The Legal Framework of the Use of Armed Force Revisited

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By Dr. René Värk*

Introduction

Peoples and states have used armed force against each other throughout history and they have also tried to regulate and restrict the use of force so that there was clarity and predictability. For that reason, the use of armed force is one of the oldest issues in international law and it remains in the midst of political and legal debates due to its complexity and continuing relevance. The contemporary legal framework of the use of armed force was enacted after the Second World War in the United Nations Charter (hereafter the Charter). After the World War states wanted to limit the unilateral use of armed force and to subordinate the use of armed force to the control of the international community, i.e. the Security Council, in order to achieve a better global security environment. These regulations restricting the use of force have contributed to the reduction of inter-state conflicts after the Second World War. Unfortunately, the limits on the use of armed force are not always respected. Although the law itself is reasonably clear and prescribes very limited number of exceptions, states and legal scholars have long proposed additional exceptions in order to further their national interests or to cope with new developments and problems in international relations. Consequently, in many cases, the use of armed force has been in clear violation of international law because the official justifications are based on unsound interpretations of law, or on nothing more than opportunistic positions supported by propagandistic arguments for public consumption, but lacking legal substance.

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This article aims to provide a full analytical overview of the legal framework of the use of armed force in contemporary international law. The article will begin with a brief explanation of how the Charter was drafted and moves to the prohibition of the use of armed force which is the central provision in the Charter. Finally, the article will examine the exceptions to the prohibition of the use of armed force. This article will not explore the Charter from the perspective of cyber warfare which is an issue that calls for a separate article.

**United Nations Charter as a Key Instrument**

It is the Charter that provides the legal framework for the use of armed force in contemporary international law. The drafting process of the Charter started in August 1944 when delegations from the Republic of China, the Soviet Union, the United Kingdom and the United States started their two-month long deliberations on a future international organisation that would replace the League of Nations. The process continued at San Francisco Conference and culminated with the adoption of the Charter on 26 June 1945.

The United Nations was created in a climate of popular outrage after the unprecedented horrors of the Second World War. The latter had caused more destruction than any previous armed conflict and the impact of the World War pushed national leaders to take steps in order to secure and maintain international peace and security in the future and, “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”¹ The United Nations’ Charter was considered a constitutive document establishing a new order and basic rules for the post-Second World War international community. The first and main purpose of the established organisation was the maintenance of international peace and security.² This was nothing new as the League of Nations, the predecessor of the United Nations, had a similar purpose.³ The regulations in the Charter were built on the experience and achievements taken from the inter-war period. *First*, the prohibition against resorting to war was first established in the Treaty providing for the Renunciation of War as an Instrument of National Policy (1928) (widely known as the Kellogg-Briand Pact).⁴ *Secondly*, the
Charter followed the Stimson doctrine, according to which the international community does not recognise international territorial changes executed by illegal war. Third, the basic model of the collective security system in the Covenant of the League of Nations provided the basis for the more advanced system in the Charter. The combination and elaboration of these components resulted in the general prohibition of the (aggressive) use of armed force in international relations and creation of an ambitious collective security system.

Prohibitions on the Use of Armed Force

The prohibition on the inter-state use of armed force is a central feature of the Charter and is found in Article 2(4) which proclaims that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This provision has been rightfully described “cornerstone of the peace in the [United Nations] Charter” and “the heart of the United Nations Charter” and “the basic rule of contemporary public international law.” Never before had nations agreed upon so comprehensive and far-reaching prohibition to use armed force. It is hardly an exaggeration to argue that Article 2(4) was one of the most fundamental changes in the system of international relations, which throughout history has valued the freedom of states to wage war. The prohibition to use armed force is essentially accompanied and strengthened by another provision demanding 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.” These fundamental principles of contemporary international law were established to realise the hopes expressed in the Charter, namely international peace and security. They encompassed the primary values and purposes of the inter-state system,
e.g. the protection of state sovereignty and independence and the effective proclamation of international peace and security as the highest objective of the international legal system. The general prohibition for states to use armed force for selfish or supposedly altruistic purposes is not merely to protect the sovereignty and independence of individual states, but to establish an overall order for the entire international community. In a way the Charter declares international peace and security more compelling than inter-state justice, or even human rights for that matter,11 because the use of armed force is not generally considered to be “the appropriate method to monitor or ensure such respect.”12

The wording of Article 2(4) is a considerable improvement on the previous attempts to outlaw the use of armed force. Yet, at the same time, the wording is still not without ambiguities. Indeed, the structure of the article is complex and almost every phrase or key term is open to dangerously wide interpretations or simply misinterpretations. Although some fundamental deficiencies in the pre-Second World War regulations were addressed and eliminated, Article 2(4) created new aspects that cause confusion even today. However, as the rationale behind the provision in question was to introduce the widest possible prohibition on the use of non-defensive (aggressive) armed force, e.g. to acquire territory or other benefits from other states,13 it is intended that we should interpret Article 2(4) in expansive manner.

This article will analyse the essential components of Article 2(4) in the light of state and court practice, and other international instruments in order to establish its generally accepted scope and content although there are, no doubt, states and scholars who advocate unconventional positions. When interpreting the Charter one should not disregard the Friendly Relations Declaration,14 a General Assembly resolution clarifying and attempting to progressively develop the Charter.15

Who is Bound by the Prohibition?

Article 2(4) is a treaty provision and, as such, was originally legally binding only for the members of the United Nations. As the membership in the United Nations is open to states only16 the
prohibition to use armed force is addressed to states and only protects states. Article 2(4) protects every state; regardless of whether the states have recognised each other or are even members of the United Nations (the text includes “any state”). In case of (terrorist) non-state actors, Article 2(4) becomes relevant only if such actors are acting on behalf of a state, in which case their conduct is attributable to the latter. However, already for long time, the prohibition to use armed force is considered something more than merely a treaty norm. It rapidly attained the status of customary international law, which is binding upon all subjects of international law including states. Therefore the few states (e.g. Kosovo, Vatican) that are not members of the United Nations are equally forbidden to use armed force in their international relations. The International Court of Justice (hereafter the Court) has confirmed that the prohibition in question exists in customary international law, but has also stressed some aspects. Treaty and customary law on the prohibition to use armed force are not “identical in content” when it comes to exceptions from the rule. But despite some variances in the regulations found in two sources of law, there are no conflicts between treaty and customary law in this area. If we were to simplify a little, customary law reflects the scope and content of Article 2(4).

