# Use of Force between States: Prohibition, Self-Defence, Self-Help and other germane (and supposed) exceptions

## A. The Contemporary Régime of the Use of Force in International Relations

Art. 2 (4) UNC introduces for the first time ever a comprehensive ban of use force in international relations between States. Indeed, use of force is outright prohibited and not only war (as did in 1928 the Briand-Kellogg Pact), thus outlawing the famous "measures short of war" too. Moreover, the ban is extended not only to the actual use of force but also to its threat. This prohibition is accompanied, within the UNC, by a mighty system of collective security embodied primarily in UNC Chapter VII. This entails too that the content and scope of this provision must be construed in the light of other relevant provisions which are contained herein (contextual interpretation).[1]

### a. The Prohibition of Use of Force between States under UNC Article 2 (4)

In order to assess the content and scope of Art. 2 (4) we must proceed to its construction by resorting to the widely admitted means of interpretation enshrined in Articles 31 and 32 VCLT 1969. From the outset, it ought to be observed that while the prohibition is incumbent to all Members of the UN, its beneficiaries are all the States, whether they are or not Members. If such specification is today irrelevant, this was not the case when the UNC was adopted and for a long-time since then.

#### i. What Kind of Force is Encompassed by Article 2 (4)?

Quite obviously, this provision outlaws the use of military force; on the contrary, it is still harshly debated whether it covers other kinds of force, such as political, economical and the like, to which States were (and are) used to resort in their international life. Far from exhausting this highly sensitive matter, we prefer to quickly enlist those elements in favor or against the extension to other species of force. In this respect, it must be cited the contextual interpretation, i.e. UNC provisions which, though mentioning "force", they admittedly refer to military force[2] while other provisions expressly use "military force", thus leading to believe that Article 2 (4), which merely refers to "force", did not intend to exclude other kinds of force outside military force[3]. Systemic interpretation can be resorted to, as Article 31 (3) (c) VCLT require to do. The same split can be observed: on one side, there are elements purporting for a restrictive interpretation of Art. 2 (4), i.e. thus covering only "military force" and those supporting an "extensive interpretation", i.e. thus

[1] Legality of the Threat or Use of Nuclear Weapons, advisory opinion of 8 July 1996, *ICJ Reports 1996*, para. 38 (at 244).
[2] Article 44 UNC.
[3] Preamble, Articles 41 and 46.

including other kind of forces. As for the former, it can be cited: UNGA Resolution 2625 on Friendly Relations, *a contrario* reading of which clearly affirms that "economic, political or any other types of measures" are inconsistent with the principle of non-intervention, thus not expressly at variance with Article 2 (4) which does not mention them. In the same vein, the 1975 Helsinki Final Act, during the framing of which a Soviet amendment aiming at inserting "other" types of force was rejected by the Conference. The same in fact had occurred in 1945, at the San Francisco UN drafting Conference, where a similar proposition – tabled by the Brazilian delegation – was eventually rebutted. In these two cases the recourse to *travaux préparatoires* as supplementary means of interpretation (one relating to the UNC itself and the other to another subsequent international instrument) conveys a restrictive interpretation of Article 2 (4). Albeit international case-law is not particularly generous in this regard, some indications can be inferred. Following a chronological criterion, the 1973 ICJ Judgment in the Fisheries Jurisdiction case must be cited, where the Court, without lavishing into details, seems though to suggest that only military force is envisaged by Art. 2 (4).[4] Later on, the seminal 1986 Nicaragua / USA case, where the ICJ incontrovertibly split its analysis of allegedly wrongfully US actions in the light of the principle codified in Article 2 (4) and the principle of non-intervention, codified in Para. 1 of this same provision.[5] This approach reveals that non-military US activities are scrutinized under the latter provision and not under Para. 4 of Article 2. Between these two cases before the ICJ, the Permanent Court of Arbitration in the 1981 Dubai / Sharjah Border Dispute Case[6], seems to cautiously support a restrictive interpretation of Article 2 (4). Finally, in this connection it must be cited Article 52 VCLT which sets for the invalidity of treaties concluded "by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations". This provision purposely remands then to the Charter – better, to the principles contained therein – and does not intend to specify what type of force is eligible in order to invoke the nullity of the treaty. A proposal aiming at inserting economic coercion within the scope of Article 52 was in fact rejected by the Vienna Conference[7] which, though, adopted ultimately a non-binding Declaration condemning "Military, Political or Economic Coercion in the Conclusion of Treaties". At the end of the day, while it can be tentatively sustained that Article 2 (4) still solely encompasses military force, one can nonetheless agree that "it cannot be concluded that [this] issue has definitively been settled".[8]

Some words must now be devoted to the last 23 words of Article 2 (4). The first group of these words ("against the territorial integrity or political independence of any State"), added at the San Francisco Conference, has been hastily and wrongly construed by some authors as being an overt loophole to the general prohibition of the use of force. Luckily enough, this is refuted by an interpretation "in the light of its object and purpose" (Article 31 § 1 VCLT). In fact, as it emerges from a comprehensive reading of the UNC, one, if not the main, purpose of the latter is to restrict at most the unilateral use of force by States in their international relations; among other elements, it

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[4] ICJ, Fisheries Jurisdiction (Federal Republic of Germany / United Kingdom v. Iceland), Judgment of 2 February 1973 (Jurisdiction of the Court): *ICJ Reports 1973,* para. 24 (at 59).

[5] Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment of 27 June 1986 (Merits): *ICJ Reports 1986*, paras. 187-192 (at 98-102) and paras. 239-253 (at 123-129).

[6] Arbitral Award of 19 October 1981, *ILR*, Vol. 91 (1993), at 569.

[7] Amendment sponsored by 19 States purporting to add "including economic or political pressure" after the term "force" (Official Documents of the Conference, at 171).

[8] O. Corten, 'Article 52. Convention of 1969', in *The Vienna Conventions on the Law of Treaties*, Brussels, 2011, vol. II, at 1207. Instead, it is undisputed that any kind of political, economic, etc. is likely to amount to an unlawful intervention in matters within the domestic jurisdiction of the affected State, thus breaching Article 2 (1) of the UNC.

suffices to glance at its Preamble[9], where everything else in the Charter seems to be submitted to this paramount purpose, reiterated besides in Article 1 § 1 of the UNC. This construction is furthermore supported by the referral to the UNC's *travaux préparatoires*, during which the majority of delegations voted for the insertion of this group of words with a view precisely to strengthen the prohibition and not to dilute it.[10] It was, on the contrary contended that limited (in time, in space and purposes) uses of force on another State territory did not amount to the infringement of its territorial integrity and political independence. This interpretation is not correct. As a matter of fact "independence" must be read as "inviolability" (i.e. any forcible trespassing of State boundaries)[11], even though of a limited duration and scope. Hence, "political integrity" doesn't merely cover any attempt to modify the legal status of the invaded territory (for instance through annexation), but also any use of force directed on (and of course against) another State. With this respect, in reality, some scholars have tried to demonstrate that military actions aimed at eradicating military or paramilitary non-state actors on another State territory without clashing, or targeting, the latter military forces, is not inconsistent with Article 2 (4). This contention isn't either well-founded for the same reasons as above (see also *infra* C.d).

The second group of words ("in any other manner inconsistent with the Purposes of the United Nations") has likewise given birth to daredevil interpretations aiming at showing that some types of military interventions *on* another State territory may well be compatible with Article 2 (4). For instance, humanitarian intervention, or the germane intervention for the protection of human rights, or intervention for the protection of nationals abroad, allegedly being carried in pursuance of UN goals would not be at odds with its principles. The last of the two grounds will be dealt with later on; it then suffices here to emphasize that this set of words aimed, again, at hardening the general prohibition as it clearly appears from the UN Conference in 1945.[12]

Finally, it is worth to remind that Article 2 (4) (and the overall régime concerning the use of force embodied herein) – whatever be the actual or overrated deficiencies of the UN system of collective security[13] – reflects customary international law as the World Court rightfully stressed in her 1986 Nicaragua Judgment[14], confirmed henceforth by international case-law at large.

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[9] "(T)o ensure (…) that armed forces shall not be used, *save in the common interest*" (emphasis added).

[10] See: R.B. RUSSELL, *A History of the United Nations Charter* , Washington, The Brookings Institution, 1958, at 456-457.

[11] In accordance with UNGA Resolution 2625 (*infra* note **Erreur ! Signet non défini.**) State boundaries must be here interpreted in its widest meaning, thus including (in addition to internationally agreed and recognized State boundaries): "international lines of demarcation, such as armistice line, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect"; ICJ's case-law (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory opinion of 9 July 2004: *ICJ Reports 2004*, para. 87 (at 171)) and UNSC's practice (Res. 111 (19 January 1956), 228 (25 November 1966) and so forth) concur to this interpretation.

[12] "The Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to insure that there should be no loopholes" (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. VI, at 335); "(T)he Committee [Special Committee of the General Assembly mandated to the elaboration of resolution 2625] regarded the concluding phrase of Article 2 (4) as a limitation on State action and not an escape clause" (quoted in E. JIMENEZ DE ARECHAGA, "International Law in the Past Third of a Century", *RCADI*, vol. 159 (1978-I), at 92).

[13] "Whatever the fate of Chapters VI and VII of the United Nations Charter, Article 2 (4) remains. That norm, I stress, is independent of collective enforcement. The argument that, under the principle *rebus sic stantibus*, or some variation of it, the failure of the intended enforcement system vitiates Article 2 (4), has no foundation. Clearly, that was not the intent of the framers of the Charter. No Government has claimed it. Not many scholars have argued it", L. HENKIN, 'International Law: Politics, Values and Functions. General Course on Public International Law', *RCADI*, vol. 218 (1989-IV), 145-146; ICJ, Corfu Channel case, Judgment of 9 April 1949 (Merits): *ICJ Reports 1949*, at 35: "The Court can

b. The Topical Definition of Aggression

UNC refers to "aggression" and "act of aggression" several times (Article 1 (1), 39, 53)[15] without though taking the trouble to define it (or them). In reality, during the UN Conference, several propositions were submitted (by small and medium-sized States)[16] for the insertion in the UNC of a binding (for the UNSC) definition of aggression, but all of them were met by the unsurprisingly hostility of the future UNSC permanent member.

