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Anticipatory action in self-defence: The law of self-defence - past, presence and future

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Publication date
2010

[Link to publication](#)

Citation for published version (APA):

Tibori Szabó, K. J. (2010). *Anticipatory action in self-defence: The law of self-defence - past, presence and future*. [Thesis, externally prepared, Universiteit van Amsterdam].

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5 The right of self-defence and the drafting of the UN Charter

5.1 Preliminaries

The end of the Second World War brought back the pacifist aspirations stronger than ever before. According to Stephen Neff, the Second World War, a contest between Good and Evil, was seen 'at the furthest possible remove from the positivist conception of war of the nineteenth century.' Between 1939 and 1945, Neff continues, 'humankind itself was the cause' and it was hardly surprising that just-war ideas pervaded the immediate post-war era.¹

Even before the war ended, several meetings took place between the Allied states to adopt common positions regarding international peace and security. In June 1941, at St. James' Palace in London, the Allied states and several governments in exile signed a declaration in which they stipulated their intention to work together for the furtherance of peace.² Two months later, in August 1941, US President Franklin D. Roosevelt and UK Prime Minister Winston Churchill signed the Atlantic Charter which declared that 'all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force.' The bilateral agreement also stipulated that 'no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers' and for that reason the disarmament of such states was essential 'pending the establishment of a wider and permanent system of general security.' The Atlantic Charter was followed by the United Nations Declaration of 1 January 1942 signed initially by President Roosevelt, Prime Minister Churchill, Maxim Litvinov, of the USSR, and T.V. Soong, of China. The following day the representatives of twenty-two other nations added their signatures. The list of agreements signed during the war was complemented with the Moscow Declaration (October 1943) and the Teheran Declaration (December 1943). The Moscow and Teheran Declarations were furthered in October 1944 by the four-power (China, Great Britain, the USSR and the United States) conversations at Dumbarton Oaks, a private mansion in Washington, D.C.

The discussions were completed on 7 October 1944, and a proposal regarding the principles and the structure of the new world organization was submitted to all United Nations governments for discussion.

5.2 Self-defence in the Dumbarton Oaks Proposals

During the Dumbarton Oaks conversations, the issue of self-defence was brought up by China. The Chinese delegation wanted to know whether, under the proposal, member or non-member states could use force unilaterally under the claim that such action was not inconsistent with the purposes of the organization. The United States representative

¹ Neff, p. 314.

² The Declaration at St. James' Palace in London, 12 June 1941. The participants were: Great Britain, Canada, Australia, New Zealand and the Union of South Africa and the exiled governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and General de Gaulle of France.

ensured the Chinese delegation that ‘except in cases of self-defence, no unilateral use of force could be undertaken without the approval of the Council.’ The Chinese delegate seemed satisfied with such clarification, but desired ‘explicit assurance that use of force in self-defence would not be regarded as inconsistent with the purposes of the Organization.’³

In spite of the Chinese demand for such explicit assurance, the issue of self-defence was not addressed in any of the provisions of the Dumbarton Oaks Proposals. What the Proposals did address, was the general prohibition to use force. Accordingly, paragraph 4 of Chapter II stated:

‘All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.’

The only exception expressly provided for in the Proposals was that in paragraph 4 of Section B of Chapter VIII, which permitted the Security Council to take forceful measures if diplomatic, economic or other non-forceful alternatives failed.

– Regional arrangements in the Dumbarton Oaks Proposals

The matter was, however, raised at the San Francisco conference by several states in relation to Section C of Chapter VIII dealing with regional arrangements. The first paragraph of Section C was meant to safeguard the autonomy of regional arrangements:

‘1. Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council.’

The second paragraph contained, nevertheless, a restriction to this autonomy:

‘2. The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council.’

Further, the third paragraph was meant to ensure that the Security Council was regularly informed about the development of such regional arrangements:

‘3. The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.’

³ Memorandum of the Under Secretary of State (Stettinius) to the Secretary of State, Washington, 2 October 1944, in *Foreign Relations of the United States: Diplomatic Papers 1944*, Vol. 1 (Washington, D.C., US Government Printing Office 1966) p. 862.

As will be shown below, the second paragraph raised a difficult question during the negotiations at the San Francisco Conference. The matter was finally solved by including an explicit assurance regarding the right of self-defence, just as the Chinese delegate had requested.

