# THE USE OF FORCE BY THE STATES UNDER INTERNATIONAL LAW

*Mohammed Salem Alqahtani*
mohd_4845@hotmail.com
Faculty of Law, National University of Malaysia
43600 UKM Bangi, Selangor, Malaysia

*Rohaida Nordin*
rohaidanordin@ukm.edu.my (Corresponding Author)
Faculty of Law, National University of Malaysia
43600 UKM Bangi, Selangor, Malaysia

*Faridah Jalil*
faridah@ukm.edu.my
Faculty of Law, National University of Malaysia
43600 UKM Bangi, Selangor, Malaysia

## Abstract

Notwithstanding the strict restriction on the use of military force under Article 2(4) of the United Nations Charter (UN Charter), notable exceptions to the provision are conferred in Article 51. There are various interpretations among the states and researchers on Article 51 of the UN Charter. Consequently, some questions beg for answers and will: what makes up an 'armed attack' and what does 'occurs' mean? Does it mean that States should wait until they have been attacked before defending themselves? Can states rely on Article 51 of the Charter to use military force on terrorist group(s) in the name of self-defense? Is there any time limit within which the state can defend itself in self-defense? What is collective security? Thus, this research is undertaken to examine and provide answers to the above said questions by using a doctrinal legal research methodology. The findings reveal that Article 2(4) of the UN Charter encompasses the actual use of armed force and the threat to use force. The use of force through irregular forces should be regarded as an armed attack by the Charter; and a state's right to defend itself is not without limitation or time limit. The UN Charter has not defined 'armed attack'. Therefore, the authors recommend for the UN Charter amendment to provide a clause that will extend the meaning of 'armed attack' to include not only acts by regular forces but also irregular forces.

***Keywords:*** *use of force, states, armed attack, self-defence, UN Charter, terrorist group*

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## INTRODUCTION

The use of force rules constitutes an essential part of Public International Law and other principles such as territorial sovereignty together with states' equality and independence. These principles serve as the framework for an international order (Brownlie, 1963; Shaw, 2002). Domestically, State has a monopoly of powers to strengthen its authority and control its territory. It is essential to point out that the use of force in the world community depends upon non-legal and other political factors and the current position of the law that seeks to present apparatus to prevent and penalize in the event of violation (Shaw, 2002).

History has shown that before establishing the United Nations (UN), the doctrine of 'just war' was developed and used as the resulting legal sanction for maintaining order in a society. The doctrine 'just war' refers to retaliating the injuries suffered where the guilty

party (the person who caused the injuries) refused to make amends. During the 13th century, the use of force could be defended if it was by a sovereign authority predicated on just reason (i.e. the punishing the wrongdoers) accompanied by belligerent's good intentions (Eppstein, 1935; Shaw, 2002).

With the formation of the European Union (E.U.), the doctrine of 'just war' began to change (Brownlie, 1963). Before resorting to war, there must be attempts to resolve the matter or difference peacefully (Shaw, 2002). The rise of states from the E.U. changed international legal frameworks since a series of sovereign States apprehensively co-existed in the E.U. in an ancient balance of power. Eventually, the legitimacy of the recourse to the use of force depended upon law's prescribed process. This change leads to the rise of positivism, focusing on state sovereignty that could bind states that consented to it (Shaw, 2002). Grotius excluded philosophical considerations as the reason for military attack during the destructive 17th century religious conflicts and redefined 'just war' in terms of self-defense, property protection, and the wrongdoing punishment by the citizens of a State (Brownlie, 1963).

With the rise of the system of balance of power and positivism in the E.U. after the Peace of Westphalia in 1648, the doctrine of 'just war' was removed from international law (Gross, 1948). The states are equal and sovereign. Therefore, no state can decide whether an attack on another state(s) was just or unjust, but each sovereign state is bound to honor an agreement and respect other states' independence and integrity, thus having to resolve differences using peaceful methods (Shaw, 2002).

The First World War put an end to the system of balance of power and led to a new issue over unjust war. This eventually resulted in the need to restructure the international legal frameworks based on the general international institution, which would control the world community's conduct to forestall future aggression (Shaw, 2002). The agreements contain in the League of Nations provide that members should submit disputes that will cause a disagreement to Council of League inquiry or judicial settlement or arbitration (League of Nations, 1919: Article 12). Under no circumstance should any member resort to the use of force until three months after the Council of League report or judicial decision or arbitral award.

