**Conquest, Aggression and the Prohibition of Force in International Law**

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 The prohibition against the use of force by states is one of the most deeply embedded legal norms in international law and diplomatic practice. All students of international relations are acutely aware of the commitment made by all members of the United Nations to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”[[1]](#footnote-1) The only exceptions are exercising their “inherent right of individual or collective self-defense if an armed attack occurs” against them, or actions initiated by the Security Council “to maintain or restore international peace and security.”[[2]](#footnote-2) This is accepted in principle by all states in the world inasmuch as all are members of the United Nations, and no state has ever renounced or even questioned the prohibition since it was implemented in 1945.

Yet despite the U.N. Charter’s general ban against the use of military force, many acts of state violence are common and some are tolerated by the international community.[[3]](#footnote-3) No one questions the legal right of the Security Council to take any action it chooses based on its own judgement of the situation. The Charter essentially gives the Council a blank check and there is no avenue for appeal.[[4]](#footnote-4) The issue is the extent to which states, individually or in concert with others, can use force when the Council does not act.

This raises a number of questions: Does the principle prohibit all uses of force under all circumstances regardless of its intensity and purpose, or only that which results in a certain level of harm and threatens the “territorial integrity and political independence” of the target state? Is the concept of self-defense narrowly limited to directly repelling an armed attack as it is occurring or can it be more broadly construed to include responding to an act of aggression after the attack is completed? Indeed, how is the term “armed attack” specifically defined? Does the prohibition against the use of force eclipse all other legal norms and values, such as the protection of human rights or self-determination, when they are in conflict? Does it apply equally to retaliatory attacks against non-state actors within the territory of other states?[[5]](#footnote-5)

This is complicated by the fact that the concept of military force itself encompasses a wide range of practices of varying severity, from limited retaliation for an unfriendly act, to extended air and naval bombardments, pre-emptive attacks, cross-border incursions, regime change, invasions, and military occupations. Not all uses of force are the same.

This paper will argue that while in theory the U.N. Charter prohibits all uses of force besides immediate self-defense, in practice there is a hierarchy in international law regarding the types of armed violence employed. Specifically, I hold that conquest, regime change, and unprovoked aggression are prohibited under all circumstances, while armed attacks against non-state actors who engaged in armed violence and certain forms of humanitarian intervention are tolerated. The legality of reprisals and anticipatory self-defense are contingent on the specific circumstances and the degree to which the principles of proportionality and necessity are followed.

I also argue that the best methods for understanding the legal obligations of states regarding the use of force is to neither focus on the text of the U.N. Charter or on state practice since its ratification. Rather, the legal rules on the use of force as those that have been developed (and sometimes modified) collectively by the international community, as expressed through international organizations and judicial institutions. I dub this the evolutionary approach.

This paper is conceptual and therefore while it makes some reference to empirical cases, it focuses primarily on legal issues. It is part of a larger project in which the conceptual issues will eventually be applied to such cases.

**Interpreting the Prohibition**

Generally there are three approaches for understanding the prohibition on the use of force in international law. Strict legalists tend to focus on interpreting the text of Article 2(4) and the decisions made by international judicial bodies such as the International Court of Justice. Others examine state practice to determine if customary international law has modified or replaced 2(4). Still others consider the prohibition within the context of contemporary *opinion juris* (a widespread belief that a common practice constitutes a legal obligation) and competing values, and take into account the evolution of the international community since 1945.

**Legal Positivists**

 Most legal analysts and international law scholars adopt a strict legalistic approach, holding that the ban on use of force is not only a treaty obligation, but one of the most solemn commitments states have made to each other. This is continually reinforced by constant reference to it by the Security Council, General Assembly, the International Court of Justice, regional security bodies and individual states.[[6]](#footnote-6) From this perspective, despite frequent violations, the prohibition on the use of force remains solid as a matter of international law. Thus, the task for these legal positivists is to define and interpret key concepts in Article 2(4), such as “the use of force,” “armed attack,” and “territorial integrity and political independence,” to determine exactly what types of behavior are prohibited.[[7]](#footnote-7) Within this group there are two main schools, the restrictionists and expansionists (also known as counter-restrictionists).

Restrictionists use traditional positivist methods to argue that the prohibition of the use of force is clearly and unambiguously articulated in the Charter and remains virtually unchanged. While they see some room for interpretation, they argue that this should be accomplished by deconstructing the text using the ordinary meaning of the words, rather than re-interpreting them according to contemporary values and interests.[[8]](#footnote-8) They hold that the proper way to pursue this is to analyze the language of the Charter and study the *travaux preparatoires* (official records) of the 1945 San Francisco conference to determine precisely what the conference delegates intended when they drafted and approved the document. In the absence of Charter amendments or a new treaty, the original meaning holds.

Thus, many legal analysts argue that the Charter is unambiguous in prohibiting all uses of force, save self-defense, and this applies whether or not the attack threatens the territorial integrity or political independence of the state.[[9]](#footnote-9) Oliver Corten’s extensive study concludes that the majority of states have solidly refuted arguments used to justify any use of force that broadens the possibilities enshrined in the UN Charter, such as preventative war and humanitarian intervention. The principles on the use of force, Corten argues, are the bedrock of a U.N. system that remains firmly intact. Despite new interpretations that have developed over the past few decades, James Henderson adds, none of the articles in the Charter have ever been modified.[[10]](#footnote-10)

Referring to the *travaux preparatoires*, Tom Ruys argues that the delegates to the San Francisco conference made it clear that it was their intention to state in the broadest terms an absolute all-inclusive prohibition that would insure that there be no loopholes, by adding the phrases “in any other manner” that is “inconsistent with the purposes of the United Nations” to Article 2(4).[[11]](#footnote-11) Thus, while there might be some flexibility in determining how far a state can go in exercising its right to self-defense, there is nothing in the Charter that allows consideration of the intensity or purpose of an armed attack when determining its legality, nor can states engage in pre-emptive or retaliatory action.

A significant number of these legal scholars go even further, holding that these Charter rules are not only binding as a matter of treaty law, but that they are among a very small number of legal norms that have achieved the status of *jus cogens.*[[12]](#footnote-12)Principles of *jus cogens* are binding on all legal subjects regardless of whether they have specifically consented to them on an individual basis, and cannot be modified either by state practice or even treaty. Thus, Charter rules regarding the use of force can be regarded as forming the basis of a general rule of international law. This is not only evidenced by the consistent articulation of this principle by a wide range of states (and the lack of protest from others), but also their inclusion in the charter of every regional organization and court decision.[[13]](#footnote-13)

The expansivists allow a greater role for interpretation and state practice in determining legal obligation regarding the use of force, and reject limiting it to a strict textural analysis of the Charter. Arthur Weisburd, for example, argues that since widespread practice can overturn or modify a treaty, Charter rules cannot be derived from either the text or the intent of the drafters without taking into account the subsequent behavior of states over the past decades.[[14]](#footnote-14) This approach moves beyond the formalism of treaty text and places the law on the use of force within the context of the particular circumstances of each case.[[15]](#footnote-15) Thus, for example, although the Charter clearly states that even the threat of force is prohibited, in practice states do not view this alone as a serious violation.

Therefore, while the expansivists do not argue that Article 2(4) is either irrelevant or nonfunctioning, they hold that it has been modified over time by state practice, which forms the basis of new customary law. As such, the prohibition on the use of force is fluid, depending upon the degree to which the international community sanctions particular military actions taken by a state. Weisburd argues that even when a treaty purports to govern state behavior, state practice under the treaty can be a key factor in evaluating the legal obligation the treaty creates. “If practice under the treaty makes it impossible to predict that states' future behavior will conform to the treaty text,” Weisburd contends, “the text loses its legal force.”[[16]](#footnote-16) The only way to determine this is to rely on a “obey-or-be-sanctioned” standard, whereby the relevance of a legal rule is determined by the degree to which states act against those who violate it. Thus, international law on the use of force is better derived from state practice than from treaties.

