SELF-HELP, SELF-DEFENSE, AND SELF-PRESERVATION IN INTERNATIONAL LAW

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Until recently, the right of self-help or the right of the individual state to execute sanctions against a state which violated its interests was one of the attributes claimed by states to be necessary for its sovereignty.[1] This concept of self-help becomes more pronounced in a decentralized legal system. That is, a legal system which does not have a central organ or power monopoly to apply the law; instead, such an obligation is left to the individual states.[2] To say that the system of international law is decentralized does not mean, however, that there is not a distinction between a legal and an illegal use of force. Instead, what is meant is that the legal order allows the injured state rather than any central organ to gain redress for the international delict committed.[3] Each nation under a decentralized system of international law is responsible for assessing the international situation in which it has become involved, for determining when an international delict has been committed, and for reacting. A system of collective security is one where the state is subject to a central organ which controls the force monopoly, forbids the use of force to individual members of the central body, and reacts collectively to a delict committed by an individual member. Such a system may only occur in a centralized legal order, and it is the concept of self-help which is the greatest hindrance to the development of such a system of collective security. The degree of centralization in a system of law determines the amount of self-help denied to the state and thus the amount of collective security insured. Hans Kelsen feels that "The significant — and decisive — step in the development of collective security is achieved only when the principle of self-help is eliminated, and the principle of self-help is eliminated only when a legal order effectively reserves the execution of the sanction to a special organ, that is, when the force monopoly of the community is effectively centralized."[4] It has been the purpose of both the League of Nations and the United Nations to centralize further the system of law and thus reduce the number of instances in which self-help may be employed and to increase the instances of collective security. The League of Nations, however, did not effectively establish a system of collective security because it allowed states to continue to use force in the form of reprisals and only advanced the development of collective security in that any member nation which

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[1] Charles G. Fenwick, *International Law* (New York: Appleton, Century, Crofts, Inc., 1948), p. 36.

[2] Hans Kelsen, *Principles of International Law* (New York: Holt, Rinehart and Winston, Inc., 1966), p. 13.

[3] *Ibid.*, p. 13.

[4] *Ibid.*, p. 14.

resorted to war would by Article 16, paragraph 1 of the Covenant "ipso facto be deemed to have committed an act of war against all other members of the League." The United Nations was created in 1945, and the Charter was written in such a way as to reduce the instances in which a state could legally and individually use force or self-help in their relations with other states. This attempt to eliminate as much as possible the concept of self-help and to replace it with a concept of collective security was in large part responsible for the reasoning behind the creation of Articles 2 and 51, the use of force and self-defense Articles of the United Nations Charter. It is the purpose of this paper to examine self-help as it has most commonly existed in the forms of retorsion, reprisals, self-preservation and self-defense and to discover what effect both the League of Nations Covenant and the United Nations Charter have had on the concept of self-help.

One of the oldest and most commonly used aspects of self-help has been that of retorsion which Hans Kelsen defines as "retaliation for legally permissible acts of a state which are considered to be objectionable by acts of a similar kind, that is, by acts which are also legally permissible."[5] Since the act of retorsion by its very definition is legal, it is not prohibited by the Charter of the United Nations. The only illegality an act of retorsion could achieve under the Charter would be if the retorsion would be carried so far as to seriously affect a state or if the retorsion is judged to be excessive when compared to the act for which the retorsion is made. In these two instances, the retorsion may be prohibited under Article 2, paragraph 3 of the United Nations Charter, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." So the only legal restrictions upon acts of retorsion are that they must be legal acts under international law that do not break any treaty obligations that are binding on the state, and the retorsion must be confined within reasonable limits.[6] It should not be inferred, however, that the retorsion need be a "retaliation in kind."[7] It would be perfectly legal, for example, for the retorsion action against a state who has adopted a damaging economic policy to be the closing of ports toward ships of that state, or the exclusion of fishing rights in the territorial waters of the injured state.[8] Areas which are not subject to international law and control such as tariffs, domestic dealings with aliens, shipping restrictions, fishing rights, and the value of currency, are usually examples of acts of retorsion.[9] Professor William W. Bishop in *International Law: Cases and Material* divides examples of possible retorsion actions into three groups: economic, political, and military, each of which is open to the state.