From the above, the Council did not disallow the use of force or war but instead restricted fighting of war to a bearable level (Harris, 2004; Abass, 2012). To achieve a total restriction of the use of force across or within member State(s), the General Treaty for the Renunciation of War of 1928 was signed. Treaty Article 1 of the General Treaty condemned the use of force and considered it part of national policy in their relations with another state(s). This treaty is still in force with its general acceptability. The prohibition of war is now part of the international law principle. Despite the treaty provision, it does not connote that war in all circumstances is unlawful. Some member states opined that the right to go into war in self-defense was still a recognized international law principle. (Holzgrefe, 2003; Shaw, 2002; Kahama, 2015)

Despite the wide range of acceptance of Article 51 of the UN Charter, there are divergent views among scholars and states on the various elements of Article 51. The questions that arise and beg for answers are: what constitutes an 'armed attack'? Should a state threaten another state(s) with nuclear weapons and waits until it the eventual attack before defending its territory or act in anticipation? What should States do if they are attacked by non-state entities, such as armed bandit, since Article 2(4) of the UN Charter talks only about states? Can states rely on Article 51 of the Charter to attack such group(s) in the name of self-defense? Is there any time limit within which the state can defend itself in the name of self-defense? What is 'collective security'? What is the difference between unilateral use of force from collective security?

The research employs doctrinal legal research[1] (Yaqin, 2011) as a methodology. Thereafter, use analytical and critical approaches to analyse, interpret, and evaluate the provisions of law, principles, and ideas as contained in the UN Charter and views of international scholars to provide the answers to the above questions. Therefore, this study examines the relevant provisions under the UN Charter related to war and the circumstance(s) where going into war is allowed.

## THE USE OF FORCE UNDER THE UN CHARTER

Under the current legal regime, States should not intervene in sovereign State independence. The intervention in an independent state's affairs by military force generally goes against the established international principle of non-involvement and the use of force prohibition under the UN Charter (Ishan Jan & Lawan Haruna, 2015; Shaw, 2002; Abass, 2012). Article 2(4) of the UN Charter states that,

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations.

The above Charter provision explicitly forbids military intervention against the sovereign State. However, it does not prevent economic sanctions such as bank account blockage and trade boycott or political pressure like treaty ratification refusal or diplomatic relation severance on a State (Ishan Jan & Lawan Haruna, 2015; Harris, 2004). This provision against a military attack does not extend to the indirect intervention cases as it has been upheld by the International Court of Justice (ICJ) in *Nicaragua v United States* (1986) ICJ 14.[2] According to Abbas, the general writers and States' understanding is that only the use of force prohibited by Article 2(4) of the UN Charter (Abass, 2012). Proponents of these positions provide the following reasons. First, they argue that since the U.N. itself was formed in response to the Second World War tragedy, the force referred to in the provision means the type of force used during that war, which relates mainly to military force. Secondly, the history of the negotiation of the U.N. supports this view. That is when discussing the formation of U.N. at a conference held in San Francisco USA, some states brought the idea that economic aggression should form part of the prohibition. However, this idea was rejected by the majority of the participants on the basis that States can decide to or not to engage in business activities with one another. Therefore, one state's refusal to trade with another should not be considered a violation of international law (Abass, 2012).

Article 2(4) of the UN Charter is considered a principle of customary international law that is applicable to all the States across the world (Skubiszewski, 1968; Henkin et al., 1993; Henkin et al., 1987). The reference to 'force' instead of war is helpful and, therefore, covers circumstances where violence is used but falls short of the state of war's technical requirements (Shaw, 2002). However, although the only military force is restricted under Article 2(4) of the UN Charter, the United Nations has expressly made it clear that economic sanctions are also not acceptable when used to coerce States. The U.N. General Assembly's Declaration on Principles of International Law Friendly Relations and

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1 Doctrinal research is concerned with legal preposition and doctrines. It is research into the law and legal concepts. The sources of data are legal documents and appellate court decisions.

