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## Self-Defence as a Circumstance Precluding the Wrongfulness of the Use of Force

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### 1. Introduction

Roberto Ago, the International Law Commission's second Special Rapporteur on the topic of state responsibility, defined the notion of self-defence in terms of a legal *faculté* of a state to use force in response to an act of another state which constitutes a breach of the principal prohibition under Article 2(4) Charter. He accordingly inserted a provision in Chapter V to Part One of the study of state responsibility expressing self-defence as a specific factual circumstance precluding the wrongfulness of the use of force which constitutes an individual or a collective measure of resistance against state aggression.<sup>1</sup>

For a considerable period, Ago's thesis lingered in the background of the Commission's study, though it was always accompanied by the mistaken assumption that it merely reaffirmed the lawfulness of conduct adopted pursuant to Article 51 Charter.<sup>2</sup> It was eventually dismantled during the tenure of James Crawford, the last of the Special Rapporteurs on the topic of state responsibility for the commission of wrongful acts. Convinced that the presence of any circumstance listed in Chapter V to Part One of the Draft Articles presupposes the existence of inconsistency between the conduct of a state and an international obligation incumbent on that state, Crawford argued that a state which exercises 'its inherent right of self-defence as referred to in Article 51 of the Charter is not, even *potentially*, in breach of Article 2(4).<sup>3</sup> He also submitted that '[i]t is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51.<sup>4</sup> Disinclined to propose the deletion of a

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1 In a working paper prepared and submitted by Ago to the Commission's Working Group on Responsibility, consent of the injured party, legitimate sanction against the author of an internationally wrongful act, self-defence and a state of necessity were listed as circumstances in which an act of the state would not be wrongful. See *YbILC*, Vol. II, 1963, p. 253. Ago presented his substantial analysis of the notion of self-defence to the Commission sometime after his appointment to the World Court. See R. Ago, Addendum to Eighth Report, *YbILC*, Vol. II, 1980, pp. 51 et seq. During the discussion of Ago's proposal at the Commission, certain members explicitly stated that they did not endorse the Rapporteur's definition and that they considered self-defence to be an inherent right of the state under the Charter. See e.g. Summary Records of the Thirty-Second Session, 1620<sup>th</sup>, 1621<sup>st</sup>, 1627<sup>th</sup> and 1628<sup>th</sup> Meetings, *YbILC*, Vol. I, 1980, pp. 189-194, 220-231, in particular the comments made by Ushakov, Reuter, Schwebel, Díaz González, Pinto and Tabibi. Following various amendments, Ago's proposed provision was adopted on first reading by the Commission and became Draft Art. 34. See Text of the Articles on Part 1 of the Draft Adopted by the Commission on First Reading, *YbILC*, Vol. II (Part 2), 1980, p. 33. It was renumbered as Draft Art. 21 in the final text adopted by the Commission in 2001. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *YbILC* Vol. II (Part 2), 2001, p. 27.

2 See e.g. Text of Articles 33 to 35, with Commentaries Thereto, adopted by the Commission at its Thirty-Second Session, *YbILC*, Vol. II (Part 2), 1980, pp. 59-60.

3 J. Crawford, Second Report, *YbILC*, Vol. II, 1999, p. 74 (emphasis added).

4 *Ibid.*, p. 76. However, Crawford's classification of Article 51 Charter as the expression of a *primary rule* of international law is erroneous. For more on this point see C. Farhang, 'The Notion of Consent in Part One of the Draft Articles on State Responsibility', 2014 *Leiden Journal of International Law* 27, pp. 67-69.

provision which had met no serious opposition since its adoption nearly two decades earlier,<sup>5</sup> the last Rapporteur then saw to it that far-reaching changes were introduced to the accompanying commentary. In its final form, the commentary to Draft Article 21 states that ‘Article 51 of the Charter of the United Nations preserves a State’s “inherent right” of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4.’<sup>6</sup> The commentary subsequently describes the effect of the circumstance of self-defence as that of precluding the wrongfulness of ‘non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision.’<sup>7</sup> The commentary goes on to explain that the broad objective of the rule expressing this circumstance, its *raison d’être*, is to remedy the absence, in contemporary international law, of a separate regime devoted to issues such as the content and scope of belligerent rights and the suspension of treaties upon the outbreak of hostilities.<sup>8</sup>

At first, it is tempting to explain Crawford’s approach to the circumstance of self-defence exclusively on the basis of his mistaken view of the correlation between the notion of circumstances precluding wrongfulness and the binding force of international obligations. The last Rapporteur, it is true, was of the view that ‘Chapter V is only relevant for so long as the obligation, the conduct inconsistent with it and the circumstance precluding the wrongfulness of that conduct coexist.’<sup>9</sup> He also submitted that in situations where a particular circumstance is alleged to be present, ‘conduct does not conform [with the obligation], but if the circumstance precludes the wrongfulness of the conduct, neither is there a breach.’<sup>10</sup> And if such premises are the foundation for the last Rapporteur’s approach to the circumstance of self-defence, they should be disposed of immediately. To that end, it would suffice to point out that the circumstances precluding wrongfulness are expressed by those rules which determine whether or not conduct that is, pursuant to the general rules of attribution, recognised as an act of a legal subject, constitutes a failure by that subject to conform with an obligation made incumbent on it by a particular rule of conduct. Consequently, the exceptional circumstances are not extrinsic to the content of obligations that arise from the primary rules of international law. Neither do they presuppose the binding force of such obligations and merely ask whether there is a right to engage in conduct that constitutes a contravention thereof. Being intrinsic to the definition of the greater majority of substantive obligations,<sup>11</sup> they stipulate that under certain exceptional or *de facto* situations, the binding pull of those obligations becomes *non-existent* and their breach *logically impossible*.

On closer inspection, however, there appears to be another, more telling explanation for Crawford’s deleterious mark on the definition of the circumstance of self-defence. Unlike Ago, the last Rapporteur was a firm believer in the supremacy of the Charter provisions vis-à-vis those rules that are concerned with the *non-obligatory* or *instrumental* consequences of internationally wrongful acts.<sup>12</sup> He in fact went as far as making the odd assertion that Article 103 Charter makes it impossible to determine the scope of

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5 The last Rapporteur’s mistaken view of the correlation between the circumstances precluding wrongfulness and the binding force of international obligations led him to the conclusion that situations where consent is expressed in advance ‘fall outside the scope of chapter V, and indeed outside the scope of the draft articles as a whole.’ On this basis, he proposed that Draft Art. 29 (first reading) be deleted. See Crawford 1999, *supra* note 3, p. 62. This proposal was rejected by the Commission and in the end, Draft Art. 29 (first reading) was renumbered as Draft Art. 20 in the final text adopted by the Commission in 2001.

6 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, adopted by the Commission at its Fifty-Third Session, *YbILC*, Vol. II (Part 2), 2001, p. 74.

7 *Ibid.*

8 *Ibid.*

9 Crawford 1999, *supra* note 3, p. 60.

10 *Ibid.*

11 There are international obligations, particularly in the field of humanitarian law, whose definition and structure exclude the possibility of invoking any of the circumstances precluding wrongfulness. The prohibitions on genocide, torture and apartheid can be given as prime examples of such obligations.

12 That Ago considered coercive measures adopted within the United Nations framework to fall within the scope of the study of state responsibility is shown in the following passage:

‘(...) we do not believe that there is any need at the present stage to embark upon a theoretical analysis of the various measures which might be taken within the United Nations system, or to make distinctions among them and classify them systematically. When we take up the various forms of international responsibility *ex professo*, these questions will be examined in detail. We shall then indicate whether, and within what limits, such measures can be juridically characterized as “sanctions”, which of them are of a “punitive” nature and purpose and which may be described more aptly as a means of constraint to enforce performance of the obligation which has not been complied with.’ R. Ago, Fifth Report, *YbILC*, Vol. II, 1976, p. 34 (references omitted).

self-defence in the backdrop of a text dealing with state responsibility.<sup>13</sup> He also made keen and ultimately successful efforts to reformulate Draft Article 39 (first reading) into a general provision, thus establishing the primacy of the Charter over the Draft Articles as a whole.<sup>14</sup> When seen in this light, it is clear that by extracting the notion of self-defence properly so-called from the Draft Articles, the last Rapporteur had the principal object of preventing the subordination of Article 51 Charter to the terms of Draft Article 1, lest the former provision become circumscribed in one important respect. The fundamental principle that any wrongful act of a state shall entail the responsibility of that state and the idea implied therein – that the state is responsible only for its *own* conduct – would have essentially required that action taken by a state in the name of self-defence should always be preceded by another state's breach of its principal obligation under Article 2(4) Charter. In other words, it would have ruled out the admissibility of the plea of self-defence with respect to force that is enlisted as a reaction against speculative threats of state origin as well as force that is used against any violent conduct which is not attributable to any state.

