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## **Part III Military Operations within the Context of the Right of Self-Defence and other Possible Legal Bases for the Use of Force, Ch.8 Legal Basis of the Right of Self-Defence under the Un Charter and Under Customary International Law**

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## (p. 213) Chapter 8 Legal Basis of the Right of Self-Defence under the Un Charter and Under Customary International Law

**8.01** The right of self-defence is used within different contexts (i.e. national or State self-defence, unit self-defence, and individual or personal self-defence) and can relate to different applicable legal regimes (e.g. international law, national criminal law, etc.). While these different manifestations of the right of self-defence share certain characteristics, in particular the notion that self-defence denotes the lawful use of force in response to a prior or impending illegal use of force, they are governed by different and distinct legal criteria and considerations. For the sake of clarity, the term self-defence as used in Part III of this Handbook will be used to denote the right of a State under international law to respond individually or collectively to an illegal armed attack directed against its territory, citizens, military vessels, aircraft, or installations, abroad or located in international sea or airspace, and subject to the legal criteria and conditions laid down in the UN Charter and in customary international law. These international legal criteria and conditions can be supplemented by other considerations of a policy or domestic legal nature, but those are separate and distinct and should not be confused with the legal regime governing the exercise of self-defence under international law.

**1.** Self-defence under international law refers to the right of a State (or States) to forcibly respond to an armed attack originating or controlled and directed from outside its territory against its territory, citizens, vessels, aircraft or military personnel stationed abroad, or which are situated in international sea or airspace.<sup>1</sup> It shares

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(p. 214) a common legal origin with other manifestations of self-defence, such as the right of personal self-defence under national criminal law, both of which trace their origins to the natural law doctrine of the just war tradition. But under modern positive law, national self-defence is a separate legal regime which is relevant only to States and is governed solely by international law criteria and conditions contained in the UN Charter and in customary international law. Consequently, it should not be confused with other manifestations of self-defence referred to and covered elsewhere in this Handbook.<sup>2</sup>

**2.** Under contemporary international law the use or threat of force is prohibited except in the context of the UN collective security system or in exercise of the right of self-defence.<sup>3</sup> Consequently, the right of self-defence is an exception to the prohibition of the use of force which provides for a recognized legal basis for the use of transboundary force in response to a prior or impending illegal use of force originating or directed from abroad with the aim and purpose of halting the attack and forestalling the occurrence of further attacks in the immediate future from the same source.<sup>4</sup> It follows that self-defence only relates to a forcible response to an illegal use of force. In short, there is no right of self-defence against the lawful use of force, whether this is in the form of a lawful exercise of self-defence by another State or the exercise by the UN Security Council of its enforcement powers under the Charter.<sup>5</sup>

**8.02** The right of self-defence under international law is directed towards and possessed by States and is governed firstly by the provisions of the UN Charter relating to the use of force in general and the exercise of that right in particular. The relevant provision (Article 51) refers to the right as being 'inherent' in nature. This reference is generally accepted as a reference to the continuing relevance of customary international law which provides an additional legal basis and criteria for the exercise of this right, alongside those contained in Article 51 and other relevant provisions of the UN Charter. Consequently, the international

right of self-defence has a dual legal basis: Article 51 of the UN Charter and customary international law, and both are

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(p. 215) relevant in determining the legality and the modalities of the exercise of this right. They should be applied in a complementary fashion which fully takes into account the criteria and conditions for the exercise of this right which are laid down in both of these legal sources, as well as taking into account all relevant factual considerations which are available at the time in question.