Although, as made clear before, the UNC régime pertaining to the use of force is comprised by several provisions and must be considered and construed as a whole, some significant differences exist between on one side Article 2 (4) and those referring to aggression. In other words, the scope of force prohibited under the former does not coincide with the notion of aggression the existence of which can trigger the right for the victim-State to respond in accordance with Article 51 (which enshrines the right of self-defense).[17]

Indeed, not all acts prohibited as per Article 2 (4) constitute an aggression, so that if it's true that an aggression amounts perforce to a breach of Article 2 (4), the contrary is not true. First of all because this provision bans also the *threat* of force which is clearly outside the scope of *actual* use of force. Second, more important and sensitive, not all *actual* uses of force – at variance with Article 2 (4) – amount to (an act of) aggression. There is in fact a discrepancy so that, as the UNGA declared in its resolution 3314 defining aggression, the latter "is the most serious and dangerous form of the illegal use of force".[18] This discrepancy is corroborated by the majority, if not all, of the elements of the general rule of interpretation, codified by Article 31 VCLT. First of all, literal interpretation, for "use of force" and "aggression" have different "ordinary" meanings; contextual[19] and judicial interpretation concur likewise to support this discrepancy[20]; systemic interpretation points to the same conclusion, through the recourse to the aforementioned UNGA resolutions 2625 (XXV) and

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only regard the alleged right of intervention as the manifestation of a policy of force, such .as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law" (emphasis added); UNGA Resolution 377 (V) "Uniting for Peace", adopted 3 November 1950 (7th and 8th Preambles). See likewise *infra* C.a.

[14] ICJ, Nicaragua, cit. (1986), para. 188 (at 99-100).

[15] This list omits Article 51 which surprisingly – contrariwise to the French text – refers to "armed attack". See *infra* B.a.i.

[16] R. B. RUSSELL, at 670-672.

[17] See *infra B*.a.i.

[18] UNGA Resolution 3314 (XXIX) adopted the 14 December 1974 (Definition of Aggression). Furthermore, a contextual interpretation buttress this reading since Article 2 of the same resolution refers to requirement that for uses of force to be considered as acts of aggression, they must entail "consequences of sufficient gravity".

[19] It suffices to recall that, as the World Court said in 1996, "The prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence …", Threat or Use of Nuclear Weapons, cit., para. 38 (at 244).

[20] ICJ, Nicaragua, cit. (1986), paras. 191, 210-210, 230, 247 (at 101, 110-111, 119, 126-127); ICJ, Threat or Use of Nuclear Weapons, cit., paras. 37-38 (at 244); Eritrea/Ethiopia Claims Commission, Partial Award *Jus ad bellum* (Ethiopia's Claims 1-8), 19 December 2005, paras.11, 12 (http://www.pca-cpa.org/showfile.asp?fil_id=158); ICJ, Oil Platforms, cit., para. 51 (at 186-187); ICJ, Armed Activities on the Territory of the Congo, cit., paras. 146-147 (at 222-223).

3314 (XXIX) and to the IR 2001[21]. Furthermore, recourse to the supplementary means of interpretation, i.e. *travaux préparatoires* (Article 32 VCLT), wherefrom emerges clearly the intention to restrict at the utmost the grounds for unilateral use of force by States.[22]

UNGA Res. 3314 (XXIX) Article 3 is based upon a case-by-case approach for it illustrates an open-ended list of situations which cannot but be considered as acts of aggression. Its non-exhaustive feature can be also inferred explicitly from Article 4 which provides that "(t)he acts enumerated above (i.e. Article 3) are not exhaustive". In fact there are two conditions which determine the existence of an aggression: firstly, the temporal element, according to which "(t)he First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression"; secondly, the substantive one, for the acts concerned must attain the severity and magnitude (in means, time and space) required in order to fall within the illustrative cases of Article 3. Otherwise, the use of force will not amount to an (act of) aggression, albeit it still infringes Article 2 (4).

In this regard, it must be noted that this list incontrovertibly constitutes the hard core of the definition of aggression (as the contextual interpretation in light of Article 4 corroborates), to the extent that any (act of) aggression whatsoever must *at least* possess these features. On scrolling this list, it is blindingly obvious that in all the situations herein enlisted we are faced to: a) Interstate relations (State against another State)[23]; b) in all, but one (3 (d)), the territorial dimension is the focal point of the act of aggression.

In this connection it must be observed that it seems that even a series of acts which do not reach individually the aforementioned threshold of aggression, can be considered as a whole, *globally taken* as such. The so-called needle-prick doctrine[24] was brought up by the ICJ in its seminal Nicaragua Judgment[25] and reiterated in 2003[26] and 2005, thus conceding that a "series of deplorable (military) attacks could be regarded as cumulative in character"[27], resulting consequently in an aggression. Therefore a series of "localized incidents"[28] (i.e. of low intensity and restricted scope and scale) can, if taken *cumulatively,* amount to an (act of) aggression. In other words, while each one of them infringes Article 2 (4), the whole set *additionally* constitutes an aggression. This point of view is consistent with the logics underlying the concept of aggression and its actual carrying-out. In this vein, it ought to call upon a well-established concept in international State responsibility, henceforth on codified by Article 15 of the IR 2001, i.e. composite act. By this formula is meant, as its § 1 recites, a "a series of acts or omissions defined in aggregate as wrongful", for they are bound together by the same intention, plan, policy[29] or even premeditation[30] and they pursue *as a whole* "the

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21 Article 21 (Self-defence as a circumstance excluding wrongfulness).
22 R. B. RUSSELL, cit., at 560-565.
23 Directly or indirectly (as encompassed by Article 3 (g)), to which will be devoted a sub-section later on (B.c.i).
24 In German-speaking literature: "Nadelstichtaktik".
25 The question was whether some military incursions "may be treated for legal purposes (i.e. ascertainment of Nicaragua's aggression against some border States) as *amounting, singly or collectively,* to an "armed attack" by Nicaragua …", ICJ, Nicaragua, cit. (1986), para. 231 (at 120).
26 ICJ, Oil Platforms, cit., para. 64 (at 192): "Even taken *cumulatively*…" (emphasis added).
27 ICJ, Armed Activities on the Territory of the Congo, cit., para. 146 (at 223).
28 See: Eritrea/Ethiopia Claims Commission, cit., paras. 11, 12.
29 See ILC Commentary to its Draft Article 15, cit., at 65.
30 In fact, it was thanks to Latin-American States at the San Francisco Conference (defending their regional arrangement of collective self-defence) that Article 51 was *moved* from Chapter VIII (Regional Arrangements) to its current place (Chapter VII). Indeed, as Article 53 (1) – in UNC Chapter VIII – provides, no State, belonging to any of the regional

same internationally wrongfully objective"[31].

B. Self-defense

As Article 51 of the UNC recites, all (Member) States hold an "inherent right"[32] of self-defense, thus pre-existing the UNC itself[33]. As the legislative history of this provision shows, it was undisputed that Member States do not need to be authorized by the UNSC in order to avail themselves of the right of self-defense.[34] However, as any subjective right this too is constitutionally limited by the legal order by which is envisaged and within which is implemented. That's why the implementation of the right of self-defense is subject to the fulfillment of several conditions provided for by public international law. These cumulative requirements are enunciated by Article 51UNC *and* by customary international law which complements the former.[35] In sum, three of them (i.e. armed attack, proportionality and necessity) are required by general international law (viz. the UNC *and* customary international law) while two of them are posited only by the UNC (i.e. the obligation to report to the UNSC and that submitting the right of self-defense to the latter)[36].

Besides, self-defense can be individual and collective; in the first scenario the target State, after having reckoned that it has been *attacked* by one (or more) State(s) reacts alone in order to push back the aggressor. In the second case, target State requests other States to help it halting the aggression. The same conditions apply in both cases. However, as far as collective self-defense is concerned, there are two additional requirements to be met. Firstly, that only target State[37] can make the determination that it has been attacked; third States are not empowered to do so in its behalf.[38] Secondly, and more important, the latter cannot intervene at its side without being explicitly (and validly) requested or invited to this effect.[39]

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arrangements, can take an "enforcement action" without UNSC authorization. See in this regard, R. RUSSELL, cit., at 696-697, 700-702.

[31] Seventh report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (continued), UN Doc. A/CN.4/307 and Add.1 & 2 and Corr.1 & 2 (*IYLC*, 1978, vol. I (1), at 47 (§ 39))

[32] In the French text "droit naturel".

[33] "(T)he use of arms in legitimate self-defence remains admitted and unimpaired", in Documents of the United Nations Conference of International Organization (UNCIO), *supra* note 12, at 334.

[34] In this connection, it ought to be reminded that for this very reason Article 51 had been moved from Chapter VIII (*supra* note 30).

[35] "The Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law", ICJ, Nicaragua, cit. (1986), para. 176 (at 94); ICJ, Oil Platforms, cit., para. 43 (at 183); resolution ("Present Problems of the Use of Armed Force in International Law") adopted by the *Institut de droit international* during its 2007 session in Santiago de Chile: "Necessity and proportionality are essential components of the normative framework of self-defence" (§ 2).

[36] ICj, Nicaragua, cit. (1986), para. 200 (at 105).

[37] In addition obviously of UNSC, by virtue of Article 39 UNSC. See *infra* ????

[38] Quite naturally, UNSC may at any time determine by virtue of Article 39 UNC "the existence … of an act of aggression".