Additionally, the prohibition to use armed force is also characterised as a peremptory norm of international law (ius cogens norm). The latter is defined as “a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” In other words, ius cogens norms represent the overriding norms of international law that must be respected at any time without any excuse (there are no circumstances precluding wrongfulness), e.g. the prohibition of slavery, torture, genocide and the violation of the right of self-determination. Such norms may not be evaded by relying on treaty or customary law which makes a later treaty relaxing the prohibition to use armed force to be null and void. As ius cogens norms are essentially similar to customary international law they are legally binding on all members of the international community regardless of whether they have expressed their approval or disapproval of a particular norm. While a treaty obligation is owed to other parties of the particular treaty, the obligation under ius
norm is owed, as a legal fiction, to the international community as a whole — every state may feel that its essential interests have been breached and consequently not only the state that is directly injured, but also any other state, is entitled to invoke the responsibility of the violating state.29

What Does “Force” Include?

Article 2(4) is certainly progressive because it talks about the use of “force” and not “war.” The latter refers to a narrow and technical legal situation which begins with a declaration of war or rejection of an ultimatum and ends with a negotiated peace treaty.30 According to the doctrine developed since the beginning of the 19th century, a state of war did not depend on the existence of objective circumstances, i.e. hostilities between states, but on the willingness of states to classify the situation as a war.31 The latter was generally prohibited before the Second World War but states found ways to by-pass the prohibition.32 The Kellogg-Briand Pact reads that states “condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.”33 Perhaps the most famous case is when Japan invaded Manchuria in 1931. Japan did not declare war against China and therefore claimed that its military operations did not amount to war and were not in violation of international law. In fact, Japan’s actions were war in reality, but not war in legal terms and, consequently, beyond the scope of the Kellogg-Briand Pact.

Due to the disgraceful practice of the 1930s the drafters of the Charter decided to replace the term “war” with the term “force,” which takes into account the factual reality and covers all forms of hostilities, both declared wars and armed confrontations falling short of an official state of war, but which may actually range from minor border clashes to extensive military operations.34 Formalistic excuses, such as classifying a military operation a police raid or border incident (euphemisms also used by Japan), do not help the state to escape the prohibition in Article 2(4). What matters for the latter is the actual use of armed force.
If one reads the provision carefully one sees that it talks “force,” not “armed force.” This provoked a discussion on what kind of force is actually prohibited by Article 2(4). The prevailing, and certainly correct, view is that in this context the term “force” is limited to armed force and it does not include, for example, political or economic coercion. In the 1950–1960s the developing and socialist states argued that “force” also covers non-military force such as political coercion (e.g. refusing to accept some treaty or breaching diplomatic relations) and especially economic coercion (e.g. imposing restrictions on commerce or arresting assets). These arguments are not persuasive for several reasons. First, when Brazil made a proposal at San Francisco Conference to include “economic measures” in Article 2(4), it was explicitly rejected. Banning non-military means of pressure leads to situation where states have left with no means to influence states that, for example, are violating the rights and interests of other states. Secondly, the Friendly Relations Declaration has derived several clarifying principles from Article 2(4) and these essentially involve the use of armed force. Third, the Definition of Aggression adopted by the General Assembly uses the wording of Article 2(4) and adds the word “armed” before the word “force.”

What Does “International Relations” Stand for?

Article 2(4) demands that states must refrain from the use of armed force “in their international relations.” This refers to inter-state relations and leaves inner-state relations outside the scope of Article 2(4). Recalling the general principle that the Charter ought not to intervene in internal affairs of any state, civil wars are consequently not prohibited — insurgents may start a revolution and governments may use armed force against them. The situation supposedly changes if the insurgents are able to establish a de facto regime controlling certain territory, exercising some governmental authority, and preferably also enjoying international recognition (e.g. the Libyan rebels in 2011). However, this can lead to strange outcomes. For example, if a secessionist movement is successful enough to take control of some territory and declare independence, but the territorial state is not able to regain control and the international community does not recognise the new “state,” the
situation becomes a frozen conflict. The longer this conflict lasts the more likely the unrecognised state will gain the protection of Article 2(4). This means that the international community now expects the territorial state to use non-military means to end the conflict, and its position is strengthened over time, e.g. Abkhazia. However, states do not violate the “international relations” requirement if they conduct military operations in other states if the latter have issued an appropriate invitation. Every sovereign state is free to decide how to make use of its territory, and if necessary, it may invite other states and even allow them to use armed force, e.g. when the Security Council authorisation expired, Afghanistan and Iraq issued an invitation to the Coalition forces. However, it is always a possibility that the invitation is not genuine, either because it was fabricated by the intervening state or was issues by a rebel group. The Soviet Union justified its invasion to Afghanistan in 1979 also by an invitation from the Afghan government, but in reality the invitation was issued only after the invasion and by the Soviet installed government (composed of former anti-government forces).

While collective operations against (terrorist) non-state actors or pirates are politically less sensitive and happen frequently, states and scholars have conflicting views on whether states should intervene in classic civil wars where internal political struggle is taking place between different factions. The classical, and probably still prevailing, view is that other states may intervene by the invitation and on the side of the government in power. But if insurgents have established control over some territory and exercise some governmental authority it becomes difficult to decide who is the legitimate representative of the state and who is therefore authorised to issue the invitation. Moreover, some states might recognise the existing government and other states may have shifted their recognition to the insurgents, e.g. Bashar al-Assad regime versus Syrian National Council in the Syrian civil war. The alternative, and rather sensible, view is that no-one should intervene in civil wars as they are internal affairs. By intervening on either side other states affect the “natural” outcome of internal, although violent, political struggle. But the situation changes and the international community should get interested if the parties are disregarding international law in their struggle and commit international crimes. To conclude, because states intervene
in civil wars by an invitation their action is not in violation of Article 2(4), although other rules of international law are applicable when assessing the validity of the invitation.

Is the Prohibition Conditional?

