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Contemporary Principles and Perspectives

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UN system of collective security. This approach will be discussed further below in the context of Chapter VII as an exception to the prohibition on the use of force.[92]

8.4.2 Legitimacy and the Future of Humanitarian Intervention

Humanitarian intervention as a doctrine of international law might be looked at as a struggle between law and legitimacy. In 1991, Oscar Schachter viewed this idea of using force based on a humanitarian intention outside of Security Council approval as potentially pardonable.[93] While Schachter's motivation might be understood in the context of the time (looking back at Security Council inertia during the Cold War years), the idea has only recently gained in popularity, notably peaking in UK politics and legal scholarship around the time of the NATO bombing of Serbia.[94] Viewed as a struggle between law and legitimacy,[95] humanitarian intervention makes sense, and may act as a 'plea in mitigation' where a state or coalition of states that use force for stated humanitarian purposes later seek absolution and political and technical assistance from the UN to implement transitional governance.

Such was the case following the NATO bombing in Serbia, where the UN set up a massive post-conflict administration in Kosovo (UNIMIK) that led to the ultimate insult to Serbia – Kosovo's declaration of independence – which was made possible only by the NATO bombing and UN infrastructure. Indeed, the 'Goldstone Commission' set up to investigate these issues concluded that the actions of NATO were not legal but they were legitimate.[96] As tempting as it is to accept such a rationalization, the

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[92] Chapter VII authority of the UN Security Council is discussed below at section 8.6.

[93] Schachter, above note 36.

[94] See arguments by then Foreign Minister Robin Cook (cited in Franck, above note 47, 183, note 27) and then Prime Minister Tony Blair for a reinvigorated doctrine of humanitarian intervention (Tony Blair, Speech delivered at Sedgefield, justifying military action in Iraq, Friday 5 March 2004, cited in Gerry Simpson, 'International Law in Diplomatic History', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2011)).

[95] Franck, above note 47, Chapter 10.

[96] Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 163–98, cited in Franck, above note 47, 181–2. For a discussion of Kosovo's passage to independence and the legal implications, see Chapter 4, sections 4.4 and 4.5.1.

fact remains that, on a legal assessment, humanitarian intervention as a *legal* doctrine is not a part of international law. It may in time become a principle of international law, but there is insufficient state practice and *opinio juris* to yet say that it is.[97]

8.5 EXCEPTION TO THE RULE: SELF-DEFENCE AND COLLECTIVE SELF-DEFENCE

The most significant exception to the prohibition on the use of force is the right to self-defence. It has long been recognized under international law that if an armed attack occurs against a state, it is the inherent right of that state to use force to defend itself.[98]

8.5.1 Development of Self-defence

The concept of self-defence was first addressed in the *Caroline* dispute of 1837.[99] In this landmark case, British forces attacked a ship moored on the Niagara River, which was suspected of supporting an armed rebellion against the British.[100] Without warning, British forces boarded the ship and attacked 33 American occupants.[101] The British forces sent the *Caroline* adrift over the Niagara Falls, killing twelve Americans.[102] The British forces claimed that they acted in self-defence, as they were responding to the impending threat of an armed rebellion.[103] In a diplomatic exchange, US Secretary of State, Daniel Webster, outlined his interpretation of the requirements for a valid act of self-defence:

> 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 . . . (and) 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.[104]

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[97] See Brownlie, above note 72, 745.

[98] See, e.g., Brownlie, above note 72, 732; Gillian Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn), 613–14; Franck, above note 47, Chapter 3.

[99] Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2008, 6th edn), 1131.

[100] *Caroline* case 29 BFSP 1137–8.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] US Secretary of State Daniel Webster, Letter to British Ambassador Lord Ashburton (24 April 1841), cited in Kenneth Shewmaker (ed.), *The Papers of*

The principles expressed by Webster have been recognized as the basic foundation of the principle of self-defence in international law.[105] This statement introduced the twin requirements of necessity and proportionality, which still operate under the UN system today.[106] Jurisprudence following the *Caroline* dispute regarded the practice of self-defence as an act of self-preservation, which could only be permitted in dire circumstances.[107]

The right to self-defence was expressly recognized in the Kellogg-Briand Pact,[108] and, in reservations to the treaty, signatory states make reference to 'the reservation of the right of self-defence and also of collective self-defence'.[109]

8.5.2 Self-defence under the UN Charter

Article 51 of the UN Charter reserves the right of states to engage in individual or collective self-defence. Article 51 represents the only explicit exception to the prohibition on the use of force that is available to states, and is outlined as follows:

> 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[110]

There are several important issues of interpretation that arise from the wording of Article 51. The use of the term 'inherent right of individual or collective self-defence' indicates that Article 51 is not the only source of the principle. The use of this language implies that customary international law and previous state practice on the issue of self-defence are relevant

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Daniel Webster: Diplomatic Papers, Vol. 1, 1841–43 (Hanover, NJ: University Press of New England, 1983) 42.

[105] Triggs, above note 98, 613–14.

[106] *Nicaragua* case, above note 41, 93 and 112, and *Nuclear Weapons* (Advisory Opinion), above note 43, 245.

[107] Brownlie, above note 2, 734.

[108] See discussion above in section 8.1.5.

[109] Brownlie, above note 2, 734.

[110] Charter of the United Nations, Art. 51.

considerations, a view supported by the International Court of Justice in the *Nicaragua* case:

> [T]he United Nations Charter . . . by no means covers the whole area of the regulation of the use of force in international relations . . . Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.[111]

The language used in Article 51 is significantly different from the terminology in Article 2(4), which contains the general prohibition on the use of force. Whilst Article 2(4) refers to the 'threat or use of force',[112] Article 51 uses the term 'armed attack'.[113] This means that Article 51 has a more restricted application, and requires a state-sponsored strike to be carried out against a UN Member State before the right to self-defence can be invoked. Accordingly, not every threat or use of force that breaches Article 2(4) will invoke a state's right to self-defence under Article 51.