From this perspective, if state behavior can be shown to conform generally to what amounts to tacit rules on the use of force -- and if states generally enforce such rules against other states -- then the resulting pattern of practice strongly supports the argument that the use of force is affected by law at a very practical level. The most important determination of legal rules regarding the use of force, then, is that which is made by officials of individual states as they decide whether to use force in particular cases and how to respond to uses of force by other states.[[17]](#footnote-17) It is therefore the practice of states and their views on the use of force, rather than resolutions by international organizations or decisions by international courts, that tells us what the law is. Drawing from a detailed study on cases where states used force during the Cold war, Weisburd argues that the rules of on the use of force embedded in the United Nations Charter have been modified by patterns of practice that have established far more permissive standards. He concludes that the only acts that are consistently condemned are classic invasions, defined as an intrusion of another’s territory by the armed forces of one state against the territorial integrity or political independence of the target state.

There is clearly merit to this argument, not the least because it is supported with empirical data. At the same time, the approach is limited. States act for a variety of reasons, often not based on an interpretation of their legal responsibilities, so their behavior or policy decisions alone are not adequate factors for determining legal obligation. Moreover, practice can vary considerably -- even by the same state -- while legal interpretations tend to be more stable.[[18]](#footnote-18) We must therefore look, not simply at the actions of individual states, but by developments within the international community as a whole. Actions by one or more states, even if the numbers are large, do not create new customary law without the requisite *opinio juris*, which requires a general consensus within the broad international community to accept the practice as creating or modifying a legal norm.[[19]](#footnote-19) Therefore, the best way to gauge current legal obligations is through an analysis of how international institutions respond to claims by states and how they promote the progressive development of international law.

# Evolutionary Approach

 A more nuanced method for understanding state’s legal obligations regarding the use of force is what I term the evolutionary approach. This method accepts that the prohibition on the use of force is a binding principle in international law and diplomatic practice, but in defining its application and limits, it takes into account developments within the international community since 1945, including the evolution of *opinio juris* and how it is balanced with other principles in international relations. As such, the evolutionary approach not only examines the Charter, as the restrictionists suggest, and state practice, as many of the expansivists advocate, but the way political leaders, legal analysts, and jurists articulate their collective understanding of the rule.

Thomas Franck argues that the UN Charter is not a static system of norms but a framework that provides a “living, growing, and above all discursive system for applying the rules on a reasoned, principled, case-by-case basis” system of rule that can be adapted to the needs of the international community pursuant to the evolution of customary practice.[[20]](#footnote-20) Similarly, Dino Kritsiotis posits that the rule prohibiting force is not absolute, but rather is “open to exceptions, which appear in the form of justifications for action."[[21]](#footnote-21) Such exceptions evolve over time and represent the consensus of the international community. Thus, while the work of Weisburd is very informative and useful, our understanding of the law on the use of force should not be based solely on state practice or the degree to which sanctions are applied to specific forms of state behavior, but also the *opinio juris* of the broader international community.

Such an approach is mandated by several factors. First, the prohibition on the use of force in the U.N. Charter was a unique experiment in international relations -- such a prohibition had never before been attempted on a global scale -- and when the Charter was developed in 1945 no one knew exactly how it would work until it was put into practice.[[22]](#footnote-22) This inevitably means that as the international community evolves and grows, it adopts various ways to reconcile its commitment to the non-use of force with new developments such as de-colonization, the dramatic increase in internal conflicts/civil wars, the growth of regional powers, the progressive development of international law, and the proliferation of international and regional organizations and judicial institutions. As Tom Ruys argues, we cannot stick to a static interpretation of the concept (non-use of force) as it may have stood in 1945, but must pay attention to evolutions in State practice and *opinio juris* subsequent to the adoption of the UN Charter.[[23]](#footnote-23)

Second, unlike most legal agreements in international law, the U.N. Charter is not simply a treaty, but also doubles as the constitutive document of a universal membership organization with several organs possessing the authority to interpret the rules and make political judgements in particular cases. This includes two political bodies (the General Assembly and the Security Council), an administrative office (Secretariat), an adjudication institution (International Court of Justice), and a legal section (the International Law Commission - ILC).[[24]](#footnote-24) This provides a foundation for interpretation and application that is not based on the expediency and parochial interests of individual state practice.

What emerges from the vast legacy of recorded debates and decisions of these principal political organs over time is that they tend to treat the Charter not as a static formula, but as a constitutive instrument capable of organic growth. Thus, the determination of whether a state’s recourse to force violates its legal obligations under the UN Charter does not lie exclusively with the black-letter text of Article 2(4), but rather how it is interpretated and modified by the activities of UN organs and constituent states, as well as the interaction among them.[[25]](#footnote-25)

This has been enhanced by the growth of numerous international authorities, whose analyses and legal opinions greatly influence how states interpret and understand international law.[[26]](#footnote-26) For example, most discussions on the international law of force liberally quote decisions by the International Court of Justice, the International Law Commission, and the International Tribunals for the Former Yugoslavia and Rwanda. Their legal judgements not only persuade legal scholars, but also have a significant influence on legal advisors who work for foreign ministries, national security departments, military organizations, and other executive branch agencies. These counselors, in their official capacity, apply, interpret, and make policy recommendations to government officials on a wide range of issues related to the implementation of international law in a given situation.[[27]](#footnote-27)

In addition to advising policymakers to conform with international law, legal advisors often play leading roles in promoting the evolution of such law, particularly in areas that they consider best suited to national interests. Their common training, experience, and interaction among them create a transnational epistemic community of legal professionals who influence how international law is perceived within their own countries.[[28]](#footnote-28) The interpretation and development of such key concepts as “armed attack,” “self-defense,” “political independence,” and “territorial integrity,” is therefore subject to the actions and decisions of a wide range of authoritative institutions.

Third, while the prohibition on the use of force has become a dominant principle in international law and diplomatic practice, it has to compete with other fundamental principles that have developed over the past decades, such as self-determination and human rights. Such principles have frequently conflicted with the ban on the use of force and the determination as to which one is controlling is usually made by international organizations and the general consensus of the international community. I will return to this point below.

Thus, since 1945, the UN regime on the use of force has tried to preserve its normative, and operational relevance by adapting and responding to changes in the broader political and legal landscape. Such developments were gradual and incremental and were often contested. At the same time, states – both individually and collectively – have gradually started to reclaim some of their prerogatives in relation to the use of force or to security in general.[[29]](#footnote-29)

In fact over time the UN itself has evolved significantly from its original structure and purpose in this area in several significant ways. The organization effectively abandoned Article 43 (the formation of a UN military force to enforce Council decision) in favor of Security Council authorizations of informal coalitions, and “sub-contracting” enforcement to regional organizations.[[30]](#footnote-30) When the Charter was drafted, Article 43 was considered a centerpiece of the organization’s enforcement mechanism. In the absence of this key piece, regional organizations and international coalitions have been forced to assume these tasks.

Moreover, the primary method for U.N. action to resolve conflicts is one that is neither mentioned nor even implied in the Charter, peacekeeping. The peacekeeping regime flourished during the Cold War when the east-west conflict paralyzed the Council and prevented it from engaging in more direct enforcement measures. It began as an ad hoc initiative by the U.N. Secretary General and has operated under a number of different names -- stabilization mission, interim security force, emergency force, preventative deployment, assistance mission, U.N. operation. On the whole, the purpose of peacekeeping operations has been to prevent, contain, mitigate or put an end to conflicts and possibly to restore peace between warring parties.[[31]](#footnote-31)

Fourth, the Council has significantly expanded its Chapter VII authority well beyond its traditional role as guardians of international peace and security by taking action in the areas of humanitarian assistance (Somalia, 1992), racial equality and self-determination (Rhodesia in the 1960s and South Africa in the 1980s), restoring democratic governance (Haiti, 1994), protecting populations from internal violence (Former Yugoslavia, early 1990s; Sudan, early 2000s; Syria, 2010s; and Libya, 2011), and creating international tribunals to prosecute political leaders who are responsible for committing atrocities (former Yugoslavia, Rwanda, East Timor, 1990s). In each case, the Council redefined what constitutes a “breach of the peace” in a way that was never contemplated by the delegates to the San Francisco conference. This greatly expanded their role in situations that were not precipitated by an armed attack by one state against another.