[39] "The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident

a. Conditions

i. Previous Armed Attack

In accordance with Article 51 an "armed attack" admittedly constitutes the *conditio sine qua non* triggering the right to self-defense[40], be it individual or collective.[41] Armed attack must be underway (i.e. already launched) or, at most, imminent; hence, the simple threat (whatever be the meaning and effectiveness of it) does not suffice at all to spark off the right of self-defense.[42] Now, unlike French text – this language was used alongside with English at the San Francisco Conference – this formula is used in lieu of "aggression armée"[43]. Notwithstanding this linguistic discrepancy, "armed attack" must be considered – for the purposes of application of Article 51 – as being equivalent "agression armée". All interpretative methods point to this conclusion: judicial[44], contextual, systemic[45] interpretation, *travaux préparatoires*[46]; furthermore, Article 33 VCLT (related to treaties "authenticated in two or more languages", viz. the case of UNC) requires to adopt the "meaning which best reconciles the texts, having regard to the object and purpose of the treaty". Once established the ultimate identity, within the scope of Article 51 UNC, between "armed attack" and "aggression" (thus in French: "agression armée"), we can remand the reader to the aforesaid (*supra* A.b) with regard of the(ir) definition.

The existence of this discrepancy between use of force as per Article 2 (4) and (acts of) aggression may give rise to the question what a State, which suffers of mere uses of force under the threshold of aggression, can lawfully do in reaction to them. We will address this issue later on (*infra* C.b) and can now move on to the other conditions to which is subject the right of self-defense.

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that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect", ICJ, Nicaragua, cit. (1986), para. 232 (at 120). In the same vein: resolution adopted by the *Institut de droit* international, *supra* note 35: "Collective self-defence may be exercised only at the request of the target State", § 8 [http://www.idi-iil.org/idiE/navig_chon2003.html].

[40] ICJ, Nicaragua, cit. (1986), para. 195 (at 103).

[41] *Ibid.*, para. 211 (at 110).

[42] See resolution adopted by the *Institut de droit* international, *supra* note 35, at § 7: "In case *of threat of an armed* attack against a State, only the Security Council is entitled to decide or authorize the use of force", § 7 (emphasis added). *Infra* B.c.ii.

[43] "When it came (in San Francisco) to defining the criteria to be used in determining aggression, it was decided to avoid the words 'war' and 'aggression. The use of these words in the Covenant of the League had led to prolonged *legalistic debate*, as over the Manchurian affair in 1931, for example", R. RUSSELL, cit., at 234 (emphasis added).

[44] With regard of Article 51 UNC, both the ICJ and any other international tribunals do consider armed attack as being the English equivalent of "agression armée". In this connection, and for the purposes of its interpretation, recourse is systematically made to the aforementioned UNGA resolution 3314 … which purports to define "Aggression".

[45] See the French version of the aforementioned IDI's resolution (*supra* note 35), states clearly this equivalence between "armed attack ("attaque armée") and "armed aggression" (§ 3).

[46] R. RUSSELL, cit., at 697-698.

ii. Necessity

The requirement of necessity traditionally embodies the need that there are no other *effective* means at the disposal of the attacked State to repel the aggression. If this is so then the target State is no more required to exhaust peaceful avenues of dispute settlement, as provided for in Article 2 (3) UNC.[47] The leading – and recurrently cited – case in this respect is represented by the Caroline (1837-1842), between USA and UK relating to the destruction – on US territory – by UK soldiers of the homonymous vessel owned and used by US nationals to supply Canadian rebels across the border. The dispute was settled through an agreement between the two States, after a lengthy diplomatic correspondence. In fact, what counts here is precisely a diplomatic note sent (24 April 1841) by US Department of State Secretary (Mr. Webster) to his UK counterpart (Mr. Fox), which reads as follows: "It will be for that Government (viz. UK) to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[48] A caveat must be nonetheless called upon in this regard; as Ago showed [49], at that time it was nonsense (logically and historically)[50] to speak of self-defense, for recourse to the use of force to assert its own rights and legal interests (the so-called self-help[51] or self-protection) belonged, under certain conditions, to the State sovereign prerogatives. Another thing is the right of self-defense, which recognizes to the target State to resort to force *only and if only* it has been attacked by another State and not to enforce its own rights or to react (*supra* A.b) to mere infringements of Article 2 (4) (uses of force under the threshold of armed attack *or* mere threats to use force).

Though, Caroline case dictum is useful in order to elucidate the concept of necessity, that is to say the unavailability of any other effective means for the State faced to an armed attack by another State, to repel the aggressor.

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[47] Institut de droit international's resolution on self-defence reiterates this requirement in its Article 3: "It [right of self-defence] may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack…".

[48] 'Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat *Caroline*. – March, April, 1841', (1857) 29 *British and Foreign State Papers (1840-1841)* 1126, at 1138; see further 'The *Caroline* Case', *Moore's Digest of International Law* (1906), vol. 2, at 409-414.

[49] "What is the fundamental reason why these publicists argue so strenuously that the scope of self-defence under general international law is much wider than that of resistance to armed attack, and thus conclude that Article 51 of the Charter, in expressly safeguarding only the right of a State to react in self-defence only in the case of armed attack, was not intended to cover the entire field of application of the concept of self-defence and left intact the much wider scope of that concept in general international law? The reason is largely that many of these writers remain wedded to notions and to a terminology – which this writer regards as incorrect – drawn from a relatively antiquated portion of State practice with which they are more familiar. It is no accident that, in their arguments, they often cite practical cases, such as that of the *Caroline* and others, which they place under the heading of self-defence in keeping with the examples set by the diplomats of the time. It has, it is submitted, been clearly shown that these cases are in fact illustrations of different circumstances; admittedly, what they have in common with self-defence is that their effect is to preclude the wrongfulness of certain kinds of State conduct, but in many other essential respects they are quite unlike self-defence. It is indispensable to differentiate, clearly, the concept of self-defence properly so-called from the various notions that are often grouped together under the common label of self-help. (…) The confusion between so very different situations hampers the task of arriving at an accurate definition of self-defence", Addendum - Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (part 1), *YILC*, 1980, vol. II (1), at 65-66, 62 (paras. 113, 106).

[50] D. ANZILOTTI, *Cours de droit international* (transl. from Italian, Paris, Sirey, 1929), at 506.

[51] ICJ, Corfu Channel case, cit., at 35: "The United Kingdom Agent, in his speech in reply, has further classified 'Operation Retail' among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations".

iii. Proportionality

This further condition, closely intertwined with that of necessity, puts the emphasis on the finality of self-defense, i.e. to stop the armed attack and push back the aggressor. Hence, military reaction by target State cannot lawfully assume either a punitive feature or pursue an afflicting aim.[52] In this regard, nonetheless, two radically different points of view would allow to seize the operational scope of proportionality. In other words, are we talking of proportionality of means, on one side, or proportionality according to the goal (of the right of self-defense), on the other? In the light of the first meaning, there should be a "proportionality of that action (by target State) to the attack to which it was said to be a response".[53] On the contrary, from the standpoint of the second perspective, i.e. of the goal, "the action needed to halt and repulse the attack may well have *to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive'* action, and not the forms, substance and strength of the action itself".[54]In this connection, albeit it's here unfortunately not the place to dwell upon this intriguing subject-matter, one needs to make clear the differences between *jus ad bellum* set of rules (in the light of which self-defense must be analysed) and *jus in bello* (i.e. international humanitarian law at large). In the same manner as we have to distinguish between the legality of the use of force, i.e. before resorting to it (macroscopic level), and each singular (or group of) military action(s) (microscopic level) *during* the conflict (to which of course relevant rules of international humanitarian law shall apply). In this regard, the Court's observations in its 1996 Advisory opinion are crystal-clear: "at the same time, *a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet* the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law";[55] thence the interlacing with IHL.[56] Hence, under the angle of *jus ad bellum*, the use of force can be (qualitatively and quantitatively) different[57] from that of the aggressor, if it's *necessary* in order to repel the latter.[58] In the light of the aforesaid, it can be maintained that proportionality in self-defense, thus under *ius ad bellum* perspective, must be meant as being related to the goal pursued by the military reaction and not to the means which the latter assumes.

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[52] G. ABI-SAAB, "Cours général de droit international public", *RCADI*, vol. 207 (1987-VII), at 371.

[53] Oil Platforms (Iran v. United States of America), Judgment of 6 November 2003 (Merits): *ICJ Reports 2003*, para. 77 (at 198). Perhaps in the same vein, yet not fully elaborated: ICJ, Nicaragua, cit. (1986), para. 237 (at 122).

[54] Ago, *supra* note 49, at 69 (§ 120, emphasis added). In the same vein: "it does not seem unreasonable as a rule to allow a State to retaliate beyond the immediate area of attack when that State has sufficient reason to expect a continuation of attacks (with substantial military weapons) from the same source" (O. SCHACHTER, "International Law in Theory and in Practice: General Course in Public International Law", vol. 178 (1982-V), at 156).

[55] ICJ, Threat or Use of Nuclear Weapons*,* para. 42 (at 245; emphasis added).

[56] We mean, by this expression, the positive "contamination" of IHL on the *ius contra bellum*; indeed, as the Court carefully specified in this same advisory opinion: "A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter", *ibid.*, para. 39 (at 244).

[57] By all means, each single "attack" (as per Article 49 of the 1977 1st Geneva Protocol) must satisfy IHL requirements in order to be considered as lawful *under this branch of law*.