Despite the apparent distinction between Articles 2(4) and 51, there is some uncertainty about what activities will constitute an 'armed attack'. The majority of the ICJ in the *Nicaragua* case attempted to define an 'armed attack' for the purposes of Article 51 as follows:

> [A]n 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, paragraph (g), of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), may be taken to reflect customary international law.[114]

This definition is supplemented by the ICJ in the *Oil Platforms* case, in which the Court held that the right of self-defence can only be invoked in response to 'the most grave forms of the use of force'.[115] However, an armed attack may also consist of a series of attacks which, when

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111 *Nicaragua* case, above note 41, 176.
112 Charter of the United Nations, Art. 2(4).
113 Ibid., Art. 51.
114 *Nicaragua* case, above note 41, 195.
115 *Oil Platforms* case (*Islamic Republic of Iran v USA*) [2003] ICJ Reports 161, 51.

considered individually, would not justify a response in self-defence.[116] If an armed attack has occurred against a state, that state's response in self-defence is limited to actions that are necessary and proportionate,[117] requirements that were subsequently supported by the ICJ in the *Oil Platforms* case[118] and the *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion).[119]

An important requirement of Article 51 is that any measure taken in self-defence must be 'immediately reported' to the Security Council.[120] This requirement exists so that the international community can assess whether an armed attack has occurred, and whether actions taken by the victim state in self-defence are necessary and proportionate to the original aggression. This is a clear break from customary international law, which contained no such reporting requirement to a multilateral authority. As explained by the ICJ in the *Nicaragua* case, this requirement to report to the Security Council is vital to assess objectively whether the victim state can legitimately claim that it has acted in self-defence.[121]

Article 51 also contains explicit protection of the Security Council's authority under Chapter VII, regardless of any measures taken in self-defence by a victim state.[122] Therefore, a state's right to take action in self-defence supplements measures that may be taken by the Security Council, which expressly retains its authority and responsibility under Article 39 to undertake its own assessment of a potential threat to international peace and security, and to take such action as it deems necessary to maintain or restore it. The Security Council is also able to utilize measures under Articles 41 and 42 to resolve any threat that has been identified. This authority can be exercised independently of, and at any time before, during or after, any self-defence measures that may be validly adopted by the victim state.

The application of the principle of the right to self-defence has been tested in a number of cases before the International Court of Justice. In the first case decided by the Court, it considered the issue of self-defence in a dispute between Albania and the United Kingdom. In May 1946, Royal Navy ships were fired upon by Albanian fortifications when attempting to

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[116] Ibid.

[117] *Nicaragua* case, above note 41, 94 [176].

[118] *Oil Platforms* case, above note 115, 196 [74].

[119] *Nuclear Weapons* (Advisory Opinion), above note 43, 245 [41] and [42]. These decisions are discussed below.

[120] Charter of the United Nations, Art. 51.

[121] *Nicaragua* case, above note 41, 200.

[122] Charter of the United Nations, Art. 51.

cross the Corfu Channel. In October, the British destroyers *Saumarez* and *Volage* struck mines in the Corfu Channel and were extensively damaged, causing the death of 44 sailors. In response to this incident, the Royal Navy engaged in mine sweeping missions on 12 and 13 November 1946. Importantly, these operations were carried out in Albanian territorial waters, without the permission of the Albanian government.

The United Kingdom argued that the minesweeping operation was an act of self-defence to protect British ships and the lives of sailors. The UK denied that its actions were designed to threaten the territorial integrity and political independence of Albania. This position was rejected by the Court, which stated that an intervention such as the minesweeping operation of the UK 'cannot . . . find a place in international law'.[123] This is because such a policy could be subject to 'most serious abuses' and 'might easily lead to perverting the administration of justice itself'.[124] Accordingly, the UK was found not to have validly acted in self-defence when sweeping for mines in Albanian territorial waters.

The content of the right to self-defence was tested in the *Oil Platforms* case between Iran and the United States. Between 1980 and 1988, Iran and Iraq were engaged in a civil war. In 1984, Iraqi ships began to attack oil tankers in the Persian Gulf on their way to and from Iran. Iran then began to attack Iraqi ships in retaliation in an escalation which became known as the Tanker War. Iranian retaliatory strikes often focused on neutral ships that were sailing towards ports in Kuwait or Saudi Arabia. In October 1987, a US-flagged oil tanker was struck by a missile in the vicinity of a Kuwaiti harbour. The US assumed that the attack was launched from a nearby Iranian oil platform. In response to the strike on the oil tanker, the US attacked and destroyed two offshore Iranian oil stations. When another US vessel struck a mine in waters near Bahrain in April 1988, the US destroyed another two nearby Iranian oil platforms.

In 1992, Iran brought an application before the International Court of Justice complaining of the US attacks on the oil platforms in the Persian Gulf.[125] The Court held that the US had not acted validly in self-defence. In view of all the circumstances, it could not be shown that the attacks on the Iranian oil platforms were a justifiable response to an armed attack on US ships. This is because the attacks on the Iranian platforms

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[123] *Corfu Channel* (*United Kingdom v Albania*) (Judgment) [1949] ICJ Reports 4.

[124] Ibid., 35.

[125] *Oil Platforms* case, above note 115.

were not *necessary* to respond to the strikes on the US ships. The attacks were conducted as part of an extensive military operation. By considering the attacks on all four oil platforms, the actions of the US could not be considered *proportionate* to the threat posed by the strikes on the oil tankers. As the attacks on the oil platforms were neither necessary nor proportionate, the US did not validly act in self-defence.

This approach was reinforced by the Court in its Advisory Opinion on the threat or use of nuclear weapons: 'The submission of the exercise of the right to self-defence to the conditions of necessity and proportionality is a rule of customary international law.'[126] In that opinion, the Court held that the principle of proportionality would not automatically prohibit the use of nuclear weapons in all circumstances. Both the threatened use and deployment of nuclear weapons would only be permissible in response to proportionate threat. Because of the inherently destructive nature of nuclear weapons and the high possibility of a retaliatory exchange, their use would be confined to the most extreme circumstances. However, the possession of nuclear weapons was held not to be a threat of force prohibited by Article 2(4) of the UN Charter. To be a prohibited threat, the possessor state would need to direct a threat against the territorial integrity of another state. Despite the fact that the threat or use of nuclear weapons could not definitively be said to be contrary to international law, the Court noted that the use of such weapons would be 'scarcely reconcilable' with the 'overriding consideration of humanity'.[127] Not surprisingly, the Court's reasoning on self-defence has been heavily criticized.[128]

8.5.3 Collective Self-defence

An important aspect of Article 51 is the explicit reference to 'collective self-defence'. It is clear from this reference that a victim state can seek assistance from other states to repel an 'armed attack'.

