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# SOME THOUGHTS ON THE UNITED NATIONS CHARTER AND THE USE OF MILITARY FORCE AGAINST ECONOMIC COERCION

Rex J. Zedalis\*

## I. INTRODUCTION

During the midst of the Iranian hostage crisis, and shortly before the Soviet Union's invasion of Afghanistan in late December of 1979, President Carter's National Security Affairs advisor, Dr. Zbigniew Brzezinski, reportedly refused to rule out the possibility of the United States using military force in reaction to or preemption of efforts by hostile elements to block access to needed natural resources.<sup>1</sup> It is probable that Brzezinski's implied warning was solely for the edification of the Soviet Union. Undoubtedly he feared the Soviet Union would perceive the antipathy between the United States and Iran as providing an ideal opportunity for making inroads in the oil-rich Persian Gulf region. Given the nature of the warning, however, it seems also to have encompassed efforts by hostile governments of countries where vitally important natural resources are located. Whether Brzezinski's implied warning reflects the policy of the Reagan adminis-

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1. Wash. Post, Dec. 20, 1979, at A-22, col. 3; Chicago Sun Times, Dec. 20, 1979, at 5, col. 1. For the views of several Congressmen on the general issue of the use of military force against, *inter alia*, efforts by indigenous elements to cut off access to certain resources see *Should the United States Use Force in the Persian Gulf*, Wash. Post, Feb. 13, 1980, at A-27, col. 1. Former President Carter never went quite as far as Dr. Brzezinski. In his 1980 State of the Union message, he spoke only of a Soviet military invasion of the Persian Gulf and the possibility of American military response. See Walsh, *Somber Speech Lashes Soviets*, Wash. Post, Jan. 24, 1980, at A-1, col. 5.

tration may be open to question, but it is, nevertheless, clear that it has served to recrudescence the controversy over whether the United Nations Charter, *as a matter of law*, precludes the use of military force against economic coercion. This controversy derives from the Charter's authorization of unilateral resort to military force only when legitimately undertaken in self-defense pursuant to article 51, which speaks simply in terms of self-defense against "armed" attack.<sup>2</sup>

This Paper suggests that the two traditional positions<sup>3</sup> regarding

2. U.N. CHARTER art. 51 provides:

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 seems necessary in order to maintain or restore international peace and security.

3. One school of thought contends that the terms of the Charter preclude the use of force while the other contends that it does not. Those who contend that the terms of the Charter preclude the use of force include: H. Kelsen, *LAW OF THE UNITED NATIONS* (1950); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872 (1947); Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 29 (1951). Kelsen states that the right of self-defense applies only in case of an armed attack and that the right of self-defense must not be exercised in case of any other violation of the legally protected interests of a United Nations member. H. Kelsen, *supra*, at 797-98. Kunz states:

Self-defense in municipal law presupposes an illegal attack; this is certainly true also in international law. . . .

"Armed attack" as the only condition of the right of self-defense under Art. 51 may, in conceivable circumstances, mean too little. For this right does not exist against any form of aggression which does not constitute "armed attack". . . The threat of aggression does not justify self-defense under Art. 51.

Kunz, *supra*, at 877-78.

Those who contend that the Charter does not preclude the use of force in extreme situations include: D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958); L. GOODRICH & E. HAMBRO, *CHARTER OF THE UNITED NATIONS* (2d rev. ed. 1949); McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057 (1959). Bowett states with respect to the view that a state may not avail itself of self-defense against economic coercion:

The reasoning behind this view is that "the Charter forbids any use of force on the part of the individual Members except for the exercise of the right of self-defense against an armed attack." With respect, this statement is inaccurate and misleading, for the relevant prohibition is Art. 2(4) which contains no prohibition of the exercise of self-defence as permitted under the general law . . . .

D. BOWETT, *supra*, at 188. Goodrich and Hambro state:

The provisions of Article 51 do not necessarily exclude the right of self-defense in situations not covered by this Article. If the right of self-defense is inherent as has been claimed in the past, then each Member retains the right subject only to such limitations as are contained in the Charter.

L. GOODRICH & E. HAMBRO, *supra*, at 301. McDougal and Feliciano state:

In particular connection with exercises emphasizing nonmilitary forms of attack, we have suggested that, in many contexts, the use of political, economic and ideological instrumentalities may indeed result in no more than a modest degree of coercion, a degree which may constitute part of the ordinary coercion implicit in the power and other

whether the Charter precludes unilateral resort to force in self-defense against economic coercion should be rejected. Instead, it is argued, the Charter does not, *as a matter of law*, preclude a state from unilaterally resorting to military force against intense economic coercion so long as it has first sought and been unsuccessful in obtaining the peaceful elimination of the coercion through negotiation, consultation, and Security Council action under Chapter VI of the Charter. Of course, since the invocation of the inherent right of self-defense provided for in article 51 must be "necessary", and the quantum and nature of the defensive force utilized by the state invoking article 51 must be "proportionate" to the coercion exerted, rarely will economic coercion justify resort to military rather than some other form of defensive force.