5.3 The drafting of the UN Charter at the San Francisco Conference

5.3.1 Proposals ahead of the Conference

The Dumbarton Oaks Proposals were sent to all United Nations governments for review and for proposing amendments ahead of the San Francisco Conference.

The issue of self-defence was first raised by the French government on 21 March 1945. In its submission, the French government affirmed that it was ‘incompatible with the conditions of security of some States, which may demand immediate action, to defer, until such time as the Council has reached a decision, emergency measures for which provision is made, in the case of contingencies, by treaties of assistance, concluded between Members of the Organization and filed with the Security Council.’⁴

The French government was trying to safeguard the Allied regional assistance agreements concluded against the Axis. According to its proposal, the second paragraph of Section C was to be supplemented:

‘Nevertheless, an exception is made to this rule in the case of the application of measures of an urgent nature provided for in treaties of assistance concluded between members of the Organization and of which the Security Council has been advised. In any event, the signatory states of such treaties should report to it, with the least possible delay, the measures which they may have been led to take in execution of their provisions.’⁵

A similar position was adopted by the Turkish Government. According to the Turkish submission, in cases of emergency, the immediate action which may be initiated through the application of regional arrangements should not be deferred pending the decision of the Security Council, because any procedure-related delay would be detrimental to the endangered country.⁶

Both submissions signalled the beginning of a major debate regarding the relationship between pre-existing regional assistance treaties and the principle of the prohibition to use force of the new world organization. The proposals of the French and Turkish governments were taken up at the plenary and committee sessions of the San Francisco Conference.

⁴ Proposal of the French Government, 21 March 1945, in *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, Vol. 3 (London, United Nations Information Organizations 1945-1955) p. 379 (hereafter, *UN Charter travaux préparatoires*).

⁵ *Ibid.*, p. 387.

⁶ Suggestions of the Turkish Government concerning the Proposals for the Maintenance of Peace and Security agreed at the Four-Power Conference at Dumbarton Oaks, 1 May 1945, in *UN Charter travaux préparatoires*, Vol. 3, p. 483.

5.3.2 The plenary discussions of the San Francisco Conference

On 25 April 1945 the San Francisco Conference started. One day later, on 26 April, at one of the meetings of the delegation of the United States the matter of self-defence was brought up. The majority view of the delegates was that if – in spite of its willingness to resort to peaceful measures for dispute settlement – a state was attacked by military force, clearly then such a state had the right to defend itself. Although such an interpretation was viewed as mirroring common sense, several representatives considered it necessary to have ‘an authoritative explanation’ in the final text of the Charter.⁷

On the basis of such an explanation, the test would be whether the action was taken in accordance with the purpose of the Organization. Accordingly, as explained by US delegate Durward Sandifer, ‘a state might have the right to act in an emergency, and, if there was an allegation that this action was contrary to the purpose of the Organization, the Security Council might review it.’⁸ Moreover, the view was expressed that if such explanation was not included in the Charter, the Senate of the United States would definitely make a reservation.⁹

A few days later, at the preliminary plenary sessions of 1 May 1945, both France and Turkey reiterated their opinions. France justified its position by reminding the delegates that it was ‘geographically placed in the immediate vicinity of one of the most dangerous’ zones, referring this way to Germany and Italy. Further, the French delegate emphasized that France knows to its own cost that in order to discourage any future attempt of aggression the gap between ‘the lightning rapidity of aggression and the inevitable slowness of consultation’ must be bridged.¹⁰

Turkey reiterated its opinion as well, but ascertained that such ‘automatically functioning arrangements’ should only be allowed for the exclusive purposes of self-defence. It also asked for the inclusion of an explicit clause on the issue of legitimate defence.¹¹

The question concerning regional arrangements and emergency situations was thoroughly addressed by Technical Committee 4 (on regional arrangements) of Commission III (on the Security Council).

5.3.3 The work of Technical Committee 4 (Committee III/4)

The task of the members of Committee III/4 was to prepare draft provisions on regional arrangements. The most difficult problem that arose in the committee was the relationship between regional agreements or arrangements and the control exercised by the Security Council of the new organization. In Bowett’s words, the members feared that ‘by the exercise of the veto a single permanent member might prevent the regional organization from taking any action.’¹²

⁷ Minutes of the Eighteenth Meeting of the United States Delegation, Held at San Francisco, 26 April 1945, in *Foreign Relations of the United States: Diplomatic Papers 1945*, Vol. 1: General (Washington, D.C., US Government Printing Office 1967) p. 427 (hereafter, *Foreign Relations of the US 1945*).