At the same time, although the UN Charter provides the framework for regulating the use of force in international relations, it exists within a broader political and institutional context involving a wide range of international and regional organizations, treaties, rulings and opinions of international judicial bodies, and customary law. Indeed, they have all played a role in defining and/or refining such key ambiguous terms directly related to the debate over the use of force including “armed attack,” “self-defense,” “territorial integrity and political independence,” and “breach of the peace.”

For example, the U.N. General Assembly 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States reiterates Charter ban on use or threat of force, however it includes two provisions that could be interpreted as expanding the definition of armed attack, and therefore grounds for self-defense:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[[32]](#footnote-32)

This was essentially the foundation of the legal arguments advanced by the United States justifying it invasion of Afghanistan in 2001 (although not its subsequent 20-year war) as an act of self-defense, following al-Qaeda’s attack on September 11. U.S. officials argued that al-Qaeda was able to plan and execute this attack because the Taliban-led government had given them safe haven and political and material support in Afghanistan.[[33]](#footnote-33)

 In 1974 the General Assembly incorporated these provisions into its definition of aggression by passing a resolution that stated in part that:

“The actions of a State in allowing its territory, which has been placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State… The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to the acts listed above...[[34]](#footnote-34)

This was reiterated by the African Union when it adopted its Non-Aggression and Common Defense Pact in 2000, stipulating that:

Each State Party shall prevent its territory and its people from being used for encouraging or committing acts of subversion, hostility, aggression and other harmful practices that might threaten the territorial integrity and sovereignty of a Member State or regional peace and security; and

Each state shall prohibit the use of its territory for the stationing, transit, withdrawal or incursions of irregular armed groups, mercenaries and terrorist organizations operating in the territory of another Member State.[[35]](#footnote-35)

 All of these statements expand states’ obligations concerning the use of force, suggesting that violations could be interpreted as constituting an armed attack even if the state’s military forces are not directly involved.

**A Hierarchy of Values**

Franck and Weisbund both suggest that the absolute ban on the use of force in international law is often relaxed in practice, as evidenced by the lack of enforcement or widespread condemnation of many actions that include armed violence. Yet as discussed above, no state has ever taken the position that the prohibition on the use of force is no longer binding. This has been reiterated numerous times by a wide range of international and regional organizations and judicial institutions. So how do we reconcile this dichotomy?

I argue that aside from the parochial political interests of individual states, the international community as a whole generally makes distinctions between types of force, the conditions under which it is employed, and the degree to which its purpose corresponds to principle values that are deploy embedded in international politics. The ban on the use of force may be one of the most important principles in international law, however in practice it must often compete with other principles that many consider to be equally compelling. Therefore the ban is adapted and applied to specific cases. This does not at all reduce the legal obligations of states, but it does place it within a context and forms the basis for distinguishing between types of force.

Although the Charter does not distinguish between types of force, in practice there is a hierarchy in international law regarding the use of force, and states evaluate these obligations depending on these types. This is because the law on the use of force is usually viewed within the context of other principles of international law. As Enzo Cannizzaro posits, in order to determine the legal nature of a particular type of conduct, a process of harmonization must take place” between potentially conflicting values.[[36]](#footnote-36) In the context of the use of force, the following principles apply in all cases and are often used as a basis for evaluating a particular action: territorial integrity, political independence, proportionality, necessity, self-determination, non-intervention, and human rights. All of these principles have been affirmed and reaffirmed many times by multiple international institutions and regional organizations.

Taking this into account I propose three categories of armed force: (1) Those there are strictly prohibited in any and all circumstances; (2) those that are contingent on circumstances and the degree to which they conform to broadly-accepted principles; and (3) those that are technically violations but are often tolerated by other states.

**Absolute Prohibitions**

 In general there are three practices that are universally condemned as illegal under virtually all circumstances: conquest/territorial annexation, regime change, and unprovoked aggression. All three involve blatant violations of the most fundamental principles in international law: territorial integrity, sovereignty and political independence. All of these principles are prominently mentioned in the U.N. Charter and the charter of all regional security organizations; they are fundamental to the existence of the international community even apart from the prohibition on the use of force.[[37]](#footnote-37) Therefore, these three practices are illegal on their face, even when they didn’t involve armed force. None of them involve the exercise of self-defense, even if one takes an expansive definition of the term.

 Prior to the 20th century, states considered conquest to be a legitimate method for expanding their territorial jurisdiction. The proposition that a state who emerges victorious in war is entitled to claim ownership or jurisdiction of the territory it occupied was a recognized principle in international law until World War I.[[38]](#footnote-38) This ended as a legitimate practice with the consolidation of the nation-state system based on the principle of sovereignty, and the decline of colonialism in the decade following the World War II.

The non-recognition of territorial annexation has been so deeply embedded in international law and diplomatic practice that no state has attempted to claim territory as a spoil of war after World War II. Rather, efforts to annex territory have all been justified as a means to right an historical wrong, that is, to reclaim territory that was purportedly part of the country but lost due to a variety of circumstances. Of course, historical arguments are always fraught with contradictory claims, conflicting memories and wildly divergent interpretations. Indeed, most territory has changed hands many times over the years, so it is difficult to determine precisely the point at which the claim can be legitimately based. For these reasons, international law has solidly rejected territorial changes, except made the consent of the parties or in cases where states break apart, merge or dissolve. Forced annexations or border changes imposed from the outside, even if accompanied by a popular referendum, are no longer considered to be an acceptable practice.

 Two bedrock principles have made this an absolute prohibition. The first is territorial integrity, which guarantees the continuing existence of a state within its legally-recognized borders, and renders unilateral changes of the territory by forceful actions of third states an unambiguous violation of international law.[[39]](#footnote-39) The other is the principle of *uti possidetis*, which holds that the borders that existed when a state gained independence remains intact and inviolable until and unless the state voluntarily grants independence to one of its regions.[[40]](#footnote-40)

Article 11 of the Montevideo Convention on the Rights and Duties of States, although enacted back in 1933, remains the standard:

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

The principle of self-determination complicates this inasmuch as it could contradict the principle of territorial integrity in particular cases.[[41]](#footnote-41) However it is clear that that right is held by the population of a particular region, not an outside state or party. Therefore while a people within an existing state may claim a right to secede and form their own polity, no outside party may do so.[[42]](#footnote-42)

 Since World War II, there have been only been four attempts at conquest (Iraq and Kuwait in 1991; Russia and Crimea, 2014 and Russia and Ukraine, 2022; and Indonesia and East Timor), not including disputes over the specific delineation of a border. In each case, the aggressor claimed an historical justification and in each case their arguments were overwhelmingly rejected by the international community.[[43]](#footnote-43)

 A second practice that is universally rejected in international law is the use of armed force to overthrow an existing government or replace it with one more acceptable to the intervener, a practice commonly known as regime change. Regime change is usually undertaken through covert action or by arming and supporting rebels in target countries, rather than an armed attack.[[44]](#footnote-44) However, regardless of the manner in which it is perpetrated, such actions are almost always illegal on their face, violating the principles of sovereignty, non-intervention and political independence. In fact, while states routinely try to influence the domestic politics of other countries, any form of *subversive* intervention, regardless of whether it is accomplished through armed force or covert action, is itself prohibited under the principle of sovereignty, and condemned by numerous resolutions from international and regional organizations.[[45]](#footnote-45)

A third practice that is almost universally condemned is unprovoked aggression, that is, the invasion of a sovereign state with ground, air, and/or naval forces by a state that was not a a victim of a prior armed attack.[[46]](#footnote-46) It is defined by the intensity and scale of the action. Here the distinction between an *act* of aggression (defined as a discrete action) and *war* of aggression (ongoing, sustained conflict with may include the occupation of foreign territory) is useful.[[47]](#footnote-47) Such an act violates all three of the bedrock principles of international law: territorial integrity, sovereignty, and political independence. Unprovoked does not necessarily mean that the invading force lacks legitimate complaints against the victim state, but it does mean that it is a war of choice initiated by the aggressor. The latter is considered to be a far more serious violation.