[58] Even a temporary military occupation of the aggressor State's territory (or parties thereof) can be envisaged, but in no way its annexation or forceful modification of its legal status. This is explicitly banned by Article 2 (4) of the UNC as authoritatively interpreted by UNGA resolutions 2625 (*supra* note 11) and 3314 (*supra* note 18). The very large majority of the doctrine supports this sound principle of public international law: R.R. BAXTER, "Treaties and Customs", vol. 129 (1970-I) at 69. In addition: "However, the practice of States and the writings of eminent publicists show that self-defence cannot be invoked to settle territorial disputes" (Eritrea/Ethiopia Claims Commission, cit. para. 10).

b. Two Conventional Requirements

Firstly, Article 51 adamantly specifies that the right of self-defense can be implemented by a State as long as UNSC has not taken "such action (…) it deems necessary in order to maintain or restore international peace and security". To this effect, that's the second requirement, the measures taken by the target State "shall be immediately reported to the Security Council". As the Court made clear in 1986, even though it can hardly be contended that these requirements are exacted by customary international law, "if self-defense is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself *convinced* that it was acting in self-defense".[59]

As these two institutional conditions show, self-defense fits into the general scheme and purpose represented by the maintenance (or restoration) of international peace and security, the main responsibility for which is vested with the UNSC.[60] Hence, Member State must not be authorized by the UNSC to resort to force in self-defense, yet the exercise of this right can be suspended, or even stopped by the UNSC when the latter has taken the necessary measures to maintain or restore international peace and security perturbed by the armed attack. The sheer reading of the following fragment contained in Article 51, corroborate the subordination of the right of self-defense to the system of collective security established in Chapter VII: "Measures taken by the Members (…) shall not in any way affect the *authority and responsibility of the Security Council*" to this effect. In this respect, though, no true precedent[61] can be cited to depict is application, with perhaps the sole exception of a peculiar (and quite debatable) interpretation of UNSC action following Iraq invasion of Kuwait in 1990.[62]

c. Two Selected Controversial Topics around Self-defense

i. Self-defense against Non-State Actors

[59] ICJ, Nicaragua, cit. (1986), para. 200 (at 105; emphasis added).

[60] "[T]he authorization of self-defence is a provisional measure intended to protect the integrity and independence of a member State until the United Nations takes collective action", M. LACHS, "The Development and General Trends of International Law in Our Time", *RCADI*, vol. 169 (1980-IV), at 165.

[61] The paucity of practice can explained at the same time by the passivity – during Cold War – of the UNSC and by the highly sensitive prerogative which is that of a State right of self-defence. Not to mention UNSC lack of "armed forces, assistance, and facilities (…) necessary for the purpose of maintaining peace and security", as envisaged by – the never implemented – Article 43 UNC.

[62] Reference is made to Resolution 678 (29 November 1990), a dispositive paragraph of which ("Member States co-operating with the Government of Kuwait") could allude to Kuwait right of collective self-defence. However, apart from this (sole) indication all other elements (textual and contextual) seem to point, more arguably, to another ground of use of force, i.e. Article 42 providing for collective security under UNC Chapter VII.

Since more than a couple of decades or so, no textbook or monograph study on the use of force have avoided this, seemingly new, topic, often in relation with another, seemingly new too, subject-matter of international terrorism. In fact, the large majority, if not all, of the classics of the Law of Nations, until at least Emer de Vattel, devoted substantial developments to what was then called "private war", i.e. public authority (viz. a State or State-like) vis-à-vis other entities, which generally were not sovereign (they thus did not possess territorial sovereignty).

However, the alleged analogy with Grotius' private war cannot be upheld, especially as a result of quantum structural modifications of international legal order since then (both on the side of substantive and institutional law). It suffices to have a glance at Vattel's *The Law of Nations* to realize that this kind of war had from then on fallen outside the scope of public international law; as it has been authoritatively affirmed, sovereign States cannot *literally* wage war against non-State actors[63]. Hence, under traditional international law, the former can only use force against their likes.[64] Sovereign States have indeed gained, most of the times forcibly, the monopoly of the use of force within their territory; UNC has enshrined this state's competence precisely in its Article 2 (4) whereby it forbids the use of force by States *only* in their international relations, leaving thus unaffected their rights within their respective territories. Under this perspective, it's not then too bold to affirm that, with the regard of the régime of the use of force and self-defense, international legal order is (still) essentially State-centred and fundamentally territorial. This entails that technically speaking, a State cannot lawfully avail itself of self-defense in order to resort to military force against armed groups (or "bands, irregulars, mercenaries") *on the territory* of another State, unless, as recites UNGA Resolution 3314 Article 3 (g): a) the latter has sent them on "its behalf" committing acts amounting to aggression (listed in the same provision); or b) it can be proved the latter's "substantial involvement" in their acts ("of such gravity as to amount" to aggression). Thence, public international law requirement of a *link* between the State, towards which self-defense is directed, and the military groups which have previously carried out acts of aggression against target State. This is arguably the position taken by the World Court when faced to acts of aggression, carried out by non-State actors from (haven) State and directed to the target State. In addition to the oft-cited Nicaragua case, ICJ has more recently addressed this issue in terms of *link*: "while Uganda claimed to have acted in self-defense, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there *is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974*. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained *non-attributable to the DRC*". [65] The test of attribution clearly remands to the body of rules codified in the IR 2001, notably in the case in point to Articles 4

[63] According to Kelsen, armed attack under Article 51 solely covers cases where "one State attacks another State with its armed forces", H. KELSEN, *The Law of the United Nations,* cit. (1950), at 930.

[64] S. LAGHMANI, 'Vattel et le *Ius ad Bellum*', in *Vattel's International Law in a XXIst Century Perspective*, Leiden, 2011, at 308-310.

[65] Case concerning Armed Activities on the Territory of Congo (DRC v. Uganda), Judgment of 19 December 2005 (Merits); *ICJ Reports 2005,* para. 146 (at 222-223; emphasis added). In the same vein: ICJ, Wall in Palestine, cit., para. 139 (at 194): "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attack against it are imputable to a foreign State"; ICJ, Nicaragua, cit. (1986), para. 277 (at 138-139).

and 8.[66] In its last case, in relation to this issue, the World Court has reaffirmed its position with regard of each of these two articles. As to the first title of attribution, the Court requires that in order for some individuals to "be equated with State organs even if that status does not follow from internal law" it must be proved that "in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument".[67] As to the second ground of attribution, and by reference to the very heading of the ILC Draft Articles provision, the Court brings up three alternate criteria: instructions, directions and control. With regard of the latter, the Court's interpretation aims at requiring that in order for the acts of private individuals to be attributable, it must be proved that State concerned exercised "effective control" over them. This criterion can be thus split in two dimensions, the horizontal and the vertical. In other words, "it must (…) be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations".[68] In order to grasp what "effective control" would concretely mean, it can be said, on the footsteps of the ICJ's considerations in the Nicaragua case, that a State's participation "even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military and paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself (…) for the purpose"[69] of attribution. Or, in other words, this participation does not amount to the "*substantial* involvement" required for in Article 3 (g) of the UNGA resolution 3314 (XXIX). However, as the Court made clear, USA, albeit not committing aggression against Nicaragua through Contras, has infringed Article 2 (4) UNC on the account of " 'organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State' and 'participating in acts of civil strife . . . in another State', in the terms of General Assembly resolution 2625 (XXV)".[70] Hence, the Court rightly insisted on the aforementioned discrepancy between (mere) use of force and aggression.[71]

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[66] ILC Articles on State Responsibility (2001). ICJ's case-law is adamant in this respect: ICJ, Nicaragua, cit. (1986), paras. 106-109, 115-116, 195 (at 61-62, 64-65, 103-104); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007 (Merits): *ICJ Reports 2007*, paras. 385-407 (at 202-210).

[67] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, cit. (2007), para. 392 (at 205). The Court makes further references to "proof of a particularly great degree of State control over them" and "complete dependence" (*ibid.*, § 393).

[68] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, cit. (2007), para. 400 (at 207). In this connection, it must be recalled that in 1999, ICYT Appeals Chamber, in its famous Judgment on the *Tadic case* (IT-94-1-A, 15 July 1999, http://www.icty.org/case/tadic/4), contested the application of such a stringent test of control in situations where the acts concerned are carried out by "individuals making up an organised and hierarchically structured group, such as a military unit, in case of war or civil strife, armed bands of irregulars or rebels. … Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the over control of the State" (§ 120). In sum, it must be proved that most of the times, most of the actions carried put by this organized group of individuals have been under the "overall control" of the State concerned. For instance, while the Court rejected the attribution of Contras acts to the United States in the Nicaragua case, the application of the ICTY's "overall control" would have reached the opposite conclusion.

[69] ICJ, Nicaragua, cit. (1986), para. 115 (at 65).

[70] *Ibid.*, at 119 (§ 228).

[71] Not unsurprisingly, the Institut de droit international (*supra* note 35) follows the Court's established case-law in this regard: "An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to counter- measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3" (§ 5).

On the contrary, if no link can be established (in accordance with relevant grounds of attribution codified in ILC Draft Articles) or, alternatively, no "substantial involvement" can be proved, then the target State cannot, on count of self-defense, react by armed force in (not to speak against) the State territory where those groups have their facilities or camps[72]. Therefore, the only situation in which a State can resort to self-defense – in the absence of such a link – is when an "armed attack by non-State actors is launched from an area beyond the jurisdiction of any State" then "the target State may exercise its right of self-defense in that area against those non-State actors".[73] Once again, the interstate and territorial paradigm of current international legal order is reaffirmed thus influencing the régime of use of force.

### ii. Temporal Aspects related to Self-defense (Anticipatory, Preventive, Pre-Emptive, and the like)

From the outset, we ought to clear the terminological ground. Indeed, here more than elsewhere, we are faced to a (sometimes purposely) blossoming of labels, tags, neologisms the only aim of which is to bewilder the critical mind. The stakes of this debate are in fact quite high, for we are dealing with the only ground allowing for a State to unilaterally resort to force in international relations. Great have thus been hitherto the efforts carried out by States and scholars (sometimes even jointly) to expand self-defense having regard to the time-element.

