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

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## 11 The interpretation of self-defence and the United Nations

### 11.1 Introduction

After discussing the main instances of state practice involving the right of self-defence, the influence of the United Nations system on the development of the concept will be explored. Three aspects of this influence will be analysed. First, the development of self-defence within the UN collective security system will receive some attention. Secondly, the work of the General Assembly and the International Law Commission in relation to self-defence will be examined. Thirdly, relevant judgments and advisory opinions delivered by the International Court of Justice will be discussed with a view on their impact on the understanding given to self-defence.

The aim of this chapter is to assess whether the temporal dimension and the juridical variables identified at the beginning of Part II (conditionality of armed attack, immediacy and proportionality) have been, in any form, addressed by various UN organs, and if yes, what were the adopted approaches.

### 11.2 Collective self-defence and collective enforcement measures

The UN Charter set up a renewed system of collective security. According to Article 1(1) of the Charter, the primary objective of the organization was to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. For that purpose, the Security Council was empowered with a number of tools under Chapters VI and VII of the Charter. Under Chapter VII, the Security Council had the right to characterize a situation as a threat of peace, breach of peace or aggression (Article 39) and to take provisional (Article 40) or various enforcement measures of a non-forceful (Article 41) or forceful (Article 42) character.<sup>1</sup>

Despite the lessons learned from the failures of the League Covenant and the improved institutional framework, the UN Charter system of collective security soon ran into a deadlock.<sup>2</sup> The primary reason for its failure was the ideological and political divide between the permanent members of the Security Council.<sup>3</sup> Consequently, enforcement measures under Chapter VII proved to be impossible to use because of the growing tensions between the permanent members. The ensuing Cold War ensured that the deadlock would last through much of the twentieth century.

The Korean War was the first instance in which enforcement measures under Chapter VII were used.<sup>4</sup> On 25 June 1950, the same day that North Korea launched its invasion against South Korea, the Security Council passed Resolution 82 in which it characterized the North Korean move as a 'breach of the peace' and demanded the immediate cessation

<sup>1</sup> Arts. 39-42, Chapter VII of the UN Charter; Gill 1989, pp. 58-60.

<sup>2</sup> See *supra* 5.4 and 5.5. Gill 1989, pp. 51-52.

<sup>3</sup> Gill 1989, p. 52.

<sup>4</sup> See *supra* 8.3. See also Stanley, pp. 278-280.

of hostilities and the withdrawal of the North Korean forces to the 38<sup>th</sup> parallel.<sup>5</sup> On 27 June, Resolution 83 was passed by the Security Council and the North Korean invasion was coined an ‘armed attack’. Although no reference was made to Article 51 of the Charter, Resolution 83 recommended Member States to ‘furnish assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.’<sup>6</sup>

Resolutions 82 and 83 are an eloquent example of combining collective security and collective self-defence. Although no reference was made to either Article 39 or Article 51, the Security Council characterized the invasion as both a breach of peace and an armed attack. The existence of a breach of peace justified the adoption of collective enforcement measures, whereas the occurrence of an armed attack opened the way to collective self-defence.

The other instance in which the collective security system functioned the way it was envisaged in 1945, was the Iraqi invasion of Kuwait in August 1990.<sup>7</sup> On 2 August 1990, Iraqi forces launched a massive attack on Kuwait, quickly defeated the small Kuwaiti army and, within days, took hold of Kuwait City.<sup>8</sup>

Before the Security Council, Kuwait requested the adoption of a resolution that would put an immediate end to the invasion and that would force Iraq to withdraw immediately and unconditionally.<sup>9</sup> The Security Council first adopted Resolution 660 in which it condemned the Iraqi invasion under Articles 39 and 40 of the Charter as a breach of international peace and security and demanded the immediate withdrawal of the invading forces.<sup>10</sup> Several days later, the Security Council adopted Resolution 661 and imposed economic sanctions on Iraq.<sup>11</sup> Resolution 661 also made reference in its preamble to the ‘inherent right of individual or collective self-defence in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.’<sup>12</sup> There were no specifications regarding the conditions under which self-defence was to be exercised, whether individually or collectively. Concerning collective self-defence, the Security Council required no special affiliation (in form of a treaty or mutual understanding) on behalf of any intervening state and did not require for the intervening state to be itself the victim of an armed attack or of a threat thereof.<sup>13</sup> Thus the view according to which states exercising collective self-defence had to be facing the threat of an armed attack from the same source was not followed by the Council.<sup>14</sup> Neither did the Council take a position

<sup>5</sup> SC Res. 82 (1950) preamble and Part I.

<sup>6</sup> SC Res. 83 (1950) para. 6.

<sup>7</sup> See *supra* 8.12.

<sup>8</sup> Sorenson, p. 35.

<sup>9</sup> SCOR, 45<sup>th</sup> Sess., 2932<sup>nd</sup> mtg., UN Doc. S/PV.2932 (2 August 1990) p. 8.

<sup>10</sup> SC Res. 660 (1990) paras. 1 and 2.

<sup>11</sup> SC Res. 661 (1990) para. 3.

<sup>12</sup> *Ibid.*, preamble.

<sup>13</sup> Alexandrov, p. 264.

<sup>14</sup> According to Judge Jennings: ‘[T]he assisting State is not an authorized champion, permitted under certain conditions to go to the aid of a favoured State. The assisting State surely must, by going to the victim State's assistance, be also, and in addition to other requirements, in some measure defending itself. There should even in “collective self-defence” be some real element of self involved with the notion of defence.’ Dissenting opinion of Judge Jennings in *Nicaragua*, ICJ Rep. (1986) p. 545. See also Higgins, pp. 208-210. *Per a contrario*, Gill 1989, p. 72; Schachter 1991, pp. 155-156.

on whether aid had to be specifically requested by the attacked state, as the International Court of Justice held in the *Nicaragua* case.<sup>15</sup>

After several subsequent resolutions, all ignored by Iraq, the Security Council, on 29 November 1990, adopted Resolution 678 and authorized states cooperating with Kuwait to ‘use all necessary means’ to implement earlier resolutions and restore international peace and security in the area.<sup>16</sup> On that basis, on 16 January 1991, a coalition of several countries led by the United States launched a massive air and ground campaign against Iraq.<sup>17</sup> The Iraqi troops withdrew from Kuwait in the last days of February 1991.<sup>18</sup>

One of the most important legal questions arising from the response to the Iraqi invasion of Kuwait was the interplay between UN collective enforcement measures and collective self-defence. Collective enforcement measures were based on Chapter VII – Article 42 in particular –, whereas the right to resort to collective self-defence was acknowledged to stem from customary law (through the use of the term ‘inherent’ in Resolution 661) and Article 51 of the Charter. Resolution 661 referred to both collective enforcement and collective self-defence, whereas in Resolution 678 demands were based on Chapter VII in general.

