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The Security Council's Right to Intervene in Non-International Armed Conflicts

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Abstract

This article examines the legal basis, scope and limits of United Nations Security Council intervention in non-international armed conflicts. Using a descriptive and analytical approach, it considers the distinction between internal disturbances, non-international armed conflicts and internationalised conflicts in light of the Geneva Conventions, their Additional Protocols, the Rome Statute and the United Nations Charter. It then analyses the Security Council's role in international criminal justice, including the establishment of the International Criminal Tribunal for the former Yugoslavia and the referral of the situation in Darfur to the International Criminal Court, as well as the legal status of persons detained during armed conflict. Particular attention is given to the authorisation of military operations, the attribution of armed-group conduct to supporting states, and the contested relationship between anticipatory or pre-emptive action and the right of self-defence. The analysis emphasises the requirements of an armed attack, necessity, proportionality, immediacy and notification of the Security Council, while highlighting legal concerns about extending self-defence to terrorist networks and using force on the basis of hypothetical threats. The article concludes that political fragmentation and external support can aggravate internal conflicts, and that Security Council action under Chapter VII is essential to protecting civilians, maintaining international peace and security, and preventing escalation into regional or international war.

Keywords: Armed conflicts; Non-international; Security Council; Intervention.

Introduction

Traditional international law recognised wars occurring within the territory of a single state, whether between a government and insurgents, among the state's own nationals, or involving peoples struggling for independence and the restoration of their sovereignty. Such conflicts were described as revolutions, uprisings, rebellions and civil wars. All of these are encompassed by what contemporary international law calls non-international armed conflicts, or civil wars.

Under traditional international law, before the emergence of recognition of belligerency, these various forms were considered domestic matters falling within the jurisdiction of the state on whose territory the armed conflict occurred, even where international parties intervened to halt it.

By contrast, international armed conflicts were governed by international law and the law of war, because they occurred between states, which traditional international law regarded as the only subjects of international legal personality.

Until the middle of the twentieth century, this traditional perspective drew an artificial distinction between international and non-international armed conflicts that lacked a sound legal basis. [1]

International armed conflicts include the use of armed force by one state against another, or military hostilities between two or more states, even where one party does not recognise a state of war. The situation is straightforward when two states engage in officially declared hostilities between their regular armies. It is different, however, where a state engages in hostilities indirectly by using armed groups to attack another state or conduct military operations on its territory. In such circumstances, the relationship between the state and the groups must be examined. [2]

According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts prepared by the United Nations International Law Commission, a state can be held responsible for the unlawful conduct of such groups only where a strong and direct relationship exists, based principally on direction, control or supervision. In the absence of such a relationship, a state may instead incur responsibility for failing to discharge its obligations to prevent its territory from becoming a refuge for these groups. [3, 4]

I shall therefore examine the nature of non-international armed conflicts and the role of the Security Council in resolving them.

Section One: The Nature of Non-International Armed Conflicts

Different approaches have been taken to their concept and forms because of the ambiguity surrounding them. Definitions often rest on subjective criteria without a stable foundation, and there is no agreement on the precise meaning of a non-international armed conflict. Such conflicts do not occur between regular armies; furthermore, their geographical confinement within a single state gives them a distinctive character in light of state sovereignty, respect for that sovereignty, non-intervention in domestic affairs and the possibility of infringing it. [5]

When violence reaches a certain threshold of seriousness, however, and evolves from mere rebellion or insurrection into an internal armed conflict of a non-international character in which grave acts threatening international peace and security are committed, potentially amounting to war crimes, crimes against humanity, inhumane acts or crimes of aggression, such a conflict cannot be resolved without international intervention involving armed force to arrest those responsible and bring them before the competent International Criminal Court.

Subsection One: The Concept of Non-International Armed Conflicts

Traditional legal scholarship sought a clear and precise definition of non-international armed conflicts, but the predominance of ideological considerations produced divergent definitions, sometimes broadening and at other times narrowing the concept.

Alongside international wars, other conflicts involved conduct similar to that occurring in war, but traditional international law did not regard them as genuine wars. They were described by various terms, including revolution, rebellion, insurrection and civil war. [6]

Part One: Definition

These are armed confrontations occurring within the territory of one state, in which armed forces from within that state operate against the central government.

Internal disturbances, such as riots, armed demonstrations and internal tensions, do not reach the level of a non-international armed conflict; nor does the category include conflicts between two or more states.

If a foreign state provides military support to an armed group against the legitimate government, the situation becomes an international conflict. [7]

Article 19 of the 1954 Convention for the Protection of Cultural Property provides for a case ‘of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties’. The Second Protocol likewise uses the expression ‘armed conflict not of an international character’. The Convention is thus presented as the first international treaty to recognise a distinction between international and non-international armed conflicts.

The four Geneva Conventions of 1949 and the Additional Protocols of 1977 also employ this designation in their common Article 3.

Part Two: Characteristics of Non-International Armed Conflicts

Unlike an international armed conflict, which entails a military confrontation between two states, a non-international armed conflict involves hostilities between government armed forces and organised armed groups, or between organised armed groups within a state, such as civil conflicts and internal wars, provided that certain conditions are met: [8]

The hostilities have reached a certain level of intensity and/or extended beyond what can be characterised as mere internal disturbances or isolated riots.

The parties can be identified.

The geographical boundaries of the conflict can be identified and defined.

The beginning and end of the conflict can be determined.

Common Article 3 of the four Geneva Conventions of 1949 is the provision specifically drafted for non-international armed conflicts. It establishes minimum rules that the parties must observe. Additional Protocol II of 1977, supplementing common Article 3, applies to internal armed conflicts taking place in the territory of a state party between its armed forces and dissident armed forces or other organised armed groups under responsible command that exercise control over part of its territory, enabling them to conduct sustained and concerted military operations and implement the Protocol. [9, 10]

It may therefore be said that war, in the legal sense, is an armed conflict, whether international or non-international, governed by international humanitarian law as embodied in the four Geneva Conventions of 1949, the two Additional Protocols of 8 June 1977, and other rules of customary international law.

Subsection Two: Forms of Non-International Armed Conflicts

In 1863, the first attempts to distinguish three forms of disruption of internal security—revolution, insurrection and civil war—appeared in the instructions drafted by the jurist Lieber and issued by the United States War Department on 24 April 1863.

Part One: The Crime of Civil War

A civil war occurs between sections of a state, each claiming to constitute the legitimate government and seeking to extend its sovereignty over the whole state.

First Paragraph: Definition of War Crimes in Non-International Armed Conflicts

War crimes are among the oldest international crimes that the international community sought to define in order to alleviate the suffering caused by war and limit its consequences as far as possible. They fall into two categories: violations of the laws and customs of war, and grave breaches of the Hague Conventions of 1907, the Geneva Conventions and their Additional Protocols relating to international humanitarian law. [11]

Article 8(2) of the 1998 Rome Statute of the permanent International Criminal Court defines war crimes as follows:

Grave breaches of the four Geneva Conventions of 12 August 1949, namely any of the eight acts listed in Article 8(2)(a) when committed against persons or property protected under the relevant Geneva Convention.