If we assume a large correspondence between Article 51 UNC and customary international law,[74] it is beyond any doubt that a State possesses an "inherent" right to react to an armed attack *already launched*.[75] What then of an armed attack on the brink of its launch? Or what about of the imminent threat of an attack? On the basis of a quick review of doctrinal positions in the current debate the following scheme of adjectives associated with self-defense can be put forward: a) interceptive; b) anticipatory; c) pre-emptive; d) preventive. We will tentatively sketch their distinctive features for each of them. As for the first ("interceptive") it is meant, in a nutshell, the right for a State to squarely "intercept" an armed attack already launched, yet not having physically hit its target. In other words, armed attack has been irremediably and irreversibly triggered; in this regard, Dinstein speaks of "nipping an attack in the bud".[76] Most of the scholars cite in this respect, the right of the USA to intercept outside its territorial waters airborne Japanese bombers approaching Pearl Harbor[77] as well as Israel's right to intercept Iraqi Scud launched during the second Gulf War in 1991.[78] In all of these examples drawn from State practice, the emphasis is thus put not only on the "opening of fire" but also, and foremost, on the characteristics of "irreversibility".[79] A tenuous wall

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[72] *Contra*: Judge Simma's and Kooijmans' separate opinions appended to the Court's Judgment in the Armed Activities on the Territory of the Congo, cit., at 335-337 and 310-316.

[73] Resolution adopted by the *Institut de droit* international, *supra* note 35, at § 10 (ii).

[74] See: ICJ, Nicaragua, cit. (1986), paras. 175-177 (at 93-95).

[75] ICJ, Oil Platforms, para. 51 (at 186): "in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United State *has to show that attacks had been made upon it* for which Iran was responsible".

[76] Y. DINSTEIN, *War, Aggression and Self-defence*, 4th edn., Cambridge, 2005, at 91.

[77] I. BROWNLIE, *International Law and the Use of Force by States*, Oxford, 1963, at 368.

[78] R. KOLB, *Self-defence and Preventive War at the beginning of the Millennium*, Vienna, 2004 at 125.

[79] Y. DINSTEIN, cit. (2005), at 191.

separates the previous scenario from that of "anticipatory" self-defense. Notwithstanding this strong similarity, the time factor is more remote insofar as in this case target State has to cope with an armed attack "on the brink of launch".[80] This form of self-defense is considered too as well founded under current international law. Between this last species of self-defense and the next two lies an invisible though significant dividing-line, that of legality. In fact, while the former two reflect current customary international law, the last two don't, in spite of recurrent and relentless attempts made by certain States and minority scholars. The third one, which can be labeled "pre-emptive"[81], presupposes that a State fears that – in a short term – it can become a (potential) target of an armed attack by another State. In fact, there lies a perception of a threat of aggression. In order to respond to the latter, the (potential) target State attempts to *pre-empt*[82] its concretization by acting "while these processes (embodying the threat of aggression) still embody only a low-level of coercion".[83] The aim thereby pursued is to put an end to the threat by resorting to less costly means than those which would have been required later on when the threat would have materialized into actual aggression. The fourth and last kind of self-defense is the preventive self-defense or preventive war tout court; if the former formula strongly resembles to an oxymoron[84], the latter is less hypocritical insofar as it unveils the real goal pursued, i.e. to wage war when the (potential) target State feels that in the long-term another State could do the same. Unlike the "pre-emptive" self-defense, in this case the perception of a threat is not only more remote in time, but also it rests on vague (and highly subjective, self-perceptive) indicators of fear. At the end of WWII, German dignitaries accused before IMT argued that III Reich was "compelled" to invade Norway (a neutral State) in order to prevent a feared invasion of the latter by Great Britain. The Tribunal, relying on Caroline's dictum requirements ("instant" and "overwhelming") categorically rejected this form of "preventive" self-defense by stating that: "In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive wars".[85] A vivid example of this strategy can be found in the 2006 US National Security Strategy[86]. Contrariwise, nearly six decades earlier, US Truman Administration issued a Strategic Security Document which famously consecrated the cold-war policy of containment (vis-à-vis USSR). According to this text, it was adamantly affirmed that USA would have never launched an armed attack "unless it is demonstrably in the nature of a counter-attack to a blow which *is on its way or about to be delivered*".[87] It must be observed in this regard that what was applicable for a threat of a nuclear aggression is all the more true for a conventional weapons armed attack. In short, this strategy while implicitly admitting "anticipatory" self-defense ("about to be delivered") straightforwardly rejected preventive (and even pre-emptive) self-defense.

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[80] M.E. O'CONNELL, 'The Myth of Preemptive Self-defence", http://www.asil.org/taskforce/oconnell.pdf, at 2 (visited 9 August 2011). USA invoked this kind of self-defence with a view to justify the shooting down by USS Vincennes of Iran Air Airbus (3 July 1988).

[81] Not to be misled with the same "pre-emptive" of the Report of the High-level Panel on Threats, Challenges and Change (Doc. A/59/565, 2 December 2004, p. 63, para. 189) of which we will talk in a while.

[82] It's not by accident that pre-empt comes from Middle Latin "prae-emere", i.e. to "buy beforehand". In other words, to "wage" war before others do it.

[83] M.S. McDOUGAL, F.P. FELICIANO, *Law and a Minimum World Public Order: The Legal Regulation of International Coercion*, New Haven, 1961, at 211.

[84] See in this respect: G. ABI-SAAB, cit. (1987), at 371.

[85] IMT, Judgment 1st October 1946, *AJIL*, vol. 41 (1947), at 207.

[86] Second edition (16 March 2006), http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/(visited 10 August 2011).

[87] http://www.mtholyoke.edu/acad/intrel/nsc-68/nsc68-3.htm (*NSC 68: United States Objectives and Programs for National Security* (14 April 1950). A Report to the President Pursuant to the President's Directive of January 31, 1950), visited 10 August 2011, emphasis added).

In conclusion, the first two kinds of self-defense are nowadays admitted as lawful whilst the last two are not. Besides, this is consonant with the "Report of the High-level Panel on Threats, Challenges and Change", which strongly opposed the right for a State to act preventively, i.e. towards a "non-imminent or non-proximate" threat. In this regard, this report reaffirmed the discrepancy of scope between Articles 39, 2 (4) and 51 UNC: the first being the widest (including even the threat to peace, thus situations not perforce encompassing the use of force in international relations, or being solely restricted within a single State), the second (including only threat and use of force between States in international relations), and finally the third (which envisages *exclusively and restrictively* inter-State aggression). In fact, they added that: " if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to". They then concluded that "the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. (…) **We do not favour the rewriting or reinterpretation of Article 51**".[88] This is likewise on par with a recent stand taken by the *Institut de droit international*, which rejected in vibrant terms any form "'preventive" self-defense (in the absence of an actual or manifestly imminent armed attack". [89] Authorities, in spite of obviously minority authors, concur in rejecting these forms of self-defense.[90] Lastly, it must be noted that ICJ hasn't had the chance yet to elaborate explicitly on the right of a State to resort to self-defense in a situation of an "imminent threat of armed attack".[91]

### C. What beyond? Tentative Responses on Some Alleged Exceptions to the Comprehensive ban on Use of Force

Leaving obviously aside the exception represented by the collective security system established by the UNC,[92] we ought to address the issue whether other titles to resort unilaterally to force may be admitted under current public international law. In fact, as the World Court affirmed in 1969, "[t]he general rule prohibiting force allows for certain exceptions"[93]; the plural can be interpreted as including the aforementioned system of collective security or not, thus leaving room for other exceptions.

#### a. General and Prefatory Remarks

[88] Report of the High-level Panel on Threats, Challenges and Change, *supra* note 81, at 63 (§§ 190-192, bold emphasis in the original).
[89] Resolution "Present Problems of the Use of Armed Force in International Law" IDI, *supra* note 35, at § 6.
[90] See i.a.: Th. FRANCK, "Fairness in the International Legal and Institutional System: General Course on Public International Law", *RCADI*, vol. 240 (1993-III), at 254. See *supra* note 42.
[91] ICJ, Nicaragua, cit. (1986), para. 194 (at 103). To our knowledge, no meaningful hints can be drawn either from the World Court subsequent decisions or from other international judicial bodies practice.
[92] See *infra* ???
[93] ICJ, Nicaragua, cit. (1986), para. 193 (at 102).

The main bias through which a new exception can be introduced in the realm of positive international law is custom, which can either modify the UNC in its relevant provisions or emerges beside it. Regardless of the two options, the theoretical underpinnings of which are of course different, the outcome would be the same, i.e. the modification of general international law. Therefore, if international custom is the means then it ought to briefly sketch out the customary process with a view to determine whether each of the alleged exceptions has penetrated into positive law. Without dwelling upon the customary source as such, it is instrumental to highlight the inescapable jurisprudential requirement in order to ascertain the creation of a new customary rule or a new customary exception to the prohibition of the use of force. The first of these clues is given by the World Court in its landmark judgment in the Nicaragua case, where, especially dealing with the need to ascertain an asserted new exception to the prohibition of the use of force, it concluded that: "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law".[94] Then, the question is how to assess whether the novel exception is truly "shared by other States". How many of them and which of them. To this end, the requirements put forward by the Court apply, i.e. a systematic practice (of non condemnation) by a very large number of representative States, including those specially affected.[95] Inversely, the lack of condemnation by *other States* of the use of force in a particular incident, even though widely, does not amount to a change of the law in this respect.[96] Any other conclusion would led to an unacceptable mechanical conception of the law, i.e. that the validity of a norm in a given legal system would depend from either approbation or the condemnation of its violation in each specific case. Such a construction of Law is tantamount to its negation.

The second clue falls likewise to the World Court, i.e. in its *North Sea Continental Shelf cases* Judgment where it was clearly underlined that "a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected".[97]

Hence, three conditions must be met: a) quantitative, i.e. "very widespread", meaning that unanimity is not required, as a large [in the French text of the Judgment] adherence to the given practice suffices; b) qualitatively, i.e. "representative", meaning that all the different sections or sub-communities [be they from the geographical, ideological, religious, economic, political, etc. criterion] of the international community have to take part in the law-making process; c) effectiveness, i.e. "specially affected", that is within every of these different communities, those States which have a special interest (in the regulation or field concerned) shall adhere to the practice proving their *opinio iuris* and ultimately the customary international law rule.