In this contribution, the aim is to challenge the last Rapporteur's detaching of the notion of self-defence from the principles of the law of responsibility *ex delicto* and to show that as a matter of basic theory and logic, this concept is incapable of covering trans-boundary use of force in situations where a threat is speculated on the part of a state or in situations where some violent and factually injurious act is commissioned by a private actor who is disconnected from the organisation of any state. To this end, in the first part of the analysis, the findings of the International Court of Justice in respect of the notions of *armed attack* and *attribution* in the context of the international law of self-defence will be outlined. Then, the points of criticism which these findings have elicited from international legal writers are very briefly described. Next, it is argued that no analysis of state practice is capable of delimiting the exact scope of Article 51 Charter. It is argued further that the question whether or not recourse to that provision must be preceded by a breach of the general prohibition can be conclusively answered only as part of efforts geared to devising an explanatory account of the situation of self-defence which accurately translates its normative origins and which, moreover, preserves its logical relations with the other, more ordinary but fundamental legal concepts. In the second part of the study, an attempt will be made to formulate such a definition for the concept of self-defence. In that connection, it is demonstrated that any meaningful definition of self-defence will have to exhibit the direct connection between its *definiendum* and the general prohibition on the use of force; distinguish it from certain notions with which it seems to share certain general features; account for the requirements of immediacy, necessity and proportionality; and last but not least, be of explanatory value with respect to action covered by the term *collective self-defence*. The study's conclusion is that respect for these essential criteria in effect leads to a definition for self-defence which is in line with Ago's postulate. According to this definition, self-defence is a *de facto* situation, recognised by a *secondary rule* of international law, whereby the obligation under the *primary rule* contained in Article 2(4) Charter is pushed into abeyance to the detriment of a state which has conducted itself in breach of that very same obligation in respect of another state; or – and this comes to being the same thing – it is a *factual* circumstance which is capable of precluding the wrongfulness of the use of force by a state in response to another state's non-observance of its principal obligation arising out of Article 2(4) Charter.

## 2. The controversy surrounding the notion of self-defence in international law

It has been the constant position of the International Court of Justice that a measure of self-defence must constitute a response to an act of the state through which a breach of the general prohibition on the use of force has materialised. This view is nevertheless opposed on two fronts. On the one hand, it is confronted by the notion that it is also permissible to speak of self-defence in those situations where the

13 Crawford 1999, supra note 3, p. 76. It is not clear to the author of the present article how exactly a treaty provision providing for the supremacy of certain treaty obligations would prohibit the codification of the customary rule which establishes the privilege of self-defence.

14 Art. 39 (first reading) appeared in Part Two of the Draft Articles and provided that '[t]he legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.' Draft Articles on State Responsibility, Part Two, Content, Forms and Degrees of International Responsibility, *YbILC*, Vol. II (Part 2), 1983, p. 43. Draft Art. 59 which appears at the very end of the final text adopted by the Commission reads as follows: 'These articles are without prejudice to the Charter of the United Nations.'

action taken has not been preceded by an actual use of aggressive force by the legal subject against whom this action is taken. On the other hand, it is contested by the idea that the so-called right enshrined in Article 51 Charter or its customary equivalent in addition encapsulates the taking of armed measures in the territory of another state in those instances where some violent conduct which is actual and not merely speculated, fails to attach to that state as a subject of international law. In what is to follow, the approximate boundaries of this debate will be outlined.

### **2.1. The World Court and legal scholarship on the requirement of armed attack**

In what is considered to be its seminal opinion on the international law of force, the World Court found that the exercise of the right of individual self-defence is 'subject to the State concerned having been the victim of an armed attack.'<sup>15</sup> In that instance, it was added that reliance on collective self-defence would not dispose of the need to prove that an armed attack had occurred.<sup>16</sup> Likewise, in the case of *Oil Platforms*, the Court held that

'(...) in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States ha[d] to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.'<sup>17</sup>

In even more decisive terms, in *Construction of a Wall in the Occupied Palestinian Territory*, the Court ruled that 'Article 51 of the Charter (...) recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.'<sup>18</sup> In none of these instances, however, was it really explained why the need to prove the occurrence of an armed attack cannot be dispensed with.

The commentators who are in agreement with the Court on this particular issue have hardly attempted to remedy this shortcoming. In general, they have not, at least expressly, disputed the assumption that prior to the advent of the Charter, the idea of self-defence as conceived under general international law, encompassed the use of force in a wide range of events.<sup>19</sup> Having confined their analyses to international law as it emerged from the devastation of the Second World War, they have instead insisted on the requirement of armed attack by referring to the principle of effectiveness in the interpretation of treaties;<sup>20</sup>

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15 *Military and Paramilitary Activities in and against Nicaragua*, [1986] ICJ Reports, p. 103.

16 *Ibid.*, pp. 103, 122.

17 *Oil Platforms*, [2003] ICJ Reports, pp. 186-187.

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Reports, p. 194. See also *Armed Activities in the Territory of the Congo*, [2005] ICJ Reports, pp. 222-223 where the Court simply presumed the indispensability of a prior armed attack to the legitimate exercise of self-defence.

19 J. Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', 1947 *American Journal of International Law* 41, pp. 877-878; H. Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations', 1948 *American Journal of International Law* 42, pp. 791-792; W. Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations*, 1950, p. 13; H. Kelsen, *The Law of the United Nations*, 1950, pp. 797-798; W. Kulski, 'The Soviet System of Collective Security Compared with the Western System', 1950 *American Journal of International Law* 44, p. 461; H. Wehberg, 'L'interdiction du recours à la force: le principe et les problèmes qui se posent', 1951 *Recueil des cours* 78, pp. 70, 81-82; C. Pompe, *Aggressive War: an International Crime*, 1953, pp. 98, 100; G. Bebr, 'Regional Organizations: A United Nations Problem', 1955 *American Journal of International Law* 49, pp. 173-174; P. Jessup, *A Modern Law of Nations*, 1956, p. 166; K. Skubiszewski, 'The Postwar Alliances of Poland and the United Nations Charter', 1959 *American Journal of International Law* 53, p. 622; Q. Wright, 'The Strengthening of International Law', 1959 *Recueil des cours* 98, pp. 167-168; Q. Wright, 'United States Intervention in Lebanon', 1959 *American Journal of International Law* 53, pp. 116 et seq.; M. Sørensen, 'Principes de droit international public: cours général', 1960 *Recueil des cours* 101, p. 240; L. Henkin, 'Force, Intervention and Neutrality in Contemporary International Law', 1963 *American Society of International Law Proceedings* 57, p. 151; K. Skubiszewski, 'Use of Force by States', in M. Sørensen (ed.), *Manual of Public International Law*, 1968, pp. 766-767; H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, 1972, p. 156; E. Jiménez de Aréchaga, 'International law in the Past Third of a Century', 1978 *Recueil des cours* 159, pp. 95-97; M. Lachs, 'The Development and General Trends of International Law in Our Time', 1980 *Recueil des cours* 169, p. 164. See more recently: O. Schachter, *International Law in Theory and Practice*, 1991, p. 150; Y. Dinstein, 'Sovereignty, the Security Council and the Use of Force', in M. Bothe et al. (eds.), *Redefining Sovereignty: The Use of Force after the Cold War*, 2005, p. 120; Y. Dinstein, *War, Aggression and Self-Defence*, 2005, pp. 182-187; J. Paust, 'Evidence and Promise of Progress', in R. Miller & R. Bratspies (eds.), *Progress in International Law*, 2008, p. 47.

20 Wehberg, *supra* note 19, pp. 84-85; I. Brownlie, *International Law and the Use of Force by States*, 1963, p. 273; P. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, 1959, p. 271; Skubiszewski 1968, *supra* note 19, p. 767; T. Christakis, 'Vers une reconnaissance de la notion de guerre préventive?', in K. Bannelier et al. (eds.), *L'intervention en Irak et le droit international*, 2004, pp. 19-20.

to the fact that the prerogative of determining the existence of a threat to peace and mandating the use of force in its suppression rests with the Security Council,<sup>21</sup> to the *travaux préparatoires* of Article 51;<sup>22</sup> and of late, to the prevalence of specificity and clear objective manifestation of the Charter provisions over the generality and the vagueness of international custom.<sup>23</sup> Consequently, they too have proved unable to defeat the arguments which the opposing school of thought has adduced in favour of the notion of anticipatory self-defence.

The latter has consistently maintained that apart from actual aggressive attacks, the contemporary customary law of self-defence permits any state to have recourse to unilateral force in anticipation and prevention of threats that it speculates on the part of another state.<sup>24</sup> A minority therein has gone as far as defining the forcible enforcement of certain essential rights other than the right to be free from aggression as other expressions of the customary right of self-defence.<sup>25</sup> In connection with the wording of Article 51 and the prominence which it gives to the notion of armed attack, the occasional argument of this camp has been that in the absence of an express provision, the Charter cannot vitiate the customary *jus ad bellum* and the broad liberties of action reserved thereunder.<sup>26</sup> That treaty provision, the argument goes further, merely places emphasis upon the paradigm case, without ruling out the other possibilities.<sup>27</sup> Pursuant to another line of reasoning that is advanced by the advocates of the notion of anticipatory self-defence, one which is disinclined to espouse the idea that treaties do no more than give hard edge to custom, the Charter's restrictive regime is intended to accompany a fully functioning collective security system. It is from the actual or potential paralysis of that system, induced by the veto or threat of the veto, that these writers infer the continuance in force of what they think to be a broader notion of self-defence rooted in general international law.<sup>28</sup>

## 2.2. *The Court and scholarship on the requirement of attribution*

In the *Nicaragua* Judgment, the following words were employed in order to return an affirmative reply to the question whether the admissibility of the plea of self-defence hinges on the attribution of an armed attack to a state as a subject of international law:

‘The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where

21 Paust, *supra* note 19, p. 48.

22 P. Lamberti Zanardi, *La legittima difesa nel diritto internazionale*, 1972, pp. 192 et seq., 209 et seq. See the diametrically opposed conclusion drawn by T. McCormack in ‘Anticipatory Self-defence in the Legislative History of the United Nations Charter’, 1991 *Israel Law Review* 25, pp. 1-42.