Given the limited scope of this Paper, no attempt will be made to list the types of economic coercion which, if exerted, would justify resort to military force in self-defense.<sup>4</sup> Such an undertaking would be speculative at best. Similarly, no effort will be made to determine whether the Charter authorizes the use of military force in self-defense

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value processes in the world arena. To say, however, that article 51 limits the appropriate precipitating event for lawful self-defense to an "*armed* attack" is in effect to suppose that in no possible context can applications of nonmilitary types of coercion (where armed force is kept to a background role) take on efficacy, intensity and proportions comparable to those of an "armed attack" and thus present an analogous condition of necessity. Apart from the extreme difficulty of establishing realistic factual bases for that supposition, the conclusion places too great a strain upon the single secondary factor of modality—military violence. A rational appraisal of necessity demands much more than simple ascertainment of the modality of the initiating coercion. The expectations which the contending participants create in each other are a function not only of the simple fact that the military instrument has or has not been overtly used but also of the degree and kind of use to which all other instrumentalities of policy are being put. What must be assessed is the cumulative impact of all the means of coercion utilized; policy-oriented analysis must be *configurative* analysis. The kind, intensity and dimension of political, economic or ideological pressure applied may, through this analysis, serve in some contexts as relevant indices of the imminence or remoteness of an allegedly expected armed attack.

McDougal & Feliciano, *supra*, at 1150 (emphasis in original).

4. This Paper does not purport to enumerate the kinds of economic coercion which would justify the resort to military force in self-defense. The complexity and perhaps futility of any such task is demonstrated by examining the hypothetical factual situations presented *infra* in note 62. Each of these draws into focus some of the factors which must be considered when attempting to determine whether the economic coercion creates the necessity for defensive action and whether defensive action which is military in nature is proportionate to the coercion precipitating its use. It should be noted that even though one may not be justified in using military force against a certain form of violative economic coercion, some other form of defensive force may be appropriate. Thus, the use of economic force against violative economic coercion may be lawful in instances where the principles of necessity and proportionality would not warrant resort to defensive military action.

against "imminent" exertions of intense economic coercion.<sup>5</sup>

5. Whenever the coercion sought to be preempted is economic rather than armed, the debate surrounding the legitimacy of the use of anticipatory military force becomes more complex.

For the view that anticipatory self-defense against imminent exertion of armed coercion is prohibited see I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275-79 (1963); Leitel, *The United Nations Charter as a Restraint Upon a Nation's Right to Wage War*, 36 BROOKLYN L. REV. 212, 226-27 (1970). Brownlie states:

The Article [51] states that the right of self-defense remains unimpaired "if an armed attack occurs against a Member of the United Nations." It is believed that the ordinary meaning of the phrase precludes action which is preventive in character . . . . In this respect the French text is less equivocal than the English since its literal translation would read "in a case where a United Nations Member is the object of an armed aggression." The Spanish text simply reads "en caso de ataque armado." There is no further clarification of the phrase to be gained from study of the *travaux préparatoires*. However, the discussions at San Francisco assumed that any permission for the unilateral use of force would be exceptional and would be secondary to the general prohibition in Article 2, paragraph 4. There was a presumption against self-defense and even action in self-defense within Article 51 was made subject to control by the Security Council. In these circumstances the precision of Article 51 is explicable. The comments of governments on Chapter VIII, section C, of the Dumbarton Oaks Proposal give no real assistance. A Turkish comment referred to "cases of emergency" but later spoke of "the country being attacked"; and a comment by the Czechoslovak delegation referred to "cases of immediate danger."

I. BROWNIE, *supra*, at 275-79. For the opposite proposition see McDougal & Feliciano, *supra* note 3:

The major difficulties with this reading of what appears to be an inept piece of draftsmanship are two-fold. In the first place, neither article 51 nor any other word formula can have, apart from context, any single "clear and unambiguous" or "popular, natural and ordinary" meaning that predetermines decision in infinitely varying particular controversies. The task of treaty interpretation, especially the interpretation of constitutional documents devised, as was the United Nations Charter, for the developing future, is not one of discovering and extracting from isolated words some mystical pre-existent, reified meaning but rather one of giving that meaning to both words and acts, in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement. For determining these major purposes and demands, a rational process of interpretation permits recourse to all available indices of shared expectation, including, in particular, that which Professor Kunz casually de-emphasized, the preparatory work on the agreement. Such a process of interpretation would, moreover, seek to bring within the attention frame of the interpreter and applier not just one element of a context suggested by one rule or principle of interpretation, such as that upon which Dr. Nintić relied, but all the relevant variable factors of a particular context. It is of common record in the preparatory work on the Charter that article 51 was not drafted for the purpose of deliberately narrowing the customary-law permission of self-defense against a current or imminent unlawful attack by raising the required degree of necessity.

*Id.* at 1145 (footnotes omitted). For additional support for the position taken by McDougal and Feliciano see Fawcett, *Intervention in International Law, A Study of some Recent Cases*, 103 RECUEIL DES COURS 342, 361-63 (1961). Bowett states:

It is not believed, therefore, that Art. 51 restricts the traditional right of self-defence so as to exclude action taken against an imminent danger but before 'an armed attack occurs'. In our view such a restriction is both unnecessary and inconsistent with Art. 2(4) which forbids not only force but the threat of force, and, furthermore, it is a restriction which bears no relation to the realities of a situation which may arise prior to an actual armed attack and call for self-defence immediately if it is to be any avail at all. No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence.

D. BOWETT, *supra* note 3, at 191-92. The view that a state may respond to imminent threat of

## II. USE OF MILITARY FORCE IN SELF-DEFENSE AGAINST EXERTIONS OF ECONOMIC COERCION

To cogently argue that the Charter does not, as a matter of law, preclude the use of military force against exertions of economic coercion, one must demonstrate that intense economic coercion violates article 2(4) of the Charter<sup>6</sup> and that the precise terms of article 51 do not restrict the exercise of the right of self-defense to only those situations where an "armed" attack occurs. Clearly, since the exercise of the right of self-defense presupposes the existence of some violative or impermissible activity against which it may be directed, any resort to force in self-defense against economic coercion would be unlawful if economic coercion itself could not be said to violate the proscription of article 2(4). Similarly, although intense economic coercion may be considered violative of article 2(4), if article 51 restricts the exercise of the right of self-defense to those instances where an "armed" attack occurs, resort to force in self-defense against intense economic coercion would, itself, violate the Charter. Such a violation would entitle the state against which force has been used to respond lawfully with its own defensive measures.<sup>7</sup> What follows addresses both of these matters.

