failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

**Article 14**

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

**Article 15**

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the admission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this article and Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if

concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

**Article 16**

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nations of the covenant-breaking state and the nationals of any other state, whether a Member of the League or not.

It shall be the duty of the Council in such cases 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 protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking state, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the Covenants of the League.

Any Member of the League which has violated nay covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other members of the League represented thereon.

The provisions contained in the Covenant were subsequently reinforced by the Treaty Providing for the Renunciation of War as an Instrument of National Policy 1928 (also known as the Kellogg-Briand Pact and the Pact of Paris). Sixty-three states signed the treaty which remains in force today. The parties to the treaty renounced war as an instrument of national policy and committed themselves to peaceful settlement of disputes.

## GENERAL TREATY FOR THE RENUNCIATION OF WAR 1928[2]

The Signatory states ...

*Persuaded* that the time has now come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

*Convinced* that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that

2 UKTS 29 (1929) Cmnd 3410; 94 LNTS 57.

> any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty ...
>
> *Have decided* to conclude a Treaty ...
>
> **Article I**
>
> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> **Article II**
>
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which arise among them, shall never be sought except by pacific means.

Two problems arose in relation to the Kellogg-Briand Pact. First, given that in the international law of the period 'war' applied only to the legal state existing between nations following an official declaration of war, there was some question whether the parties' undertakings applied also to use of force other than declared war and to the threat of war without actual hostilities. In 1934 the International Law Association, a private organisation of lawyers, suggested that the Pact did cover armed force and threat of war but such an interpretation was not supported by state practice. Secondly, it was unclear whether the Pact permitted war used in self-defence. The prevailing view was that it did.

## 14.3 The law after 1945: Article 2(4) of the UN Charter

Those responsible for drafting the UN Charter were much motivated by a desire to correct the inadequacies in the law which events after 1920 had revealed. Consequently the Charter emphasises in Article 1 that it is a purpose of the United Nations to 'maintain international peace and security' which may involve collective measures to prevent and remove threats to the peace, the suppression of acts of aggression or other breaches of the peace, and the settlement or adjustment of international disputes, or situations which might lead to a breach of the peace, by peaceful means. Article 2(3) obliges members to settle disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. The principal prohibition on the use of force is contained in Article 2(4) which states:

> 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.

It is generally acknowledged that Article 2(4) is declaratory of customary international law. In 1970 the General Assembly adopted by consensus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[3] This Declaration reaffirmed the commitment to outlawing the use of force. Further evidence for the customary law prohibition on the use of force is to be found in the ICJ decision in the *Nicaragua* case (1986).

3 See Chapter 13.

## *Nicaragua Case (Merits) Nicaragua v United States*[4]

*Judgment of the court*

188 The Court ... finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials to those found in customary international law ... The Court has however to be satisfied that there exists in customary international law an *opinio juris* ... This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of states towards certain General Assembly resolutions, and particularly Resolution 2625 (XXV).[5] The effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principles of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingent to be provided under Article 43 of the Charter ...

190 A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, para 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International law Commission, in the course of its work on the codification or the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'.[6]

191 As regards certain particular aspects of the principle in question it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in ... General Assembly Resolution 2625 (XXV) ...

193 The general rule prohibiting force allows for certain exceptions ... the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or '*droit naturel*') which any state possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover ... [in Resolution 2625 (XXV)] the reference to the prohibition of force is followed by a paragraph stating that:

> Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

This resolution demonstrates that the states represented in the General Assembly regard the exception to the prohibition of force constituted by the right of

4 [1986] *ICJ Rep* at p 14.

5 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations 1970.

6 *YBILC* 1966, II, p 247.

individual or collective self-defence as already a matter of customary international law.

194 With regard to the characteristics governing the right of self-defence, ... reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence ...

195 In the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description, contained in Article 3, para (g), of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident has it been carried out by regular armed forces. But the Court does not believe the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states. It is also clear that it is the state which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting its own assessment of the situation ...

199 At all events ... the Court [also] finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the state which is the victim of the alleged attack is additional to the requirement that such a state should have declared itself to have been attacked.

