MASTER THESIS | MASTER'S THESIS

Titel | Title

The Use of Force in Interventionist Diplomacy: Great Power Practices and Challenges to Contemporary International Norms

verfasst von | submitted by

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angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of

Master of Advanced International Studies (M.A.I.S.)

Wien | Vienna, 2026

Studienkennzahl lt. Studienblatt | Degree programme code as it appears on the student record sheet:	UA 992 940
Universitätslehrgang lt. Studienblatt | Degree programme as it appears on the student record sheet:	Internationale Studien | International Studies
Betreut von | Supervisor:	Prof. Dr. Holger Hestermeyer

Pledge of Honesty to your thesis:

On my honor as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.

Abstrakt

Die vorliegende Masterarbeit analysiert die rechtlichen Grenzen zwischen dem völkerrechtlichen Gewaltverbot nach Artikel 2 Absatz 4 der UN-Charta und den rechtmäßigen Ausnahmen für den Einsatz militärischer Gewalt. Im Zentrum der Untersuchung steht die interventionistische Diplomatie von Großmächten und die kritische Frage, ob diese Akteure das Gewaltverbot als zwingende völkerrechtliche Norm (*Jus Cogens*) respektieren oder es lediglich als prozedurale Hürde betrachten, die es zur Rechtfertigung geopolitischer Interessen interpretatorisch zu umgehen gilt. Methodisch basiert die Arbeit auf dem rechtlichen Positivismus, der eine strikte Trennung von Gesetz und Politik vornimmt, um die Legalität staatlichen Handelns unbeeinflusst von moralischen oder politischen Legitimitätsdebatten objektiv bewerten zu können. Das erste Kapitel umreißt die strengen Grenzen zwischen dem absoluten Gewaltverbot und rechtmäßigen Ausnahmen. Zu diesen Ausnahmen gehören das fundamentale Recht auf individuelle und kollektive Selbstverteidigung gemäß Artikel 51, die Autorisierung durch den Sicherheitsrat und die Intervention auf Einladung. Das zweite Kapitel führt eine detaillierte empirische Analyse von drei zentralen Fallstudien durch: dem Golfkrieg 1990, dem Irakkrieg 2003 und der russischen Invasion der Ukraine im Jahr 2022. Diese drei Fälle zeigen eine gefährliche Entwicklung der rechtlichen Erosion. Während der Golfkrieg eine multilaterale Durchsetzungsmaßnahme darstellte, brachte er weitreichende Autorisierungsmechanismen hervor. Bis 2003 manipulierten die Vereinigten Staaten Konzepte der präventiven Selbstverteidigung, um den Sicherheitsrat vollständig zu umgehen. Letztendlich verdeutlicht der Ukraine-Konflikt 2022 einen Abstieg in die zynische Bewaffnung internationaler Rechtsnormen, bei dem Russland dieselbe Grauzone innerhalb von Präventivdoktrinen nutzte, um territoriale Aggression zu legitimieren.

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Introduction.

In the architecture of the modern world order, International Law, particularly the principle prohibiting the use of force to interfere with state sovereignty, was not built upon an idealistic assumption of an inherently just world, nor the hope that injustice would spontaneously vanish through human patience and tolerance. Instead it is established upon a realist perception, in which states and individuals, even when convinced of their own righteousness, must be bound by legal constraints. The reason is not due to a lack of morality, but because power will inevitably be manipulated or masqueraded as "morality" when devoid of limits and oversight mechanisms. The world has paid a catastrophic price in destruction when conflicting parties were too certain of their own rectitude, acting under a power that cloaked itself in morality.

The catastrophic effect of such lawless order has led to the UN Charter to establish a supreme moral responsibility, right from the preamble: "To save succeeding generations from the scourge of war." [1] This is not merely a transient solution for immediate conflicts but the constitutional foundation for a sustainable order. The lessons of two World Wars are invaluable, in which it revealed the fact that if every state were to self-appoint as the representative of justice and grant itself the right to use force to execute that "justice," war would no longer be an exception but the default operating mechanism of international relations.

Since its inception, the UN Charter has functioned as a global "constitutional document," establishing the foundational legal norms for contemporary international law and the rules-based international order. Chief among these is the prohibition on the use of force under Article 2(4), a provision widely—and accurately—regarded as the cornerstone of the international legal order established by the Charter. It explicitly proscribes "*Any threat or actual use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations*" [2]. Within the

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[1] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) **https://treaties.un.org/doc/publication/ctc/uncharter.pdf**

[2] Ibid. RES /25/2625 (1970) ; http://www.un-documents.net/a25r2625.htm

framework of treaty law, this prohibition is recognized as a peremptory norm of international law (*jus cogens*) [3], forming a boundary that no state is permitted to transgress.

Alongside this prohibition, international law provides for specific exceptions, most notably those enshrined in the UN Charter. These include the right to self-defense under Article 51, as well as Articles 39, 42, and 43 of Chapter VII, which empower the Security Council to authorize the use of force against a state responsible for threats or breaches of peace through resolutions binding upon all member states [4]. Furthermore, there are extra-Charter exceptions that permit the use of force for intervention, notably the customary international law doctrine of intervention by invitation [5] which is predicated on the consent of the host state.