### A. *Economic Coercion as a Violation of the Charter*

Article 2(4) of the Charter prohibits "the threat or use of *force* against the territorial integrity or political independence of another state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>8</sup> Arguably, the term "force" should be read broadly, since it is located in article 2 rather than in article 1<sup>9</sup> of the Charter.

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attack is also approved in *The Caroline Case*, 2 I. MOORE, A DIGEST OF INTERNATIONAL LAW § 217 (1906).

6. U.N. CHARTER art. 2, para. 4 provides: "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."

7. If the Charter, as a matter of law, permits the use of force in self-defense only in instances where a state has first been the object of an "*armed* attack", then using force in any other instance would never be consonant with the Charter. The result would be that in every instance where state A used military force against state B, which previously exerted some form of coercion which was not armed, state A would be unable to justify the use of military force on the basis of the right of self-defense, and state B would be lawfully entitled to resort to military force in self-defense against state A.

8. U.N. CHARTER art. 2, para. 4 (emphasis added).

9. U.N. CHARTER art. 1 provides:

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

Article 2 sets out the *principles* in accordance with which the members of the international community must act while article 1, in stating the *purposes* of the collective community under the auspices of the United Nations, prohibits "threats to the peace," "breaches of the peace," and "acts of aggression." This reading suggests that the proscription of force includes, but is not limited to, threats to the peace, breaches of the peace, and acts of aggression,<sup>10</sup> and, therefore, might also include certain other forms of intense coercion.

Nevertheless, many have contended that for other reasons the Charter concept of force does not encompass economic coercion, regardless of its intensity. The reasons advanced in support of this contention include:

1. The delegates to the 1945 San Francisco Conference on International Organization rejected a Brazilian proposal to amend the original draft of article 2(4) to include in the prohibition "the threat or use of economic measures" in any manner inconsistent with the purposes of the United Nations;<sup>11</sup>
2. the inability of the Sixth (Legal) Committee of the General Assembly and the Special Committees of 1953<sup>12</sup> and 1956<sup>13</sup> to develop a definition of aggression which included economic coercion, as well as the absence of economic coercion from the Consensus Definition of aggression embodied in General Assembly Resolution

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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;

2. 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;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

10. In another context, one commentator has gone so far as to suggest that the principles of article 2 are superior to the purposes of the U.N. as stated in article 1. See Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60, 71 (1977). For a criticism of this view, see Letter from Professor Jordan J. Paust to Editor in Chief, American Journal of International Law, June 16, 1977, reprinted in 71 AM. J. INT'L L. 749 (1977).

11. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331, 334-35 (1945).

12. Report of the Special Committee on the Question of Defining Aggression, 9 U.N. GAOR Supp. (No. 11) at 1-15, U.N. Doc. A/2638 (1954).

13. Report of the 1956 Special Committee on the Question of Defining Aggression, 12 U.N. GAOR Supp. (No. 16) at 1-33, U.N. Doc. A/3574 (1956).

3314 of 1974;<sup>14</sup>

3. since article 51 of the Charter permits resort to the right of self-defense only when an "armed" attack occurs,<sup>15</sup> any reading of article 2(4) which characterizes certain forms of economic coercion as impermissible creates a lacuna in the Charter whereby a state would not be entitled to invoke article 51 to defend itself against exertions of impermissible coercion;<sup>16</sup>
4. since no one contends that article 2(4) is designed to restrict economic competition, a reading of the term "force" so as to include economic coercion creates the inordinately difficult and politically sensitive problem of having to distinguish permissible economic competition from impermissible economic coercion.<sup>17</sup>

Upon close analysis, none of these arguments prove convincing enough to require that the term "force" be read as precluding intense forms of economic coercion.

The delegates' rejection of the Brazilian proposal at the Conference on International Organization deserves some weight. It is difficult to say categorically, however, that the rejection evidences the aversion of the delegates to the assimilation of any form of economic coercion to the force prohibited by article 2(4).<sup>18</sup> Significantly, during the debates on the Brazilian proposal the Belgian delegate suggested that the proposal underestimated the reach of the phrase "or in any other manner"<sup>19</sup> inconsistent with the Purposes of the United Nations," which appeared then, and still appears, at the end of the text of article 2(4). Under this reasoning a strong argument can be made that the Brazilian proposal was rejected because it simply restated that which was already provided. This argument appears corroborated by the language in the Report of Rapporteur of Committee I to Commission I to the effect that "unilateral use of force *or similar coercive measures* is not authorized or admitted" by the terms of article 2(4).<sup>20</sup> The use of the words

14. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). For a discussion of Resolution 3314, see Stone, *Hopes and Loopholes In The 1974 Definition of Aggression* 71 AM. J. INT'L L. 224 (1977).

15. *Supra* note 2. The accuracy of this construction is explored *infra* in the text accompanying notes 39-50.

16. See 20 U.N. GAOR Annexes (Agenda Item Nos. 90, 94) at 88, U.N. Docs. A/546 (1965).

17. See Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983, 996 (1974).

18. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331, 334-35 (1945).

