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Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51

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(p. 1397) Article 51

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 the 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.

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(p. 1399) A. Evolution and Significance of the Right of Self-Defence*

1 The development of the right of self-defence should be viewed against the background of the development of international law towards the prohibition of war, and, eventually, of the use of force. Until the beginning of the twentieth century the right of self-defence was of only modest significance.¹ Public international law permitted States to wage war freely,² so that no justification for doing so was needed. When, in spite of this, States explicitly invoked their right of self-defence, their purpose was merely political.³ Even so, the right of self-defence played a certain role as a legal justification with regard to hostilities not occurring in a state of war, since the use of force in times of peace was in fact restricted by international law.⁴ The content and scope of the right of self-defence were relatively unclear, however, and extended well into the sphere of self-help.⁵

2 At the beginning of the twentieth century, when the freedom to resort to war became more and more restricted,⁶ the right of self-defence gained in significance. This development first culminated in the conclusion of the Briand-Kellogg Pact in 1928. The general prohibition of war laid down in Art. I of the Pact was subject only to the reservation of the right of self-defence.⁷ Consequently, it was solely in the exercise of the right of self-defence that war could still be lawful. Various incidents and legal developments subsequent to the entry into force of the UN Charter led to a further increase in the importance of the right of self-defence. Today, the right of individual or collective self-defence is invoked with regard to almost every unilateral use of military force.⁸

3 The prohibition of the use of force embodied in Art. 2 (4) not only proscribes war, but any use or threat of force. Apart from the now obsolete clauses concerning the former enemy States,⁹ the UN Charter contains only two exceptions to the prohibition of force, namely SC enforcement actions pursuant to Chapter VII, and the right to individual and collective self-defence laid down in Art. 51. International legal practice since 1945, (p. 1400) contrary to the intentions of the authors of the Charter, has continued to see a significant amount of unilateral use of force by States. Yet in this respect the Charter provides in Art. 51 for a regulation which allows individual States the threat or use of force, in principle, only under the conditions stipulated therein.¹⁰ The right of self-defence laid down in Art. 51 of the UN Charter has therefore become the pivotal point upon which disputes concerning the lawfulness of the use of force in interstate relations usually concentrate. Such disputes not only raise questions of legal interpretation, but even more often questions of fact, as shown by several decisions of the ICJ.¹¹

4 The interpretation and the development of Art. 51, like the law on the use of force in general, remain subject to the applicable rules of international law. The UN Charter is to be interpreted according to the general rules on treaty interpretation which are codified in Arts 31–33 VCLT, and which also reflect customary international law, taking duly into account the character of the Charter as the constitutive document for the organization of the international community of States.¹² The general rule on treaty interpretation of Art. 31 (3) (b) VCLT requires in particular that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' and any 'established practice of the organisation' (Art. 2 (f) VCLT) as a reflection of customary international law) be taken into account. In principle, the rules on treaty interpretation and on the sources of international law do not exclude the possibility that Art. 51 is reinterpreted, including on the basis of subsequent practice.¹³ Theoretically it is even possible that an additional exception to the general prohibition of the use of force could develop alongside Art. 51 by way of superseding customary international law.¹⁴ In view, however, of the fundamental importance of the right to self-defence for the Charter system of collective security, the conditions for the recognition of any significant reinterpretation of, or superseding exception to, Art. 51 are strict. This is true regardless of whether the Charter is seen as possessing a special constitutional status, or as only having the quality of an ordinary treaty. It is therefore not sufficient that one or

more 'incidents' lead a State or a group of States to assert a certain reinterpretation of Art. 51, or to postulate another exception to the general prohibition of the use of force (Art. 2 (4)), even if such assertions are not immediately, clearly, or broadly opposed by a number of other States. It would rather be necessary that such assertions (p. 1401) of a reinterpretation or a new exception are 'generally accepted' or that they constitute an 'established practice'.

5 A significant amount of current disagreement over the proper interpretation of Art. 51, both among States and among commentators, can ultimately be traced to underlying differences of opinion over the interpretation and application of the rules on the sources of international law, as well as to different assessments of what the respective historical situation (with its characteristic threat scenarios) requires.¹⁵ If properly identified, such underlying differences of opinion should not prevent an appropriate interpretation of Art. 51.

B. Content and Scope

I. Relation of Article 51 to Article 2 (4)

6 Arts 51 and 2 (4) do not exactly correspond to one another in scope, ie not every use of force contrary to Art. 2 (4) may be responded to with armed self-defence. The UN Charter did not intend to exclude self-defence entirely, but has restricted its scope considerably. A comparison of the different terms used in the two provisions illustrates that, remaining uncertainties apart, 'armed attack' is a narrower notion than 'threat or use of force'.¹⁶ If Art. 51 is thus read in connection with Art. 2(4), the—at first sight—counter-intuitive conclusion is that any State which is affected by another State's unlawful use of force that does not reach the threshold of an 'armed attack', is bound, if not exactly to endure the violation, at least to respond only by means falling short of the use of cross-border force. One possible means of defence is, of course, the use of force by a State on its own territory. While such means may sometimes not be fully effective, this result is intended by the Charter, since the unilateral use of force is meant to be excluded as far as it is bearable for States, in view of the typical dangers of escalation which are connected with mutual uses of armed force. Until an armed attack occurs, States are expected to renounce forcible self-defence. Because of the pre-eminent position of the SC within the Charter system of collective security, the affected State can in that situation merely call upon the SC to qualify the violations of Art. 2 (4) as constituting a breach of the peace and to decide on measures under Chapter VII. Only if and when the prohibited use of force rises to an armed attack can the State concerned unilaterally resort to forcible measures for its defence. But even this authority is limited in two ways: first, the State acting in self-defence must observe the principle of 'proportionality';¹⁷ secondly, it has to report immediately to the SC the measures taken, and it has to discontinue (p. 1402) them as soon as the latter has itself taken the measures necessary for the maintenance of international peace.

7 The view of the present authors that there exists a gap between Arts 2 (4) and 51 not only corresponds to the prevailing view in international legal writings¹⁸ but has also been confirmed by the ICJ's *Nicaragua*¹⁹ and *Oil Platforms*²⁰ judgments, as well as, indirectly, in the *Congo v Uganda* decision.²¹ It clearly follows from the ICJ's observations that not every use of force is necessarily to be considered an armed attack.²²

8 This conclusion has, as a matter of policy, given rise to objections, for it means that there is not always effective protection against States violating the prohibition of the use of force, as long as they do not resort to an armed attack. Therefore, critics in international legal doctrine have made efforts to deny or to fill the lacuna existing between Arts 2 (4) and 51. Some do not regard Art. 51 as being more restrictive than the term 'use of force' in Art. 2 (4)²³ and others would permit 'proportionate defensive measures' against any smaller-scale 'unlawful use of force "short of" an armed attack ("agression armée") within the meaning of Article 51'.²⁴ Such approaches may at first sight appear more satisfactory policywise than the prevailing view. It is true that a State which has violated the prohibition of the use of force has at least provided the primary cause for the

response. And it must be admitted that if States are bound to endure acts of force that do not reach the intensity of an armed attack, they may remain devoid of fully effective protection until the SC has taken remedial measures, which may not always come about. These considerations do not, however, override the concern which underlies the prevailing view that the danger of escalation which is inherent in most forms of transboundary uses of force justifies the rule that States deal with small-scale uses of force against them by using force on their own territory or by using non-violent means, and thus in a way which does not involve the use of cross-border force. The concern that an escalation, or even a full-scale war, could be the consequence of a State responding in self-defence to slight uses of armed force, such as a small frontier incident, cannot be dispelled by (p. 1403) responding that force used in self-defence must never be disproportionate²⁵ since the principle of proportionality is not determinate enough to provide sufficiently clear guidance in such situations. The fact that the Charter has not explicitly banned uses of force on a smaller scale does not mean that self-defence against such acts is permissible. On the contrary, it can be claimed equally well that, by deliberately not pronouncing upon the small-scale use of force in the context of self-defence and by allowing self-defence only in response to an armed attack, the UN Charter has expressed the position that no small-scale forcible self-defence is permissible against small-scale uses of force. Thus the critique of the prevailing position merely leads back to the question of whether, and to what extent, there is a broader general right of self-defence apart from Art. 51, but it does not provide an independent foundation for a right to 'small-scale self-defence'.

II. Article 51 and the 'Inherent' Right of Self-Defence

9 What has been shown so far is only that Arts 2 (4) and 51 do not entirely coincide in their scope. But whether the UN Charter really does allow for forcible self-defence only in the case of an armed attack also depends on whether and to what extent a general right of self-defence exists apart from Art. 51, and whether Art. 51 is intended to abolish that right, or at least to restrict it as far as possible. This point is the subject of a long-standing controversy.

10 The prevailing view considers Art. 51 to exclude any self-defence, other than that in response to an armed attack, referring, above all, to the purpose of the UN Charter, ie to restrict as far as possible the use of force by individual States.²⁶ According to this view, the designation in Art. 51 of the right of self-defence as 'inherent' simply means that the right is also vested in States other than UN members, and that UN members may give assistance to a non-member falling victim to an armed attack.²⁷ This position is supported, though by no means unambiguously, by most commentators²⁸ in that it restricts the right of self-defence to cases in which 'an armed attack occurs against (p. 1404) a Member of the United Nations'. The view that Art. 51 has superseded any previous customary right of self-defence does not, however, exclude that subsequent practice concerning the scope and the limits of the right of self-defence needs to be taken into account when interpreting the provision.²⁹

11 Another approach regards the customary right to self-defence as not being affected by Art. 51, but rather as having only received a particular emphasis, in a declaratory manner, for the case of an armed attack.³⁰ Above all, this approach is intended to serve as a justification for certain traditional forms of self-defence, even of self-help, in particular cases. For example, the protection of the lives and property of a State's own nationals abroad,³¹ and even the forcible protection of certain economic interests in a foreign country,³² have been claimed to be justified on the grounds of self-defence not prohibited by Art. 51. The latter case aptly illustrates that this view of Art. 51 is highly questionable.

12 The content and scope of a customary right of self-defence are unclear and could extend far into the spheres of self-help in such a way that its continuing existence would, to a considerable extent, reintroduce the unilateral use of force by States, the far-reaching abolition of which is intended by the UN Charter.

13 The interpretation of Art. 51 as being an exclusive regulation of the right of self-defence, has been confirmed by State practice³³ and by the ICJ. In its *Nicaragua* judgment the ICJ proceeded

from the assumption that the existence of an armed attack is a *conditio sine qua non*³⁴ for the exercise of the right to individual and collective self-defence. The Court held as follows:

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this.³⁵...

The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack’.³⁶

(p. 1405) The ICJ has reaffirmed this view in its *Oil Platforms* judgment.³⁷ It follows that the right to self-defence cannot be asserted against acts which do not reach the threshold of an armed attack. With regard to the requirement of an ‘armed attack’, the ICJ considered in *Nicaragua*³⁸ and in *Oil Platforms*³⁹ that Art. 51 and the right of self-defence under customary international law coincide.⁴⁰ Since it was not relevant for its decision in the *Nicaragua* Case, the ICJ left the questions open as to which countermeasures a State that is affected by an intervention not constituting an ‘armed attack’ may lawfully resort to, and whether those countermeasures may include the use of force.⁴¹ Despite the uncertainties created by this evasive language, the formulations by the ICJ as a whole imply the rejection of a right of self-defence extending far into the purview of self-help. It should be noted, however, that Judge *Simma*, in his Separate Opinion in the *Oil Platforms* Case, has expressed the view that such forcible defensive countermeasures would be permissible: According to him

... there are two levels to be distinguished: there is, first, the level of ‘armed attacks’ in the substantial, massive sense of amounting to ‘une agression armée’, to quote the French authentic text of Article 51. Against such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an ‘armed attack’ within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. *Nicaragua*) and bound to necessity, proportionality and immediacy in time in a particularly strict way.⁴²

While Judge *Simma*’s position has found some support among commentators, the prevailing view, in particular among States, does not accept this position.⁴³

14 Since the right of self-defence embodied in Art. 51 is restricted to the case of an armed attack, and in the absence of further exceptions to Art. 2 (4) allowing for the use of force by individual States,⁴⁴ the exercise of force for the enforcement of a vested right (p. 1406) or for the purpose of ending another State’s unlawful behaviour is prohibited.⁴⁵ Not even arbitral awards or judgments by the ICJ⁴⁶ may be enforced by means of forcible self-help. It is of particular importance that countermeasures (formerly reprisals), once the most frequently used form of force, are today likewise only admissible in so far as they do not involve the use of armed force.⁴⁷

15 For example, the firing of 23 cruise missiles, on 26 June 1993, by US warships in the Red Sea and the Persian Gulf upon Iraqi intelligence headquarters in Baghdad, in response to an unsuccessful Iraqi attempt to murder former US President Bush during his visit to Kuwait from 14 to 16 April 1993, could not be justified as an act of self-defence, as US President Clinton claimed on the evening of the raid.⁴⁸ Even if the attempted assassination of former President Bush were to be

qualified as an armed attack, it is quite clear that in this situation, such an armed attack no longer existed more than two months later, nor did the threat of such an attack. On 27 June 1993, Madeleine Albright, US Permanent Representative to the UN also referred to Art. 51 to justify the raid, but added that the raid 'was designed to damage the terrorist infrastructure and deter further acts of aggression against the United States'.⁴⁹ This suggests that the raid was intended to be a countermeasure but as such it was not compatible with the existing law governing the use of military force.⁵⁰