2 The full name of the case is *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* [1986] International Court of Justice Rep. 14.

Cooperation among the States should be according to the Charter of the U.N. (United Nations General Assembly, 1970) provides that,

> No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from its advantages of any kind.

It is essential to mention that Article 2(4) of the UN Charter consists of the actual use of armed force and the threat to the use of force (Abass, 2012). Accordingly, the "threat of use of force" includes circumstances where an ultimatum is given to use of military actions if particular requests are not granted (Ishan Jan & Lawan Haruna, 2015). Thus, both threat and actual use of armed force against a sovereign State's territorial integrity is prohibited in International Law (Ruiz, 1997; Shaw, 2002; Harris, 2004).

Additionally, according to the UN Charter, Article 2(4) was considered an International Law principle in the 1970 Declaration on Friendly Relations and Cooperation among the states systematically analysed (Shaw, 2002; Harris, 2004). Firstly, a war of aggression is a crime under international law (International Law Commission, 1980).[3] Secondly, States must not use military force or threat to resolve international disputes. Thirdly, States should retaliate by the use of military force. Fourthly, states must not use force to deprive peoples of their right to self-determination and independence. And lastly, states must not organize, instigate, assist or participate in acts of terrorism or civil strife acts in another State and desist from encouraging the formation of armed banditry in the territory of another state. Although the Declaration is not legally binding in itself, it is vital concerning the interpretation of the relevant provision of the Charter (Ruiz, 1979; Rosenstock, 1971).

The use of forces by the states and intervention into an independent state's domestic affairs are not the same. Intervention is prohibited where it relates to the matters that a state can decide freely under the principle of state sovereignty (Shaw, 2002). The non-intervention principle is part of customary international law and founded upon the concept of respect for the territorial sovereignty of States (United Nations General Assembly, 1965; United Nations General Assembly, 1970). In the case of *Nicaragua v United States,* the ICJ noted that the choice of a political, economic, social, and cultural system and the formulation of foreign choice is solely within a state's power. Intervention becomes wrongful when it involves the methods of coercion towards such choices which must be free ones (United Nations General Assembly, 1965: Article 1-5). Although, a state interference in another state's affairs may not amount to the use of force, it may nevertheless be contrary to international law as an intervention (Harris, 2004). This position has been stated in *Nicaragua v United States* where the ICJ held that the funding of contras, although not an unlawful use of force but it considered an illegal intervention.

Hakimi and Cogan (2016) argue that the rule on the use of force is clear from the synchronicity of two different codes; the Institutional Code and the State Code. This is because these two codes replicate the opposing normative orders, they pull in conflicting directions and both stem from the UN Charter. Each has its own procedural and substantive norms, and its own base of support. The Institutional Code results from the organised and joint decision-making processes of international institutions that harshly restrict the use of force by individual states and thereby reinforce the same institutional processes; restrictive substantive norms channel decisions, as much as possible, through the UN Security Council. The State Code emerges from a disorganized and horizontal

[3] Article 19(3) of the Draft Articles on State Responsibility provides that "a serious breach of an international obligation of essential importance for maintenance of international peace and security may constitute an international crime for which the State may be criminally liable".

decision-making process in which States act or react in specific cases (Hakimi and Cogan, 2016).

Despite the prohibition of military force intervention in the UN Charter, the rule is not absolute, as the Charter recognizes certain situations that may call for the use of such force across countries (Ishan Jan & Lawan Haruna, 2015; Shaw, 2002). To put it succinctly, the Charter outlined certain exceptional cases for the use of military force, namely: (i) military intervention may be deployed in self-defence in line with Article 51 of the Charter; (ii) such force may also be deployed if it is by the U.N. Security Council authorization; and (iii) the use of military force against States former enemy as enshrined under the Article 107 of the UN Charter. They are discussed extensively in the subsequent heading.