However, an issue can arise as to when other states can legitimately assist a victim state under Article 51. An assisting state or coalition of states cannot unilaterally decide to intervene and repel a perceived armed

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[126] *Nuclear Weapons* (Advisory Opinion), above note 43, 245.
[127] Ibid., 262.
[128] See, e.g., Timothy McCormack, 'A *Non Liquet* on Nuclear Weapons – The ICJ avoids the Application of General Principles of International Humanitarian Law' (1997) 37 *International Review of the Red Cross* 1; Theo Farrell and Hélène Lambert, 'Courting Controversy: International Law, National Norms and American Nuclear Use' (2001) 27 *Review of International Studies* 309.

attack. In the *Nicaragua* case, the ICJ emphasizes this principle: '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.'[129] To permit other states to assist in a collective self-defence action, the state for whose benefit the action is taken must consider itself to be the victim of an armed attack.

Nicaragua applied to the ICJ, alleging that the United States had laid mines in Nicaraguan waters and engaged in unprovoked attacks on ports. Nicaragua also alleged that the US trained, funded and supported a group of anti-government rebels in their struggle against the incumbent ruling regime of Nicaragua. It was argued that the US had violated the sovereignty of Nicaragua, thereby violating the principle of non-intervention contained in Article 2(7) of the UN Charter, and engaged in an unlawful use of force. The US argued that it acted in collective self-defence for the benefit of El Salvador because of Nicaragua's practice of harbouring Communist opponents of the government of El Salvador.

The Court stated that there is 'a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'.[130] It held that Nicaragua's conduct in relation to El Salvador did not constitute an armed attack. Whilst an armed attack could include 'assistance to rebels in the form of the provision of weapons or logistical or other support',[131] there was insufficient evidence to conclude that Nicaragua had been engaged in an armed attack against El Salvador. A state cannot engage in acts of collective self-defence until the target of an armed attack requests assistance. If this assistance is requested, the intervening state must notify the Security Council in accordance with Article 51 of the UN Charter. In this case, there was no evidence to support a finding that El Salvador had requested assistance, and the USA had not notified the Security Council of its actions. Therefore, even if El Salvador had been the victim of an armed attack, the USA could not engage in acts of collective self-defence against the territory of Nicaragua, because such assistance had not been requested and the Security Council was not notified.

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[129] *Nicaragua* case, above note 41, 199.

[130] Ibid., 94. The same phrase is cited by the Court in its *Nuclear Weapons* (Advisory Opinion), above note 43, 245.

[131] Affirming General Assembly Resolution 3314 (XXIX) Art. 3(g).

8.5.4 Status of Anticipatory Self-defence

The most controversial aspect of Article 51 concerns whether a state's right to self-defence against an armed attack includes the right to anticipatory self-defence. This concept arises when a state believes that an armed attack is imminent, but there has not yet been an act of aggression. Advocates of anticipatory self-defence argue that a state should have the right to use necessary and proportionate force to prevent an armed attack on its territory, without having to wait for such an attack to be imminent or inevitable.[132]

Article 51 of the UN Charter explains that a state has the right to act in self-defence 'if an armed attack occurs'. A literal interpretation of the wording of Article 51 suggests that an armed attack must already be in progress before a state can legitimately act in self-defence. This appears to exclude any right to engage in acts of anticipatory self-defence.

During the drafting discussions at the San Francisco Conference, no recorded discussion exists about the intended meaning of the term 'if an armed attack occurs'.[133] Timothy McCormack argues that this lack of discussion means that the words were included without a limitation as to their meaning,[134] which is significant when compared to the extensive discussion of the language to be used in other provisions. One possible interpretation is that the drafters of the UN Charter did not intend to prohibit acts of anticipatory self-defence under Article 51.[135]

Because of the wording of Article 51, supporters of anticipatory self-defence are forced to cite customary international law to support their position.[136] Advocates refer to the opinion of US Secretary of State Webster in the *Caroline* case, namely that a state can take anticipatory steps in self-defence, provided that the need for the adopted measures

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[132] Timothy McCormack, 'Anticipatory Self-Defence in the Legislative History of the United Nations Charter' (1991) 25 *Israel Law Review* 1, 35–7. See also Donald Rothwell, 'Anticipatory Self Defence' (2005) 24(2) *University of Queensland Law Review* 337; Dinstein, above note 3, 168.

[133] McCormack, above note 132, 35.

[134] Ibid., 35–40. See also Natolino Ronzitti, 'The Expanding Law of Self-Defence' (2006) 11(3) *Journal of Conflict and Security Law* 343.

[135] Michael Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25 *Harvard Journal of Law and Public Policy* 539.

[136] Brownlie, above note 2, 734–5. See also Terry Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy' (2006) 11(3) *Journal of Conflict and Security Law* 361.

is instant, overwhelming and there is no moment for deliberation.[137] However, as Brownlie suggests, relying on Webster's 1837 formulation may also be viewed as 'anachronistic and indefensible'.[138]

The concept of anticipatory self-defence was supported by the UN High-Level Panel on Threats, Challenges and Change. In its December 2004 report, the Panel outlined the following position:

> [A] threatened state, according to long established international law, can take military action as long as the attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real; for example the acquisition, with allegedly hostile intent, of nuclear weapons making capability.[139]

This report appears to give support to the position that a state can use force to prevent an imminent attack on its own territory. For example, if a state is amassing troops, positioning weapons and publicly declares its intent to invade, the victim state may be permitted to use a necessary and proportionate amount of force to nullify the imminent threat.