It is clear from the reference in Resolution 661, that the Security Council viewed the legal requirement for collective self-defence to be met by the fact that Kuwait was the victim of an armed attack and its government had requested or accepted assistance from the United States and other countries.<sup>19</sup> Since Resolution 678 did not mention collective self-defence, the argument was made that the right of self-defence no longer applied when the Security Council decided to take collective enforcement actions under Chapter VII.<sup>20</sup> According to this claim, resort to self-defence was justifiable only up to the point the Security Council took collective enforcement measures, that is, adopted Resolution 678.

It is indeed true that Article 51 allows the exercise of self-defence only as long as that action does not affect the Council’s authority to take measures. In the view of the present author, however, practice has shown that such limitation does not affect the legality of the actions of the defending state.<sup>21</sup> In the case of the Persian Gulf War, the right to

<sup>15</sup> The ICJ asserted in the *Nicaragua* case that there was no rule permitting the exercise of collective self-defence in the absence of a request by the state which regarded itself as the victim of an armed attack. The Court implicitly conditioned the recourse to collective self-defence on the existence of a somewhat formalised request. *Nicaragua*, ICJ Rep. (1986) para. 199. This requirement was criticized by Judge Jennings, who doubted ‘whether it was helpful to suggest that the attacked State must in some more or less formal way have “declared” itself the victim of an attack and then have, as an additional “requirement”, made a formal request to a particular third State for assistance.’ Dissenting opinion of Judge Jennings in *Nicaragua*, ICJ Rep. (1986) p. 544. Although Jennings admitted that the victim state had to be in real need and had to wish for assistance, requiring the issuance of a formal request was in his view an unrealistic demand. *Ibid.*, p. 545.

<sup>16</sup> SC Res. 678 (1990) p. 2.

<sup>17</sup> Khadduri and Ghareeb, pp. 169-170.

<sup>18</sup> *Ibid.*, pp. 178-179.

<sup>19</sup> Gill 1989, p. 72; Alexandrov, p. 264.

<sup>20</sup> A. Chayes, ‘The Use of Force in the Persian Gulf’, in L.F. Damrosch and D.J. Scheffer, eds., *Law and Force in the New International Order* (Boulder, Westview Press 1991) p. 5-6; R. Mullerson, ‘Self-Defence in the Contemporary World’, in L.F. Damrosch and D.J. Scheffer, eds., *Law and Force in the New International Order* (Boulder, Westview Press 1991) p. 22; T.K. Plofchan, ‘Article 51: Limits on Self-Defence?’, 13 *Michigan Journal of International Law* (1992) p. 341.

<sup>21</sup> Franck 2002, pp. 49-50; Higgins, p. 205; Gill 2007.

individual and collective self-defence and that right was never terminated by the Security Council.<sup>22</sup> It is obvious that there was no contradiction between the right of individual or collective self-defence reserved by these states and the measures taken by the Security Council. In this case, they were complementary and collective self-defence was actually confirmed by the Council.<sup>23</sup> If the collective enforcement measures taken by the Security Council were meant to supersede the right of collective self-defence, explicit mention of that would have been made in Resolution 678.

In both cases, collective self-defence was invoked after an armed attack occurred. In the case of the Korean War, the armed attack was still ongoing when the defensive response began; in the case of the Gulf War, Kuwait was already occupied when coalition forces launched an armed action in collective self-defence. In both cases, the requirement of necessity was met, because the armed attacks created a present and inevitable need to resort to force.

Collective self-defence could also be employed against an armed attack that has not yet occurred. Assuming that there had been enough evidence to demonstrate that the Iraqi regime was plotting with al-Qaeda a massive terrorist attack against the United States, the coalition of the willing would have acted in collective self-defence to remove the threat. In fact, the US/UK war against Afghanistan is a good example of an instance of collective self-defence exercised both after an armed attack had occurred (9/11) and in order to remove future threats. In all these – real or hypothetical – cases, a present and inevitable need for action has to exist and the ensuing exercise of collective self-defence must not exceed the limits of what is proportionate to ward off the perceived danger.

### 11.3 The work of other United Nations bodies

Apart from the Security Council's role in influencing the concept of self-defence, the effect of other UN organs is also worth mentioning. The GA resolutions dealing with different forms of the use of force have already been mentioned in this research.<sup>24</sup> A very short review will be nevertheless undertaken in order to place these documents in the right context of the UN system. Further, the work of the International Law Commission will also be succinctly reviewed, although some comments regarding Ago's report have already been made.<sup>25</sup>

#### 11.3.1 The General Assembly of the United Nations

Although GA resolutions are not binding, there is an important interplay between them and international customary law. As the ICJ pointed out in the *Nicaragua* case, *opinio juris* could be deducted from the attitude of states towards certain GA resolutions.<sup>26</sup> In other words, GA resolutions may be declaratory of existing customary law.<sup>27</sup>

<sup>22</sup> Alexandrov, p. 265-267; Gill 1989, p. 76.

<sup>23</sup> Gill 1989, pp. 72-73. See also Alexandrov, p. 270; Y. Dinstein, 'Implementing Limitations on the Use of Force – The Doctrine of Proportionality and Necessity: Remarks', 86 *American Society of International Law Proceedings* (1992) p. 56; Franck 2002, p. 49.

<sup>24</sup> See *supra* 10.3.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Nicaragua*, ICJ Rep. (1986) para. 188.

<sup>27</sup> Dixon, pp. 45-47.

Two of the most important GA documents connected to the prohibition to use force are the Friendly Relations Declaration (Resolution 2625 (1970)) and the Definition of Aggression (Resolution 3314 (1974)).

Resolution 2625 (XXV) adopted the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States, which set out several principles of international law. The preamble emphasized the importance of the codification of certain principles, including the prohibition of the threat or use of force. The declaration also stated that a war of aggression would be considered a crime against peace, for which there was responsibility in international law. Two obligations regarding the form of use of force are important to mention. First, states had to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state. Secondly, states had the duty to refrain from ‘organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts.’<sup>28</sup> The declaration also expressly forbade the resort to ‘acts of reprisal involving the use of force.’<sup>29</sup> Although neither the right of self-defence nor the concept of an armed attack was mentioned by the declaration, the resort to irregular use of force was acknowledged as a breach of the prohibition to use force. Moreover, the duties described by the declaration were characterized as principles embodied in the UN Charter and basic principles of international law.<sup>30</sup> Likewise, the ICJ interpreted the consent to the text of Resolution 2625 (XXV) as an acceptance of the validity of the rule or set of rules declared by the resolution itself.<sup>31</sup>

Resolution 3314 (XXIX) approved the Definition of Aggression, which identified several forms of use of armed force that amounted to an act of aggression. The resolution defined 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.’<sup>32</sup> Apart from invasion, bombardment, blockade or other attacks by the armed forces of a state against the territory of another,<sup>33</sup> also certain indirect forms of force were listed as potential acts of aggression. Accordingly, ‘the use of armed forces of one state which are within the territory of another state with the agreement of the receiving state’ or ‘the action of a state in allowing its territory [...] to be used by that other state for perpetrating an act of aggression against a third state’ could also amount to an act of aggression.<sup>34</sup> The Definition of Aggression went one step further in relation to the use of irregular forces by states than the Friendly Relations Declaration did. Whereas the latter defined the organization of irregular forces as a breach of the prohibition to use force, the former qualified it as an act of aggression. Accordingly, ‘the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries’ which would carry out acts of armed force against another state of such gravity as to amount to acts performed by regular forces could also amount to an act of aggression. Likewise, a state’s substantial

<sup>28</sup> Friendly Relations Declaration, GA Res. 2625, Part 1.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., Part 3.