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[5] *Ibid.*, p. 22.
[6] Julius Stone, *Legal Controls of International Conflicts* (New York: Rinehart and Company, Inc., 1959), pp. 288-289.
[7] J.G. Starke, *An Introduction to International Law* (London: Butterworth's, 1963), p. 388.
[8] James Leslie Brierly, *The Law of Nations* (New York: Oxford University Press, 1963), p. 399.
[9] Fenwick, *International Law*, p. 532.

The imposition of higher tariffs, the raising of trade barriers, the closing of ports to ships from a particular nation, and the cessation of all traffic between two nations are examples of economic retorsion. Acts which encompass political retorsion include the withdrawal of the diplomatic staff including the ambassador, the closing of consulates, or the severance of diplomatic relations. The last general grouping of retorsion actions include shows of force such as a naval grouping just outside territorial waters, maneuvers, or mobilization.[10] All of these examples involve the use of legal but unfriendly acts enacted primarily in pursuance of legitimate state interests.

One of the classic examples of the use of retorsion was the United States' reaction to the British Navigation Acts in 1818. In the early nineteenth century, the British government passed several Navigation Acts which restricted trade with the British colonies in the Western Hemisphere to British vessels. After several unsuccessful attempts to have the laws relaxed, the United States resorted to retorsion action embodied in the Act of the Congress of the United States, April 18, 1818.

> Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that from and after the thirteenth of September, next, the ports of the United States shall be and remain closed against every vessel owned wholly or in part by a subject or subjects of his Britannic majesty, coming or arriving from every port or place in a colony or territory of his Britannic majesty that is or shall be, by the ordinary law of navigation and trade, closed against vessels owned by citizens of the United States . . . and every such vessel, so excluded from the ports of the United States, that shall enter or attempt to enter, the same, in violation of this act, shall, with her tackle, apparel and furniture, together with her cargo on board such vessel, be forfeited to the United States.[11]

The American reaction to the British Navigation Acts is a true example of retorsion, since both the action of England and the reaction of the United States constituted legal acts under international law. However, if the action by England had been a violation of international law and thus a delict, the reaction of the United States would more probably have followed in the form of a reprisal. The main distinction between a reprisal and a retorsion is that "reprisals are acts which, although normally illegal, are exceptionally permitted as reaction of one state against a violation of its rights by another state."[12] L. Oppenheim defines reprisals as "such injurious and otherwise intentionally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its

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[10] William Warner Bishop, Jr., *International Law: Cases and Materials* (Boston: Little, Brown and Company, 1962), pp. 744-745.
[11] Herbert Whittaker Briggs, *The Law of Nations* (New York: Appleton, Century, Crofts, Inc., 1952), p. 947.
[12] Kelsen, *Principles of International Law*, p. 21.

own international delinquency."[13] In defining the international delinquency, Oppenheim includes such areas as "non-compliance with treaty obligations, violation of the dignity of a foreign state, violation of foreign territorial supremacy, or any other intentionally illegal act."[14] So the pre-League doctrine of reprisals did not consider a delict of a second state, such as any interference or intervention including armed force, to be a delict if it were enacted in retaliation to a delict committed by the first state.[15] The delict committed by the second state, however, would be considered a delict of international law if it were to affect the rights of a third state.[16] The value of the reprisal in the classical system of international law is that it allows the state to redress its grievances without the establishment of a formal state of war.[17] But, the inception of controls upon the concept of self-help embodied in the League of Nations and in the United Nations first casted doubt upon the legality of reprisals and finally made them illegal under international law.

However, before the Charter of the United Nations made reprisals illegal, they enjoyed a long history in international law. One of the most common forms of reprisals in the sixteenth and seventeenth centuries was "letters of marque" which were granted by the state to an individual, empowering him to take a special reprisal against the state that committed the delict, which could comprise, for example, the seizing of property of nationals of the delinquent state.[18] However, this practice of the individual seeking to inflict the reprisal gradually fell into disuse, and the burden of reprisals was relinquished to the state. In the period, before the inception of the League, reprisals generally fit into one of three categories: "a) embargo of the offending state's ships found in the ports and territorial waters of the state that claimed to have been wronged, b) seizure of its ships or property on the high seas, and c) pacific blockade."[19]