23 T. Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, 2010, pp. 13-14.

24 H. Waldock, ‘The Regulation of the Use of Force by Individual States in International Law, 1952 *Recueil des cours* 81, pp. 496 et seq.; J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law*, 1954, pp. 243 et seq.; J. Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, 1958, p. 44; G. Schwarzenberger, ‘The Fundamental Principles of International Law’, 1955 *Recueil des cours* 87, p. 343; D. Bowett, *Self-Defence in International Law*, 1958, pp. 187-192; M. McDougal & F. Feliciano, *Law and Minimum World Public Order*, 1961, pp. 231-241; M. McDougal, ‘The Soviet-Cuban Quarantine and Self-Defense’, 1963 *American Journal of International Law* 57, p. 597; S. Schwebel, ‘Aggression, Intervention and Self-Defence in Modern International Law’, 1972 *Recueil des cours* 136, pp. 479-482; P. Malanczuk, ‘Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles on State Responsibility’, 1983 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 43, p. 764; A. Arend, ‘International Law and the Recourse to Force: A Shift in Paradigms’, 1990 *Stanford Journal of International Law* 27, p. 29; R. Higgins, *Problems and Process: International Law and How We Use It*, 1995, pp. 242-243. See also *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 15, pp. 347-348 (Dissenting Opinion of Judge Schwebel).

25 E. Colbert, *Retaliation in International Law*, 1948, pp. 202-203; Schwarzenberger 1955, *supra* note 24, p. 339; Bowett, *supra* note 24, p. 270; J. Stone, *Conflict through Consensus: United Nations Approaches to Aggression*, 1977, p. 89; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, 1984, pp. 39-40.

26 A. Goodhart, ‘The North Atlantic Treaty of 1949’, 1951 *Recueil des cours* 79, pp. 192, 202; Schwarzenberger, 1955 *supra* note 24, pp. 327 et seq.; Bowett, *supra* note 24, pp. 184-185; McDougal & Feliciano, *supra* note 24, pp. 232-241.

27 Bowett, *supra* note 24, p. 188; McDougal & Feliciano, *supra* note 24, p. 237; Schwebel 1972, *supra* note 24, p. 480.

28 Schwarzenberger 1955, *supra* note 24; Stone 1958, *supra* note 24, p. 96. See also *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 15, pp. 543-544 (Dissenting Opinion of Judge Jennings). But see *Corfu Channel*, [1949] ICJ Reports, pp. 34-35; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 15, p. 100.

such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.<sup>29</sup>

The failure on the part of the Court to firmly ensconce the conception of attribution which it had developed earlier in that same judgment inevitably contributed to the diversity of the arguments advanced in support of the contention that the situation known as self-defence also encompasses forcible action taken in foreign territory against armed attacks of private source and origin.<sup>30</sup> Though in subsequent decisions of the Court, the centrality of attribution was confirmed more unequivocally,<sup>31</sup> the propensity of the principal judicial organ of the UN system and its benefactors to forego any deep forms of reasoning,<sup>32</sup> has only served to reassure a substantial portion of the latest generation of legal writers that the ‘qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua*’ and nothing else.<sup>33</sup> At the risk of over-generalisation, it can be said that in the present day, the points of criticism levelled against the Court with respect to the question of attribution describe two distinctive trajectories.

In the first trajectory, the words ‘[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence’ are taken to mean that Article 51 does not require that an armed attack which is actually carried out by a state should precede the exercise of the so-called right of self-defence.<sup>34</sup> In buttressing this general proposition, certain authors assert that in the ‘preeminent precedent’ on self-defence, the 1837 *Caroline Affair*, the source of armed attack was utterly irrelevant.<sup>35</sup>

Other writers bring out the fact that the Security Council has reaffirmed the inherent right of individual or collective self-defence in Resolution 1368 and in Resolution 1373 without,<sup>36</sup> however, making any reference to an armed attack of a state.<sup>37</sup> An extreme minority even considers that the

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29 *Military and Paramilitary Activities in and against Nicaragua*, supra note 15, pp. 103-104 (emphasis added).

30 The Court formulated the *complete control* and the *effective control* tests of attribution in *Military and Paramilitary Activities in and against Nicaragua*, supra note 15, pp. 62-65.

31 *Oil Platforms*, supra note 17; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 18. See also *Armed Activities in the Territory of the Congo*, supra note 18, pp. 222-223.

32 On this question of attribution, the following works are in agreement with the Court: D. Alland, ‘International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility’, in M. Spinedi & B. Simma (eds.), *United Nations Codification of State Responsibility*, 1987, p. 157; J. Raby, ‘State of Necessity and the Use of Force to Protect Nationals’, 1988 *Canadian Yearbook of International Law* 26, pp. 254-256; I. Scobbie, ‘Words My Mother Never Taught Me’, 2005 *American Journal of International Law* 99, pp. 80 et seq.

33 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 18, p. 215 (Separate Opinion of Judge Higgins). See also *Armed Activities in the Territory of the Congo*, supra note 18, p. 313. (Separate Opinion of Judge Kooijmans) and p. 336 (Separate Opinion of Judge Simma).

34 J. Combacau, ‘The Exception of Self-Defence in U.N. Practice’, in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force*, 1986, p. 26; A. Coll, ‘The Legal and Moral Adequacy of Military Responses to Terrorism’, 1987 *American Society of International Law Proceedings* 81, p. 302; W. O’Brien, ‘Reprisals, Deterrence and Self-Defence in Counterterrorism Operations’, 1989-1990 *Virginia Journal of International Law* 30, p. 475; Higgins, supra note 24, pp. 250-251; R. Wedgwood, ‘Responding to Terrorism: the Strikes against Bin Laden’, 1999 *Yale Journal of International Law* 24, p. 564; R. Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence’, 2005 *American Journal of International Law* 99, p. 57; S. Rosenne, ‘The Perplexities of Modern International Law’, 2001 *Recueil des cours* 291, p. 171; H. Koh, ‘The Spirit of the Laws’, 2002 *Harvard International Law Journal* 43, p. 28; C. Stahn, ‘Terrorist Acts as Armed Attack’, 2003 *Fletcher Forum of World Affairs* 27, no. 2, p. 36; Dinstein 2005 (*War, Aggression...*), supra note 19, pp. 206-207; G. Battaglini, ‘War Against Terrorism Extra Moenia, Self-Defence and Responsibility: A Pure Judicial Approach’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, 2005, p. 145; I. Canor, ‘When *Jus ad Bellum* Meets *Jus in Bello*: The Occupier’s Right of Self-Defence against Terrorism Stemming from Occupied Territories’, 2006 *Leiden Journal of International Law* 19, p. 134; N. Shah, ‘Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism’, 2007 *Journal of Conflict & Security Law* 12, p. 106; K. Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’, 2007 *International and Comparative Law Quarterly* 56, pp. 147-155; L. Waldron Davis, ‘The Phantom of the Neo-Global Era’, in R. Miller & R. Bratspies (eds.), *Progress in International Law*, 2008, pp. 634, 640; N. Lubell, *Extraterritorial Use of Force against Non-State Actors*, 2010, pp. 31-2. See also *Military and Paramilitary Activities in and against Nicaragua*, supra note 15, pp. 340-343 (Dissenting Opinion of Judge Schwebel); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 18, pp. 242-243 (Declaration of Judge Buergethal).

35 See e.g. S. Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter’, 2002 *Harvard International Law Journal* 43, p. 50; S. Murphy, ‘Self-Defence and the Israeli Wall Advisory Opinion: an *Ipse Dixit* from the ICJ?’, 2005 *American Journal of International Law* 99, p. 64-65. See also Waldron Davis, supra note 34, p. 642.

36 UN Doc. S/RES/1368 (2001); UN Doc. S/RES/1373 (2001).

37 See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 18, pp. 229-30 (Separate Opinion of Judge Kooijmans); *Armed Activities in the Territory of the Congo*, supra note 18, p. 337 (Separate Opinion of Judge Simma); J.-M. Thouvenin, ‘Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence’, in J. Crawford et al. (eds.), *The Law of International Responsibility*, 2010, p. 463.

legitimacy of authorisation of enforcement measures against private persons and groups by the Security Council acting pursuant to Articles 39 and 42 Charter necessarily presupposes the permissibility of the use of force by a state against such entities in foreign territory in accordance with Article 51.<sup>38</sup>

That being said, the majority of authors who think of the notion of armed attack as the sole coordinate axis for determining the scope of Article 51 are hesitant to treat the *Caroline Affair*, a case which significantly predates the coming into force of the general prohibition on the use of force, as a typical example of self-defence. They also refrain from drawing a direct correlation between the decisions adopted by the executive organ of an international organisation and the conceptual contours of self-defence. They, moreover, refrain from subscribing to the unctuous idea that the existence of wide-ranging powers on the part of the Security Council for the purpose of maintaining international peace and security translates to a right for every individual member state to use force against private actors in foreign territory under the heading of self-defence. Instead, these authors, on the basis of what they take to be the evidence of newly formed *opinio juris* of the members of the international community, conclude that a threat originating from private individuals will amount to an armed attack for the purposes of Article 51 Charter, provided that it is of the scale and effect once deemed exclusive to military expeditions undertaken by the armed forces of states.<sup>39</sup> To justify the precarious position in which the territorial state must find itself, they then make the assertion that transboundary force aimed strictly at non-state actors in foreign territory undermines neither the territorial integrity nor the political independence of another state.<sup>40</sup> These learned authors, however, never clarify how such partitioning of the primary subject of international law into an immune official core and a violable penumbra consisting of its territory and human beings who are not its *de jure* or *de facto* organs would reconcile with essential rules of international law such as those pertaining to exercise of jurisdiction, extradition, neutrality and so forth.