From the meaning of "representative" must be understood the different sections (or even subsections) of the international community, according not only to general divide lines (north-South, East-West, Western/African/Asian, etc.), but also to the more specific field of international regulations in point.[98] As for the meaning of "specially affected States" by the given regulation, it is

[94] ICJ, Nicaragua, cit. (1986), para. 207 (at 109).
[95] In this vein: ICJ, Nicaragua, cit. (1986), para. 186 (at 98).
[96] G. ABI-SAAB, *supra* note 52, at 378.
[97] North Sea Continental Shelf cases, Judgment of 20 February 1969: *ICJ Reports 1969*, para. 73 (at 42).
[98] See in this respect: Texaco Calasiatic v. Government of Libya, Arbitral Award of 19 January 1977, *ILM*, vol. 17 (1978),

worth quoting what the ICR affirmed that "[w]ith respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict".[99] In this connection, the USA challenged this affirmation by asserting that "specially affected States [by a given regulation]" are those States which are *usually* involved in those problems, with regards to which State practice is accordingly analyzed.[100]

Still on the same point, a distinguished scholar remarked that *among* "specially affected States", *special relevancy* must be given to those acts which go against States' interests: "Particularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy etc." [101] Treves thus proposed a "unit of evaluation" for evidences (of State practice) within the international process, such as confession, put forward from time to time by the ICJ itself. Hence, the behaviour of the State more deeply involved in a given situation is deemed to be more *representative* than that of other States which are but rarely "affected".[102] In addition, it can be contended that being Article 2 (4) a *ius cogens* rule any State is by definition entitled to the same weighting coefficient in the assessment of its "specially affected" status, in the same way as the integral treaties according to Article 60 (2) c) VCLT. Therefore, since all the States are "specially affected", none of them is ultimately, so that all States' practice is characterized (weighted) by the same coefficient of importance.

Finally it needs also to be stressed that, according to a general principle of law in matter of interpretation, any exception to a rule must be construed restrictively; moreover, in the case in point, this is all the more true since the rule concerned is a peremptory norm of public international law.[103]

Another argument, often invoked in order to soften the prohibition of the use of force, relies on the asserted dysfunction or inefficacy of the UN collective security system. Without having to dwell upon this allegation, it ought to recall what the World Court, already in 1949, affirmed in this respect: "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past given rise to most serious abuses and such as cannot, *whatever be the present defects in international organization*, find a place in international law".[104] In the same vein, one year

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para. 84 [The original French version in: *JDI*, vol. 104 (1977), 350-389].

[99] *Customary International Humanitarian Law*, ed. by J.-M. HENCKAERTS and L. DOSWALD-BECK, Cambridge, 2005, vol. I, at xxxix.

[100] The letter – sent to the ICRC – read as follows: "Not every State that has participated in an armed conflict is "specially affected"; such States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as "specially affected". Moreover, those States are not simply "specially affected" when their practice has, in fact, been examined and found relevant by the ICRC. Instead, specially affected States generate practice that must be examined in order to reach an informed conclusion regarding the status of a potential rule". US Gov, p. 445. In this same letter has also been quoted the personal opinion of one of the Committee's members (Th. Meron) which drafted the customary IHL study: "The practice of "specially affected states" – such as nuclear powers, other major military powers, and occupying and occupied states – which have a track record of statements, practice and policy, remains particularly telling", "The continuing role of custom in the formation of international humanitarian law", *AJIL*, vol. 90 (1996), p. 249.

[101] T. TREVES, "Customary International Law", in *The Max Planck Encyclopedia of Public International Law*, Oxford, 2008, para. 30.

[102] T. TREVES, cit. (2008), para.30.

[103] In this connection, one shall remind that in accordance with Art. 53 VCLT, a *ius cogens* rule cannot but be modified by another norm "having the same character". With regard of this major ground of invalidity of treaties.

[104] ICJ, Corfu Channel case, cit., at 35 (italics added).

later, the UNGA adopted the famous resolution "Uniting for Peace" (377 (V), the preamble of which declares, in its third last paragraph to Preamble A, that "Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States … does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security". Moreover, under the Law of Treaties' perspective, the oft-cited argument relying on a "fundamental change of circumstances" as a cause for suspending, at least softening, if not squarely terminating, UNC's provisions pertaining to the use of force (notably: Article 2 (4) and relevant Chapter VII provisions) must be straightforwardly and irrevocably rebutted.[105] In fact, even assuming that all Article 62 VCLT's stringent (five) conditions – enunciated in Para. 2 – are met in the case in point, Para. 2 would apply for the fundamental change invoked – i.e. the dysfunction (lack of unanimity and / or the failed implementation of Article 43 UNC) of the collective security system is due to … very Member States which attempt to avail themselves of this ground of termination / suspension.

b. Armed Counter-Measures (or "Light Self-defense")

In the oft-cited Nicaragua case, the Court seemed to say that if a State is affected by a "use of force of a lesser gravity" it could then resort to "proportionate counter-measures".[106] Therefore, the Court, after having adamantly rejected collective armed counter-measures – invoked in the case in point by the United States – ended up opening this possibility for the State which has been victim of uses of force below the threshold of armed attack.[107] Hence, as the IDI declared: "acts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3".[108] Therefore, the view can be held that, despite the Court's ambiguities in 1986 and its subsequent silence, "against smaller-scale use of force, defensive action – by force also "short of" Article 51 – is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defense within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action,

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[105] By the way, as it has been observed: "But no responsible voice, surely no government, has suggested that the failures of the organization vitiated the agreement and nullified or modified the Charter's norms", L. HENKIN, "Use of force: Law and U.S. Policy", in *Right v. Might. International Law and the Use of Force*, New York, 1989, at 38.

[106] ICJ, Nicaragua, cit. (1986), para. 249 (at 127). In this connection, it must be observed that in a puzzling previous paragraph, the Court had affirmed that: "Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure", *ibid.*, at 110 (§ 211).

[107] Quite obviously, injured State can make likewise recourse to pacific counter-measures, the lawfulness of which is clearly attested by Articles 22 and 49 to 53 of the IR 2001.

[108] Resolution IDI, § 5.

for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defense expressly reserved in the United Nations Charter".[109] Fair enough. Yet, while insisting on the "defensive" character of these armed counter-measures (i.e. which could be grossly labeled "light-self-defense"), it could be awkward in some circumstances to distinguish them from their road companions, i.e. armed reprisals. For the latter are in indeed undoubtedly banned in public international law, as the Court itself affirmed in its 1996 Advisory opinion[110], relying on UNGA resolution 2625.[111] Other international instruments uphold this prohibition, such as the 2001 ILC's Draft Articles on State responsibility and the 1975 Helsinki Final Act,[112] to name only a few of them. Hence, a thin red line must be drawn between defensive counter-measures (short of self-defense) and (punitive) armed reprisals. To this end, timing ("leaving no moment for deliberation") and purposes – on one hand to repel the hostile use of force while on the other to punish its author and at the same time deter the latter to do it again[113] – must be taken into account with a view to determine whether we are faced to a defensive counter-measure or to an armed reprisal.[114] While the former is lawful, the latter remains unlawful since it is a means of forcible self-help,[115] and as such "cannot find a place in international law".[116]

State[117], UNSC practice[118] as well as "the teachings of the most highly qualified publicists"[119] – in spite of a loud doctrinal minority[120] – abound in buttressing the unlawfulness of reprisals (i.e.

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[109] Individual opinion of Judge Simma appended to the Court's Judgment in the Oil Platforms case, cit. para. 12 (at 331-332).

[110] ICJ, Threat or Use of Nuclear Weapons, para. 46 (at 246).

[111] Article 50 (1) a) IR 2001.

[112] Principle II.3.

[113] "A reprisal is an act of self-help (*Selbsthilfehandlung*) by the injured state, responding – after an unsatisfied demand – to an act contrary to international law committed by the offending state (…) Its object is to obtain reparation from the offending state for the offense or a return to legality by the avoidance of further offenses", Naulilaa case, cit., at 1026 [our translation]. Hence, the Tribunal clearly ranks (armed) reprisals among the States' means of self-help. As already underlined the latter – henceforth banned by UNC Article 2 (4) – does not coincide at all with self-defence; see also *supra* notes 13 and 104.

[114] Other authors, not less consistently, make recourse to proportionality as yardstick of differentiation: Y. DINSTEIN, cit. (2005, at 228) considers "defensive armed reprisals" as being an example of a "calibrated form of counter-force", being thus lawful in PIL. In the same vein: R.A. FALK, R.A., "The Beirut Raid and the International Law of Retaliation", *AJIL*, vol. 63 (1969), at 441-442; O. SCHACHTER, "The Extraterritorial Use of Force Against Terrorist Bases", *Houston Journal of International Law*, vol. 11 (1989-II), at 312-316.

[115] As it has vividly argued: "A reprisal, in short, was a law-enforcement operation; whereas a war was an attempt by a state to bend another to its will", S. C. NEFF, *War and the Law of Nations. A General History*, Oxford, 2005, at 227.

[116] ICJ, Corfu Channel case, cit., at 35.

[117] A study carried out by US State Department reached the conclusion that: "that the United States has taken the categorical position that reprisals involving the use of force are illegal under international law;", quoted in: M.L. NASH, *Digest of United States Practice in International Law (1979)*, Washington, 1983, at 1749-1752.

[118] Among others, where the condemnation of reprisals is expressly pronounced: 101 (24 November 1953), 111 (19 January 1956), 171 (9 April 1962); 228 (25 November 1966); 188 (9 April 1964). The last one is particular eloquent by virtue of its context since UNSC qualified UK's reprisals as being "incompatible with the purposes and principles of the UN", while the condemned State *merely* abstained during its vote thus allowing the adoption of the resolution.