## EXCEPTION TO THE USE OF FORCE UNDER THE UN CHARTER

As clearly mentioned in the preceding heading, with the explicit provision against the use of military force enshrined in Article 2(4) of the UN Charter, the rule allows specific exceptions to the provision. In other words, Article 2(4) of the UN Charter forbids unilateral use of force[4] (Abass, 2012) and military intervention used for other reasons than in self-defense. The three exceptions to the rules are as follows,

a. The use of force for the purpose of self-defense under Article 51 of the UN Charter;
b. The use of force authorized by the U.N. Security Council commonly known as 'collective security' as echoed under Article 51 of the UN Charter; and
c. The use of military force against States former enemy as enshrined under the Article 107 of the UN Charter.

With respect to the last exception, the deployment of military force against former enemy States, when the UN Charter was adopted, States such as Japan, Germany, and Italy were considered former enemy states (Abass, 2012). This was because these states fought on the side of Nazi Germany against the rest of the world during the Second World War. When the U.N. was established, Article 107 allowed a U.N. Member State to use military force against any of the former enemy states if the U.N. Member state has a reason to believe that the enemy states was always continuing its aggression policy. However, considering all that former enemy states are members of the U.N., Article 107 of the UN Charter is considered as a dead provision. Therefore, security, this leaves us with two exceptions to Article 2(4) of the UN Charter: self-defense and collective.

Lamba (2019) argues that the exceptions under Article 2(4) of the UN Charter have been practiced and in most of the times they have been practiced, the facts of the circumstance are such that is deemed controversial or even a direct breech of international law, as in the case of Nicaragua, Iraq and Yugoslavia.

[4] Unilateral use of force refers to the force use by one or more States without the authorization of the relevant international bodies such as the UN Security Council. Therefore, the use of force by a single State against another is not unilateral if it is authorized by the relevant authority. Meaning to say, what makes a use of force unilateral is not the number of States that use it but whether or not it is authorized

## Self-Defence

Article 51 of the UN Charter provides that the state that has been attacked by armed group can act in defense either collectively or individually. Thus, attacked state can call and seek help from other States to help defend it against attackers (Abass, 2012).

It is essential to note here that despite the broad acceptance of Article 51 of the UN Charter, there is still a considerable disagreement among scholars and states on the various elements of Article 51. The questions that arise are: what constitutes 'armed attack'? Should a State threaten to attack with nuclear weapons waits until it the attack is being actualized before defending its territory, or can it act in anticipation? What states should do if they are attacked by non-state entities, such as armed bandits since Article 2(4) of the UN Charter mentions only on states? Can states rely on Article 51 of the Charter to unleash force on such group(s)? (Abass, 2012). The discussion below examines these questions and for purposes of clarity the discussion is divided into: an armed attack; objective of self-defense; anticipatory self-defense; collective self-defense; and until when the Security Council has taken necessary actions.

### *Armed Attack*

The phrase 'armed attack' was not explicitly defined under the UN Charter but according to Abas, it is commonly agreed that an armed attack happens if regular forces of one state use force on another state territory (be it sea, airspace or land) (Abass, 2012). This definition raises a question as to whether an armed attack through irregular forces (such as proxy or agents) constitutes an armed attack as conceived under Article 51 of the Charter that may require self-defense?

In this regard, the ICJ ruling in the case of *Nicaragua v. USA* will be relevant. The facts in this case involve Nicaragua's claim before the ICJ was that the United State of America (USA), through its foreigners and personnel working for USA, started actions that the Nicaraguan Government regarded the activities as an attack directed against its legitimate government. Nicaragua further alleged that USA financed and logistically supported the Contras, a Nicaragua insurgent group. The USA, in its response explained that it has a justification for its action, and the action was in collective self-defense of Costa Rica, El Salvador, and Honduras that Nicaragua attacked. One of the issues raised for determination before the ICJ was whether the activities of the USA as complained by the Nicaragua constituted an armed attack? The findings reveal that some of the acts complained of were carried out not by American military personal instead by the agents such as the Contras rebel forces who were supported by the USA. The ICJ ruled that armed attacks shall consist of state regular forces' attacks outside its borders or attacks by irregular forces executing on behalf of that State. As such, irregular forces such as rebel groups and armed bandits can also attack sovereign territory when they act on behalf of a state (*Nicaragua v United States,* 1986). The ICJ further held that acts such as providing weaponry arms and logistical support to the irregular forces such as armed bands or rebels do not constitute an armed attack (*Nicaragua v United States,* 1986).