III. The Notion of 'Armed Attack'

1. Significance

16 The term 'armed attack' (French: 'agression armée') represents the key notion of the concept of self-defence pursuant to Art. 51. Its interpretation decides how far unilateral use of force is still admissible and is of utmost significance for the effectiveness of the rules of international law on war prevention. The more clear-cut and unambiguous the definition of an 'armed attack', the more plausible attempts by States to justify illicit uses (p. 1407) of force as self-defence can be successfully discredited. In addition, since the facts which give rise to an allegation that an armed attack has occurred are mostly disputed⁵¹ it is also important to note that the alleged victim State has the burden of proving the existence of an armed attack if it wishes to justify any use of force in self-defence.⁵²

2. Definition

17 The UN Charter uses the terms 'attack' and 'aggression' in Arts 1 (1), 39, 51, and 53, albeit without defining them precisely. Following futile attempts during the League of Nations era, the UN has been unsuccessfully striving since 1950, first in the ILC, then in four subsequent Special Committees of the GA, for a definition of these terms.⁵³ The adoption of GA Res 3314 (XXIX) (14 December 1974)⁵⁴ constituted a significant indirect contribution to this effort. The 'Definition of Aggression' contained therein, however, apart from constituting a mere recommendation, formally only claims to specify the notion of 'act of aggression' as it is embodied in Art. 39 of the Charter, and not that of 'armed attack' as used in Art. 51.⁵⁵ Pursuant to paras 2 and 4 of the Preamble, as well as according to Art. 6, the Definition does not contain an interpretation of the right of self-defence in response to an armed attack.⁵⁶ The *travaux préparatoires* of the Definition also confirm that a definition of the notion of 'armed attack' was not intended.⁵⁷ In the Special Committee which worked out the Definition, the United States, supported by other Western States, strongly emphasized that the task of the committee was to elaborate a definition of aggression pursuant to Art. 39 of the UN Charter, without prejudice to other provisions of the Charter, especially Art. 51.⁵⁸ Like the Soviet Union,⁵⁹ the US expressed the view that the notions of 'act of aggression' and 'armed attack' are not identical.⁶⁰ While it must therefore be assumed that the notions of 'armed attack' ('agression armée') and 'act of aggression' ('acte d'agression') do not necessarily coincide fully and (p. 1408) that 'armed attack' is the narrower concept of the two,⁶¹ the difference between the two is so small that it is often overlooked.⁶²

18 The jurisprudence of the ICJ has brought about only a modest amount of clarification in this respect. On the term 'armed attack',⁶³ the ICJ simply remarked in the *Nicaragua* judgment that '[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks'.⁶⁴ This statement, albeit fairly surprising in view of the unsuccessful previous efforts towards agreeing on a definition of 'armed attack', has not led the ICJ to provide a more specific definition of the term. Instead, the ICJ merely gave one example in order to illustrate the existence of an armed attack in a specific situation and stipulated that the notion not only comprises unspecified cross-border actions by regular forces, but also the participation of a State in the use of force by unofficial armed bands, as described in Art. 3 (g) of the Definition of Aggression.⁶⁵ The Court reaffirmed this approach in 2005 in its *Congo v Uganda* judgment.⁶⁶ Such

use by the ICJ of GA Res 3314 demonstrates the (indirect) importance of the definition contained therein for the purpose of defining the concept of armed attack. In its *Oil Platforms* judgment, the ICJ avoided precisely determining whether several (established and alleged) instances of uses of force in a maritime context, individually or together, constituted an armed attack.⁶⁷ The jurisprudence of the ICJ, while leaving many controversial questions unanswered, demonstrates that the ascertainment of the specific factual circumstances of each alleged instance of an exercise of the right of self-defence, and the corresponding attribution of the burden of proof, are often more decisive for the determination of a situation, in particular the outcome of a judicial decision, than the resolution of certain questions of legal interpretation.

19 GA Res 3314 has proved to be of continued value as an (indirect) indication of whether certain forms of uses of force constitute 'armed attacks' in the sense of Art. 51 and this (p. 1409) seems to have been accepted by the vast majority of States.⁶⁸ The lasting significance of GA Res 3314 has been reaffirmed in 2010 when it served as the basis for the definition of the crime of aggression for the purposes of the Statute of the International Criminal Court.⁶⁹

3. 'Armed Attack' in relation to 'Threat or Use of Force'

20 As has been pointed out earlier,⁷⁰ the notion of 'armed attack' has a narrower meaning than the term 'threat or use of force' in the sense of Art. 2 (4). Whereas an 'armed attack' always includes a use of force in the sense of Art. 2 (4), not all such uses of force constitute an 'armed attack'. The latter only exists when force is used on a relatively large scale, is of a sufficient gravity, and has a substantial effect.⁷¹ Thus, mere frontier incidents, such as the incursion of an armed border patrol into another State's territory, may well be characterized as a use of force contrary to Art. 2 (4), but not necessarily as an 'armed attack'. This exclusion of frontier incidents from the concept of armed attack has been confirmed by the ICJ.⁷² *A fortiori*, a mere 'threat' of the use of force is not, in principle, an 'armed attack', but would have to be significantly qualified to be so regarded.⁷³

21 The criterion of gravity need not necessarily be applied in a temporally isolated manner or be confined to one particular act. The accumulation of several smaller attacks, each of which does not as such reach the necessary gravity, can under certain circumstances trigger the right of self-defence of Art. 51.⁷⁴ The ICJ can, however, be read as suggesting that a mere addition of several small-scale attacks alone does not easily translate into one sufficiently large-scale cumulative attack which would give rise to the right of self-defence.⁷⁵ Given the manifest danger of circumvention of the gravity and immediacy⁷⁶ elements of an 'armed attack', international practice and many commentators have been reluctant to recognize specific assertions of accumulations of events as constituting an (p. 1410) armed attack.⁷⁷ It should, on the other hand, be noted that the openness for the concept as such seems to have increased in recent years.⁷⁸

4. Forms of Attack

22 Even though the GA's Definition of Aggression does not, as such, claim to define the notion of 'armed attack',⁷⁹ its Art. 3 does in fact give useful indications on how to interpret this term.⁸⁰ The provision lists examples of 'acts of aggression', which can, subject to certain qualifications, be taken to characterize 'armed attacks' within the meaning of Art. 51 as well. The ICJ has, for example, referred to the case of Art. 3 (g) of the Definition of Aggression as being one possible form of 'armed attack'.⁸¹

(a) Invasion, Bombardment, and Cross-Border Shooting

23 The invasion or attack by the armed forces of a State on the territory of another State, as well as the cross-border use of weapons or bombardment of foreign territory, as mentioned in Art. 3 (b) of the Definition of Aggression, represent the classic cases of 'armed attacks',⁸² provided, however, that the military actions are on a certain scale and have a major effect, and are thus not to be considered mere frontier incidents.⁸³ This would usually seem to be the case when an

invasion occurs, but 'attacks', 'bombardments', and the 'use of weapons' do not in every case reach an intensity that enables them to be classified as 'armed attacks'.⁸⁴ Furthermore, Art. 3 (a) describes military occupation resulting from an invasion or attack and the annexation of foreign territory by the use of force as 'acts of aggression'. The concept of 'permanent aggression'⁸⁵ to which these formulations refer is not applicable to the notion of 'armed attack'. Occupation and annexation do not as such constitute 'armed attacks', since they do not necessarily involve the use of military force, even though they will typically go hand in hand.⁸⁶

(b) Blockade

24 Pursuant to Art. 3 (c) of the Definition of Aggression, the blocking of a State's ports or coasts by the armed forces of another State is deemed an 'act of aggression'. At least if (p. 1411) maintained effectively, a blockade is also to be considered an 'armed attack',⁸⁷ regardless of whether the obstruction is carried out by land, air, or naval forces. Since Art. 3 (c) is confined to the access to coasts and ports, only a part of a State's transport system is protected. The land-locked countries did not succeed in including the barring of passage to the open sea across another State's territory into the Definition of Aggression.⁸⁸ This indicates that the majority of States were not willing to regard the obstruction of transit across land to the open sea as an 'armed attack'.⁸⁹ But exceptions have to be admitted where the blockade is equivalent to a military invasion, eg by cutting off all communication routes. In such extreme cases an 'armed attack' can be taken to exist.⁹⁰

(c) Attack on State Positions Abroad

25 Art. 3 (d) of the Definition of Aggression stipulates that attacks by a State's armed forces on the land, sea, or air forces or marine and air fleets of another State belong to the category of 'acts of aggression'. In each of these cases, an 'armed attack' is involved as well, provided that the use of force is not insignificant.⁹¹ Thus it is undisputed, for instance, that warships and combat aircraft, when assaulted by foreign forces on the high seas or in international airspace respectively, have the right to defend themselves by means of military force.⁹² The ICJ has carefully formulated in the *Oil Platforms Case* that it 'does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"'.⁹³ An armed attack may also be found when military units of a State abroad are assailed by forces of the territorial State or a third State. Being instruments for the safeguarding of its political independence, (p. 1412) the regular forces of a State, wherever they are, enjoy the protection of the prohibition of the use of force.⁹⁴

26 In principle, this also applies where a State attacks military units of another State which are present on disputed territory.⁹⁵ If, however, the presence and actions of foreign troops are manifestly illegal, as in the case of a valid revocation of a stationing agreement and the lapse of an appropriate withdrawal period,⁹⁶ the conduct of the foreign troops will in many cases constitute an 'armed attack', so that a forcible response by the territorial State would in turn be justified according to Art. 51.⁹⁷ Insofar as the conduct of the foreign forces does not reach the scale and effects of an 'armed attack' proper, however, armed countermeasures would be contrary to the prohibition of force laid down in Art. 2 (4) and, given the required scale and intensity, would themselves be classified as an 'armed attack'.

27 According to one view, coercive military measures against commercial vessels and aircraft outside the territory of their home State cannot be equated with attacks on that State itself, and are therefore not to be regarded as 'armed attacks'.⁹⁸ In the *Oil Platforms Case*, the ICJ carefully assessed the evidence regarding who fired a missile on one particular commercial vessel.⁹⁹ This seems to give a certain support for another view which holds that the right of self-defence can also be triggered by an attack on a single commercial vessel.¹⁰⁰ However, the safer interpretation is that the Court evaded addressing this issue and instead decided to deal with the specific allegation under review on evidentiary grounds. On the other hand, as distinct from individual commercial vessels or aircraft, assaults on the whole of the civilian marine or air fleet,¹⁰¹ as purportedly

referred to in Art. 3 (d) of the Definition of Aggression,¹⁰² are said to threaten the affected State as such and thus, if applicable,¹⁰³ to constitute 'armed attacks'.¹⁰⁴ The same should be true for continuous assaults on essential parts of them.

(p. 1413) **28** Diplomatic missions¹⁰⁵ and individual citizens are not considered by most States to be 'external positions' of a State that could be the objects of an armed attack.¹⁰⁶ The list in Art. 3 (d) of the Definition of Aggression does not include attacks on nationals abroad as an example of an act of aggression. In order to justify military rescue operations to help nationals who find themselves in difficulties in another country, there has been no shortage of attempts in the literature to declare the use of force by a State on its territory against foreign nationals to be an armed attack against the latter's home State.¹⁰⁷ It is argued that an assault on its nationals abroad constitutes an attack against a State, because nationals form part of a State's population and are thus one of its essential constituents.¹⁰⁸ This position is rejected by most commentators on the grounds that the security or existence of a State is not under threat if its nationals are assaulted in another country.¹⁰⁹ Such an extensive interpretation of 'armed attack' would result in the blurring of any contours of the right of self-defence.¹¹⁰ Indeed, States which have actually carried out such rescue operations have refrained from accusing the territorial State of an 'armed attack'.¹¹¹ It is, however, not excluded that a specific justification for certain forms of evacuation operations may have evolved under customary international law.