In 1981, Israel bombed an Iraqi nuclear reactor that was under construction in Osirak on the basis of anticipatory self-defence. Israel argued that the construction of a nuclear reactor in a hostile state posed a direct threat to its sovereignty and political independence. Notwithstanding any future hostility that may ensue, Israel was not under an imminent threat of nuclear or other armed attack from Iraq. The actions of Israel were unanimously condemned in Security Council Resolution 487 as a 'clear violation of the Charter of the United Nations', as there was no imminent threat of armed attack posed by Iraq.[140]

8.5.5 Self-defence and Pre-emption

The notion of pre-emption allows a state the right to use military force to nullify a perceived threat to its sovereignty or territorial integrity. Pre-emption can be distinguished from anticipatory self-defence, because an attack does not have to be imminent to invoke

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[137] Brownlie, above note 2, 735.

[138] Ibid., 734. See also Leo van den Hole, 'Anticipatory Self-Defence Under International Law' (2004) 19 *American University International Law Review* 69.

[139] UN Doc. A/59/565, 2 December 2004, 54.

[140] 'Iraq-Israel', SC Res. 487, UN SCOR, 36th sess., 2288th mtg, UN Doc. S/RES/487 (19 June 1981), [1].

the justification of a pre-emptive strike.[141] To this extent, the state acting in pre-emption does not have to be expecting an armed attack, and can simply be responding to a perceived military threat.[142] This can lead to a military strike against a state before there is any evidence that an attack has been planned or even contemplated.

Pre-emption was included in the very controversial 2002 National Security Strategy of the United States of America, commonly known as the 'Bush Doctrine'.[143] In response to the attacks of 11 September 2001, President Bush argued that the United States has the right to eliminate the threat posed by a 'rogue state and their terrorist clients'.[144] Significantly, this policy targeted non-state actors as well as states, and extended far beyond the concept of anticipatory self-defence.[145]

The Bush Doctrine is an aggressive policy that overtly threatens the sovereignty of adversaries of the US. The concept of pre-emption operates far beyond the scope of Article 51 of the UN Charter, as a perceived threat does not have to be imminent or even planned to be used as the justification for retaliation. By its very nature, a pre-emptive strike cannot be a defensive action, as there is no current threat to which a target state is responding. This indicates that the doctrine of pre-emption is not an act of self-defence, but rather a policy of threat and aggression.

8.6 EXCEPTION TO THE RULE: CHAPTER VII AUTHORITY OF THE SECURITY COUNCIL

The prohibition on the use of force is subject to the unique authority of the Security Council. Chapter VII of the UN Charter bestows on the Security Council a responsibility to identify and investigate any emerging threat to

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141 Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2004) 4 *San Diego International Law Journal* 7, 8. See also Gill, above note 136.

142 Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14(2) *European Journal of International Law* 227, 235. See also Sanjay Gupta, 'The Doctrine of Pre-emptive Strike: Application and Implications during the Administration of President George W. Bush' (2008) 29(2) *International Political Science Review* 181.

143 'The National Security Strategy of the United States of America' (September 2002), available at http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf

144 Ibid. See also Miriam Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' (2003) 97 *American Journal of International Law* 599.

145 Anton, Mathew and Morgan, above note 17, 545. See 'The National Security Strategy of the United States of America', above note 143.

international peace and security. Most importantly, Chapter VII provides the Security Council with the power to authorize the use of collective force in response to a wide variety of crises. The primary reason for bestowing this authority on the Security Council is explained by Brownlie:

> In spite of the weakness involved in multilateral decision-making, the assumption is that the Organization (UN) has a monopoly on the use of force, and a primary responsibility for enforcement action to deal with breaches of the peace, threats to the peace or acts of aggression.[146]

Article 39 of the UN Charter allows the Security Council to identify emerging issues and crises within the international community. This authority is often the basis for UN Security Council resolutions, particularly on issues involving potential border disputes or armed hostilities. It is a broad authority that allows the Council to explore many avenues to resolve a crisis. If armed hostilities have not commenced, the Security Council may first pass a condemnation resolution to attempt to 'shame' a state into complying with its obligations under international law. An example is UN Security Council Resolution 660 in 1990, which stated that the international community '(c)ondemns the Iraqi invasion of Kuwait'[147] and '(d)emands that Iraq withdraw immediately and unconditionally all of its forces'.[148]

If these measures prove ineffective, the Security Council can then utilize its authority under Article 41 of the UN Charter, which enables it to call upon states to take certain measures, including 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. Examples of targeted sanctions include freezing an individual's assets,[149] restrictions on diplomatic representation,[150] ending

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[146] Brownlie, above note 2, 738.

[147] 'Iraq-Kuwait', SC Res. 660, UN SCOR, 45th sess., 2933rd mtg, UN Doc. S/RES/660 (2 August 1990), [1]; 'Non-proliferation/Democratic People's Republic of Korea', SC Res. 1874, UN SCOR, 64th sess., 6141st mtg, UN Doc. S/RES/1874 (12 June 2009), [1]; 'The Situation in Côte d'Ivoire, SC Res. 1975, UN SCOR, 66th sess., 6508th mtg, UN Doc. S/RES/1975 (30 March 2011), [3], [4], [5] and [9].

[148] 'Iraq-Kuwait', SC Res. 660, ibid, [2].

[149] 'Peace and Security in Africa', SC Res. 1970, UN SCOR, 66th sess., 6491st mtg, UN Doc. S/RES/1970 (26 February 2011) and 'The Situation in Libya', SC Res. 1973, UN SCOR, 66th sess., 6498th mtg, UN Doc. S/RES/1973 (17 March 2011). See also the targeted asset freezing measures in 'The Situation in Côte d'Ivoire', SC Res. 1975, UN SCOR, 66th sess., 6508th mtg, UN Doc. S/RES/1975 (30 March 2011).