<sup>31</sup> *Nicaragua*, ICJ Rep. (1986) para. 188.

<sup>32</sup> Definition of Aggression, GA Res. 3314, Art. 1.

<sup>33</sup> Ibid., Art. 3(a)-(d).

<sup>34</sup> Ibid., Art. 3(e) and (f).

involvement in such activities was also seen as a potential act of aggression.<sup>35</sup> Although the resolution does not make any connection between an ‘act of aggression’ and an ‘armed attack’, that connection was made by the ICJ in the *Nicaragua* case. Accordingly, the Court held that an armed attack had to be understood as including not merely action by regular forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries’ for the purposes described by Article 3(g) of the Definition of Aggression.<sup>36</sup> The Court made specific reference to that article in defining an armed attack by irregular forces and contended that the description ‘may be taken to reflect customary international law.’<sup>37</sup>

The importance of the two GA resolutions is twofold. First, as maintained by the International Court of Justice, they reflect *opinio juris* as regards various forms of the use of force and the corollary obligations of states to refrain from them. Secondly, they shed some light on what the majority of the members of the United Nations view as illegal uses of force or aggression. Coupled with the interpretation of armed attack given by the Court, the two GA resolutions also help in better contouring the circumstances in which specific uses of force can serve as basis for a lawful claim of self-defence.

### 11.3.2 The work of the International Law Commission

The issue of self-defence also came up in the work of the International Law Commission on state responsibility.<sup>38</sup> The importance of codifying the principles of state responsibility was recognized by the Commission as early as 1949, although work only started in 1955. Several reports were prepared by various special rapporteurs over the years on all the important topics relevant to state responsibility.<sup>39</sup>

Self-defence was first given detailed attention by Roberto Ago in the addendum of his eighth report on the principles of state responsibility.<sup>40</sup> He discussed state of necessity and self-defence as two of the circumstances precluding wrongfulness of an act of a state. He proposed the adoption of an article on self-defence that read as follows:

‘The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations.’<sup>41</sup>

Ago’s report was formulated in very cautious terms when it came to the more controversial questions of self-defence. He deferred a discussion of several ‘problems of

<sup>35</sup> *Ibid.*, Art. 3(g).

<sup>36</sup> *Nicaragua*, ICJ Rep. (1986) para. 195.

<sup>37</sup> *Ibid.*

<sup>38</sup> Succinct references to ‘anticipatory self-defence’ were made during the discussions on diplomatic protection and on the draft Code of Crimes against Peace and Security of Mankind, but no elaborate discussions followed on the subject. See John R. Duggard, Special Rapporteur, *First Report on Diplomatic Protection*, UN Doc. A/CN.4/506 (2000) p. 19, para. 56, as well as Summary Record of the 2135<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.2135 (1989) p. 297, para. 47.

<sup>39</sup> *The Work of the International Law Commission*, 5<sup>th</sup> edn. (New York, United Nations 1996) pp. 121-122; *Analytical Guide to the Work of the International Law Commission, 1949-1997* (New York, United Nations 1998) pp. 226-255.

<sup>40</sup> Ago Report.

<sup>41</sup> *Ibid.*, p. 70.

interpretation’ and emphasized that such a task was for ‘bodies responsible for interpreting and applying the Charter.’<sup>42</sup> Ago’s report was discussed in several meetings of the Commission and the official ILC report of the 32<sup>nd</sup> session contained an equally cautious commentary to self-defence.<sup>43</sup> In this report, the wording of the article changed slightly to read:

‘The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.’<sup>44</sup>

After Special Rapporteur James Crawford revisited the work of the Commission on self-defence in 1999,<sup>45</sup> the ILC adopted a final version of the provision (now Article 21) that read:

‘The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.’<sup>46</sup>

Some of the most important issues discussed regarding self-defence will be elaborated in the following paragraphs to shed light on the way the members of the International Law Commission viewed the role and limits of defensive use of force.

### 11.3.2.1 Self-defence and ‘general international law’

Ago emphasized the dual basis of the right of self-defence by pointing out that since the adoption of the Charter, there had been no known case where it was argued that self-defence was admissible solely by virtue of Article 51 and not – ‘primarily’ – by virtue of an ‘absolute rule previously recognized by general international law.’<sup>47</sup> Ago also asserted that the meaning given to self-defence by the drafters of Article 51 was the one perceived as valid at the time of the adoption of the Charter.<sup>48</sup> Consequently, it was hard to believe that there was any difference whatsoever in content between the notion of self-defence in general international law and the notion of self-defence endorsed by Article 51.<sup>49</sup>

That contention was criticized by Schwebel in the ensuing ILC discussion. Accordingly, Schwebel contended that although the Charter did codify the law governing

<sup>42</sup> Ibid., p. 68, paras. 117-118.

<sup>43</sup> *Report of the International Law Commission to the General Assembly on the Work of Its 32<sup>nd</sup> Session, 5 May-25 July 1980*, UN Doc. A/35/10 (1980) p. 52 (hereafter, ILC Report 1980).

<sup>44</sup> Ibid.

<sup>45</sup> James Crawford, Special Rapporteur, *Second Report on State Responsibility*, UN Doc. A/CN.4/498/Add.2 (1999). Crawford’s report focused primarily on the question whether use of force in self-defence precludes the wrongfulness of acts in breach of other international obligations, stemming from international humanitarian law, human rights law, environmental law (pp. 33-37). The same question was addressed by several members during the 2589<sup>th</sup> mtg. of the ILC. See Summary Record of the 2589<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.2589 (1999).

<sup>46</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001, p. 74. The comments on Art. 21 (Self-Defence) focus on the question whether use of force in self-defence precludes the wrongfulness of acts in breach of other international obligations (pp. 74-75).

<sup>47</sup> Ago Report, p. 61, para. 104.

<sup>48</sup> Ibid., pp. 62-63, paras. 107-108.