The League of Nations Covenant did not radically alter the legality of reprisals, for it did not specifically prohibit their execution; and many writers such as Ian Brownlie feel that in such a system as that set up in the League Covenant, where there may exist a legal war, there could also exist legal reprisals.[20] The ambiguous nature of the League Covenant toward reprisals was exemplified by the League's attitude toward the 1923 Italian bombardment and ultimate occupation of Corfu. Italy claimed her action toward Corfu was a legitimate act of reprisal whose legality was based on the fact that such action was not forbidden by the Covenant.[21] The League Council did not act upon the Italian occupation of Corfu and referred to a Committee of Jurists certain legal questions concerning the case. The

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[13] Hersh, Lauterpacht, ed., *International Law by L. Oppenheim* (New York: David McKay Company, Inc., 1965), p. 136.
[14] *Ibid.*
[15] Kelsen, *Principles of International Law*, p. 21.
[16] Fenwick, *International Law*, p. 533.
[17] Ian Brownlie, *International Law and the Use of Force by States* (London: Oxford University Press, 1963), p. 220.
[18] Brierly, *Law of Nations*, p. 399.
[19] *Ibid.*
[20] Brownlie, *International Law and the Use of Force by States*, p. 220.
[21] *Ibid.*

fourth question referred to the Committee dealt with the nature of the legality of reprisals under the Covenant. Legal reprisals

> IV. Are measures of coercion which are not means to constitute acts of war consistent with the terms of Article 12 to 15 of the Covenant when they are taken by one member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?
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> Reply of Jurists. Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.[22]

So under the Covenant, the reprisal may or may not be legal, depending upon the decision of the League Council, which would in all decisions depend upon international politics.

The legality of reprisals remained very much in question, and in 1928 conditions, which reprisals must be subject to and satisfy, were set up in the *Naulilaa* Arbitration.[23] The issue in the case had arisen as a result of a misunderstanding between Germany and Portugal while Portugal was still neutral during the First World War. As a reprisal for an incident in which three Germans were killed, Germany sent troops into Portuguese territory in Africa. This action caused the Portuguese to evacuate and allowed a native uprising against Portugal. The German plea that they were acting under the right of reprisals was rejected by the International Tribunal that defined reprisals as acts

> of self-help on the part of the injured state, responding after an unsatisfied demand to an act contrary to International Law on the part of the offending state. They have the effect of suspending momentarily in the relation of the two states the observance of this or that rule of International Law. They are limited by the experience of humanity and the rules of good faith, applicable in the relations of state with state. They would be illegal if a previous act contrary to International Law had not furnished the reason for them. They aim to impose on the offending state reparation for the offense, the return to legality and the avoidance of new offences.[24]

The Arbitration also set down three conditions upon which the legitimacy of reprisals resides. The first is that the other state must have committed a delict of International Law. Also, before force may be employed in a reprisal situation, a redress of grievance must be

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[22] *Ibid.*, p. 221.
[23] Brierly, *Law of Nations*, p. 400.
[24] *Ibid.*, p. 401.

requested, and the reprisals must be proportional with the original delict.[25] Even though the legality of reprisals has changed because of the United Nations Charter, the principles and conditions of reprisals set down in the *Naulilaa* case must be considered to govern the nature of the illegal reprisals enacted presently.

The legality of reprisals was placed in question when the United Nations Charter was being drafted. The adoption of the Charter led to the outlawing of the use of force in reprisals which was previously allowed.[26] The refusal in the United Nations Charter to allow force to be used in reprisals is to be found in Article Two, paragraph four, which states 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." Theoretically, force as a method of reprisal became illegal under both the resort to force and the peaceful settlement of disputes paragraphs of the Charter. The Charter does allow for collective security, and there has been much discussion in the United Nations about the concept of collective reprisals based upon the principle of self-defense in Article 51. Such a collective reprisal was passed by a Security Council Resolution of May 18, 1951, which called for an embargo by all member states against North Korea and China for aggressive acts toward South Korea. The embargo included such items as arms, ammunition, and petroleum. Surprisingly, since the United Nations has such a limited coercive power, a number of states complied at least partially with the request. Regional agreements concluded for the purpose of collective security such as SEATO, NATO, and the Organization of American States, also adhere to the principle of collective reprisals. Reflecting this trend the Ministers of Foreign Affairs of the Organization of American States, September 2, 1962, voted to collectively suspend trade with Cuba as a reprisal for the accusation that Cuba was "conducting subversive activity in the Americas."[27] This concept of a central force monopoly other than the state, which leads to the idea of collective security and collective reprisals, is a revolutionary idea of the twentieth century; and, if the present trend continues, the concept of reprisals will move increasingly from the state to the central organ which controls the force monopoly.