⁸ *Ibid.*, pp. 428-429.

⁹ *Ibid.*, p. 428.

¹⁰ Plenary Sess., 1 May 1945: Discussion, in *UN Charter travaux préparatoires*, Vol. 1, p. 437.

¹¹ *Ibid.*, p. 453.

¹² Bowett 1958, p. 183.

The French and Turkish concerns were also shared by Czechoslovakia. In the view of the Czechoslovak delegation, authorization of the Security Council was to be given 'in advance and as a general rule for cases of immediate danger,' because the suspension of any coercive action until the intervention of the Security Council could cause 'irremediable delays'.¹³

The question of autonomy of regional arrangements went beyond the concerns of the Allied states and was especially taken up by the American states who sought to safeguard their mutual assistance system and the Act of Chapultepec.¹⁴ According to the Inter-American system (affirmed at Chapultepec), an attack against an American state was to be viewed as an attack against all American states. Moreover, the Act allowed action to be taken not only after such aggression occurred, but also if there were 'reasons to believe that an aggression is being prepared' (Section 4 of the Act). Since the US was party to the Act of Chapultepec, the matter of regional autonomy in emergency situations was repeatedly discussed by the US representatives at several of their delegation meetings. The question was asked what the US could do if Germany sent a fleet into the waters of Argentina.

'Would it be illegal if we shot across the German bows when they attempted to land in Argentina? Mr. Pasvolsky [Leo Pasvolsky, US delegate, KTSz] said that we would act, and that the Security Council would then be in a position to review our action, asking us what we were trying to do.'¹⁵

The first amalgamation proposal was jointly submitted by United States, United Kingdom, the Soviet Union and China and it took as point of departure the submission of France and Turkey. Accordingly, the amendment aimed to solve the question of security regarding the ex-enemy states of the war. The four states proposed to complement paragraph 2 of Section C, by adding the phrase 'with the exception of measures against enemy states in this war provided for pursuant to Chapter XII, paragraph 2,¹⁶ or, in regional arrangements directed against renewal of aggressive policy on the part of such states' until the Organization can take over the measure.¹⁷

The purpose of this amendment was to ensure that the European states were protected against a potential rearming of the Axis. However, this did not solve the concerns of the American states, because the two exceptions did not provide any autonomy to non-

¹³ Terms of Reference of Committee III/4, Chapter VIII, section C of the Dumbarton Oaks Proposals with Pertinent Excerpts from Comments and Draft Amendments submitted by Delegations, 14 May 1945, in *UN Charter travaux préparatoires*, Vol. 12, p. 773.

¹⁴ The Act of Chapultepec was an agreement adopted at Chapultepec Castle (Mexico City) by the Inter-American Conference on the Problems of War and Peace a few weeks before the San Francisco Conference (21 February-8 March 1945). The Chapultepec Conference was attended by all the nations of North and South America except Argentina. The signatories agreed to a policy of mutual defense during Second World War against aggression towards any one of them.

¹⁵ Minutes of the Twenty-Ninth Meeting of the United States Delegation, Held at San Francisco, Friday, 4 May 1945, in *Foreign Relations of the US 1945*, p. 592.

¹⁶ Paragraph 2 of Chapter XII of the Dumbarton Oaks Proposals stated: 'No provision of the Charter should preclude action taken or authorized in relation to enemy states as a result of the present war by the Governments having responsibility for such action.'

¹⁷ Terms of Reference of Committee III/4, Chapter VIII, section C of the Dumbarton Oaks Proposals with Pertinent Excerpts from Comments and Draft Amendments submitted by Delegations, 14 May 1945, in *UN Charter travaux préparatoires*, Vol. 12, p. 765.

European regional arrangements. Thus, they were left without a similar freedom of action under the Act of Chapultepec.