The prohibition to use armed force in Article 2(4) is followed by a phrase “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Does this mean that the prohibition is conditional and armed force may be used for a variety of purposes if it is not aimed “against the territorial integrity or political independence of any State,” e.g. in-and-out surgical anti-terrorism military operations? This argument has provided justification for humanitarian and pro-democratic interventions and other “altruistic” forms of military operations. Anthony D’Amato, a well-known representative of the school of restrictive interpretation, has argued that the territorial integrity requirement is violated only if the state permanently loses a portion of its territory.44 However, these clauses were never intended to restrict the prohibition to use armed force but were seen by the drafters as the most obvious examples of what is prohibited.45 The initial Dumbarton Oaks Proposals for the Establishment of a General International Organization stated simply that, “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.”46 The clauses were added at San Francisco Conference at the insistence of smaller states who wanted a particular emphasis on those vital aspects.47 Considering the travaux préparatoires of the Charter, it is not possible to claim that the prohibition to use armed force is limited to these restrictive circumstances. This position has been supported by the Court in the Corfu Channel case where the United Kingdom argued that it had a right to intervene and sweep the minefield in Albania’s territorial waters, which were a part of the state’s territory, in order to guarantee the right of innocent passage. The Court considered such activity a “manifestation of a policy of force, such as has, in the past, given rise to most serious
abuses and such as cannot … find a place in international law” and emphasised that “respect for territorial sovereignty is an essential foundation of international relations.” Therefore, an incursion into another state’s territory constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of its territory, and the word “integrity” actually ought to be read as “inviolability.” Furthermore, the clauses “territorial integrity” and “political independence” should not distract attention from third clause, “any other manner inconsistent with the Purposes of the United Nations.” The latter acts as a “safety net” that covers all uses of armed force that do not fall explicitly under first two clauses. The paramount and overriding purpose of the United Nations is to maintain international peace and security and, to that end, to prevent and remove threats to peace and suppress aggression in its different forms. Indeed, every single use of armed force, even a precision attack against a terrorist non-state actor, can potentially endanger the precious and often unstable international peace and security. The decisions to intervene are often based on the opinion and understanding of one or some states, not on the general consensus of the international community. State practice indicates, unfortunately, that the true reasons for intervention are usually egoistic rather than altruistic and tend to further political or economic interests of the intervening states. The preamble of the Charter underlines that “armed force shall not be used, save in the common interest.” The Charter is a universal agreement that, in the words of Louis Henkin, sends a message that “even justified grievances and a sincere concerns for ‘national security’ or other ‘vital interests’ would not warrant any nation’s initiating war.” To conclude, the prohibition to use armed force is not conditional, but general.

What Amounts to “Threat of Force”?

The prohibition of threatening with armed force has received much less attention than other elements of Article 2(4). It is not easy to answer what the term “threatening” covers. International judicial organs have not decided a single case about the threat of force in the sense of Article 2(4) because states have not filed any complaints. But one should not
conclude that states have not threatened others with armed force. On the contrary, but threats are usually followed by actual military operations and therefore the situations are discussed as violations of the prohibition to use armed force. The threat and use of armed force are actually two distinct violations, but states pay more attention to uses and judicial organs seem to have a practical approach that “more serious” conduct (use of armed force) covers “less serious” conduct (threat of armed force). Article 39 regulating the conduct of the Security Council also differentiates between “threat to the peace” (includes the threat of armed force), and “breach of the peace” and “act of aggression” (includes the use of armed force). The prohibition to threaten with armed force is separately mentioned also in other international instruments.53

States are surprisingly resistant and tolerant to the threats of armed force. The latter is essential and inevitable part of the system of international relations and fulfils certain functions.54 We can find such threats regularly in the media and they receive far less attention than actual armed attacks. But such power games must have boundaries in order for the prohibition to threaten with armed force to have meaning.

The arming, forming alliances and in other ways building self-defence capability are not a violation of Article 2(4). It is certainly difficult, if not impossible, to distinguish between the arming for defensive or offensive purposes. In the Legality of the Threat and Use of Nuclear Weapons advisory opinion the Court found that the possession of nuclear weapons (the same logic applies of all weapons) in itself does not amount to the violation of Article 2(4), unless the particular state intends to direct them directly against the territorial integrity or political independence of a state, or against the purposes of the United Nations or whether, “in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.”55

The Court emphasised that there is a close connection between a “threat” and a “use,” i.e. the legality of the threat depends directly on the legality of the intended use.56 If a state or an alliance sends the potential aggressor a message that armed force will be used repel its armed attack, this is legal because the state or the alliance is “threatening” with legitimate self-defence. But if a state demands that another state handed over a part of its territory and adds that it is prepared to use armed force
if the other state is not willing to comply, the state is threatening with an illegal form of armed force and is violating Article 2(4). In practice, it is difficult to draw a line between threats and uses. In the *Military and Paramilitary Activities in and against Nicaragua* case the Court was not convinced that the military manoeuvres held by the United States near the Nicaraguan borders were threats of armed force. But the United Kingdom found in the Security Council that when Iraqi artillery and tanks were deployed in positions pointing towards and within range of Kuwait with ammunition at the ready, Iraq’s action was a threat to Kuwait and in breach of Article 2(4).

**Exceptions to the Prohibition**

As with every rule the prohibition to use armed force is not without exceptions. Although certain states and legal scholars have advocated several potentially questionable justifications for the lawful use of armed force, only two explicit exceptions exist in the Charter: (1) individual and collective self-defence, and (2) military enforcement measures authorised by the Security Council. Armed reprisals, i.e. military reactions to the other breached of international law, are forbidden under the Charter.

**Self-Defence**

States have an inherent right to self-defence. This mantra has been repeated countless times but it is still important to emphasise that self-defence has a clear meaning in international law. It can sometimes have very little connection with the not-so-rare emotional and political declarations by states that they have the right to defend themselves against various “inconveniences.” Self-defence in international law refers to the right to use armed force against an attack involving a significant amount of armed force. There is no doubt that self-defence is permissible if the armed attack was carried out by a state. Do states have similar rights if an attack is organised by a non-state actor? Opinions differ on this matter, but it would be unreasonable to argue that self-defence should be ruled out under any circumstances.
All legal instruments which have restricted or prohibited the use of armed force have explicitly or implicitly recognised the right to self-defence. Similarly, Article 51 of the Charter did not establish, but simply recognised, that right and provides that

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

Self-defence has generally been associated with inter-state relations, but after the events of 11 September 2001 it is necessary to ask whether the concept of self-defence can also include non-state actors. Article 51 does not itself specify that the right to self-defence only applies between states. This condition has been taken as implicit because self-defence is an exception to the general prohibition to use force, and Article 2(4), which contains that prohibition, speaks about states. Nonetheless, there is no reason why the right to self-defence should only be confined to inter-state relations because the violent acts by non-state actors can at times be comparable to those of states.