(d) Breach of Stationing Agreements

29 Article 3 (e) of the Definition of Aggression classifies as an 'act of aggression' the use of one State's armed forces which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in the host State beyond the termination of the agreement. This form of aggression, a concession by the Great Powers to the anxieties of smaller States,¹¹² can only be an 'armed attack' subject to the condition that minor violations of a stationing agreement may not be considered an armed attack. Only if the breach of the terms of the agreement has the effect of an actual invasion or occupation can an 'armed attack' triggering the right of self-defence pursuant to Art. 51 be held (p. 1414) to exist.¹¹³ In addition, the principle of bona fides would seem to require that the foreign troops must be given appropriate time to leave the country after the valid revocation of the consent by the territorial State.¹¹⁴

(e) Placing Territory at Another State's Disposal

30 According to Art. 3 (e) of the Definition of Aggression, the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State is itself deemed an act of aggression. This provision envisages only the voluntary 'placing' of territory at another State's disposal and does not cover the case where a State has done what is required to prevent acts of aggression from being carried out from its territory by another State.¹¹⁵ Provided that the 'act of aggression' by the acting State qualifies as an 'armed attack', the complicity of the two States may be taken to comprise an 'armed attack', including by the State which remains passive from the military point of view.¹¹⁶

(f) The Use of Force by Irregular Organized Armed Groups

31 It is generally recognized that the participation by a State in the use of force by irregular organized armed groups is covered by the prohibition of the use of force. However, the specific pre-conditions required for 'private' uses of force to be a breach by a State of Art. 2 (4) are disputed.¹¹⁷ The same is true of the question as to whether and to what extent such indirect use of force may be classified as constituting an 'armed attack'. In its Art. 3 (g), the Definition of Aggression characterizes certain forms of assistance to the 'private' use of force as 'acts of aggression'. Although aware of the provision's impact on the right of self-defence laid down in Art. 51, even those States which had previously denied the existence of a right of self-defence against

indirect aggression, such as the Soviet Union¹¹⁸ and the non-aligned States,¹¹⁹ tolerated the inclusion of this example in the list of 'acts of aggression' and concentrated their efforts on keeping the scope of Art. 3 (g) as narrow as possible.¹²⁰

32 In its *Nicaragua* judgment, the ICJ referred to Art. 3 (g) of the Definition of Aggression as also being a case of an 'armed attack':

In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.¹²¹

(p. 1415) This description, as it is contained in Art. 3 (2) of the Definition of Aggression, has been essentially confirmed by the ICJ in its *Congo v Uganda* judgment¹²² and may therefore be taken to reflect both Charter law and customary international law. The ICJ saw no reason to deny that, in customary law, the concept of the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.¹²³

33 The sending of armed bands by a State is an armed attack provided that they are committing acts of armed force against another State, the gravity of which equals that of the other acts listed in Art. 3 (g). In the case of 'sending', a sufficiently close link exists between the State and the private groups, so that the latter's position is coming close to that of *de facto* State organs.¹²⁴ If the aggressive acts carried out by such organized armed groups are of the required gravity,¹²⁵ it seems perfectly justified to hold the sending State responsible for an armed attack. As far as the ICJ, in its interpretation of the term 'armed attack', has referred to the element of 'substantial involvement' in the sending of irregular armed groups which is contained in Art. 3 (g) of the Definition and thereby implies that this conduct also comes within the notion of an 'armed attack', it is necessary to bear in mind that application of the rather vague term 'substantial involvement', which allows for a variety of value-oriented assessments,¹²⁶ requires a particularly careful consideration of the rules on the burden of proof, as the ICJ has demonstrated in its *Congo v Uganda* judgment.¹²⁷

34 In its *Nicaragua* judgment, the ICJ did not consider assistance for rebels in the form of the provision of weapons or logistical support to suffice for an 'armed attack'.¹²⁸ Yet the ICJ did not suggest under what circumstances an involvement must be taken to be substantial enough as to amount to an armed attack. Taking current forms of state disintegration and international terrorism into consideration, the original formulation of the ICJ in the *Nicaragua* judgment today appears to be too narrow and in need of further differentiation. Otherwise, States could not sufficiently protect themselves against force committed by other States in an indirect manner.¹²⁹ If, for example, a State knows that an irregular organized group is willing to commit significant acts of armed force against another State and it places its territory at the disposal of this group to train its members and to offer them a safe haven after they have committed these acts, and additionally provides them (p. 1416) with weapons and logistical support, it would be difficult to understand why this should be a lesser participation in the acts of the group than the mere sending of such a group. It is not appropriate to exclude certain types of support of irregular organized armed groups *a limine* from being qualified as 'substantial involvement' and consequently also as an 'armed attack'. Instead it should be determinative to what extent State involvement has made it possible for irregular groups to commit acts of armed force of a certain scale which, if committed by a State, would have to be qualified as an 'armed attack'.

35 The terrorist acts committed on 11 September 2001, against the United States of America, causing the death of thousands of victims and hitting at the centres of defence and trade,

amounted to an armed attack as far as the scale and intensity of these acts of terrorism are concerned. These terrorist acts have caused an intense debate on whether the concept of 'armed attack' still requires any involvement of a State in the use of armed force by irregular armed groups as a precondition for an exercise of the right of self-defence.¹³⁰

36 The ICJ has been strongly criticized by some authors¹³¹ for holding in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory*, without further reasoning, that Art. 51 'recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State'.¹³² This statement seems¹³³ to affirm that the right of self-defence only applies between States and that uses of force by organized armed groups can only be seen as an 'armed attack' in the sense of Art. 51 of the Charter if they are attributable to a State. Judge *Simma* has criticized this apparent position of the Court in his Separate Opinion in the case of *Congo v Uganda*:

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions....¹³⁴

Despite such invitations to reconsider its position, the Court has, in its *Congo v Uganda* judgment, reaffirmed its earlier jurisprudence according to which attacks by organized armed groups, as a general rule, need to be attributable to a State in order to trigger the right of self-defence:

The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the (p. 1417) definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.¹³⁵

The Court nevertheless noted that it had 'no need' in this case 'to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.¹³⁶ It thereby left open the possibility that such large-scale attacks need not be attributable to a State in order to trigger the right of self-defence.

37 Although individual judges and many commentators have expressed a different view,¹³⁷ the preferable view still seems to be that attacks by organized armed groups need to be attributed to a State in order to enable the affected State to exercise its right of self-defence, albeit under special primary rules of attribution.¹³⁸ It is certainly true that recent developments have confirmed that organized armed groups are able to launch serious forms of transboundary force even without active support from a State. However, this consideration should only give rise to a reassessment of the pertinent rules on attribution in the light of the applicable primary rules.¹³⁹ Recent practice suggests that any form of substantial assistance by a State to an organized armed group which conducts armed cross-border attacks leads to an attribution of such attacks to the assisting State for the purpose of the exercise of the right of self-defence. Such attribution flows from a proper interpretation of Art. 51 as a primary rule and not necessarily from the subsidiary (secondary) rules on State responsibility.¹⁴⁰ It would go too far, however, to potentially expose any State, from the territory of which organized armed groups operate, to forcible measures of self-defence even if this State has either been unaware of the relevant activities of such groups or if it has done what can reasonably be expected of it under international law to remove the threat for other States which emanates from its territory. It is significant, for example, that the OAS and the Rio Group have in

2008 condemned the use of transboundary force by Colombia into Ecuador to pursue armed groups 'who (p. 1418) were clandestinely encamped on the Ecuadorian side of the border' and which had conducted raids into Colombia.¹⁴¹

38 Thus, acts of force, including terrorist acts, committed by irregular armed groups, as such, are not armed attacks in the sense of Art. 51 of the UN Charter. But if acts of force of a sufficient gravity, including terrorist acts, by irregular armed groups are attributable to a State, they are an armed attack in the sense of Art. 51. They are also attributable to a State if they have been committed by private persons and the State has encouraged these acts, has given its direct support to them, planned or prepared them at least partly within its territory, or was unwilling to take steps which can reasonably be expected of it to prevent these acts after having received substantiated information. The same is true if a State demonstrably gives shelter to terrorists after they have committed an act of terrorism within another State in a situation in which the attack can still be regarded as ongoing.

39 It is noteworthy in this regard that the SC, in its Res 1368 (12 September 2001)¹⁴² in which it unequivocally condemned the terrorist attacks which took place in New York, Washington DC, and Pennsylvania and regarded them as a threat to international peace and security,¹⁴³ also recognized in the Preamble 'the inherent right of individual or collective self-defence in accordance with the Charter'. On 8 October 2001, after the beginning of their military action against Afghanistan, the United States and the United Kingdom reported to the SC that this action was taken in accordance with their inherent right of individual and collective self-defence. In a press statement of the same day, the President of the SC declared that 'the members of the Council were appreciative of the presentation made by the United States and the United Kingdom'.¹⁴⁴

40 As far as measures of self-defence against acts of organized armed groups, including terrorists, are carried out on the territory of another State, the principles of proportionality and necessity¹⁴⁵ must be strictly respected.

41 A special situation arises if a State is not unwilling but simply unable to impede acts of organized armed groups committed by making use of its territory. The ICJ touched upon this issue in its *Congo v Uganda* judgment in which it did not accept that the right of self-defence could be exercised in such a situation against smaller-scale attacks by irregular forces. The Court did, however, leave open the possibility that 'contemporary international law provides for a right of self-defence against large-scale attacks of irregular forces'.¹⁴⁶ It may indeed be appropriate that a victim State should be able to react by military means against large-scale attacks by armed groups which operate from the territory of a State which is manifestly incapable of taking serious steps to prevent such (p. 1419) attacks from originating in its territory.¹⁴⁷ In such cases the special rule on attribution would be exceptionally wide ('manifestly unable to prevent large-scale attacks') and the respect of the principles of necessity and proportionality would have to be particularly insisted upon.¹⁴⁸

(g) 'Cyber attacks'

42 Since electronic means of communication are today also used for the purpose of causing damage, including as means of warfare, the question is increasingly discussed whether so-called 'cyber attacks' can trigger the right of self-defence.¹⁴⁹ Certain incidents, such as the causation of the self-destruction of Iranian uranium centrifuges by the 'Stuxnet' worm in 2010,¹⁵⁰ or the overwhelming of government servers in Estonia in 2007,¹⁵¹ have fuelled the debate.

43 It seems that, despite their novelty and their specific character, cyber attacks can be satisfactorily assessed by properly taking into account the general considerations which apply to other forms of aggression. Since the ICJ has held that the exercise of the right of self-defence does not depend on the type of weapon which is used for an attack,¹⁵² an 'armed attack' does not require the use of kinetic weapons, but may, in principle, also be conducted by electronic weapons.¹⁵³ It is another question whether the use of an electronic weapon must produce physical effects which are comparable to those which kinetic, atomic, chemical, or biological weapons

typically produce.¹⁵⁴ In order to reach the level of an 'armed attack', every kind of weapon must produce substantial and immediate destructive effects.¹⁵⁵ In order to reach the threshold of an 'armed attack', such effects must be comparable to those which are required for a conventional use of force to be recognized.¹⁵⁶ Whether the effect of a 'cyber attack' is actually comparable to such a conventional use of force must take into account the specific character and importance of the protected object for the affected State and its population. Thus, the immediate disabling of vital infrastructure with inhibitive (and not sufficiently quickly reparable) effects on the ability of the State to act or on the elementary living conditions of the (p. 1420) population can, in principle, produce the necessary destructive effect which would justify the designation 'armed attack'.¹⁵⁷

44 The possibility that 'cyber attacks' can, in certain extreme cases, amount to 'armed attacks' which may trigger the right of self-defence, does not mean, however, that the possibility of exercising this right can be easily established. This is true even if it were clear that a 'cyber attack' with the required immediate destructive effect has actually taken place. So far, the main difficulty seems to lie in the fact that it is normally not possible to quickly identify the attacker and thus to attribute the attack to a particular actor within the necessary time frame.¹⁵⁸ Even if the requirement of attribution of the attack to a State were relaxed considerably in view of the fact that it is even more difficult to distinguish between State and private activity in the virtual sphere, the difficulty would mostly remain in identifying the source of the electronic attack.

45 Furthermore, even if the source of an electronic attack could be located, additional conditions must be fulfilled before the right of self-defence can actually be exercised. In particular, the attack must not be over but still be ongoing. This will often be difficult to determine, and the burden of establishing that the attack is still ongoing lies on the State that purports to exercise its right of self-defence.¹⁵⁹

46 Finally, even if all other conditions are fulfilled, the principle of proportionality may in certain circumstances require that those States which have the capacity to do so, exercise the right of self-defence solely by electronic means, and not by way of kinetic or other weapons which produce direct physical effects. The answer to the question of whether this is actually required will usually be quite fact-specific. Again, the burden to demonstrate the proportionality of the response lies on the State which purports to exercise its right of self-defence.¹⁶⁰

IV. Collective Self-Defence

47 Art. 51 of the Charter allows not only individual, but also collective self-defence. It is generally accepted that the right of collective self-defence also authorizes a non-attacked State to lend its assistance to an attacked State.¹⁶¹ Thus, the right to collective self-defence is not, as the terms of Art. 51 might suggest, restricted to a common, coordinated exercise of the right to individual self-defence by a number of States which have all been attacked.¹⁶² Such a restrictive interpretation of the right of collective self-defence corresponds neither to the history of Art. 51¹⁶³ nor to State practice since 1945.¹⁶⁴ (p. 1421) Furthermore, this interpretation would diminish the effectiveness of the prohibition of the use of force, since the occasional lack of reliability of the UN system of collective sanctions may leave weaker States unprotected and at the mercy of militarily superior States.

48 The ICJ has interpreted the right of collective self-defence accordingly.¹⁶⁵ In its *Nicaragua* judgment, the ICJ emphasized that any collective exercise of the right of self-defence requires the attacked State for whose benefit collective self-defence would be used 'to form and declare the view that it has been so attacked'.¹⁶⁶ It is not required for the exercise of the right of collective self-defence that the State invoking the right be under an obligation resulting from a treaty of assistance.¹⁶⁷ Rather, it is sufficient, but also necessary, that the support be given with the consent of the attacked State.¹⁶⁸ Such consent needs to be declared, as the ICJ has stated for the right of self-defence under customary law,¹⁶⁹ in the form of a 'request' which must be clear and verifiable, though not necessarily formal and express.¹⁷⁰ This threshold serves both to ensure that it is not employable as a mere cover for aggression disguised as protection and to exclude an

excessive and possibly inhibitive formalism.

V. Anticipatory Self-Defence

49 No consensus has emerged among States and in international legal doctrine over the point in time from which measures of self-defence against an armed attack may be taken. In recent years, however, developments have taken place which have somewhat redrawn the lines of the debate.

