firmative vote of seven members including the concurring votes of the permanent members." This paragraph certainly can be interpreted in the sense that the concurring votes of *all* the permanent members are necessary; but, as Kelsen shows,[14] there is also a second interpretation legally possible, by *argumentum a contrario* from Articles 108, 109, where it is specifically prescribed that the two-thirds majority of the members must include *"all"* the permanent members of the Security Council. Under this second interpretation, Article 27, paragraph 3, would mean "including the votes of the permanent members, present and voting."

14. Indeed, it is this second interpretation which prevails in the practice of the Security Council. This is already shown in the accepted practice that abstention by a permanent member is not a veto. The Statement of the Department of State of June 30, 1950,[15] lists the principal cases of abstention by a permanent member and then continues: "The voluntary absence of a permanent member from the Security Council is clearly analogous to abstention." This is legally not tenable; for a precedent on abstention is only a precedent on abstention, not on absence. But there *is* a precedent on absence, when Mr. Gromyko walked for the first time out of of the Council meeting. The Security Council, at its 30th meeting, in the Iranian case adopted a resolution by nine votes in the absence of the delegate of the Soviet Union. And Mr. Gromyko did not attack the legality of this decision after his return.

The investigation of this problem leads, therefore, to the conclusion that the resolutions taken by the Security Council on June 25 and 27, 1950, were legal and valid, weighed, from a strictly legal point of view, in the light of the corresponding rules of the United Nations Charter and of the practice of the Security Council.

JOSEF L. KUNZ

PREVENTIVE WAR CRITICALLY CONSIDERED

Members of the American Society of International Law are by inference charged by the Constitution of their Society with doing all that is possible to promote the study and development of international law and the conduct of international affairs on the basis of law and justice. For this purpose it is not sufficient to study and advocate the development of the law itself or for its own sake. Much attention must be given, certainly much more than has been given in the past, to the second section of the mandate, partly because of its own importance and partly to provide the kind of international situation where the law can thrive and be effective—which in turn is calculated to promote peace and justice. Friends of international law cannot afford to evade even the most difficult and delicate issues in the field of international relations on the ground that they are purely political in character.

[14] Kelsen, *op. cit.*, pp. 239–241.

[15] *Supra*, note 13.

One of these dangerous issues being widely discussed today is that of "preventive war." Quite frankly a certain number of persons, by no means all of them insane, suggest that the United States should anticipate what they believe to be certain aggression by Soviet Russia against this country, if, indeed, as they would argue, such aggression may not fairly be regarded as already having begun. Just what all the modalities of such action shall be is not specified, but perhaps the general issue may be considered without such precise definition and it might also be just as well to consider the problem in its own right apart from its application in Russian-American relations.

Preventive war as an idea or doctrine has a bad name. It is by no means a new idea and for over one hundred and fifty years it has rather uniformly been condemned. This is traceable, apart from the merits of the case, to the fact that the opposition came very largely—and strongly—from the pacifist segment of opinion or from ardent lovers of peace. Other groups or individuals—governments, officials, realistic students of international relations—who might (not necessarily, but possibly) see some value or validity in the idea, would be less inclined to speak out in its defense. Indeed it is probably not going too far to say that the idea of preventive military action has been condemned too hastily and too completely to permit a careful consideration of the problem. It has been rather uncritically condemned and a critical reconsideration of the issue may not be out of place in a day when obviously new international arrangements for security action are in view.

One of the most striking and impressive reasons for such reconsideration lies in the fact that in other fields of political activity, national and local, and in other walks of life than the purely political—public health, for example—extensive use is made of the preventive principle and indeed preventive action is in many situations given strong preference over mere remedial action. The superior value of an ounce of prevention is proverbial. Preventive medicine has tremendous support and has enjoyed tremendous development in recent times. Finally in many legal fields—criminal law, property, public administration, torts, to mention only a few—the preventive principle has been introduced in numerous legal systems, precisely in the more advanced countries of the world. It is believed that much more is to be accomplished on behalf of the individual and also in the interests of the community by taking action in time to prevent injury than by waiting until injury has been done and then trying, at times vainly, to remedy it.