**1.** The dual legal basis of the right of self-defence is generally recognized and acknowledged as being Article 51 of the UN Charter and customary international law, which is indirectly referred to in that provision by use of the term 'inherent' in relation to the nature of the right of self-defence.<sup>6</sup> Notwithstanding the general acknowledgement of the dual legal basis of the right in both Charter and customary law, there is nevertheless a considerable degree of legal disagreement and controversy relating to the scope of the right under customary international law between those States and authors who support a more restrictive approach and those which take a more liberal attitude as to what is permitted under customary law.<sup>7</sup> In keeping with the intention and purpose of a work such as this Handbook, it is not felt necessary to reproduce this doctrinal debate and controversy at any length here. The approach taken here is that Article 51 provides the starting point for an examination of the scope and purpose of the right of self-defence and is complemented by customary international law to the extent that this is not incompatible with Article 51 and the overall purpose of the Charter's legal framework governing the use of force and the primacy of the Security Council in the maintenance and restoration of international peace and security. Consequently, the lawful exercise of self-defence must meet both the conditions set out in Article 51 and other relevant provisions of the Charter, and those provided for under customary international law, which complement the Charter legal framework, such as necessity, proportionality, and immediacy.

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(p. 216) **2.** The application of the legal criteria referred to in the previous paragraph must also take account of the relevant factual circumstances and conditions pertaining at the time a self-defence action is undertaken. Principles such as necessity, proportionality, and immediacy, while capable of a general legal definition, only take on meaning in the light of relevant circumstances such as the nature, gravity, and scope of the attack; the likelihood of further attacks in the immediate future; the availability of effective and feasible alternatives; the factual evidence relating to the source of the attack; the availability and likeliness of possible outside assistance; the state of readiness and capabilities of the defending State's armed forces, and so forth.<sup>8</sup> This list is indicative, and not meant to be exhaustive, but it does serve to illustrate that the legal criteria governing the exercise of self-defence cannot be seen in isolation from other relevant considerations. Whether a particular action taken in the context of self-defence is, for example, proportionate will depend on the seriousness of the attack and the likelihood of further attacks and can only be reasonably assessed on the basis of the information readily available at the time, not on what may come to light weeks, months, or even years later.<sup>9</sup>

**8.03** The exercise of self-defence under Article 51 of the Charter is predicated upon the occurrence of an armed attack. Under customary international law, the possibility is not ruled out that a State may respond to a clear and manifest danger of an impending armed attack when the danger of such an impending attack is supported by convincing factual evidence and no other alternatives are reasonably available. An armed attack can be carried out either directly by a foreign State's armed forces, or indirectly by a State acting

through organized armed groups which are under a foreign State's control or are subject to significant involvement and influence from a foreign State. Additionally, an armed attack can be carried out by an organized armed group which is capable of mounting an armed attack, which is comparable in its scale and effect to a conventional armed attack carried out by a State. An 'armed attack' denotes a reasonably significant use of force originating or directed from abroad, or a series of smaller related armed incidents which have the common purpose of destabilizing the victim State or exacting political concessions from it.

(p. 217) **1.** The notion of an 'armed attack' is a generally recognized prerequisite for the exercise of the right of self-defence as is provided for in the text of Article 51 of the Charter.<sup>10</sup> The Charter does not define or clarify what is meant by the term; for this recourse must be had to customary international law and the interpretations thereof by the International Court of Justice, the Security Council, and other competent organs of international organizations, as well as to legal literature.

**2.** On the basis of these indications and interpretations it is clear that an 'armed attack' denotes a reasonably significant use of force which rises above the level of an ordinary criminal act, an isolated frontier incident, or an expression of purely verbal or material support for the acts of an organized armed group acting independently of another State's control.<sup>11</sup> Such acts, while 'unfriendly' or even 'hostile' would not rise to the level of an 'armed attack', even when they were otherwise illegal under national or international law. The question of purely material support for an insurgency or other armed group is somewhat controversial<sup>12</sup> in this respect. The *Nicaragua* decision of the ICJ would seem to rule out the possibility that purely material support (of a non-humanitarian character) such as the provision of weapons, training, and military equipment to an insurgent or other organized armed group would qualify as an 'armed attack'. However, this interpretation has been the subject of a considerable amount of criticism and commentary.<sup>13</sup> It is fair to assume as a general proposition that purely material support for an insurgency or other organized armed activity will not normally qualify as an 'armed attack'; but if the level of support is significant and includes more than mere material assistance (such as logistical support, training, intelligence and so forth), it could so qualify once it reached the level of 'substantial involvement'.<sup>14</sup>