While the concept of reprisals of an individual state has become illegal under International Law, another concept of self-help which has in fact been retained is the concept of self-defense. However, no discussion of self-defense would be adequate without prior mention of the much debated right of self-preservation in view of the fact that in the nineteenth century self-defense was regarded either as synonymous with or as a specific case of the much broader right of self-preservation.[28] It becomes extremely difficult for an International

[25] Brierly, *Law of Nations*, p. 401.
[26] Kelsen, *Principles of International Law*, p. 21.
[27] Starke, *An Introduction to International Law*, p. 390.
[28] Brownlie, *International Law and the Use of Force by States*, p. 43.

lawyer to prove the embodiment of the right of self-preservation in international law. Instead of a right of self-preservation, what has really evolved is an extra-legal position taken by a state in a time of necessity when the very existence of the state is being threatened.[29] Self-preservation, then, actually refers to a moral and not a legal condoning of the use of force or threatened use of force in violation of the right of a state or a delict of international law if the very nature of a state relies upon those actions. Recently, the trend has been to consider that self-preservation is an instinct of survival inherent in every state, but international law should not admit that it is legal to subordinate law to this instinct.[30] If this attitude were not the trend and the right of self-preservation undermined all other rights granted to states by international law, then it would become the duty of every state to "admit, suffer and endure every violation done to one another in self-preservation."[31] Such a duty for a sovereign state under the present system of international law does not exist. Any acceptance of self-preservation as a formal right under international law would be instrumental in rendering compliance with present laws merely conditional depending in large measure upon the position the state is placed in during any given international situation and to the attitude the state adopts toward the effect of the international law on the sovereignty and vital interests of the state. No law, then, would be too fundamental to break in the interest of the individual state, and so for the continuance of international law as we know it and as it may evolve self-preservation should continue to be considered an extra-legal instinct taken by the state as a last resort and not as a right of the state.

Historically, the idea of a right of self-preservation in international law is not revolutionary but dates to the seventeen hundreds. During this century, Vattel, a Swiss member of the Saxony diplomatic corps, introduced the doctrine of the equality of states into international law. He felt that international law had validity as law between equal states, since it was based upon the consent of the states. This basic consent of states to be subject to international law may be found, Vattel felt, both in the formulation of treaties between states and in the practice of states to observe some fundamental rules of international order. Since all states enjoy fundamental equality with all other states, the rights and obligations of states under international law would be identical. One such right of a state is that of self-preservation, which if necessary could take precedent over all other rights and norms of international law; and each state remains its own judge as to when the right is to be invoked, to what extent, and by what means.[32] Taking this view and extending it even farther, by the nineteenth century the claim of self-preservation was used to project an appearance of morality and legality to the almost unlimited use of force by states.[33] The writers of the period such as

[29] Kelsen, *Principles of International Law*, pp. 59-60.
[30] Brierly, *Law of Nations*, p. 404.
[31] Lauterpacht, *International Law*, p. 297.
[32] Stone, *Legal Controls of International Conflict*, pp. 15-16.
[33] Brownlie, *International Law and the Use of Force by States*, p. 49.

W. E. Hall agreed that self-preservation was an inherent right of the state saying "In the last resort almost the whole of the duties of the state are subordinated to the right of self-preservation."[34] But, they disagreed as to what specific type of action was required for the invoking of self-preservation actions. A few writers such as Wheaton regarded self-preservation as the expanded right of self-defense to be used in the case of an armed attack or threatened use of armed force against a state.[35] Others expanded the concept to include actions taken in self-preservation against a friendly or allied nation. They argued

> The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed either through the helplessness of the country or by means of intrigues with a party within it.[36]

By this explanation the state could expand the definition of self-preservation to include preventive measures in order to preserve a favorable balance of power and maintain the international status quo.[37] This nineteenth century view of the doctrine of self-preservation presented a great stumbling block to the development of adequate legal restraints on the use of armed force by states, and it is a direct result of this nineteenth century attitude and logic that nations today still base some actions on the right of self-preservation.