Upeniece (2018) argues that Article 51 of the UN Charter does not offer a legal definition of the conduct which is considered as an armed attack or the commencement of such an attack. It does not provide strict principles for the use of force for self-defence. Based on that, divergent explanations of this norm have been arising and continuing to change in response to new situations and threats.

The majority of the authorities and scholars support the position that indirect attacks through armed bands, armed groups, mercenaries, or rebels constitute an armed attack. In a related view, Professor Rosalyn Higgins also supported the idea that the use of irregular military forces to launch an attack against another state, from a technical

viewpoint, amounts to a use of military force (Higgins, 1961). Additionally, Riffat (1979) opines that states have devised a new means through the use of armed bands and other secret means in an attempt to avoid the prohibitions of military attacks as enshrined in Article 2(4) of the UN Charter.

It is a well-known fact that the decision of ICJ serves a source of international law and this implies that its decision will have far-reaching effects even if, as in the case of *Nicaragua,* most of the States and writers have a different position on the use of force by irregular forces. Fortunately, the ICJ is not bound to follow its own decision in a similar case (i.e., it is not bound by the 'doctrine of *stare decisis*') and may decide contrary to that which it took in *Nicaragua's case*.

Conclusively, the authors are of the same view as that of Professor Brownlie (1963); Professor Rosalyn (1961), Rifaat (1979), among others, on the use of force through irregular forces using groups such as armed bands, rebels, or armed group, which should be considered as armed attack and thus, State(s) can invoke Article 51 of the UN Charter in the name of self-defense. This is because the law should not be interpreted narrowly considering the facts that nowadays, there are various deceitful means upon which a state can use force against the territory of another without necessarily using its regular forces (such as military personnel of the State), instead, through irregular forces such as armed bands, rebels, and armed group by providing logistical support to the said group in order to launch an armed attack on another State territory.

## *Object of Self-Defence*

After a careful perusal of Article 51 of the UN Charter, only states are allowed to take self-defense actions. The reason for that is that only states are banned from threatening or using force under Article 2(4) of the UN Charter. It is essential to note that states cannot violate Article 2(4) of the UN Charter by attacking other states. Nowadays, non-State entities such as rebel and terrorist organizations also attack states.

However, Article 2(4) of the UN Charter does not allow non-state groups' use of force. Therefore, the provision does not prohibit these groups from attacking one another or against the states. Hence, they have no international legal stance of defending themselves under Article 51 of the Charter when the states attacks them. The provision allows states to use force against non-state entities. The question that begs for an answer is can the states defend themselves under Article 51 of the UN Charter when non-state entities attack them?

The ICJ in the case of *Palestine v. Israel* (Occupation of the Palestinian Territory) ruled that Article 51 establishes the existence of an inherent right of self-defense in a situation of an armed attack by one State on the territory of another state. Meanwhile, Israel does not establish such an attack against its territory as ascribable to a foreign state (International Court of Justice, 2004). The Court's explicit link of self-defense to an attack by a state in that sentence could lead to claims that the Court said that only attacks caused by states lead to a right of self-defense. The Court noted that Israel never establishes that the attack is imputable to a foreign state. The 'imputable' reference suggests that the ICJ recognized self-defense right against acts done by insurgent or terrorist entities on behalf of a state (Abass, 2012).

After a careful perusal of the UN Charter, it is noted that there is no single provision in the Charter that prohibits States from taking self-defense actions against non-state entities. Based on the above, some states like the USA have taken actions against non-states entities such as al-Qaeda in the name of self-defense. For instance, following the attacks on the USA in respect of 11$^{th}$ September 2001 (9/11 attacks), the USA government relied on Article 5 of the North Atlantic Treaty and invited NATO member

states to assist in defending it against al-Qaeda group who claimed to be responsible for the 9/11 attacks. Article 5 of the North Atlantic Treaty provides,

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or parties so attacked by taking forthwith, individually and in concert with the other Parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area… Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace.

Additionally, the Organization of American States (OAS) also assisted the USA in self-defense against al-Qaeda. Article 28 of the 1948 OAS Charter provides as follows,

> Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.

Although self-defense against insurgents or terrorists is permissible, the pertinent question remains on what basis would a state act in self-defense against such groups, not being state?