In the second trajectory, the operation of Article 51 Charter or its customary equal is defined as the terminus of the process in which an armed attack is legally ascribed to a state. Here, the point of departure is the assertion that owing to some newly crystallised *lex specialis*, an armed attack may attach to the state as a subject of international law regardless of the fact that the attack itself is not committed by its *de jure* or *de facto* organs, or by private persons under its effective control.<sup>41</sup> However, the authors who subscribe to this view hardly acknowledge the significance of derogation from the basic principle which

38 See T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, 2002, p. 54; T. Franck, 'Terrorism and the Right of Self-Defense', 2001 *American Journal of International Law* 95, p. 840.

39 S. Ratner, 'Jus ad Bellum and Jus in Bello after September 11', 2002 *American Journal of International Law* 96, pp. 907-910; A. Randelzhofer, 'Article 51', in B. Simma (ed.), *The Charter of the United Nations*, 2002, p. 802; R. Wolfrum & C. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 2002 *Max Planck Yearbook of United Nations Law* 6, pp. 589-590; Stahn, *supra* note 34, pp. 42-43; Dinstein 2005 (*War, Aggression...*), *supra* note 19, p. 245; Canor, *supra* note 34, pp. 132-134; Y. Ronen, 'Israel, Hizbollah, and the Second Lebanon War', 2006 *Yearbook of International Humanitarian Law* 9, p. 371; N. Ronzitti, 'The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force', in M. Bothe et al. (eds.), *Redefining Sovereignty: the Use of Force after the Cold War*, 2005, p. 103; M. Milanović, 'State Responsibility for Genocide', 2006 *European Journal of International Law* 17, p. 584; J. d'Aspremont, 'Mapping the Concepts behind the Contemporary Liberalization of the Use of Force in International Law', 2009-2010 *University of Pennsylvania Journal of International Law* 31, p. 1121 (while considering the privatisation of the concept of armed attack plausible, this author does not take a clear position as to whether such evolution has materialised); R. van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?', 2010 *Leiden Journal of International Law* 23, pp. 197-199; Thouvenin, *supra* note 37. The following authors have made explicit the contention that attribution of an act to the state as a subject of international law pursuant to Chapter II in Part One of the Draft Articles must be conceptually distinguished from the determination of the level of state involvement that is necessary before an armed attack could give rise to the right of self-defence: J. Green, *The International Court of Justice and the Self-Defence in International Law*, 2009, p. 50; T. Ruys, 'Crossing the Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah', 2007 *Stanford Journal of International Law* 43, p. 275.

40 J. Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', 2001-2002 *Cornell International Law Journal* 35, pp. 556-557; Wedgwood 1999, *supra* note 34, p. 565; Randelzhofer, *supra* note 39; Wolfrum & Philipp, *supra* note 39; C. Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 2003 *San Diego International Law Journal* 4, pp. 23-25; Stahn, *supra* note 34, pp. 42-43; Ronen, *supra* note 39, p. 386; Trapp, *supra* note 34, pp. 141-147; Ruys, *supra* note 23, pp. 493-496.

41 A. Cassese, 'The International Community's "Legal" Response to Terrorism', 1989 *International and Comparative Law Quarterly* 38, pp. 596-599; R. Grote, 'Between Crime Prevention and the Laws of War: Are the Traditional Categories of International Law Adequate for Assessing the Use of Force against International Terrorism?', in C. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, 2004, p. 973; A. Nollkaemper, 'Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility', in N. Blokker & N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?*, 2005, p. 162; J. Kammerhofer, 'The Armed Activities Case and Non-State Actors in Self-Defence Law', 2007 *Leiden Journal of International Law* 20, p. 110; Stahn, *supra* note 34, p. 37; C. Tams, 'Light Treatment of a Complex Problem: the Law of Self-Defence in the Wall Case', 2005 *European Journal of International Law* 16, p. 968; C. Tams, 'The Use of Force against Terrorists', 2009 *European Journal of International Law* 20, pp. 385-387.

underlies the general law of attribution in its entirety. In accordance with this principle – which is really a derivative of the basic rule expressed in Draft Article 1 – ‘a State is responsible only for its own conduct, that is to say, the conduct of persons acting, on whatever basis, on its behalf.’<sup>42</sup> Consequently, they fail to explain how it is that precisely with respect to an obligation as far-reaching as that imposed by the hard core of Article 2(4) Charter, there has been a spontaneous revision of the apparent inflexibility in the general rules of attribution. This omission is particularly culpable because the existence of a strong presumption against derogation from the general rules of attribution is generally recognised. For example, in relation to the rules contained in Chapter II of Part One of the Draft Articles, the Commission has stated ‘[i]n the absence of a *specific* undertaking or guarantee (which would be a *lex specialis*), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter.’<sup>43</sup> And for its part, the World Court has declared that ‘rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.’<sup>44</sup>

### **2.3. Relevance of state practice for determining the scope of the concept of self-defence**

As can be deduced from the observations made in the foregoing, there are divergences of opinion as regards the bifurcated question whether resort to force in self-defence must be preceded by the commission of an act of the state by which a breach of the principal prohibition under Article 2(4) is committed. Moreover, the competing propositions either are arbitrary and therefore devoid of sufficient persuasive force or undercut some of the fundamental aspects of the international legal order. The next step is, therefore, to ask whether analysis of recent trends in state practice is capable of providing a definitive reply to the question under consideration.

The part of state practice often conjured up in a bid to substantiate the so-called right of anticipatory self-defence need hardly detain the discussion. That such is the case is due to the fact that such practice may also be considered to be causative of the formation of another rule which is distinct from the rule that instils normative force into the notion of self-defence under international law. By virtue of this rule, engagement by a state in thorough and definitive preparatory measures for the commission of aggression against another state, elicits, as a disadvantageous normative consequence for the former subject, the latter subject’s freedom to resort to force for the purpose of applying a punitive and repressive armed sanction or a countermeasure.

The same can be said about instances of state practice where self-defence has been exploited for vindicating action taken against a threat of a private nature. On thorough reflection, there appears to be no compelling reason why such conduct – granted that it indeed amounts to practice in which a new rule of customary law is spontaneously or unconsciously objectified – must necessarily project its effect in the context of self-defence. Its analysis could just as well bring out the legality of armed sanctions against the territorial state’s breach of its obligation to prevent the organisation, within its territory, of private activities that are calculated to assault another state. Equally, a direct and exhaustive scrutiny of state practice as well as that of the attitudes observed in government representatives, could indicate that pursuant to international law prevailing now, the need to preserve an essential security interest against a private menace demands the temporary setting aside of the subjective right vested by Article 2(4) Charter with respect to the state from whose territory that danger emanates.

To these assertions, however, the objection can be made that by virtue of Draft Article 26, none of the circumstances enumerated in Chapter V to Part One of the Draft Articles is capable of precluding the wrongfulness of any act which is not in conformity with an obligation arising under a peremptory norm of general international law. The argument could proceed by stating that the prohibition on the use of force being in the nature of *jus cogens*, necessity and countermeasures may not be invoked in relation to that obligation, however exceptionally and under stringent conditions.<sup>45</sup> The problem with

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42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, [2007] ICJ Reports, p. 210.

43 Draft Articles with Commentaries, *supra* note 6, p. 39 (reference omitted and emphasis added). See also J. Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’, 2002 *American Journal of International Law* 96, p. 879.

44 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 42, pp. 208-209.

45 J. Rytter, ‘Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond’, 2001 *Nordic Journal of International Law* 96, p. 135.



this mode of reasoning is that the underlying rationale of Draft Article 26 derives from the definition of a rule of *jus cogens* as ‘a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’<sup>46</sup> However, as this author has had occasion to say elsewhere, this definition is circular and therefore has no meaning.<sup>47</sup> If certain rules of international law are recognised as rules of peremptory nature, this is not because they permit no derogation. It is rather because by virtue of the content of those rules, breach of the obligations which they impose will result in *secondary* or *responsibility* relations not only between the author of the breach and injured state but also between the former subject and all other states. In the first sense, the responsibility relations materialise as the injured state’s subjective right to obtain reparation as well as its legal *faculté* of taking coercive measures, immediately and thus independently of the claim to reparation, to repress the wrongful act, and to punish its author. In the second sense, responsibility relations find expression in a third state’s entitlement, within the strength at its command, to adopt measures which would be unlawful were their application not warranted by the fact of their having the objective of repressing the particularly serious wrongful act and punishing the state which is guilty of its commission. What is more, it is a common occurrence that states express their consent to the stationing of foreign troops on their territory. However, it has never been suggested that such consent, as a matter of principle, is incapable of precluding the characterisation of the conduct in question as a breach of the obligation arising out of the peremptory norm contained in Article 2(4) Charter. Instead, disagreement has manifested itself as regards the question whether, in the particular case, consent has actually been given, and if so, whether it has been of such source and scope so as to constitute a valid defence.<sup>48</sup> This, together with the fact that consent, necessity and countermeasures are all recognised as factual circumstances precluding the wrongfulness of state conduct in Chapter V to Part One of the Draft Articles, underscores the irrelevance of Draft Article 26 in the context of determining whether or not necessity and countermeasures are admissible as justifications vis-à-vis the use of force.