**Contingent on Circumstances**

 The right of a state to use force to repel an armed attack is uncontested. It is firmly embedded in Article 51 of the UN Charter and remains part of customary law. Whether a state can also do so to assist another state who was subject to an armed attack at their request is a bit murkier, but may be implied within the concept of extended defense. However the use of force to repel an attack as it is occurring is very rare, raising the larger question of how far a state can go to respond to an attack after it has occurred or to pre-empt one that is imminent but has not yet been launched. Both of these are contingent on a number of factors, including the degree to which defensive actions adhere to the principles of proportionality and necessity.

In most cases, claims of self-defense involve responding to an attack after it has already been concluded. This is referred to as a defensive reprisal or a counter-attack.[[48]](#footnote-48) Reprisals are unilateral actions carried out by a state in response to an armed attack committed against it by another state. Although they are initiated after the initial attack has concluded, they are justified as a form of self-defense in that they are intended to discourage the aggressor from launching any further attacks. As such they are designed to be limited and focused. Under customary law they may not injure third parties and must cease as soon as the offending state makes reparations for its illegal acts. Equally important, reprisals may not be initiated to counter a reprisal, a principle to prevent a cycle of violence escalating into open warfare.

Yet there is considerable controversy over the conditions under which an armed response to an attack that has already ended would be considered to be defensive. Many legal analysts consider reprisals to violate the prohibition on the use of force as articulated in Article 2/4, as well as a number of other agreements and U.N. resolutions.[[49]](#footnote-49) Others agree that while such measures might be illegal in isolation, when initiated in direct response to a prior attack it could be considered legitimate grounds to derogate from the normal rules regarding the unilateral use of force.[[50]](#footnote-50)

Derek Bowett argued (back in 1972) that although the Security Council had generally taken the position that reprisals are illegal in most cases, it was never able to stop them, and appeared to be moving to some sort of acceptance of what they considered to be reasonable actions. Indeed, he concluded that the law on reprisals had become divorced from actual practice and was rapidly degenerating to a stage where its normative character was in question.[[51]](#footnote-51) This is based on the position that to confine the legality of responding to an armed attack to immediately repelling the attack as it is occurring could allow an aggressor to use force with impunity. Indeed, it would encourage discrete attacks from aggressors, knowing that their target would not be able to legally respond. This suggests some flexibility in defining when a counter-attack is warranted under the principle of self-defense. Thus, Guy Roberts argues that peacetime reprisals establish an acceptable tool for maintaining a semblance of legal regulation over the use of force short of war."[[52]](#footnote-52)

So under what conditions, other than expediency, would retaliatory attacks be legal or at least accepted as legitimate? The answer depends on several factors: first, whether the provocation (initial attack) was of sufficient intensity and magnitude to warrant a violent response. This raises the debate over whether the prohibition of the use of force requires a certain intensity of harmful effects to be considered an armed attack. States do not always condemn minimally invasive violations of territorial sovereignty, leading to the question of whether there is a minimal threshold in which the ban on the use of force (and consequently, the right of self-defense) kicks in. Like most debates over the use of force, there are conflicting views.

The restrictionist view holds that Article 2(4) encompasses all uses of force regardless of its magnitude, duration, purposes gravity or intensity. According to Tom Ruys, a close inspection of the *travaux preparatoires* (of the conference where the Charter was drafted) reveals that it was the intention of the drafters of this provision to state in the broadest terms an absolute, all-inclusive prohibition.[[53]](#footnote-53) Other argue that there is a threshold below which the use of force in international relations, while contrary to certain rules of international law, does not violate the prohibition on the use of force, and therefore an armed response to a minor incident may not be justified.[[54]](#footnote-54) In fact, one of the main rationales for establishing a gravity threshold is to reduce the potential for escalating conflicts between states, by discouraging a cycle of violence produced by claims and counterclaims, attacks and counter-attacks, sometimes leading to all-out war.[[55]](#footnote-55)

Despite the continued debate, it is clear that many institutions do make distinctions between levels of force, even though it is not clear exactly where the line is drawn. For example, in the oft-cited International Court of Justice case, Nicaragua v the United States (1986), the Court distinguished between “the most grave forms of the use of force from other less grave forms,” and held that the a distinction should be made based on “the scale and effects” of the act.[[56]](#footnote-56) Moreover, the Kampala Agreement, which amended the Rome Statute of the International Criminal Court, defined an act of aggression as one “which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations,” clearly establishing a distinction between levels of force.[[57]](#footnote-57) All of this suggests that the legality of reprisals as a defensive act initially rests on the degree to which the provocation was of sufficient gravity to warrant a response.

In any case, even if this condition has been met, there are still generally-accepted restrictions on the use of reprisals in the exercise of self-defense. The traditional conditions governing self-defense in customary international law was developed in the 1837 Caroline dispute between the United States and the United Kingdom. Under customary law, a claim of self-defense must demonstrate necessity (leaving no choice of means and no moment for deliberation) and that the response must be immediate, overwhelming, and proportionate to the offense.[[58]](#footnote-58) The term *necessity* is used to determine whether the use of force is the only means to achieve legitimate ends of self-defense. At the same time, there might be some relaxation of the requirement that the response be immediate with no opportunity for deliberation.[[59]](#footnote-59)

Beyond this, the legality of a reprisal also depends upon the degree to which the initial attack was a single isolated incident or part of a broader ongoing campaign. This in turn helps to determine when the attack ends and whether the aggrieved state is justified in launching an armed response after the initial attack. Even a narrow view of self-defense must take into account the possibility that the attack might continue and therefore whether a reprisal counts as immediate self-defense. If an armed attack is clearly over, and no further attack is imminent, then force is prohibited and alternatives must be sought. If an armed attack is not clearly over, then the use of force may be justified. However even if an armed attack is clearly over, force may remain lawful so long as further attacks are anticipated.

 At the same time, the nature of the response is at least as important as right to respond. Since the only legal use of unilateral force is self-defense, the lawfulness of the response depends on whether it is considered to be punishment (which would be viewed as retribution and thus illegal), a counter-attack (which under specific circumstances could be legal under the principle of self-defense), or deterrence to prevent future attacks (which is usually considered to be illegal but might be tolerated depending on circumstances). In this vein, Fiona McKinnon argues that a fine line exists between acts of reprisal and those of immediate self-defense. Both are forms of self-help in response to a prior attack, however while acts of self-defense attempt to eliminate an immediate threat, reprisals are often punitive in character. They seek to impose reparation for a particular harm, compel a satisfactory settlement of the dispute created by the initial illegal act, or compel the delinquent state to abide by the law in the future.[[60]](#footnote-60) These in and of itself would not comport with the idea of self-defense.

One the most important factors in determining the legality, or at least the acceptability, of a retaliatory action is its degree of proportionality. In international law, proportionality has a dual role. First, it serves to identify whether a unilateral use of force is necessary and thus permissible in relation to the intensity or scale of the initial attack, or whether the aggrieved state should take more limited countermeasures such as economic or diplomatic sanctions. Second, it serves to determine the type and extent of military action needed to achieve a legitimate goal of self-defense. That is, the degree to which the scope and level of the armed response is proportionate to both the attack itself and to the needs of self-defense.[[61]](#footnote-61) There is therefore a direct relationship between necessity and proportionality.

The principle of proportionality is one of the oldest and most important norms in international law. In contemporary rules on the use of force, it acts as a constraint on the scale, intensity and effects of defensive action.[[62]](#footnote-62) It ensures that a defensive response does not become an offensive attack and that it does not initiate a cycle of violence. At the same time, it is notoriously difficult to evaluate since it requires at least some degree of subjective evaluation.