200 ... Article 51 of the United Nations Charter requires that measures taken by states in exercise of this right of self-defence must be 'immediately reported' to the Security Council. As the Court has observed above (paragraph ... 188), a principle enshrined in a treaty, or reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever the influence the Charter may have had on customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so clearly dependent on the content of a treaty commitment and of the institutions established by it, should have been followed.

On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence ...

202 The principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed [in the *Corfu Channel* case]: 'Between independent states, respect for territorial sovereignty is an essential foundation of international relations' ([1949] *ICJ Rep* at p 35), and international law requires political integrity also to be respected ... This principle [of non-intervention] is not, as such, spelt out in the Charter. But is was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of states of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of states ...

203 The principle has since been reflected in numerous declarations adopted by international organisations and conferences in which the United States and Nicaragua have participated, eg General Assembly Resolution 2131 (XX).[7] It is true that the United States, while it voted in favour of General Assembly Resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be 'only a statement of political intention and not a formulation of law' ... However, the essentials of Resolution 2131 (XX) are repeated in the Declaration approved by Resolution 2625 (XXV) which set out principles which the General Assembly declared to be 'basic principles' of international law, and on the adoption of which no analogous statement was made by the United States representative.

204 ... In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention; while these principles were presented as applying to the mutual relations among the participating states, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205 ... As regards the ... content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of political, economic, social and cultural system, and the

7 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty 1965 – adopted by 109 votes to nil with one abstention (the UK).

formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another state ... General Assembly Resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting state when the acts committed in another state 'involve threat or use of force'. These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention ...

206 ... There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another state. The Court is not here concerned with the process of decolonisation; this question is not an issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207 In considering the instances of the conduct above described, the Court has to emphasise that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice' but they must be accompanied by the *opinio juris sive necessitatis* ... The significance for the Court of cases of state conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a state on a novel right or any unprecedented exception to the principle might, if shared in principle by other states, tend towards a modification of customary international law. In fact, however, the Court finds that states have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition ...

209 The Court therefore finds that no such general right of intervention in support of an opposition within another state, exists in contemporary international law ... The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

210 ... [I]f one state acts towards another in breach of the principle of non-intervention, may a third state lawfully take such action by way of counter-measures against the first state as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of armed attack, but both the act which gives rise to the reaction, and the reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a state has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decisions to those points which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a state which considers itself the victim of another state's act of

intervention, possibly involving the use of force. Hence it has not determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211 The Court has recalled above ... that for one state to use force against another, on the ground that that state has committed a wrongful act of force against a third state, is regarded as lawful, by way of an exception, only when the wrongful act provoking the response was an armed attack ... In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – states do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack' ...

**Judge Jennings** (dissenting opinion): ... Another matter which seems to call for brief comment, is the treatment of collective self-defence taken by the Court. The passages beginning with para 196 seem to take a somewhat formalistic view of the conditions for the exercise of collective self-defence. Obviously the notion of collective self-defence is open to abuse and it is necessary to ensure that it is not employable as a mere cover for aggression disguised as protection, and the Court is therefore right to define it somewhat strictly. Even so, it may be doubted whether it is helpful to suggest that the attacked state must in some more or less formal way have 'declared' itself the victim of an attack and then have, as an additional requirement, made a formal request to a particular third state for assistance ... It may readily be agreed that the victim state must both be in real need of assistance and must want it and that the fulfilment of both these conditions must be shown. But to ask that these requirements take the form of some sort of formal declaration and request might sometimes be unrealistic.

But there is another objection to this way of looking at collective self-defence. It seems to be based almost upon the idea of vicarious defence by champions: that a third state may lawfully come to the aid of an authenticated victim of armed attack provided that the requirements of a declaration of attack and a request for assistance are complied with. But whatever collective self-defence means, it does not mean vicarious defence; for that way the notion is indeed open to abuse. The assisting state is not an authorised champion, permitted under certain conditions to go to the aid of a favoured state. The assisting state surely must, by going to the victim state's assistance, be also, and in addition to the other requirements, in some measure defending itself. There should even in 'collective self-defence' be some real element of 'self' involved with the notion of 'defence' ... (It may be objected that the very term 'self-defence' is a common law notion, and that, for instance, the French equivalent of '*legitime defense*' does not mention 'self'. Here, however, the French version is for once, merely unhelpful; it does no more than beg the question of what is '*legitime*'.)