Another objection that can be raised is that the Charter rules out, albeit implicitly, the possibility of invoking necessity as a circumstance precluding wrongfulness to justify the use of force. More particularly, it can be said that the relevant provisions of the Charter carefully balance the essential interests of states by laying down a strict rule prohibiting the use of force while providing for certain clear exceptions, namely Security Council authorisation in the context of Chapter VII and the inherent right of self-defence pursuant to Article 51.<sup>49</sup> To bolster this thesis, one may further assert that the *travaux préparatoires* of the Charter confirm that Article 2(4) was drafted in such a way so as to exclude the legality of action not otherwise provided by that instrument.<sup>50</sup> This professed exclusion by the Charter regime can then be referred to Draft Article 25(2)(a) which provides that necessity may not be invoked by a state as a ground for precluding wrongfulness where the international obligation in question excludes the possibility of invoking necessity. But this mode of reasoning is also defective, since it is not clear at all whether the Charter provisions were intended to rule out the possibility of invoking a state of necessity with respect to the prohibition on the use of force.<sup>51</sup> From the fact that it was considered essential to safeguard especially and explicitly the right to use force in self-defence or in implementation of those Security Council decisions that are adopted pursuant to Article 42 Charter, it does not logically or necessarily follow that the intention was to also exclude the elimination of the wrongfulness of conduct not in conformity with the prohibition on the basis of the concept of necessity.<sup>52</sup>

Yet another objection that can be raised is that government representatives generally express the view that neither necessity nor armed countermeasures suffice in justifying the resort to force of arms.<sup>53</sup> It can then be asserted that such declarations amount to evidence that in the *opinio juris* of the members

46 Art. 53 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331.

47 See Farhang, *supra* note 4, p. 70.

48 R. Ago, Eighth Report, *YbILC*, Vol. II, 1979, pp. 31-33.

49 See e.g. O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*, 2012, p. 214.

50 *Ibid.*, p. 215.

51 O. Spiermann, ‘Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*’, 2002 *Nordic Journal of International Law* 71, p. 543.

52 Ago 1980, *supra* note 1, p. 41.

53 See e.g. S. Jagota, ‘State Responsibility: Circumstances Precluding Wrongfulness’, 1985 *Netherlands Yearbook of International Law* 16, p. 270.

of international community, the two factual circumstances in question are inadmissible in respect of Article 2(4) Charter. The easy rebuttal to this is that a possible preference for giving self-defence a broad interpretation does not *ipso facto* render the notions of necessity and countermeasures inadmissible in relation to the main rule expressed in Article 2(4) Charter. If a state seeks to absolve a certain behaviour on its part, which is *prima facie* incompatible with a given primary rule, by appealing to one particular exception or justification, then that attitude can only be referred to in order to confirm the existence of the primary rule in question. Such attitude does not have any value for the purpose of determining whether the disputed conduct is in fact justifiable on the basis of the particular justification that has been pleaded. The falsity of the assumption that governments' views unavoidably foreshadow the conceptual outlines of self-defence is further illustrated when it is considered that the intentions which impel such views are extremely diverse. A state might, for example, invoke Article 51 Charter with an intention to underscore the non-performance of certain vital obligations other than the general prohibition on the part of the territorial state. Another state could plead self-defence because of its belief that only by pleading the principal and immediate remedy against conduct as grave as aggression, the real gravity and the real scope of the peril with which that state is threatened can be conveyed to others. The inclination to plead self-defence could also transpire from an ulterior awareness on the part of the pleading state that the magnitude and object of the measure allegedly taken against private persons are of the kind which would contradict its classification as limited and non-aggressive use of force against another state.<sup>54</sup>

At this juncture, it may be asked if various analyses of present-day practice of states and the reactions of the *opinio juris* are also unable to determine whether or not the exercise of self-defence must be preceded by a breach by a state of the general prohibition on the use of indiscriminate force, what can? In reality, whether or not the occurrence of an armed attack and its attribution to a state as a subject of international law are indispensable conditions for the admissibility of the plea of self-defence in any given case is a purely systemic question. It can only be entertained as part of efforts geared to ascertaining the reasons for which the general theory of law ascribes to a particular situation the distinctive appellation of self-defence. Thus, the question under consideration would have to be answered not with reference to arbitrary judicial announcements or the indefinite argumentative opportunities that lie outside the reality of international legal life but as part of careful efforts to develop an explanatory account of the concept of self-defence which accurately translates its normative origins and which, moreover, preserves its logical relations with other fundamental legal concepts.

### **3. Towards an accurate definition for the notion of self-defence**

Any accurate definition for the notion of self-defence must be guided by a number of essential criteria and certain clear and clean-cut distinctions. A clear opinion as to what exactly these criteria and distinctions are and the problems which disregard for them will entail should readily emerge from the analysis of the existing definitions of the concept of self-defence. In what is to follow, three of these well-known definitions will be reviewed.

#### **3.1. The normative conflict theory**

From the prevailing definitions of self-defence, one holds that the rule banning the indiscriminate use of force and the rule permitting of defensive action are two valid but intersecting rules, of which one overrides the other once its conditions are complied with.<sup>55</sup> A faithful adaptation of this hypothesis is found in a report drawn up by the International Law Commission's Study Group on Fragmentation. In that Report, Article 51 Charter is defined as '*lex specialis* in relation to the principle of non-use of force in Article 2(4).'<sup>56</sup> Pursuant to the understanding of normative conflict as any 'situation where two rules

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54 Ago 1980, *supra* note 1, pp. 42, 44.

55 See J. Raz, 'Legal Principles and the Limits of Law', 1971-1972 *Yale Law Journal* 81, pp. 829-832. It is good to point out that in advancing this idea, Raz's aim is to punch a hole in Dworkin's claim that '[i]f two rules conflict, one of them cannot be a valid rule.' R. Dworkin, 'The Model of Rules', 1967-1968 *University of Chicago Law Review* 35, p. 27. Dworkin's response to Raz can be found in R. Dworkin, *Taking Rights Seriously*, 1997, pp. 73 et seq.

56 Report of the Study Group on Fragmentation of International Law, UN Doc. A/CN.4/L.682, pp. 52-53.

or principles suggest different ways of dealing with a problem,<sup>57</sup> the Report provides that Article 51 is as much a *specific application* of Article 2(4) as it is an *exception* to that rule. In the former sense, Article 51 covers a reaction to a violation of the obligation imposed by Article 2(4), thus strengthening and supporting the territorial integrity and political independence of states. In the latter sense, it derogates from Article 2(4) by allowing the use of force in specific cases, namely those involving an armed attack.<sup>58</sup>

This definition, however, is deficient in two important respects. Firstly, the logical corollary of the premises adopted by the Study Group is that self-defence might have a meaning in a system of laws which does not actually enjoin its subjects to refrain from the indiscriminate use of force. For, if the more narrow or *specialis* scope of application that is ascribed to Article 51 should be a decisive factor in resolving the alleged normative conflict to its favour, then there is nothing to prevent the inference that the said provision could eventually vacate the customary rule expressed in Article 2(4). Against this outcome, it must be objected that in any given normative order, the absolutely necessary condition for the admission of the notion of self-defence is the existence of a general ban on the indiscriminate use of force.<sup>59</sup> In the backdrop of a social order to which this prohibition is unknown, the enlisting of violence by the subjects in their dealings *inter se* does not contravene any valid norm of conduct, and likewise, all references to self-defence as a vested right are simply without any meaning. Put differently, in a system of laws where an act of aggression does not elicit adverse normative consequences for its author, the resort to arms by another subject in order to resist against that aggression need not rely on any justification other than the fact that the system in question contains no provision against violence.

Secondly, the normative conflict theory practically assumes that any two rules can be in a state of contradiction. It is important, however, to bear in mind that any effective legal order is a cohesive whole, meaning that its fundamental constituent elements function in relative harmony with one another. For this reason, in each and every effective legal order there is a strong presumption against normative conflict.<sup>60</sup> And where normative conflict is indeed discerned, it is an occasion of serious crisis, an occasion that requires a decision that would alter the legal landscape in some dramatic way. But even with the assumption that normative conflicts are widespread, a problem will remain. A rule providing for a ground justifying the non-observance of an obligation imposed by a rule of conduct simply cannot be said to be in normative conflict with that other rule. The latter is applicable only with the limitation imposed by the former. The two rules therefore pertain to two different sets of facts and their compatibility is readily brought out by the possibility to paraphrase their respective definitions into a description for a single rule.<sup>61</sup>

### 3.2. The forfeiture of rights thesis

Another explanatory account of self-defence forms around the theory of forfeiture of rights. In this arrangement, which is structurally similar to the one outlined in the preceding lines, the crux of the problem inherent in self-defence appears as one of conflict between two subjective rights, of which one must inevitably give way to the other. Thus, when state A attacks state B, the former's claim that its territorial integrity or political independence should not be undermined by forcible means is set against and eventually sacrificed to the latter subject's *fundamental* or *inherent* right to use force in order to halt and repulse the unlawful attack.<sup>62</sup> In its most dramatic configuration, the forfeiture account derives from

57 *Ibid.*, p. 19.

58 *Ibid.*, pp. 52-53.

59 Ago 1980, *supra* note 1, p. 52.

60 M. Akehurst, 'Hierarchy of Norms in International Law', 1974-1975 *British Yearbook of International Law* 47, pp. 275-276; R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, Vol. II, 1996, p. 1275; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, 2003, pp. 240-244; A. Tzanakopoulos, 'Collective Security and Human Rights', in E. de Wet & J. Widmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, 2012, p. 51.