Many legal analysts hold that proportionality is measured by both quantitative and qualitative factors with respect to the response. Quantitative measures include the scale of the action, the type of weaponry and the magnitude of the damage in order to achieve the goal of self-defense. A qualitative test seeks to establish whether the means employed are appropriate in relation to the aim sought by the victim of the initial attack. In this sense, a proportionate response would be one that is necessary and appropriate to respond to the attack, with less concern over the degree of symmetry to the provocation.[[63]](#footnote-63)

In a study of the Security Council’s official reaction to armed reprisals, Derek Bowett found that the reasonableness of reprisals is often measured by the proportionality of the reaction to the injury, in particular, the type of targets attacked. He suggested that it may be less useful to make a blanket distinction between reprisals and self-defense, and more helpful to distinguish between those reprisals that are likely to be condemned as unnecessary and disproportionate and those that satisfy some concept of reasonableness.[[64]](#footnote-64)

Thus, the type of action that is considered proportionate to the offense that led to the reprisal is often viewed within the context of its goal. Essentially, there are three types of reprisals: reciprocal, cumulative, and deterrent. A reciprocal attack is a direct response to a specific provocation. Whether the provocation justifies a violent response, and if so the scale and intensity of said response, is determined by the severity of the initial provocation. There is therefore a direct link between the scale of the attack and the proportionality of the response. A cumulative reprisal focuses not only on the immediate provocation, but on the accumulation or aggregation of past acts. Henderson refers to this as the “accumulation of events theory,” based on the idea that a series of smaller attacks can cumulatively result in a high degree of gravity and intensity and therefore the standard should be the cumulative effect not each individual one.[[65]](#footnote-65) Deterrence is future directed and is designed to discourage future attacks. In this case, the degree of proportionality is defined less by details of the attack that provoked the response than on the purported necessity to prevent future ones.

While a reciprocol reprisal is often considered legitimate (if not strictly legal), the legality of the latter two is highly controversial within the international community.[[66]](#footnote-66) Deterrence comes very close to being an element of preventative war, a practice that is almost universally rejected by the international community. Moreover, the accumulation of events theory has not gained general acceptance in the international community. It is viewed as being too susceptible to abuse. There are, however, signs that with the growing awareness that transnational terrorist attacks, it is not as widely rejected as it was in the past. As Christian Tams puts it, “states seem to have shown a new willingness to accept the ‘accumulation of events’ doctrine which previously had received little support.”[[67]](#footnote-67) Most legal analysts, however, continue to consider this to be a violation.

**Tolerated**

 There is at least two practices that are often tolerated depending on circumstance, even if not necessarily accepted as legal: anticipatory self-defense (the use of force to avert or deter an attack that has not yet occurred but is in process and imminent) and attacks against non-state actors who have committed acts of terrorism against them.

 Most analysts agree that Article 51 of the UN Charter precludes any use of force before an attack has actually begun.[[68]](#footnote-68) Beyond its illegality, there is fear within the international law community that such actions could easily escalate into open warfare, possibly leading to a World War I scenario.[[69]](#footnote-69) This view has been supported by a relatively consistent series of resolutions by the UN Security Council, and the fact that those states that have exercised this form of armed violence rarely justify it as a form of anticipatory self-defense.[[70]](#footnote-70) However some argue that such a right could be extrapolated from customary law if it meets the standard criteria of necessity and imminence, in cases where the potential victim state has exhausted all diplomatic avenues to prevent the attack from actually occurring.

As Lassa Oppenheim suggests, “while anticipatory action in self-defense is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defense than they are in other circumstances.[[71]](#footnote-71)

While there are few cases where a state has justified its use of force on the basis of anticipatory self-defense, under specific conditions such behavior may be tolerated by the international community. At the minimum, these conditions include imminence and credibility -- that is, there there is solid evidence that an armed attack is highly likely to occur in the immediate future unless some immediate action is taken to prevent it.[[72]](#footnote-72) However determining this is tricky inasmuch as it requires some degree of conjecture, although for a threat to be credible it must be based on considerably more than speculation. Indeed, there must be clear evidence that such an attack has already begun to develop, such that an attack is not only likely but virtually inevitable.

According to U.N. Secretary General Kofi Annan, an action to address imminent threats are fully covered by Article 51 and that legal analysts have long recognized that self-defense includes actions to address an imminent attack, as well as one that has already occurred.[[73]](#footnote-73) Although the Secretary General does not have the legal standing to make authoritative judgements on international law, s/he often reflects the prevailing view of the U.N. membership in areas of security. Thus his position does offer some indication of contemporary thinking on the use of anticipatory self-defense.

 One thing is clear however: an extended form of anticipatory self-defense -- pre-emptive or preventative war -- is overwhelmingly viewed as illegal under most or virtually all circumstances.[[74]](#footnote-74) Both of these practices involve launching an attack against a perceived adversary with the justification that the target will pose some kind of security threat in the unspecified future. Unlike anticipatory defense, the perceived attack is not imminent and the evidence that such an attack may be coming does not have to be solid or credible. This argument was made by President George W. Bush prior to the 2003 U.S. invasion of Iraq; his administration claimed that Iraq was developing weapons of mass destruction that could pose a grave threat to the U.S. in the future (the claim was later disproved).[[75]](#footnote-75) Most legal analysts and state officials agreed that there is no foundation for this practice in the law of self-defense.

 Another use of force that is often tolerated, depending on the circumstances, are attacks against non-state actors who launch military or terrorist attacks against a state. Under some interpretations of international law, assaults on the territory or institutions of a state by foreign or transnational non-state organization can be considered to be an armed attack, a designation that would allow for a claim of self-defense by the victim state. This raises several issues. First, the question of intensity is important here. Non-state organizations usually have far fewer resources than states and therefore its attacks are usually much lower in scale, intensity and effects. This could influence the degree to which a state can claim justification in launching a counter-attack..

The issue is not whether attacks against non-state actors violate the prohibition on the use of force against the territorial integrity or political independence of a state. Clearly it does not; only states enjoy the rights of sovereignty and political independence. Since non-state organizations do not have legal authority over territory, the issues of territorial integrity and sovereignty do not arise. Moreover, private groups are not party to treaties or members of international organizations and are not subjects of international law, and therefore they are not protected by the legal prohibition concerning the use of force.

Rather, the issue arises when the victim state chooses to respond outside of its own territorial jurisdiction without the consent of the state where the group is located, based or operates. Victim states can respond to an attack either by targeting the non-State actors and their bases of operation in foreign territory or they can expand their scope and target the state from whose territory the non-State actors operate. To some degree the legality of the response depends on the involvement or culpability of that state where the private group is based. As mentioned above, it is generally accepted that every state has the duty to refrain from organizing or assisting in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts. Moreover, states are required to take an affirmative action to prevent its territory and its people from being used for encouraging or committing acts of subversion, hostility, or aggression against another state.[[76]](#footnote-76)

There are therefore two scenarios in which states could advance a claim of a right to act unilaterally in self-defense: (1) the organization was acting with the support or permission of the state where they are based or located; or (2) the state did not support the attack but was unwilling or unable to prevent the group from acting. In both cases, under the principle of necessity, the victim state is first required to request the assistance of the state in which the non-state actor is located (if the state consents to the presence of foreign forces from the victim state, it does not become a question for international law, since sovereignty and territorial authority rest with the state in power).

In the first scenario, the state itself can be considered part of the armed attack and therefore the response could theoretically be directed against both the state and the group. Even if this is the case, however, any armed response would be limited to the conditions governing the use of reprisals (discussed above).

 In the second scenario, any a reprisal or counter-attack must be focused on and limited to the organization that precipitated the attack.[[77]](#footnote-77) In this case, if the state does not consent to allowing the victim state to attack the perpetrator on its territory, the reprisal itself might be illegal, but it would be a violation of the principles of sovereignty and non-intervention, but not of the use of force, since the attack would not be directed against the state or its institutions.

A particular, and possible unique issue arises when the non-state group is transnational, that is, not based in one location but multiple states. The Obama administration adopted the position that once a state is engaged in an armed conflict with an armed non-state organization, the conflict follows the members of that group wherever they go, as long as the group’s members continue to engage in hostilities against that state.[[78]](#footnote-78) In pursuing this strategy, American military forces have operated in such diverse territories as Afghanistan, Pakistan, the Philippines, Indonesia, Sudan, Yemen, and Somalia. In some of these cases, the host state did not consent to the presence of American forces (air, ground, or both). This pushes the boundaries of a legitimate claim of self-defense.