According to Abass (2012), to act in self-defense against a non-state entity, a member state that has been attacked has two options. First, it might show that a non-state entity carries out the attack, the attack is carried out with the implicit or definite knowledge of a state, or that the latter condones the act or at the very least, its consent to the act. For instance, considering al-Qaeda operated out of Afghanistan with the proven knowledge and acquiesces of the Taliban government in that state, the terrorist attack on the USA would be regarded to have been carried out by Afghanistan under international law (Abass, 2012).

The other basis for acting in self-defense against non-state entities is that since Article 51 of the UN Charter prohibits the states from taking such measures, then non-state groups are consequently among those that can be attacked in self-defense (Abass, 2012). Considering the terrorist organizations always operate within a state, it is unlikely that states will always establish the linkages between those groups and their host states. Additionally, since terrorist organizations usually have their ammunition within the states territory, it would be challenging for an attacked state to target those weaponry arms belonging to the terrorist without attacking the host country. Therefore, the attacked state needs to establish a link between the terrorists and the attack before acting in self-defense (Abass, 2012).

Notwithstanding the terrorist organization's presence on a state territory, it should be noted that it does not necessarily make that State liable for that group's activities in self-defense. The fact that the state is ought to be aware or aware of the terrorist organization's presence on its state is important in drawing a link between the state and the group (Abass, 2012).

## *Anticipatory Self-Defence*

Article 51 of the UN Charter requirement that self-defense right can only stand if an armed attack 'occurs' is very controversial. What does 'occurs' connote? Does it mean that state should not act until it has been attacked? What should a state threatened with nuclear weapons do?

Some hold the position that when a state is challenged by an irresistible sense of danger deemed an imminent attack, states cannot afford to wait for an attack to occur before they do something. Therefore, the states facing such a threat can act in anticipation of an attack. This is known as 'anticipatory self-defense' (Abass, 2012). For instance, in 1981, Israel launched an attack on the Iraqi nuclear reactor in Osirak in the name of self-defense on the ground that Iraq directed its nuclear weapons towards Tel Aviv (United Nations Security Council, 1981).[5]

It is observed that under the UN Charter, there is no single provision on anticipatory self-defense. However, as a right, self-defense has its origin from customary international law, and the rules backing it were stated in the celebrated case of *Carolina Affair* of 1837 (Abass, 2012; Brownlie, 2008). The facts of *Carolina Affairs* case were based on a dispute between the USA and United Kingdom (U.K.) over Canada's issues. In 1837, some Canadians conspired with Americans to plot an insurrection against the U.K., the then colonial authority in Canada. Both mutinies were crumpled, but some succeeded in fleeing to the USA. The rebels recruited the U.S. steamboat services, Carolina, which was used for mobilization of arms and troops. Thereafter, the British authorities destroyed their logistics among which is the boat that was pushed over the Niagara Falls. Consequently, the British Secretary of State, Daniel Webster justified the act of the British authorities and argued as follows,

> … the necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada - even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be strewed that admonition or remonstrance to the persons on board the '*Carolina'* was impracticable, or would have been unavailing: it must be strewed that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror (*People v Mcleod*, 1841).[6]

It is observed that the ICJ had declined to comment on anticipatory self-defense based on the issues brought for determination before it was concerned with real attacks and not an imaginary one (International Court of Justice, 1996*)*[7] Abass (2012) observes that regardless of differences among states and scholars on anticipatory self-defense, the developments after the 9/11 attacks in the USA have augmented the status of anticipatory self-defense in international law. Abass (2012) further noted that these are strangely

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5 This action of Israel against Iraq was condemned by the United Nations Security Council in this resolution.

6 Restated in this case.

7 Particularly the dissenting opinions of Judge Schwebel; Judge Koroma and Judge Higgins.

different situations from when Israel attacked Iraq in 1981. After the 9/11 attacks, the USA has become the loudest and utmost assertive claimant to anticipatory self-defence, and thereafter, incorporated it in its national security strategy. Sequel to that, former American President, George W. Bush once said,

> For much of the century, America's defence relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence - the promise of massive retaliation against nations – means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies… Our security will require transforming the military you will lead – a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for *pre-emptive* action when necessary to defend our liberty and to defend our lives (Bush, 2002).