**3.** The modality of an armed attack can vary in terms of authorship. A direct armed attack is carried out by the armed forces or other State organs against another State. This is the type of armed attack which the framers of the Charter had in mind when Article 51 was drafted and such attacks usually pose few difficulties in terms of establishing which State is responsible for carrying out the attack.<sup>15</sup> An indirect attack is one whereby a State conducts an attack through an organized armed group over which it exercises control, instead of through official organs of the attacking State.

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(p. 218) International courts and tribunals have expressed somewhat different viewpoints regarding the requisite degree of control necessary to be able to attribute such an attack to the supporting State.<sup>16</sup> In any case once an organization comes under the effective control of a State, or the level of a State's involvement in providing the armed groups with training, equipment, supplies, sanctuary, and other possible forms of assistance can be qualified as 'substantial', there is general agreement that an attack launched by such an armed organization or group can be attributed to the controlling or supporting State.<sup>17</sup> However, in such cases, it will often be more difficult for the target State to provide sufficient factual evidence of the suspected attacking State's degree of involvement and control which may be necessary to convince a court or the international community at large of the necessity of taking self-defence measures against the supporting State. There is no generally recognized standard of proof which has been accepted in this regard.<sup>18</sup> It will depend upon a number of factors; including the seriousness of the attack, the degree of objectively recognizable involvement or control linking the (suspected) supporting State to the

armed organization, and the 'reputation' of the States concerned, to name but several of the more important considerations. Certainly, mere allegations of outside support for an attack carried out by an armed group or organization will not suffice and should not be regarded as sufficient to justify measures against the alleged supporting State. However, it would likewise be unrealistic to expect a State which has been the target of repeated attack by an armed group or organization which it has reasonable grounds to believe is under the control of another State, or which receives a substantial degree of support from another State enabling that organization to carry out its activities, to forgo the taking of necessary and proportional measures of self-defence against both the organization and the source of support or control, provided it has the means to do so and there was reasonable evidence to establish the relationship of dependence or substantial involvement.

**4.** A third modality for the authorship of an armed attack is that of an attack being conducted by an armed group or organization which is capable of launching an

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(p. 219) attack autonomously and on its own initiative without the substantial involvement of another State.<sup>19</sup> There is nothing in either the provisions of the UN Charter or in customary international law which rules out this possibility or restricts the right of self-defence to reactions to State launched or controlled armed attacks, notwithstanding certain pronouncements to the contrary. Recent practice indicates that this possibility has been recognized and customary law has long acknowledged this possibility.<sup>20</sup> In cases where an armed group or organization carries out an armed attack against a State, it will either be carried out with the knowledge and support of another State, or it will be capable of operating independently from another State's territory, but without that State's support or control over its activities.<sup>21</sup> This will usually be a consequence of the incapacity of the State from where the attack is carried out to effectively control its territory and halt the activities of the armed organization. This could be the result of a (partial) breakdown in the State's authority over its territory, the remoteness of the area from where the organization operates, or a degree of sympathy with the activities of the armed organization without necessarily being significantly involved in them or exercising control over the organization.

**5.** The modalities discussed earlier have consequences for the courses of action open to the defending State. Obviously, a direct attack by a State upon another State will justify measures of defence directed against the attacking State itself. Likewise, an 'indirect armed attack' which is carried out by an armed group or organization which is under the effective control or with the substantial involvement of another State would justify defensive measures aimed at both the armed group and its source of control or substantial support. In such a case, the defensive measures aimed at the controlling or supporting State would be directed at countering the organization's attacks and disrupting the links between it and its supporting State. Finally, in the event an organization was capable of mounting an attack from another State's territory, but independent of any control or substantial degree of support by that State, this would justify defensive measures directed against the armed group or organization, but not against (the organs of) the State