On the other hand, this obviously does not constitute a blanket approval of preventive war, apart entirely from the problem of the applicability to international law and administration of the science or art of national or local government and the administration of justice. In the practice of what we may call simply preventive social action in the local community

several prerequisite conditions can be detected by common observation and have indeed at times been formulated by those concerned with such action. The injury feared must be highly probable, if not certain, in absence of preventive action; the probable damage to be done by any preventive action must be markedly less than the anticipated injury; the action must be taken on the basis of public law, which is supposed to have involved in its establishment the agreement of those against whom the action is taken; and finally, adequate provision must be made to control the preventive action actually taken, to prevent it from becoming excessive, and to permit possible judicial or at least adequate administrative review afterward. Finally such action is rarely permitted to interested individuals, but is reserved for public authorities, "self-help" having been eliminated here even more completely than in the field of remedial justice.

Obviously, few of these prerequisite conditions exist in the international field; or, rather, while the situation justifying preventive action in the local field may quite conceivably be reproduced on the international level, all of the other apparatus of preventive public action is lacking or is very defective. We do not yet have statutes authorizing such action; we do not have international agents or forces capable of taking such action; we do not have adequate arrangements for control and review. Until the first lack is remedied, preventive military action by a state or group of states or an international organization would seem to enjoy no juridical foundation; this would apply to preventive war by the United States against Soviet Russia. This conclusion may appear to constitute merely a confirmation of the obvious, but it is important precisely because of its limited character and because of the other side of the picture, which is probably more important today than the purely legal aspect.

Thus the conclusion drawn does not preclude action by a state against which aggression in some proper sense of the term already has been begun, although without actual war, especially in a highly competitive international situation where community action for preservation of peace and security is virtually non-existent. This involves the highly difficult definition of aggression, but if we assume such a definition, the action of the threatened state may amount to nothing more radical—indeed, more normal—than self-defense, and this in view not only of common international law but all such instruments as the Pact of Paris and the United Nations Charter. Secondly, the conclusion does not pretend to pass upon the ethical aspects of the matter; at times it may be ethical to violate the law; it was noted that the practical and logical need for preventive action may be quite as great in the international sphere as elsewhere. Thirdly, developments are obviously under way which may provide the necessary authorization for preventive action and even provide the machinery for controlling it and carrying it out and reviewing it if need be. It seems clear that on practical grounds and grounds of theory, both as a matter of

international law and as a matter of international administration, we would do well to reconsider the oversimplified attitudes taken toward preventive war in the past, *pro* and *con*, respectively, by some patriots and all pacifists. The device of preventive international police action, non-military or military, is or would be terribly delicate and dangerous, especially if delegated to any particular state or states to carry out—and a unitary international force seems still far in the future. Nothing is to be gained by refusing to keep ahead of events in thinking out the problem, however.

PITMAN B. POTTER

RESERVATIONS TO MULTILATERAL TREATIES

The problem of reservations to multilateral treaties signed at the close of international conferences is one that has long been a matter of concern to the regional Organization of the American States, as it is now to the Secretariat of the United Nations. How can we promote the general acceptance of international agreements and yet recognize that, after the text of the treaty has been agreed upon and signed by representatives of the executive department of a state, the popularly elected Congress, which in democratic constitutions must give its assent to the ratification of the treaty, may object to certain provisions of the treaty and refuse to approve the agreement without making exception of one or more objectionable articles?

The simplest answer would be to say that we simply cannot recognize any such intervention on the part of the legislative body. Once the treaty has been signed, the treaty must be ratified in the form signed or not ratified at all. But such a position would be needlessly extreme. What if the other signatories of the treaty find no objection to the proposed reservation, looking upon it as being no more than the expression of a national complex which the particular state may have with respect to possible effects of the treaty not contemplated by themselves, or in any case as not constituting any substantial obstacle to the attainment of the objectives of the treaty? In such a case the other signatories might readily agree to accept the proposed reservation under the belief that it is better to have the particular state coöperate in that restricted way than not at all; and if they are willing to do so, why not let them?

The difficulty arises when, out of a large number of signatories, some of which may already have ratified the treaty, one or two, perhaps even as many as ten percent, may be unwilling to accept the proposed reservation. In such cases there is a choice of two distinct procedures: either to exclude the state proposing the reservation from participation in the treaty, or to permit it to participate with the large majority who are willing to accept its reservation, leaving the treaty without effect in relation to the states unwilling to accept the reservation. The first of these two procedures was