Under international law, it has not been settled as to whether a state has a right to defend itself in anticipation of an attack. However, nowadays, there is an increasing number of states claiming this right of anticipatory self-defense. For instance, after President George W. Bush statement portraying Iraq, Iran alongside North Korea as part of the 'axis of evil'. North Korea responded that it could launch an attack on the U.S. if it were to feel threatened by the USA acts (Abass, 2012). North Korea interpreted President Bush's statement as a prelude to imminent attack.

It is noted that the U.N. Security Council has also become more interested and supporting states who invoked anticipatory self-defense or acting under Article 51 of the UN Charter. This is justified in Resolution 1373 of the U.N. Security Council where its mandated states to attack terrorist groups proactively, and the said Resolution provides,

> The Security Council,
> *Reaffirming* also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11th September 2001, and expressing its determination to prevent all such acts, …
>
> 2. *Decides* also that all States shall:
>
> …
> (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
> (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to *prevent and suppress* terrorist attacks and take action against perpetrators of such acts … (United Nations Security Council, 2001).

From the above Resolution, U.N. Security Council has mandated states to make required efforts to avert committing terrorist acts, including warning early through information exchange. For instance, a state may warn another state early about a plan being orchestrated in its state, or that of a third state which is to lead to an attack against another state, nothing stops the threatened state from attacking the group planning the attack (Abass, 2012). It is noted that paragraph (c) of Resolution 1373 enjoins states to cooperate in order to 'prevent and supress' terrorist activities, which can be read to include anticipatory action that is preventive. Thus, the Resolution tilt toward favoring an action fully (Abass, 2012). Hence, the Security Council still requires some evidence, such as giving an early warning before a State can forestall a terrorist attack. This indicates that

anticipatory self-defense must base on real evidence of an impending attack (Abass, 2012).

Consequent to the above discussions on anticipatory self-defense, for justification of a State attack launched in anticipation of an attack, it must show that there is compelling evidence of an imminent attack on its territory; state attacks out of necessity, and its attack is proportionate. It is further observed that after the 9/11 attacks in the USA, the support given to anticipatory self-defense doctrine has increased tremendously. There is considerable support by the U.N. Security Council for States using the doctrine to prevent terrorist activities, and for States that want to invoke the doctrine, must show that there is a plan by a group to attack that state.

## *Collective Self-Defence*

The ICJ in the *Nicaragua v. USA,* while pronouncing on what constitutes 'armed attack', also made a pronouncement as what composes of 'collective self-defense' under Article 51 as follows,

> It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another state to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the state for whose benefit this right is used will have to declare itself to be the victim of an armed attack.

As per the above decision of ICJ, it is, therefore, imperative for the attacked State to explicitly request the military assistance of other states to defend its territory. The ICJ held further that,

> At all events, the Court finds that in customary international law, whether of a general kind or that particular to the Inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

The basis behind this approach appears fairly understandable: formally inviting other state(s) for collective self-defense prevents the risk of losing ground to third states who might want to take advantage of the attacked State and intervene in a situation that do not have any direct link to them (Abass, 2012). However, requiring an attacked state to explicitly request help from others to defend it appears excessively formalistic (Green, 2021). Such a requirement is not evident from the provision of Article 51. According to Abass (2012), this requirement is just a matter of courtesy, and it does not mean without such a request, there could be not have been valid collective self-defense.

## *Until the Security Council has taken Measures Necessary*

A state's right to defend itself does not exist *ad infinitum*, without limitation or time limit. It is available to States only until the U.N. Security Council has taken necessary actions to ensure security and peace. Once the Security Council intervenes, the right terminates.

Additionally, a State must report whatever self-defense measures adopted to the Security Council. However, such actions taken by the States in the name of self-defense cannot prevent the U.N. Security Council's appropriate measures necessary.

According to Abass (2012), the phrase "until the Security Council has taken measures necessary" shows that Article 51 of the UN Charter's essence is to give an opportunity to the States the right to defend themselves pending Security Council's actions. He added the intent was not to confer the states the powers of the Security Council. Therefore, once a State decides to defend itself before the Security Council took any measures, the state decides whether the Security Council's subsequent actions are sufficient to protect its territory. Yet, if the Security Council acts first, then the states cannot claim that the Security Council's actions are insufficient and resolve into their actions (Abass, 2012).