## 14.4 The definition of force

It can immediately be noted that Article 2(4) is not concerned with outlawing 'war' but prohibits the use of 'force'. The problem is then to define what is meant by 'force'. Use of armed force is certainly covered, but the position as regards threats or action short of actual use of armed force is less clear. There has been dispute as to whether only armed force should be covered or whether

the prohibition should extend to economic force. In the *travaux préparatoires* of the UN Charter Brazil proposed that a prohibition on the use of economic force should be included in Article 2(4). The proposal was rejected although the significance of the rejection is disputed, some writers arguing that it indicated a desire not to outlaw economic force, others suggesting that the proposal was rejected because 'force' would encompass all forms of force including economic force. No further definition was provided by the 1970 Declaration, although the section dealing with the prohibition on intervention in the domestic affairs of foreign states provides that:

> No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

There is also some argument over whether Article 2(4) is absolute in its prohibition on the use of force or whether it only prohibits force directed against territorial integrity, political independence or force that is contrary to the purposes of the UN. Brownlie argues that territorial integrity and political independence constitute the sum total of legal rights which a state has, and thus all force is prohibited unless specifically allowed by the UN Charter. This view is often referred to as the *restrictive view of force*. But others, for example Bowett, argue for a *permissive view of force*, suggesting that the use of force which does not result in the loss or permanent occupation of territory, does not compromise a state's ability to make independent decisions and which is not contrary to the purposes of the United Nations is not unlawful. state practice since 1945 would appear to favour the restrictive view and no state has relied solely upon the permissive view to justify its use of force. In the *Corfu Channel* case (1949) the UK sought to argue that its mine-sweeping operation in Albanian territorial waters was not unlawful since it did not threaten the territorial integrity or political independence of Albania, but the argument was rejected by the ICJ.

## 14.5 The justifications for the unilateral use of force

### *14.5.1 Self-defence*

Although Article 2(4) of the UN Charter prohibits the use of force, the prohibition has to be read in the light of Article 51 which states that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

> The UN Charter is intended to provide a watertight scheme for the contemporary reality on the use of force. Article 2(4) explains what is prohibited, Article 51 what is permitted. But almost every phrase in Article 2(4) and Article 51 is open to more than one interpretation. Further, what happens if Articles 2(4) and 51 are not in fact a watertight system, are not entirely opposite sides of the same coin? Can there be, for example, a use of force that is *not* against the territorial integrity or political independence of a state (and thus not, on the face of it, violative of Article 2(4)) – but is also not individual or collective self-defence (and thus manifestly permitted under Article 51)? It is unlikely – most uses of force, no matter how brief, limited or transitory, do violate a state's territorial

integrity. A simple aerial military incursion will do so. So, too, will an attempt to exercise self-help even if in international straits. Self-help is the use of force to obtain legal rights improperly denied. In the *Corfu Channel* case[8] the United Kingdom engaged in mine-sweeping in the Corfu Straits (an international strait but also Albanian territorial waters) in order to make effective its legal right to free passage. The Court found such action unlawful – the action violated Albanian territorial sovereignty and legal rights were not to be vindicated through the manifestation of a policy of force.