**Definition of “Armed Attack”**

Article 51 asserts explicitly that states can lawfully exercise self-defence “if an armed attack occurs.” The term “armed attack” was left undefined at the San Francisco Conference because it was considered
self-evident and sufficiently clear. However, this was a too optimistic judgment to make because it soon proved to be rather difficult to agree on a standard definition of “armed attack” as some nations preferred restrictive and others a liberal interpretation of Article 51. The Court has asserted that it is necessary to distinguish the gravest forms of armed force (those constituting armed attack) from other less grave forms. However, it does not explain which criteria should be used for making that distinction. It seems that the Court assesses the quantitative amount of armed force because it refers to “scale and effect,” distinguishing armed attacks from mere frontier incidents. To some extent, the Court has a point — a single shot across the border is technically a use of armed force and violation of Article 2(4), but it should not initiate self-defence. States should have a “thick skin” and limit their reaction to non-military measures in case of insignificant use of armed force. But as was noted by Sir Gerald Fitzmaurice, “there are frontier incidents and frontier incidents; some are trivial, some may be extremely grave.”

What may seem a minor border incident to Israel might appear to be an armed attack to Estonia. But, in the end, it is dangerous to exclude “small” armed attacks from “genuine” armed attacks. Such a distinction seems artificial and is difficult to apply during or immediately after the attack. It is more reasonable to say that the quantitative extent of armed force simply limits the choice of counter-measures on the basis of proportionality.

The Court has tried to mitigate the exclusion of the less grave forms of armed force by suggesting that separate but connected attacks could cumulatively constitute an armed attack. This was a surprising move because states and legal scholars have long been sceptical about the theory of accumulative events, and the Security Council has for years denied such a possibility. This theory may seem an appealing option, but it is full of uncertainties, e.g. who authoritatively assesses this accumulation and over what time period must this accumulation take place?

Can a non-state attack amount to an armed attack for the purposes of Article 51? If an attack by a non-state actor is comparable by scale and effect to an attack by regular armed forces it would be unreasonable to claim that no armed attack was carried out in the sense of Article 51. This is supported by the Definition of Aggression adopted by the
General Assembly that qualifies any act of aggression as, “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 the acts listed above, or its substantial involvement therein.”

Can non-state actors commit an armed attack for the purposes of Article 51? Traditional interpretation would say no, but the situation has changed since 11 September 2001 and subsequent state practice would suggest that it could be. Article 51 does not provide that the right to self-defence is only applicable if an armed attack originates from a state. Why should this right depend on the type of attacker? The Court has acknowledged this possibility, but makes it conditional on whether the attack is eventually attributable to a state (the latter is eventually responsible for the conduct of the non-state actor).

The infamous Caroline case that has long been taken as an authoritative source for the criteria of self-defence was about self-defence against a non-state actor (the British forces acted against a group of Americans who provided cross-border support to the Canadians who rebelled against the British). Immediately after the 11 September 2001 attacks, the Security Council, NATO and the Organization of American Sates explicitly confirmed the right to self-defence in the wake of these attacks — a position that was at least implicitly supported by the rest of the international community. True, reaffirmations of self-defence were found in the preamble of the Security Council’s resolutions, but this fact does not render these reaffirmations meaningless.

Anticipatory Self-Defence

Although Article 51 provides that states may exercise self-defence “if an armed attack occurs” there is still the debate about whether states may resort to self-defence also before an actual armed attack has occurred (anticipatory self-defence). According to most legal doctrines, the term “armed attack” refers to an actual armed attack. This is certainly the position under the Charter. The intent of the drafters and the purpose of the Charter was to minimise the unilateral use of armed force and to draw a line at the precise point of an armed attack — an event the
occurrence of which could be objectively established — which served the purpose of eliminating uncertainties.\textsuperscript{76} There is hardly any reason to suggest that the plain language of Article 51 does not convey precisely the meaning that was intended — actual armed attack. States seem to share that conclusion because when they claim anticipatory self-defence they do not refer to Article 51, but make vague references to the inherent right of self-defence. Hence, any counter argument must be based on customary law. Those in favour of anticipatory self-defence believe that the Charter has left previous, more relaxed, customary international law intact because Article 51 pledges that, “nothing in the [United Nations] Charter shall impair the inherent right of … self-defence.” Anticipatory self-defence was recognised in customary international law predating the Charter, but it is certainly not obvious that such a permissive rule has survived the adoption of the Charter. Although we cannot dismiss the fact that after 11 September 2001 more states and legal scholars have expressed willingness to accept a very narrowly circumscribed anticipatory self-defence,\textsuperscript{77} The Court has persistently dodged the question as to whether anticipatory self-defence is permissible.\textsuperscript{78}

Anticipatory self-defence takes two forms:\textsuperscript{79}

- Pre-emptive self-defence — military action taken against an imminent attack;

- Preventive self-defence — military action taken against a threat that has not yet materialised and that is uncertain or remote in time.

