Chapter VI recommend either a method of resolution or specific terms of settlement.

Chapter VII comes into play only if the Security Council determines that there exists a threat to peace, a breach of the peace, or an act of aggression. If so, the Council may either make recommendations to the parties or take "measures . . . to maintain or restore international peace and security." Such measures might not involve the use of armed force; such options include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." If such non-forcible means are inadequate, the Council may "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

*"A corollary to this idea of individual rights under international law is the elimination of the view that how a state treats its own nationals is not an international concern but merely a domestic matter."*

As originally envisaged by the Charter, armed action under the authority of the Security Council would be taken by national armed forces made available in advance to the Council. Overall direction of the employment of these forces was to have been exercised by a Military Staff Committee consisting of the chiefs of staff (or their representatives) of the armed forces of the five permanent members. Since this Military Staff Committee has never really functioned as intended, the Security Council has been forced to adopt ad hoc arrangements in the only two instances in which it has taken armed enforcement measures. In the Korean War, the United States was asked to designate a commander of U.N. forces. In Operations Desert Shield and Storm, the Security Council (in Resolution 665) used the device of calling "upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area" to use such measures as were necessary to enforce the maritime embargo previously declared by Resolution 661. The Council used the same approach when, in Resolution 678, it authorized offensive action against Iraq. There it authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) [the initial resolution calling on Iraq to withdraw from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area."

What we had then was less a *de jure* U.N. Security Council enforcement action than a Security Council imprimatur on a collective self-defense operation by states coming to the aid of Kuwait. If this interpretation is correct (and not all international lawyers would agree with it), then this brings into play Articles 2(4) and 51 of the United National Charter.

Article 2, paragraph 4, provides that "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." The most generally agreed exceptions to the prohibition on the use of force in Article 2(4) are actions authorized by or in implementation of a decision of the Security Council, humanitarian interventions for the rescue of nationals (a right disputed by some), and individual or collective self-defense.

Self-defense is the subject of Article 51, which provides in part that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." The important concepts here are that: the right of self-defense is not created by the Charter but is inherent, a sovereign right of states; the right may be individual or collective; an armed attack must have occurred; and self-defense measures can continue only as long as the Security Council has not taken the action necessary to maintain peace and security.

Let us briefly address each of these concepts. First, the "inherent right" is based on the fundamental principle that a state has a right of self-preservation. This right pre-existed the U.N. Charter; although the Charter may have put limits on how it may be exercised, it did not take away the right itself. Second, this provision recognizes that a state is not required to rely on its own resources alone in repelling an attack. It may call upon other states to come to its assistance to repel the attack and maintain or regain its security. Our own whole web of mutual security arrangements with other states is based on this principle.

Third, the attack must "occur." This is perhaps the most controversial part of the article. Does it mean that the victim state must absorb the first blow before it can respond? If so, the right to respond would be an empty one; in this age of missiles and weapons of mass destruction, the first blow may be fatal. Nevertheless, some respected authorities have argued for this position. Others have pointed out the unreality of such a position and have argued for the right of anticipatory self-defense, pre-emptive attack, or preventive war. This too has its dangers, perhaps inviting all manner of pre-emptive assaults on the mere suspicion of an intent to attack. There is a middle ground, espoused by, among others, an eminent Israeli publicist, Yoram Dinstein, who suggests that an attack "occurs" when one party "embarks upon an irreversible course of action, thereby crossing the Rubicon."[13] He calls this type of self-defense "interceptive" rather

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than anticipatory or pre-emptive. Under his theory, the United States would have been properly exercising the right of self-defense had it detected and attacked the Japanese fleet en route to Pearl Harbor in December 1941.