**Conclusion**

 Despite universal acceptance of the prohibition on the use of force by states, some acts of state violence are accepted or tolerated by the international community. Some of this can be explained by simple expedience -- policy makers often decide whether to use force in a given situation not by examining their legal obligations but by examining the costs and benefits of doing so. Similarly, states will sometimes accept the use of force by their allies and condemn it if practiced by their adversaries, without making reference to international law.

Some legal analysts argue that this means that Article 2/4 “has fallen into desuetude (the abandonment of a legal obligation as a result of nonenforcement or noncompliance), and is therefore no longer obligatory.”[[79]](#footnote-79) Others claim that since the Security Council has generally not fulfilled its central task of acting effectively on behalf of the international community against those who breach the peace, states are forced to exercise their pre-Charter right to self-help. As a result, the ineffectiveness of the UN’s collective security system has led to a new legal paradigm provides greater discretion for states to use force than that which is contained in the Charter.[[80]](#footnote-80)

Yet this remains a distinctly minority view in academic, legal, and diplomatic circles. No government has ever renounced 2(4) or the general prohibition on the use of force. On the contrary, state officials continually evoke the non-use of force principle in international forums, diplomatic exchanges, and speeches. Moreover, since most states do not use force at any particular time, there is actually more compliance than violation. Those that do employ violence typically justify their behavior on the basis of generally accepted exceptions (such as self-defense) and within what can be considered reasonable interpretations, even if their justifications are self-serving and a cover for self-interest.[[81]](#footnote-81) Thus, violations are treated by states, legal analysts and international institutions as breaches of the rules rather than the abandonment of the principle.[[82]](#footnote-82)

 Rather, as this paper has pointed out, over the past seventy years since the ratification of the U.N Charter, states have reconciled their commitment to the non-use of force with new developments in the international community such as de-colonization, the increase in internal conflicts/civil wars, the progressive development of international law, and the proliferation of international and regional organizations. As a result, states and international institutions have made distinctions between the type of force used. Some are prohibited on almost all circumstances. Others are contingent on meeting several stringent conditions. And still others are tolerated, even if not considered to be strictly in adherence with the letter of the law. The determining factor is the degree to which the use of force is consistent with the fundamental principles of the international system, namely, sovereignty, territorial integrity, proportionality, and necessity. Moreover, although not found in the U.N. charter or other documents addressing the use of force, states also consider the magnitude, duration, gravity and intensity of what is deemed as an armed attack or act of self-defense.

 Two areas that this paper did not address are first, the degree to which states may provide armed assistance to other states in internal conflicts and civil wars and second, humanitarian intervention. Neither is specifically addressed by the U.N. Charter. Most interpretations of the legality of assisting a government at its request are based on the principle of sovereignty. Under this principle, the governments in power may request assistance to counter armed rebellions but the rebels may not. Thus, states may accept an invitation to intervene from the government, but they may not assist those who oppose or challenge the sitting government. Such support for rebels would constitute an act of coercive intervention.[[83]](#footnote-83) Of course the direct use of force to assist rebels is very rare. Rather, states accomplish this through covert action and the provision of arms and military training to the opposition.

 Humanitarian intervention is both more complicated and more controversial. At first blush, humanitarian intervention clearly violates the United Nations Charter and the non-use of force principle (there is not even a hint at a humanitarian exception in the ban on the use of force), but its unique character and developments in state practice have rendered this less clear. Legal analysts do not agree on whether the principle of human rights does in fact create such an exception, however there is a considerable basis to suggest that while such actions may not be consistent with the letter of the law in the U.N. Charter, many states have in fact accepted it in theory, depending upon the case.

 This position is articulated by the Independent Commission on Kosovo, created in response to NATO’s use of aerial bombing to protect Kosovar Albanians from attacks by the Serbian government in 1999. This is an important case because it is the first time a state justified the use of force to protect a foreign population (in the other major cases -- India in Pakistan in 1971, Tanzania in Uganda in 1978, and Vietnam in Cambodia in 1979 -- none of the interveners justified their actions on humanitarian grounds). Although controversial, the commission concluded that: “the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”

 This does not come close to resolving the issue, however it does provide an opening for a legal debate.

 There is, of course, a limit to what can be addressed in a single paper, particularly one representing a project that is in its infancy. For this reason, the paper have focused on broad conceptual issues in advancing a case that in practice there is a hierarchy in international law regarding the types of armed violence employed.

1. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, articles 2(4). [↑](#footnote-ref-1)
2. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, article 51 and chapter VII. [↑](#footnote-ref-2)
3. I define the international community as an identifiable group of recognized political actors who establish certain constitutional elements that set out the basic criteria for rights and obligations under international law and diplomatic practice. See Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden and Boston: Martinus Nijhof, 2009). [↑](#footnote-ref-3)
4. The Charter is unambiguous on the Council’s authority: “the Security Council *shall determine* the existence of any threat to the peace, breach of the peace, or act of aggression and *shall make recommendations, or decide* what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security” (Article 39). Moreover, the Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” (Article 42). Italics, mine. [↑](#footnote-ref-4)
5. For a good discussion of these debates, see Christian Henderson, *The Use of Force and International Law,* pp. *216-226.* [↑](#footnote-ref-5)
6. See, for example, Organization of American States (OAS), *Charter of the Organization of American States*, 30 April 1948, article 22; Organization of African Unity, *Constitutive Act of the African Union*, 1 July 2000, article 4(f); Organization for Security and Co-operation in Europe (OSCE),  *Charter for European Security*, 19 November 1999, paragraph 11; U.N. General Assembly, “Declaration on the Enhancement of the effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,” Resolution 42/22, 18 Nov. 1987; and U.N. General Assembly Resolution, “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,” 24 October 1970, A/RES/2625. [↑](#footnote-ref-6)
7. See, for example, Christian Henderson, *The Use of Force in International Law* (Cambridge: Cambridge University Press, 2018. [↑](#footnote-ref-7)
8. See, for example, Yoram Dinstein, *War, Aggression and Self-Defense* and James Henderson, The Use of Force and International Law. Cambridge, UK: Cambridge University Press, 2018. [↑](#footnote-ref-8)
9. See, for example, Ian Brownlie, International Law and the Use of Force by States (Oxford: Oxford University Press, 1963), pp. 265–8; Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge: Cambridge University Press, 2017),, p. 87; and Christine Gray. International Law and the Use of Force. 4th ed. Oxford: Oxford University Press, 2018. [↑](#footnote-ref-9)
10. #  Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2012).