Other serious violations of the laws and customs applicable in international armed conflicts within international law, namely any of the 26 acts listed in paragraph 2(b).

In the event of an armed conflict not of an international character.

Other serious violations of the laws and customs applicable in non-international armed conflicts, namely any of the 12 acts set out in Article 8(2)(d), which are listed below.

The international community, through Article 8(2)(d) of the Rome Statute of the International Criminal Court, has also identified conduct constituting serious violations of the international laws and customs applicable to non-international armed conflicts which, where their specific elements are present, amount to war crimes within the Court's jurisdiction. [12]

Serious violations of the laws and customs applicable in non-international armed conflicts include:

Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Intentionally directing attacks against buildings, materials, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in accordance with international law.

Intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection afforded to civilians or civilian objects under the law of armed conflict.

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

Pillaging a town or place, even when taken by assault.

Rape, sexual enslavement, enforced prostitution, forced pregnancy as defined in Article 7(2)(f), enforced sterilisation or any other form of sexual violence constituting a serious violation of the Geneva Conventions.

Conscripting or enlisting children under the age of fifteen into armed forces or armed groups, or using them to participate actively in hostilities.

Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians concerned or imperative military reasons so demand.

Killing or wounding an adversary combatant treacherously.

Declaring that no quarter will be given.

Subjecting persons in the power of another party to the conflict to physical mutilation or medical or scientific experiments that are neither justified by the medical, dental or hospital treatment of the persons concerned nor carried out in their interest, and that cause death or seriously endanger their health.

Destroying or seizing an adversary's property unless such destruction or seizure is imperatively demanded by the necessities of war.

Employing poison or poisoned weapons. [13]

Employing asphyxiating, poisonous or other gases and analogous prohibited liquids, materials or devices.

Employing bullets that expand or flatten easily in the human body, such as bullets with hard envelopes that do not entirely cover the core or are pierced with incisions.

Rebellion and insurrection, also known as revolution, may constitute internal violence between civilians and the authorities, whether the latter are legitimate, have seized power in a coup, have refused to resign and transfer power to the opposition following defeat in democratic elections, or have lost legitimacy because of weakness or corruption in governing the country.

An uprising may be brief and peaceful, without riots or clashes, as in a peaceful popular movement. It may alternatively take the form of civil disobedience, a general strike and the paralysis of traffic, economic activity and civilian life, bringing protesters into direct confrontation with the ruling authorities and leading to clashes with riot police.

When inhabitants take up arms against the government or one of its branches in defiance of its laws, this constitutes an insurrection. If the uprising becomes sufficiently widespread to amount to war between the lawful government of a kingdom and provinces seeking to renounce their allegiance and establish a separate government, it is described as a revolution. [14]

Internal disturbances and tensions express a state of political or social unease, potentially manifested peacefully. Sudden clashes, rebellions and fighting may nevertheless occur between organised groups and state security forces, prompting the authorities to declare a state of siege or emergency and resort to arbitrary detention, enforced disappearance, internment camps, military prisons, torture and intimidation.

In attempting to distinguish non-international armed conflicts from internal disturbances and tensions, the jurist Gidel argues that the former presuppose two parties engaged in armed conflict within one state, whereas the latter do not presuppose two such parties but involve an established government confronting persons who do not constitute armed parties to an armed conflict. [15]

Article 8(3) of the Rome Statute of the International Criminal Court specifies that nothing in Article 8(2)(c) and (d) affects the responsibility of a government to maintain or re-establish law and order in the state or to defend its unity and territorial integrity by all legitimate means. This provision draws on Article 3(1) of Additional Protocol II. It was included to address the concerns of states unwilling to incorporate rules governing non-international armed conflicts for fear that they would permit interference in domestic affairs and limit the states' ability to respond to internal disturbances within their national borders.

Part Two: The Problem of Internationalised Armed Conflicts

Some hold that every state contains the seeds of internal division, whether ethnic, political or ideological.

The interests of domestic groups are often extensions of more powerful external interests. A purely internal conflict is therefore rare; conflicts are instead frequently mixed in character, with non-governmental groups intervening in other states and states supporting irregular armed groups fighting on the ground without deploying their own forces directly. [16]

In such mixed international and internal conflicts, it becomes extremely difficult to determine which law applies to the conflict as a whole or to its individual components.

Section Two: Security Council Intervention

The United Nations Security Council is the principal organ responsible for maintaining international peace and security. It has authority to determine whether a threat to the peace or an act of aggression exists, pursue peaceful settlement of disputes, adopt binding decisions under Chapter VII of the United Nations Charter, impose economic sanctions and arms embargoes, authorise the use of armed force, or refer a situation to the Prosecutor of the International Criminal Court for an international criminal investigation into conduct amounting to war crimes, crimes against humanity, genocide or the crime of aggression.

Subsection One: Referral of Conflicts by the Security Council to International Criminal Courts

The Security Council has played a major role in activating international criminal justice to try perpetrators of crimes committed in non-international armed conflicts when the United Nations General Assembly was unable to silence the machinery of war, genocide and atrocities against humanity in certain countries.

Part One: The Security Council's Authority to Establish the International Criminal Tribunal for the Former Yugoslavia

On 25 May 1993, the Security Council adopted Resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia to administer justice and try persons accused of serious violations of international humanitarian law in Yugoslav territory, particularly those committed against Bosnian Muslims by the Serbian army under the command of Ratko Mladić and Milošević in 1991. Yugoslavia was a country in south-eastern Europe, in the Balkans. Established as a kingdom in 1918 and renamed Yugoslavia in 1929, it comprised a federation of six socialist republics—Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro and Macedonia—as well as Kosovo, with Belgrade as its capital. It disintegrated following the collapse of communism and ethnic civil wars, whose victims included Muslims seeking independent republics in Bosnia and Herzegovina and Kosovo. They faced bloodshed and genocide at the hands of the Serbian army after surrendering their weapons to United Nations peacekeepers. A total of 8,372 Bosnian Muslims, most of them children, women and elderly people, were massacred after the brutal siege of Srebrenica between 11 and 22 July 1995. [17]

Judge Georges Abi-Saab, a member of the Tribunal's Appeals Chamber, explained that Article 2 of the four Geneva Conventions and Articles 3, 4 and 5 of the Statute applied to internal and international armed conflicts. [18]

On 22 November 2017, the International Criminal Tribunal for the former Yugoslavia delivered a judgment convicting perpetrators of war crimes and genocide. [19]