For remedying this shortcoming, the idea was to extend this proposal in such a way as to apply for the Latin-American States as well. Senator Vandenberg, delegate of the United States at the Conference, proposed to apply a 'limited extension of the European exemption' to the benefit of the American states.¹⁸

Nevertheless, this extension was criticized on the basis that it 'would gut the international power by emphasizing regional authority.'¹⁹ Moreover, the regional question speedily developed into a problem of the concern of all. Apart from the South Americans trying to protect the Act of Chapultepec and the Arabian bloc concerned regarding its impact on Palestine, the Australians were also anxious about their regional autonomy. The Australian delegation proposed an amendment that allowed 'self-defensive action, regional or otherwise [...] after failure of the Security Council to authorize such action or to take action itself.'²⁰ Vandenberg's amendment was thus rejected by the members of the committee and the regional question seemed to become 'the crux of the Conference.'²¹

In a renewed effort to find a solution to the regional problem, the amendment was subjected to revision. The wording was changed in such a way as to clarify that regional arrangements could be autonomous for the sole purpose of self-defence. Accordingly, the revised draft read as follows:

'Should the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member state, such member state possesses the inherent right to take necessary measures for self-defence. The right to take such measures for self-defence against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.'²²

This proposal was met with strong dislike on the part of the UK delegation. According to the opinion of UK delegate Anthony Eden, the draft could result 'in regionalism of the worst kind.' Eden also emphasized that 'no one had been able to define aggression for

¹⁸ A.H. Vandenberg, Jr., *The Private Papers of Senator Vandenberg* (Boston, Houghton Mifflin 1952) pp. 187-188.

¹⁹ *Ibid.*, p. 188.

²⁰ Interim Report to Committee III/4 on the Work of Sub-Committee III/4/A, submitted by the Rapporteur Dr. V.K. Wellington Koo (China), 15 May 1945, in *UN Charter travaux préparatoires*, Vol. 12, p. 837.

²¹ Vandenberg, pp. 190-191. Among the South American states, Bolivia adopted a fundamentally opposite position. It submitted an amendment on the basis of which paragraph 2 of section C was to be complemented with the sentence: 'In no case should such regional systems, arrangements, or agencies be able to adopt measures of sanction, whether economic or military, without the expressed authority of the Security Council.' Interim Report to Committee III/4 on the Work of Sub-Committee III/4/A, submitted by the Rapporteur Dr. V.K. Wellington Koo (China), in *UN Charter travaux préparatoires*, Vol. 12, p. 836.

²² Minutes of the Thirty-Seventh Meeting of the United States Delegation, Held at San Francisco, 12 May 1945, in *Foreign Relations of the US 1945*, pp. 685-686.

thirty years' and thus the wording would lead to confusion.²³ Other drafts were also discussed during several five-power informal consultation meetings, but consensus seemed impossible to reach.²⁴

Finally, the five powers concurred in adopting an amendment with more general language that would make no specific reference to the Act of Chapultepec or any other regional arrangement. Additionally, the delegates agreed with the opinion of UK delegate Eden that any attempt to specify in the Charter conditions under which self-defence measures could be taken would raise many difficult issues.²⁵

Finally, the proposal drafted by UK delegate Jebb seemed to bring the delegates closer to an agreement:

'Nothing in this Charter should invalidate the right of self-defence against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary measures to maintain or restore international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.'²⁶

After consultation between the UK and US delegates, the first part of this amendment was revised and read:

'Nothing in this Charter impairs the inherent right of self-defence, wether individual or collective, in the event that the Security Council has failed to maintain international peace and security and armed attack against a member state has occurred.'²⁷

In order to ensure general agreement with the proposal, the US delegation invited the South American delegations to a private meeting in which they presented the new proposal. The new wording, as Senator Vandenberg explained, would reserve the right of self-defence 'including regional self-defence if and when the Security Council fails to act' and would guarantee the resort to regional facilities 'among the peaceful mechanisms to be embraced.' Although the new wording did not encounter any staunch opposition, the Latin American states expressed their concern that such general phrasing might jeopardize the inter-American system and that a public statement was necessary to clarify the purpose of such provision.²⁸

To meet such concerns, the US delegates proposed to include a separate provision that would clarify and strengthen the role of regional agencies and arrangements in the

²³ Minutes of the Third Five-Power Informal Consultation Meeting on Proposed Amendments (Part I), Held at San Francisco, 12 May 1945, in *Foreign Relations of the US 1945*, p. 692.

²⁴ *Foreign Relations of the US 1945*, pp. 691-706.

²⁵ Memorandum by Mr. Robert W. Hartley of the United States Delegation of a Conversation Held at San Francisco, 12 May 1945, in *Foreign Relations of the US 1945*, p. 703.

²⁶ *Ibid.*, p. 704.