[150] See, e.g., the restrictions on Libyan diplomats abroad after Libya refused to extradite suspects for the Lockerbie bombing in 'Libyan Arab Jamahiriya',

military cooperation[151] and imposing aviation bans.[152] These measures are not designed to adversely affect the general population, but rather to compel the ruling elite of a state to comply with the demands of the international community. However, sanctions can have a devastating impact on the civilian population,[153] exacerbating an already dire situation in the target state.[154]

Importantly, the Security Council must exhaust all viable diplomatic measures before the use of force can be considered to resolve an emerging crisis. This requirement clearly indicates that military force authorized by the UN Security Council is only to be used as the last resort after all other avenues have proved to be ineffective.

If all viable diplomatic measures under Article 41 have been unsuccessful, then the Security Council can take action under Article 42, allowing it to take a variety of actions, including 'demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'. Article 42 clearly permits acts of collective force, utilizing resources such as troops and military equipment from participating states. Examples of this may include the deployment of a multilateral UN force to resist advancing troops, a naval blockade or targeted airstrikes on the military stockpiles of the offending state.

If the Security Council determines that military force is the only viable option to maintain international peace and security, then the members of the UN are obliged to comply with this decision. Article 25 of the UN Charter indicates that states 'agree to accept and carry out the decisions of

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SC Res. 748, UN SCOR, 47th sess., 3063rd mtg, UN Doc. S/RES/748 (31 March 1992), [6].

[151] See, e.g., the ban on supplying military equipment, training and cooperation in 'Non-proliferation', SC Res. 1929, UN SCOR, 65th sess., 6335th mtg, UN Doc. S/RES/1929 (9 June 2010).

[152] See, e.g., the no-fly zone imposed on military aircraft in Bosnian airspace in 'Bosnia and Herzegovina', SC Res. 816, UN SCOR, 48th sess., 3191st mtg, UN Doc. S/RES/816 (31 March 1993), [1] and [4].

[153] ICISS Report, above note 68, [4.5].

[154] 'Iraq-Kuwait', SC Res. 661, UN SCOR, 45th sess., 2933rd mtg, UN Doc. S/RES/661 (6 August 1990), and 'Iraq-Kuwait', SC Res. 687, UN SCOR, 46th sess., 2981st mtg, UN Doc. S/RES/687 (3 April 1991). These sanctions were not lifted until 15 December 2010 in a series of three resolutions: 'The Situation concerning Iraq', SC Res. 1956, UN SCOR, 65th sess., 6450th mtg, UN Doc. S/RES/1956 (15 December 2010), 'The Situation concerning Iraq', SC Res. 1957, UN SCOR, 65th sess., 6450th mtg, UN Doc. S/RES/1957 (15 December 2010). 'The Situation concerning Iraq', SC Res. 1958, UN SCOR, 65th sess., 6450th mtg, UN Doc. S/RES/1958 (15 December 2010).

the Security Council', whilst Article 49 requires that states 'join in providing mutual assistance' to enforce binding decisions.

8.6.1 Responsibility to Protect

In 2000, UN Secretary-General Kofi Annan asked the following question of the UN General Assembly:

> [I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?[155]

In response to this poignant question, the Canadian government established the Internal Commission on Intervention and State Sovereignty (ICISS), charged with the responsibility of defining the circumstances in which external military intervention can be justified to protect the citizens of a state.[156] The ICISS embarked on a wide-ranging and somewhat radical review of the concept of state sovereignty in the context of modern internal conflicts.

The result of this process was the development of the 'Responsibility to Protect' doctrine ('R2P') in December 2001. The central theme of R2P is that every sovereign state has a responsibility to protect its own citizens from avoidable catastrophes, including mass murder, rape and starvation.[157] This is because the concept of state sovereignty implies responsibility, primarily to protect the population from harm.[158] When the government of a state is unwilling or unable to protect its own citizens from these atrocities, the responsibility to protect must be borne by the international community.[159] R2P encompasses three important priorities:

1. Responsibility to Prevent – identify and seek to resolve the root causes of internal conflicts and humanitarian crises;[160]
2. Responsibility to React – respond to situations of compelling human need with measures such as economic sanctions, international prosecution and military intervention in extreme cases;[161] and

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[155] Secretary-General Kofi Annan, 'We the Peoples: The Role of the United Nations in the 21st Century', above note 86.
[156] ICISS Report, above note 68, [1.7].
[157] Ibid., [2.32].
[158] Ibid., [2.15].
[159] Ibid., Foreword.
[160] Ibid., [3.18].
[161] Ibid., [3.33]–[3.34].

3. Responsibility to Rebuild – provide assistance with recovery, reconstruction and reconciliation, and also address the root causes of the internal crisis.[162]

Importantly, it seeks to confine the use of force in response to humanitarian crises that require an 'exceptional and extraordinary measure'.[163] In accordance with Articles 41 and 42 of the UN Charter, military intervention can be used only as a measure of last resort, when all other peaceful avenues have been exhausted.[164] For military force to be used, 'serious and irreparable' harm to a civilian population must be imminent.[165] This is confined to a large-scale loss of life, with or without genocidal intent, or large-scale ethnic cleansing, including mass killings, forced expulsion and widespread rape.[166] An intervention should only be undertaken when there are reasonable prospects of preventing further suffering.[167]

The R2P doctrine seeks to establish broad rules of engagement for a military intervention in response to a humanitarian crisis.[168] The UN Security Council is recognized as the most appropriate body to authorize the use of military force.[169] The Permanent Five members of the Security Council should agree not to use their veto power to obstruct a resolution proposing a military intervention for human protection purposes where there is clear majority support from other states.[170] In this important way, the R2P doctrine differs from the doctrine of humanitarian intervention, which occurs outside of Security Council authorization. R2P has received significant support from the UN as an emerging international norm. Paragraph 200 of the UN's 2004 report, 'A More Secure World', explains this change as follows:

> The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities . . . which can properly be considered a threat to international security and as such provoke actions by the Security Council.[171]

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[162] Ibid., [2.29].
[163] Ibid., [4.18].
[164] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), 27.
[165] ICISS Report, above note 68, [4.18].
[166] Ibid., [4.18]–[4.20].
[167] Ibid., [4.41]–[4.43].
[168] Emma McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13(1) *Journal of Conflict and Security Law* 123, 126.
[169] ICISS Report, above note 68, [6.14].
[170] Ibid., [6.20]–[6.21].
[171] Secretary-General Kofi Annan, 'A More Secure World: Our Shared Responsibility', UN GAOR, 59th sess., UN Doc. A/59/565 (2 December 2004), [200].