Clearly, the UN Charter's regulatory system regarding the principle of the non-use of force has established a rigorous and self-contained legal framework aimed at safeguarding global collective security. It was envisioned that the world would be free from armed attacks, and " In this ideal Charter world, no state would ever again attack another: and if one did, its aggression would be met by a unified and overwhelming response made under the authority and control of the Security Council" [6] Regrettably, military interventions in practice continue to occur, most of which involve Great Powers. Bruno Simma describes the effort to restrain force as a "hard struggle" against irrational mindsets of power that humanity believed it had moved past centuries ago [7]. The author fully shares this view: the primacy of international

[3] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, para 190; International Law Commission, 'Draft conclusions on peremptory norms of general international law (jus cogens)' (2022) UN Doc A/77/10, Annex (a). The *jus cogens* nature of the prohibition of the use of force was affirmed by the ICJ in the *Nicaragua* case. Doctrinally, because Article 2(4) is subject to exceptions (self-defence), the ILC (2022) clarified that the absolute core of this principle is strictly the 'prohibition of aggression'.

[4] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) Chapter VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

[5] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10, art 20; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, paras 42–47. Regarding the conditions for the customary rule of military assistance on request, see also: Institut de Droit International, 'Military Assistance on Request' (Rhodes Session, 2011) Art 1. Under customary international law, the valid consent of the host state serves as a circumstance precluding the wrongfulness of armed intervention. This principle is codified by the International Law Commission (ILC) in Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

[6] Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2004) 2.

[7] Bruno Simma, 'Foreword' in Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021) VII.

law is facing a serious challenge from political power. In other words, legal norms are directly threatened by modern geopolitical calculations. This challenge is most evident in how great powers use force in interventionist diplomacy, turning it into a strategic tool to achieve their goals while avoiding the risk of an all-out war. This explains why military operations always go hand in hand with "campaigns" of legal interpretation. The objective of great powers is not to deny the general prohibition on the use of force, but rather to interpret the exceptions in such a way as to justify the use of force, thereby blurring the boundary between the prohibition and the permitted exceptions for its use. Contemporary international law is frequently confronted with new arguments justifying "right to wage war" - as Bruno Simma observes- legal justifications are sometimes discarded even as a "fig leaf", leaving the use of force entirely unconcealed. [8] Consequently, there is every reason to be concerned that great power practices regarding the use of force pose formidable challenges to the contemporary system of international legal norms.

The research objective and question.

The research objective of this thesis is to systematize the international legal framework to clearly identify the boundaries between the prohibited use of force and lawful exceptions. On this foundation, it seeks to analyze the practice of interventionist diplomacy involving armed force by major powers through specific case studies, thereby assessing their degree of compliance and the legal nature of their justifications.

Great powers consistently invoke a myriad of justifications for armed intervention, ranging from political interests and moral rationales to historical claims. In order to delimit the research scope, the methodological approaches address the issue exclusively through the lens of positive international law (*lex lata*). Accordingly, the study focuses on examining he matter through the system of international treaties, with a primary emphasis on the UN Charter, recognized customary international law, and relevant jurisprudence concerning the fine line between the prohibition on the use of force and its allowable exceptions.

To safeguard research objectivity, the thesis follows a specific sequence: Firstly, it aim to establish the legal norms, before delving into the interpretive practice of great powers,.

[8] ibid

Methodologically, the separation between norm and practice in international law always entails a certain degree of artificiality, in which state practice intrinsically plays a core role in both treaty interpretation and the formation of customary law. In other words, practice itself is an inseparable constituent element of a legal norm. The analysis of case studies thus allows the research to remain closely grounded in dynamic realities, meanwhile, the normative framework established in Chapter 1 ensures that that all acts of intervention involving **use of force** must be filtered through a rigorous **benchmark** of "Lawful" or "Unlawful", under the lens of Article 2(4) and Article 51 of the UN Charter. . In light of the aforementioned research objectives and perspectives, this thesis focuses on addressing the following 2 fundamental questions:

- *How are the legal boundaries between the prohibition of the use of force and lawful exceptions established and delineated within the contemporary international legal framework?*

- *How have great powers manipulated or interpreted contemporary international law to justify their use of force? Has the prohibition on the use of force (Article 2, paragraph 4 of the UN Charter) been treated by great powers as a legal procedural hurdle to be cleared, rather than a binding peremptory norm (jus cogens) governing their actions?*

Why does it matter?

Analyzing the legal interpretation strategies employed by great powers when conducting armed interventions is vital due to its meaningful practical and international legal implications. The principle of the prohibition of the use of force (Article 2(4) of the UN Charter) is considered humanity's greatest achievement following World War II, aimed at ending the era of "might makes right."[9] However, when great powers—the very entities responsible for upholding the Charter—proactively reinterpret or violate this principle, it sets a dangerous precedent. If research indicates that Article 2(4) has become a 'negotiable'

[9] John Linarelli, 'When Does Might Make Right? Using Force for Regime Change' (2007) SSRN ID 1010340.

provision and is being “disregarded” by great powers, it serves as a warning of the fragility of the collective security framework.