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(p. 220) from where it operated if no other means were available to the defending State. In such a situation, the State from where the attack was being conducted would be under an obligation to not forcibly oppose the defensive measures undertaken.<sup>22</sup>

**6.** The temporal dimension of the right of self-defence relates both to the question when an 'armed attack' can be said to have occurred and the timeframe within which it is permissible for the target State to take action in self-defence.<sup>23</sup> In particular, the question whether a State has the right to institute self-defence measures in response to an impending and imminent threat of an attack has received a considerable amount of attention in both State practice and in legal literature, especially

in recent years.<sup>24</sup> The literal text of Article 51 has given rise to one school of opinion that self-defence is only permissible once an armed attack 'occurs', which to some implies that an attack must have been initiated before self-defence measures may be taken. However, there is another body of opinion and interpretation which takes the position that self-defence measures may be taken in response to a manifest threat of an impending armed attack, when this is based on clear indications and no other feasible alternatives are available to forestall an attack being launched.<sup>25</sup> This approach refers to the recognition of this possibility in customary international law and to the dual legal basis of self-defence in both customary and Charter (-based) law.<sup>26</sup> On balance, it would appear that a reasonable interpretation of the right to self-defence would allow for the possibility of taking action in self-defence in response to a clear and manifest threat of an impending (threat of an) attack if the indications are convincing and no alternatives are available. This interpretation takes into account both the complementary nature of the Charter and customary law and the basic intention underlying the concept of self-defence as a legal right. Any other interpretation results in the consequence that either target State would have to suffer a possibly devastating first strike before being

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(p. 221) allowed to respond; or in the expansion of self-defence beyond its legal boundaries and essential underlying purpose, with the consequence of undermining the legal framework regulating the use of force.<sup>27</sup>

**8.04** In addition to the occurrence of an armed attack, or the clear and manifest danger of an impending attack, the Charter requires that any action undertaken in self-defence be reported forthwith to the Security Council and gives the Council primacy in determining what further measures may be necessary in order to restore international peace and security. Under customary international law, the requirements of necessity, proportionality, and immediacy are well established as complementing the requirements provided in the Charter in relation to the exercise of self-defence. Necessity relates to the existence of an ongoing armed attack or clear threat of repeated attack within the near future, as well as the absence of feasible alternatives including measures undertaken by the Security Council which have the effect of restoring the situation pertaining prior to the attack and ending the threat of further attacks. Proportionality in this context refers to the requirement that the measures taken in self-defence must be roughly commensurate with the scale and effect of the attack and are directed towards ending the attack and neutralizing the danger of further attack. Immediacy refers to the requirement that measures of self-defence must be taken within a reasonable period, taking into account the relevant factual circumstances.

**1.** In addition to the requirement of an 'armed attack', action taken in self-defence must meet the other requirements for the exercise of this right which are set out in the Charter and which are well established in customary law. The Charter provides for a duty to report self-defence action as soon as possible to the Security Council and establishes the Council's primacy in the relationship between the exercise of its enforcement powers under Chapter VII and the right of self-defence.<sup>28</sup>

**2.** The duty to report to the Security Council is not to be confused with a requirement of prior authorization. The defending State has the right to initiate measures of self-defence once an armed attack has occurred, or is imminent. However, once defensive action has been initiated, the primacy of the Council signifies that it has the final authority to endorse, take note of, or reject the reporting State's invocation of self-defence. If the Council succeeds in taking measures which have the effect of restoring the situation, the defending State's

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(p. 222) right of self-defence will cease to be operative. The Council can also decide to take measures which complement the defensive action of the attacked State in which self-defence measures will mutually reinforce each other and operate side by side until the situation has been restored, or the Council determines otherwise. Finally, the Council can determine that the invocation of self-defence is no longer necessary or is unjustified and order both parties to a conflict to cease and desist from further action.<sup>29</sup> In short, while self-defence is an autonomous right of every State, it is subject to the Council's final authority and is part of the overall Charter's legal framework regulating the use of force.