Paragraph 87 of the Appeals Chamber's decision stated: 'The expression "violations of the laws or customs of war" is traditional; the term "armed conflict" is now used instead of "war", particularly in the 1949 Geneva Conventions. The definition of crimes falling under Article 3 raises an important point: "violations of the laws or customs of war" is a traditional expression previously

used when “war” and “laws of war” were the prevailing terms, before they were replaced by “armed conflict”, particularly in the Geneva Conventions and international humanitarian law, especially following the influence of human rights principles.’ [20]

Part Two: The Security Council’s Referral of the Situation in Darfur to the International Criminal Court

Security Council Resolution 1593 referred the situation in Darfur to the International Criminal Court in an attempt to end the conflicts in the region, which had caused tens of thousands of deaths and displaced persons and refugees. The referral followed the parties’ failure to respect the ceasefire and to end violations of human rights and international humanitarian law in Darfur. The report of the International Commission of Inquiry had a significant influence on the adoption of the resolution, which represented the first referral of its kind by the Security Council to the Court. [21]

The Security Council based the referral of the Darfur conflict to the Court on its powers under Chapter VII, including Articles 39, 41 and 42 of the United Nations Charter, to maintain international peace and security. States are obliged to implement these decisions.

The referral was made pursuant to Article 13 of the Rome Statute, irrespective of whether the state of nationality of those alleged to have committed human rights offences was a party to the Statute, with the aim of preventing war criminals from escaping international justice.

The report of the International Commission of Inquiry confirmed that the Sudanese judiciary was unable or unwilling to prosecute and punish war criminals and perpetrators of human rights violations in Darfur.

An innovation of the Statute of the permanent International Criminal Court was to consolidate these violations of the laws and customs of war in the Rome Statute. This reinforces the principle of written legality in international criminal law and facilitates the work of the international criminal judge empowered under the Statute to adjudicate war crimes through fair and regular proceedings, with judicial guarantees recognised in civilised countries for persons accused of war crimes, crimes against humanity, aggression and genocide. Nevertheless, recent pressure exerted by the United States and Israel on the Prosecutor of the International Criminal Court, including threats against her and her family and financial sanctions imposed on the Court, constitutes a serious infringement of international justice.

Among the legal consequences and questions raised by the war on terrorism is the legal status of persons detained in that context and the law applicable to them: the national law of the detaining state or international law on the basis that they are prisoners of war? This issue is addressed in the following part.

Part Three: The Legal Status of Detainees in Non-International Armed Conflicts

One of the most controversial questions in legal circles and international humanitarian law is the status of combatants in non-international armed conflicts.

First Paragraph: Lawful Combatants

In international armed conflicts, the term ‘combatant’ denotes a person entitled to participate directly in hostilities. A combatant is ‘a person authorised by a party to participate in armed hostilities and entitled to the protection attached to combatant status’, which includes authorisation to kill or wound an enemy combatant and destroy military objectives. [22, 23]

A lawful combatant in an international armed conflict is entitled to prisoner-of-war status upon capture by the enemy. The Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War provides that prisoners of war may not be tried or punished merely for having participated in hostilities and must be treated humanely from the moment they fall into enemy hands until their release and repatriation. [24, 25]

For a detainee to be recognised as a prisoner of war, the person must fall within one of the categories enumerated in Article 4(A) of the Third Geneva Convention. Under Article 5 of the same Convention, if there is doubt about the legal status or category of a person who has fallen into enemy hands, that person enjoys the Convention’s protection until their status is determined by a competent tribunal. [26]

Once a lawful combatant falls into the hands of the opposing party and ceases fighting, that person is considered a prisoner of war and enjoys all associated rights.

It is prohibited to kill a prisoner or take reprisals against them. Where the prisoner lacks identification documents, the detaining power must provide identity documentation. Other rights include release on parole under Article 21 of the Third Geneva Convention of 1949; release on health grounds under Article 109; subsistence under Articles 15 and 28; final release through exchanges of prisoners between the parties; and the other rights specified by the Third Geneva Convention and Additional Protocol I of 1977.

In all cases, captivity and the detention of prisoners of war end upon the cessation of hostilities, when all prisoners of war are repatriated.

Other persons not falling within the categories specified in Article 4 of the Third Geneva Convention are not entitled to prisoner-of-war status if captured by the enemy. This applies to participants in non-international armed conflicts: members of organised armed groups do not enjoy a special status under the law applicable to such conflicts and may be prosecuted under domestic criminal law for participation in hostilities.

Nevertheless, international humanitarian law applicable to non-international armed conflicts, Additional Protocol II where applicable, customary international humanitarian law, relevant national law and international human rights law all provide detainees with rights concerning treatment, conditions of detention and trial in accordance with due process. [27]

Second Paragraph: Unlawful Combatants. Another category of persons who may participate in a non-international armed conflict comprises unlawful combatants. The expression ‘unlawful’ or ‘unauthorised’ combatant denotes persons directly participating in hostilities without authorisation. [28, 29]

These include spies, mercenaries and deserters. They are not entitled to prisoner-of-war status; the Fourth Geneva Convention concerning civilians and the relevant provisions of Additional Protocol I apply to them if the detaining state has ratified it. [30, 31]

Unlawful combatants may be prosecuted under national law for direct participation in hostilities and may remain detained while they pose a serious security threat. Under certain conditions, they may be deprived during detention of specific privileges otherwise granted by the Fourth Geneva Convention. They may also be prosecuted for war crimes and other offences and sentenced to periods extending beyond the duration of the conflict, in accordance with the penalties prescribed by national law. [32]

Persons covered by neither the Third nor the Fourth Geneva Convention in international armed conflicts are nevertheless entitled to the fundamental guarantees of customary international law, applicable national law and international human rights law, including rights concerning treatment, detention conditions and trial. Which law, then, applies to persons detained in the context of counter-terrorism? [33]

Violations of peremptory norms or supplementary rules necessitate Security Council intervention under Chapter VII of the United Nations Charter through force to preserve international peace and security. Examples include armed aggression, enslavement, genocide and ethnic cleansing, racial discrimination, torture, inhuman and degrading treatment, and violations of the right to self-determination. State support for one party to a civil war may also constitute the crime of armed aggression.

Subsection Two: Military Operations Authorised by the Security Council

The use of armed force by the Security Council is addressed in Article 42 of the United Nations Charter, which allows the Council, pursuant to Chapter VII, to resort to ‘such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’.

Any act of aggression constituting a war crime may threaten international peace and security and require the application of Chapter VII of the Charter. The Security Council usually first relies on Article 41 to impose non-military measures, such as sanctions. In some circumstances, however, military coercion is necessary where states persistently violate international law. Pending the establishment of a military staff committee under Articles 43 and 47 of the Charter, permanent members of the Security Council have been permitted to undertake operations involving armed intervention. [34]

First Paragraph: Criteria for Military Operations Authorised by the Security Council

First Paragraph: The Criterion of Direct and Overall Control

The question here is whether hostile military action constitutes an armed attack attributable to a state sponsoring one of the parties to a conflict.