61 On this point see G. Williams, 'Offences and Defences', 1982 *Legal Studies* 2, pp. 233-256.

62 The forfeiture theme has a significant pedigree in moral philosophy and law. In 1673, Pufendorf expressed the idea in the following terms: '[H]e who professes himself an enemy is no longer protected by any right which would prevent me from repelling him by any means whatsoever.' J. Tully (ed.), *On the Duty of Man and Citizen According to Natural Law* 1991, p. 49. Modern advocates of the forfeiture thesis are H. Bedau, 'The Right to Life', 1968 *Monist* 52, p. 568; A. Ashworth, 'Self-Defence and the Right to Life', 1975 *Cambridge Law Journal* 34, p. 283; J. Thomson, 'Self-Defense', 1991 *Philosophy & Public Affairs* 20, p. 302; S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 1994, p. 200. Amongst international legal scholars, Georg Schwarzenberger gave the idea recognition in the following terms: 'If the conditions of self-defence are fulfilled, the right of self-defence overrides any competing rights of the offending

this fundamental right of the state, a correlative duty of the same content.<sup>63</sup> In the example just given, this means that B's right to act in self-defence effectively links with an obligation for A to not resist B's defensive measures. Nevertheless, even in its most reasoned variation, this rights-based account is burdened by various weaknesses.

On the first level, it fails to take notice of the fact that the term *subjective right* refers to a claim which the law accords to a subject vis-à-vis another subject, of whom he may lawfully demand a specific course of behaviour. By reason of this omission, it also fails to understand that when a subject invokes self-defence, what he is effectively doing is *justifying* his disregard for a legitimate legal claim held against him by another and not advancing some superseding claim of his own against that other person.

On the second level, the forfeiture of rights thesis fails to explain why it is that despite the forfeiture of the claim to sovereign integrity by the aggressor, the standard criteria applicable to individual self-defence and those applicable to third-party action are not identical in every respect. If any state that engages in aggression indeed forfeits its sovereignty, it is only reasonable to assume that the legitimacy of the defensive measure is contingent on the same criteria with respect to all other states, irrespective of whether they have been subjected to the armed attack of the aggressor state or not.

The forfeiture thesis is, moreover, incapable of affording a proper normative basis to the generally accepted restraints on defensive measures. These constraints are that defensive force should be necessary, remain proportionate to the objective of repelling the armed attack and be used immediately after the attack has been launched. Advancing from the proposition that the aggressor state has no claim to sovereign integrity, the theory may either attribute these constraints to transcendentalist norms of equity and rectitude, or it may describe them as three aspects of a distinct primary rule whose effect it is to prohibit excessive self-defence. The first avenue to explaining away the anomaly need not be taken seriously here. However, it cannot be denied that the other contrivance has some semblance of a foundation. Upon a moment's reflection, however, it becomes clear that such adaptation of the doctrine of *abuse of rights* is incapable of characterising a measure, which is patently unnecessary for or disproportionate to the objective of repelling an unlawful attack, as an act of aggression in itself. This is because if general international law were to contain a rule prohibiting the abusive exercise of the right of self-defence, then force which unduly encroaches upon the aggressor's sphere of competences would inevitably amount to a wrongful act in respect of that rule alone and not the rule expressed in Article 2(4) Charter.

### 3.3. *The rights of limited scope thesis*

The third and last approach to be mentioned is also draped in the language of rights. In this view, there exists a rule of international law which distinguishes between aggression and self-defence.<sup>64</sup> Thus, state B's duty to refrain from the use of force against the territorial integrity and political autonomy of state A and the latter's corresponding right are subject to implicit limitations. The duty does not apply to situations calling for B to act in self-defence against force that stems from A. Likewise, the correlative right in A is presumed non-existent when B uses force as means of resistance against an attack initiated by A. Admittedly, a virtue of this account is that it presupposes the existence of the prohibition on the use of force as the necessary premise for the idea of self-defence. But the difficulty which it simultaneously raises is that it effectively presupposes that both self-defence and the obligation to refrain from the use of force are of the same general nature. In other words, it overlooks the 'obvious difference between conduct which is generally lawful and conduct which is generally wrongful and would remain wrongful if there were not, in a particular case, a special circumstance that took away its wrongfulness.'<sup>65</sup> For this reason, it is barred from claiming that the state which is the victim of a wrongful armed attack is *temporarily*

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party under international customary law. It is irrelevant whether these rights stem from rules applicable in states of peace, war or *status mixtus*.' G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, 1968, p. 32.

63 See e.g. Schwarzenberger 1968, supra note 62, pp. 31-32; Schwarzenberger 1955, supra note 24, p. 340.

64 The idea of self-defence as a limit imposed on the right of states not to be territorially and politically undermined by forcible means, or correlatively, as a limitation to the ambit of the prohibition on the use of force is endorsed by d'Aspremont. According to that author, this approach 'is also reflected in the case law of the International Court of Justice, which, in its decision in the *Oil Platforms* case, ceased to consider self-defence an exception to the prohibition to use force and qualified it a "limitation."' d'Aspremont, supra note 39, p. 1106; *Oil Platforms*, supra note 17, p. 183.

65 Ago 1979, supra note 48, p. 35.

exempted from the general obligation to refrain from exhibiting force and that this is a *de facto* situation which disappears once the attack is successfully repulsed and its object and purpose soundly defeated.

No less importantly, the *rights of limited scope* thesis is incapable of casting light on the distinctive features of the situation underlying self-defence. In more specific terms, it cannot readily distinguish between force that materialises as a true instance of self-defence and force which is compelled by virtue of the existence of a state of necessity or force which materialises as the application of a sanction or a countermeasure by one state in respect of the commission of an internationally wrongful act by another state.

### 3.4. A different account: self-defence as an aspect of the international responsibility entailed by aggression

Despite its brevity, the foregoing survey showed that each of the prevailing definitions of self-defence is weighed down by one or more explanatory shortcomings. The *normative conflict* theory unconsciously presupposes the independence of the rule providing for the right of self-defence from the rule imposing the prohibition on the use of force. The *forfeiture of rights* thesis universally alienates the aggressor subject. As a result, it can neither account for the conditions that are indispensable to the admissibility of the plea of collective self-defence nor give normative grounding to the requirements of immediacy, proportionality and necessity. For its part, the *rights of limited scope* thesis obliterates the distinction between *de jure* and *de facto* situations in law and with it, the corresponding distinction between conduct that is generally lawful and conduct that is exceptionally lawful. It also fails to properly distinguish force that is adopted pursuant to the concept of self-defence from forcible conduct that is adopted under a genuine state of necessity or that which constitutes the legitimate application of an armed countermeasure. Now, these observations and the uncertainties about the validity of the requirements of armed attack and its attributability, which were outlined in Section 2, render it legitimate to insist on the following conditions when devising an explanatory definition for the concept of self-defence: The definition should above all exhibit that the characterisation of an act as an act of self-defence is meaningful only in the context of a legal order which entertains a general prohibition against the indiscriminate use of force. In addition to its capacity to exhibit the direct correlation between the general prohibition and the idea of self-defence, it is also necessary that the definition expresses precisely that self-defence is fundamentally distinct from notions with which it seems to share certain general features, and that it encompasses all aspects of that independence. The definition should, furthermore, demonstrate whether or not the legitimacy of defensive force under international law is always contingent on the existence of an armed attack which emanates from a state. At the same time, it should be able to show that resort to defensive force by a state is legitimate precisely because *in the case in question* and *within certain limits*, that state is *no longer* required to act otherwise and that this is a *de facto* situation which comes to an end once the object of the defensive measure has been obtained. Last but not least, the definition must be able to make sense of the action which is covered under the term *collective self-defence*.

In the remainder of this contribution, an attempt will be made to produce an analysis which respects these essential criteria and distinctions. To this end, first emphasis will be placed on the logic of mutual legal relations which precede and succeed an act of aggression. With adherence to Hohfeld's scheme of jural relations, it will be revealed that the suspension of the right to sovereign integrity for one subject and the emergence of the situation of self-defence for another do not correspond with two independent facts which occur in succession, but that they instead are projections of a single connection between a disjunction of operative facts and a conjunction of legal consequences onto two opposing points of observation.<sup>66</sup> At the same time, self-defence will be situated in the backdrop of the law of responsibility *ex delicto*. This will produce the necessary foundation underlying the requirements of armed attack and attribution. It will then be shown that the rule imposing the general prohibition and the rule investing the right of self-defence are two contrasting but indissolubly linked norm fragments which together constitute a complete norm of conduct. The former, being a *primary* or *substantive* rule, simply defines a certain objective course of behaviour as the necessary but not sufficient condition for the operation of certain legal consequences. The latter, being a *secondary* or *sanctioning* rule, defines exposure to force of

66 See W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 1913-1914 *Yale Law Journal* 23, pp. 16-59.

arms as one of the legal consequences which attaches to a breach of the general prohibition; or – and this comes to being the same thing – it denotes a *de facto* situation whereby the injured state, and possibly also a third state, is exempted from the duty to refrain from the use of force with respect to the state that has carried out an actual aggressive attack. In the arrangement that will be thus proposed, the sole objective of action taken by a state in the name of self-defence will present itself as that of warding off an illegal attack of another state and preventing it from realising its aims and purposes. For their parts, the constraints imposed on the exercise of the faculty of self-defence will show as expressions of the justification behind each and every adverse normative consequence which attaches to any wrongdoing, namely the need to safeguard the effectivity of obligation imposed by the corresponding primary rule and to ensure that fewer of its breaches are committed. Lastly, the notion of collective self-defence will appear as a component of the aggravated responsibility regime which becomes operative every time the obligation arising out of the peremptory rule enshrined in Article 2(4) Charter is disregarded.