²⁷ Minutes of Informal Drafting Session, by Mr. Robert W. Hartley, 12 May 1945, in *Foreign Relations of the US 1945*, p. 705.

²⁸ Note on Second Informal Consultative Meeting with Chairmen of Delegations of Certain American Republics, Held at San Francisco, 15 May 1945, in *Foreign Relations of the US 1945*, pp. 730-736.

peaceful settlement of disputes.²⁹ This way, the acquiescence of the Latin American states was ensured.³⁰

On the same day (15 May), the US delegation thus announced that it was elaborating an amendment ‘intended to reconcile the global organization of the collective security system and the continued operation of the Inter-American System.’³¹

The promised proposal was finally put forward on 21 May, having as sponsoring states ‘the Big Four’ (United Kingdom, China, Russia and United States), France and the Latin American countries. The text of the proposal read:

‘Nothing in the Charter impairs the inherent right of individual or collective self-defence if an armed attack occurs against a member state, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken in the exercise of this right of self-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 this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.’³²

On 23 May 1945, at the fourth meeting of Committee III/4, the proposal was unanimously adopted. Senator Vandenberg wrote on that day: ‘The subject itself was difficult – how to save legitimate regionalism (like Pan-Am) and yet not destroy the essential over-all authority of the International Organization. By hammering it out vis-à-vis, we have found an answer which satisfies practically everybody.’³³

5.4 The final provision on self-defence – Interpretation

The proposal unanimously adopted on 23 May 1945 suffered some minor wording changes before it was adopted by the San Francisco Conference as Article 51 of the UN Charter. The delegates involved in the drafting of the provision, viewed it as a successful compromise that satisfied the wants of all concerned. Moreover, Article 51 was viewed as an explicit assurance of the legality of self-defensive action.

In order to interpret the provision in Article 51, the meaning of its terms has to be elucidate in the context in which they were negotiated and in the light of the provision’s object and purpose. As to the contextual meaning of the terms, it is important to note that the content and limits of self-defence were addressed by neither the Dumbarton Oaks nor the San Francisco negotiations.³⁴ Some viewed the right as implicit and subject to common sense; others considered it too difficult to define. For instance, during the

²⁹ Minutes of the Fourth Five-Power Informal Consultation Meeting on Proposed Amendments, Held at San Francisco, 15 May 1945, in *Foreign Relations of the US 1945*, p. 737. The proposal for a separate provision on regional arrangements in the peaceful settlement of disputes became Art. 33 of the UN Charter.

³⁰ Vandenberg, pp. 192-193.

³¹ Interim Report to Committee III/4 on the Work of Sub-Committee III/4/A, submitted by the Rapporteur Dr. V.K. Wellington Koo (China), in *UN Charter travaux préparatoires*, Vol. 12, p. 834.

³² Proposal for the Amalgamation of Amendments offered to Chapter VIII, section C, prepared by the Delegation of the United States in Consultation with the Other Sponsoring Governments and France, 21 May 1945, in *UN Charter travaux préparatoires*, Vol. 3, pp. 635.

³³ Vandenberg, p. 198 (emphasis added).

³⁴ See also: D. Ciobanu, ‘The Contribution of the Advisory Committee of Jurists to the Drafting of the UN Charter’, 53 *Rivista di Diritto Internazionale* (1970) pp. 327-330.

discussions in Commission I (dealing with general provisions), it was affirmed that ‘the use of arms in legitimate defence remains admitted and unimpaired’ and that no specific reservation was needed to safeguard such right.³⁵ On the other hand, UK delegate Eden repeatedly emphasized that self-defence (and aggression) was very difficult to define and that it was better to avoid interpretive formulations.³⁶

Discussions regarding the limitation of self-defence to those instances where an armed attack had already occurred took place within the US delegation.³⁷ Some of the delegates have indeed expressed their intention to limit self-defence to the time after an armed attack had occurred.³⁸ The proposal was, however, questioned by other US delegates who saw it as ‘greatly qualifying the right of self-defence.’³⁹ This exchange was interpreted by Franck as showing ‘beyond dispute that the negotiators deliberately closed the door on any claim of anticipatory self-defence.’⁴⁰ This view overlooks the fact that only a few of the delegates of the United States expressed such restricting intentions at the meetings of the US delegation. These proposals were not discussed in the plenum of Technical Committee 4, in order to discern the opinion of the delegates from other countries.⁴¹

Consequently, the preparatory negotiations of the Charter cannot shed light on whether self-defence was exclusively seen as an anticipatory or a remedial forcible measure. No clear conclusion can be drawn from the records as to the temporal dimension attributed to self-defence. Accordingly, the argument put forward by some authors that Article 51 settled the issue of anticipatory action in self-defence by rejecting it, cannot be maintained.⁴² For that reason, one has to look at the way self-defence was perceived by the different governmental representatives participating in the drafting of the Charter. Moreover, one has to look at how Article 51 was perceived by commentators at that time.