**3.** Alongside the abovementioned Charter framework, the exercise of self-defence is also subject to the well-established conditions of necessity, proportionality, and immediacy which are part of the customary law relating to self-defence and which complement the provisions of Article 51 of the Charter.<sup>30</sup> The terms 'necessity', 'proportionality', and 'immediacy' have a specific connotation within the customary law relating to self-defence and should not be confused with their counterparts in other branches of international law, such as, for example, the law of armed conflict, where similar or identical terms are in use to express related but distinct concepts.<sup>31</sup>

**4.** Within the context of self-defence, necessity signifies the existence of an ongoing attack or the clear and manifest threat of an imminent threat of an armed attack or of further attack. It also relates to the absence of feasible alternative courses of action open to the defending State under the prevailing circumstances. These can include the implementation of collective measures by the Security Council which have the effect of restoring the situation, the agreement by the attacking State to terminate its actions by means of accepting a cease-fire and accepting conditions aimed at ensuring compliance and preventing the recurrence of further attacks, or the realistic alternative of terminating or forestalling attack through measures other than self-defence, such as law enforcement measures or cooperation by the authorities of the State from where the attack originated without its knowledge or assistance.<sup>32</sup>

(p. 223) **5.** Proportionality in the context of self-defence refers to the requirement that the measures taken in self-defence must be roughly comparable in scale and effects to that of the armed attack and the overall threat of attack posed by the attacking State or entity. Proportionality means the measures taken must be aimed and geared towards terminating the attack or continuation of attack and not exceed what is required for this purpose. If an attack is relatively limited in scope and duration, the measures taken in self-defence must correspondingly be limited to repelling that attack and not seek to widen the conflict. On the other hand, a large-scale offensive by an attacking State aimed at subjecting the target State or inflicting large-scale casualties or dismembering its territory would justify a defensive war conducted by the defending State and its possible allies to defeat the attacking State or entity's forces and prevent the occurrence of further aggression. Proportionality can be measured against a single larger scale attack, or a series of related and successive smaller scale attacks carried out by the same author over a period of time. In the latter situation, the defending State would be justified in undertaking measures of self-defence on a larger scale than the individual actions forming what is in essence a phased armed attack.<sup>33</sup>

**6.** Immediacy in this context signifies that action taken in self-defence must be taken within a reasonable timeframe in relation to the occurrence of the attack. The notion of reasonableness allows for the necessary flexibility in this respect in taking the relevant circumstances into account. These include such factors as the necessity of providing the evidence of responsibility for an attack when this is not otherwise clear, the geographical location of an attack, the time required to deploy or mobilize forces to repel the attack and so forth. The essential notion underlying this requirement is that measures taken in self-defence must be taken within a reasonable period and aimed at terminating the attack rather than being essentially punitive in nature.<sup>34</sup>


**8.05** Self-defence may be exercised either individually by a State which has been subjected to an attack, or collectively by one or more States which have been subjected to an attack originating from a common source, or by one or more States which at the request



of a State which has been subjected to an attack, elect to come to that State's assistance. Such a request for assistance may be based on a pre-existing (p. 224) commitment to provide assistance in the event of an attack, or be made on an ad hoc basis once an attack has been mounted or is imminent.

1. Collective self-defence is recognized in both the Charter provisions and in customary international law and provides both for a right of more than one State to mount a joint defence against an attack or series of attacks which is aimed at all of them, or for one or more States to come to the assistance of a State which has been subjected to an attack at the request of that State's government.<sup>35</sup> Such a request may be made in the form of a pre-existing commitment through a treaty of alliance or other agreement or on an ad hoc basis in response to an attack or threat of imminent attack. An example of the former would be the provision in the NATO Treaty providing for a commitment of mutual assistance in the event of an attack, while an example of the latter can be seen in the request by the Kuwaiti Government in exile to the United States and United Kingdom to come to its assistance after the invasion and occupation by Iraq in August 1990.<sup>36</sup>
2. In addition to such a request any action taken in collective self-defence is subject to all the requirements relating to self-defence provided for in both Charter law and in customary international law referred to in Sections 8.01–8.04.