### *3.4.1. Individual self-defence*

With respect to the notion of individual self-defence, the starting point should be the basic assumption that a complete norm of conduct connects *recourse to force* as conditioning fact, hereinafter symbolised by  $\sim\varphi$ , with a conjunction of disadvantageous consequences which include but are not limited to  $\sim\varphi$  in riposte. Now, mutual applicability of this norm of conduct to A and B would mean that each of those subjects is simultaneously involved in two fundamentally similar but separate primary legal relations. In one, A is in possession of an enforceable claim or a *subjective right* in respect of  $\varphi$  linking him to B; or – and this is really the same – it is incumbent on B not to commit  $\sim\varphi$  against A. In the other, B's subjective right works against A for  $\varphi$ ; or, correlatively, A is under a duty to refrain from committing  $\sim\varphi$  to the detriment of B. It would also mean that any unlawful instance of  $\sim\varphi$ , in other words, any disruption in one of the original or primary legal relationships, entails the suspension of the other. Thus, if the illegal act consists of  $\varphi$  carried out against B, the primary relationship expressed as A's right and B's correlative duty is replaced by a new, distinct relationship. This secondary relationship which is *non-obligatory* or *instrumental* in essence, translates for B into a *privilege* or *faculté* to engage in  $\sim\varphi$  against A whereas for A, it shows as a *no-right* held against B for  $\varphi$ . Conversely, if the act of breach consists of  $\sim\varphi$  perpetrated against A's person, B's subjective right and A's correlative duty would yield to a secondary relation adequately expressed as A's liberty from the duty to conduct himself in  $\varphi$  with respect to B.

Of the virtues of this simple description, the one deserving immediate notice is the non-admission of the idea of conflict between two rules or two subjective rights as the ultimate referential figure in the theory of self-defence. Here, the situation of self-defence is represented as the non-obligatory component of the very norm of conduct which prohibits the indiscriminate use of force. From the vantage point of the victim of aggression, this component appears in the form of a privilege or *faculté*, granted in law, to the effect that in relation to the case for which the grant is made, force may be used to repel the unlawful armed attack. When observed from the aggressor's perspective, it shows as one of the disadvantageous legal consequences that the law of state responsibility annexes to that subject's unjust use of force.<sup>67</sup>

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67 The idea of self-defence as a disadvantageous legal consequence entailed by aggression; or correlatively, as a circumstance excluding the wrongfulness of conduct involving the use of force, has been endorsed by a number of publicists. See e.g. A. Ross, *A Textbook of International Law: General Part*, 1947, pp. 192-193, 244; H. Kelsen, *Principles of International Law*, 1952, p. 60; E. Jiménez de Aréchaga, 'International Responsibility', in M. Sørensen (ed.), *Manual of Public International Law*, 1968, p. 541; I. Brownlie, *Principles of Public International Law*, 1973, p. 452; I. Brownlie, *System of the Law of Nations: State Responsibility*, 1983, p. 46; G. Badr, 'The Exculpatory Effect of Self-Defence in State Responsibility', 1980 *Georgia Journal of International and Comparative Law* 10, pp. 1-28; Alland, *supra* note 32; W. Ripphagen, 'Techniques of International Law', 1994 *Recueil des cours* 246, pp. 281, 379; G. Gaja, 'The Concept of an Injured State', in J. Crawford et al. (eds.), *The Law of International Responsibility*, 2010, p. 947. The same idea is implied in the final commentary to Draft Art. 41: 'further consequences of a serious breach (...) may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression.' Note 6, *supra*, p. 116.

On the strength of its conformity with logic and legal reality, the conception of self-defence as a particular legal consequence entailed by aggression, or correlatively, as a circumstance excluding the wrongfulness of force that constitutes a response to an illegal armed attack pervades even the works of those publicists who are most indomitably committed to defining the subject matter as an *inherent* or *fundamental* right of the state. Amongst those who have considered the germ of the problem independently of the law of responsibility *ex delicto*, only to admit afterwards that self-defence is also a *de facto* situation precluding the wrongfulness of conduct involving the use of force, the noteworthy are: Schwarzenberger 1968, *supra* note 62; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. I, 1957, p. 572; Rosenne, *supra* note 34, pp. 149-176, 401; M. Shaw, *International Law*, 2003, pp. 707-708, 1024-1035;

Another advantage of this construction is that it is capable of upholding the bifurcated requirement that any measure taken in the name of self-defence by a state be preceded by an actual armed attack of another state. Having embedded the notion in the law of state responsibility *ex delicto*, it can indeed draw on the purely inter-state nature of that law to rule out the admissibility of self-defence with respect to any instance of transboundary violence which is not attributable beyond an individual or group of individuals which has actually engaged in it. In order to exclude the so-called notion of anticipatory self-defence, it can draw upon the basic and logical principle that the coming into operation of responsibility *ex delicto* to the detriment of any state is contingent on the existence of conduct which amounts to a breach of an international obligation incumbent on that state.

Yet another quality of the analysis of self-defence as a component of responsibility *ex delicto* is that it supplies a proper normative basis to the conditions which determine the admissibility of the plea of self-defence in a given case. When construed as a consequence of aggression, use of force in self-defence inevitably resonates with the rationale that underlies those other unilateral and instrumental measures upon which the effectivity of the international legal order still so largely depends. Therefore, just as the legitimate application of a countermeasure is called for in order to rectify a failure to obtain reparation and to restore the primary legal relationship, so is the legitimacy of defensive conduct also dependent on its being necessary for the objective of safeguarding the effectivity of the primary rule whence the general prohibition on the use of force emanates. And again, just as a legitimate countermeasure must never lead to a situation which is substantially more adverse than the injury incurred from the infringement of the substantive obligation, so is an act of legitimate self-defence never able to unduly usurp the legally recognised competences of the aggressor state.

The definition to be forged does not, however, obscure the fact that the two types of reaction to international wrongfulness are 'relevant to different moments and, above all, are distinct in logic.'<sup>68</sup> Insofar as the temporal distinction is concerned, the definition allows for the assertion that the objective of the situation known as the legitimate application of a sanction and the acts which it realises is to exact reparation or inflict punishment for a harm which has come and gone. At the same time, it is capable of sustaining the claim that the situation of self-defence is born out of the idea that where an illegal act consists of forcible encroachment in the legal domain and competences of another subject, utmost urgency attaches to protection of that subject. As far as the logical distinction is concerned, the definition firstly shows that the necessity of self-defence assumes meaning neither in terms of failure to obtain redress nor in terms of whether a more serious regime of responsibility should apply, but in relation to determining whether or not conduct involving force is the only means of protection against a breach of the prohibition. By demanding equivalence between the capacity of the reaction and the aim of repelling the armed attack and defeating its aim and purpose, it then rules out those limitations which could prejudice the restoration of the primary legal relationship that is disrupted by aggression. In other words, it shows that unlike the legitimacy of the application of a countermeasure which is, in general, judged on the basis of its being commensurate with the international wrong which has called for its implementation, a defensive reaction may acquire dimensions disproportional to the aggressor's wrongful act, provided that its aim consists of reinstating the territorial integrity and political independence of its author and nothing else.

No less importantly, the proposed definition draws a sharp distinction between the concept of self-defence and the situation known as a state of necessity. Admittedly, a state acting in self-defence, like a state acting in a state of necessity, acts in response to an imminent threat, which must in both cases be serious, immediate and incapable of being dealt with by other means. While not denying this similarity, the definition nevertheless exhibits that the state against which another state acts in self-defence is itself the source and origin of the threat to that other state whereas the state in respect of which another state

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Thouvenin, *supra* note 37, p. 466. There is hardly a need to point out that on the account of their reluctance to forego the last vestiges of the natural law theory of fundamental rights, these authors have unwittingly constructed an even greater fallacy – that the international order is so extravagant in incongruity and so deprived of effectivity that it should contain two distinct rules providing for the legitimacy of a single course of conduct, one granting a subjective right to that conduct and the other excluding the wrongfulness, and ultimately, the responsibility which would otherwise exude from the conduct in question.

68 Ago 1980, *supra* note 1, p. 54.

adopts a course of conduct which is at odds with an international obligation on the basis of necessity may be completely innocent.

### 3.4.2. *Collective self-defence*

A no less significant aspect of the account which is based on the logic of primary and secondary legal relations is its being a template for an accurate description of the phenomenon covered by the expression *collective self-defence*. Traditionally, this particular dimension of the law of inter-state force has arranged international legal thinkers into two diametrically opposed groups. For one faction, the term denotes the collective exercise by states of their right of individual self-defence.<sup>69</sup> In reality, this proposition draws from the rationale that is formulated in certain military alliance treaties – that an armed attack perpetrated against one contracting party constitutes an armed attack against all contracting parties.<sup>70</sup> For the opposing school of thought, the term self-defence designates an autonomous legal ground whereby armed force may be used to assist a state which has found itself the target of an unlawful armed attack.<sup>71</sup>

The first thesis must be rejected immediately for it indulges the faulty idea that a duty for one legal subject would have as its correlative, a single super-right resting on the combined sum of the other subjects,<sup>72</sup> and that consequently its breach would give rise to legal injury for everyone but the breaching party.<sup>73</sup> Obviously, there is no denying that in a given legal system, a particular legal modality may materialise against a large and indefinite class of subjects. The point to be made is rather that such cases always presuppose the existence of as many fundamentally similar but independent individual rights, duties, privileges and so forth as there are subjects of the legal order. To bring this out with a simple example, it is recognised that under international law, a state may suspend or terminate its subjective right to the benefit of another state, as in the situation where state A consents to the stationing on its territory of armed forces belonging to state B. In this case, unless it is acknowledged that only a single right from an indefinite number of separate rights of the same content for state A has been suspended, it will not be permissible to contend that it is merely state B which has a privilege to dispatch its army to the territory of A and that the legal relations that transpire by virtue of Article 2(4) and involve A and C, A and D, A and E and so on continue unaffected.