## Collective Security

The term 'collective security' has not been defined by the UN Charter, but several scholars have attempted to define the term. One of the commonly adopted definitions is that collective security is "the use of preponderant force for the maintenance of international peace and security" (Abass, 2012). Various researchers who defined the term 'collective security' have concluded that collective security is a measure that is authorized only by the U.N. Security Council (Downs, 1994; Weiss, 1993). In other words, 'collective security' means the use of overwhelming force to enforce the international community's will (Abass, 2012). Certain points stand out from this definition. First is the idea of the 'use of preponderant force' which connotes to the magnitude of force deployed. The word 'overwhelming' is sometimes used to mean the attack that is launched collectively against a violator of peace. However, the word also implies that the 'preponderant' force is used on behalf of and enforces the will of the international community'. 'International community' in the current situation means all of the nations of the world, including both non-members and members of the U.N.

In all situations, collective security needs approval from any competent organ of the international community, i.e. the U.N. as Security Council or any other recognized organ of the U.N. It is important to differentiate the unilateral use of force from collective security. Unilateral action is an action taken by one or more States but without the authorization of the U.N. Security Council or any other competent representative of the U.N. While collective security is an action taken with the authorization by any international community's competent organ.

Wherever there is an issue at any time in the world, such as the violation of Article 2(4) of the UN Charter by a state. The Security Council is required to officially inform the United Nations members that there is an issue and that issue threatens or has violated international peace. In legal language, this is called a 'determination' that there is a threat to peace, violation of the peace or act of aggression. The Security Council makes this determination by adopting a resolution under Chapter VI of the UN Charter.

Once the U.N. Security Council makes a determination, it will usually follow this with provisional measures such as asking the states to stop worsening the situation, commencing negotiations to resolve the dispute, and imposing economic embargoes or sanctions. Suppose the states refuse to comply with the Security Council provisional measures under Article 40 of the UN Charter, the Council will impose economic sanctions under Article 41 of the UN Charter.[8] Petreski (2015) opines that the exclusive right of

[8] Article 41 of the UN Charter states that: "The Security Council may decide what measures not involving the use of force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal,

using force is placed only in the UN Security Council. However, nothing impairs the inherent right of individual and collective self-defense in case of committed armed attack against any member State of the UN until the Security Council takes the necessary measures for restoring international peace and security.

## CONCLUSION

Based on the above discussions, this manuscript demonstrates that the restriction against the use of forces as enshrined in Article 2(4) of the UN Charter is not absolute as the Charter recognizes certain situations that could call for the use of military force in international relations such as self-defense under Article 51 of the Charter and collective self-defense (authorization by the U.N. Security Council) under Chapter VII of the UN Charter. The analysis demonstrates further that both the actual and threat to use military force against a state sovereignty territorial integrity are prescribed under international law. On the anticipatory self-defense, the analysis shows that the attacked state must established a link between the terrorists and a state before acting in self-defence and for a state to justify its action taken in anticipation of an imminent attack, it must show that there is a convincing justification of imminent attack on it; its attacks out of necessity; and its action is proportionate. Further, the right of a state to defend itself is not without limitation or time limit. Such right is available to states only until the U.N. Security Council have taken actions necessary to ensure international peace and security. While unilateral action is an action taken by one or more states but without the U.N. Security Council's authorization or any other competent representative of the U.N., collective security is an action taken with the authorization by a competent international community organ.

Additionally, discussion in this manuscript demonstrates that the U.N. Charter has not defined what amounts to "armed attack." Consequently, the researchers opine that there is a need to amend the UN Charter to insert a clause that will extend the definition of 'armed attack' to include acts by regular forces beyond its borders under Article 51 of the Charter including irregular forces. Such provision should also provide that providing weapons and logistical support to irregular forces such as armed bands and rebels is to be considered as armed attack under Article 51 of the UN Charter.

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telegraphic, radio and other means of communication, and the severance of diplomatic relations".

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