<sup>49</sup> Ibid., p. 63, para. 108.

the use of force in international relations, Article 51 had to be read in conjunction with other provisions of the Charter (such as Article 2(4) and Chapters VI and VII as a whole) to elucidate on the meaning given to self-defence. Article 51, taken alone, could not give a complete understanding of the notion of self-defence.<sup>50</sup> Sir Francis Vallat also asserted that the reference in Article 51 to self-defence as an ‘inherent right’ indicated that those who had drafted the Article had not attempted to codify the concept of self-defence.<sup>51</sup> Schwebel and Vallat thus agreed that there was more to self-defence than the wording of Article 51. Tsuruoka, the Japanese member of the ILC, approached the matter differently. He also disagreed with Ago’s conclusion, but for totally different reasons. He noted that Japanese writers had emphasized that in formulating Article 51 the authors of the Charter had taken an immense step towards pacifism by taking care to restrict the exercise of the right of self-defence to one clear-cut case. He disagreed thus on the point that Article 51 reflected a principle rooted in legal thinking at that time.<sup>52</sup>

On the subject of an armed attack, Ago criticized those authors who contended that Article 51 consecrated self-defence against the most important situations only, and that general international law allowed self-defence against other uses of force as well.<sup>53</sup> He placed advocates of ‘preventative’ self-defence in the same category, although pointed out that not all of them agreed with the existence of other grounds for self-defence than armed attack.<sup>54</sup> Ago did not assess the concrete relationship between the different arguments he claimed were part of the same school of thought. He merely asserted that the report was not the place for a detailed discussion of the merits or flaws of such arguments and that ‘all the theses advanced by the advocates of that school of thought have been subjected to critical analysis and rejected one by one.’<sup>55</sup>

During the ensuing discussions of the report, several members of the ILC pointed out that the reference to ‘armed attack’ in Article 51 did raise some concerns and created confusion as to the significance of other forms of illegal use of force, such as an act of aggression in the sense of GA Resolution 3314.<sup>56</sup> Diaz Gonzalez went as far as to highlight that there were other types of aggression which could be far more effective in threatening or destroying a state, such as economic, ideological and cultural aggression and thus the concept of aggression should not be confined solely to armed attack.<sup>57</sup> Consequently, in the opinion of Diaz Gonzalez, the ILC was not in a position to state categorically when the use of force was lawful and when an act of aggression should be deemed to have taken place, because there was no definition of an act of aggression that

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<sup>50</sup> Summary Record of the 1621<sup>st</sup> ILC mtg., UN Doc. A/CN.4/SR.1621 (1980) para. 2 (comment by Schwebel).

<sup>51</sup> *Ibid.*, para. 20 (comment by Sir Francis Vallat).

<sup>52</sup> Summary Record of the 1627<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1627 (1980) para. 3 (comment by Tsuruoka).

<sup>53</sup> Ago Report, p. 64, paras. 110-111.

<sup>54</sup> *Ibid.*, pp. 64-65, paras. 111-112.

<sup>55</sup> *Ibid.*, pp. 65-66, paras. 113-114.

<sup>56</sup> Summary Record of the 1620<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1620 (1980) paras. 16 (comment by Ushakov), 20-21 (comment by Reuter); Summary Record of the 1621<sup>st</sup> ILC mtg., UN Doc. A/CN.4/SR.1621 (1980) paras. 4 (comment by Schwebel), 20-21 (comment by Sir Francis Vallat); Summary Record of the 1628<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1628 (1980) para. 13 (comment by Verosta).

<sup>57</sup> Summary Record of the 1627<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1627 (1980) para. 5 (comment by Diaz Gonzalez).

justified self-defence.<sup>58</sup> Similar views were expressed by then ILC Chairman Pinto, who emphasized that, through codification, self-defence was to be extended beyond armed attacks to encompass the ways in which a state could defend itself against threats to its economy or to its legitimate interests outside its territory or outside the territory of any state. The codified concept of self-defence had to take account of whether or not such threats involved the use of armed force, in the sense of full-scale military operations, or of some other form of coercion which fell short of military operations, and whether or not there had been overt aggression. It also had to determine whether defensive measures taken by a state aimed at warding off an armed attack at some time in the future, rather than an attack that was imminent or was actually taking place.<sup>59</sup> Barboza took a middle-way approach by contending that Article 51 in fact reflected general international law, while it also incorporated certain additional elements relating to the United Nations system of collective security. At the same time, he emphasized that Article 51 was not a comprehensive statement of international law on the matter of self-defence, because it made no mention of necessity and proportionality.<sup>60</sup>

The contentions of Ago were transposed into the ILC report of the 32<sup>nd</sup> session. Accordingly, the report stated that the prevailing opinion in legal doctrine was that self-defence was applicable only against an armed attack and not other forms of the use of force.<sup>61</sup> No explicit reference to the connection between ‘armed attack’ and ‘aggression’ was made; however, the report later interchangeably used the terms of armed attack and aggression as legal grounds for self-defence.<sup>62</sup>

### 11.3.2.2 Armed action against private groups as ‘state of necessity’

While differentiating between ‘state of necessity and self-defence,’ Ago emphasized that armed action undertaken by a state to ward off a danger emanating from private individuals or groups could not be defined as self-defence, because self-defence presupposed the wrongful conduct of a *state*. In such a case, the action undertaken was to be considered a ‘state of necessity’.<sup>63</sup> Ago clearly based his line of reasoning on the assumptions that self-defence could only be invoked against a state and that there was no involvement whatsoever of a state in the activities of the private groups.

That point was questioned by Schwebel in his comments on the report. He asserted that states were surely entitled to defend themselves against ‘attacks by terrorist organizations and individuals’ and that he could not agree with Ago’s interpretation on that point.<sup>64</sup> Notwithstanding that comment, the ILC report of the 32<sup>nd</sup> session took over Ago’s comments on the possible response of states to armed acts of private groups and stated that according to the prevailing opinion at the time state action undertaken in such cases and for such purposes had to be explained on other grounds than self-defence.<sup>65</sup>

<sup>58</sup> Ibid., para. 6 (comment by Diaz Gonzalez).

<sup>59</sup> Ibid., para. 21 (comment by chairman Pinto).

<sup>60</sup> Ibid., paras. 10-11 (comment by Barboza).

<sup>61</sup> ILC Report 1980, p. 58, para. 19.

<sup>62</sup> Ibid., p. 60, para. 22.

<sup>63</sup> Ago Report, pp. 61-62, para. 106.

<sup>64</sup> Summary Record of the 1621<sup>st</sup> ILC mtg., UN Doc. A/CN.4/SR.1621 (1980) para. 5 (comment by Schwebel).

<sup>65</sup> ILC Report 1980, p. 57, para. 16.