Another setting where insistence on separateness and relativity of legal relations *in rem* is indispensable to correct analysis is that of responsibility entailed by aggression itself. In this narrow scope, it serves at the outset to explain why in any particular case, the claim to war reparation is observed to inhere in the state which suffers an unlawful armed attack and not the state which becomes entitled to act pursuant to collective self-defence.<sup>74</sup> It does so by showing that the former is both an *interest subject* and a *proceedings subject* in relation to the duty under Article 2(4) Charter, and that as a consequence it is entitled not only to devise appropriate measures of self-protection but also to demand that the responsible state remove the material consequences of its action by complying with its duty reparation.

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69 This interpretation is found in Kulski, *supra* note 19, p. 463; Waldock, *supra* note 24, p. 505; O. Schachter, 'The Right of States to Use Armed Force', 1983-1984 *Michigan Law Review* 82, p. 1639; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 15, p. 545 (Dissenting Opinion of Judge Jennings); R. Macdonald, 'The Nicaragua Case: New Answers to Old Questions', 1986 *Canadian Yearbook of International Law* 24, p. 151; Dinstein 2005 (*War, Aggression...*), *supra* note 19, p. 269; Gaja, *supra* note 67, p. 947. The last author regards an unlawful attack perpetrated against a single state as breach of the prohibition *vis-à-vis* all states. He nevertheless proceeds to argue that only the state which finds itself at the receiving end of an armed attack is an *injured state* within the meaning of Draft Art. 42 and consigns the rest to the category of *specialty affected states* as defined in Draft Art. 48.

70 Art. 3(2) of the 1947 Inter-American Treaty of Reciprocal Assistance, 21 *UNTS* 77. The said provision supplemented the policy set forth in the 1945 Act of Chapultepec, 21 *UNTS* 147. See also Art. 5 of the 1949 North Atlantic Treaty, 34 *UNTS* 243 and Art. 4 of 1955 Warsaw Agreement, 219 *UNTS* 3.

71 See e.g. R. Tucker, 'The Interpretation of War under Present International Law', 1951 *International Law Quarterly* 4, p. 29; Riphagen, *supra* note 67, pp. 279, 315; Arend, *supra* note 24, p. 4; Kunz 1947, *supra* note 19, p. 875; J. Kunz, 'Sanctions in International Law', 1960 *American Journal of International Law* 54, p. 333; Stone 1954, *supra* note 24, p. 245; Skubiszewski 1959, *supra* note 19, 627-628; Skubiszewski 1968, *supra* note 19, p. 769; J. Crawford, 'Multilateral Rights and Obligations in International Law', 2006 *Recueil des cours* 319, p. 435; Ruys, *supra* note 23, pp. 85 et seq.

72 W. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', 1916-1917 *Yale Law Journal* 26, p. 743.

73 One is forced to agree with Ago that even if this preconception were to be accepted, there would still be 'no reason why the adjective "collective" should be used to describe a situation which is, in fact, only a purely fortuitous juxtaposition of several conducts adopted in "individual" self-defence.' See Ago 1980, *supra* note 1, p. 68.

74 B. Simma, 'International Crimes: Injury and Countermeasures', in J. Weiler et al. (eds.), *International Crimes of States*, 1989, p. 301; Dinstein 2005 (*War, Aggression...*), *supra* note 19, pp. 109-110.



At the same time, it evinces that the state which is not itself confronted by the unlawful attack is only a proceedings subject because its power of invocation does not correspond with impairment of a vested legal interest and that consequently, the sole change in its legal relations vis-à-vis the responsible state is the temporary suspension of the obligation under Article 2(4) Charter, i.e. the *faculté* of action in the name of collective defence.

What is more, the understanding of rights *in rem* as a bundle of fundamentally similar but separate legal situations diminishes the arbitrariness in the requirement that the exercise of collective self-defence be preceded by the victim state declaring the view that it has been unlawfully attacked and requesting for assistance.<sup>75</sup> In actuality, this bifurcated requirement is a purely artificial juxtaposition of two secondary rules which although similar in content, relate to different aspects of responsibility. The first rule is that following any act of breach, the subject of interest may dispense with its capacity to invoke the resultant responsibility by waiver or acquiescence in the lapse of the claim. It safeguards the discretion of the state whose territory is unlawfully encroached on to ignore, voluntarily and on the basis of its own assessment, part or all of the legal consequences entailed by aggression. When this discretion is exercised, it is only obvious that the capacity of third states to hold the aggressor state to account should also become extinguished. The second rule is that consent to an act of the state otherwise contrary to an obligation precludes the wrongfulness of that act. By conditioning the legitimacy of conduct adopted by a third state in the name of collective self-defence on a request made by the state which has suffered the armed attack, this secondary rule ensures that the concept of collective self-defence does not lend itself to abuse at the hands of those states whose ulterior motive is interference in the internal or external affairs of the state which has become the victim of an unlawful armed attack.

If the foregoing is correct then the second position seems to be the most sensible characterisation of the situation covered by the term collective self-defence. To further enhance its explanatory power, however, it must be borne in mind that defensive assistance can occur spontaneously, or pursuant to the terms of certain treaties previously concluded for such purpose. In the former sense, the aiding state acts despite having a legal *faculté* to remain idle. In the latter sense, it conducts itself pursuant to a duty, a duty whose counterpart is the injured state's affirmative right that come an armed attack, it should obtain military assistance from that first state. There is hardly a need to add that whether assistance is spontaneous or follows an affirmative legal duty is immaterial for the legal relations between the aggressor state and the aiding state. Instead, the crucial issue relates to the circumstances in which the latter may be said to have capacity to invoke the international responsibility of the aggressor. Thus, armed attack as conditioning fact, when accompanied by certain conditioning circumstances, namely the victim state's declaration of the view that it has been unlawfully attacked and its request for armed assistance, would entitle any state to which such request has been made, to invoke the international responsibility of the aggressor state and ultimately use force against it under the banner of collective self-defence.

#### 4. Concluding remarks

In the introductory section of this contribution, it was shown that James Crawford's approach to the circumstance of self-defence was for the most part shaped by his aversion to the definition of self-defence in terms of the use of force by a state in response to another state's breach of its principal obligation under Article 2(4) Charter. This finding was used in Section 2 as a springboard towards the examination of the controversy surrounding the concept of self-defence under international law. There, it was shown at the onset that contrary to the position of the World Court, a great number of publicists still insist that every state may act pursuant to Article 51 Charter in anticipation of another state's armed attack or as a means of protection against a tangible and violent assault of private source and origin. Subsequently, it was argued that state practice is of little relevance for appraising the merits or demerits of both contentions. To advance the inquiry, in Section 3, the existing definitions of the notion of self-defence were reviewed and dismissed as inadequate. Guided by the points of criticism presented against those definitions, the

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<sup>75</sup> *Military and Paramilitary Activities in and against Nicaragua*, supra note 15, pp. 104, 120; *Oil Platforms*, supra note 17. See also Ago 1980, supra note 1, p. 68.

study proceeded to formulate a new definition for self-defence. In the end, it described self-defence in terms of a *de facto* situation, expressed by a *secondary rule* of international law, whereby the substantive obligation under the *primary rule* enshrined in Article 2(4) is suspended to the detriment of a state which has conducted itself in breach of that very same obligation in respect of another; or, correlatively, in terms of a specific factual circumstance which precludes the wrongfulness of the use of force which constitutes a response to an instance of state aggression. At the same time, it was submitted that in consonance with this definition, it is precisely due to its release from observance of the prohibition in the specific case that when it employs force to repel aggression, the state acts objectively lawfully until the moment that its conduct sails beyond the bounds of necessity and proportionality which thus becomes an instance of aggression in itself. It was also demonstrated how this definition presupposes the existence of the general prohibition on the use of force and distinguishes its *definiendum* from the application of an armed countermeasure and the use of force under a state of necessity. Last but not least, it was shown how the definition creates a foundation for the requirements of armed attack and attribution and how it accommodates what is covered by the term collective self-defence.

At this point, it is imperative to emphasise that the portion of international practice which now seems to impel the litany of complaints against what the Court has consistently upheld since *Nicaragua* in connection with the armed attack and its attribution to the state, may only be valued as evidence of the existence of additional limits to the scope of the Charter prohibition. One such limitation is coextensive with the application of punitive and repressive armed countermeasures in response to a wrongful act which consists of the threat of the use of force. Another limitation would involve the application of forcible measures as a means of safeguarding certain essential security interests against a grave but non-attributable peril. The third limitation, being applicable to cases where there is some degree of contribution by a state towards the existence of a grave danger of a private source and origin, consists of the application of armed countermeasures in response to that state's failure to observe its international obligation to act with due diligence in confronting, within its territory, those individuals who imperil the security of other states. The arbitrary refusal to acknowledge the existence of these additional limitations in situations which most closely follow their logic and their rationales will have only one effect. It will further promote the unfortunate trend where efforts aimed at circumventing the general prohibition on the use of force take the form of qualifying genuine instances of countermeasures and necessity as cases of self-defence. And such encouraging of misguided interpretations of certain important legal concepts or principles would in no case be of any benefit to the science of international law as these interpretations will only lead to a dangerous confusion of its other, more basic but nevertheless fundamental principles. ¶