Examples of the implementation of a policy of self-preservation will usually reveal that the measures were not taken as the last resort of necessity. Instead, they were usually enacted to prevent an unfavorable shift in the balance of power, and the claim of self-preservation was used as a justification. One such case was that of the *Danish Fleet*,[38] where according to a secret clause between France and Denmark in the Peace of Tilsit of 1807 in certain cases Denmark could be coerced into a war with England after which it would surrender the Danish Fleet to France thus increasing the French strength. During an ensuing struggle with England, when Britain feared France was about to invoke the secret clauses, Britain asked Denmark to turn over its fleet which would be restored at the end of the war. Denmark refused to surrender its fleet, and Britain, claiming it acted under the right of self-preservation, shelled Copenhagen.[39] England had in this case used the doctrine of self-preservation to justify an act which did not salvage her very existence.

A second example of the right of self-preservation being used as a pretext for use of almost unlimited action by a state occurred in

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[34] Brierly, *Law of Nations*, p. 404.
[35] Brownlie, *International Law and the Use of Force by States*, p. 46.
[36] *Ibid.*, p. 309. Brownlie here refers to W.E. Hall's *International Law*, published in 1895.
[37] Brierly, *Law of Nations*, p. 404.
[38] Lauterpacht, *International Law*, pp. 299-300.
[39] *Ibid.*

1914 in the case of Germany's violation of the neutrality of Belgium and Luxemburg. Chancellor Von Bethman-Hollweg tried to explain to the Reichstag on August 4, 1914 that the violation of the neutrality was an exercise of the right of self-preservation. The Chancellor declared:

> Gentlemen, we are now in a state of necessity and necessity knows no law! Our troops have occupied Luxemburg, and perhaps are all ready on Belgian soil. Gentlemen, that is contrary to the dictates of International law . . . the wrong — I speak openly — that we are committing we will endeavor to make good as soon as our military goal has been reached. Anyone, who is threatened, as we are threatened and is fighting for his highest possessions, can only have one thought — how he is to hack his way through.[40]

It should not be inferred, however, that the practice of claiming self-preservation to license the use of force or threat of force by a state is a practice of the past. On October 22, 1962, President John F. Kennedy invoked the right of self-preservation as a justification for the demand that missiles sent to Cuba from the Soviet Union be removed and as justification for the Cuban Quarantine. In a television address to the nation, he claimed that:

> This urgent transformation of Cuba into an important strategic base, by the presence of these large, long-range and clearly offensive weapons of sudden mass destruction, constitutes an explicit threat to the peace and security of all the Americas, in the flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this nation and hemisphere, the Joint Resolutions of the Eighty-seventh Congress, the Charter of the United Nations and my own public warnings to the Soviets on September 4 and 13.[41]

These examples have one aspect in common, they all acted upon the nineteenth century definition of the right of self-preservation, even the United States in 1962 when the right had been relegated to an instinct of the state. Self-preservation, then, largely remains a doctrine of convenience under which a state may resort to otherwise illegal measures. When these delicts involve the use of armed force, the question arises as to the differentiation between self-preservation and self-defense.

Hans Kelsen cites the differences between the two doctrines by asserting that "the so called right of self-preservation — as distinguished from the right of self-defense — is the virtually unrestricted freedom it gives to a state to act contrary to any norm of International Law, if such action is deemed necessary for its own preservation."[42] For the instant that the self-preservation becomes

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[40] Fenwick, *International Law*, p. 230.
[41] John F. Kennedy, *The Burden and the Glory* (New York: Harper and Row, 1964), p. 90.
[42] Kelsen, *Principles of International Law*, p. 59.

necessary, the doctrine presupposes the suspension of all international law, and the latitude of the action knows no limit. Even though the state holds itself to be the sole judge of the necessity of self-preservation actions, it must ultimately justify its position before a judicial or political organ such as the International Court of Justice or the Security Council of the United Nations who will decide if the action was valid and what, if any, reprisals will be taken.[43] While actions of self-preservation presupposes a suspension of international law, self-defense presupposes a coercive legal order, and all actions taken in the right of self-defense must be legally enacted under and governed by such international law as the *Caroline* decision and the United Nations Charter. It is for this reason that the right of self-defense rather than that of self-preservation has been fostered under the present system of international law.