50 Until about the beginning of the twenty-first century there were two main positions.¹⁷¹ Some authors interpreted Art. 51 as merely confirming a pre-existing right of self-defence and who considered anticipatory measures of self-defence to be admissible under the conditions set up in the *Caroline Case*,¹⁷² ie when ‘the necessity of that self-defence is instant, (p. 1422) overwhelming and leaving no choice of means, and no moment for deliberation’.¹⁷³ Other authors considered, in accordance with the predominant State practice,¹⁷⁴ that such recourse to traditional customary law would lead to an inappropriate broadening of the narrow right of self-defence laid down in Art. 51. According to those authors, an anticipatory right of self-defence would be contrary to the wording of Art. 51 (‘if an armed attack occurs’)¹⁷⁵ as well as to its object and purpose, which is to reduce to a minimum the unilateral use of force in international relations. And since the (alleged) imminence of an attack could usually not be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the State concerned. The manifest risk of an abuse of that discretion would de facto undermine the restrictive character of the right of self-defence. Therefore, according to those authors, Art. 51 had to be interpreted narrowly as containing a prohibition of anticipatory self-defence.¹⁷⁶

51 The proclamation of a new US National Security Strategy in 2002 which contained a so-called ‘Bush doctrine’ on pre-emptive self-defence, and the invasion of Iraq in 2003 by US and allied forces have led to an intense debate and to reassessments of the legal analysis in the light of modern developments and practice. Building on a position which the United States had taken on previous occasions,¹⁷⁷ the US National Security Strategy 2002¹⁷⁸ claimed that the dangers which arose from modern forms of terrorism and the proliferation of weapons of mass destruction required an interpretation of the right to self-defence which would allow exercising the ‘right of self-defence by acting preemptively against such terrorists’ since ‘[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack’ and based on the need to ‘adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries’ which was no longer a ‘visible mobilization of armies, navies, and air forces preparing to attack’.¹⁷⁹ This general policy statement was seen by some as having been applied in 2003 when the United States justified the invasion of Iraq not (p. 1423) only by invoking a (‘revived’) authorization by the SC, but arguably also by reference to self-defence.¹⁸⁰

52 The reactions of States and among commentators to the ‘Bush doctrine’ and to the Iraq invasion indicates that, while the claim of a broad right of ‘pre-emptive’ self-defence has only found the approval of some States,¹⁸¹ most States and commentators have rejected it.¹⁸² However, a prevailing opinion among commentators today seems to accept that the right of self-defence entails a very narrow right to anticipatory self-defence, either along the lines of the *Caroline* formula or even narrower.¹⁸³ In a variation of the *Caroline* formula, the UN High-level Panel on Threats, Challenges and Change stated in 2004 without further qualification that ‘a threatened State, according to long established international law, can take military action as long as the threat is imminent, no other means would deflect it and the action is proportionate’.¹⁸⁴ This statement has, however, been criticized by the member States of the Non-Aligned Movement invoking the jurisprudence of the ICJ.¹⁸⁵ The Court has so far evaded taking a clear position on the question of anticipatory self-defence.¹⁸⁶ In its *Congo v Uganda* decision of 2005 it has limited itself to formulating a critical *obiter dictum* against basing military action on ‘essentially preventative’ security needs, but it noted at the same time that ‘the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised’.¹⁸⁷ The GA has equally refrained from

addressing the subject.¹⁸⁸

53 Although it remains true that the *Caroline* formula is hardly compatible with the wording of Art. 51 ('has occurred'),¹⁸⁹ there are now additional reasons why many, if not most authors today recognize it as reflecting a proper interpretation of the right of self-defence. While the case of the invasion of Iraq (2003) has vindicated the widespread (p. 1424) concern that anticipatory self-defence is inherently prone to abuse and must, if it is to be accepted at all, be very narrowly circumscribed, the claim that certain situations may arise in which the aggressive use of force can only be halted (and in that sense 'repelled') before it has made an irreversible impact, has equally been made plausible. Thus, the object and purpose of the prohibition against the use of force can under such circumstances be fulfilled by a narrowly circumscribed right of anticipatory self-defence.

54 To actually remain narrowly circumscribed and within the limits of the concept of self-defence as an emergency reaction, however, the terms and the spirit of the *Caroline* formula must be taken seriously as an expression of a strictly limited exception. This can only be ensured if the formula, or its equivalents, are applied on the basis of a heavy burden of proof which States claiming to exercise their right of self-defence must meet.¹⁹⁰ This burden of proof must be particularly high in the case of military action against non-State actors which are about to use conventional weapons in their attributable attack. In the absence of a competent international court the State concerned would have to present credible evidence to the satisfaction of other competent international bodies, in the first place the SC and the GA, that its action has met the strict conditions required.¹⁹¹

55 Finally, it should be pointed out that the limitation on the possibility of anticipatory self-defence embodied in Art. 51 is compatible with the strategy of nuclear powers only as long as States are able to defend themselves against a pre-emptive strike launched against them.¹⁹² Should this so-called second-strike capability fall away, the limitation on the possibility of anticipatory self-defence would not be removed, but its observance by States would nevertheless likely be diminished.

C. The Duty to Report to the Security Council

56 The UN Charter confers upon the SC the primary responsibility for the maintenance of international peace and security. This is why, according to the first sentence of Art. 51, the right of self-defence may be used only until the SC has taken the necessary measures. In order to enable the SC to step in as soon as possible, the second sentence of Art. 51 stipulates that measures taken in self-defence are to be immediately reported to the SC.¹⁹³ These provisions are evidence of the fact that the right of self-defence embodied in Art. 51 is only meant to be of a subsidiary nature. During the Cold War the (p. 1425) restriction envisaged by the reporting duty,¹⁹⁴ as well as the related duty to discontinue defensive measures,¹⁹⁵ were of limited practical significance. However, since the ICJ has held in its *Nicaragua* judgment that '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'¹⁹⁶ it is clear that the duty to report to the SC can acquire an important evidentiary significance. States seem to have heeded the advice and have increased their reporting under Art. 51 since the *Nicaragua* judgment.¹⁹⁷

D. The Principles of Necessity and Proportionality as Limits on the Right of Self-Defence

57 The principles of necessity and proportionality are of exceptional legal and practical importance as limits on the right of self-defence.¹⁹⁸ The ICJ has emphasized and applied them on several occasions.¹⁹⁹ Thus, any recourse to the right of self-defence laid down in Art. 51 is likewise subject to these principles of necessity and proportionality.²⁰⁰ Their violation constitutes an 'additional ground of wrongfulness'.²⁰¹ Lawful self-defence is restricted to what is necessary for the repelling of an armed attack and must not acquire a retaliatory, deterrent, or punitive

character.²⁰² The means and the extent of the defence must not be disproportionate to the gravity of the attack.²⁰³

58 The principles of necessity and proportionality are not always easy to distinguish in the context of the right of self-defence. In the *Oil Platforms* Case, the ICJ applied the principle of necessity in order to determine whether a particular target, as such, could be struck for the purpose of self-defence, and the principle of proportionality to assess whether, even if this particular target was a legitimate target, it was proportionate to strike it taking into account the relationship between the gravity of the original attack and the dimension of the military reaction to the attack as a whole.²⁰⁴ Regardless of whether one agrees with the application by the Court of the principles in the specific case,²⁰⁵ the reasoning of the Court correctly suggests that the principle of necessity responds to the question whether a specific measure is necessary to achieve a legitimate (p. 1426) purpose of self-defence, whereas the principle of proportionality answers the question how far a specific measure may go in order to achieve such a purpose. Since, however, the right of self-defence is based on the assumption that States do not have to tolerate the continuation of an armed attack against them, situations in which a particular measure of self-defence would be necessary but disproportionate are less likely to occur than in the context of human rights law or national constitutional law.

59 The principles of necessity and proportionality are notoriously difficult to apply with respect to the right of self-defence.²⁰⁶ This is not only because they are, in themselves, comparatively indeterminate legal concepts which are prone to be interpreted differently by competing views on the scope and the purpose of the right of self-defence, but also because of the increasing diversity of situations in which the right of self-defence has been invoked,²⁰⁷ particularly after the end of the Cold War.²⁰⁸ Notwithstanding these difficulties it is possible to identify general features which these principles entail. In fact, it is precisely because of the diversity of situations in which the right of self-defence has been invoked that the principles of necessity and proportionality have gained increased importance in more recent practice.²⁰⁹ These principles require that States pay particular attention to, and properly assess, the specific facts of the case, including an overall assessment of the situation. The ICJ has therefore insisted that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”’.²¹⁰

60 The principles of necessity and proportionality concern the relationship between the purpose of any act of self-defence, which is the repelling of an armed attack, and the means which are employed to that effect.²¹¹ The requirement that self-defence must be limited to repelling of the armed attack does not mean that the weapons used in self-defence must necessarily be similar to those used for the attack.²¹² Repelling rather aims at ending the attack so that the specific impulse from which the attack emerged is no longer present. This may require the use of considerably more force than was displayed by the attack itself. Thus States, when exercising their right of self-defence, are not limited to expelling attacking foreign troops from their territory, but they may, in principle, pursue them across the border in order to secure an end of the attack.²¹³ As long as its actions visibly and credibly preserve a primary repelling character it is immaterial (p. 1427) whether a State acting in self-defence simultaneously harbours additional, but subordinate, deterrent, retributive, or even punitive motives when conducting them.

61 The difficulty in applying the principles of necessity and proportionality is particularly acute in cases of occasional low-level transboundary uses of force by irregular armed groups. In such cases different questions must be distinguished: the first is whether an armed attack has occurred at all. It is only when this threshold has been crossed that the principles of necessity and proportionality apply.²¹⁴ In the case of occasional low-level transboundary uses of force by irregular armed groups it is not always clear whether the attack has ended, in the sense that the specific impulse from which the attack emerged—in contrast to the persistence of a latent general threat—is no longer present, and whether certain measures are necessary and proportionate to bring about an end to the attack. This problem cannot be resolved without an overall assessment of the facts of the specific situation. It can be said, however, that the less grave the original attack

has been and the more specifically its (non-State) author can be identified, the more any repelling transborder military action must be conducted within an appropriate time frame (a period which preserves the credibility of the primary character of such action as being repelling) and be as far as possible directed only against the non-State authors of the attack. This does not mean that the response to such occasional low-level armed attacks by non-State actors is subject to a stricter application of the principles of necessity and proportionality but only that the necessity of transborder defensive action can typically not be established as clearly as in situations of classical interstate conflict. If the character of the attack is not constantly reassessed in such situations the defensive action would risk going beyond what is necessary and proportional.

62 The specific application of the principles of necessity and proportionality in the context of occasional low-level armed attacks by non-State actors sometimes appears to blur the line between the right of States to use force (*ius ad bellum*) and the law in armed conflict (*ius in bello*). Formally, the principle of proportionality in international humanitarian law aims at the minimization of damage to non-combatants²¹⁵ whereas the same principle in *ius ad bellum* serves to protect against excessive overall reactions. This does not mean, however, that there are two or more different meanings of the principles of necessity and proportionality.²¹⁶ These principles rather have an abstract common content which must derive its meaning in an individual case by an assessment of its specific facts. Therefore, a partial overlap between the *ius ad bellum* and *ius in bello* aspects of the principles of necessity and proportionality in certain situations is not necessarily an indication of a substantive difference between those principles, but rather the result of their application in situations where the permissible aims and the means to pursue them overlap.

E. The Right of Self-Defence under Customary International Law

63 Referring to the use in Art. 51 of the term 'inherent right' ('droit naturel') and the mentioning of this right in the Friendly Relations Declaration, the ICJ has, in its *Nicaragua* judgment, acknowledged the existence under customary law of a right to self-defence, (p. 1428) comprising individual as well as collective self-defence.²¹⁷ The Court, albeit without giving any reasons, takes the content and scope of this customary right to correspond almost completely to the right of self-defence under Art. 51 of the Charter.²¹⁸ Thus, the customary right of self-defence may also be resorted to solely in the case of an armed attack.²¹⁹

F. The Right of Self-Defence and Enforcement Measures by the SC

64 When Iraq invaded Kuwait in 1990 and the SC began to adopt the 'necessary measures',²²⁰ there was some discussion concerning whether, notwithstanding the SC's actions, Kuwait and the United States continued to have the right to self-defence under Art. 51. The wording and the purpose of that provision suggest that the answer depends on a proper interpretation of the resolution concerned, in particular on whether there are indications that the SC considered the measures it took as being sufficient to deal with the situation and as implying a full or partial limitation of the exercise of the right to self-defence.²²¹ Typically much will depend on the kind of measure which the SC has taken.

65 Another question is whether the right of self-defence limits the power of the Security Council to take enforcement measures.²²² This issue was raised before the ICJ by Bosnia and Herzegovina arguing that the arms embargo by the SC violated its right of self-defence by preventing it from obtaining the means for exercising this right.²²³ This argument is difficult to accept since it would considerably impair the role of the SC and create legal uncertainty without providing any guidance as to the circumstances under which the right of self-defence could be exercised effectively.²²⁴ On a more fundamental level, the argument seems to contradict the prevailing view that the right of self-defence is circumscribed by the Charter and this includes the power of the Security Council to determine the necessary measures.²²⁵

Footnotes:

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¹ See R Ago, acting as Special Rapporteur of the ILC, 'Addendum to the Eighth Report on State Responsibility' (1980) ILC Yearbook, vol 2 pt 1, 13, 52.

² cf B Fassbender, 'Selbstverteidigung und Staatengemeinschaftsinteresse in der Zeit des Völkerbundes' in T Bruha, S Heselhaus, and T Marauhn (eds), *Legalität, Legitimität und Moral* (Mohr Siebeck 2008) 101; **Randelzhofer** and Dörr on Art. 2 (4) MN 4.