Two conditions must be satisfied to answer this question:

First, the aggressive acts must be attributable to the state sponsoring the armed conflict.

Second, they must reach the requisite level of criminal gravity.

First: Attribution of Aggressive Acts to the Attacking State

Certain rules of public international law permit acts of warfare supported by a state to be attributed to that state as acts of armed aggression, subject to the following conditions:

The perpetrators are agents of the state’s security apparatus.

If the perpetrators do not have an official character, such as private terrorist groups or militias (for example, Lebanese Hezbollah, described in the source as affiliated with Iran, or the Shabbiha affiliated with the Syrian regime), they are not organs of the state. Article 8 of the International Law Commission’s draft articles states: ‘The conduct of persons acting on their own account under the instructions and direction of that State shall be considered an act of the State.’ [35]

In the Nicaragua case concerning the Contras and the United States, the International Court of Justice held that an essential prerequisite was direct US control over the military or paramilitary operations at the time the armed attacks were committed. [36]

Second: Attribution of Hostile Acts to a Supporting State

The mere provision of financial assistance or military equipment does not in itself mean that hostile acts are attributable to the state sponsoring a civil war, as illustrated by the United Arab Emirates providing funding, weapons and Colombian mercenaries to support the Rapid Support Forces in Sudan in their aggression against the Sudanese army.

Article 3 of United Nations General Assembly Resolution 3314 (XXIX) identifies acts of armed aggression, including ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’.

The Security Council strongly condemned the Taliban, then Afghanistan’s de facto rulers, for continuing to harbour terrorist groups belonging to al-Qaeda and granting asylum and protection to Osama bin Laden and his associates. [37]

The International Criminal Court held that ‘the sending of armed groups into the territory of another State may constitute an armed attack ... if the scale and effects of the operations allow them to be characterised as an armed attack rather than a mere frontier incident, just as if they had been carried out by regular armed forces’. [38]

Another hypothesis involves the accumulation of attacks—that is, repeated acts of terrorism—which may generate greater fear and insecurity and thereby give rise to a right of self-defence.

Second Paragraph: Criminal Gravity

A threat to international peace and security must be serious and genuine, explicitly affecting human life, property and the fundamental and vital interests of the state. Its imminence must be beyond doubt, with no means of averting it other than the use of armed force.

The International Criminal Court held that ‘the sending of armed groups into the territory of another State may constitute an armed attack ... if the scale and effects of the operations allow them to be characterised as an armed attack rather than a mere frontier incident, just as if they had been carried out by regular armed forces’. [39]

Another possibility concerns the accumulation of attacks, or the repetition of hostile acts, which may heighten fear and insecurity and give rise to a right of self-defence.

Part Two: Types of Military Operations Authorised by the Security Council

In several resolutions, the Security Council rejected certain operations, while the United States exercised its veto over decisions against Israel following strikes, military operations and wars against Arab and Muslim states justified on grounds of anticipatory self-defence, or so-called pre-emptive war.

This part therefore examines the exercise of self-defence against armed attacks on a preventive or pre-emptive basis in the first paragraph and the theory of self-defence after an attack has occurred in the second.

Particular attention is paid to international practice, which provides the basis for the theory of anticipatory self-defence.

First Paragraph: The Right of Anticipatory Self-Defence

First: Concept of Anticipatory Self-Defence

Anticipatory self-defence refers to a state launching preventive military attacks, not in response to an armed attack that has already occurred, but against an attack that has not yet occurred and which the state considers imminent or certain. The concept permits states to use military force before they themselves are attacked. [40, 41]

Supporters of this expansive interpretation of Article 51 of the Charter invoke several arguments:

The right of self-defence is inherent. Article 51 did not create it but recognised a right already operative before the United Nations Charter as a rule of customary law permitting anticipatory self-defence. They argue that Article 51 does not restrict this customary rule, relying on international practice in support of their position, and conclude that anticipatory self-defence remains a valid and lawful right under the Charter. [42]

Supporters further maintain that Article 51’s procedural requirement to report immediately to the Security Council all measures taken in the exercise of self-defence is merely procedural and does not limit the state’s underlying right. A failure to fulfil that obligation can be remedied at any time without extinguishing the right of self-defence. [43]

The concept of anticipatory self-defence also rests on a ‘meta-legal argument’ (*argument métajuridique*): proponents emphasise the dangers of weapons of mass destruction, ballistic missiles and nuclear arms, which could destroy an entire state. The fear created by such weapons, even by the threat of their use, is said to justify pre-emptive strikes to prevent their deployment. [44, 45]

In this context, Bowett argues that international custom and decisions of courts established by the United Nations had recognised the legality of preventive defence where necessity left no choice of means and no time for deliberation, provided that a serious and imminent danger existed, no other means of averting the threat were available, and preventive measures taken in self-defence were reasonable and limited to what protection required. [46]

Supporters of anticipatory self-defence also justify it by reference to the need to eliminate terrorist groups, whose activities now cross national boundaries. They contend that the principle prohibiting the use of force applies only to states and not to terrorist organisations. In their view, terrorists are criminals engaging in war without observing international rules and must therefore be dealt with pre-emptively. [47]

On this reasoning, pre-emptive strikes against terrorist groups are considered both effective and lawful, potentially preventing numerous terrorist operations without requiring a state to establish proof of an armed attack or even to comply with the

remaining procedural requirements for exercising self-defence. [48]

This form of pre-emptive self-defence is directed against a potential, rather than an actual and certain, danger and is therefore based on uncertainty. United Nations Secretary-General Kofi Annan condemned the doctrine of pre-emptive self-defence, or the purported right of pre-emption, before the General Assembly, stating that it presented a fundamental challenge to international rules which, even if assumed to be ideal, had underpinned international peace and security for 58 years. He warned that the doctrine could turn an exception into a precedent multiplying unilateral uses of force, with or without substantiated grounds, and could enable states to invoke flimsy pretexts. [49]

The doctrine of anticipatory self-defence has found expression in the practices of major powers, especially the United States, which formally adopted it in its National Security Strategy. Some Western scholars have also accepted it, but within defined limits and subject to conditions. [50]

Second: Practical Application of Anticipatory Self-Defence [51]

Professor Stephen M. Walt distinguishes preventive war from pre-emptive war. A preventive war is fought, for example, to stop an adversary from acquiring the means to achieve a position of strength from which it could threaten its opponents. [52]

This is what Israel seeks to do through preventive warfare against Palestinian resistance movements in Gaza, such as Hamas and Islamic Jihad, in order to prevent them from acquiring weapons that might threaten Israeli security in the future. A state may thus wage a ‘preventive war’ (*guerre préventive*) against another state without evidence that the latter intends to attack, now or in the future, seeking instead to weaken its opponent by depriving it of the means of power. In Stephen M. Walt’s formulation, ‘the stronger party decides to wage war to ensure that the weaker party cannot become a threat’. [53, 54]

Because preventive war is waged against a state that has committed no aggression, launched no attack and may not even be preparing one—and may lack the capacity to attack—it is unlawful under international law and constitutes an aggressive war.