Accordingly, one can first look at how the delegates viewed self-defence on the basis of their submissions. Regarding the reasons for self-defence, delegates referred to ‘measures of urgent nature’ (France), ‘cases of emergency’ (Turkey) or ‘immediate danger’ (Czechoslovakia), all circumstances that needed ‘immediate action’ (France, Turkey). Although the temporal dimension of self-defence (before, during or after the attack) did not come up during the negotiations, the wording used by delegates in their submission does not show any tendency to restrict that dimension to a post-attack time. The phrases exemplified above rather echo the understanding of self-defence according to which there had to be an immediate need for armed action in face of an attack or invasion. This understanding was based on a requirement of necessity, ‘present and

³⁵ Report of the Rapporteur of Committee 1 to Commission I, 13 June 1945, in *UN Charter travaux préparatoires*, Vol. 6, p. 459.

³⁶ Memorandum by Mr. Robert W. Hartley of the United States Delegation of a Conversation Held at San Francisco, 12 May 1945, in *Foreign Relations of the US 1945*, p. 703.

³⁷ Franck 2002, p. 50.

³⁸ Minutes of the Forty-Eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, 20 May 1945, in *Foreign Relations of the US 1945*, p. 818.

³⁹ *Ibid.*; Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, 14 May 1945, in *Foreign Relations of the US 1945*, pp. 707-709.

⁴⁰ Franck 2002, p. 50.

⁴¹ Franck himself regards the restrictive proposal of the US delegates as ‘logically indefensible’. Franck 2002, p. 50.

⁴² Brownlie 1963, p. 275; Gray 2004, p. 98; Kunz, pp. 877-878.

inevitable,⁴³ which was in various forms reiterated in the early decades of the twentieth century.⁴⁴

As to the object and purpose of Article 51, the intention was to ensure compatibility between the new Charter and the pre-existing regional arrangements, such as the Act of Chapultepec. Both the United States and the other American states viewed the new provision as a successful compromise and as a safeguard of the Inter-American system. Although Section 4 of the Act of Chapultepec did not make express reference to self-defence (it only allowed for action against aggression or when aggression was prepared), the Latin American states viewed Article 51 as the confirmation of the legitimacy of their right to take steps according to the Act. The Director General of the Pan-American Union in a report submitted to the Governing Board of the Union on the action of the San Francisco Conference with regard to regional arrangements drew the following conclusion:

‘The right of any group of nations to enter into agreements for self-defence is recognized. Consequently, the Act of Chapultepec, or the treaty that may be concluded to convert this wartime measure into a peacetime agreement, is entirely in harmony with the World Charter.’⁴⁵

Section 4 of the Act of Chapultepec read:

‘[I]n case acts of aggression occur or there may be reasons to believe that an aggression is being prepared by any other State against the integrity and inviolability of the territory, or against the sovereignty or political independence of an American State, the States signatory to this Act will consult amongst themselves in order to agree upon the measures it may be advisable to take.’

Prima facie, the provision seems to establish a system of collective security much broader than the concept of self-defence. Nonetheless, its compatibility with the UN Charter system was solved by addressing two issues: regional arrangements (that allowed Latin American states to take non-military action in face of aggression) and self-defence (which permitted the parties of the Act of Chapultepec to take military action in face of aggression). Accordingly, Section 4 of the Act – inasmuch as it refers to military action – has to be viewed as compatible with Article 51 of the UN Charter.

It is reasonable to assert that the understanding that was given to self-defence at the time of the drafting of the Charter was the same that Kellogg used and that Webster formulated on the basis of centuries’ of consequent interpretation.⁴⁶ Obviously, this understanding did not allow preventive action in face of a possible danger. Thus the argument put forward by some authors that by the time of the Charter customary law allowed only a narrow right of self-defence is accurate, with the proviso that such a narrow sense permitted anticipatory action against imminent threats.⁴⁷ Preventive unilateral action was indeed prohibited by the UN Charter as an element of the absolute

⁴³ Webster, *BFSP*, p. 1138.