³ See Ago (n 1); P Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 ZaöRV 705, 754; Y Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 69 and 188. On the issue of whether the very concept of self-defence and thus the national security of States is to be subjected to legal rules at all, see O Schachter, 'Self-Defence and the Rule of Law' (1989) 83 AJIL 259.

⁴ The most famous example in State practice in this respect is the *Caroline* Case of 1837, see 'Correspondence between Great Britain and The United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline' (1857) 29 British and Foreign State Papers (BFSP) 1126, 1137–38; 'Correspondence between Great Britain and The United States, Respecting the Destruction of the Steamboat Caroline' (1858) 30 BFSP 193, 195–96 and RY Jennings, 'The Caroline and McLeod Cases' (1938) 32 AJIL 82.

⁵ See J Zourek, *L'Interdiction de l'emploi de la force en droit international* (Sijthoff 1974) 98–102; Fassbender (n 2) 112.

⁶ cf **Randelzhofer** and Dörr on Art. 2 (4) MN 5–9.

⁷ Ago (n 1) 59; Fassbender (n 2) 111; **Randelzhofer** and Dörr on Art. 2 (4) MN 10.

⁸ C Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 114; CJ Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359, 378, and 382.

⁹ On these clauses cf **Randelzhofer** and Dörr on Art. 2 (4) MN 45 and Ress and Bröhmer on Art. 53 Enemy State Clause.

¹⁰ See below MN 10 and 13; Tams, 'The Use of Force against Terrorists' (n 8) 382–83 and 392; some writers have claimed that a customary right to conduct rescue operations in certain limited situations has emerged in recent years from uncontested state practice, see T Gazzini, *The Changing Rules on the Use of Force in International Law* (Juris Publishing 2005) 173 and W Ader, *Gewaltsame Rettungsaktionen zum Schutz eigener Staatsangehöriger im Ausland* (VVF 1988) 97ff, 254ff. But see C Kreß, 'Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völkerrechtlicher und verfassungsrechtlicher Sicht' (1997) 57 ZaöRV 329, 349; Dinstein (n 3) 255f; Gray (n 8) 159–60; and below MN 28.

¹¹ See *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, paras 61, 64, 71–72; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, paras 130, 146–47; *Land and Maritime Boundaries between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* [2002] ICJ Rep 303, paras 323–24; Gray (n 8) 114ff with further references; see also S Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99 AJIL 62, 70ff.

¹² Kadelbach, Interpretation of the Charter, MN 23f.

¹³ cf, *mutatis mutandis*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 28; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 22; Gazzini (n 10) 131f.

- 14** Paulus and Leiss on Art. 103 MN 69.
- 15** O Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2006) 16 EJIL 803.
- 16** This represents the prevailing view: see Gray (n 8) 118; Dinstein (n 3) 207; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 403; MN Shaw, *International Law* (6th edn, CUP 2008) 1133; K Oellers-Frahm, 'Der IGH und die "Lücke" zwischen Gewaltverbot und Selbstverteidigungsrecht—Neues im Fall "Kongo gegen Uganda"?' [2007] ZEUS 71, 72ff; G Dahm, *Völkerrecht*, vol 2 (Kohlhammer 1961) 413–14; M Bothe, 'Das Gewaltverbot im allgemeinen' in W Schaumann, *Völkerrechtliches Gewaltverbot und Friedenssicherung* (Nomos 1971) 16–20; N Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Nijhoff 1985) 11–12.
- 17** *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 194; *Oil Platforms* (n 11) paras 74–76 (necessity), 77–78 (proportionality); see MN 57.
- 18** See the references in n 16.
- 19** *Nicaragua* (n 17) (technically, this judgment does not concern Arts 2 (4) or 51 directly, as the ICJ based its ruling exclusively on rules of customary international law).
- 20** *Oil Platforms* (n 11) para 51; but see also *ibid* (Separate Opinion Judge Higgins) [2003] ICJ Rep 225, para 43 and *ibid* (Separate Opinion Judge Simma) [2003] ICJ Rep 324, para 12 ('the present judgment follows at this point what are some of the less fortunate statements in the Court's *Nicaragua* judgment of 1986').
- 21** *Congo v Uganda* (n 11) para 147.
- 22** Thus, the ICJ states in para 210 of the *Nicaragua* judgment (n 17) '[the Court] has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve the use of force'. cf also *ibid*, para 195; see also Eritrea Ethiopia Claims Commission *Jus Ad Bellum* (Partial Award, Ethiopia's Claims 1–8, 19 December 2005) (2009) 135 ILR 479, paras 11–12.
- 23** E Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963, Principle B, 966; C Greenwood, 'Self-Defence' MPEPIL (online edn) para 12; JA Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 149; Gazzini (n 10) 138; WH Taft IV, 'Self-Defense and the Oil Platforms Decision' (2004) 29 YJIL 295, 300–01; H Fischer, 'Friedenssicherung und friedliche Streitbeilegung' in K Ipsen, *Völkerrecht* (5th edn, CH Beck 2004) 1087; JL Hargrove, 'The *Nicaragua* Judgement and the Future of the Law of Force and Self-Defense' (1987) 81 AJIL 135, 139; similarly *Nicaragua* (n 17) (Dissenting Opinion Judge Jennings) [1986] ICJ Rep 528, 544.
- 24** *Oil Platforms* (Separate Opinion Judge Simma) (n 20) para 12; in A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Duncker & Humblot 1984) paras 469 and 472, Simma reached this result also by way of a restrictive interpretation of the forms of 'use of force' prohibited by Art. 2 (4); see also J Stone, 'Force and the Charter in the Seventies' (1974) 2 Syr J Intl L & Com 1, 11–12.
- 25** Wilmshurst (n 23) 966; Green (n 23) 149; Greenwood (n 23) para 12; Gazzini (n 10) 138; Fischer (n 23) 1087.
- 26** I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 272–5; Gray (n 8) 118; Corten (n 16) 411; Greenwood (n 23) para 9; Dinstein (n 3) 196ff; T Ruys, *Armed Attack and Article 51 of the UN Charter* (CUP 2010) 515; Fischer (n 23) 1086, 1097; D Schindler, 'Die Grenzen des völkerrechtlichen Gewaltverbots' (1986) 26 DGVR Berichte 11, 17; Ago (n 1) 65–67 with further references in fn 261; A Cassese, *International Law in a Divided World* (Clarendon Press 1986) 230; L Henkin, *How Nations Behave* (2nd edn, Columbia UP 1979) 141–45; cf

moreover the references given by L Wildhaber, 'Gewaltverbot und Selbstverteidigung' in Schaumann (n 16) 150 fn 11.

²⁷ See H Wehberg, *Krieg und Eroberung im Wandel des Völkerrechts* (Metzner 1953) 83–84; Schindler (n 26) 17; F Berber, *Lehrbuch des Völkerrechts*, vol 2, *Kriegsrecht* (2nd edn, CH Beck 1969) 46–47. Too great a relevance must not be attached to the designation as 'inherent', for instance by holding that Art. 51 refers in a declaratory manner to a right of self-defence existing independently from the Charter under natural law. Neither what the Charter envisages as collective self-defence nor the fact that self-defence pursuant to Art. 51 is secondary to SC action corresponds to the thesis that under natural law the right of self-defence is based upon individual self-preservation. Correctly therefore Kelsen 792; Dinstein (n 3) 191–93. Ago (n 1) 67 fn 263 takes the term 'inherent' to emphasize that the ability of lawfully defending itself against an armed attack is a prerogative of every sovereign State which it is not entitled to renounce.

²⁸ cf R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 197–203, although she apparently tends to draw the opposite conclusion from her account of practice. For UN practice with regard to Art. 51 see also J Combacau, 'The Exception of Self-Defence in UN Practice' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986) 9–38; Schachter, 'Self-Defence and the Rule of Law' (n 3) 272–73 points to the strong resistance by governments to the widening of the concept of self-defence.

²⁹ See above MN 4, and Gazzini (n 10) 131f.

³⁰ See DW Bowett, *Self-Defence in International Law* (Manchester UP 1958) 187–93; J Brunnée and S Toope, 'The Use of Force: International Law after Iraq' (2004) 53 ICLQ 785, 792, 794; DB Rivkin, Jr, LA Casey, and MW DeLaquil, 'Preemption and Law in the Twenty-First Century' (2004) 5 Chicago J Intl L 467, 476; MS McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' (1963) 57 AJIL 567, 600; S Schwebel, 'Aggression, Intervention and Self-Defence' (1972-II) 136 Rec des Cours 411, 479–81; JN Moore, 'The Secret War in Central America and the Future of World Order' (1986) 80 AJIL 43, 83. Further references given by Ago (n 1) 64 fn 257.

³¹ See Bowett, *Self-Defence in International Law* (n 30) 87–94; N Ronzitti, 'The Expanding Law of Self-Defence' (2006) 11 J Conflict & Security L 343, 354; Dinstein (n 3) 255–59. For the issue of the protection of nationals abroad see in greater detail MN 28 and **Randelzhofer** and Dörr on Art. 2 (4) MN 58–61.

³² cf Bowett, *Self-Defence in International Law* (n 30) 106–14 and 182–93.

³³ Gray (n 8) 118.

³⁴ *Nicaragua* (n 17) para 237.

³⁵ *ibid*, para 195.

³⁶ *ibid*, para 211.

³⁷ *Oil Platforms* (n 11) para 51.

³⁸ What the ICJ says in respect of Art. 51 is, strictly speaking, merely an *obiter dictum* since the *Nicaragua* ruling is based only on customary international law.

³⁹ *Oil Platforms* (n 11) para 51.

⁴⁰ This applies to both individual and collective self-defence. Although the ICJ's remarks on the 'law of the United Nations system' (*Nicaragua* (n 17) para 211) relate *expressis verbis* only to 'collective armed response', in the context of the whole of the judgment they must be taken to apply to individual self-defence as well; cf Green (n 23) 26f.

⁴¹ See *Nicaragua* (n 17) para 210: 'However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a state which considers itself the victim of another state's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El

Salvador, the latter was lawfully entitled to take any particular counter-measure.' See also *ibid*, para 249 and Eritrea Ethiopia Claims Commission (n 22) paras 11–12.

⁴² *Oil Platforms* (Separate Opinion Judge Simma) (n 20) para 13.

⁴³ In favour of Judge Simma's position eg A Cassese, *International Law* (2nd edn, OUP 2005) 172; Gazzini (n 10) 138; but see Corten (n 16) 403; Dinstein (n 3) 208f; Ruys (n 26) 146; PH Kooijmans, 'The Legality of the Use of Force in the Recent Case Law of the International Court of Justice' in S Yee and J-Y Morin (eds), *Multiculturalism and International Law: Essays in honour of Edward McWhinney* (Nijhoff 2009) 455, 460; J Kammerhofer, 'Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the *Oil Platforms* Case' (2004) 17 *Leiden J Intl L* 695, 709; ILC, 'Commentary on the Draft Articles on the Responsibility of States' (2001) ILC Yearbook, vol II, pt 1, 131–32.

⁴⁴ See **Randelzhofer** and Dörr on Art. 2 (4) MN 44–63.

⁴⁵ For the prohibition of self-help see Tams, 'The Use of Force against Terrorists' (n 8) 382; Dinstein (n 3) 272; Gazzini (n 10) 168f; K Chainoglou, *Reconceptualising the Law of Self-Defence* (Ant N Sakkoulas, Bruylant 2008) 129f; Verdross and Simma (n 24) para 470; K Hailbronner, 'Die Grenzen des völkerrechtlichen Gewaltverbots' (1986) 26 *DGVR Berichte* 49, 73–75; Higgins (n 28) 216.

⁴⁶ For the latter this is confirmed by Art. 94 (2) of the UN Charter.

⁴⁷ In its judgment in the *Corfu Channel* Case the ICJ has made clear that, except in the case of self-defence pursuant to Art. 51 of the UN Charter, the prohibition of the use of force also bans the use of military force in the form of a reprisal, cf *Corfu Channel Case* (Merits) [1949] ICJ Rep 4, 35. The prohibition of armed reprisals is moreover expressed in the Friendly Relations Declaration (UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV): 'States have a duty to refrain from acts of reprisal involving the use of force'; see also Art. 50 (1) (a) of the Articles on State Responsibility. For UN practice see RP I, Supp 5, 34–36. See also *Oil Platforms* (n 11) (Dissenting Opinion Judge Elaraby) [2003] ICJ Rep 290, para 1.2; *ibid* (Separate Opinion Kooijmans) [2003] ICJ Rep 246, para 62; Tams, 'The Use of Force against Terrorists' (n 8) 382; JA Green, 'Self-Defence: A State of Mind for States?' (2008) 55 *NILR* 181, 188; Gray (n 8) 150f, 197f.

⁴⁸ Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters (28 June 1993) 29 *Weekly Compilation of Presidential Documents* 1183.

⁴⁹ UNSC 'Provisional Verbatim Record' (15 July 1993) UN Doc S/PV.3254, 6; UNSC 'Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations' (26 June 1993) UN Doc S/26003.

⁵⁰ L Condorelli, 'A propos de l'attaque américaine contre l'Irak du 26 Juin 1993: Lettre d'un professeur désemparé au lecteur du JEDI' (1994) 5 *EJIL* 134 is concerned about the fact that the majority of the members of the SC spoke in favour of the legality of the raid, a behaviour that could undermine the prohibition of armed reprisals. Favouring such a tendency WM Reisman, 'The Raid on Baghdad: Some Reflections on its Lawfulness and Implications' (1994) 5 *EJIL* 120.