**Pre-emptive Self-Defence**

Pre-emptive self-defence has positive and negative aspects, but the latter prevail. The alleged imminence of an armed attack cannot usually be assessed by objective criteria, therefore any decision to take pre-emptive action would necessarily be left to the discretion of the state in question.
Such discretion involves a noteworthy potential of error which may have devastating results and a manifest risk of abuse, which can in turn seriously undermine the prohibition to use armed force. Moreover, the argument that an armed attack begins with planning, organisation and logistical preparation is not very persuasive, otherwise the armed attack would begin with pencil and paper rather than with bullets and bombs. The proponents of pre-emptive self-defence refer to the famous *Caroline* incident. The 1837 rebellion in Canada, then a British colony, found active support from American volunteers and private suppliers operating out of the border region in the United States. The steamship *Caroline* was involved in the supply of both men and materials to the rebel-occupied Navy Island in the Niagara River, which served as a base for the volunteers. The United States government knew about these activities, but did little to prevent them. The British forces had information that the Caroline was about to bring new supplies and the British forces crossed the border to the United States, seized the *Caroline*, set her on fire and cast the vessel adrift so that she fell to her destruction over Niagara Falls. Two citizens of the United States were shot dead aboard the *Caroline*, and one British officer was arrested and charged with murder and arson.\(^80\)

The British government justified its action as necessary for self-defence and self-preservation since the United States did not hinder the threatening activities originating from its territory. The British also cited the perceived future threats posed by the operations of the *Caroline*. The reply of the United States Secretary of State Daniel Webster to the British Government has long been regarded as a definitive statement of the right of self-defence in international law.\(^81\) Webster recognised that the right of self-defence did not depend upon the United Kingdom having already been the subject of an armed attack and accepted that there was a right of pre-emptive self-defence in the face of a threatening armed attack, provided that there was “a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.”\(^82\) The Webster formula has since then been frequently used by the proponents of pre-emptive self-defence.

Since 1945, only few states have invoked pre-emptive self-defence and only some additional states have “accepted” the doctrine by not actively criticising the states which have used such self-defence. For example, in
1967 there was a remarkable assembly of armed forces in the Sinai Peninsula near the southern frontier of Israel. When the United Nations peacekeeping forces were withdrawn from the buffer-zone between two states, Israel launched airstrikes against Egypt claiming that it had right to pre-emptive self-defence as the Egyptian forces had been deployed as part of an impending armed attack. However, in the Security Council other states saw Israel’s first strike as a clear proof that Israel was the aggressor, not Egypt and Syria, and even the delegations that were more sympathetic towards Israel (the United Kingdom and the United States), refrained from any discussion about the permissibility of pre-emptive self-defence.

However, an armed attack may be so imminent and certain (it is not a question of if, but when) that it would be unreasonable to demand that the soon-to-be victim state should wait until the moment when the first missiles hit their targets. Even though the author does not support the general right to pre-emptive self-defence, if a state or non-state actor has taken decisive and irreversible steps to begin an actual armed attack the targeted state may use interceptive self-defence. These are exceptional cases. A sound mind would not require that the state waits for an inevitable attack to happen before acting. The Charter should not become a suicide pact.

**Preventive Self-Defence**

In September 2002, President George W. Bush submitted to the Congress a report on the national security strategy that asserted, among other things, an evolving right to use force preventively (despite using the word “preemptive,” the strategy is actually talking about preventive self-defence) against the threat originating from the “rogue states” and terrorists possessing weapons of mass destruction. The report claims that the United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To
forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.

This statement sparked a hot debate among governments and legal scholars. Although preventive self-defence was accepted or even adopted by some states (e.g. Australia, Japan, France India, Iran), the “Bush doctrine” was overwhelmingly criticised. In fact, the United States narrowed its claims somewhat later. Preventive self-defence is clearly unlawful under international law. There is nothing in contemporary legal norms and general state or court practice that would suggest that such a broad, even overly broad, construction of an armed attack is a part of current customary law. Such a precautionary approach would be alarming, undesirable and wide-open to mistakes or abuse, and it is difficult to understand how this would contribute to global stability and ensuring international peace and security. The proponents are perhaps inspired by (international) environmental law which requires that if there may be negative effects one has to take precautionary measures, e.g. if a state is building a hydro-plant on a river and there are indications that the project may have harmful effect on the environment a state has to act to avoid negative effects. Now, if one would apply the same principle to self-defence, the rule would read “in the case of uncertainty, strike.” States simply may not use armed force when an armed attack is merely a hypothetical possibility.

In 1981, Israel exercised preventive self-defence when it attacked a nuclear reactor in Iraq. Israel explained in public statements and in the Security Council that it had been forced to defend itself against the dangers arising from the construction of a nuclear reactor in Iraq — once operational, the reactor could contribute to the development of nuclear weapons, which Iraq would not hesitate to use against Israel. The latter argued that the nuclear reactor was to become a critical problem in a matter of weeks and it decided to strike before the nuclear reactor became an immediate and greater menace to Israel. So, Israel did not
react to an actual armed attack, but instead to a potential and still remote threat. All members of the Security Council disagreed with the Israeli interpretation of Article 51 and supported without reservation the resolution that condemned, “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”\textsuperscript{93} True, the Security Council did not reject preventive self-defence as such, but more likely concluded that Israel failed to demonstrate the imminence of an armed attack from Iraq.\textsuperscript{94}

**Criteria for Exercising Self-Defence**

Self-defence has to be immediate, necessary and proportional. These well-known criteria are also applicable if self-defence is exercised against non-state actors. However, there are a few nuances that should be taken into consideration. Overall, some flexibility is necessary in order not to render self-defence a mere theoretical option.\textsuperscript{95} When states react in self-defence it must happen immediately and without undue delay after the armed attack — otherwise the military operation is simply an armed reprisal. When is immediate, when is late? To begin with, we cannot compare personal self-defence in national law to state self-defence in international law. Depending on circumstances it may take hours or even days before a state is ready to exercise self-defence. During the Falklands War several states accused the United Kingdom of disregarding the immediacy requirement because the first British units reached the islands in about three weeks.\textsuperscript{96} But the critics failed to take into account the geographical aspect — the Falkland Islands were almost 12,700 kilometres from the British Isles which made this “delay” reasonable. The geographical origin of the attacks carried out by (terrorist) non-state actors is not immediately known, as is usually the case in inter-state conflicts. For that reason, gathering information and identifying the perpetrators (somewhere abroad) prolongs the reasonable time period between the armed attack and the implementation of self-defence.

The criterion of necessity demands that there be no feasible alternative to the use of armed force. It is reasonable to ask the state to consider peaceful means of settling disputes if the armed attack was an isolated or
insignificant episode. But in the event of an extensive attack the state may use armed force more freely as a first resort.\textsuperscript{97} A judgment on necessity is certainly subjective, but this subjectivity does not equate to wanton discretion.