### 11.3.2.3 ‘Preventive’ self-defence

Ago contended that the ILC could not take sides in the controversy regarding the admissibility of ‘preventive’ self-defence, ‘particularly if the object of the preventive action is to halt, before it materializes, a thoroughly planned armed attack that is about to be launched.’<sup>66</sup> Ago did not discuss what exactly he meant by ‘preventive’ self-defence and whether there was any difference between halting an armed attack that was ‘about to be launched’ and preventing another more remote in time. As a matter of fact, Ago seems to have equated ‘preventive’ self-defence with stopping an armed attack that was ‘about to be launched.’ Elsewhere, however, Ago admits that ‘a state acting in self-defence, like a state acting in a state of necessity, acts in response to an imminent danger – which must in both cases be serious, immediate and incapable of being countered by other means.’<sup>67</sup> Similarly, he asserted that a defensive use of force was opposed to an offensive one inasmuch as it had as objective ‘preventing another’s wrongful action from proceeding, succeeding and achieving its purpose.’<sup>68</sup> This was – Ago admitted – ‘the core of the matter’,<sup>69</sup> and indeed it was, not only because it was a clear differentiation between defensive and offensive use of force, but also because the three crucial moments of self-defence were identified: before, during and after an armed attack.

During the discussion of the report, one of the members of the ILC (Barboza) pointed out that ‘one of the main issues to be decided by the Commission was whether the concept of self-defence should extend to the use of force against the threat of imminent armed attack.’<sup>70</sup> Barboza further asserted that, in his understanding, self-defence related primarily to the use of force and ‘possibly the threat of the use of force.’<sup>71</sup> Nonetheless, the Commission refused to take an official stance on the question of anticipatory action in self-defence.

### 11.3.2.4 Necessity and proportionality

On the topic of necessity, Ago noted that its relevance was greater in case ‘preventive’ self-defence was admitted as lawful. Necessity meant that the state attacked or threatened with an imminent attack could not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. For that reason, necessity as a requirement was more important in case of defensive action against an imminent threat of an armed attack.<sup>72</sup>

Regarding proportionality, Ago offered a clear substantiation of the ‘accumulation of events’ theory. Accordingly, he contended that self-defence could be justified against an

<sup>66</sup> Ago Report, p. 67, para. 116.

<sup>67</sup> Ibid., p. 53, para. 88. That statement was almost literally transposed in the ILC Report 1980, p. 52, para. 3.

<sup>68</sup> Ago Report, p. 54, para. 90. That statement was reiterated in a slightly changed form in the ILC Report 1980, p. 53, para. 5.

<sup>69</sup> Ago Report, p. 54, para. 90.

<sup>70</sup> Summary Record of the 1627<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1627 (1980) para. 10 (comment by Barboza).

<sup>71</sup> Ibid., para. 11.

<sup>72</sup> Ago Report, p. 69, para. 120.

armed attack consisting ‘of a number of successive acts.’ In such a case, the requirements of proportionality and immediacy had to be looked at ‘in the light of those acts as a whole.’<sup>73</sup> Accordingly:

‘if a state suffers a series of successive and different acts of armed attack, *from another state*, the requirement of proportionality would certainly not mean that the victim state is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.’<sup>74</sup>

As a matter of fact, the requirement of proportionality had to be measured against ‘the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself.’<sup>75</sup>

Ago’s observations on proportionality were upheld by Riphagen, one of the members of the ILC. In the ensuing discussions, Riphagen emphasized that ‘the suffering of the aggressor State often exceeded that which it had intended to inflict on the victim State’ and that, consequently, the requirement of proportionality needed more attention.<sup>76</sup> In his reply, Ago specified that when it came to self-defence, the assessment of the proportionality varied considerably from one case to another.<sup>77</sup> At times the action taken in defence against an armed attack had to be out of proportion to that attack, because ‘self-defence must aim at preventing the attack, and not at objectives going beyond that limit.’ Notwithstanding the flexibility of the rule of proportionality in self-defence, Ago emphasized that a state could not profit from an armed attack to react not only by warding off the attack, but also by annexing the territory of the attacker.<sup>78</sup>

Several conclusions can be drawn from Ago’s report and the ensuing discussions of ILC members. First, regarding the existence of an armed attack, Ago maintained that such an attack could only stem from a state. If armed acts were carried out by non-state actors, the targeted state could only respond on the basis of a state of necessity and not self-defence. That contention was questioned in the ensuing discussion, showing thus that there was no unanimity as to the potential authors of an armed attack among the members of the ILC. Moreover, the opinions expressed also showed that some lawyers still viewed self-defence as lawful against threats of non-forceful nature.

Secondly, Ago’s reference to a danger immediate and incapable of being countered by other means echoed the immediacy factor of the necessity requirement. Nonetheless, Ago refrained from discussing whether anticipatory action in self-defence could be lawful on the basis of that factor. He only hinted at the significance of the principle of necessity in the event that ‘preventive’ self-defence was admitted as lawful.

Thirdly, the Ago report defined proportionality in the same terms that the ‘accumulations of events’ theory did. There was no contention on Ago’s part as to any novelty in this interpretation and he was definitely not referring to non-state actors in his

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<sup>73</sup> Ibid., pp. 69-70, para. 121.

<sup>74</sup> Ibid., (emphasis added). It has to be reiterated that Ago believed that self-defence could only be exercised against states. Ibid., pp. 61-62, para. 106.

<sup>75</sup> Ibid., pp. 69, para. 121.

<sup>76</sup> Summary Record of the 1620<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1620 (1980) para. 4 (comment by Riphagen).

<sup>77</sup> Summary Record of the 1629<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1629 (1980) para. 9 (comment by Ago).

<sup>78</sup> Ibid.

discussion of proportionality. Ago's views on proportionality were upheld by the Commission and no member expressed any contrary views on that interpretation.

All in all, the work of the ILC on self-defence contributed to all three elements of that right. It adopted a restrictive view on the conditionality of an armed attack by delimiting it to state action. It confirmed the immediacy factor without, however, drawing any conclusions on the temporal dimension of self-defence. As regards proportionality, the ILC's contribution was to strengthen the interpretation given to that principle by the 'accumulation of events' theory.

## 11.4 The work of the International Court of Justice

The ICJ touched upon the right of self-defence several times and addressed some of the most controversial questions regarding that right. A succinct analysis of the *Nicaragua*, the *Oil Platforms* and the *Armed Activities in Congo* cases as well as of the *Nuclear Weapons* and *Israeli Wall* advisory opinions will be conducted in order to discern the views adopted by the Court on the necessity and proportionality requirements as defined in the introductory remarks of Part II.<sup>79</sup>

The following paragraphs will review the Court's findings for each of the three elements pertaining to necessity and proportionality of self-defence.