The core focus of this research is to decipher the process of legal “Erosion” in contemporary international relations. The expansion of exceptions not only creates grey zones that blur the boundaries of the prohibition on the use of force, but also pushes the collective security system toward a hopeless state, where force operates beyond restraint, and violations are increasingly rationalized under the guise of “practical adaptation” or “subsequent practice”. The case studies analyzed in this thesis serve to partially illustrate this reality, where the line between violation and adaptation runs the risk of becoming "Hopelessly Blurred," as Lauterpacht once warned [10] . Consequently, delineating this legal boundary is not merely a pressing academic necessity, but also a vital effort to help prevent international law from degenerating into a legitimizing instrument for the increasingly pervasive use of force by certain major powers today.

While it is universally acknowledged that wrongful acts can never give rise to legal custom (*ex injuria jus non oritur*) , this does not eliminate the risk of forming distorted international customs. In international law, State practice combined with *opinio juris* creates customary law. If the interventions of great powers occur persistently and without effective opposition, they may gradually crystallize into new customary norms. This research helps identify whether we are moving toward an era in which the use of force is becoming more widely accepted.

Ultimately, the significance of this research lies in its implications for the survival of small and medium-sized states. Although the primary focus is on the interventionist behaviors of great powers, the consequences of these actions directly dictate the future security of less powerful nations. In a global system where international norms are under siege, militarily disadvantaged states become the most vulnerable. This study addresses a critical concern in contemporary international politics: the use of force by great powers not only undermines the integrity of international law but also threatens to dismantle Article 2(4)—the only legal shield that protects smaller nations from the whims of the powerful.

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[10] Hersch Lauterpacht, as cited in Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2004) 9

Methodology

Although applying International Relations theories is necessary to comprehend the motivations driving the behavior of great powers, this does not constitute the primary research objective of this study. Consequently, variables such as power structures, strategic interests, and economic-military capabilities are treated strictly as contextual background rather than direct objects of investigation. Instead, the following thesis will adopts the framework of legal positivism, maintaining a resolute separation between law and politics.

As Hans Kelsen observed: "The ideal of an objective science of law and State, free from all political ideologies, has a better chance for recognition in a period of social equilibrium." [11] Furthermore, he argued that even during periods of stability, the concept of a legal science independent of politics must be resolutely upheld. This approach ultimately aims to safeguard " The strict autonomy of law, an attempt to save the law from destruction through its instrumentalization for political purposes" [12] In this regard, it is essential to maintain a clear distinction between legality and legitimacy. While legitimacy plays a significant role, it is often subject to the subjective influence of political or moral factors; consequently, a legal argument must prioritize the establishment of legality as a prerequisite, "Any specific use of force can be lawful only if it can be based on an exception to this rule which is valid as a matter of law " [13] The rigor of the law serves as the final barrier against the arbitrariness of political power and provides a solid theoretical foundation for evaluating the forcible interventions of great powers through the normative lens of contemporary international law.

From the positivist perspective, maintaining a clear distinction between legality and legitimacy is vital. While legitimacy is often swayed by subjective political or moral considerations, a legal assessment must prioritize objective legality. As Michael Bothe notes, "any specific use of force can be lawful only if it can be based on an exception to this rule which is valid as a matter of law." [14] The rigor of positive law serves as the final barrier

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[11] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1949) XVII.

[12] Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 EJIL 361, 381.

[13] Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 EJIL 227, 228.

[14] Ibid

against arbitrary political power, providing a firm normative foundation for evaluating the forcible interventions of great powers.

Therefore, when examining the practical use of force by great powers in relation to legal norms, the positivist legal method is adopted as the fundamental approach, which then enables the thesis to maintain objectivity by isolating legal analysis from political or moral variables. This help to avoid entanglement in multidimensional debates that conflate legality and legitimacy. The entire research process—from the identification of legal sources and the interpretation of their content to the application of legal norms within case studies—is constructed upon this positivist legal foundation. Such methodological approach requires a strict "reliance on existing texts and on the interpretation made of them by the international community of States as a whole" [15] , thus is applied to the research process through the following steps:

- ***Identify the primary sources of law selected for the study***:

These are legal instruments that have been written and implemented by states. Article 38(1) of the Statute of the International Court of Justice (ICJ) is frequently cited as the starting point for discussing these fundamental sources of international law, which include: international conventions, international custom and judicial decisions (case law) [16] . Additionally, Resolutions of the United Nations Security Council—upon being implemented and recognized by States— are considered part of the system of existing legal instruments (*lex lata*) [17]

[15] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021) 541.