The doctrine was also endorsed by UN Secretary-General Ban Ki-moon in his January 2009 report, 'Implementing the Responsibility to Protect'.[172] This report emphasizes that every state has the primary responsibility to protect its own population from genocide, war crimes, ethnic cleansing and crimes against humanity. Importantly, the Secretary-General explains that the next stage in the development of R2P is to 'operationalize' the doctrine in response to a situation of gross human rights abuses.[173]

The 2011 crisis in Libya is the first clear example of the R2P doctrine being invoked by the international community. International forces intervened in Libya in March 2011 in an attempt to prevent the Gaddafi regime from violently suppressing an uprising. UNSC Resolution 1970 refers to the 'Libyan authorities' responsibility to protect its population'.[174] This is a clear example of R2P terminology, and reflects the intention of international forces to prevent further atrocities being committed against the civilian population.

8.7 CONCLUSIONS

The prohibition on the use of force is an ever evolving area of international law. It is only in relatively recent history that states have been restricted in their ability to use military power as an element of diplomatic relations. Because of the inherently destructive nature of warfare, the international community has endeavoured to regulate its use of force and prohibit aggressive territorial conquests. In accordance with this stance, states are prohibited from engaging in unprovoked acts of aggression that violate the sovereignty of other states.

Despite the existence of a general prohibition on the use of force, there are several limited but important exceptions. Under Article 51 of the UN Charter, if an armed attack occurs against a state, it is an inherent right of that state to defend itself. Importantly, a state that exercises its right of self-defence must immediately report the incident to the Security Council. The exception of self-defence extends beyond an individual state responding to an imminent threat to its territorial integrity. Article 51 of the UN Charter permits collective self-defence, but the target state must explicitly request assistance and regard itself as the victim of an armed attack. However, the exception of self-defence does not extend to a pre-emptive

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172 'Implementing the Responsibility to Protect' Report, above note 67.

173 Ibid., [71].

174 'The Situation in Libya', SC Res 1973, above note 149, Preamble.

attack on a foreign state where there is no apparent imminent threat. The widespread criticism of the 'Bush Doctrine' illustrates that self-defence cannot include nullifying potential threats that may never eventuate.

The UN Security Council is the international organ charged with the responsibility to maintain international peace and security. To achieve this broad objective, the Security Council is endowed with the authority under Chapter VII of the UN Charter to adopt both diplomatic and military measures to resolve crises that threaten international peace and security. Under Article 42 of the UN Charter, the Security Council can authorize measures of collective force, such as no-fly zones, naval blockades, targeted air strikes or the deployment of ground troops. Importantly, these measures can only be implemented if all other diplomatic avenues have been exhausted. The Security Council's authority under Chapter VII takes precedence over a state's inherent right to self-defence, as explicitly outlined in Article 51 of the UN Charter. Chapter VII allows the Security Council to perform its role as the only body which can legitimately authorize the use of force under the UN Charter. Importantly, the inclusion and use of Chapter VII indicates that the use of force is not intended to be completely removed from diplomatic relations, but instead confined to very limited circumstances.

The most dynamic and controversial area concerning the use of force is the concept of humanitarian intervention. The practice of forcibly intervening in the territory of another state without consent has been criticized as a fundamental breach of the principle of non-intervention contained in Article 2(7) of the UN Charter. However, there is a need to protect civilians of a foreign state from gross and systematic breaches of human rights, such as mass arbitrary killings and forced expulsions. As the Rwandan genocide of 1994 clearly illustrates, the consequences of international inaction in response to a widespread internal crisis can be catastrophic. As outlined by the General Assembly and Security Council, an internal humanitarian crisis can be considered a threat to international peace and security. Whilst the international community is yet to develop firm guidelines for the practice of humanitarian intervention, there is an imperative need to use appropriate measures to protect civilians of a foreign state from gross abuses of human rights.

International practice concerning the use of force will continue to adapt to ever-changing circumstances. As new international crises emerge, it is likely that the doctrines of self-defence and humanitarian intervention will be refined and applied to different situations. However, despite ongoing efforts to prohibit aggressive warfare, it is unlikely that many states will ever renounce the use of force as a tool of international diplomacy. The deterrent effect of possessing military stockpiles and armed forces is likely

to remain a key aspect of national security policy for the foreseeable future. Whilst the prohibition on the use of force is likely to be further refined, it is unlikely that such efforts will ever completely satisfy the lofty objective of saving 'succeeding generations from the scourge of war'.[175]

[175] Charter of the United Nations, Preamble.

9. Pacific resolution of disputes

9.1 THE LEGAL FRAMEWORK

Peaceful dispute resolution at the international level has occurred more or less formally since the existence of international law itself. Long before the creation of the Permanent Court of Arbitration or, indeed, the UN Charter, states engaged in the settlement of disputes through a range of bilateral and ad hoc mechanisms. An important nineteenth-century example was the settlement of the now famous *Caroline* dispute, relating to the sinking by the British of a US ship. That event, still significant in understanding self-defence in international law, was resolved by diplomatic exchanges between the affected states.[1] More ancient examples of states resolving their disputes by peaceful means can be found at least as far back as the Roman system of *jus gentium*.[2]

Of course, disputes were not always settled peacefully and, unlike the position today under the modern UN Charter regime of collective security, there was little or no impediment under international law to states resorting to the use of force to resolve their disputes. While it is often said that prior to 1945 there was no universally accepted prohibition against the use of force by states to settle disputes, there was at least some framework in place. The Hague Peace Conferences of 1899 and 1907 were unsuccessful in preventing the Second World War, despite the creation of an arbitral framework, a Permanent Court of International Justice and a multilateral treaty rendering the use of force in large part unlawful (the Kellogg-Briand Pact[3]). Even so, these normative developments did lend greater legitimacy to the prosecution of German and Japanese leaders following the Second World War for the crime of aggression.