### 11.4.1 The conditionality of an armed attack

By far the most addressed issue pertaining to self-defence by the Court was the notion of armed attack, perceived by the Court as a condition *sine qua non* for lawful self-defence.<sup>80</sup> In the *Nicaragua* case, the Court reiterated Article 3 of the Definition of Aggression, according to which, an armed attack must be understood as including not merely action by regular 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' an actual armed attack conducted by regular forces 'or its substantial involvement therein.'<sup>81</sup>

On this point, however, the Court expressed one of its most controversial opinions: the concept of 'armed attack' was not to be interpreted as including assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance could amount to a threat or use of force or could be regarded as intervention in the internal affairs of a state, but it could not be viewed as an armed attack.<sup>82</sup>

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<sup>79</sup> For the factual background of these cases, see *Nicaragua*, ICJ Rep. (1986) paras. 18-25; *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, ICJ Rep. (2003) paras. 23-26; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Rep. (2005) paras. 72-91 (hereafter, *Armed Activities in Congo*). For background of the advisory opinions, see *Nuclear Weapons*, ICJ Rep. (1996) paras. 1, 20-22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. (2004) para. 1 (hereafter, *Israeli Wall*).

<sup>80</sup> Green, p. 30. Green also discusses the gravity threshold set by the Court for armed attack. *Ibid.*, pp. 31-42.

<sup>81</sup> *Nicaragua*, ICJ Rep. (1986) para. 195; Definition of Aggression, GA Res. 3314.

<sup>82</sup> *Nicaragua*, ICJ Rep. (1986) para. 195.

In the *Israeli Wall* advisory opinion, the Court asserted that Article 51 of the Charter recognized the existence of an inherent right of self-defence ‘in the case of an armed attack by one state against another state.’<sup>83</sup> In the *Armed Activities in Congo* case, the judges declined to discuss ‘whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces,’ because they believed that this was not necessary given the inability of Uganda to prove the existence of legal and factual circumstances for the exercise of self-defence.<sup>84</sup>

Some of the members of the Court disagreed with the state-based view on armed attack. In his dissenting opinion in the *Nicaragua* case, Judge Jennings contended that the provision of arms could be a ‘very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement.’<sup>85</sup> He also pointed out that power struggles were increasingly carried on by ‘destabilization, interference in civil strife, comfort, aid and encouragement to rebels,’ which were all forms of assistance given to irregulars engaging in the use of force. Against this background, Judge Jennings emphasized that the view adopted by the Court created a ‘large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.’<sup>86</sup>

In her dissenting opinion in the *Israeli Wall* case, Judge Higgins adopted a similar view. She asserted that, in her opinion, there was nothing in the text of Article 51 stipulating that self-defence was available only when an armed attack was made by a state.<sup>87</sup> Similar points were made by Judge Buergenthal, who additionally emphasized that Security Council Resolutions 1368 (2001) and 1373 (2001) recognized self-defence against terrorism, thus implicitly acknowledged that an armed attack could be committed by non-state actors.<sup>88</sup> Judge Kooijmans noted that, even though Article 51 was in the past interpreted as referring to an armed attack coming from another state, SC Resolutions 1368 (2001) and 1373 (2001) radically changed this view to interpret armed attacks as possibly being committed by non-state actors as well.<sup>89</sup>

Likewise, in his separate opinion in the *Armed Activities in Congo* case, Judge Simma contended that since the terrorist attacks of 11 September 2001, claims that Article 51 also covered defensive measures against terrorist groups were more favourably viewed.<sup>90</sup> Judge Kooijmans pointed out that because of its reluctance to discuss this matter ‘the Court has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so.’<sup>91</sup>

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<sup>83</sup> *Israeli Wall*, ICJ Rep. (2004) para. 139.

<sup>84</sup> *Armed Activities in Congo*, ICJ Rep. (2005) para. 147.

<sup>85</sup> *Nicaragua*, ICJ Rep. (1986) p. 543 (dissenting opinion of Judge Jennings). *Per a contrario*, Gray 2004, pp. 109-110.

<sup>86</sup> *Nicaragua*, ICJ Rep. (1986) p. 543-544 (dissenting opinion of Judge Jennings).

<sup>87</sup> *Israeli Wall*, ICJ Rep. (2004) p. 215 (separate opinion of Judge Higgins).

<sup>88</sup> *Ibid.*, p. 242 (declaration of Judge Buergenthal).

<sup>89</sup> *Ibid.*, pp. 229-230 (separate opinion of Judge Kooijmans).

<sup>90</sup> *Armed Activities in Congo*, ICJ Rep. (2005) p. 337 (separate opinion of Judge Simma).

<sup>91</sup> *Ibid.*, p. 313 (separate opinion of Judge Kooijmans).

The state-based approach of the Court was criticized by several authors as well.<sup>92</sup> According to Wedgwood, Article 51 did not link the right of self-defence ‘to the particular legal personality of the attacker.’<sup>93</sup> Although in the past it was unlikely that non-state actors could mimic the force available to nation-states, according to Wedgwood, the events of 11 September 2001 had retired that assumption. The Security Council itself endorsed the right of self-defence against terrorist attacks. Wedgwood also pointed out that ‘it would indeed be peculiar if states were legally unable to protect their civilians against repeated acts of terrorism, when they can use force against conventional armies attacking conventional targets.’<sup>94</sup> Kelly expressed similar views. He also emphasized that Article 51 only referred to an armed attack occurring against a state without specifying the author of the attack.<sup>95</sup> Although at the time of the adoption of the Charter there had not been as many instances of ‘transnational terrorist actions not directly or not clearly attributable to a state,’ there had been numerous examples of ‘extraterritorial law enforcement and response to armed bands conducting cross-border activity.’<sup>96</sup> According to Kelly, the *Caroline* incident of 1837 ‘involved the contact of hostile activities by armed and organized citizens of the United States across the border in the British province of Canada, in support of a rebellion in that province.’<sup>97</sup> Likewise, Kelly noted, the US expedition in Mexico in pursuit of Pancho Villa also involved armed action against cross-border activities of armed bands.<sup>98</sup> Kelly concluded that the necessity of a state to defend itself against non-state actors had long been acknowledged by state practice and was not a novelty in itself, thus Article 51 could have not been envisaged to prevent state from such course of action.<sup>99</sup> Murphy also expressed harsh criticism of the restrictive interpretation of armed attack. He noted that the position of the Court conflicted with ‘the language of the UN Charter, its *travaux préparatoires*, the practice of states and international organizations, and common sense.’<sup>100</sup>

The same attitude was expressed by authors commenting on the Court’s decision not to address the role of non-state actors in the *Armed Activities in Congo* case.<sup>101</sup> According

<sup>92</sup> R. Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense’, 99 *American Journal of International Law* (2005) p. 58; S.C. Breau, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion, 9 July 2004’, 54 *International Comparative Law Quarterly* (2005) pp. 1007-1008; Kelly, pp. 224-225; S.D. Murphy, ‘Self-Defence and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?’, 99 *American Journal of International Law* (2005) p. 62.

<sup>93</sup> Wedgwood 2005, p. 58.