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 References

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### Footnotes:

- 1 On the legal character of the right of self-defence and its relationship to related but distinct notions such as self-help and self-preservation see *inter alia*, D.W. Bowett, *Self Defence in International Law* (Cew York: Praeger, 1958), 3–25; I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 251 *et seq.*, Y. Dinstein, *War, Aggression and Self-Defence*, 5th edn (Cambridge: Cambridge University Press, 2011), 187 *et seq.* and C.H.M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', in 41 *RdC* (1952), 455–68.
- 2 See sub-Chapter 5.3 and Chapters 22 and 23.
- 3 On the prohibition of force under contemporary international law see Section 5.02 with supporting notes and commentary.
- 4 The purpose of forestalling future repeated attacks from a given source once an attack has been launched or is imminent should not be confused with the notion of 'preventive self-defence', in advance of any clear and manifest threat of an armed attack in the immediate future. See in this respect, T.D. Gill, 'The Temporal Dimension of Self-Defence; Anticipation, Pre-emption, Prevention and Immediacy', in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Leiden and Boston, Nijhoff, 2007), 113. This precision will make later references more transparent.
- 5 Dinstein, *War, Aggression and Self-Defence*, 190 quoting the decision by a US Military Tribunal in the 1949 *Ministries* case (*USA v von Weizsäcker et al.*, Nuremberg), 1949, 14 NMT 314, 329.
- 6 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), ICJ Reports 1986, 14, 94 (hereinafter, referred to as the *Nicaragua* case/decision/judgment).
- 7 It is dangerous to try to label the opinions of authors or court decisions as 'permissive' or 'restrictive'. However, it is fair to say that, at least generally speaking, most authorities tend towards one basic view or another. Amongst those who are generally 'restrictive' in their approach towards self-defence are authors such as Brownlie, *International Law*, 25 *et seq.*; C. Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), 86 *et seq.* and the majority of the Court in the *Nicaragua* decision of 1986 (ICJ Reports 1986, 14; 98–106). Among

those who take a somewhat wider view of self-defence and the role of customary international law therein are Bowett, *Self Defence*, 269 *et seq.*; T.M. Franck, *Recourse to Force State Action against Threats and Armed Attacks* (2003), 45 *et seq.* and the dissenting judges in the *Nicaragua* judgment. In reality, these and other authorities' viewpoints are often too complex and nuanced to be able to be fit neatly into a given 'school', but there is a divide between those who emphasize the literal text of Article 51 and rely heavily upon certain General Assembly resolutions and on condemnations by the Security Council of specific invocations of self-defence as support for the general position that customary law has little specific separate content from the relevant Charter provisions, and those who take the position that custom continues to exist alongside the Charter and has specific legal content which must be taken into account in interpreting the relevant Charter provisions.

<sup>8</sup> See further e.g. O. Schachter, *International Law in Theory and Practice* (Dordrecht: M. Nijhoff, 1991), 152–4 and 167–9.

<sup>9</sup> For example, the UN Security Council unanimously condemned an Israeli air strike against an Iraqi nuclear reactor in 1981 as essentially not meeting the criteria of necessity at the time. When evidence emerged later in the 1990s of Iraq's efforts to obtain nuclear weapons, some States and authors reconsidered their position in hindsight. However, this is not acceptable as a legal proposition; the question of whether a particular act was necessary can only be assessed on the basis of available evidence.

<sup>10</sup> The term 'armed attack' is used in the English version of Art. 51. The Spanish, Russian, and Chinese texts are a direct translation of the English. However, the equally authoritative French text uses the term *agression armée* which is generally considered to be a somewhat wider notion. See e.g. Dinstein, *War, Aggression and Self-Defence*, 196–7.

<sup>11</sup> *Nicaragua* decision, para. 195, 103–4.