It has been generally accepted, ever since this clear finding by the Court on the question, that self-help is unlawful under the Charter, notwithstanding the failure of the UN system to ensure that states do get the legal rights to which they are entitled. But, where the physical security of states is concerned, no matter has been more contested. So the inability of the United Nations to provide for the collective security of states has led to a rather more prolonged debate on the legal status of reprisal under the Charter. Reprisals consist of action in response to a prior unlawful military attack, aimed not at defending oneself against an attack as it happens, but rather at delivering a message of deterrence against the initial attack being repeated. Under customary international law, reprisals were lawful if certain criteria were met. These criteria, traditionally attributed to the *Naulilaa Arbitration*,[9] were that there must have been a prior deliberate violation of international law; that an unsuccessful attempt must have been made at redress; and that the action taken in reprisal be proportionate to the injury suffered. Reprisals would necessarily involve a violation of Article 2(4), however, and, not being in self-defence, are not brought within the permissive use of force in Article 51. It is undeniable that post-war state practice has seen a substantial amount of military activity that has been frankly characterised as reprisals – that has been particularly true of the Arab-Israeli conflict in the Middle East. At times it has seemed as if there is an expectation of reprisals in the face of attack, and that the major concern has been as to the proportionality of the reprisals. But the Security Council has repeatedly condemned reprisals (albeit while often failing to condemn equally the prior illegal acts that led to them); and they are condemned in terms in the General Assembly's Declaration of Principles of International Law Concerning Friendly Relations[10] (which *does* clearly also condemn the organisation or encouragement by one state of irregular forces for hostile conduct in another). The text of Articles 2(4) and 51 clearly do not allow reprisals; and the study of other instruments and practices and judicial decisions does not allow one to conclude that there has been any *de facto* amendment of the Charter on this point – notwithstanding the fact that, in the absence of effective means of self-protection, reprisals may be expected to continue.

When a state is not able to engage immediately in action to defend itself, subsequent action can (wrongly) take on the appearance of reprisals, though it is still action in self-defence. Let us imagine that a state is not in a position immediately to resist an invasion; provided that it does not repel the invasion as soon as it is able, or as soon as all attempts to secure a peaceful withdrawal have failed, the action will still be in self-defence. The position of the United Kingdom in respect of the Falklands/Malvinas, and of Kuwait in respect of Iraq, illustrates the point. In the former, a period of several weeks elapsed between the Argentine invasion and the arrival in the area of the UK task force. In the latter, nearly five

8 [1949] *ICJ Rep* at p 3.

9 *Naulilaa* case (*Germany v Portugal*) 2 RIAA 1011.

10 GA Res 2625 (XXV) 1970 A/8028 (1970).

> months elapsed between the invasion of Kuwait by Iraq, and the military response by a coalition of UN members.
>
> A particularly acute variation of this problems occurs when the United Nations secures a cease-fire, perhaps with a UN force to oversee the cease-fire – but does not succeed in obtaining the withdrawal of the invading forces. Does the UN cease-fire, and the passage of time (during which the position of the intervening forces becomes entrenched) really preclude the invaded country from liberating its territory? The decision of the Croatian troops on 22 January 1993 to march across UN lines into Serb-held territory within Croatia graphically illustrates the dilemma. it is hard to see that the United Nations' inability to secure the objectives of its agreed plan[11] after a year should extinguish a suspended right of self-defence.[12]

The US Secretary of State, Daniel Webster, gave the classic definition of self-defence in the *Caroline* case (1841)[13] following a British military raid on a US port to seize and destroy a ship, *The Caroline*, which had been used to supply anti-British rebels in Canada. The raid took place at night and without warning; The Caroline was set on fire and allowed to drift over the Niagara Falls. Following the attack, the US authorities arrested the British leader of the raid, McLeod, and charged him with murder and arson. The UK sought the release of McLeod arguing that the action had been one of self-defence. In the course of an exchange of diplomatic notes between the USA and the UK Webster wrote:

> .... it will be for Her Majesty's government to show upon what state of facts, and upon what rules of national law, the destruction of the Caroline is to be defended. It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the person on board the Caroline was impracticable or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fill the imagination with horror. A necessity for all this, the government of the United States cannot believe to have existed.

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11 Return of certain lands to Croatia, demilitarisation of Krajina and its placing under UN supervised autonomy; and the return of refugees to their homes. See SC Res 743 (1992) establishing UNPROFOR, and approval of the associated UN plan in SC Res 740 (1992).

12 Rosalyn Higgins, *Problems and Processes: International Law and How We Use It*, 1994, Oxford: Clarendon Press at pp 239–41.

13 29 *British and Foreign State Papers* 1137–38; 30 *British and Foreign State Papers* 195–96.