By contrast, ‘pre-emptive war’, a term used by the Bush administration in the National Security Strategy announced in September 2002, means ‘attacking first to prevent or stop a certain and real attack that has not yet occurred’.

In a pre-emptive war, the party striking first knows, or possesses reliable evidence and information, that the adversary is preparing an attack. It therefore decides to strike first to prevent that attack. Some commentators do not oppose this form of war, treating it as self-defence provided that reliable evidence establishes the adversary’s readiness to attack. [55]

The United States administration employed the expression ‘pre-emptive war’ in its National Security Strategy to give the doctrine an appearance of legitimacy. It nevertheless adopted a broader conception than the strict meaning of pre-emption, asserting a right to attack states merely because they might acquire capabilities or technologies, such as nuclear technology, with which they could compete with or threaten US security, especially states on the US administration’s blacklist. [56, 57]

States facing an external attack are generally understood to possess the right to defend themselves when the danger is evident, such as armies massing along a frontier in preparation for invasion. Technological developments have, however, replaced armies stationed at borders with missiles capable of reaching targets within minutes and lethal biological material that can be transported not only in luggage but also in letters.

In an era of weapons of mass destruction and of highly organised yet unidentified adversaries such as al-Qaeda, the US administration considers that the requirement of a direct and immediate attack no longer applies to self-defence. Whether an attack has occurred, or when it might occur, becomes immaterial: the intentions of terrorist groups and the risk that they might use weapons of mass destruction create a new, imminent threat said to justify preventive military strikes. [58]

The International Court of Justice has not directly addressed the theory of anticipatory self-defence or preventive and pre-emptive strikes, although in its judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua it affirmed that self-defence is an inherent right exercised in response to an armed attack. [59]

In its 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court did not address self-defence against a threat to use nuclear weapons; it affirmed only that threats or uses of force are prohibited and unlawful under Article 2(7) of the Charter, regardless of the weapons used. [60]

In December 2004, the report of the United Nations High-level Panel on Threats, Challenges and Change defined anticipatory self-defence as ‘the pre-emptive use of military force to confront an imminent danger’, such as a terrorist threat, while rejecting preventive defence involving military force in the absence of an imminent threat. [61, 62]

The Panel identified five conditions for the validity of any operation undertaken in the name of pre-emptive self-defence: seriousness of the threat, propriety of purpose, force as the only means of addressing the danger, proportionality of means to threat, and assessment of the consequences.

The US administration promptly rejected these recommendations because they restricted its ability to use military force in the name of self-defence. [63]

Third: Assessment of the Doctrine of Anticipatory Self-Defence

Article 2(7) of the United Nations Charter embodies a fundamental rule of international law prohibiting the use or threat of force in international relations. The rule is not absolute, however: the Charter provides narrowly defined exceptions, including the

exercise of self-defence under Article 51 and implementation of the collective security system.

To prevent these exceptions from becoming a means for states to return to an age of conflict and hostility, states agreed to regulate and delimit their exercise.

The collective security system primarily aims to maintain international peace and security in accordance with the purposes of the United Nations. Although self-defence is an inherent right recognised under customary international law, its scope and methods of exercise had to be regulated within the modern international legal order. Article 51 of the Charter performs that function, preventing self-defence from becoming a pretext for the use of force in international relations.

The pre-emptive war doctrine introduced by the US National Security Strategy envisages military force against states and groups not in response to an attack or threat of attack but merely because they may intend to attack the United States, given their hostility towards it and their possession, or potential acquisition, of capabilities that might one day threaten US security. [64]

If states adopted this strategy, as certain major powers such as the United Kingdom have done, decades of efforts to build an international order would be undermined and force and war would undoubtedly become the primary instruments of international relations. [65]

The use of military force against armed terrorist groups operating within another state's territory is not necessarily prohibited. A state may strike terrorist bases in another state where it has first obtained that state's consent. The territorial state is obliged to prevent such groups from operating on its territory; a failure to do so may entail international responsibility, potentially extending to measures under the collective security system.

A state cannot, however, invoke self-defence against groups of non-state individuals because self-defence is exercised by states against states. In its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice affirmed that a state may not invoke self-defence against ordinary individuals who are not states. Furthermore, the US National Security Strategy is based on potential future danger that may never materialise, so military operations rest on mere possibility. In its judgment of 6 November 2003 in the Oil Platforms case between Iran and the United States, the Court affirmed that Iran's mere threat to attack the United States did not entitle the latter to strike an Iranian vessel with missiles, still less where no threat of attack exists. [66, 67]

Second Paragraph: The Theory of the Right of Self-Defence

Although Resolution 1368 (2001) affirmed the inherent right of individual or collective self-defence in accordance with the Charter, a question arises: if this right is inherent and the Charter merely recognised rather than created it, does its exercise require confirmation or authorisation by the Security Council? In principle, the right may be exercised whenever its conditions are met, without authorisation. [68]

The Security Council likewise acknowledged self-defence against armed attack without specifying or declaring the existence of an 'attack/aggression' under Article 51. Does civil war constitute an armed attack, or is armed attack not the only circumstance permitting self-defence?

First: Concept of the Right of Self-Defence

Self-defence is the right of states, individually or collectively, to employ proportionate force to repel an armed attack actually directed against them. [69]

As an exception to the principle that United Nations members must refrain in their international relations from threatening or using force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations, Article 51 of the Charter recognises the inherent right of individual or collective self-defence if an armed attack occurs against a UN member, until the Security Council has taken the measures necessary to maintain international peace and security.

The right of self-defence necessarily follows from the right of survival and self-preservation and is described as a peremptory rule of customary international law that cannot be waived. Any agreement to surrender the right of self-defence or prevent another state from exercising it would therefore be void. [70, 71]

The conditions of self-defence include:

An immediate danger arising from an armed attack threatening life and property that cannot be repelled by other means.

A defensive response commensurate with the gravity of the attack. [72]

Present necessity.

In non-international war, objectives and means are often undisclosed, and conventional confrontation between armies may be impossible because of guerrilla and urban warfare. Suicide operations are particularly difficult to predict or confront because their objectives may be temporary. This is said to make action before an attack necessary as a measure to protect life, leaving neither alternatives to consider nor time for deliberation and establishing an immediate necessity to use armed force against an imminent potential danger. [73]

Second: Conditions for Exercising the Right of Self-Defence

(a) An armed attack against a United Nations member. Article 51 of the Charter expressly imposes this condition, limiting self-defence by requiring an armed attack and by requiring notification of the Security Council. [74]

The attack must involve physical aggression, not merely a threat. Article 1 of United Nations General Assembly Resolution 3314 (XXIX), adopted on 14 December 1974, defines aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.