<sup>94</sup> *Ibid.*

<sup>95</sup> Kelly, p. 225.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, pp. 225-226.

<sup>98</sup> *Ibid.*, pp. 226-227.

<sup>99</sup> *Ibid.*, p. 227.

<sup>100</sup> Murphy 2005, p. 62. Wedgwood and Murphy have also dismissed the Court’s contention that Israel, as an occupying power, could not defend its territory and nationals against armed attacks emanating from the occupied territory. Wedgwood 2005, pp. 58-59; Murphy 2005, pp. 68-69.

<sup>101</sup> S.A. Barbour and Z.A. Salzman, ‘“The Tangled Web”: The Right of Self-Defence against Non-State Actors in the *Armed Activities Case*’, 40 *NYU Journal of International Law and Politics* (Special Issue 2008) p. 62; J.T. Gathii, ‘Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)’, 101 *American Journal of International Law* (2007) p. 148; S. Verhoeven, ‘A Missed Opportunity to Clarify the Modern *Ius ad Bellum*: Case Concerning Armed Activities on the Territory of the Congo’, 45 *Military Law and the Law of War Review* (2006) pp. 360, 363.

to Barbour and Salzman, that case seemed to show that ‘attacks carried out by non-State actors that are not attributable to a state are not armed attacks within the scope of Article 51, and therefore do not entitle the victim state to respond with force in self-defence.’<sup>102</sup>

The Court also set a high burden of proof as to the existence of an armed attack. In the *Oil Platforms* case, the Court found that even though the evidence of Iranian responsibility for the attacks on US-flagged ships was ‘highly suggestive’, it was not conclusive enough to clearly establish such responsibility.<sup>103</sup> The Court did not rule out the possibility that an attack on a single vessel could amount to an armed attack.<sup>104</sup> Nonetheless, the Court held that the alleged attacks, even taken cumulatively, did not seem to constitute an armed attack, as a most grave form of the use of force.<sup>105</sup>

This approach was criticized by several authors. US Department of State Legal Adviser William Taft IV characterized the *Oil Platforms* decision as ‘regrettable’, because of statements ‘that might be read to suggest new and unsupported limitations on the ability of States to defend themselves from armed attacks.’<sup>106</sup> In particular, Taft referred to the limitations set by the judgment concerning the threshold and target of an armed attack.<sup>107</sup> Taft believed that such limitations would substantially and dangerously enlarge the ability of states to undertake armed attacks without fear that such attacks will be defended against.<sup>108</sup> Gill asserted that the Court set a high burden of proof on the state invoking the right of self-defence, without clearly defining the standard of proof and it offered a number of rather ambiguous indications concerning the threshold for an armed attack.<sup>109</sup>

Consequently, the approach of the Court to the notion of armed attack can be characterized in three points. First, the mentioned judgments and advisory opinions put forward a restrictive, state-based approach regarding the authors of an armed attack. Accordingly, the Court repeatedly held that only states could be held responsible for armed attacks.<sup>110</sup> Secondly, the Court set a high burden of proof for showing the existence of an armed attack. Highly suggestive evidence, even corroborated, was deemed inconclusive. At the same time, the Court did not offer an explanation of how such burden of proof could be met in the absence of obvious evidence pertaining to the attacks.<sup>111</sup> Thirdly, there has been considerable division among the members of the Court as to the position adopted regarding the notion of armed attack. The gap between the mentioned judgments and advisory opinions, on one hand, and state practice and legal literature, on the other, has been partly bridged by those dissenting opinions that adopted a more realistic view on armed attack. Accordingly, several judges have pointed out that

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<sup>102</sup> Barbour and Salzman, pp. 61-62.

<sup>103</sup> *Oil Platforms*, ICJ Rep. (2003) paras. 52-61, 71.

<sup>104</sup> *Ibid.*, para. 72.

<sup>105</sup> *Ibid.*, para. 64.

<sup>106</sup> W.H. Taft, ‘Self-Defense and the Oil Platforms Decision’, 29 *Yale Journal of International Law* (2004) p. 306.

<sup>107</sup> *Ibid.*, p. 299.

<sup>108</sup> *Ibid.*, p. 306.

<sup>109</sup> Gill 2007, p. 123.

<sup>110</sup> *Nicaragua*, ICJ Rep. (1986) para. 195; *Israeli Wall*, ICJ Rep. (2004) para. 139.

<sup>111</sup> *Oil Platforms*, ICJ Rep. (2003) paras. 52-61, 64, 71.

the state-based approach was a matter of the past and that a reinterpretation was needed to meet the realities of twenty-first century state practice.<sup>112</sup>

#### 11.4.2 Immediacy

In general, the Court shied away from discussing the requirement of necessity in general as well as immediacy or imminence in particular.<sup>113</sup> In the *Nicaragua* case, the Court declined to discuss the issue of self-defence against an imminent threat, because the parties had not referred to it. Likewise, in the *Armed Activities in Congo* case, the Court declined to discuss the lawfulness of a response to the imminent threat of an armed attack, because the issue had not been raised although the evidence adduced by Uganda showed the ‘preventative nature’ of many of its armed acts.<sup>114</sup>

The Court implicitly acknowledged that the necessity requirement had to pertain to the inevitability of the danger in the *Oil Platforms* case. Accordingly, the Court found that not all the available options were explored by the US before resorting to armed force, because there was no evidence that it had complained to Iran about the military activities of the oil platforms.<sup>115</sup>

Apart from these timid references, the Court refrained from elaborating on the elements or limits of the necessity requirement of self-defence.<sup>116</sup>

#### 11.4.3 Proportionality

In the *Nuclear Weapons* case, the Court asserted that a proportionate use of force in self-defence has to meet the requirements of international humanitarian law.<sup>117</sup> This way, the Court established a relationship between the *jus ad bellum* principle of proportionality and the *jus in bello* pertaining to armed conflict.

Also in relation to proportionality, in the *Oil Platforms* case, the Court held that the US response of 18 April 1988 (*Operation Praying Mantis*) was of a much greater scale than the incident that allegedly triggered it. The Court noted that ‘it cannot close its eyes to the scale of the whole operation, which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft.’<sup>118</sup> Accordingly:

‘[A]s a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.’<sup>119</sup>

<sup>112</sup> *Israeli Wall*, ICJ Rep. (2004) pp. 215 (separate opinion of Judge Higgins), 229-230 (separate opinion of Judge Kooijmans), 242 (declaration of Judge Buerghenthal); *Armed Activities in Congo*, ICJ Rep. (2005) pp. 313 (separate opinion of Judge Kooijmans), 337 (separate opinion of Judge Simma).

<sup>113</sup> On the marginalization of necessity and proportionality in general, see Gray 2004, pp. 122-123; Green, pp. 105-107.

<sup>114</sup> *Armed Activities in Congo*, ICJ Rep. (2005) para. 143.