 [↑](#footnote-ref-10)
11. Tom Ruys, The Meaning Of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded From UN Charter Article 2(4)? *The American Journal of International Law* , vol. 108, no. 2 (April 2014), p. 164. [↑](#footnote-ref-11)
12. *Jus cogens* (a peremptory norm of general international law) are those legal rules that are accepted and recognized by the international community of states as a norm from which no derogation is permitted even by agreement. For arguments that apply this to the prohibition on the use of force, see, for example, Oscar Schachter, “In Defense of International Rules on the Use of Force,” 53 *University of Chicago Law Review*, vol, 53, (1986); Alexander Orakhelashvil1, *Peremptory Norms In International Law* 50 (2006); and Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects,” *European Journal of International Law*, vol. 10 (1999). [↑](#footnote-ref-12)
13. See, for example, Antonio Cassese, *International Law in a Divided World*, pp. 137-38, Yorum Dinstein, *War, Aggression, and Self-Defense*, p.92; ILC, “Report of the International Law Commission,” 18th Session, 1966 in the *ILC Yearbook*, vol. 11, p. 247; Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge, 2011). [↑](#footnote-ref-13)
14. A.M. Weisburd, *Use of Force: the Practice of States* (Penn State Press, 1997). [↑](#footnote-ref-14)
15. Hilaire McCoubrey and Nigel D. White, *International Law And Armed Conflict* (Dartmounth Publishing Company, 1992), p. 56. [↑](#footnote-ref-15)
16. A.M. Weisburd, *Use of Force*, p. 20. [↑](#footnote-ref-16)
17. A.M. Weisburd, *Use of Force*, p. 17. [↑](#footnote-ref-17)
18. For example, under the administration of George W. Bush, the U.S. promoted the legal argument that preventative war was an acceptable method of self-defense. His successor, President Barak Obama, firmly rejected this argument. State practice therefore veered wildly in two directions. [↑](#footnote-ref-18)
19. *Opinio juris* is a general recognition among states that a general practice has achieved the status of customary law and is therefore a binding obligation. In other words, widespread practice over time is not enough; states must agree that such practice is a legal norm. See Christian Dahlman, "The Function of Opinio Juris in Customary International Law," *Nordic Journal of International Law*, vol. 81, no. 3, 2012. [↑](#footnote-ref-19)
20. Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), p. 260. Clearly Franck altered the position he held in 1971, when he argued that Article 2/4 was no longer operative. [↑](#footnote-ref-20)
21. Dino Kritsiotis, “When States Use Armed Force,” in Christian Reus-Smit ed., *The Politics of International Law*, p. 45 (Cambridge: Cambridge University Press, 2004). [↑](#footnote-ref-21)
22. The only other attempt to regulate the use of armed violence on a global scale was the Covenant of the League of Nations. The Covenant, however, did not require states to renounce the use of force; indeed it did not even mention the use of force at all, but rather referred to “war or threat of war” and in some cases “aggression.” [↑](#footnote-ref-22)
23. Tom Ruys. *Armed Attack*, p. 22 [↑](#footnote-ref-23)
24. The ILC was established by the United Nations General Assembly in 1947 to promote the progressive development and codification of international law. It consists of 34 legal specialists chosen according to a formula that guarantees representation from all of the world's principal legal systems and regions, as well as participation by legal scholars who are citizens of the five permanent members of the Security Council. In practice, the International Law Commission (ILC) has emerged as one of the most important institutions for developing new legal norms and interpreting and modifying existing rules. [↑](#footnote-ref-24)
25. See Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), p. 174. [↑](#footnote-ref-25)
26. As A.M. Weisburd points out, there two meanings of authority: (1) a person or institution with the legitimate right to issue commands or establish rules by virtue of his or her position in a political or legal hierarchy; and (2) a person or institution whose views are generally respected by a community due to his or her expertise, knowledge, training, and past performance. I am using the second meaning of the term. [↑](#footnote-ref-26)
27. See Andraz Zidar and Jean-Pierre Gauci, eds., *The Role of Legal Advisors in International La*w (British Institute of International and Comparative Law, 2017) and Antonio Cassese, “The Role of Legal Advisors in Ensuring That Foreign Policy Conforms to International Legal Standards,” *Michigan Journal of International Law*, vol. 14, issue 1, Fall 1992. [↑](#footnote-ref-27)
28. In a series of interviews conducted by legal scholar Antonio Cassese, many legal advisors reported a direct correlation between conformity with international legal standards and the need to take into account the pronouncements of regional and global organizations. See his, “The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards,” *Michigan Journal of International Law*, vol. 14, issue 1 (1992), p. 162. [↑](#footnote-ref-28)
29. Russell Buchan and Nicholas Tsagourias, *Regulating the Use of Force in International Law: Stability and Change* (Northhampton, MA: Edward Elgar, 2021), p. 212. [↑](#footnote-ref-29)
30. Article 43 has never been evoked since the adoption of the Charter, however the U.N. Security Council has authorized the use of force a number of times. [↑](#footnote-ref-30)
31. Ronald Hatto, “From Peacekeeping to Peacebuilding: The Evolution of The Role of the United Nations in Peace Operations,” *International Review of the Red Cross* (2013). [↑](#footnote-ref-31)
32. General Assembly Resolution 2625 (XXV) at http://www.un-documents.net/a25r2625.htm) [↑](#footnote-ref-32)
33. #  See United States Department of Defense, “Message to the Force - One Year Since the Conclusion of the Afghanistan War,” news release, August 30, 2022 at https://www.defense.gov/News/Releases/Release/Article/3144082/message-to-the-force-one-year-since-the-conclusion-of-the-afghanistan-war.

 [↑](#footnote-ref-33)
34. Definition of Aggression, United Nations General Assembly Resolution 3314, XXIX of 14 December 1974, articles 3(f) and (g).
 [↑](#footnote-ref-34)
35. African Union, “Non-Aggression and Common Defense Pact,” adopted in Abuja, Nigeria, 2005. Article 5. Although 44 African countries signed the agreement, as of 2023 only 22 have ratified it. [↑](#footnote-ref-35)
36. See Enzo Cannizzaro, “Customary International Law on the Use of Force: Inductive Approach vs. Value-Oriented Approach,” in Enzo Cannizzro and Paolo Palchetti, eds., *Customary International Law on the Use of Force: A Methodological Approach* (Leiden: Martinus Nijhoff Publisher, 2005), p. 253. [↑](#footnote-ref-36)
37. For example, Chapter one, article one of the Charter of the Organization of American States lists as a primary purpose of the organization, “to defend their sovereignty, their territorial integrity, and their independence.” Similarly, Article 3 the Constitutive Act of the African Union cites the defense of “sovereignty, territorial integrity and independence of its member States” as its primary objective. The same terms are specifically highlighted in the Charter for European Security (the Organization for Security and Cooperation in Europe represents all European and North American states, including Russia and its former republics). [↑](#footnote-ref-37)
38. #   [Sharon Korman](https://www.amazon.com/Sharon-Korman/e/B001KD68FC/ref%3Ddp_byline_cont_book_1), *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996).

 [↑](#footnote-ref-38)
39. Marxsen, Christian, “The Concept of Territorial Integrity in International Law – What Are the Implications for Crimea?,” Heidelberg Journal of International Law, 2015. Available through the Social Science Resarch Network at: https://ssrn.com/abstract=2515911 [↑](#footnote-ref-39)
40. See, Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), p. 84 and Giuseppe Nesi, “Uti possidetis Doctrine,” in *Max Planck Encyclopedia of International Law* (Rüdiger Wolfrum ed., 2011). [↑](#footnote-ref-40)
41. Article 1 of the Covenant for Civil and Political Rights, for example, states that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status…” [↑](#footnote-ref-41)
42. Even when sought by the population, secessionist claims may be suspect. Not every cohesive group claiming to be a nation is entitled to secede. To do so it must fulfill the following criteria: The secessionists are a well-defined "people” with a well-documented historic claim to specific territory; the state from which they are seceding seriously violates their human rights; there are no other effective remedies; and the population overwhelming supports it. See Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation, *Yale Journal of International Law*, vol. 16, 1991. [↑](#footnote-ref-42)
43. Iraq’a 1990 invasion and annexation of Kuwait was solidly rejected by every member of the United Nations, resulting in the unanimous passage of Security Council resolution 660, which condemned the invasion and demanded Iraq withdraw immediately and unconditionally to positions as they were on August 1 1990. Similarly, the Russian invasions and annexation of Crimea and four regions in Eastern Ukraine were overwhelmingly opposed by the U.N. General Assembly. The Assembly twice overwhelming voted to condemn the Russian invasion of Ukraine (141-5-35 and 141-7-32). The resolution made specific mention of several treaties and documents from international organizations: Article 2 of the Charter; the 1970 GA Declaration on Principles of International Law concerning Friendly Relation, and the resolution 3314 (XXIX) of 14 December 1974, which defines aggression.  The Chinese annexation of Tibet is a contentious case, however Tibet never actually existed as an independent state in the modern system and currently every state in the world recognizes it as part of China. [↑](#footnote-ref-43)
44. Levin, Dov, and Carmela Lutmar. "Violent Regime Change: Causes and Consequences." Oxford Research Encyclopedia of Politics. 30 April 2020 [↑](#footnote-ref-44)
45. #  Subversive intervention is any action that seeks to foster rebellion, sedition, or treason to disrupt or undermine the existing political authority structure of another state. See Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield, 2005), p. 54.