19. *Id.* at 334.

20. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 387, 400 (1945) (emphasis added).



"or similar coercive measures," in juxtaposition to the term "force," seems to indicate that article 2(4) should not be read in a manner which precludes even intense forms of economic coercion from being considered impermissible.

With respect to the significance attributed to the failure of the Sixth Committee of the General Assembly and the Special Committees of 1953<sup>21</sup> and 1956<sup>22</sup> to define aggression to include economic coercion, combined with the absence of economic coercion from the Consensus Definition of aggression in General Assembly Resolution 3314 of 1974,<sup>23</sup> it need only be noted that, whenever the focus of attention is the question of the impermissibility of certain forms of economic coercion under the Charter, the appropriate concern is the more inclusive term "force" and not the limited term "aggression." "Aggression" is used only in article 1(1) of Chapter I<sup>24</sup> of the Charter, which states the *purposes of the United Nations*, and article 39 of Chapter VII,<sup>25</sup> which sets out the instances activating the jurisdictional competency of the Security Council to take collective security actions. Therefore, the exact content of an acceptable comprehensive definition of aggression has significance only in those contexts.<sup>26</sup> The fact that early efforts to define aggression as including economic coercion proved unsuccessful, and that the recently adopted Consensus Definition of aggression fails to include economic coercion, seem to have some bearing on the nature of the action the Security Council is authorized to undertake in dealing

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21. Report of the Special Committee on the Question of Defining Aggression, 9 U.N. GAOR Supp. (No. 11) at 1-15, U.N. Doc. A/2638 (1954).

22. Report of the 1956 Special Committee on the Question of Defining Aggression, 12 U.N. GAOR Supp. (No 16) at 1-33, U.N. Doc. A/3574 (1956).

23. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

24. U.N. CHARTER art. 1, para. 1. For full text of article 1, see *supra* note 9.

25. U.N. CHARTER art. 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

26. See D. BOWETT, *supra* note 3. He states:

The purpose of this concept [self-defence] is not, as with aggression, to define the circumstances in which the competent organs of the collective security will take action to maintain international peace and security, but rather to define the situations in which the state, acting without the authorization of those competent organs, may use force to protect those essential rights on which its security depends.

D. BOWETT, *supra* note 3, at 256. Bowett also states:

[I]t is submitted that in considering whether a situation affords a state the right of self-defence the only relevant concept is that of self-defence; the concept of aggression, as it has been elaborated during the course of the last forty years, has an entirely different purpose and can afford no guide to the question of whether a right of self-defence exists.

D. BOWETT, *supra* note 3, at 261-62.

with intense economic coercion. These considerations, however, have no bearing upon the question of whether such coercion is prohibited by the Charter. The latter question can be examined only by measuring the coercion actually used against the provisions of article 2 which set forth the *principles* in accordance with which members of the international community must act. When this is done, it becomes apparent that the only relevant concern is the term "force" as used in article 2(4).

The argument that economic coercion, regardless of its intensity, should never be characterized as impermissible force, since the consequence would be to create a lacuna in the Charter,<sup>27</sup> is based on what will later be suggested is an inaccurate reading of article 51. It will suffice for the time being to note that a lacuna does not exist if one accepts the view that the exercise of the inherent right of self-defense articulated in article 51 is not limited to situations where an "armed" attack occurs,<sup>28</sup> but also encompasses exertions of other forms of impermissible coercion. Such a reading of article 51 does not, as a matter of law, preclude the exercise of self-defense in response to the use of intense forms of economic coercion. The key consideration in such cases is whether the coercion jeopardizes those essential security interests which the Charter protects, not whether the coercion is of an armed or economic nature.

With respect to the contention that the inclusion of certain forms of economic coercion in the Charter concept of impermissible force would give rise to burdensome and even impossible efforts to distinguish permissible economic competition from impermissible economic coercion,<sup>29</sup> it is observed that there is in this an element of hyperbole. At present, whenever a state invokes the right of self-defense as justification for resort to force against another, it subjectively determines whether its response is warranted by "necessity" and whether its action is "proportionate" to the coercion against which it is directed. These determinations are subject to subsequent evaluation by the members of the United Nations whenever called upon to decide the legality of the resort to self-defense. Since the decision making process undertaken by both the state invoking article 51 and the United Nations would be similar whether the question involved the "necessity" of action in self-defense or the permissibility of the exertion of a certain form of eco-

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27. See *infra* text accompanying notes 39-50.

28. For the arguments supporting this view see *infra* text accompanying notes 39-50.

29. *Supra* note 17.

conomic pressure,<sup>30</sup> it seems that the contention alluded to is nothing more than an observation of the difficulties of grappling with the various aspects of the lawfulness of the invocation of article 51. Difficulty in determining whether a specific exertion of economic pressure is impermissible does not justify refusing to read article 2(4) as encompassing exertions of intense forms of economic pressure. Every exercise of the right of self-defense involves extremely difficult and troubling issues.