⁵¹ Gray (n 8) 114.

⁵² cf ICJ in *Oil Platforms* (n 11) para 57: 'the burden of proof of the facts showing the existence of such an attack rests on the United States'.

⁵³ See BB Ferencz, *Defining International Aggression*, vol 2 (Oceana Publications 1975) 1–13; T Bruha, *Die Definition der Aggression: Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974* (Duncker & Humblot 1980) 51–55; B Broms, 'The Definition of Aggression' (1977-I) 154 *Rec des Cours* 298, 315–36; O Solera, *Defining the Crime of Aggression* (Cameron May 2007) 17–204.

⁵⁴ UN Doc A/RES/3314(XXIX).

⁵⁵ Ruys (n 26) 136; Corten (n 16) 404; A **Randelzhofer**, 'Die Aggressionsdefinition der

Vereinten Nationen' (1975) 30 EA 621, 630; Fischer (n 23) 1073; M Knof and C Kress, 'Der Nicaragua-Fall des IGH im Spannungsfeld zwischen Gewaltverbot und Interventionslust' (1990) 41 Österr ZÖR 9, 16. According to Ago (n 1) 68, the acts listed in the Definition do not necessarily all qualify as 'armed attacks'.

⁵⁶ Ruys (n 26) 137; Ferencz (n 53) 46; V Cassin and others, 'The Definition of Aggression' (1975) 16 Harv Intl LJ 589, 594; **Randelzhofer**, 'Die Aggressionsdefinition der Vereinten Nationen' (n 55) 630.

⁵⁷ Ferencz (n 53) 12; Bruha (n 53) 110–11 fn 62 and 163–201; Ruys (n 26) 129–36.

⁵⁸ cf the statements made by the US representative (UNGA 'Summary Record of the 113th mtg of the Special Committee on Defining Aggression' (12 April 1974) UN Doc. A/AC.134/SR.113, 27; UNGA 'Summary Record of the 105th mtg' (9 May 1973) UN Doc A/AC.134/SR.105, 17 and UNGA 'Summary Record of the 108th mtg' (29 May 1973) UN Doc A/AC.134/SR.108, 43, the representatives of Japan (UNGA 'Summary Record of the 112th mtg' (12 April 1974) UN Doc A/AC.134/SR.112, 16), and the United Kingdom (UNGA 'Summary Record of the 113th mtg' (12 April 1974) UN Doc A/AC.134/SR.113, 39f).

⁵⁹ See the statement by the Soviet representative (UNGA 'Summary Record of the 105th mtg' (9 May 1973) UN Doc A/AC.134/SR.105, 16).

⁶⁰ See the statement by the US representative (UNGA 'Summary Record of the 105th mtg' (9 May 1973) UN Doc A/AC.134/SR.105, 17).

⁶¹ This was pointed out in the Special Committee on the Question of Defining Aggression by the representatives of the Soviet Union (n 59) and the United Kingdom ('Summary Record of the 67th mtg' (30 July 1970) UN Doc A/AC.134/SR.67, 5). The draft definition submitted to the Special Committee by thirteen nonaligned countries also emphasized in para 2 of its Preamble 'that armed attack (armed aggression) is the most serious form of aggression' (UNGA 'Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Uganda and Yugoslavia: proposal' (24 March 1969) UN Doc A/AC.134/L.16 and Add. 1, 2; reproduced by Bruha (n 53) 332–34). In legal writings, the view regarding 'armed attack' as the narrower term also prevails: see Gray (n 8) 130f and 182f; Dinstein (n 3) 196f and 308; Corten (n 16) 404; Bowett, *Self-Defence in International Law* (n 30) 192; Dahm (n 16) 390; Bothe, 'Das Gewaltverbot im allgemeinen' in Schaumann (n 16) 16; M Bothe, 'Die Erklärung der Generalversammlung der Vereinten Nationen über die Definition der Aggression' (1975) 18 JIR 127, 137 fn 27; A Rifaat, *International Aggression* (Almqvist & Wiksell International 1979) 124–25; *Contra* Knof and Kress (n 55) 16; C Chaumont, 'La définition de l'agression en 1970–1972' in Centre interuniversitaire de droit public et de l'Université libre de Bruxelles (ed), *Miscellanea W. J. Ganshof van der Meersch*, vol 1 (Bruylant 1972) 128; P Rambaud, 'La définition de l'agression par l'ONU' (1976) 80 RGDIP 835, 878.

⁶² P Daillier, M Forteau, and A Pellet, *Droit International Public* (8th edn, L.G.D.J. 2009) 1039.

⁶³ The ICJ's ruling does not relate directly to Art. 51 of the UN Charter, but to corresponding customary international law.

⁶⁴ *Nicaragua* (n 17) para 195.

⁶⁵ *ibid*: 'In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein". This description, contained in Art. 3 paragraph (g) of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), may be taken to reflect customary international law'; see also Corten (n 16) 405.

⁶⁶ *Congo v Uganda* (n 11) para 146; see also *Legal Consequences of the Construction of a Wall* (n 13) para 139.

- 67** *Oil Platforms* (n 11) paras 64 and 72.
- 68** Gray (n 8) 130.
- 69** See International Criminal Court—Assembly of States Parties ‘The Crime of Aggression’ (11 June 2010) Res RC/Res.6 <http://www.icc-cpi.int/iccdocs/asp_docs/resolutions/rc-res.6-eng.pdf> accessed 30 January 2012; see S Barriga and L Grover, ‘A Historic Breakthrough on the Crime of Aggression’ (2011) 105 AJIL 517, 520; C Kreß and L von Holtendorff, ‘The Kampala Compromise on the Crime of Aggression’ (2010) 8(5) JICJ 1179.
- 70** See above MN 6.
- 71** *Nicaragua* (n 17) para 191; *Oil Platforms* (n 11) paras 51, 64, and 72; see also Institut de Droit International ‘Tenth Commission, Present Problems of the Use of Armed Force in International Law’ (27 October 2007) 10A Res EN, para 5; Green (n 23) 31f; Dinstein (n 3) 207–09; Corten (n 16) 403.
- 72** *Nicaragua* (n 17) para 195: ‘The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces’; see also Eritrea Ethiopia Claims Commission (n 22) para 11: ‘Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter’; Green (n 23) 34ff; Gray (n 8) 177ff; against the ICJ: Dinstein (n 3) 210f; Gazzini (n 10) 133 and 138; Wilmschurst (n 23) 966.
- 73** See below MN 49–55 on anticipatory self-defence.
- 74** Ruys (n 26) 169; Greenwood (n 23) para 13; Schindler (n 26) 35–36; Higgins (n 28) 201. The ICJ has not excluded such a possibility, but has also not actively pursued such a concept in *Congo v Uganda* (n 11) para 146.
- 75** *Oil Platforms* (n 11) paras 122–23.
- 76** See MN 50 below; Gazzini (n 10) 192.
- 77** *Oil Platforms* (Separate Opinion Judge Simma) (n 20) para 14; Tams, ‘The Use of Force against Terrorists’ (n 8) 370; Gray (n 8) 155; Gazzini (n 10) 192; L A Sicilianos, ‘L’Invocation de la Légitime Défense face aux Activités d’Entités Non-Étatiques’ (1989) 2 Hague YB Intl L 147, 155–57; N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 51.
- 78** Tams, ‘The Use of Force against Terrorists’ (n 8) 388–90; A Zimmermann, ‘The Second Lebanon War: *Jus ad Bellum*, *Jus in Bello* and the Issue of Proportionality’ (2007) 11 Max Planck YB UN L 99, 109; T Reinold, ‘State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11’ (2011) 105 AJIL 244, 284–85; D Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Ius Ad Bellum*’ to be published in EJIL 2012.
- 79** See above MN 17.
- 80** Concurring Gray (n 8) 130 and 173; Dinstein (n 3) 217; Corten (n 16) 404; Ruys (n 26) 139, 539; D Blumenwitz, *Feindstaatenklauseln: die Friedensordnung der Sieger* (Langen Müller 1972) 739; Schindler (n 26) 16, 33.
- 81** *Nicaragua* (n 17) para 195.
- 82** Gray (n 8) 11 and 128; Gazzini (n 10) 134f; Green (n 23) 34; G Meier, ‘Der Begriff des bewaffneten Angriffs’ (1973/5) 16 AVR 374, 382.
- 83** See above MN 20; *Oil Platforms* (n 11) para 51; the Definition of Aggression itself contains a ‘*de minimis* rule’ for small-scale attacks: according to Art. 2, the SC may determine whether actions falling under the examples given in Art. 3 do not constitute ‘acts of aggression’, owing to their lack of gravity.
- 84** See eg *Oil Platforms* (n 11) para 51.
- 85** On which see Bruha (n 53) 245–46.

⁸⁶ For the discussion of this point in the Special Committee on the Question of Defining Aggression see the account by Bruha (n 53) 167, 245–48.

⁸⁷ Concurring Ruys (n 26) 276; A Constantinou, *The Right of Self-Defence Under Customary International Law and Article 51 of the UN Charter* (Ant N Sakkoulas, Bruylant 2000) 76–81; P Wittig, 'Der Aggressionsbegriff im internationalen Sprachgebrauch' in Schaumann (n 16) 47.

⁸⁸ cf Bruha (n 53) 251–54.

⁸⁹ On the question of whether traffic obstructions are in principle susceptible to being classified as armed attacks see Constantinou (n 87) 81; W Wengler, *Das völkerrechtliche Gewaltverbot—Probleme und Tendenzen* (de Gruyter 1967) 10–11.

⁹⁰ Concurring Hailbronner (n 45) 76.

⁹¹ ICJ in *Oil Platforms* (n 11) para 72; R Lagoni, 'Gewaltverbot, Seekriegsrecht und Schifffahrtswfreiheit im Golfkrieg' in W Fürst, R Herzog, and DC Umbach (eds), *Festschrift für Wolfgang Zeidler*, vol 2 (de Gruyter 1987) 1841–42.

⁹² Greenwood (n 23) para 21; Ronzitti, 'The Expanding Law of Self-Defence' (n 31) 350; Ruys (n 26) 200; Dinstein (n 3) 217. In the SC debate on the Gulf of Tonkin incident, where naval forces of North Vietnam attacked an American warship, the applicability of Art. 51 was in principle not called into question, see RPSC Supp (1964–65), 195–96. When the United States used force against Libyan missile ships and radar installations in response to a Libyan attack on American naval aircraft in the Gulf of Sidra on 24 March 1986, the United States, in a letter to the President of the SC, invoked their 'right of self-defence in accordance with Art. 51' (UNSC 'Letter dated 25 March 1986 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (25 March 1986) UN Doc S/17938; cf [1986/3] UN Chron 20, and 'U.S. Response to Libyan Attack' (1986) 86/2110 US Dept St Bull 80). This position was in principle vindicated by the governments of France, Spain, Japan, and the Federal Republic of Germany, who, while urging restraint, acknowledged the United States' right to self-defence when attacked in international waters (cf (1986) 32 *Keesing's* 34455). In a similar incident off the Libyan coast on 4 January 1989, the United States downed two Libyan planes which had allegedly first attacked American combat aircraft. This action, too, was justified as 'self-defence against an armed attack' (cf [1989/2] UN Chron 33). Some authors regard the forcible defense of a warship as admissible without assuming a case of Art. 51, see K Skubiszewski, 'Use of Force by States, Collective Security, Law of War and Neutrality' in M Sorensen (ed), *Manual of Public International Law* (Macmillan 1968) 773; Schindler (n 26) 16; C Lerche, *Militärische Abwehrbefugnisse bei Angriffen auf Handelsschiffe* (Lang 1993) 204–07.

⁹³ ICJ in *Oil Platforms* (n 11) para 72.

⁹⁴ Concurring Greenwood (n 23) para 21; Lagoni in Fürst, Herzog, and Umbach (n 91) 1839, 1841.

⁹⁵ Thus, the invasion of the Falkland Islands by Argentina on 2 April 1982 constituted a breach of Art. 2 (4) as well as an 'armed attack', regardless of whether the presence of British troops on those islands was lawful or not, see A **Randelzhofer**, 'Der Falklandkonflikt und seine Bewertung nach geltendem Völkerrecht' (1983) 38 *EA* 685, 686.

⁹⁶ See below MN 29.

⁹⁷ Dinstein (n 3) 202 and 214; on the problem of enforcing the territorial sovereignty of the coastal State *vis-à-vis* warships see Hailbronner (n 45) 68–69.

⁹⁸ See Verdross and Simma (n 24) paras 472, 473; Green (n 23) 40–41; Hailbronner (n 45) 67; Schindler (n 26) 15. Thus the SC debate on the Israeli interception of a civilian Libyan aircraft within international airspace on 4 February 1986 referred solely to legal rules of international aviation rather than to those on the use of force (cf [1986/3] UN Chron 16–19).

⁹⁹ ICJ in *Oil Platforms* (n 11) paras 50–56; N Ochoa-Ruiz and E Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-Defence' (2005) 16 *EJIL* 499, 513.