Where armed groups based in another state perpetrate an attack, the responsibility of the territorial state becomes an issue. The relationship between the state, the groups operating on its territory and their armed attack must be examined, including whether the state exercises control and direction over the groups. [75]

The author accordingly argues that state terrorism should be confined to states sponsoring rebellion by providing insurgents with safe haven or support, facilitating their operations or escape, helping them avoid punishment, or otherwise assisting their activities. But does providing safe haven and logistical assistance amount to aggression permitting self-defence?

In the judgment on Military and Paramilitary Activities in and against Nicaragua, the International Court of Justice affirmed in paragraphs 187–201 that individual or collective self-defence may be exercised only in response to an 'armed attack'. The Court explained that such an attack need not consist exclusively of regular armed forces crossing international borders: a state's sending of armed bands into another state's territory may qualify if the scale and effects would amount to an armed attack had regular forces carried it out. The Court added that the concept does not include assistance to rebels in the form of weapons, covert support or other kinds of assistance. [76]

Consequently, according to this judgment, a state's provision of safe haven and support to terrorists does not entitle states subjected to terrorist attacks to exercise self-defence against the supporting state, provided that it does not exercise effective control over the groups.

Acts of international terrorism are committed by groups or individuals. A state's provision of safe haven or support to terrorists, in any form, does not reach the threshold of an armed attack permitting self-defence against that state, although its international responsibility is not thereby excluded. [77]

Even where a state does not direct or control terrorist groups, its subsequent endorsement of their acts or failure to take measures to end them may render those acts attributable to it and establish international responsibility. The author refers in this regard to the International Court of Justice judgment of 24 May 1980 concerning United States Diplomatic and Consular Staff in Tehran. [78]

(b) Proportionality of the defensive response to the attack. Necessity and proportionality are established conditions under customary international law. Necessity requires that force be the only and last means available to the attacked state to repel aggression. Where other measures are available, such as recourse to an international organisation or another party, the requirement of necessity is absent. [79]

Proportionality requires the defensive action to correspond to the aggression suffered. Relevant factors include the intensity of the attack and the weapons employed. Although it may be difficult to assess proportionality in practice, an attacked state has the right to use the means necessary to repel an assault, but only to the extent required to halt it and prevent further aggression. Action exceeding that limit amounts to retaliation, potentially turning the original aggressor into a victim entitled, in turn, to invoke Article 51 of the Charter.

The requirement of necessity is particularly difficult to satisfy in the case of terrorist attacks, which often occur suddenly and end immediately, allowing states to seek other means of punishing perpetrators or preventing future offences.

If US military aircraft had intercepted an aircraft heading towards the White House, this would have been a legitimate and necessary defensive action to repel the attack. Waging war a month after the attacks, however, would no longer fall within self-defence and should be described by another term. [80, 81]

(c) Immediate and temporary character of self-defence. A state's defensive action must be an immediate response to aggression. Once the aggression has ended or ceased, the state cannot resort to force in the name of self-defence, as that would constitute retaliation against the attacking militias or opposing armed forces. Responsibility for taking measures against an offending state would then fall to the United Nations. The author considers the international war on terrorism incompatible with these requirements and therefore retaliatory. [82]

Further conditions include the obligation to inform the Security Council of all measures taken in self-defence, enabling it to assess their legality and developments on the ground and to determine the measures necessary to maintain or restore peace. [83]

It may be said that the international community has accepted the idea of using force in self-defence against terrorism despite its incompatibility with the conditions governing the exercise of that right. [84]

A literal interpretation of Article 51 confines self-defence to responses to armed attack. Some scholars, however, argue that armed attack is not the sole circumstance in which self-defence may be exercised, relying on an expansive interpretation of

Article 51 and the practice of certain major powers.

Self-defence remains the sole exceptional justification for departing from the principle prohibiting force where immediate necessity exists. This is reflected in Article 21 of the International Law Commission's Articles on State Responsibility, adopted by the United Nations General Assembly on 12 December 2001. The author relates the provision to Chapter VII and Article 51 of the Charter, which preserves the inherent right of individual or collective self-defence and, by implication, a customary rule underpinning the exception. [85]

(d) The Obligation to Notify the Security Council

The International Court of Justice is cited as stating: 'In examining customary rules, failure by states whose sovereignty has been violated, and which intend to use armed force in self-defence, to notify the Security Council is among the elements revealing their intention to comply with legality'. [86]

This obligation establishes a substantive connection between the exception of self-defence and that of collective security, as a state may adopt unilateral protective measures pending a Security Council decision.

Nevertheless, the Council does not always expressly authorise states to use force.

Third Paragraph: Limits on Intervention in Self-Defence

There are two limits: temporal and material.

1. Temporal limit. It begins with the commencement of an armed attack. Self-defence is temporary, provisional and subsidiary. Article 51 of the United Nations Charter provides that a state is entitled to exercise it only 'until the Security Council has taken measures necessary to maintain international peace and security'.

In the case of Afghanistan, the United States intervened without first seeking the Security Council's opinion. Yet Resolution 1373 (2001), adopted unanimously to establish measures against terrorism, and Resolutions 1386 (2001) and 1390 (2002), which created mechanisms to maintain international peace and security through UN forces, meant, in the author's view, that the presence of these forces on Afghan territory left no room for the exception of immediate necessity in self-defence. [87]

2. The only available means. The danger must be real and imminent, rather than merely potential, and must be serious and consequential. It may also be continuing, as in hostage-taking, where the lives of captives are at risk. The author cites the hostage-taking incident at the Tiguentourine gas facility in the Algerian Sahara, which Algeria treated as a situation of self-defence. [88]

Armed intervention must be the sole means of protection where the state in whose territory the nationals requiring protection are located fails to act. Intervention by way of self-defence is the ultimate and last resort, owing to collusion or a lack of cooperation by the territorial state with the intervening international force. [89]

International humanitarian law also establishes equal rights and duties for parties engaged in armed conflict. Equality of belligerents is a fundamental principle of the law of armed conflict. Classifying violence between terrorist organisations and states fighting them as an armed conflict could confer comparable rights and obligations on those groups and states, according to each party's status and the law of war. Describing the situation as 'war' may therefore confer on an opposing party a legitimacy it does not deserve. [90, 91]

Governments often refuse to recognise rebel groups as 'formal parties to the conflict' and consequently avoid expressly acknowledging the applicability of common Article 3 of the Geneva Conventions, fearing that this could amount to recognition of rebels as an adverse party. The author argues that the problem is even more pronounced where states would be recognising terrorist organisations as parties to an armed conflict. [92]

Such recognition is arguably what those organisations seek. The Baader–Meinhof Group and the Red Brigades described their activities as a people's war against the police state in Germany and Italy respectively. On the same logic, bin Laden would officially be a party to a war against the world's most powerful state. [93]

An armed conflict is defined in relation to its parties and the protection available to them under international humanitarian law. Parties may be regular armed forces or organised armed groups possessing a command structure and sufficient capacity to implement international humanitarian law. [94]

With terrorism, however, it is difficult to determine how the criterion of a 'party' to a conflict applies to a clandestine criminal terrorist network carrying out violent criminal acts against civilians in unspecified locations across the world.