There are two other reasons, in addition to those just discussed, for rejecting contentions that the Charter concept of impermissible force does not include even the most intense forms of economic coercion. First, the term "force" in article 2(4) is not surrounded by descriptive adjectives designed to restrict its scope.<sup>31</sup> This seems significant when it is considered that where the drafters of the Charter intended to so circumscribe the term they removed all ambiguity by either prefacing it with the adjective "armed," as in article 46,<sup>32</sup> or using it in a context which left no doubt that it meant "armed force," as in article 44.<sup>33</sup> Second, given the increasing degree of economic interdependence and the drastic national and international consequences attendant to sudden and substantial reductions in the availability of certain vital resources, maintaining that economic coercion, regardless of its intensity, can never be analogous to armed coercion ignores the realities of modern existence.<sup>34</sup> In many instances a substantial reduction or total cut-off of vital resources could produce effects far surpassing those which would warrant a resort to self-defense under article 51 if the coercion causing the effects were armed. Accordingly, it seems untenable to maintain that economic coercion, regardless of its intensity, cannot violate the Charter. The use of any type of particularly intense coercion, even

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30. Any determination that the right of self-defense may be, or was, lawfully exercised requires a thorough examination of numerous factors, including the basic nature of the coercion which precipitated the invocation of the right. Thus, questions dealing with "necessity" invariably require analysis of the coercion alleged to have led to the use of defensive force.

31. Dempsey, *Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253, 269-70 (1977).

32. U.N. CHARTER art. 46 states: "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."

33. U.N. CHARTER art. 44 states:

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

34. See McDougal & Feliciano, *supra* note 3, at 1150.

though it may be economic in nature, against the territorial integrity or political independence of another state, or in any other manner inconsistent with the purposes of the United Nations, violates article 2(4).

#### B. *Article 51 and Responses to Impermissible Economic Coercion*

Under international law, unilateral resort to military force in self-defense is justified only if it can be demonstrated that, in addition to the force being "necessary" and "proportionate" to counter the exertion of some impermissible coercion,<sup>35</sup> the circumstances surrounding its utilization meet the terms of article 51 of the Charter. Article 51 states in pertinent part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken . . . in the exercise of this right of self-defense shall be immediately reported to the Security Council . . . .

There are two traditional schools of thought on the meaning of article 51. As mentioned at the outset, both should be rejected in favor of a third reading. One school of thought argues that, as a matter of law, article 51 cannot be invoked against economic coercion, since, when read in conjunction with article 2(4), it authorizes the exercise of

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35. The principles of "necessity" and "proportionality" have been articulated by McDougal and Feliciano as follows:

The principal requirements which the "customary law" of self-defense makes prerequisite to the lawful assertion of these claims [to use intense coercion] are commonly summarized in terms of necessity and proportionality. For the protection of the general community against extravagant claims, the standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the *Caroline* case—that there must be shown a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." The requirement of proportionality which, as we shall develop below, is but another application of the principle of economy in coercion, is frequently expressed in equally abstract terms. One example is M. de Brouckere's formulation: "Legitimate defense implies the adoption of measures proportionate to the seriousness of the attack and justified by the imminence of the danger." There is, however, increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context. What remains to be stressed is that reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.

McDougal & Feliciano, *supra* note 3, at 1132.

self-defense only against "armed" coercion.<sup>36</sup> Accordingly, exertions of force against a state using economic coercion are said to violate article 2(4). The second school of thought rejects such a reading of article 51, indicating that nothing in the Charter prohibits the unilateral use of force which is necessary and proportionate, presumably including, in extreme situations, the use of military force, if designed to respond to intense impermissible economic coercion.<sup>37</sup> It would seem that the effect of this reading would be to characterize as lawful an *immediate* resort to unilateral military force whenever the economic coercion against which it is directed is so intense that the responsive military force can be said to be necessary and proportionate. In advancing this position, proponents *intimate* that it cannot be stated that *immediate* resort to necessary and proportionate unilateral military force against such economic coercion is, as a matter of law, precluded by the Charter.<sup>38</sup>

### 1. Use of Military Force Illegal

There are three reasons for rejecting the view that article 51 authorizes the unilateral resort to military force in self-defense only against "armed" coercion. First, it is a *non sequitur* to say that, because article 51 provides that nothing in the Charter forbids or limits the interim exercise of the inherent right of self-defense against armed coercion, it must ineluctably follow that self-defense may legitimately be exercised only against armed coercion.<sup>39</sup> The fact that article 51 provides that the Charter does not impair the interim exercise of self-defense against armed coercion does not mean that it *prohibits* the exercise of self-defense against unarmed forms of coercion. Article 51 is a declaratory affirmation of the inherent right of self-defense against coercion of an armed nature, not a renunciation of this right against other forms of coercion violative of the Charter.

Second, article 51 was not included in the Charter in order to re-

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36. See *supra* note 3.

37. *Id.*

38. It is quite clear that none of the commentators who subscribe to the second school of thought *explicitly* state that force may be used *immediately* against violative economic coercion. In failing to discuss the applicability of Chapter VI of the Charter, however, it seems safe to assume that such is their intimation. Given the fact that it is difficult to imagine some type of economic coercion producing instantly the degree of "necessity" requisite to support lawful invocation of the right of self-defense, the requirement that a state first seek resolution of the "dispute" accompanying the exertion of violative economic coercion would provide time for the effects of the coercion to intensify and thus create the requisite "necessity."