[16] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38(1)

[17] Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 115 (arguing that the manner in which states vote on and adopt UN resolutions provides crucial evidence of both state practice and *opinio juris*, thereby influencing the formation of customary international law. Although not explicitly listed in Article 38(1) of the ICJ Statute, UN Security Council resolutions are binding on all Member States pursuant to Article 25 of the UN Charter. Conversely, while General Assembly resolutions (Articles 10–14) are generally non-binding recommendations, they play a pivotal role in shaping customary international law.

- ***Interpreting the legal content based on Article 31 of 1969 Vienna Convention on the Law of Treaties (VCLT)***

Pursuant to Article 31 of the Vienna Convention, interpretation in good faith in accordance with the ordinary meaning of the terms is the mandatory starting point for any process of treaty interpretation [18]. Through a positivist lens, the text itself constitutes the most objective and unequivocal evidence. This approach is strictly applied when interpreting and analysing treaties, customary practices, case law, and other existing textual sources within the research scope of this thesis.

This thesis places particular emphasis on Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) in order to examine the "subsequent practice" of States. However, as numerous scholars contend [19], it must be emphasized that the prohibition of the use of force is not an ordinary norm, but rather constitutes a peremptory norm (*jus cogens*). Consequently, as Henderson posits, any alteration in the legal landscape concerning exceptions to the use of force demands that the global community collectively recognize and accept such a change as a binding legal obligation [20]

- ***Applying the two-element approach to identify the scope of the customary law***

The positivist approach demands objective evidence for the existence of law. In this context, the "Two-element approach" serves as a foundational positivist tool to determine whether an act of intervention has attained the status of customary law [21]. Furthermore, because the use of force is directly linked to peremptory norms (*jus cogens*), the following two-element test

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[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 31.

[19] M Byers and S Chesterman, 'Changing the Rules about Rules? Unilateral Intervention and the Future of International Law' As cited in JL Holzgrefe and RO Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 180. Any modification to a rule " Requires the support of most, if not all, States, as expressed through their active or passive support coupled with a sense of legal obligation"

[20] C Henderson, *The Use of Force and International Law* (CUP 2018) 26.

[21] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 European Journal of International Law, 1. This positivist rigor is perfectly exemplified in Professor Bruno Simma's analysis of the 1999 NATO bombing in Kosovo. He posits that while the intervention might be deemed morally "legitimate," under a strict positivist lens—failing to satisfy the two-element test—it remains strictly illegal and unequivocally fails to generate a new customary exception for intervention.

cannot merely rely on widespread practice; it must explicitly demonstrate that such practice reflects the consensus of the international community of States as a whole:

Analysis of State Practice: Focus on examining the conduct of great powers, particularly physical acts such as military intervention and verbal acts: [22] Notably, this method assesses the consistency and generality of interventionist acts to determine whether they constitute a general practice. Conversely, a legal discourse predicated on conduct that lacks recognition from the international community will not possess the validity to establish a customary norm.

Opinio Juris: While state practice is undeniably crucial, a modification to the customary framework on the use of force requires a decisive showing of *opinio juris*. In the context of armed interventions by great powers, this legal conviction is evidenced by the justifications advanced by the intervening state and the subsequent approval or condemnation expressed by the international community. As Olivier Corten asserts: "The importance of practice is not denied, but practice only possesses meaning if and to the extent that it can be deduced that states believe their conduct conforms to a legal rule" [23]. Consequently, the ultimate benchmark for assessing the legality or illegality of any armed intervention is to "examine international law through the language used by states" [24] , which requires decoding the legal justifications formulated by the intervening state alongside the diplomatic responses of the rest of the world.

Furthermore, applying the two-element approach serves to determine the relationship between treaty law (the Charter) and customary law, which will help shed light on a fundamental debate: Whether the interventionist practices of major powers are directly 'eroding' existing law, or whether they are, in fact, contributing to making the Charter more 'adaptable' to practice.

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[22] Conclusion 6: Forms of practice, Draft conclusions on identification of customary international law 2018, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf. "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction"

[23] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Volume 7 in the series French Studies in International Law , 2nd edn, Hart Publishing 2021) 18

[24] Ibid

Outline of thesis.

The thesis is structured into followings part:

Chapter 1: The Normative Framework on the Use of Force: Boundaries between Prohibition and Lawful Exceptions

Chapter 1 aims to establish a theoretical framework for identifying the constitutive elements of a prohibited "use of force" under Article 2(4) of the UN Charter, as well as the elements constituting lawful exceptions permitting the use of force. Three fundamental exceptions are identified: the right of individual or collective self-defense in the event of an armed attack under Article 51 of UN Charter; the Security Council's authorization to use force (Article 42); and the extra-Charter exception derived from State practice, namely Intervention by Invitation (based on State consent). Specifically, Chapter 1 will access: (i) the legal substance of a prohibited "use of force" between States under both treaty and customary law; (ii) the legal nature of acts that do not violate the prohibition, based on exceptions under treaty and customary law, with a particular focus on the right of self-defense under Article 51 of the Charter. This analysis is inextricably linked to the interplay between treaty law and customary law regarding the prohibition of the use of force and its exceptions. The chapter will be thus divided into two section, namely:

Section 1.1 thoroughly examined the principle prohibiting the use of force between states under international law, with an initial focus on elucidating the interplay between the two primary sources of law governing this prohibition. The analysis affirmed that the prohibition of the use of force exists as an independent rule of customary international law, operating in parallel with the United Nations Charter. This customary norm is not a mere "replica" of Article 2(4). Its content, scope of application, and exceptions may be broader, narrower, or more flexible than the static wording enshrined in the 1945 Charter. On this basis, the section clarified the substantive meaning of an unlawful "use of force," while establishing specific criteria to evaluate the illegality of such conduct through the lens of both treaty and customary law.