Assessing proportionality is not an exact science either. The best results are achieved after conflicts have ceased when it is possible to calmly and comprehensively evaluate the circumstances. The purpose of self-defence is to repel and end the attack, but this does not mean that the military operation must stop at the border,\textsuperscript{98} although this does not justify the full occupation of the state either. Regrettably, proportionality is not the definitive criterion for assessing the legality of the armed force used in self-defence. The armed conflict may escalate (the aggressor renews its offensive operations) and in the end, the use of armed force reaches the level which is disproportional to the initial attack. Once war is raging the exercise of self-defence may bring about the destruction of the aggressor's armed forces.\textsuperscript{99}

\textbf{Collective Self-Defence}

States may collectively exercise a right that they may also individually exercise. Collective self-defence has received surprisingly little attention. Most principles and criteria are equally applicable in both cases, but collective self-defence is more complex than individual self-defence and deserves closer examination.

\textit{First}, exercising collective self-defence requires that (1) a state identifies itself as the victim of an armed attack\textsuperscript{100} and (2) a state issues a request for assistance.\textsuperscript{101} The first requirement is implicitly applicable also in the event of individual self-defence and indicates that there was an armed attack that triggered the right to self-defence. The second requirement is supposed to prevent situations where other states intervene against the will of the victim state. Without this requirement an armed attack can become an excuse to intervene in other states for less honourable reasons. After 11 September 2001 the United States informed the Security Council that it was the victim of armed attacks and from 7 October 2001 they would be exercising individual and collective self-
defence in Afghanistan.\(^{102}\) This opened the way for collective self-defence and for the participation of other states. 

Secondly, collective self-defence is exercised for the benefit of the victim state (no need for some degree of “self”).\(^ {103}\) Therefore the range of appropriate participants is not limited to those who were victims along with the state issuing a request for assistance. This is most reasonable and better maintains international peace and security: a potential aggressor has to consider the possibility that all states may, from the moment of the first armed attack, participate in a multinational military operation against it (spontaneously or under a prior agreement\(^ {104}\)). The United Kingdom was not a direct victim of the 11 September 2001 attacks (Article 5 of the Washington Treaty creates a legal fiction that all members of NATO were victims of these attacks), but was entitled to participate in collective self-defence with the United States.

### Role of the Security Council

The drafters of the Charter considered the right of self-defence a temporary right that a state may exercise “until the Security Council has taken measures necessary to maintain international peace and security” — states had to resist the aggressor until the international community took over. This idealism remained on paper, but it does not mean that provisions concerning the role of the Security Council in connection with self-defence are completely meaningless. States are obliged to inform the Security Council immediately of the measures taken in the exercise of self-defence. This is necessary so that the Security Council, who has “primary responsibility for the maintenance of international peace and security,”\(^ {105}\) is aware of what is happening in the world and why states are using armed force. What happens if a state fails to respect this obligation? This is a procedural obligation and failure to observe it does not affect the legality of self-defence.\(^ {106}\) But at the same time, “the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence.”\(^ {107}\) The measures taken by states do not affect in any way the authority and responsibility of the Security Council to take at any time such action as it
deems necessary in order to maintain or restore international peace and security. The Security Council has competency to evaluate whether states are exercising legitimate self-defence, e.g. when South Africa intervened militarily in Angola (1966–1989), the Security Council repeatedly rejected the former’s arguments that its military operations were self-defence.\textsuperscript{108} Equally, the Security Council may decide that it takes over the responsibility for resolving the situation. As mentioned above, the right of self-defence is terminated or at least suspended when the Security Council takes necessary measures. But what can one expect from the Security Council? Is it enough if the Security Council demands that the parties to the conflict cease hostilities or imposes economic sanctions that have no effect on the aggressor? There is no consensus about this among states. While non-victim states are ready to accept modest measures,\textsuperscript{109} victim states have emphasised that they are ready to relinquish their right to self-defence only if the Security Council is effectively handling the conflict.\textsuperscript{110} Indeed, we cannot expect the states to give up their inherent right of self-defence if the Security Council does not provide alternative measures of comparable or better effect.

\textbf{Military Enforcement Measures}

The collective security system is based on the postulate that an institution representing the international community may take an authoritative decision to use enforcement measures against a member of the international community that has committed an aggression or other violations of international law. The contemporary collective security system is headed by the Security Council upon whom states have conferred “primary responsibility for the maintenance of international peace and security.”\textsuperscript{111} Although it is composed of only 15 member states\textsuperscript{112} the Security Council acts on behalf of all member states when carrying out its duties in connection with maintenance of international peace and security.\textsuperscript{113} Despite being a political organ whose decisions are, and also have every right to be, linked to political motivations not necessarily congruent with legal considerations, the Security Council’s actions have legal consequences. It is the one organ of the United
Nations that can impose legally binding obligations and non-military or military sanctions on the member states. The Security Council, a constantly attentive executive organ, has a broad range of considerable means at its disposal under Chapter VII of the Charter to fulfil its responsibility, starting with diplomatic or economic sanctions and ending with military measures. These are often called collective enforcement measures.

**Determination of a Situation**

The Security Council cannot employ enforcement measures at any given moment. It is supposed to follow certain procedures in order to establish that conditions for the use of such measures are satisfied — the primary condition is the existence of a threat to the peace, a breach of the peace, or an act of aggression. Once a positive determination has been made, the door is automatically opened to enforcement measures of a non-military or military nature. Nevertheless, this is a procedural rather than substantive limitation, basically demanding that the Security Council as a collective organ reaches a consensus before imposing enforcement measures. Yet such a limitation may equally help to ensure consistency in the Security Council’s practices if this determination is not made on the basis of political expediency but after a genuine assessment of the situation and comparison of the latter with other similar situations. The practice shows that the Security Council has not always explicitly determined that a threat to the peace, a breach of the peace, or an act of aggression existed before imposing sanctions. In such cases we have to assume an implied determination. A few observations are called for. First, there is no need to expressly refer to Article 39 when making such a determination. Secondly, a determination is not necessary in cases of resolutions that follow from previous connected resolutions that did contain a determination. Third, in terms of time the validity of such a determination does not expire automatically — it remains valid until the Security Council decides otherwise, even if there is a change in the situation on the ground.