The United Nations Charter in 1945 gave birth to a radical new

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[1] For a detailed discussion of the *Caroline* case, see Chapter 8, section 8.5.1.

[2] See Chapter 1, section 1.3.1.

[3] General Treaty for the Renunciation of War as an Instrument of National Policy (opened for signature 27 August 1928, entered into force 4 September 1929) LNTS. See Chapter 8, section 8.1.5.

international framework under which states must never resort to armed force to settle disputes except in limited circumstances. Article 2(4) of the UN Charter prohibits the threat or use of force by states other than in individual or collective self-defence (Article 51). Article 2(3) provides that all members 'shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. Article 33(1) further obliges parties to a dispute to seek resolution first by 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. Article 33(2) gives the Security Council the power to call upon parties to settle disputes by such means as those listed in Article 33(1) when it deems necessary. The Security Council also has the power under Chapter VII to take measures to maintain or restore international peace and security, which includes the creation of international criminal tribunals.[4]

9.2 NON-JUDICIAL SETTLEMENT PROCEDURES (NON-BINDING)

9.2.1 Negotiation

Negotiation involves discussions between the disputing parties seeking to understand the different positions they hold in order to resolve the dispute. There is generally no third party involvement, and the negotiations are purely consensual and informal. Therefore, for negotiations to be successful they require a measure of goodwill, flexibility and mutual understanding between the parties. Even if a negotiation fails to resolve a dispute, it will often assist the parties in clarifying the nature of the disagreement and the issues in dispute and in obtaining a clearer idea of their own and each other's positions, what they are willing to compromise on and what it might take to resolve the dispute.[5]

Many treaties provide for negotiation as a precondition to binding international dispute resolution. Examples include Article 84 of the Vienna Convention on the Representation of States in their Relations with

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[4] United Nations Charter, Art. 39. This power was the basis of the creation of the ad hoc International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

[5] See, e.g., the negotiation that took place between Argentina and Israel involving the capture of Nazi Adolf Eichmann: L.C. Green, 'Legal Issues of the Eichmann Trial' (1962–3) *Tulane Law Review* 641, 643, 647.

International Organizations (1975) and Article 41 of the Convention on the Succession of States in Respect of Treaties (1978).

However, neither in the UN Charter nor otherwise in international law is there any general rule that requires the exhaustion of diplomatic negotiations as a precondition for a matter to be referred to a court or tribunal.[6] Nevertheless, the court or tribunal may direct parties at the preliminary stages of the proceedings to negotiate in good faith and to indicate certain factors to be taken into account in that negotiation process.[7] Ultimately, there is no obligation on states to reach agreement, only that 'serious efforts towards that end will be made'.[8] This requires parties to 'negotiate, bargain and in good faith attempt to reach a result acceptable to both parties'.[9] Examples of a breach of good faith have included unusual delays, continued refusal to consider proposals and breaking off discussions without justification.[10] Negotiations may continue while there are other resolution processes under way, formal or informal, and a resolution may be reached at any time.[11]

9.2.2 Inquiry

Article 50 of the International Court of Justice Statute provides that the Court may 'at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.

The possibility of engaging a formal commission of inquiry carried out by reputable observers to ascertain facts objectively was first envisaged in the 1899 Hague Convention for the Pacific Settlement of International Disputes.[12] These provisions were revised and included in the 1907 Hague Convention following their successful application in the *Dogger Bank* case.[13] This success also led to inquiry provisions being incorporated into many treaties at the time.[14] There has been very little use of

[6] *Cameroon v Nigeria* (Preliminary Objections) [1998] ICJ Rep 275, 303.

[7] *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) [1973] ICJ Rep 3, 32.

[8] *German External Debts* case [1974] 47 ILR 418, 454.

[9] Ibid., 453.

[10] *Lac Lanoux* (1957) 24 ILR 101, 119.

[11] *Aegean Sea Continental Shelf* case (*Greece v Turkey*) [1978] ICJ Rep 3, 12.

[12] Convention for the Pacific Settlement of International Disputes (29 July 1899) (entered into force 4 September 1900), Arts 9 and 10.

[13] *Dogger Bank* case (*Great Britain v Russia*) (1908) 2 AJIL 931–6 (ICI Report of 26 February 1905).

[14] Malcolm Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn), 1020.

inquiry provisions in practice over the years, though there have been some occasions in recent times, particularly in relation to arms control treaties.

9.2.3 Good Offices

Good offices is another informal means of assisting parties to resolve a dispute. This involves the attempt by an impartial third party to influence the disputing parties to enter into negotiations. The Security Council itself has engaged in this form of international diplomacy, often using a recognized and respected person to negotiate with the parties towards a settlement of the dispute. An example of this was the use by Barack Obama of former US President Bill Clinton to assist in negotiating the release of US journalists held by North Korea in 2009, and former US President Jimmy Carter to secure the release of an American citizen in 2010.[15] Another successful example was the intervention by Kofi Annan which led to an agreement between the negotiators for President Mwai Kibaki and the opposition in the Kenyan post-election turmoil, in which a dispute over an election in 2007 led to weeks of violence.[16] An unusual example was the *Beagle Channel* dispute in which the Pope was requested by both parties to provide his good offices in a dispute between Argentina and Chile, and at his suggestion both countries agreed to comply with the proposed outcome.[17]

Perhaps one of the most impressive modern examples of good offices concerns the intractable dispute relating to the *Lockerbie* incident. The problem concerned a jurisdictional dispute over who was to try two Libyan men accused of planning and executing the infamous terrorist attack on a Pan Am flight blown up over Lockerbie, Scotland, in December 1988. Both the US and the UK had initiated legal proceedings against the men, whom Libya refused to transfer in accordance with both its own extradition laws and a reading of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971.

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[15] Kay Seok, 'From a North Korean Hell to Home' (27 August 2010) *Human Rights First*.

[16] See, e.g., Elisabeth Lindermayer and Josie Lianna Kaye, 'A Choice for Peace? The story of 41 days of mediation in Kenya' (August 2009) *International Peace Institute* (New York) 1, 1; 'Ballots to Bullets, Organized Political Violence and Kenya's Crisis of Governance' (16 March 2008) *Human Rights Watch* (New York) (20) No.1 (A).