Section 1.2 focus on analyzing Article 51 from a treaty law perspective, specifically illuminating the intersection of two key concepts within the same norm: the prerequisite of an "armed attack" and the recognition of the "inherent right" of self-defense under customary law. Furthermore, based on an assessment of the threshold of violence and the constitutive elements of an armed attack, this section delved into the interplay between customary and treaty law in the context of the law having to "adapt" to contemporary practice. By establishing this theoretical filter, this section deconstructs the expansive interpretations of the right to self-defense—namely anticipatory self-defense and preemptive self-defense—while emphasizing that the doctrine of preemptive self-defense invoked by the United States since 2003 rests on a highly ambiguous legal basis and thus remains a subject of fierce controversy.

To complete the comprehensive picture of the legal framework to be applied to the actual use of force by major powers, Chapter 1 also elucidated two other fundamental exceptions to the prohibition of the use of force: the mechanism of using force under the authorization of the Security Council (Article 42, Chapter VII) and the exception emerging from extra-Charter practice, namely intervention by invitation, based on the consent of the host state.

Chapter 2: The Interventionist Use of Force by Major Powers: Case Studies

Chapter 2 draws upon highly reliable legal documentation from the United Nations Security Council (UNSC), with a primary focus on resolutions and verbatim records. From a theoretical standpoint, international law is founded on the principles of voluntarism and State consent. Consequently, UNSC documents serve not merely as authoritative decisions, but also as reflections of the will, practice, and *opinio juris* of State actors. This empirical data functions as an objective benchmark against which existing legal norms are evaluated during the analysis of great powers' use of force. Throughout this chapter, the thesis constantly maintains the lens of legal positivism. Accordingly, a military intervention campaign—even if disguised with a veneer of legitimacy or perfectly justified on moral grounds in the eyes of certain actors—still constitutes a legally wrongful act if it contravenes the strict boundaries of the international legal framework. Limiting the analytical scope of Chapter 2 to three representative cases—**the Gulf War (1990-1991), the Iraq War (2003), and the Ukraine Conflict (2022)**—is by no means an arbitrary choice. Rather, these cases were deliberately selected based on a systematic set of criteria to provide a comprehensive picture of interventionist diplomacy involving armed force. This is based on three following facts:

First, in regards to the representativeness of the actors and legal justifications, the intervening actors in all three cases are major powers positioned to fundamentally shape the global order. The legal arguments invoked by these states revolve around the three core exceptions, which was elucidated in Chapter 1, namely the right of self-defense (Article 51), the authorization of the use of force by the Security Council (Chapter VII), and intervention by invitation (the consent of the host state).

Second, in regards to the diversity of conflict paradigms, the three events represent three fundamentally distinct geopolitical scenarios, ensuring the objectivity of the research sample: (i) **The Gulf War (1990)**: A paradigm of a smaller state initiating aggression, prompting a lawful intervention by the international community spearheaded by a major power. (ii) The **Iraq War (2003):** A paradigm of a major power proactively launching a military intervention (preemptive strike) based on national security justifications. (iii) The **Ukraine conflict (2022)**: A paradigm of a major power proactively using force to commit an act of aggression aimed at altering the geopolitical status quo and territorial boundaries.

Third, in regards to the transition of legal practice across successive phases, the timeline of these three events is not merely a coincidental selection, but serves as the starkest milestones gauging a downward trajectory in compliance with international law. This sequence delineates a transition from expansively interpreting the boundaries of multilateral authorization **(Gulf War 1990)** to the manipulation and distortion of the law for unilateral strategic gain **(Iraq War 2003),** and culminating in the cynical appropriation and weaponization of shared legal concepts (such as the right of self-defense or the prevention of genocide) aimed at dismantling the existing order **(The Ukcraine Conflict 2022)**. Corresponding to this trajectory is a systemic deterioration in the institutional role of the UN Security Council, sliding from a position of proactive coordination and regulation of force **(Gulf War 1990),** to being circumvented and bypassed **(Iraq War 2003),** and ultimately descending into a state of absolute paralysis and neutralization in the face of actions by its Permanent Members (The **Ukraine Conflict 2022).**

Chapter 1: Normative Framework on the Use of Force: Boundaries Between Prohibition and Lawful Exceptions

In an international system characterized by anarchy and devoid of a supranational authority to enforce rules upon states, armed interventions by great powers are frequently viewed through the lens of pure realism. Within this paradigm, strategic interests and military might act as the decisive factors, and the law often proves fragile and susceptible to violation whenever core interests are threatened. As K.N. Waltz argues, " Most international law is obeyed most of the time, but strong states bend or break laws when they choose to" [25] Consequently, the international legal system continues to grapple with the most fundamental question of all: the restraint of the use of force in international relations [26] . In essence, it is a question of how to prevent the prohibition of the use of force from eroding amidst increasingly expansive interpretations that grant great powers broader latitude to use military force.