<sup>12</sup> Some of these would violate the principle of non-intervention or non-use of force without necessarily rising to the level of an armed attack, at least on the basis of the ICJ's interpretation in the *Nicaragua* decision.

<sup>13</sup> See, in this respect, the vigorous dissents by Judges Jennings and Schwebel to the *Nicaragua* decision in ICJ Reports, 1986, 347–450 (Schwebel) and 542–4 (Jennings).

<sup>14</sup> In this, the position of the two dissenting judges referred to in the previous note appears to me to be more realistic and persuasive.

<sup>15</sup> This is clear from an examination of the drafting history of Art. 51. See in this respect Bowett, *Self Defence*, 182 *et seq.* and Franck, *Recourse to Force State Action*, 45–51.

<sup>16</sup> In its *Nicaragua* decision, the ICJ characterized the necessary level of control as 'effective', (see ICJ Reports, 1986, 65) while the ICTY determined that 'overall control' was sufficient to impute the acts of an armed group to a supporting State in the decision of the Appeals Chamber in the *Tadić* case (see ICTY Case no. 94-I-A, Appeals Chamber 1999 reproduced in 38 *ILM* (1999), 1518, 1540 *et seq.*).

<sup>17</sup> In *Nicaragua*, the Court determined that 'substantial involvement' on the part of a State in the acts of an armed group (rebels, terrorists, mercenaries, etc.) was a form of indirect attack on the basis of UN GA Res. 3314 'Definition of Aggression' (XXIX) 1974. However, the Court made little effort to determine what would constitute 'substantial involvement'; a point which was criticized by both Judges Jennings and Schwebel in their respective dissents referred to earlier in the chapter.

<sup>18</sup> The ICJ has generally required a high level of proof, as for example in the *Oil Platforms* case reproduced in 42 *ILM* (2003), 1334. See in this respect, the Court's pronouncements on the requisite burden of proof in relation to the existence of an armed attack on a reflagged tanker and a US warship in paras 53–61 and 69–71. The Court indicated that the evidence was respectively 'suggestive' and 'highly suggestive' in relation to those two incidents, but insufficient to establish Iranian involvement. This and other aspects of the judgment were vigorously criticized by a number

of judges in their individual opinions. See e.g. Judge Higgins at 1384–6, Kooijmans at 1396–7, Buergethal at 1413–16 and Owada at 1424–5.

<sup>19</sup> See e.g. Dinstein, *War, Aggression and Self-Defence*, 224–230, Franck, *Recourse to Force State Action*, 64–8.

<sup>20</sup> The ICJ in its Advisory Opinion on the construction of a wall in occupied Palestinian Territory inferred that self-defence was restricted to situations where an armed attack is carried out by a State against another State. This came in for vigorous criticism by a number of judges in their individual opinions. See ICJ Reports, 2004, 194, para. 139 for the Court's pronouncement on this issue. For the contrary opinion see, for example, Judge Higgins' separate opinion at 215. See also SC Res. 1368 and 1373 UNSC (2001), which refer to the right of self-defence in relation to the attacks on the WTC and Pentagon, which were carried out by non-State agents. The well-known *Caroline* incident of 1837 related to the support of private US citizens for an insurgency in Canada and is often referred to as the *locus classicus* for assessing the customary right of self-defence. See Gill, 'The Temporal Dimension', 125–8.

<sup>21</sup> An example of the former situation would be that of al Qaeda operating from the territory of Afghanistan in and prior to 2001, and of the latter, the operations conducted by the PKK from the territory of Northern Iraq in recent years.

<sup>22</sup> This is a consequence of the fact that there is 'no self-defence against self-defence' (as set out in Dinstein, *War, Aggression and Self-Defence*, 190) and the failure of the State whence the attack originated to exercise the requisite due diligence to prevent its territory being used as a base of operations by an armed group to carry out attacks against another State, due to either incapacity or unwillingness. This duty of due diligence has long been recognized in legal doctrine and in jurisprudence. See e.g. the *Corfu Channel* case, ICJ Reports, 1949, 4 at 22.