[119] R. AGO, *Eight report to the ILC*, cit., para. 81; C. BASSIOUNI, Legal responses to international terrorism: United States procedural aspects, Dordrecht, 1988, at XLVIII; P. KLEIN, P., « Vers la reconnaissance progressive d'un droit à des représailles armées », in *Le droit international face au terrorisme*, CEDIN (17), Paris, 2002, at 256 ; J.A. McCREDIE, "The April 14, 1986 Bombing of Libya: Act of Self-defence or Reprisal?", *Case Western Reserve Law Journal of International Law*, vol. 19 (1987-II), at 241; S. C. NEFF, cit., at 243; R. QUADRI, *Diritto internazionale pubblico,* 5th ed., Naples, 1968, at 267, 271; J. VERHOEVEN, "Le droit, le juge et la violence", *RGDIP*, 1987, at 1216.

[120] W. T. BURKE, "The Legal Regulation of Minor International Coercion: A Framework of Inquiry", in *Essays on*

punitive and/or deterring purposed).

c. Protection of Nationals Abroad

States have not seldom in the past invoked this title in order to justify their interventions by forcible means in another State territory. Franco-British intervention in Egypt[121], during the Suez Canal crisis[122], Belgian intervention in Congo, USA intervention in Dominican Republic (1965), Grenada (1983)[123] and Panama (1989)[124] well illustrate the case in point; not to mention the notorious Entebbe case.[125] Neither the ICJ (nor its predecessor) has heretofore been called upon to look into

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*Intervention*, 1964, at 109; B. LEVENFELD, "Israel's Counter-Fedayeen Tactics in Lebanon: Self-defence and Reprisal Under Modern International Law", *Columbia Journal of Transnational Law*, vol. 21 (1982/1), at 35-37.

121 UK representative at the UNSC argued in these terms: "In Egypt there many thousands of British and French nationals. The chain of events which began with the Israel moves into Egypt has developed into hostilities and hostilities have created a disturbed situation. In those circumstances, French and British lives must be safeguarded. I again emphasize […] that we should certainly not want to keep any forces in the area for one moment longer than it is necessary to protect our nationals" (quoted in N. RONZITTI, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, 1985, at 28.

122 France backed Belgian intervention on grounds of its humanitarian purposes: "their mission of protecting lives […] is the direct result of the failure of the Congolese authorities is in accord with a recognized principle of international law, namely, intervention on humanitarian grounds" (UNSC Doc. S/PV. 873 (1960), § 144).

123 Operation "Urgent Fury". US President Reagan justified the intervention in the following terms: "When I received reports that a large number of our citizens were seeking to escape the island thereby exposing themselves to great danger, and after receiving a formal request for help...I concluded the United States had no choice but to act strongly and decisively." (Interview, President Reagan with reporters, White House, 25 Oct 83, weekly Compilation of Presidential Documents, 3l Oct 83, p. l487 [cited in: R.H. Cole, *Operation Urgent Fury. Grenada* (Joint History Office, Office of the Chairman of the Joints Chiefs of Staff, Washington DC, 1997, p. 46. UNSC was unable to adopt a draft resolution submitted by Nicaragua and purporting to condemn US invasion, due to the latter's veto (11 affirmative votes and 3 abstentions). On the contrary both UNGA (resolution 38/7 of 2 November 1983) and CARICOM (see: W. Gilmore, *The Grenade Intervention. Analysis and Documentation*, London, 1984, at 38) condemned US raid in the Caribbean island.

124 Operation "Just Cause", see US President George Bush statement (*NYT*, 21 December 1989).

125 The 27 June 1976 a French carrier airliner, flying from Tel-Aviv to Paris, was hijacked by a commando of four Palestinians who compelled the pilot to land at the Ugandan airport of Entebbe. All non-Israeli passengers were quickly freed while the hijackers ransomed Israeli Government to liberate their fellows jailed in different countries in exchange for the remaining 86 Israeli hostages. The 3 July, a special Israeli force landed at the airport, without prior Uganda's authorization, and managed to free the hostages. During the raid some Ugandan military forces were wounded and the Israeli forces destroyed a ten or so of Ugandan airplanes. Upon Ugandan – and UN African group – request, UNSC was convened on five days later. While Israel asserted its right "to take military action to protect its nationals in mortal danger", several other States categorically rejected this argument, Uganda tagging the intervention as a "barbaric aggression". USA stand up for Israel's right which "flow[s] from the right of self-defence", while France argued that Israeli intervention infringed Uganda's sovereignty yet not its "territorial integrity". India's and Sweden's stances must be briefly recalled in this connection. The former underlines that UNC only recognizes a State right to self-defence only if it has been the victim of an armed attack; in the case in point, it's not Israel which is the target State, but on the contrary Uganda. India thus rebutted the legality of Israeli intervention. Sweden, in an articulated speech, recalled that UNC makes room for two exceptions only (i.e. self-defence and forcible measures under Chapter VII) by thus adding that "Any formal exceptions permitting the use of force or of military intervention in order to achieve certain aims; however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak. In our view, the Israeli action which we are now considering involved an infringement of the national sovereignty and territorial integrity of Uganda". Yet, in spite of that, Swedish Government did "not find it possible to join in a condemnation in this case (S/PV.1940, §§ 121-122, at 14). UNSC couldn't ultimately adopt any resolution condemning Israel's raid, on the account of lack of unanimity between its permanent members.

the lawfulness of forcible actions aiming at rescue nationals abroad. However, some hints can be drawn from its Judgment in the Hostage case, initiated by an US application asking for the Court to assess the responsibility of Iran arising out of the invasion and occupation of US embassy and general consulate in Tehran as well as from the detention of US nationals and diplomatic and consular staff. While the case was before the Court, US government decided to set up a rescue expedition, but the mission ended up in a crushing fiasco. The Court ultimately determined that Iran's responsibility was engaged, yet it also reckoned that "it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980 (…). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its *concern* in regard to the United States' incursion into Iran".[126] The Court couldn't go further to ascertain the wrongfulness (the presumption of which can be inferred by the use of the term "concern") for the substantive scope of its jurisdiction was limited to the two Vienna Conventions of 1961 and 1963 in matter of diplomatic and consular relations. Therefore, as it took care of stressing, "neither the question of the legality of the operation of 24 April1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court".[127] The Court was thus impeded by its jurisdictional limits in the case in point to go further than the – already eloquent – expression of its "concern".

In the same vein, reference can be made to the works of the ILC pertaining to diplomatic protection. Second Special Rapporteur, John Dugard, submitted in his First Report to the ILC a provision – Article 2 – which envisaged the right for a State to rescue its nationals abroad by resorting to forcible means.[128] The exercise of this right to intervention was subject under five stringent and cumulative conditions;[129] moreover, the first paragraph of this proviso was framed in conditional and negative terms for it stated the principle of non-intervention, "except in the case … where" all the requirements were fulfilled. Yet, notwithstanding all these strictures, this draft provision was rejected by the ILC in 2000, on the ground "that diplomatic protection did not include the use of force. It was thus quite clear that article 2 was not acceptable to the Commission".[130]

Hence, in the light of the foregoing it can hardly be contested that, at least *de lege lata*, public international law does not admit the right to a State to rescue its nationals abroad by way of forcible means. In this regard, the mechanism of diplomatic protection, ancient institution of the Law of Nations, well reconciles each State's conflicting interests arising out of the infringement of public

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126 United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980 (Merits): *ICJ Reports 1980*, para. 93 (at 44; italics added).

127 *Ibid.*, § 94, p. 44.

128 First Report to the ILC, UN Doc. A/CN.4/506, at 16.

129 They were: a) "The protecting State has failed to secure the safety of its nationals by peaceful means" ; b) "The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State" ; c) "The nationals of the protecting State are exposed to immediate danger to their persons" ; d) "The use of force is proportionate in the circumstances of the situation" ; e) "The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued" (*ibid.*, at 17-17).

130 ILC's Report to the UNGA, UN Doc. A/55/10, at 76.

international law against aliens.

d. (Hot) Pursuit

A right of (hot) pursuit has been asserted by some scholars and Governments alike; so that it would be lawful for a State to send its troops into another State territory for the purposes of catching military or paramilitary bands which have found there a safe haven. Quite obviously, in the case in point neither a organic link nor a "substantial implication" can be established between the host-State and the private individuals, otherwise one would be faced to an indirect aggression on the account of Article 3 (g) of the UNGA resolution 3314.[131] Indeed, while some authors have fit this hypothesis into a highly stretched definition of aggression,[132] so to trigger a right of self-defense[133], others, no more plausibly, have endeavored to establish a separate title of intervention, notably by analogy with the Law of the Sea. In fact, according to Article 111 of the UNCLOS III State, "The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted (…).[134] Therefore, the right of pursuit is subject to the condition that the chase has commenced in one of the maritime areas wherein the coastal State has sovereign rights or functional competences and it can accordingly continue – with no discontinuation – into the High Seas (thence the label "hot"). It must of course stop at the outer limit of another State's territorial waters.[135]

However, the propounded analogy cannot be sustained not only in the light of State (and UN alike) practice but also from a juridical standpoint. Under the first heading, several elements concur to the

131 This scenario has been already analysed (*supra* B.c.i)

132 I.a.: A. D. SOFAER, "Terrorism and the Law", 64 *Foreign Affairs* (1986), at 920-922; O. SCHACHTER, "The Extraterritorial Use of Force Against Terrorist Bases", 11 *Houston Journal of International Law* (1989), at 312-315.

133 Fewer authors have relied, even less convincingly, on state of necessity (D. BOWETT, *Self-defence in International Law*, Oxford, 1956, at 38-41). Without dwelling upon this argument, it suffices to recall that state of necessity as a circumstance precluding wrongfulness – codified in Article 25 IR 2001– is barred from being invoked when the breached obligation flows from a peremptory rule of public international law (see Article 26 IR 2001). Indeed, as already made clear, the prohibition of the use of force admittedly belongs to this body of international norms.

134 The customary international law rule reflected in this proviso has seemingly ripened during the US prohibition (of alcohol) era and it was aimed at preventing and punishing the smuggling of alcohol in the Federal territory.