Unless violence between terrorist networks and the states confronting them reaches the threshold of an armed conflict, or develops into one, as occurred in Afghanistan, national law, international human rights law and international criminal law remain the more appropriate legal frameworks for violence falling short of armed conflict.

Fourth Paragraph: Problems Arising from an Expansive Application of Self-Defence

The purpose of self-defence is protection, not revenge. Every state has a right to survival, and armed force may be necessary to protect its sovereignty against organised militias operating across borders.

The extension of the self-defence exception can be reconciled only with conduct by sovereign states facing aggression from another hostile state. Extending it to attacks by international or domestic militias has no foundation in treaty obligations but is invoked through customary rules. Article 51 permits states to employ force temporarily in self-defence pending measures by the Security Council to maintain international peace and security. The Council did not authorise such action against al-Qaeda after 11 September 2001, indicating that it did not regard the attack as aggression by one state against another. Al-Qaeda was nonetheless transnational and was sheltered by Afghanistan under Taliban rule. The conditions of immediate necessity and legitimate objectives must be considered before Security Council action, and failure to distinguish them risks confusing threats to international peace and security with armed aggression.

States supporting self-defence against terrorism restrict the right to operations targeting terrorists based within a state whose territory serves as a rear base for terrorism, or where that state's sovereignty has been appropriated in the area occupied by terrorist groups and it refuses to impose sanctions, take deterrent measures or prosecute them.

Excessive force, including strikes against military or civilian targets belonging to the territorial state whose sovereignty has been infringed, is impermissible. The ultimate aim of self-defence is to arrest offenders and bring them to justice.

The Security Council has condemned numerous unilateral cross-border operations by states responding to hostile acts beyond their territorial jurisdiction, including Israeli actions against different Palestinian liberation movements in Arab countries, which it regarded as armed aggression. [95]

Following the attacks of 11 September 2001, the Security Council accepted an extension of the concept of self-defence in Resolutions 1368 (2001) and 1373 (2003), adopted on 12 and 28 September 2001 respectively. This established a new approach. Nevertheless, the terrorist attacks of 11 September cannot be fully reconciled with the general legal framework of self-defence because the resolutions did not expressly authorise it; the only references appear in their preambles, which are devoid of substance. The Council is a political rather than a legal body. Anticipatory self-defence is likewise unacceptable because a threat of attack alone cannot justify it, although the Security Council under Article 24(1), the European Union and the North Atlantic Treaty Organization (NATO) unequivocally supported the US–British response to 11 September as self-defence, treating the attacks as armed aggression against all the allies rather than one state alone. [96, 97, 98]

The League of Arab States, the Non-Aligned Movement and the Organisation of African Unity also expressed positions on the intervention, accompanied by a United Nations General Assembly report. The underlying argument was that the 11 September 2001 attacks were not merely terrorist acts but armed attacks, because civilian aircraft were used as missiles against civilian targets. Terrorist acts by private groups not subject to international law may become armed attacks on states because of their gravity, a conclusion inferred from Security Council Resolution 1368. In its advisory opinion of 9 July 2004 concerning the wall built by Israel in the occupied Palestinian territory, the International Court of Justice addressed Israel's reliance on Article 51 and Resolutions 1368 (2001) and 1373 (2001) to justify its asserted right to use force in self-defence against terrorism. The Court observed that the threat invoked by Israel arose within the occupied Palestinian territory, which Israel itself controlled, not from outside it. The situation therefore differed from that contemplated in the Security Council resolutions, and Israel could not rely on them to support its position concerning self-defence. [99, 100]

Article 2(4) of the United Nations Charter prohibits recourse to force or its threat 'against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.

There is scholarly disagreement concerning the binding scope of this rule, particularly where force is used in alleged self-defence without violating a state's territory, occupying it, destabilising its political system or forcing it to change its political choices. On one view, force that does not impair a state's territorial integrity or political independence may be lawful. [101]

On the other hand, it is difficult to identify precisely the operation or aggression that permits self-defence. States invoking that right rely on Article 51 rather than Article 2(4), which restricts resort to war to repel aggression.

Conclusion

Ideological shifts, political divisions and the fragmentation of states along ethnic lines—especially following the collapse of the communist bloc and authoritarian totalitarian regimes—are among the principal reasons for the escalation of non-international armed conflicts. The growing greed of liberal states also plays a role, as they use their agents to create 'creative chaos' in order to divide states and control their resources.

Wisdom, dialogue and peaceful means of resolving domestic disputes have consequently ceased to predominate. External financing of civil wars has intensified turmoil and disorder, leading to the killing, forcible displacement and starvation of unarmed civilians, children and women.

Force, then, is met by force. The Security Council must therefore intervene under Chapter VII of the United Nations Charter to maintain international peace and security, protect civilians and prevent an internal armed conflict from developing into a regional or international war.

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volunteer corps, including organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if that territory is occupied, provided that such militias or volunteer corps, including organised resistance movements, fulfil the following conditions: (a) being commanded by a person responsible for subordinates; (b) having a fixed distinctive sign recognisable at a distance; (c) carrying arms openly; and (d) conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces professing allegiance to a government or authority not recognised by the detaining power. (4) Persons accompanying the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or services responsible for the welfare of the armed forces, provided they have received authorisation from the armed forces they accompany. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and crews of civil aircraft of the Parties to the conflict, who do not benefit from more favourable treatment under other provisions of international law. (6) Inhabitants of non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war ...' See Article 4(A) of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, previously cited.

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[61] L'Arrêt du 25 septembre 1997, l'Affaire relative au projet GABCIKOVO NAGGMAROS (Hongrie / Slovaquie) dans : Philippe WECKEL, nouvelles pratiques Américaines en matière de légitime défense ? AFRI, Vol VI, Bruyant, Bruxelles, 2005, p 132.

[62] Le rapport du Groupes de Personnalités de Haut Niveau sur les menaces, les défis et le changement. Voir :Chantal De JONGE OUDRAAT, Le Conseil de Sécurité de l'ONU et la lutte contre le terrorisme, op. Cit., p 122.

[63] Chantal De JONGE OUDRAAT, Le Conseil de Sécurité de l'ONU et la lutte contre le terrorisme, op. Cit., p 122.