<sup>23</sup> See, *inter alia*, Gill, 'The Temporal Dimension', 151–4.

<sup>24</sup> This refers to the ongoing controversy relating to the permissibility of 'anticipatory' or 'pre-emptive' self-defence. See in addition to the sources cited earlier the ongoing debate in legal journals, especially in the aftermath of the '9/11' attacks and the invocation by the Bush Administration of a wider right of pre-emptive and even preventive self-defence in its national security strategy of 2003. It should be pointed out that this proposed wider right went well beyond the more generally accepted *Caroline* criteria of an immediate threat of attack and met with vigorous criticism from many States and in legal doctrine.

<sup>25</sup> Examples of authors opposing anticipatory or 'interceptive' self-defence as it is sometimes referred to include those cited as 'restrictive', while those categorized as belonging to the more 'permissive' school are in favour of such a right within the confines of the *Caroline* criteria.

<sup>26</sup> Anticipatory self-defence is generally derived from the famous *Caroline* incident of 1837 as evidence of its recognition under customary law. For an extensive treatment of this incident and its legal significance, see R. Jennings, 'The Caroline and McLeod Case' in 32 *AJIL* (1938), 82 *et seq.* See also Gill, 'The Temporal Dimension', 125–8.

<sup>27</sup> Gill, 'The Temporal Dimension', 145–55.

<sup>28</sup> This primacy is evident from both the terms of Article 51 and the underlying purpose and object of the Charter. See in this respect for example, Dinstein, *War, Aggression and Self-Defence*, 234, R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press 1994), 239–40 and Waldock, 'Regulation of the Use of Force', 487–8.

<sup>29</sup> These possibilities and alternative courses of action open to the Security Council are set out and analysed in Dinstein, *War, Aggression and Self-Defence*, 236–9. The effect of Security Council action upon a State's right to exercise self-defence should be seen in context. If the Security Council takes note of, or explicitly or implicitly endorses, a State's invocation of self-defence, the right will continue to operate alongside any measures taken by the Council in the exercise of collective security as was the case in SC Res. 678 (1990) and in SC Res. 1373 (2001). However, if

the Council orders a State to refrain from further action in self-defence as it did in SC Res. 598 (1987) in the context of the Iran/Iraq War, the right of self-defence will be terminated unless one of the parties continues with military action in violation of the Council's cease and desist order.

**30** This is universally accepted in both legal doctrine and State practice. See e.g. ICJ Reports, 1980, 103.

**31** See in this respect J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), 10 *et seq.*

**32** See e.g. Schachter, *International Law*, 152–5, Dinstein, *War, Aggression and Self-Defence*, 262–7, and Gardam, *Necessity*, 148–53 on necessity and proportionality in general. Self-defence specifically in relation to non-State controlled or conducted terrorist acts is a measure of last resort, which can only be exercised when the act rises to the level of an armed attack and the logical alternative course of action in the form of law enforcement is either unavailable or would clearly not suffice to counter the threat posed.

**33** See the sources cited in the previous note in relation to the general content of proportionality *ad bellum*. For the question of proportionality in relation to a phased armed attack, see the Report by Roberto Ago in his capacity as Special Rapporteur to the International Law Commission in 'Addendum to the Eighth Report on State Responsibility', 1980 II (1) *Yearbook of the International Law Commission* 13, 69–70.

**34** *Ibid.* See also Gill, 'The Temporal Dimension', 151–4.

**35** Article 51 refers to 'the inherent right of individual or collective self-defence' and the ICJ recognized the customary nature of collective self-defence in paras 196–199 of its 1986 *Nicaragua* decision, ICJ Reports, 1986, 104–5.

**36** Article 5 of the North Atlantic Treaty, 1949, 34 *UNTS* 243, 246. On Kuwait's request for military assistance see D. Hiro, *Desert Shield to Desert Storm: The Second Gulf War* (Bloomington, IN: iUniverse, 1992), 102–6.