135 In this connection it's relevant to note that when the UNSC authorized (resolution 1846 (2008)) – under UNC Chapter VII (yet with State concerned consent) – "States and regional organizations cooperating (with the transitional Somali Government) to enter into the latter's territorial waters in order to "fight against piracy and armed robbery at sea off the coast of Somalia" (Para. 10). What it is important to underline in this respect is the following paragraph by which UNSC stressed that its "resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and *affirms further* that such authorizations have been provided only following the receipt of the 20 November letter conveying the consent of the TFG;". Hence, it ought to be observed that not only this resolution cannot be taken into account as State practice likely to substantiate their *opinio juris*, but also, that this was made possible only thanks to the prior consent given by the State concerned (even though it can be argued that it was not required for the UNSC acted under Chapter VII, the resolution adopted under this heading being hence binding upon Member States as per Article 25 UNC).

refutation of a right of pursuit on foreign territory. UNSC practice in condemning or just determining the unlawfulness of this behavior abounds; for instance, in 1985, it "*denounces and rejects* racist South Africa's practice of hot pursuit to terrorize and destabilize Botswana and other countries in southern Africa".[136] Other UNSC resolutions can be cited the content of which clearly attests the constant condemnation of the right of pursuit.[137]

Moreover, the alleged analogy with the Law of the Sea must be challenged and rejected from a purely juridical point of view. In fact, while in the right of (hot) pursuit in the High Seas, State action concerns a space which is admittedly *res omnium*, i.e. beyond the jurisdiction of any State, in the case of pursuit on foreign territory, the latter is under the exclusive jurisdiction of a sovereign State. Therefore, according to the famous *Island of Palmas case*, "territorial sovereignty … involves the exclusive right to display the activities of a State", i.e. "to the exclusion of any other State".[138] In conclusion, since the legal status of spaces concerned by the forcible incursions are far from being identical (here exclusiveness, there concurring competencies), then the analogy cannot be upheld. By way of consequence, there is no right of pursuit – be it hot or not – on a land territory under the jurisdiction of another State, unless of course the latter gives beforehand its consent to this effect.[139]

e. Self-Help

Under this generic tag, we are referring to those doctrines according to which an injured State is entitles to recourse to force. In other words, a mere IWA would allow a State to implement by force its breached right. In fact, we have already addressed the question of legal means enabling a State to so doing, i.e. counter-measures, peaceful[140] and forcible.[141]

True, it is nonetheless of paramount importance at this stage to clearly distinguish counter-measures from "self-help" in the same manner as one has to differentiate species from gender. The former are indeed one of the most frequent mechanisms by which States implemented their right to "self-help", yet other means were at its disposal. Hence, what it is here at stake is to examine whether, leaving aside counter-measures, States can nowadays, under the generic label of "self-help", lawfully resort to use of force in order to guarantee their subjective rights previously breached.

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[136] UNSC Resolution 568 (21 June 1985), para.4.

[137] A far from exhaustive list would comprise, in addition to racist South Africa: South Rhodesia (against Botswana, 1977: resolutions 403 and 406; Mozambique, 1976: resolution 386; Zambia, 1978: resolution 424); Israel (on Lebanon, 1982: resolutions 517 and 520; Tunisia, 1985: resolution 573; on Jordan's occupied West Bank, 1953: resolution 101; on Jordan, 1966: resolution 228; on Syria, 1956 (resolution 111), 1962 (resolution 171); Great Britain (on Yemen, 1964: resolution 188).

[138] Island of Palmas case (Netherlands / United States), arbitral award of 4 April 1928, *RIAA*, vol. II, at 839,838.

[139] See for instance Article 41 of the Schengen Agreement between some European countries (19 June 1990); Mauritania, Algeria, Mali and Niger have presumably entered into an international agreement (Tamanrasset agreement, 2010) – or have at least reached and understanding – granting a reciprocal right of hot pursuit in their respective territories (parts of the Sahel) with a view to fight Al-Qaeda Organization in the Islamic Maghreb's terrorists (see *Le Temps*, 27 July 2010; *FT*, 22 April 2010).

[140] Article 22 IR 2001.

[141] See *supra* C.b.

Some authors[142] have boldly maintained that if UNSC, to which UN Member States have bestowed through Article 24 UNC their original power of forcible self-help, fails to carry out its function then these same can lawfully withdraw such a mandate, thus recovering their initial liberty to resort to armed force in order to react to international breaches. This argument doesn't seem to be convincing. In fact, in order for the UNSC to be stripped of one of its prerogatives, it would need an international agreement or a customary (constitutional) law related to the UNC among all the UN Members.[143] It is therefore not sufficient that some of them, (rightly or not) discontent with UNSC, individually withdraws their mandate. Since, they are not, individually taken, the titular of the mandate conferred to the UNSC.

Furthermore, unlike League of Nations [hereinafter: LoN] system,[144] UNC has stripped Member States of their "residual" power of forcible self-help. The Court was adamant in 1949 to indeed declare with regard of UK's acts aiming at safeguarding its rights:

> "The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of intemational relations. The Court recognizes that the Albanian Govemment's complete failure to cany out its duties after the explosions, and the dilatory nature of its diplornatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty"[145]

Therefore, even if UNSC fails to perform its duties under the Charter, regarding UN system of collective security, Member States are not "relieved … of their obligations … under the Charter".[146]

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[142] "(1) Article 24 of the Charter has conferred on the Security Council "primary responsibility for the maintenance of international peace and security" and imposed on it the duty of ensuring "prompt and effective action" to this end. Such action constitutes for the Council not a mere possibility but a "duty" flowing from this responsibility. If such action does not take place at all, or if a timely action is impeded by the veto of one of the permanent Members of the Council, the organization loses the precedence of its intervention, inherent in the words "primary responsibility". Far-reaching consequences follow from a situation in which the Security Council does not duly fulfil the task attributed to it by the Charter. By preventing prompt and effective action of the Council, Members open the way to legitimate intervention of other States, whenever they choose, on the basis of the general rules of international law and in the framework of their own responsibility, to take measures they consider necessary to meet the situation (…)", P. PESCATORE, P., "The US–UK Intervention in Iraq", *in Reader's exchange, ASIL Newsletter*, May/July 2003)

[143] In this same vein, one could also envisage a modification of the UNC through subsequent practice as it happened for Article 27 (3) and other provisions thereof. This scenario is neither applicable in the case in point, since UNSC had not really initiated and supported in the first instance the modification of the relevant provisions as it has been the case for the aforementioned article.

[144] "If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice" (Article 15 para. 7). Therefore, if the LoN failed to reach a unanimous agreement on a stance to take vis-à-vis a dispute or situation between member States, the latter re-gained their original freedom of individual forcible self-help, though in accordance with other LoN relevant provisions. The General Tellini's case (1923-1924) is particularly telling in this regard; LoN's Council, relying on report prepared by the League Commission of jurists, reached the conclusion that such unilateral forcible measures of self-help can be resorted to by States, even though their lawfulness was to be ultimately challenged before it (*Official Journal of the League of Nations*, 1924, at 524).

[145] ICJ, Corfu Channel case, cit., at 35.

[146] UNGA 377 (V) ("Uniting for Peace"), adopted 3rd November 1950.

Further, it ought to recall that Articles 2 (4) and 24 UNC combined effect is to abolish UN Member States right of self-help, so that States cannot anymore disguise under the tag "self-defense" what is genuinely an act of self-help. The former allows a State to resort to force only if it is the victim of an aggression whilst by the latter PIL recognized any State to react, provided the fulfilment of some strict conditions, by forcible measures to any IWA. In the wake of its 1949 Judgment, the Court had thus no hesitation in declaring that: "

> "Article 51 of the Charter may justify a use of force in self-defense only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council"[147]

However, it must be reiterated that the compliance by Member States with Article 2 (4) does not depend on the successful functioning of the UNSC (or even UNGA according to resolution 377 (V)), The Court declared that in the 1949 Channel of Corfu case[148] and "[t]ere is nothing in the *travaux préparatoires* which authorizes the belief that they [UN's original Member States] accepted the general prohibition of the use of force *on condition that the collective security system worked*".[149] Kelsen is therefore right when he commented in 1950 already, maybe a little bit resigned, that, since unilateral (i.e. non-authorized) forcible self-help is henceforth banned:

> "The delinquent [State] which is in actual possession of the illegal advantage is *protected by the Charter against any enforcement action other than that taken by the Security Council*"[150]

Further, as already sketched, argument based on an alleged modification, or even, termination of the UNC's provisions banning self-help (i.e. Articles 2 (4) and 24), as a result of a fundamental change of circumstances (Article 62 VCLT), must be altogether be rebutted. Even if we grant for the sake of argument that all the other conditions are met, there is one that is for sure not fulfilled, i.e. that the change must have been impossible to foresee. In other words, recourse to the *travaux préparatoires* shows us that States participating at the San Francisco conference did *foresee* the imminent failure of the UN collective security system.[151]

Besides, one of the two exceptions provided for in Article 62, i.e. that the fundamental change must not have been brought about by the Parties' conducts. Now, it can hardly be contested that if there is a failure of the UN collective security system, then this can be attributed to the UN Member States, and notably to P5, these very States which have invoked this argument.

Moreover, as it has been rightly observed, one of the two Articles allegedly to be affected by this fundamental change of circumstances, i.e. Article 2 (4), has also a customary value so that this argument is simply ineffective vis-à-vis it. Article 62 VCLT is a cause of termination / suspension of treaties and cannot thus bring prejudice to a customary international law rule, let alone to say that there are good grounds to affirm that it may even possess a peremptory character.

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147 ICJ, Armed Activities, para. 148 (at 223-224).
148 *Supra* note 13.
149 N. RONZITTI, *Rescuing National Abroad through Military Coercion and Intervention on Grounds of Humaniy*, Dordrecht, 1985, at 9.
150 H. KELSEN, cit. (1950), at 269.
151 Gloomy clouds were already gathering in the preceding conference of Potsdam.

Notwithstanding some minor and eccentric doctrinal positions, jurisprudence tends to buttress the unlawfulness of unilateral forcible self-help.[152]

[152] Y. DINSTEIN, cit. (1988), at 86-87.