- 100** Greenwood (n 23) para 23; D Raab, ‘“Armed Attack” after the Oil Platforms Case’ (2004) 17 *Leiden J Intl L* 719, 726–29; Ronzitti, ‘The Expanding Law of Self-Defence’ (n 31) 350; Ruys (n 26) 204–13; some authors would accept such a conclusion only under limited circumstances, see Dinstein (n 3) 217; Constantinou (n 87) 82.
- 101** Concerning attacks on a State’s space fleet see R Harndt, ‘Die militärische Nutzung des Weltraums und ihre völkerrechtlichen Grenzen’ (1984) 24 *Rev de Droit Mil et de Droit de la Guerre* 69, 82–83.
- 102** Lagoni in Fürst, Herzog, and Umbach (n 91) 1841–42 and Dinstein (n 3) 217. For the restrictive effect of the use of the term ‘fleet’ see also Bruha (n 53) 261 and Bothe, ‘Die Erklärung der Generalversammlung der Vereinten Nationen über die Definition der Aggression’ (n 61) 134.
- 103** Thus one might think of the case of an attack on the entire fishing fleet of a State whose economic existence depends upon the fishing industry.
- 104** Lagoni in Fürst, Herzog, and Umbach (n 91) 1839, 1841–42 views the attack against the civilian air or marine fleet of a State as an ‘armed attack’.
- 105** The ICJ briefly touched on this issue in the *Tehran Hostages Case* but did not address the substance of the matter: *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, paras 32, 93, and 94; see also M Hakenberg, *Die Iran-Sanktionen der USA während der Teheraner Geisellaffäre aus völkerrechtlicher Sicht* (Lang 1988) 225–28 with further references.
- 106** CPF/Cassese, 1347–50; M Bothe, ‘Friedenssicherung und Kriegsrecht’ in W Graf Vitzthum (ed), *Völkerrecht* (5th edn, de Gruyter 2010) 660 MN 21; Kreß (n 10) 344f; A Nußberger, ‘Völkerrecht im Kaukasus—Postsowjetische Konflikte in Russland und in Georgien’ (2008) 35 *EuGRZ* 457, 464; Hailbronner (n 45) 69; Verdross and Simma (n 24), 290, para 473; more open with respect to certain situations: Gazzini (n 10) 171f; Ruys (n 26) 215 and 239–43; Corten (n 16) 403f, 510.
- 107** O Schachter, ‘The Right of States to Use Armed Force’ (1984) 82 *Mich L Rev* 1620, 1632; Dinstein (n 3) 217–19; T M Franck, *Recourse to Force* (CUP 2002) 96; L Doswald-Beck, ‘The Legality of the United States Intervention in Grenada’ (1984) 31 *NILR* 355, 361.
- 108** See Doswald-Beck (n 107); cf also Bowett, *Self-Defence in International Law* (n 30) 92, Greenwood (n 23) para 24; KE Eichensehr, ‘Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues’ (2007–08) 48 *Virginia J Intl L* 451, 468.
- 109** H Neuhold, *Internationale Konflikte—Verbotene und erlaubte Mittel ihrer Austragung* (Springer-Verlag 1977) 146; see also Verdross and Simma (n 24) para 1338; Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (n 16) 11; Henkin (n 26) 145; Schindler (n 26) 15, 21; U Beyerlin, ‘Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht’ (1977) 37 *ZaöRV* 213, 220.
- 110** Hailbronner (n 45) 102.
- 111** See the account of State practice given by Gray (n 8) 159f and Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (n 16) 26–49; **Randelzhofer** and Dörr on Art. 2 (4) MN 59.
- 112** See **Randelzhofer**, ‘Die Aggressionsdefinition der Vereinten Nationen’ (n 55) 626.
- 113** A restrictive interpretation of Art. 3 (e) is also advocated, though with regard to the term ‘act of aggression’, by Bruha (n 53) 248–49 and Bothe, ‘Die Erklärung der Generalversammlung der Vereinten Nationen über die Definition der Aggression’ (n 61) 134–35.
- 114** See ICJ in *Congo v Uganda* (n 11) para 99; M Vashakmadze, *Die Stationierung fremder Truppen im Völkerrecht* (Duncker & Humblot 2008) 91–94; Ruys (n 26) 344.
- 115** Schindler (n 26) 39 and Bruha (n 53) 263.
- 116** HP Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 381; Schindler (n 26) 39.

- 117 See **Randelzhofer** and Dörr on Art. 2 (4) MN 23–28.
- 118 See UNGA ‘Summary Record of the 84th mtg’ (8 February 1971) UN Doc A/AC.134/SR.84, 35.
- 119 cf para 7 of the Draft Definition of Aggression submitted by the non-aligned countries (n 61).
- 120 cf the comprehensive account of the process forming the consensus with the Special Committee given by Bruha (n 53) 169–72, 228–39.
- 121 *Nicaragua* (n 17) para 195.
- 122 ICJ in *Congo v Uganda* (n 11) paras 146 and 147; see *ibid* (Separate Opinion Judge Kooijmans) [2005] ICJ Rep 306, para 21.
- 123 *Nicaragua* (n 17) para 195; *Congo v Uganda* (n 11) paras 143ff, in particular para 147.
- 124 See Art. 8 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, paras 391f.
- 125 *Nicaragua* (n 17) para 249.
- 126 See **Randelzhofer**, ‘Die Aggressionsdefinition der Vereinten Nationen’ (n 55) 627 and P Lamberti Zanardi, ‘Indirect Military Aggression’ in Cassese, *Current Legal Regulation* (n 28) 115.
- 127 *Congo v Uganda* (n 11) para 146.
- 128 *Nicaragua* (n 17) para 195.
- 129 T Ruys and S Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’ (2005) 10 J Conflict & Security L 289, 313–15; S D Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter’ (2002) 43 Harv Intl LJ 41, 51; C Stahn, ‘International Law at a Crossroads? The Impact of September 11’ (2002) 62 ZaöRV 183, 226f; Wilmschurst (n 23) 969f; C Tomuschat, ‘Der Sommerkrieg des Jahres 2006 im Nahen Osten. Eine Skizze’ (2006) 81 Friedens-Warte 179, 181f.
- 130 See Tams, ‘The Use of Force against Terrorists’ (n 8) 384ff; Lubell (n 77) 29ff; CJ Tams, ‘Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case’ (2005) 16 EJIL 963; Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter’ (n 129) 50; Murphy, ‘Self-Defense and the Israeli Wall Advisory Opinion’ (n 11) 64ff; Zimmermann (n 78) 120; Ruys and Verhoeven (n 129) 305; R van Steenberghe, ‘Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?’ (2010) 23 Leiden J Intl L 183, 197–99; Ruys (n 26) 447; Corten (n 16) 443; Dinstein (n 3) 224–30.
- 131 Wilmschurst (n 23) 969; Murphy, ‘Self-Defense and the Israeli Wall Advisory Opinion’ (n 11) 62f; Ruys and Verhoeven (n 129) 289, 305; Lubell (n 77) 31.
- 132 *Legal Consequences of the Construction of a Wall* (n 13) para 139.
- 133 But see Gray (n 8) 135f who suggests that the statement can be interpreted more narrowly.
- 134 *Congo v Uganda* (Separate Opinion Judge Simma) [2005] ICJ Rep 334, para 11.
- 135 *Congo v Uganda* (n 11) para 146.
- 136 *Congo v Uganda* (n 11) para 147.
- 137 *Legal Consequences of the Construction of a Wall* (Declaration Buergenthal) [2004] ICJ Rep 240, para 6; *ibid* (Separate Opinion Judge Higgins) [2004] ICJ Rep 207, para 33; *Congo v Uganda* (Separate Opinion Judge Kooijmans) (n 122) paras 29f; *ibid* (Separate Opinion Judge Simma) (n 134) paras 11f; Greenwood (n 23) paras 17f; T M Franck, ‘Terrorism and the Right of Self-Defence, Editorial Comment’ (2001) 95 AJIL 839, 840; Wilmschurst (n 23) Principle F; Tomuschat (n 129) 182; Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter’ (129) 50; Ronzitti, ‘The Expanding Law of Self-Defence’ (n 31) 348; van Steenberghe (n 130) 197–99; Y Ronen, ‘Israel, Hizbollah, and the Second Lebanon War’ (2006) 9 YB Intl Humanitarian Law 362,

384–85; KN Trapp, *State Responsibility for International Terrorism* (OUP 2011) 59f; Dinstein (n 3) 227ff; Chainoglou (n 45) 128; Lubell (n 77) 35.

138 Tams, 'Light Treatment of a Complex Problem' (n 130) 973; Tams, 'The Use of Force against Terrorists' (n 8) 374, 384f; SR Ratner, 'Jus ad Bellum and Jus in Bello after September 11' (2002) 96 AJIL 905, 910; J Kammerhofer, 'The *Armed Activities* Case and Non-State Actors in Self-Defence Law' (2007) 20 Leiden J Intl L 89, 110; Brunnée and Toope (n 30) 794–95; C Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence' (2008) 55 NILR 159, 171; J Kranz, *War, Peace or Appeasement?* (Instytut Wydawniczy EuroPrawo 2009) 152.

139 Ruys and Verhoeven (n 129) 315f; Stahn (n 129) 214ff, 226ff; Tams, 'The Use of Force against Terrorists' (n 8) 384f; Zimmermann (n 78) 120; S Verhoeven, 'A Missed Opportunity to Clarify the Modern *Ius ad Bellum*: Case Concerning Armed Activities on the Territory of the Congo' (2006) 45 Military Law and the Law of War Review 355, 359–60; but see Ruys (n 26) 491–93.

140 HP Aust, 'The Normative Environment for Peace—On the Contribution of the ILC's Articles on State Responsibility' in G Nolte (ed), *Peace through International Law: the Role of the International Law Commission* (Springer 2009) 43.

141 See Declaration of the Heads of State and Government of the Rio Group on the recent events between Ecuador and Colombia, 'Report of the OAS Commission that visited Ecuador and Colombia' (16 March 2008) OEA/Ser.F/II.25 RC.25/doc. 7/08, Annex 2; Rio Group 'Resolution of the Permanent Council of the OAS' (5 March 2008) OEA/Ser.G CP/RES.930 (1632/08); see also Independent International Fact-Finding Mission on the Conflict in Georgia 'Report', vol II (September 2009), 19 <http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf> accessed 30 September 2011; Corten (n 16), 464–66.

142 UN Doc S/RES/1368 (2001).

143 This qualification could be the basis for a decision of the SC under Art. 42 of the UN Charter to take military action against States to which such acts of terrorism are attributable.

144 Press Release 'Press Statement on Terrorist Threats by Security Council President' (8 October 2001) AFG/152-SC/7167.

145 See below MN 57.

146 ICJ in *Congo v Uganda* (n 11) para 147.

147 As to the phenomenon of 'failed States' see D Thürer and M Herdegen, 'Der Wegfall effektiver Staatsgewalt: "The failed state"' (1996) 24 DGVR Berichte 9ff, 49ff.

148 *Congo v Uganda* (n 11) para 147.

149 Gray (n 8) 129; Dinstein (n 3) 33 and 212; Greenwood (n 23) para 14; Ruys (n 26) 176; Y Dinstein, 'Computer Network Attacks and Self-Defence' (2002) 76 International Law Studies 99; M Roscini, 'World Wide Warfare—Jus ad Bellum and the Use of Cyber Force' (2010) 14 Max Planck YB UN L 85; T Stein and T Maruhn, 'Völkerrechtliche Aspekte von Informationsoperationen' (2000) 60 ZaöRV 1; MN Schmitt, 'Computer Network Attack: The Normative Software' (2001) 4 YB Intl Humanitarian Law 53; F Dittmar, *Angriff auf Computernetzwerke, ius ad bellum und ius in bello* (Duncker & Humblot 2005).

150 K Ziolkowski, 'Computer Network Operations and the Law of Armed Conflict' (2010) 49 Military Law and the Law of War Review 47, 59; MC Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36 YJIL 421, 423.

151 (2007) 53 Keessing's 47944.

152 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [2005] ICJ Rep 226, para 39.

153 Ruys (n 26) 176; Dinstein, 'Computer Network Attacks and Self-Defence' (n 149) 103; Roscini (n 149) 115; Dittmar (n 149) 155; Schmitt (n 149) 73.