Accordingly, Chapter 1 focuses on analysing the prohibition of the use of force under Article 2(4) of the United Nations Charter as the foundational norm of the contemporary international order. However, the scope and substantive content of this prohibition cannot be fully comprehended by interpreting Article 2(4) in isolation [27] . In practice, legal controversies in armed conflicts frequently revolve around the interpretation of the exceptions to this prohibition. In order to establish a legal framework that serves as an analytical baseline for evaluating forcible interventions practices of great powers, the following chapter will examine the prohibition of the use of force through the dual lenses of treaty law and customary international law.

[25] Kenneth N Waltz, 'Structural Realism after the Cold War' (2000) 25(1) International Security 5, 27.

[26] Bruno Simma, 'Foreword' in Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021) VII.

[27] Bruno Simma et al. (eds), The Charter of the United Nations: A Commentary, Volume I (3rd edn, Oxford University Press 2012). Chapter I: Purposes and Principles, Article 2 (4), para 15.

1.1. The Prohibition of the Use of Force and the Scope of Legal Accountability.

a) The prohibition use of force under treaty-rule

The prohibition use of force is primary a treaty-bound obligation, most notably established by the United Nations Charter under Article 2, paragraph 4. Establishing specific criteria to define violations of the prohibition of the use of force in its broad sense is crucial as it creates a universal legal standard that governs how states must behave to maintain international peace and security. The term "force" as defined in Article 2(4) of the UN Charter represents a more comprehensive category than "war," with the latter being classified as a particularly severe manifestation of the use of force. [28] Prior to the establishment of the UN Charter, international law maintained a distinction between formal warfare and limited military actions known as "measures short of war." [29] , in which circumscribed operations, such as targeted armed reprisals, were generally accepted because they did not trigger a formal state of war, allowing peacetime legal frameworks to remain in effect while bullets were flying. The authors of the UN Charter eventually sought to close these loopholes by using more stringent language. By shifting the focus from "war" to the broader concept of "force" in Article 2(4), especially when viewed in tandem with Article 2(3), which mandates the peaceful settlement of all disputes, the Charter intended to outlaw nearly all forms of cross-border military coercion regardless of their scale, thus effectively rendering the old "measures short of war" inadmissible.

The prohibition is not only restricted to full-scale armed attacks or major military confrontations, but also encompasses any military operation conducted by one state against another. This principle is further reflected in the seventh paragraph of the Preamble regarding the objectives of the Charter: *"to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest*."[30] Given the context of interventional diplomacy becoming increasingly prevalent worldwide, should the prohibition of the use of force be interpreted strictly to describe only direct armed interventions, such as the overt entry of regular armed forces into foreign territories, aerial

[28] H Rumpf, 'The Concept of Peace and War in International Law' (1984) 27 GYIL pg. 429–43.

[29] CHM Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 RCADI 467–68, 471–72 and 475–76.

[30] Charter of the United Nations, Preamble, 24 October 1945, para. 7, 1 UNTS XVI.

bombings, or cross-border skirmishes? The understanding of what constitutes "force" has also been consistently reaffirmed by numerous nations during the deliberations for key General Assembly resolutions that defined the limits of the prohibition on the use of force. Most notably, the UN General Assembly adopted the *1970 Declaration on Friendly Relations* to established a formal "duty" for nations to avoid using or threatening force, categorizing such actions as direct violations of international law and the UN Charter.[31] By specifically focusing on cross-border military actions, armed reprisals, and the facilitation of armed civil strife, the Declaration demonstrates that the concept of "force" under the Charter exclusively encompasses acts of an armed nature. Consequently, non-military forms of coercion, such as economic or political pressure, fall outside the scope of this specific prohibition.

b) The Prohibition of the Use of Force under Customary International Law

The prohibition of force also functions as a rule of customary international law, which not only creates a private agreement between members, but also serves as a universal legal framework that binding states regardless of their specific treaty affiliations.[32] Olivier Corten (2005) observes that: " From a restrictive standpoint, this principle is seen as originating from both treaty and customary law, wherein neither source prevails over the other." Such reasoning implies an alignment between written law (the Charter) and unwritten customary law, therefore, ensures that the Charter's provisions remain a rigid framework, and the

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[31] UNGA Res 2625 (XXV) 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations' (24 October 1970) (Declaration on Friendly Relations). Principle 1 of the Declaration establishes a formal duty for states to refrain from the threat or use of force, explicitly declaring that such actions violate international law and the UN Charter, which include:

- The use of force to violate existing international boundaries or to resolve international and territorial disputes (para 4);
- The use of force to violate international lines of demarcation, such as armistice lines (para 5);
- Acts of reprisal involving the use of force (para 6);
- Forcible actions that deprive peoples of their right to self-determination, freedom, and independence (para 7);
- Organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another state, or acquiescing in organized activities within its territory directed toward such acts (para 8)

[32] Tom Ruys, '*Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010), 18.

prohibition cannot be easily relaxed or flexibly reinterpreted by the subsequent, unilateral practice of powerful States. [33] Under standard doctrine, altering such a norm requires meeting a remarkably high threshold, as customary international law (CIL) is established through the consistent and general practice of states accompanied by a shared sense of legal obligation. [34] The latter element, known as *opinio juris*, serves as the essential core of customary international law. Often described as the "psychological" element [35], the term itself distinguishes state actions performed out of political interest or international courtesy from those executed as a legal mandate. While treaty-based regulations are strictly limited to the specific nations that have formally entered into the agreement, CIL carries a much broader authority as it applies to the entire international community. The only exceptions to this universal binding nature are "persistent objectors", which refer to nations that consistently and explicitly voiced their opposition to a rule during its formative stages and have explicitly communicated their objections to other States while consistently upholding them [36].

Given that **opinio juris** is often identified through the consistent behavior of states, the necessity of a customary pillar suffers from well-known difficulties, particularly, when there is little agreement about what type of state action counts as state practice [37]. While policy statements, domestic legislation, and diplomatic correspondence are widely accepted as straightforward evidence of state practice, other sources remain subject to debate. For instance, international agreements are frequently cited as proof of customary international law, yet their application remains erratic regardless of whether the treaties are multilateral or bilateral in nature. There are also writings of jurists, which serve as a common reference point, however, they are often critiqued as tendentious or biased. Perhaps most contentious, yet controversially indicators of an emerging international consensus, is the growing reliance on United Nations General Assembly resolutions and other non-binding instruments. Within

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[33] Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 16 EJIL 803, 813.

[34] Restatement (Third) of Foreign Relations Law. 1987. Philadelphia: The American Law Institute. Para 102 (2)

[35] A. Kaczorowska, Public International Law (4th ed) (*Routledge* 2010) , 39. Chapter 2: Source of International law. Kaczorowska simply treat opinio juris as the psychological element of customary international law.

[36] ILC draft conclusion 16(1): '1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.'

[37] Fidler, David P., "Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law" *German Year Book of International Law 39*, 198.

this field, *Opinio Juris* is often identified through the consistent behavior of states and the adoption of landmark UN General Assembly resolutions, such as the 1970 Friendly Relations Declaration and Resolution 42/22, both of which articulate a universal legal conviction that the ban on force binds all states regardless of treaty membership.

Under customary norm, the principle of prohibition use of force is inherently adaptable, as well as evolving alongside emerging risks to global stability, which allows the international legal framework to gradually modernize and refine its implementation through actual practice and established precedents. Nevertheless, for a new custom to evolve, mere state practice is insufficient, given that it must be paired with a clear expression *opinio juris,* reflecting a consensus from the international community of states in its entirety.[38] The legal reality was famously solidified by The 1986 landmark *case Nicaragua v. United States* of the International Court of Justice (ICJ) , which acknowledged this principle for the first time as a In the *Nicaragua* (Merits) case, the Court determined that the prohibition on the use of force and the inherent right to self-defense existed within customary international law prior to the drafting of the UN Charter, and that they are "Developed under the influence of the Charter "[39]. Specifically from paragraphs 187 to 190 (merits phase), the International Court of Justice (ICJ) established a landmark argument to affirm that the principle of the prohibition of the use of force in Article 2(4) of the UN Charter constitutes customary international law, achieved through the convergence of its two constituent elements:. Firstly, in regard to State Practice, although The Court declined to review state practice in exhaustive detail [40] , it introduced the "general consistency" standard, which emphasized that practice need not be in absolute conformity with the rule. However, if a State acts inconsistently but justifies its conduct by appealing to legal exceptions, such a defense actually confirms the existence of

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[38] Christian Henderson, The Use of Force and International Law (CUP 2018) 26. According to Christian Henderson, any shift in the legal landscape regarding the use of force necessitates that the global community collectively recognizes and accepts such a change as a binding legal obligation.

[39] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, 96-9, para 181. "So far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law…."

[40] Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 101. The ICJ's refusal to conduct a detailed review of State practice regarding the prohibition of the use of force in the Nicaragua Judgment (Merits) has been critically analyzed by Anthony d'Amato and Thomas Franck in n the *American Journal of International Law*. See also Thomas M Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' (1987) 81 AJIL 116. Franck asserts that the Court employed a "shortcut" by ignoring actual State conduct in favor of verbal statements, an approach which both scholars argue weakens the objectivity of international law and creates a customary rule that is divorced from the reality of international relations.

the rule[41] . Secondly , regarding the *opinio juris* element, The Court deduced this from the attitude of States toward key General Assembly resolutions, notably Resolution 2625 (XXV). It regarded the acceptance of these texts as an acknowledgement of the rule's independent binding force, even when detached from the Charter's institutional framework [42]. Based on this reasoning, the final verdict indicated that the US had acted " In breach of its obligation under customary international law not to use force against another State "[43] . This judgment has since become a crucial benchmark for evaluating international relations practice concerning the prohibition of the use of force in specific cases.