<sup>115</sup> *Oil Platforms*, ICJ Rep. (2003) para. 76.

<sup>116</sup> Green, pp. 105-107.

<sup>117</sup> *Nuclear Weapons*, ICJ Rep. (1996) para. 42.

<sup>118</sup> *Oil Platforms*, ICJ Rep. (2003) para. 77.

<sup>119</sup> *Ibid.*

The discussion of the US operations in the *Oil Platforms* case suggested that the Court put more emphasis on the quantitative element of proportionality rather than the qualitative. Accordingly, it focused primarily on the scale of the original attacks rather than on the need to ward off the danger stemming from the author(s) of those attacks.<sup>120</sup>

#### 11.4.4 The customary basis of self-defence

Despite the cautious approach taken by the International Court of Justice in relation to the right of self-defence, it made a very important contribution to the understanding of the basis of the right. Accordingly, the most important finding of the Court on self-defence related to the relationship between customary law and treaty law. In the *Nicaragua* case, the Court acknowledged that the customary right of self-defence coexisted with Article 51 and the latter did not supersede the former:

‘On one essential point, this treaty itself [the UN Charter] refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “*droit naturel*”) of individual and collective self-defence, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack.’<sup>121</sup>

The Court went on interpreting Article 51 as being meaningless without reference to the ‘natural’ or ‘inherent’ right of self-defence, which could only be of customary nature.<sup>122</sup> The language used by the Court suggested that Article 51 was interpreted as a bridge to customary law for interpreting the content of the right of self-defence. Even though the Court admitted that the customary right of self-defence might have been subsequently confirmed or influenced by the Charter, it also emphasized that Article 51 did not directly regulate all aspects of this right.<sup>123</sup> As an illustration, the Court pointed out that there was no specification as to the necessity and proportionality of the measures taken and, equally, there was no definition provided for an armed attack. For that reason, one had to turn to customary law to seek answers to the issues not addressed in Article 51. Consequently, the Court was of the view that Article 51 could not be interpreted as a provision that subsumed and supervened customary international law.<sup>124</sup>

Apart from demonstrating the co-existence of both treaty provisions (Article 51) and customary international law (the inherent right of self-defence), the Court also implicitly acknowledged that the purpose of Article 51 was to guarantee the survival of the natural right and not to supervene it.<sup>125</sup>

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<sup>120</sup> Ibid.

<sup>121</sup> *Nicaragua*, ICJ Rep. (1986) para. 176.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid., paras. 176-177.

## 11.5 Concluding remarks

The aim of this chapter was to assess whether the temporal dimension and the juridical variables identified at the beginning of Part II (conditionality of armed attack, immediacy and proportionality) have been, in any form, addressed by various UN organs, and if yes, what were the adopted approaches.

It is reasonable to conclude that the work of UN organs relevant for the right of self-defence did not address in any elaborate form the temporal dimension of self-defence. Discussion of self-defence was generally based on the assumption of an already-occurred armed attack, thus the remedial dimension of self-defence was implicitly confirmed.<sup>126</sup> The instances of collective self-defence expressly endorsed by the Security Council also involved situations in which an armed attack had already occurred.<sup>127</sup> The three above-mentioned ICJ cases also pertained to circumstances where some sort of use of force triggered claims of self-defence.<sup>128</sup> Nonetheless, no explicit rejection of the possible legality of anticipatory action in self-defence was made by any of the examined UN organs. In truth, both the ILC and the ICJ expressly declined to discuss the matter.<sup>129</sup>

Regarding the influence of the work of UN organs on the elements of self-defence, three points are important to be made. First, both the International Law Commission and the International Court of Justice adopted a restrictive, statist approach to the definition of an armed attack. This gap was somewhat bridged by Resolution 1368 (2001) of the Security Council in which self-defence against terrorist attacks was recognized. Moreover, individual members of both the ILC and the ICJ pointed out that the definition of armed attack had to be reinterpreted to include non-state actors as authors.

Secondly, the factor of immediacy in self-defence was hardly ever addressed by the ICJ and ILC. The Court marginalized the discussion of the necessity requirement of self-defence in general. In its report before the ILC, Ago confirmed that the danger faced by the state exercising the right of self-defence had to be immediate and incapable of being countered by other means.<sup>130</sup> Apart from this short reference to immediacy, no elaborate discussion on the issue was taken up by any of the examined UN organs.

Thirdly, the requirement of proportionality received some attention in Ago's report, although there was no extensive discussion of the principle in the ensuing ILC meetings.<sup>131</sup> Ago primarily focused on the qualitative approach when defining proportionality and his view was not challenged by the other ILC members.<sup>132</sup> The ICJ

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<sup>126</sup> See *supra* 11.3.2 and 11.4.1.

<sup>127</sup> See *supra* 11.2.

<sup>128</sup> For the factual background of these cases, see *Nicaragua* ICJ Rep. (1986) paras. 18-25; *Oil Platforms*, ICJ Rep. (2003) paras. 23-26; *Armed Activities in Congo*, ICJ Rep. (2005) paras. 72-91. See also *supra* 11.4.1, for the assessment of such uses of force.

<sup>129</sup> Ago Report, p. 67, para. 116; *Armed Activities in Congo*, ICJ Rep. (2005) para. 143.

<sup>130</sup> Ago Report, p. 53, para. 88. That statement was almost literally transposed in the ILC Report 1980, p. 52, para. 3.

<sup>131</sup> Ago Report, p. 69, para. 121; Summary Record of the 1620<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1620 (1980) para. 4 (comment by Riphagen); *Oil Platforms*, ICJ Rep. (2003) para. 77.

<sup>132</sup> See *supra* 11.3.2.4. Ago asserted that the requirement of proportionality had to be measured against the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself. Ago Report, p. 69, para. 121. Riphagen agreed, but warned against the abuse of the proportionality requirement. Summary Record of the 1620<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1620 (1980) para. 4 (comment

placed more focus on the qualitative approach, though it shied away from giving thorough attention to the concept.<sup>133</sup>

The most important addition of the UN organs to the interpretation of self-defence originates from the ICJ. As shown in section 11.4.4 above, the Court acknowledged the coexistence of customary law and treaty law regarding the right of self-defence. That statement followed the realities of post-Charter state practice on self-defence, in which references to the requirements of necessity and proportionality have often been made. The rest of the contributions shed light on many issues pertaining to the right of self-defence. Most of them point to the questions raised by the notion of armed attack. Nonetheless, the effect of these contributions, taken individually or cumulatively, cannot be interpreted as reflecting the emergence of a new customary rule that has significantly altered the pre-Charter understanding of self-defence.

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by Riphagen); Summary Record of the 1629<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1629 (1980) para. 9 (comment by Ago).

<sup>133</sup> See *supra* 11.4.3. *Oil Platforms*, ICJ Rep. (2003) para. 77.