[64] Gabor Rona, 'When Is a War Not a War? The Proper Role of the Law of Armed Conflict in the Global War on Terrorism', workshop on protecting human rights while countering terrorism, official statement, Copenhagen, 15–16 March 2004, International Committee of the Red Cross website, www.icrc.org/web/ara/sitearao.nsf.octobre 2009, accessed 6 June 2010.

[65] This is reflected in a statement by the Russian Minister of Defence, reported in the Egyptian newspaper Al-Ahram in 2003, that his country 'does not rule out a preventive military strike against any state in the world if its interests so require'.

[66] Avis du 09 juillet 2004, Dans : Philippe WECKEL, nouvelles pratique en matière de légitime défense, op. Cit., p.p. 134 135.

[67] Philippe WECKEL, nouvelles pratique en matière de légitime défense, op. Cit., p.p. 134 135.

[68] Joe. VERHOEVEN, Les Etirements de la légitime défense, AFDI, XLVIII, CNRS Paris, 2002, p 53.

[69] Individual self-defence is exercised by an attacked state acting alone to repel aggression; collective self-defence is exercised jointly by states to repel aggression against a particular state. Article 51 of the Charter recognises the right of UN member states to use force in defence of another member subjected to armed attack. Collective self-defence is especially exercised within international military alliances such as NATO, whose Article 5 provides that members may use force to repel aggression against any member. See Maher Abdelmonem Abu Younes, The Use of Force in Enforcing International Legality, previously cited, pp. 139–141.

[70] Ibid., p. 129.

[71] Antonio CASSESE, Commentaire sur l'article 51 de la Charte des Nation Unies, Ouvrage collective, sous la direction de Jean-Pierre Cot et Alain Pellet, La charte des Nations Unies Commentaire article par article, 2ème édition, Economisa, Paris, 1991, p 790.

[72] D.ALLAND, droit international public, puf, paris, 2000 ; p 539.

[73] « Necessity of that self-defiance is instant, over whelming, and leaving no choice of means and no moment for deliberation »

[74] D. ALLAND, justice privée et ordre juridique international étude théorique des contre-mesures en droit international public, pedone, paris, 1994 ; p466.

[75] Turkey has regularly conducted military operations against irregular Kurdish armed groups affiliated with the Kurdistan Workers' Party. Iran has likewise conducted operations in Iraq on the same claimed ground of self-defence against attacks launched by Kurdish groups from Iraqi territory. The most recent example cited is Turkey's military intervention in northern Iraq in summer 2008, ostensibly to pursue members of the Kurdistan Workers' Party. Mohamed Khalil Al-Mousa, The Use of Force in Contemporary International Law, Dar Wael, Lebanon, 2004, pp. 86–88.

[76] International Court of Justice judgment of 27 June 1986 concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America); Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1948–1991, United Nations Publications, 1992, p. 218.

[77] An armed attack necessarily originates from a state, whether directly or indirectly. See Ahmed Hussein Sweidan, International Terrorism in a Changing International Environment, Al-Halabi Legal Publications, Beirut, 2005, p. 124.

[78] Paragraphs 69–79 of the judgment state that the endorsement by numerous Iranian authorities of the detention of US diplomatic and consular personnel in Tehran, the seizure of diplomatic premises and the use of those acts to pressure the United States rendered the acts of the militant students attributable to Iran. The militant students were thereby considered agents of that state, which became internationally responsible for their acts. International Court of Justice judgment of 24 May 1980 concerning United States Diplomatic and Consular Staff in Tehran; see Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1948–1991, previously cited, pp. 140–144.

[79] Selim EL SAYAGH, Légitime défense, terrorisme et préemption, Article sur le site : wwww.diplomarc.org, p 2. Mars 2009.

[80] Ahmed Hussein Sweidan, International Terrorism in a Changing International Environment, Al-Halabi Legal Publications, Beirut, 2005, pp. 139–140. [

[81] Joe VERHOEVEN, Les Etirements de la légitime défense, op. Cit. p 66.

[82] Selim EL SAYAGH, Légitime défense, terrorisme et préemption, op.Cit. p 02.

[83] Ahmed Hussein Sweidan, International Terrorism in a Changing International Environment, Al-Halabi Legal Publications, Beirut, 2005, pp. 142–143.

[84] Ibid., pp. 142–143.

[85] Résolution 56/83 AGNU.

[86] Affaire des activités militaires et paramilitaires, Rec. CIJ, 1986, p.105, §200.

[87] P.Dailler, les nations unies et la légitime défense, LGDJ, 1999. p.117.

[88] The In Amenas hostage crisis occurred at a natural gas facility in the Algerian Sahara when an armed group led by Mokhtar Belmokhtar, known as 'Laouar', and affiliated with the al-Muwaqqi'un bi-l-Dima group that had split from al-Qaeda in the Islamic Maghreb, attacked on 16 January 2013. The group detained 600 Algerian workers and 41 foreign employees as hostages. The Algerian army intervened to free the hostages without notifying the Security Council. The operation resulted in the deaths of all the terrorist perpetrators and, regrettably, 23 foreign hostages; the attackers had threatened to blow up the gas facility.

[89] P.richard, droit de l'extradition et terrorisme, risques d'une pratique incertaine ; du droit vers le nom – droit ?, afdi, 1980, 1988, p.66.

[90] Excerpt from the report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', previously cited, pp. 20–21.

[91] Andréani GILLES, La Guerre contre le terrorisme le piège des mots, AFRI, Bruylant, Bruxelles,2003, P37.

[92] Frits Kalshoven and Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law, translated by Ahmed Abdel Alim, previously cited, p. 80.

[93] Andréani GILLES, La Guerre contre le terrorisme le piège des mots, op. Cit, p105.

[94] Excerpt from the report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', previously cited, pp. 19–20.

[95] Resolutions: 171 (1962), 228 (1966), 248 (1968), 256 (1968), 262 (1968), 265 (1969), 270 (1969), 280 (1970), 313 (1972), 332 (1973), 337 (1973), 347 (1974), 425 (1978), 508 (1982), 509 (1982), 573 (1985) and 611 (1988).

[96] Security Council résolutions 1368 (2001) et 1373 (2001) : what they say and what they do not say, forum de L'EJIL, site internet : http://www.jil.org/form_WTC/ny.stahn.pdf(disponible en 2005).

[97] Déclaration du 8 octobre 2001, CE.ORG.

[98] Déclaration du 6 décembre 2001, DAI.N° 3.1er février 2002, pp.118 119.

[99] United Nations General Assembly report A/56/4P, p. 44 ff.; the states opposing intervention were Iraq, Iran, North Korea, Cuba and Malaysia.

[100] Rec. CIJ, 2004, p 194, § 139.

[101] Rapport A/35/10, ANN.CDI, 1980, Vol. II, 2ème parties, p.74, §23.