The discretionary power of the Security Council is very broad in terms of deciding both when and how to act. At the San Francisco Conference
various proposals were made that the regulations should be more detailed with regard to the collective security system but, in the end, the present wording was preferred. It was expressly stated that the lack of more specific criteria was necessary if the Security Council were to be allowed to decide how to act on a case-by-case basis. A determination is essentially a judgment based on factual findings and the weighing up of political considerations that cannot be measured by legal criteria. The former usually prevails. The political nature of determinations is further underlined by the fact that permanent members of the Security Council have the power of veto. Nonetheless, once it has made a determination this determination is conclusive and all member states must accept the Security Council’s verdict even if they do not share its opinion. The Security Council is theoretically obliged to make a determination and subsequently take any enforcement measures. But in reality it operates selectively and with much discretion. The “threat to peace” is the most flexible and dynamic of the three terms in Article 39 and it is here that the Security Council enjoys the broadest discretion. It is equally true that within this discretion lies the possibility of subjective political judgments. In fact, we can conclude rather bluntly that a threat to the peace is whatever the Security Council says is a threat to the peace. Obviously, here one should distinguish such discretion from the necessity to sufficiently explain to states the characteristics of a specific threat to the peace. While this may not be necessary in the event of more traditional threats (e.g. preparing an armed attack against a state), it may well be vital if the Security Council is referencing a continuous state of affairs (e.g. the inability to demonstrate the denunciation of terrorism) or an abstract phenomenon (e.g. terrorism). A threat to the peace does not have to be linked to any breach of international law. In other words, a threat to the peace is not necessarily a state of facts, it can merely be a state of mind; and the mind that counts is that of the Security Council. When examining Security Council practice, one notices that very different situations may qualify as a threat to the peace, e.g. non-international armed conflicts, serious violations of human rights, violations of the democratic principle, violations of the law of armed conflict, terrorism as well as the proliferation of nuclear, chemical and biological weapons.
If we were to simplify a little, the “breach of the peace” is mostly manifested in the form of an armed attack. The Security Council has never determined that a situation is an “act of aggression” (apparently too strong term for politicians) so there is no precedent to comment on.

Authorising the Use of Armed Force

Once the situation is determined to constitute a threat to the peace, a breach of the peace, or an act of aggression, the Security Council may authorise measures it deems necessary to maintain or restore international peace and security. Relevant decisions depend on the existence of political consensus among the member states in the Security Council (most importantly among the permanent members), which means that authorisations are not necessarily easy to obtain. During the Cold War the system was basically dead-locked and the Security Council did not fully employ the collective security system. In the Korean War the Security Council did determine that the situation constituted a breach of the peace, but did not authorise use of armed force (it recommended that states provided military forces and other assistance, which looked more like an exercise of collective self-defence).130 Ideally, the Security Council should start with non-military measures under Article 41, but if the Security Council considers that such measures would be inadequate or have proved to be inadequate it may straightaway authorise military measures. Article 42 gives the Security Council the right, “to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” The Security Council does not use such cumbersome wording, but it has adopted a practice of authorising “all means necessary” or “all necessary measures,” which logically include the use of armed force.131 The authorisation are often accompanied with conditions, e.g. in 2011, the Security Council authorised states, “to take all necessary measures … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”132 States (in reality NATO) were allowed to use armed force only to protect civilians and civilian populated areas (no engagement with Libyan armed
forces for other purposes) and were effectively required to employ air force or navy forces for their operations (no ground forces). Some further explanations are needed. *First*, the Security Council is not in command of United Nations standing armed forces, although they were foreseen in the Charter. Therefore the Security Council relies on the hope that there are states, which for some reason wish to participate in collective military operations. The Security Council may not compel states contribute armed forces — the authorisation is more of a recommendation or justification, not a command, to use armed force. *Secondly*, the authorisation is often executed by a regional organisation, e.g. NATO. The Charter actually encourages the Security Council to utilise, “regional arrangements or agencies for enforcement action under its authority.” It should be noted that although the Charter recognises the importance of regional organisations and their involvement resolving conflicts, such organisation do not have the right to authorise the use of armed force — they may only act according to the authorisation given by the Security Council. *Third*, the determination of a situation as a threat to the peace, a breach of the peace, or an act of aggression is not enough. The Security Council must issue a separate and explicit authorisation to use armed force. When the NATO started its bombing campaign in the Federal Republic of Yugoslavia in March 1999, they claimed that they had an implicit authorisation to use armed force because the Security Council had twice determined that the situation in Kosovo constituted a threat to peace and security in the region. But such determinations are not enough. No state or regional organisation has the right to guess what the Security Council had in mind when the resolution was adopted or what the Security Council might do in the future. *Fourth*, the target state is barred from legally invoking the right of self-defence and later claim reparations for damage caused during the collective security system operations. *Fifth*, states that find themselves confronted with special economic problems arising from carrying out the enforcement measures may consult with the Security Council to find a solution of those problems. The practice has been unsatisfactory. During the Iraq-Kuwait conflict numerous states applied for assistance, but no state was exempted from participation in the sanctions although states were promised assistance from the international community. Jordan, for
example, resumed its oil imports from Iraq due to unsatisfactory reaction from the United Nations.

**Conclusion**

The United Nations Charter is still a valid and relevant instrument to assess the legality of the use of armed force. The conservative interpretations of its provisions have significantly contributed to a better global security environment. Article 2(4) enacts a general prohibition to use armed force for aggressive purposes and the prohibition is not limited to uses against the territorial integrity or political independence of states. Article 51 confirms the right of self-defence, which is allowed if an actual armed attack has occurred against a state. An armed attack must not necessarily originate from a state. If the attack by a non-state actor is comparable by scale and effect to an attack by state’s armed forces it would be unreasonable to claim that states do not have the right to exercise self-defence because the attacker was a non-state actor. Different forms of anticipatory self-defence are not compatible with Article 51, and open to mistakes and abuses, which have also occurred in practice. But states may exceptionally exercise interceptive self-defence before an actual armed attack if another state or non-state actor has taken decisive and irreversible steps to begin an armed attack. A reasonable government would not require that the state waits for an inevitable attack to happen before acting. The Charter should not become a suicide pact. The Security Council is a guardian of international peace and security and for that purpose the Security Council has the right to authorise the use of armed force, if necessary, to maintain or restore international peace and security. The actions through the Security Council are preferable because they are based on the collective decisions involving the international community. True, the effectiveness of the collective security system is inevitably dependent on the political consensus in the Security Council and the reality proves that the latter may be fiercely divided, which leaves conflicts unresolved and causes more suffering.
1 Charter of the United Nations, preamble.