Fourth, when does the right to self-defense end? Does Article 51 mean that if the Security Council passes any resolution at all, the state or states exercising the right of self-defense must desist? As preposterous as this seems, some noted publicists have argued so. A more sensible interpretation is that the measures must be both "necessary" and "sufficient" to restore or maintain international security. Who then is to decide whether the measures are sufficient? Is it the Security Council itself, or the state that believes itself a victim of aggression? The Charter is silent. Most publicists argue for the Security Council, and I would agree, but only if the Security Council makes an explicit finding that the measures it has taken are sufficient to restore international peace and security and directs the state or states exercising the right of self-defense to desist from further armed action. Under the rule of unanimity of the five permanent members of the Security Council, the rights of a victim state would seem to be adequately protected by this interpretation. Under it, measures adopted by the Security Council and actions of states in the exercise of their rights of individual or collective self-defense can proceed concurrently, at least until the Security Council passes a definitive resolution requiring hostilities to cease. That is the situation that existed in Operation Desert Storm.

The International Court of Justice has recently addressed certain aspects of the right of individual and collective self-defense in the case of Nicaragua v. United States.[14] Some of the views expressed in the majority opinion take an extremely narrow approach to this right and have caused concern among some international lawyers who view the right as an important bulwark against aggression, particularly in a situation in which the United Nations Security Council fails to take effective action to protect a victim state. Among the holdings of the Court that I find troubling are the following:

- Although the term "armed attack" includes attacks by irregular forces or guerrillas from foreign territory under certain circumstances, the term does not include assistance to rebels in the form of weapons or logistic support.
- The exercise of the right of "collective" self-defense depends upon a declaration by the victim state that it is the subject of an armed attack and an explicit request for help to the assisting state. An assisting state cannot make this determination on its own, even if it is a party to a treaty with the victim state containing a clause stating that an attack on one is an attack upon all.
- Under Article 51 of the Charter, the failure by a state to report measures it is taking in self-defense to the Security Council contradicts that state's claim that it is exercising the right of collective self-defense.

Although the judgments of the International Court of Justice are not binding precedents in the same way that our domestic court decisions create law to be

applied in similar cases in the future, the Court is the most prestigious judicial body in the international system. Its statements will have persuasive effect in shaping the further development of the international law of self-defense.

The period since World War II has seen greater growth and change in international law than in any comparable period of history. There were many stimuli for these changes—the total victory by Allied forces in World War II, the creation of the United Nations and the other organizations it spawned, the emergence of the Cold War, the decolonization movement of the 1960s and 1970s, the recognition of the concept of internationally protected human rights, and many more. With the end of the Cold War, the breakup of the Soviet empire and the hoped-for emergence of democratic states in its place, the growth of the international environmental movement, and many other events we can not currently perceive, the next half-century will probably bring even more dramatic changes in international law. For like domestic law, international law is not a static body of rules but rather a living creature, continually forged and shaped to serve the needs of an international community that itself is constantly changing.

## Notes:

1. R.R. Baxter, "Introduction to International Law," *International Law Studies*, v. 61 (Newport, R.I.: Naval War College Press, 1980), p. 1.

2. Constitution of the Universal Postal Union with Final Protocol, Vienna, 1 January 1966, 16 UST 1291, TIAS 5881, 611 UNTS 7. Additional Protocols were adopted in 1971, 1974, and 1984.

3. Baxter.

4. Manley O. Hudson, "Legal Foundations of International Relations," *International Law Studies*, v. 61 (Newport, R.I.: Naval War College Press, 1980), p. 57.

5. Statute of the International court of Justice, Article 38, San Francisco, 26 June 1945, 59 Stat. 1055, T.S. No. 933, 3 Bevans 1179. All members of the United Nations are automatically parties to the Statute of the Court.

6. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

7. Hersh Lauterpact, *Oppenheim's International Law*, v. 1, 8th ed. (London, New York, Toronto: Longmans, Green and Co., 1957), p. 641.

8. Filartiga v. Pena-Irala.

9. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159.

10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 21 UST 2517, TIAS 6997, 330 UNTS 3. This convention has over eighty parties.

11. United Nations Convention on the Law of the Sea, U.N. Publication Sales No. E.83.V.5. The Convention is not yet in force. It will enter into force when sixty states deposit their ratification. As of January 1992, fifty-one states had ratified.

12. United Nations Charter, Article 27, San Francisco, 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

13. Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge, U.K.: Grotius Publications, 1988), p. 179.

14. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits), I.C.J. Reports 1986, p. 4 (reprinted in *International Legal Materials*, September 1986, p. 1023).