39. D. BOWETT, *supra* note 3.

flect the view of the drafters that the inherent right of self-defense as traditionally known was to be somewhat altered so that in the future international law would authorize its exercise only against armed coercion.<sup>40</sup> Rather, it is widely acknowledged that article 51 was included in the Charter to assure the continued viability of the inter-American system of mutual defense established by the Declaration of Lima (1938),<sup>41</sup> the Act of Havana (1940),<sup>42</sup> the Act of Chapultepec (1945),<sup>43</sup> and the, then-anticipated, Inter-American Treaty of Reciprocal Assistance (1947).<sup>44</sup> Article 51 was also intended to permit state members of the inter-American and similar mutual defense organizations to take forceful measures of collective self-defense whenever the Security Council was paralyzed by the veto of one of the five permanent members.<sup>45</sup> Specifically, concern for the inclusion of language like that found in article 51 stemmed from the fact that the right of self-defense would have been substantially fettered had Chapter VIII (C)(2) of the Dumbarton Oaks Proposals<sup>46</sup> found its way into the final draft of the Charter. Chapter VIII (C)(2), considered by the delegates to the Conference on International Organization, provided that forceful measures, including those in collective self-defense, could not be taken by mutual defense organizations "without the authorization of the Security Council."<sup>47</sup> In essence, this provision required advance Security Council approval of all measures of collective self-defense, thereby subjecting the state suffering the impermissible coercion to additional depredation while the matter was being considered. Further, this provision presented states belonging to mutual defense organizations with the possibility of having to act without the necessary Security Council "authorization" as a result of a permanent member's negative vote. Article 51 departs considerably from Chapter VIII (C)(2) of the Dumbarton

40. Under customary international law, the right of self-defense was not limited to exercise only in response to armed coercion. D. BOWETT, *supra* note 3.

41. Declaration of Lima, Dec. 27, 1938, 3 BEVANS 534.

42. Act of Havana, July 30, 1940, 54 Stat. 2491, E.A.S. No. 199.

43. Act of Chapultepec, Mar. 8, 1945, 60 Stat. 1831, T.I.A.S. No. 1543.

44. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, T.I.A.S. No. 1858.

45. D. BOWETT, *supra* note 3, at 297-99; Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 362 (1962); McDougal & Feliciano, *supra* note 3, at 1145-46.

46. Chapter VIII (C)(2) of the Dumbarton Oaks Proposals provides that, "The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council." 11 DEP'T ST. BULL. 372 (1944).

47. *Id.*

Oaks Proposals. As drafted, it does not require mutual defense and regional security organizations to seek Security council approval before taking measures of collective self-defense against armed coercion. It does require, however, that all measures which are taken be subsequently reported to the Security Council.

Third, it seems that if it is correct to read article 51 as authorizing the exercise of self-defense only against armed coercion, then the transcendent principle enunciated in article 2(4)<sup>48</sup> should somehow complement article 51 by characterizing the use of force against forms of coercion which are not armed as impermissible. In this respect, however, it must be recalled that the Report of Rapporteur of Committee I to Commission I states, in relation to article 2(4), that "[t]he use of arms in legitimate self-defense *remains admitted and unimpaired*."<sup>49</sup> The breadth of this language, which was approved by Commission I and the Plenary Conference, appears to indicate that the right of self-defense as traditionally known "remains" and may continue to be exercised against all forms of impermissible coercion. Thus the specific language of article 51 should be read as affirming the right to exercise self-defense against armed coercion, not as limiting its exercise only to instances where there has been an exertion of armed coercion.<sup>50</sup> Furthermore, aside from the Rapporteur's illuminating gloss on the relationship of article 2(4) to article 51, resort to force solely for the purpose of defending one's own territorial integrity or political independence cannot, by definition, involve the threat or use of force against the territorial integrity or political independence of another. Therefore, it appears that nothing in the explicit terms of article 2(4) prohibits the defensive use of force, including "necessary" and "proportionate" military force, against impermissible coercion which is not armed. It also appears that it was the intention of the delegates to the Conference on International Organization that article 2(4) not be seen as impairing the right of self-defense as traditionally conceived.

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48. Article 2(4) purports to be a comprehensive statement of all types of force prohibited by the Charter. The use of force not prohibited by article 2(4) is, therefore, permitted. Cf. D. BOWETT, *supra* note 3 at 184-85 ("rights formerly belonging to member states continue except insofar as obligations inconsistent with those existing rights are assumed under the Charter.")

49. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 387, 400 (1945) (emphasis added).

50. Had article 2(4) been intended to proscribe the use of force in self-defense against forms of impermissible coercion not of a military nature, the language of the Report of the Rapporteur with respect to the effect of article 2(4) on self-defense would have been drafted much more narrowly. The language actually utilized certainly implies that the traditional right of self-defense was not to be altered or diminished by article 2(4).

## 2. Use of Military Force Legal: Traditional and Alternative Views

The view which intimates that article 51 can be read as authorizing an *immediate* resort to unilateral military force whenever the economic coercion against which it is directed is so intense that the responsive force can be said to be necessary and proportionate should be rejected, just like that which insists self-defense may be legitimately exercised only against armed coercion. This view, held by those who subscribe to the second school of thought, attributes undue significance to the fact that the drafters of the Charter did not entertain any intention of altering the right of self-defense as traditionally conceived. Further, the view also *ignores the language in article 51 implicitly indicating that the Charter impairs or, for want of a better description, establishes prerequisites which must be satisfied in advance of resort to the unilateral use of force in self-defense against forms of coercion which are not armed.* This latter point supplies the foundation for a third reading of article 51.

If one looks closely at the language in article 51 which provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . until the Security Council has taken the measures necessary to maintain international peace and security,"<sup>51</sup> one gets the impression not that the Charter prohibits, but that something in the Charter impairs or establishes certain prerequisites to the exercise of the inherent right of self-defense whenever the coercion against which it is directed is not armed. Indeed it appears that the precise terms of article 51 are designed to insulate only the right of self-defense against armed coercion from possible impairment by certain provisions of the Charter, and are not designed to protect the right of self-defense against other forms of impermissible coercion from those same provisions.<sup>52</sup> Given this, it would be inaccurate to read article 51 as authorizing immediate resort to military force against impermissible economic coercion, although the coercion may be so intense that the responsive force would be necessary and proportionate. Rather, the better reading of article 51 would be that it declares, first, that in instances where an armed attack occurs

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51. U.N. CHARTER art. 51.