2 Charter of the United Nations, Article 1(1).


6 Covenant of the League of Nations, Articles 10, 16.


10 Charter of the United Nations (1945), Article 2(3).

11 Louis Henkin, International Law: Politics, Values and Functions (Dordrecht: Martinus Nijhoff Publisher, 1990), 146.


14 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970. The resolution is not legally binding instrument, but it is still considered an authoritative
source reflecting the opinion of the members of the United Nations (the resolution was adopted by consensus). See also Ian Sinclair, “The Significance of the Friendly Relations Declaration,” in The United Nations and the Principles of International Law (London: Routledge, 1994), 1–32.


16 Charter of the United Nations (1945), Article 4(1).


18 Customary international law is generated by decentralised factual conduct of states. When claiming that a customary norm exists, the claimant must show (1) constant, uniform and general practice and (2) conviction that particular practice reflects a legal obligation. All states are bound by customary law (even if they did not contribute to the process), except persistent objectors (states that consistently protested against the new emerging customary norm).

19 Military and Paramilitary Activities in and against Nicaragua, supra note 12, paras 188–190.

20 Ibid, paras 175–177.

21 Ibid, para 181.

22 See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136, para 87.

23 The Court has regarded the prohibition of the use of force as being “a conspicuous example of a rule of international law having the character of ius cogens.” Ibid, para 190.

See, for example, Barcelona Traction, Light and Power Company Limited (Belgium v Spain), Second Phase, Judgment, ICJ Reports (1970) 3, paras 34–35.


Article 1.

For similar reasons, the post-Second World War Geneva Conventions (1949) and later instruments adopted the term “armed conflict” instead of the term “war.”


38 E.g. duty to refrain from the threat or use of force to violate the existing international boundaries or as a means of solving international disputes, duty to refrain from acts of reprisal involving the use of force, duty to refrain from any forcible action which deprives peoples from their right to self-determination.


40 Charter of the United Nations, Article 2(7).


42 The Court has also taken a permissive position on this question. See, for example, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports (2005) 168, paras 92–105.


48 *Corfu Channel* (United Kingdom v. Albania), Merits, ICJ Reports (1949) 4, 35.
49 Charter of the United Nations, Article 1(1).
51 This position was explicitly supported by the United States delegation at San Francisco Conference. United Nations Conference on International Organisation Documents (1945), Vol 6, 335.
53 Draft Declaration on Rights and Duties of States, GA Res 375 (IV), 6 December 1949, Annex, Article 9; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131 (XX), 12 December 1965, para 1; Friendly Relations Declaration, Annex 1, Section 1; Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA 42/22, 17 November 1987, Annex, para 1.1.
56 *Ibid*, para 47.
57 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 12, para 227.

59 To be precise, there is a third, temporary transitional exception against former enemy states (any state which during the Second World War had been an enemy of any signatory of the Charter), but this has been obsolete for decades. See Charter of the United Nations, Articles 53, 107.

60 *Corfu Channel*, supra note 48, 35.

61 Although the Kellogg-Briand Pact did not explicitly mention self-defence, its legality was reaffirmed during the negotiations.


66 *Oil Platforms*, supra note 64, para 64.


69 Definition of Aggression, Article 3(g).

78 Military and Paramilitary Activities in and against Nicaragua, supra note 12, para 194; Armed Activities on the Territory of the Congo, supra note 42, para 143.
79 Different states, institutions and legal scholars use different terms for more or less the same content.
82 29 British Foreign and State Papers (1840–1841), 1138.

85 See also Dinstein, *War, Aggression and Self-Defence*, *supra* note 35, 203–205.


92 Alexandrov, *Self-Defense against the Use of Force in International Law*, *supra* note 83,


95 The criteria are not included in Article 51, but are derived from customary international law and must be assessed based on generally accepted state practice. *Military and Paramilitary Activities in and against Nicaragua, supra* note 12, para 194, 237; *Oil Platforms, supra* note 64, paras 43, 76.

96 Cassese, “Article 51,” *supra* note 75, 775.


Dinstein, War, Aggression and Self-Defence, supra note 35, 262.

Military and Paramilitary Activities in and against Nicaragua, supra note 12, para 191.

Ibid, 199; Oil Platforms, supra note 64, para 51.


Military and Paramilitary Activities in and against Nicaragua, supra note 12, paras 195–196.


Charter of the United Nations, Article 24(1).

However, the Court hinted indirectly that the state which fails to inform the Security Council loses the right to justify its actions as self-defence. Military and Paramilitary Activities in and against Nicaragua, supra note 12, paras 235–237; Armed Activities on the Territory of the Congo, supra note 42, paras 145–147.

Military and Paramilitary Activities in and against Nicaragua, supra note 12, paras 200, 235.


E.g. UN Doc S/PV.2963 (1990) (Malaysia in 1990)


Charter of the United Nations, Article 24(1).

Altogether there are 193 member states in the United Nations.
Charter of the United Nations, Article 24(1).

Ibid, Article 25. The other organs may legally bind the member states only in certain administrative matters within the United Nations, for example, the General Assembly adopts the budget and determines the amount every member states has to contribute.

Ibid, Article 41.

Ibid, Article 42.

Ibid, Article 39.


Charter of the United Nations, Article 27(3).


E.g. SC Res 1132, 8 October 1997.


E.g. SC Res 1267, 15 October 1999.


SC Res 84, 7 July 1950.


133 Charter of the United Nations, Article 43.

134 When the Security Council authorised the use of armed force to expel Iraq from Kuwait in 1990, the resolution read “[the Security Council] requests all States to provide appropriate support for the actions undertaken [for that purpose]” (emphasis added). SC Res 678, 29 November 1990 (Iraq).

135 The whole Chapter VIII of the Charter is dedicated to “regional arrangements.”

136 Charter of the United Nations, Article 53.


140 Charter of the United Nations, Article 50.


142 E.g. UN Doc S/21786 (1990).