[17] *Beagle Channel Arbitration* (*Argentina v Chile*) [1978] 52 ILR 93.

The case went before the ICJ which, in absurd circumstances, refused to order provisional measures.[18]

UN Secretary-General Kofi Annan facilitated an agreement between a number of countries – including Libya, the UK and the US – with regard to the prosecution of the two Libyan nationals. The agreement achieved was complex, requiring the enactment of national legislation in at least two jurisdictions to enable a Scottish court to apply Scottish law in the territorial jurisdiction of the Netherlands, and for the Netherlands to facilitate this by keeping the suspects in custody and repatriating them to Scotland to serve their sentences.[19]

9.2.4 Mediation and Conciliation

Both mediation and conciliation are open to the parties in dispute as a flexible means of dispute resolution.

A mediator facilitates negotiations between the parties, and may propose solutions to the dispute. Therefore, the mediator will need to be well respected, accepted by all parties and sensitive to a range of different contextual issues.

Conciliation involves a third party investigation of the basis of the dispute and submission of a report suggesting means by which a settlement may be reached. It tends to involve elements from both inquiry and mediation. Conciliation reports are not binding, and this differentiates them from arbitration. As with inquiry, conciliation has become less popular as a method of resolving disputes.[20]

9.2.5 The General Role of the United Nations

Under Article 36 of the UN Charter, the Security Council may, at any stage of a dispute, 'recommend appropriate procedures or methods of adjustment'.[21] Article 37 requires parties who fail to resolve their differences to refer the dispute to the Security Council, and Article 38 allows for referral of disputes to the Security Council where the parties agree. Many disputes, such as that between Argentina and Israel over

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[18] *Libyan Arab Jamahiriya v UK* [1992] ICJ Rep 3. For a good summary of the case, see Gillian Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011) 108–9.

[19] Letter from the Secretary-General addressed to the President of the Security Council, 5 April 1999, UN Doc. S/1999/378 (1999).

[20] Shaw, above note 14, 1023.

[21] Charter of the United Nations, Art. 36.

the arrest of Adolf Eichmann,[22] have been referred to the Security Council under these provisions and this has led to a successful resolution. However, there are differing views as to the true effectiveness of the UN as a facilitator of the pacific settlement of disputes[23] with some claims that 'the line between pacific settlement and enforcement has blurred'.[24]

9.3 INTERNATIONAL ARBITRATION (BINDING)

Arbitration is a binding form of dispute resolution. Article 37 of the Hague Convention contains the accepted definition of arbitration at international law:

> International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the Award.[25]

It can be distinguished from judicial resolution as it is normally an ad hoc body, created specifically for the resolution of a particular dispute.[26] In addition, the parties have greater control over the process in that they must agree on how the case will run with regard to the issues to be decided and, although international law is applied, the parties may agree that certain principles be considered.[27] The parties must also decide on how many and who the arbitrators will be.[28] Arbitration may arise out of a treaty provision or as a result of an ad hoc agreement.

One prominent example of international arbitration is the *Rainbow Warrior* case.[29] France and New Zealand were involved in a dispute after

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22 See discussion above under 6.3.5.4.

23 See, e.g., Steven R. Ratner, 'Image and Reality in the UN's Peaceful Settlement of Disputes' (1995) 6 *European Journal of International Law* 426; Saadia Touval, 'Why the UN Fails' (1994) 73(5) *Foreign Affairs* 44; Thomas M. Franck and Georg Nolte, 'The Good Offices Function of the UN Secretary-General', in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World: The UN's Roles in International Relations* (Oxford: Clarendon Press, 1993, 2nd edn), 143.

24 Ratner, ibid., 426, 443.

25 Hague Convention of 1907, Art. 37.

26 Triggs, above note 18, 646.

27 Shaw, above note 14, 1052.

28 Ibid., 1050.

29 See also, *SS 'I'm Alone'* case (*Canada v US*) (1935) III RIAA 1609.

the French military security service sank the *Rainbow Warrior* ship while in Auckland Harbour in 1985.[30] Two French secret service agents were arrested and charged in New Zealand and then convicted for manslaughter and wilful damage.[31] The French government eventually acknowledged that the agents acted under orders and argued that therefore they should not be blamed.[32] New Zealand notified France that it would be pursuing a claim for compensation.[33] Negotiations took place between the two parties over the possible repatriation of the agents on the condition that they serve the rest of their sentences.[34]

However, in 1986 France began to impede imports from New Zealand.[35] After pressure from other states to resolve the dispute, France and New Zealand agreed to refer all matters to arbitration by the Secretary-General of the UN.[36] The arbitration took place in early July 1986 and New Zealand was directed to transfer the agents into French custody on an isolated island to serve three years in a military facility; France was directed to apologize and pay compensation to New Zealand, and stop impeding New Zealand imports.[37] Both countries complied with the decision, although France allowed the agents to return to France before they completed their three-year sentences and further awarded them the highest order in France. The issue of whether this was a breach of international law was put to arbitration, and it was declared that France was indeed in breach of international law.[38]

9.3.1 Diplomatic Protection: Admissibility of State Claims

Although not limited to international arbitration,[39] the diplomatic protection of a state over its natural or juristic persons has typically taken place

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[30] Michael Pugh, 'Legal Aspects of the *Rainbow Warrior* Affair' (1987) 36 *International and Comparative Law Quarterly* 655, 656.

[31] Ibid. 656.

[32] Ibid. 657.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] *Rainbow Warrior* (*New Zealand v France*) *Conciliation Proceedings* (1986) 74 ILR 241.

[38] *Rainbow Warrior* (*New Zealand v France*) *Conciliation Proceedings* (1990) 82 ILR 499.

[39] In theory, diplomatic protection by a state can take any form of peaceful settlement of disputes discussed in this chapter: see *Kaunda v President of South Africa* CCT 23/04, [2004] ZACC 5, [26–[27]. Key ICJ cases on the topic include