⁴⁴ June 23 Note, in Miller, pp. 213-214; Art. 2 Locarno Pact 1925. See *supra* 4.3.2; Benes-Politis Report, p. 483; Oppenheim, Vol. 1, pp. 178-179.

⁴⁵ M.S. Canyes, ‘The Inter-American System and the Conference of Chapultepec’, 39 *American Journal of International Law* (1945) p. 508 (quoting the report submitted to the Governing Board of the Pan-American Union by the Director General, *Congress and Conference Series*, No. 48).

⁴⁶ See *supra* 3.3 and 4.7. Bowett 1958, pp. 188-189.

⁴⁷ Brownlie 1963, pp. 257-261.

right to war that sovereigns had enjoyed over many centuries. Under the Charter system, preventive action in face of potential dangers could only be exercised on express authorization of the Security Council as part of the new system of collective security. Accordingly, if the Security Council deemed a conflict a threat to or a breach of international peace and security under Chapter VII, it could also call for collective measures involving the use of force to prevent the escalation of the conflict.⁴⁸

Unilateral defensive wars, on the other hand, could no longer be preventive and could not be employed in cases of more or less serious suspicions regarding another state's plans. One of the major effects of the UN Charter was, indeed, to prohibit unilateral preventive war. The narrow conception of self-defence was implicitly accepted by the drafters and was embedded in Article 51. The temporal dimension of this narrow understanding of self-defence was not restricted to pre-attack or post-attack time. It was rather based on the existence of a 'present and inevitable'⁴⁹ necessity of resorting to moderate (proportionate) armed action in the face of an attack or invasion.⁵⁰ Accordingly, when discussing the content of Article 51, the drafters used an understanding of self-defence that had been employed for centuries by Christian theologians and jurists as well as positivist lawyers and that had been viewed for centuries as accepted defensive action on the part of individuals and sovereigns.⁵¹

5.5 Concluding remarks

With the first steps towards the restriction of war, the absolute right of the sovereign to decide when and why to wage war started to weaken. As a result of a surge in bilateral and multilateral agreements restricting or prohibiting war, the right to wage punitive and preventive wars as well as to resort to reprisals or other, smaller armed interventions was beginning to be challenged. The adoption of the UN Charter was the culmination of this cascade of law-creation. The corroborated purpose of Article 2(4) and Article 51 excluded both punitive and preventive wars as well as other measures short of war from the list of rights individual states enjoyed. The broad right of states to wage preventive wars was transferred to the Security Council. Accordingly, Article 24 and Chapter VII enabled the Security Council to take collective enforcement measures against a situation that endangered international peace and security.

The only prerogative of states that survived the movement to restrict and prohibit war was the natural-law conception of self-defence. This narrow, natural-law understanding of the right was increasingly viewed as the only lawful exception to the prohibition of war.⁵² Self-defence thus understood had been accepted as a customary rule across jurisdictions in the three normative frameworks identified. It is reasonable to conclude at this point that, by the time of the adoption of the Charter, that customary rule was

⁴⁸ T.D. Gill, 'The Second Gulf Crisis and the Relation between Collective Security and Collective Self-Defence', 10 *Grotiana* (1989) pp. 58-60.

⁴⁹ Webster, *BFSP*, p. 1138.

⁵⁰ June 23 Note, in Miller, pp. 213-214; Benes-Politis Report, p. 483; Oppenheim, Vol. 1, pp. 178-179.

⁵¹ See *supra* 2.4, 3.3 and 4.7.

⁵² See *supra* 4.7 and 5.5.

international in the modern sense of the word and not only in the traditional 'law of nations' connotation.⁵³

The drafters of the UN Charter saw Article 51 as a compromise that both prohibited illegal use of force and guaranteed the right of self-defence against such use of force. The wording of the article cannot be analysed in an isolated manner, but has to be read in conjunction with the drafting negotiations and with the interpretation given to self-defence at that time.

It is the conclusion of this chapter that the narrow, natural-law conception of self-defence was the one accepted as customary law at the time the United Nations Charter was drafted. This understanding of self-defence was taken in consideration when the compromise of Article 51 was reached.

⁵³ Nussbaum, pp. 1-2. For the 'international' characteristic of self-defence as a customary norm in earlier frameworks, see *supra* 2.4 and 3.3.