The right of self-defense is a limited right under international law and consists of "acts of force taken in response to an illegal use of force."[44] There is an innate conservative principle found in the concept of self-defense which is the idea of conserving territory or values currently held rather than acquiring or destroying territory or values of the attacking nation.[45] This conservative principle is the central aim of any policy of self-defense. Historically, the state has been the sole judge of when the need for self-defense has arisen and has judged the extent to which the acts of self-defense will be carried. Adherence to this principle was displayed by the United States at the signing of the Kellogg-Briand Pact by the declaration that "Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case the world will applaud and not condemn."[46] This does not mean, however, that the state has an unlimited right of self-defense similar to the concept of self-preservation. What is meant, instead, is that the state remains free to take acts in self-defense subject to the laws of the existing legal system. Thus, as the system becomes more centralized and the force monopoly moves increasing to one organ, the right of self-defense would resemble more closely the right of self-defense granted to individual members of a state.

The origins of these restrictions upon the right of self-defense lie in the *Caroline Case* of 1837.[47] During a rebellion in Canada, the steamer Caroline was used by a small band of Americans to transport men and weapons across the Niagara River into Canada. Since the United States government would do nothing to stop this illegal action on the part of some of its citizens, the British government seized the Caroline and set it adrift over Niagara Falls. The legal question became if this action by the British Government constituted a legiti-

[43] Lauterpacht, *International Law*, p. 299.
[44] Kelsen, *Principles of International Law*, p. 60.
[45] Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), p. 218.
[46] Brierly, *Law of Nations*, p. 407.
[47] Brierly, *Law of Nations*, p. 405.

mate act of self-defense, and it was the American Secretary of State, Daniel Webster, who finally set up the conditions under which the right of self-defense could be implemented. He said for there to be a legitimate use of the right of self-defense there must be a "necessity for self-defense, instant overwhelming, leaving no choice of means and no moment of deliberation."[48] Regarding the nature of the act itself, it must consist of "nothing unreasonable, or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."[49] These two principles of legitimate self-defense action seen in the context of the United Nations Charter are still regarded presently as criteria for any action taken in self-defense. The importance of the *Caroline Case* lies in that it was one of the first attempts to specifically restrict instances in which a state could resort to a policy of self-defense, and until the creation of the United Nations Charter, it contained the only finite rules for governing the doctrine of self-defense.

Actually, the League of Nations Covenant made no specific mention of the right of self-defense in either expanding or restricting it. What the League did was to recognize the right of self-defense as existing without defining the scope or nature of the right.[50] Each nation of the League under Article 10 of the Covenant was to "undertake to respect and preserve as against external aggression the territorial integrity, and existing political independence of all Members of the League. In case of any such aggression or in the case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled," thus attempting to create a system of collective responsibility. Article 11 of the League Covenant sought to further this collective security by asserting that "any war or threat of war, whether immediately affecting the League or not, is hereby declared a matter of concern to the whole League and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." If a state were to persist in an act of aggression, under Article 16 of the Covenant it would be the duty of the injured state to report the aggression to the League Council, whose duty it would be to "recommend to the several governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the Covenant of the League." However, nations were not obliged to abide by any decision of the Council and could if they preferred have their case heard by the League Assembly. The League also allowed for legal war and legal reprisals to occur and remained an ineffective powerless body that did nothing to restrict the scope of the right of self-defense.

By the mid 1920's it was clear that the idea of collective security could never be effective under the League of Nations Covenant, and nations began to show a tendency to desire a restoration of the right of self-help in the classical sense. To prevent this tendency, the

[48] *Ibid.*, p. 406.
[49] *Ibid.*, p. 406.
[50] Brownlie, *International Law and the Use of Force by States*, p. 252.

American Secretary of State Frank B. Kellogg established a pact whereby nations renounced war as an "instrument of national policy." He sent a note to the signatory governments of the Kellogg-Briand Pact assuring them that even though the Pact outlawed war "as an instrument of national policy" it would not "restrict or impair . . . the right of self-defense. That right is inherent in every Sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."[51] So until 1945, the *Caroline Case* and the Kellogg-Briand Pact were really the two main documents which governed the right of self-defense. By this period many jurists felt that to have an effective international body the right of self-defense must be permitted but held within rigid limits. For example, the Inter-American Judicial Committee while examining this problem expressed the belief that authority for the use of force to prevent or react to aggression should reside in the international body but added "Resistance by a nation to aggression must be limited to the defense of its territory pending effective action by the community of nations."[52] This is the principle embodied in the United Nations Charter, and the right of self-defense stipulated in Article 51.