 [↑](#footnote-ref-45)
46. The classic definition of aggression approved by the U.N. General Assembly is far broader: the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. However this definition is identical to the wording in Article 2(4) of the Charter and therefore encompasses all types of military force. See United Nations General Assembly, Definition of Aggression, Resolution 3314 (XXIX). [↑](#footnote-ref-46)
47. **Noah Weisbord, *The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats* (Princeton University Press, 2019).** [↑](#footnote-ref-47)
48. Yoram Dinstein makes a distinction between a belligerent reprisal, which is a response to an unfriendly act, and a defensive reprisal, which is a response to an armed attack. *War, Aggression and Self-Defense*, p. 271. [↑](#footnote-ref-48)
49. See Shane Darcy, “Retaliation and Reprisal,” in Marc Weller, ed., *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015) and Derek Bowett, “Reprisals Involving Recourse to Armed Force,” *American Journal of International Law*, vol. 66, no. 1 (January 1972). [↑](#footnote-ref-49)
50. Robert Tucker, “Reprisals and Self-Defense: The Customary Law,” *The American Journal of International Law*, vol. 66, no. 3 (July, 1972), p. 589. [↑](#footnote-ref-50)
51. Derek Bowett, “Reprisals Involving Recourse to Armed Force,” 66 *American Journal of International Law*, vol. 66 (1972), p. 2 [↑](#footnote-ref-51)
52. G.B. Roberts, Self-help in Combatting State Sponsored Terrorism: Self-defence and Peace-time Reprisals, 19 Case W. Res. J.I.L. 185 (1987). [↑](#footnote-ref-52)
53. Tom Ruys, “The Meaning of ‘Force’ and the Boundaries of the Jus Ad Bellum: Are ‘Minimal’ Uses of Force Excluded From UN Charter Article 2(4)?, The American Journal of International Law, vol. 108, no. 2 (April 2014). See also,

Special Rapporteur Roberto Ago, Eighth Report on State Responsibility, “The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1),” UN Doc. A/CN.4/318/Add.5–7 (29 February; 10 and 19 June 1980) para. 58. [↑](#footnote-ref-53)
54. Olivier Corten, *The Law Against War*, p. 55 and Mary Ellen O’Connell, “The Prohibition on the Use of Force,” in Nigel D. White & Christian Henderson, eds., *Research Handbook on International Conflict And Security Law* (Edward Elgar Publishing., 2015). Rosalyn Higgins argues that any use of force could trigger the right to self-defense, but that the type of response is regulated by the principle of proportionality. See her *Problems and Process: International Law and How we Use it* (New York: Clarendon Press, 1994), p. 250. [↑](#footnote-ref-54)
55. See Christian Henderson, *The Use of Force and International Law,* p. 223. [↑](#footnote-ref-55)
56. International Court of Justice, “Case Concerning Military and Paramilitary Activities in and Against Nicaragua,” Merits (27 June, 1986), Paragraph 191 [↑](#footnote-ref-56)
57. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Article 8 bis “Crime of aggression,” Kampala, 11 June 2010. I should point out, however, that the International Criminal Court’s standard is based on the prosecution of individuals for international crimes, which may be different from standards regarding treaty violations. Thus, the threshold for criminal law is higher than treaty law. [↑](#footnote-ref-57)
58. See Malcolm N. Shaw, *International Law* (4th ed, Cambridge University Press, 1997), p. 787. [↑](#footnote-ref-58)
59. M.B. Occelli, argues that the requirement to respond immediately does not make sense when attacked by terrorists or when it takes time to determine who was responsible for the attack. "Sinking" the Caroline: Why the Caroline Doctrine's Restrictions on Self Defense Should Not Be Regarded as Customary International Law,” *San Diego International Law Journal*,” vol. 4, 2003, pp. 482-83 [↑](#footnote-ref-59)
60. Fiona McKinnon, "Reprisals as a Method of Enforcing International Law," *Leiden Journal of International Law* vol. 4, no. 2 (September 1991), pp. 231-32. [↑](#footnote-ref-60)
61. For a good discussion of this, see Thomas M. Franck, “On Proportionality of Countermeasures in International Law,” *The American Journal of International Law* , vol. 102, No. 4 (October, 2008), pp. 721 and David Kretzmer, “The Inherent Right to Self Defence and Proportionality in Jus Ad Bellum,” European Journal of International Law, vol. 24, no. 1, 2013, p. 244. [↑](#footnote-ref-61)
62. Tom Ruys, *Armed Attack and Article 51 of the U.N. Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), p. 110. [↑](#footnote-ref-62)
63. See Enzo Cannizzaro, “Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War,” *International Review of the Red Cross*, volume 88, number 864, December 2006 and see Christian Henderson, *The Use of Force and International Law,* pp. 235-37. [↑](#footnote-ref-63)
64. Derek Bowett, “Reprisals Involving Recourse to Armed Force,” p. 11. [↑](#footnote-ref-64)
65. Christian Henderson, *The Use of Force and International Law,* p. 239. [↑](#footnote-ref-65)
66. Derek Bowett, “Reprisals Involving Recourse to Armed Force,” p. 10. [↑](#footnote-ref-66)
67. Christian Tams, “The Use of Force against Terrorists,” *European Journal of International Law*, vol. 20 no. 2 (2009). p. 359 [↑](#footnote-ref-67)
68. See Yoram Dinstein, *War, Aggression and Self-Defense*, pp. 222-235 and Christian Henderson, *The Use of Force in International Law*, chapter 7. [↑](#footnote-ref-68)
69. See James Joll, *The Origins of the First World War*, 2nd ed., New York: Longman, 1992 [↑](#footnote-ref-69)
70. Tom Ruys and Jan Wouters, “The Legality of Anticipatory Military Action after 9/11: the Slippery Slope of Self-Defense,” Studia Diplomatica, Vol. 59, No. 1, 2006. [↑](#footnote-ref-70)
71. Robert Jennings and Arthur Watts, eds, *Oppenheim's International Law*, 9th ed, (Longman, 1992), pp. 121-22. [↑](#footnote-ref-71)
72. Christian Henderson, *The Use of Force in International Law*, p. 282. [↑](#footnote-ref-72)
73. United Nations, “In Larger Freedom: Towards Development, Security and Human Rights for All,” Report of the Secretary-General, 21 March 2005, A/59/2005, paragraph 124. [↑](#footnote-ref-73)
74. See, for example, Council of Europe, “The Concept of Preventive War and its Consequences for International Relations,” Report of the Political Affairs Committee, 8 June 2007, Doc. 11293. [↑](#footnote-ref-74)
75. See Michael E. O’hanlon, Susan E. Rice, and James B. Steinberg, “The New National Security Strategy and Preemption,” The Brookings Institution, Policy Brief 113, December 2002. [↑](#footnote-ref-75)
76. UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV) and UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314. [↑](#footnote-ref-76)
77. See International Court of Justice, Democratic Republic of Congo v Uganda, para 147. See also, Daniel Janse, “International Terrorism and Self-Defence,” Israel Yearbook on Human Rights, vol. 36 (2006), p. 170. [↑](#footnote-ref-77)
78. Ashley S. Deeks, “Pakistan's Sovereignty and the Killing of Osama Bin Laden,” *Insights* (Journal of the American Society of International Law), Volume 15, Issue 11, May 5, 2011. [↑](#footnote-ref-78)
79. Michael Glennon, “The Limitations of Traditional Rules and Institutions Relating to the Use of Force,” in *Oxford Handbook****,*** p.91 and Glennon, (How War Left the Law Behind, NYT, Nov. 21, 2003) and Michael Glennon, “How International Rules Die,” *The Georgetown Law Journal*, vol. 93 and p. 960. See also, Anthony Arend, “Do Legal Rules Matter? International Law and International Politics,” *Virginia Journal of International Law*, vol. 38 (1997-98), p. 107. [↑](#footnote-ref-79)
80. For example, Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the U.N. Charter Paradigm* (Routledge, 1993). [↑](#footnote-ref-80)
81. See, for example, Christian Henderson, *The Use of Force in International Law* (Cambridge, 2018) and Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge: Cambridge University Press, 2017), pp. 100-102. [↑](#footnote-ref-81)
82. Oscar Schachter, American Society of International Law, Washington, D.C., 1990, Proceedings of the 8lst Annual p. 159 [↑](#footnote-ref-82)
83. See Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), chapter 3. [↑](#footnote-ref-83)