- 154** Stein and Marauhn (n 149) 7; Dinstein, 'Computer Network Attacks and Self-Defence' (n 149) 103; Roscini (n 149) 115; K Zemanek, 'Armed Attack' MPEPIL (online edn) para 21; H B Robertson, Jr, 'Self-Defense against Computer Network Attack under International Law' (2002) 76 *International Law Studies* 121, 138; Dittmar (n 149) 155; more cautiously: Greenwood (n 23) para 14; *contra* M Benatar, 'The use of cyber force' (2009) 1 *Göttingen Journal of International Law* 375, 393f; CC Joyner and C Lotrionte, 'Information Warfare as International Coercion, Elements of a Legal Framework' (2001) 12 *EJIL* 825, 855.
- 155** See above MN 6ff and 20.
- 156** See the references in n 154 for the prevailing view.
- 157** Dinstein, 'Computer Network Attacks and Self-Defence' (n 149) 105; Dittmar (n 149) 158.
- 158** Stein and Marauhn (n 149) 10; Roscini (n 149) 96ff; Schmitt (n 149) 56; Robertson (n 154) 137; Dittmar (n 149) 153.
- 159** *Oil Platforms* (n 11) para 57.
- 160** *Oil Platforms* (n 11) para 76.
- 161** See CPF/Cassese, 1354; Greenwood (n 23) paras 35ff; Gray (n 8) 167; Dinstein (n 3) 280; Ruys (n 26) 87; Verdross and Simma (n 24) para 474; Berber (n 27) 47; Wildhaber, 'Gewaltverbot und Selbstverteidigung' in Schaumann (n 16) 167; Ago (n 1) 68.
- 162** But see Bowett, *Self-Defence in International Law* (n 30) 216; Bowett, 'The Interrelation of Theories of Intervention and Self-Defence' in JN Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins UP 1974) 46–50; concurring Higgins (n 28) 208–09. For a detailed discussion see Knof and Kress (n 55) 22–27 and R Mushkat, 'Who May Wage War? An Examination of an Old/New Question' (1987) 2 *Am UJ Intl L & Pol'y* 97, 146–50.
- 163** Neuhold (n 109) 135, 146–47.
- 164** In various treaties of assistance, States have, upon reference to Art. 51 of the UN Charter, committed themselves to provide military support in the case of an attack against another party; see eg Art. IV of the Treaty of Brussels (adopted 17 March 1948) 19 *UNTS* 53, which became Art. V after the 1954 amendment (adopted 23 October 1954) 211 *UNTS* 342; Art. 3 of the Rio Treaty (adopted 2 September 1947) 21 *UNTS* 77; Art. 5 of the North Atlantic Treaty (adopted 4 April 1949) 34 *UNTS* 243; Art. 4 of the Warsaw Pact (adopted 14 May 1955) 219 *UNTS* 3.
- 165** See *Nicaragua* (n 17) paras 195–96.
- 166** *ibid*, para 195; see also para 199.
- 167** Greenwood (n 23) para 39; Dinstein (n 3) 281f; Dahm (n 16) 412; Verdross and Simma (n 24) para 474; Neuhold (n 109) 147; but see A Martin, *Collective Security* (UNESCO 1952) 170.
- 168** Ruys (n 26) 87; Gray (n 8) 186–87; Constantinou (n 87) 178; Verdross and Simma (n 24) para 474; Ago (n 1) 68.
- 169** *Nicaragua* (n 17) para 199; *Oil Platforms* (n 11) para 51.
- 170** See ICJ in *Nicaragua* (n 17) para 232: 'It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect'; Ruys (n 26) 89; Gray (n 8) 185–87; Greenwood (n 23) para 38; but see also *Nicaragua* (Dissenting Opinion Judge Schwebel) [1986] ICJ Rep 259, para 191 and *ibid* (Dissenting Opinion Judge Jennings) (n 23) 545; Dinstein (n 3) 294–96; JN Moore, 'The *Nicaragua* Case and the Deterioration of World Order' (1987) 81 *AJIL* 151, 155; W Wengler, 'Die Entscheidung des Internationalen Gerichtshofs im Nicaragua-Fall' (1986) 39 *NJW* 2994, 2996.
- 171** Gray (n 8) 160–65.
- 172** eg Bowett, *Self-Defence in International Law* (n 30) 188–89; CHM Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952-II) 81 *Rec des Cours* 451, 497–98; Schwebel (n 30) 479–81; Schachter, 'The Right of States to Use Armed Force' (n 107) 1634–35;

Wildhaber, 'Gewaltverbot und Selbstverteidigung' in Schaumann (n 16) 153; Hailbronner (n 45) 81; TLH McCormack, *Self-Defence in International Law: The Israeli Raid on the Iraqi Reactor* (Palgrave Macmillan 1996) 226–38, 285–302.

173 cf JB Moore, *Digest of International Law*, vol 2 (US Govt Printing Office 1906) 412.

174 See in particular the condemnation by the Security Council of the bombing by Israel of a nuclear reactor in Iraq in 1981, UNSC Res 487 (19 June 1981) UN Doc S/RES/487(1981); cf, however, the debate in the GA on the Six Days War where views differed on the lawfulness of the strike by Israel (UNGA 'Consideration of the Middle East Situation' (1967) UNYB 199–200).

175 The English as well as the Spanish version ('en caso de ataque armado') are reasonably clear in this respect, whereas the French text ('dans le cas où un Membre des Nations Unies est l'objet d'une agression armée') tends to be less restrictive.

176 See Brownlie, *International Law and the Use of Force by States* (n 26) 275–78; I Brownlie, 'The Principle of the Non-Use of Force in Contemporary International Law' in WE Butler, *The Non-Use of Force in International Law* (Nijhoff 1989) 24–25; T Farer, 'Law and War' in CE Black and R Falk (eds), *The Future of the International Legal Order*, vol 3 (Princeton UP 1971) 36–39; Wengler (n 89) 5; Skubiszewski in Sorensen (n 92) 778–79; Zourek (n 5) 106; G Danilenko, 'The Principle of Non-Use of Force in the Practice of the International Court of Justice' in WE Butler, *The Non-Use of Force in International Law* (Nijhoff 1989) 109; CP (2nd edn)/Cassese 776–80 and CPF/Cassese, 1335–43, especially 1341.

177 See WM Reisman and A Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defence' (2006) 100 AJIL 527ff; Cassese, *International Law in a Divided World* (n 26) 230–33 had already detected a growing trend in State practice that anticipatory self-defence might be allowed under strict conditions.

178 The White House Washington, 'The National Security Strategy of the United States of America' (September 2002) <http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf> accessed 30 September 2011; AD Sofaer, 'On the Necessity of Pre-emption' (2003) 14 EJIL 209ff.

179 The White House Washington (n 178) at V.

180 'The actions that coalition forces are undertaking...are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.' UNSC 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (21 March 2003) UN Doc S/2003/351; Gray (n 8) 216–22.

181 See the pronouncements quoted by Reisman and Armstrong (n 177) 538ff.

182 Reisman and Armstrong (n 177) 547ff; Gray (n 8) 252; M Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 EJIL 227, 233f; the United States has indeed later narrowed its claim somewhat, perhaps in view of the fact that more States might actually adopt it as their policy, see Reisman and Armstrong (n 177) 549f.

183 Bothe, 'Terrorism and the Legality of Pre-emptive Force' (n 182) 231; Greenwood (n 23) paras 45f and 50; M E O'Connell, 'Defending the Law against Preemptive Force' in A Fischer-Lescano (ed), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos 2008) 246; Wilmshurst (n 23) Principle D; Ruys (n 26) 356; Ronzitti, 'The Expanding Law of Self-Defence' (n 31) 347; some authors accept the Caroline formula without accepting that it covers a case of anticipatory self-defence, eg Dinstein (n 3) 197f and Gazzini (n 10) 151f; as to the contrary opinion see H Neuhold, 'Legal Crisis Management: Lawfulness and Legitimacy of the Use of Force' in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 281 at fn 21.

184 UNGA 'A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change' (2 December 2004) UN Doc A/59/565, para 188.

185 'Article 51 of the UN Charter is restrictive and...should not be re-written or re-interpreted. This

is supported by the practice of the UN and in accordance with international law pronounced by the International Court of Justice, the principal judicial organ of the UN, concerning this question.’ Comments of the Non-Aligned Movement on the observations and recommendations contained in the Report of the High-level Panel On Threats, Challenges and Change (UN Doc A/59/565 and A/59/565 Corr.1) (28 February 2005) para 23 <<http://www.un.int/malaysia/NAM/NAM.html>> accessed 30 September 2011.

186 *Nicaragua* (n 17) para 194; *Legal Consequences of the Construction of a Wall* (n 13) para 139.

187 *Congo v Uganda* (n 11) para 143.

188 UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1.

189 Reisman and Armstrong (n 177) 532; Ronzitti, ‘The Expanding Law of Self-Defence’ (n 31) 348.

190 Wilmshurst (n 23) Principle D.

191 According to Franck, *Recourse to Force* (n 107) 107, it is for the UN organs ‘collectively responding to the evidence—and not for an attacking state, to determine the propriety or culpability of such anticipatory use of force’. The involvement of additional national institutions (eg courts) in the decision by a State to take anticipatory action could de facto lead to greater care in the collection and handling of evidence but it would not, as such, provide such action with additional international legitimacy, apart from raising other concerns; see AN Guiora, ‘Anticipatory Self-Defence and International Law—A Re-Evaluation’ (2008) 13 J Conflict & Security L 3 and T Gazzini, ‘A Response to Amos Guiora: Pre-Emptive Self-Defence against Non-State-Actors?’ (2008) 13 J Conflict & Security L 25.

192 On the development of nuclear strategy and its impact on the concept of preventive self-defence cf Neuhold (n 109) 240–58; see also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 48.

193 No obligation corresponding to this requirement laid down in the UN Charter exists under customary law; see *Nicaragua* (n 17) paras 200, 235. Against a mandatory obligation even under Art. 51: DW Greig, ‘Self-Defence and the Security Council: What Does Article 51 Require?’ (1991) 40 ICLQ 366, 366–88.

194 Gray (n 8) 91–92, especially n 25.

195 See MN 64.

196 n 17, para 200, but see also *Nicaragua* (Dissenting Opinion Judge Schwebel) (n 170) paras 221–30.

197 Gray (n 8) 122ff.

198 On these principles see J Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 138ff; TM Franck, ‘On Proportionality of Countermeasures in International Law’ (2008) 102 AJIL 715, 719–22; E Cannizzaro, *Il principio della proporzionalità nell’ordinamento internazionale* (Guiffrè 2000); E Cannizzaro, ‘Contextualizing Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War’ (2006) 864 IRRC 779, 779–85; Gray (n 8) 148ff.

199 *Nicaragua* (n 17) paras 194, 237; *Oil Platforms* (n 11) paras 43, 51, 73–77; *Congo v Uganda* (n 11) para 147; *Legality of the Threat or Use of Nuclear Weapons* (n 152) para 41.

200 See Brownlie (n 26) 261–80; Bothe, ‘Das Gewaltverbot im allgemeinen’ in Schaumann (n 16) 20, Neuhold (n 109) 139; Schindler (n 26) 17, Schachter, ‘The Right of States to Use Armed Force’ (n 107) 1637.

201 *Nicaragua* (n 17) para 237.

202 Ago (n 1) 69; *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion Judge Higgins) [2005] ICJ Rep 583, para 5; Corten (n 16) 484ff; Cassese, *International Law* (n 43) 355.

203 cf *Nicaragua* (n 17) para 237; *Oil Platforms* (n 11) paras 73–77; *Congo v Uganda* (n 11) para

147.

204 *Oil Platforms* (n 11) para 76; similarly *Congo v Uganda* (n 11) para 147; *Nicaragua* (n 17) para 237.

205 Franck, 'On Proportionality of Countermeasures' (n 198) 730–32; JA Green, 'The Oil Platforms Case: An Error in Judgement?' (2004) 9 J Conflict & Security L 357, 380f; Taft IV (n 23) 303–06.

206 Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 'Final Report to the Prosecutor' <<http://www.icty.org/sid/10052>> accessed 31 January 2012, at para 48.

207 MN 22–46.

208 Tams, 'The Use of Force against Terrorists' (n 8) 382.

209 For example, see the relevance of these principles in the discussion of the (Second) Lebanon War 2006 in: Tomuschat (n 129) 183f; Zimmermann (n 78) 124f; Cannizzaro, 'Contextualizing Proportionality' (n 198) 784f; Ronen (n 137) 387f and 389ff.

210 *Oil Platforms* (n 11) para 73.

211 Gardam (n 198) 11; Corten (n 16) 470; Cannizzaro, 'Contextualizing Proportionality' (n 198) 782.

212 Thus, a general prohibition of the first use of nuclear weapons cannot be derived from the principle of proportionality. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that 'there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such'; further the ICJ said that it 'cannot conclude definitely whether the threat or the use of nuclear weapons would be lawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'; see *Legality of the Threat or Use of Nuclear Weapons* (n 152) 266; see also Neuhold (n 109) 140; Dahm (n 16) 417; Dinstein (n 3) 262–67.

213 Gardam (n 198) 164; Independent International Fact-Finding Mission on the Conflict in Georgia (n 141) 272.

214 *Contra* Franck, 'On Proportionality of Countermeasures' (n 198) 722.

215 J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, vol 1: *Rules* (CUP 2005) Rule 14.

216 G Nolte, 'Thin or Thick? The Principle of Proportionality and International Humanitarian Law' (2010) 4 Law & Ethics of Human Rights 244, 247.

217 *Nicaragua* (n 17) para 193.

218 Only in respect of the duty to report to the SC pursuant to the second sentence of Art. 51 does the ICJ establish a divergence between the conventional and the customary right of self-defence; see *ibid*, para 235. For the complete identity of customary and conventional law see Ago (n 1) 63 and TD Gill, 'The Law of Armed Attack in the Context of the Nicaragua Case' (1988) 1 Hague YB Intl L 30, 49 who both claim that the Charter provision has superseded the traditional rule.

219 *Nicaragua* (n 17) para 195.

220 First, by finding that the invasion constituted a breach of international peace and security (UNSC Res 660 (2 August 1990) UN Doc S/RES/660(1990)); next, by imposing a mandatory global embargo (UNSC Res 661 (6 August 1990) UN Doc S/RES/661(1990), paras 3, 4, 5); and then, by calling on members disposing of forces in the area to use such measures commensurate with the specific circumstances as may be necessary under the authority of the SC to halt all inward and outward maritime shipping (UNSC Res 665 (25 August 1990) UN Doc S/RES/665(1990), para 1).

221 Gray (n 8) 124f; N Krisch, *Selbstverteidigung und kollektive Sicherheit* (Springer 2001) 180–82.

222 Gray (n 8) 126ff.

223 eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Oral Proceedings) ICJ Verbatim Record [1993] CR 93/13, 46–48 and CR 93/33, 42ff.

224 Gray (n 8) 127.

225 Krisch, *Selbstverteidigung und kollektive Sicherheit* (n 221) 134f.