52. As just noted, the opening language of article 51 simply says that the Charter does not establish any impediment to the right of self-defense "if an armed attack occurs." It would, therefore, appear that there are no prerequisites to the use of force in self-defense against armed attack. This opening language *implies*, however, that the right of self-defense against other forms of impermissible coercion may very well be impaired by the Charter.



against a state, the state may *immediately* and unilaterally resort to the use of force in self-defense, and continue to do so until the Security Council has taken measures necessary to maintain international peace and security;<sup>53</sup> and, second, that in instances where impermissible coercion of some other form is exerted against a state, such as intense economic coercion, the state must initially satisfy whatever prerequisites are found in the Charter before resorting to the unilateral use of force in self-defense.<sup>54</sup>

The cogency of this third, alternative reading of article 51 becomes apparent when the other provisions of the Charter are scrutinized. Article 2(3), for instance, requires states engaged in international "disputes" to settle them by "peaceful means."<sup>55</sup> This would seem to fix a duty upon states to peacefully resolve disputes, thereby precluding resort to force in self-defense as a method of resolution before peaceful efforts have been attempted. In implementation of this adjuration, Chapter VI of the Charter establishes two obligatory methods of "dispute" settlement which could arguably be seen as the substantive impairments or prerequisites implicitly referred to by the terms of article 51. Specifically, article 33 declares that "parties to *any dispute*, the continuance of which is likely to endanger the maintenance of international peace and security, *shall* . . . [attempt to resolve the matter by] negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means . . . ."<sup>56</sup> Article 37 then states that if efforts to so resolve the dispute fail, the parties "shall" refer the matter to the Security Council which "shall," if it determines that the continuance of the dispute is

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53. The use of force in self-defense against armed coercion is not subject to certain prerequisites. The right is clearly an interim measure, however; that is, once the Security Council acts to restore international peace and security, future responsive measures may not be justified as in accordance with the right of self-defense.

54. Unlike self-defense against armed attack, if a state desires to respond to some other form of impermissible, violative coercion, it must first satisfy the prerequisites enunciated in the Charter. Thus, there is no interim right identical to that which may be exercised against armed attack. Once these prerequisites, see *infra* text accompanying notes 55-57, are satisfied, however, the state would seem to be entitled to exercise self-defense until the Security Council acts to restore international peace and security, see *infra* text accompanying notes 59-62. For purposes of clarification, it should again be observed that this Paper focuses on the use of military force against violative economic coercion. Therefore, no position is taken with respect to the applicability of the aforementioned prerequisites to the use of other forms of defensive force, e.g., retaliatory economic coercion.

55. U.N. CHARTER art. 2, para. 3 states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

56. U.N. CHARTER art. 33, para. 1 (emphasis added).

likely to endanger the maintenance of international peace and security, "recommend" terms of settlement which it considers appropriate, or, pursuant to article 36, procedures or methods of adjustment designed to resolve the matter.<sup>57</sup>

Clearly, while both article 33 and article 37 are activated only by an international situation which rises to the level of a "dispute", the use of impermissible economic coercion by one state against another satisfies that threshold requirement. After all, since some sort of "dispute"—and article 33 speaks only in terms of "any" dispute—likely to endanger the maintenance of international peace and security inevitably precedes, accompanies, or follows exertions of force proscribed by the Charter, the threat or use of economic coercion against the territorial integrity or political independence of a state necessarily involves a "dispute" because such is prohibited by article 2(4).

In light of the affiliation of Chapter VI and article 51 of the Charter, it appears that a state may not *immediately* resort to the use of force in self-defense against impermissible economic coercion. The use of force in self-defense against all but armed forms of impermissible coercion, irrespective of their intensity, appears to be permitted only after the state which is the target of the coercion has first sought resolution of the "dispute" under article 33 and, if necessary, article 37 of the Charter. Once such an effort to peacefully resolve the matter has been made, the target state has fulfilled its obligation under article 2(3) and may then, and only then, resort to the use of force, including "necessary" and "proportionate" military force, against the impermissible coercion.

Before leaving the discussion of this alternative reading of article 51, it should be pointed out that any effort by a target state to resolve a dispute under Chapter VI could produce one of several results: negotiated resolution of the dispute under article 33; a determination by the Security Council under article 37 that the dispute is not likely to endanger the maintenance of international peace and security; failure of the Security Council to act under article 37 to resolve a dispute which does endanger the maintenance of international peace and security; or issuance by the Security Council of a "recommendation" setting out the terms of a settlement or the procedures for resolving the dispute.

A negotiated resolution of the dispute would seem to end the matter. If a negotiated resolution proves elusive, however, failure of the

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57. U.N. CHARTER art. 37.

Security Council to act under article 37 to resolve a dispute endangering the maintenance of international peace and security should not preclude the target state from using force in self-defense once it becomes obvious that the Council is incapable of acting. Article 2(3)<sup>58</sup> and Chapter VI of the Charter obligate a target state to make an earnest effort to peacefully resolve the dispute bilaterally or through the offices of the Security Council. Neither should be construed as requiring the state to continue enduring exertions of impermissible coercion in the face of Security Council inaction or paralysis. Under such a construction, the Security Council would be entitled to neglect fulfilling its *raison d'être* which is to "bring about by peaceful means . . . adjustment or settlement of international disputes,"<sup>59</sup> thereby subjecting the target state to the consequences of the Council's delinquency.