> Nothing in the present 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 Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It should be realized that even though the Charter speaks of an "inherent right" of self-defense the Charter is defining the limits of the right and not merely restating a pre-existent right. Rather than restricting the right of self-defense, Article 51 enlarges it by providing for "collective self-defense" which is the right of United Nations member states to combine either through regional agreements concluded under Articles 52 through 54 of the Charter or by defense agreements concluded directly under Article 51. All of these regional or defense agreements are subject to the restrictions of Article 51, and the regional agreements have the additional requirements of trying to "achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council," (Article 52) and keeping the Security Council at all times "fully informed of activities undertaken or in

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[51] Julius Stone, *Aggression and World Order* (Berkeley: University of California Press, 1958), p. 32.
[52] Fenwick, *International Law*, pp. 234-235.

contemplation under regional arrangements or by regional agencies, for the maintenance of international peace and security." (Article 54). The advantage of the regional and defense agreements over strictly individual self-defense is that if any of the Five Great Powers blocks a measure to restore peace member states may combine with the attacked state either through a Uniting for Peace Resolution in the General Assembly or through regional agreements. It is for this reason that since 1945 such regional agreements as NATO, the Brussels Treaty of 1948, OAS, and the Warsaw Pact were developed.

The scope of the power of self-defense granted to such regional organizations and individual states resides in the interpretation of Article 51. Under the Article, the right of self-defense is granted "if an armed attack occurs" and a controversy has arisen between International lawyers over exactly what power of self-defense this actually grants to the state. The restrictive school of thought feels that the right of self-defense occurs only in the case of an armed attack and at no other time. Self-defense, then, is the only exception to the Charter's prohibition on force and the wording of Article 51 renders such preventive, self-defense measures as anticipatory self-defense illegal.[53] In defining the term "armed attack", however, it is generally expanded beyond the concept of solely a military invasion to include revolutionary groups from another state sent in to disrupt the country, bands of citizens from another state who continually violate the borders of the state, and terrorist groups who are trained for guerrilla warfare within the state.[54] In contrast, the second group of jurists feels the phrase "if an armed attack occurs" to be not the representation of the sole reason for the implementation of the policy but an example as to what type of situation would be serious enough to warrant the invocation of the "inherent right" of self-defense.[55] These jurists feel that the right could not only be limited to an armed attack because many practical situations arise which make it imperative to anticipate pending attack by attacking first.[56] What they are actually doing is disregarding all prohibitions upon force contained in the Charter and referring instead to the customary right of self-defense and the broader right of self-help which accompanies it.[57]

The other phrase of Article 51 which was the cause of controversy was the armed attack "against a Member of the United Nations." Until the Korean controversy, it was widely held that collective security could not be invoked to defend a non-member state of the United Nations. However, this issue was resolved when by Resolutions of the Security Council of June 25, and 27, 1950, collective security and collective self-defense were also extended to non-members.[58]

[53] Kelsen, *Principles of International Law*, p. 67.
[54] *Ibid.*, p. 62.
[55] Brierly, *Law of Nations*, p. 417.
[56] Fenwick, *International Law*, p. 229.
[57] Kelsen, *Principles of International Law*, p. 68. Note that Julius Stone takes this view in *Aggression and World Order*, when he says: ". . . any implied prohibition on Members to use force seems conditioned on the assumption that effective collective measures can be taken under the Charter to bring about adjustment or settlement 'in conformity with the principles of justice and international law.' It is certainly not self-evident what obligations (if any) are imported where no such effective collective measures are available for the remedy of just grievances."
[58] Kelsen, *Principles of International Law*, p. 42.

Self-defense and other forms of self-help are, of course, only a part of a system of international law which is in a constant state of evolution. The precedents of the Covenant of the League of Nations and the United Nations Charter have served to further the concept of a centralized system of international law. Such a concept may serve to only reduce the number of instances in which self-help may be used by the individual state. Because of the mass destruction through nuclear weapons that could be brought upon the earth, self-help must continue to decrease as a right of the state. To be able to entrust a world organization with the force monopoly of the world, it will be necessary for each state to be able to re-adjust their views on the rights and duties of states in the legal order. Until such a time, if ever, when the force monopoly can be thus centralized, it is the responsibility of each state to impose its own controls over the self-help it employs.