In instances where the Security Council under article 37 either determines that the dispute is not likely to endanger the maintenance of international peace and security or acknowledges the likelihood that such may indeed be endangered and thus issues a "recommendation" setting out the terms of a settlement or the procedures for resolving the dispute, it cannot be stressed strongly enough that the state claiming to be the target of coercion warranting resort to the use of force in self-defense should proceed with circumspection. This is particularly so where the state wishes to respond to economic coercion with military force. Specifically, where the Security Council determines that the dispute is not likely to endanger the maintenance of international peace and security,<sup>60</sup> it would be advisable to reconsider the initial assessment of the situation before deciding that the coercion justifies the resort to force in self-defense. The reason for this admonition is that since the Security Council ultimately determines whether a particular use of force is justified as an exercise of self-defense, it may prove nearly impossible for a state claiming self-defense against economic coercion to convince the Council of the propriety of its use of force if the Council previously determined that the dispute which led to the use of the responsive force was not likely to endanger the maintenance of international peace and security. Undoubtedly, some members of the Security Council will contend that if the dispute relating to the exertion of economic coercion was not "likely to endanger the maintenance of inter-

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58. U.N. CHARTER art. 2, para. 3.

59. U.N. CHARTER art. 1 para. 1. For full text of article 1 see *supra* note 9.

60. Technically such a determination only has the effect of preventing the Security Council from issuing a recommendation under article 37. See U.N. CHARTER art. 37, para. 2.

national peace and security," then the coercion did not amount to a "threat or use of force against the territorial integrity or political independence" of a state which would justify the invocation of article 51.

In cases where the Security Council acknowledges that the dispute endangers the maintenance of international peace and security and acts to remove the danger by issuing a "recommendation" setting forth the terms of a settlement or procedures for resolving the dispute, caution would again seem to dictate great reluctance in resorting to the use of force in contravention of, or at variance with, the suggested peaceful settlement. While "recommendations" under Chapter VI are admittedly not binding,<sup>61</sup> resort to force in such an instance cannot but help influence the Security Council's thinking regarding which of the states involved in the controversy legitimately used force pursuant to the right of self-defense.

In either of the two aforementioned situations, circumspection is not intended to serve as an insuperable impediment to the use of force in legitimate self-defense. It is merely intended to reflect the realities of the international decision-making process and the preference for peaceful methods of dispute resolution.

### III. CONCLUSION

This Paper has attempted to demonstrate that the United Nations Charter does not, as a matter of law, preclude the use of military force against impermissible economic coercion. As noted at the outset, however, this does not mean that a state which is the target of such coercion is always permitted to take up arms in self-defense. To the contrary, in almost every imaginable instance the principles of "necessity" and "proportionality," principles inherent to the right of self-defense, will make it particularly difficult for a state to demonstrate the lawfulness of the use of military force against impermissible economic coercion. Moreover, even in those few instances where resort to some form of military force can be shown to be both necessary and proportionate,<sup>62</sup>

61. Doc. 498, III/2/19, 12 U.N.C.I.O. Docs. 65,66 (1945) (Chapter VIII, section A, of Dumbarton Oaks Proposals which is now Chapter VI of the Charter). *See also* statement in Introduction to the Annual Report of the Secretary-General on the Work of the Organization, U.N. Doc. A/4800/Add.1, 16 U.N. GAOR Supp. (No. 1A) (1961) to the effect that "'recommendations' within the terms of Chapter VI or certain other articles of the Charter" are not binding. U.N. CHARTER art. 25 specifically says that the binding orders of the Security Council are "decisions." Article 25 reads: "The Members of the United Nations agree to accept and carry out the *decisions* of the Security Council in accordance with the present Charter" (emphasis added).

62. This Paper has steadfastly refrained from attempting to list specific types of economic

the state contemplating using such is first required to attempt to peacefully resolve the matter in dispute through the methods prescribed by Chapter VI of the Charter. *Immediate* resort to military force is unlawful, regardless that the economic coercion against which it is directed may be so intense that the responsive force can be said to be necessary and proportionate.

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coercion which warrant resort to military force in self-defense. In order to give one a slight flavor of the difficulties involved in compiling any such list, however, as well as to indicate that the principles of "necessity" and "proportionality" require examination of factors too numerous to enunciate in a brief discussion, a spectrum of possible types of economic coercion, ranked in order of increasing intensity follows:

1. A total cutoff of all oil from a specific location destined for a country with diversified supply channels, readily available substitute forms of energy, and relatively wasteful energy consumption habits.
2. A similar cutoff of all oil destined for a relatively conservation-conscious country without diversified supply channels and available access to substitute forms of energy.
3. A complete and intentional termination of all commercial relations imposed by all trading partners of a country which is largely self-sufficient and trades primarily for relative commercial advantage.
4. A similar termination imposed by all trading partners of a country which is totally dependent on international commerce for its very existence.
5. A termination of all shipments of strategic minerals destined for a country primarily dependent on such outside supplies for the development and maintenance of the weapons-systems utilized by its defense community.
6. An unprovoked military blockade designed to prevent all ships of foreign registry from entering the jurisdictional waters of a particular state for the purposes of engaging in commerce.

It is apparent that, while the Charter does not automatically preclude resort to military force against any of the types of coercion listed simply because they are not of an armed nature, such a response would probably stand a greater chance of being in accordance with the Charter and the principles of "necessity" and "proportionality" if it is directed against a form of coercion near the lower end of the spectrum.