The status of Article 2(4) as customary international law is also revealed to extend beyond the Nicaragua judgment. Having been reaffirmed throughout subsequent jurisprudence within *the 2004 Wall Advisory Opinion* [44] The Court elevated its interpretation by linking the prohibition of the use of force to a direct legal consequence, expressing that force can never be a source of sovereignty, "no territorial acquisition resulting from the threat or use of force shall be recognized as legal" [45] . As a matter of principle, a just legal system never permits rights to derive from wrongful acts (*Ex injuria jus non oritur*).

Furthermore, given its critical importance to the international order, the principle of "prohibition of the threat or use of force" is recognized as a peremptory norm of general international law or *jus cogens*. This status places the norm regarding the prohibition use of force at the highest level of the legal hierarchy, permitting no derogation and overriding inconsistent treaties [46]. In the process of drafting the law of treaties, the International Law

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[41] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, 98, para 186.

[42] ibid, 99-100, para 188-189.

[43] ibid, 146-147, para 292 (4) &(6) .

[44] Legal Consequences of *the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion 2004, ICJ Rep, 136. https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf. accessed 30 May 2026

[45] ibid, 171, para 87.

[46] International Law Commission, 'Report of the International Law Commission on the work of its seventy-third session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10, ch IV ('Peremptory norms of general international law (jus cogens)'), Conclusion 2. https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf accessed 30 May 2026

Commission (ILC) identified this prohibition as a "conspicuous example [47] . As such, this principle serves as a foundational legal norm that states cannot bypass through mutual agreements. Under Article 53 of the Vienna Convention on the Law of Treaties (VCLT), any international agreement that conflicts with such a peremptory norm is considered entirely void [48]. Moreover, if a new peremptory norm emerges, existing treaty provision that conflict with the new norm become void and terminate under Article 64 of VCLT. This status grants the prohibition a universal character, binding all States regardless of whether they are parties to the relevant agreements.

The parallelism between treaty law and customary law has transformed the prohibition of force into the cornerstone of the international order, establishing a global legal standard for the maintenance of international peace and security. Although under customary rule, the prohibition maintains independent significance, particularly in scenarios where treaty-based jurisdiction is restricted, as seen in the Nicaragua case [49]. In analyzing the relationship between treaty rule and customary law, the Simma commentary observes "It follows that the ICJ for all practical purposes tends to view the prohibition of force under general international law and the prohibition laid down in Art. 2 (4) as being identical in content." [50] Thus highlighting the Court's tendency to take a methodological shortcut, which effectively mapping the treaty's exact wording directly onto its interpretation of custom. Nevertheless, as Randelzhofer and Dörr submitted "Although the Court's line of argument appears to be highly objectionable, the result is that the existence of a prohibition of the use of force under customary law, though possibly differing in content from that laid down in Art. 2 (4), can in practice hardly be denied ".[51] This divergence is critical as it implies that states might be

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[47] International Law Commission, 'Reports of the Commission to the General Assembly' (1966) vol II Yearbook of the International Law Commission 247, UN Doc A/6309/Rev.1. https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf. accessed 30 May 2026

[48] A/CN.4/167 and Add.1-3 Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur Topic: Law of Treaties Extract from the Yearbook of the International Law Commission:- 1964 ,vol. II https://legal.un.org/ilc/documentation/english/a_cn4_167.pdf accessed 30 May 2026

[49] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, 83-84, para 174-176.

[50] D Simon and LA Siciliano, 'La contre-violence unilatérale—Pratiques étatiques et Droit international' (1986) 32 AFDI 53, 70; and FL Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 147. As cited by Albrecht Randelzhofer and Oliver Dörr (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012), *See.* Chapter 1: Purpose and Principle, Article 2(4)', E. Special Problems . I. Article 2 (4) as Customary International Law, paras 65

[51] Ibid. Albrecht Randelzhofer and Oliver Dörr (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012)

subject to differing legal interpretations of the prohibition use of force under customary international law and treaty. For instance, if the UN Charter was interpreted such that force authorized through General Assembly resolution no longer constituted a breach of Article 2(4), this shift in treaty interpretation would not automatically modify customary law to match. Consequently, force authorized by the General Assembly might be lawful under the Charter yet remain a violation of the customary prohibition on force. While a new treaty rule should prevail over a conflicting customary prohibition, such an argument is problematic because the customary prohibition is widely regarded as a *jus cogens* norm. Therefore, by analogy with Article 53 of VCLT, any interpretation of the Charter that conflicts with such a peremptory norm would likely be considered invalid rather than simply superseding the existing custom [52].

1.2. Exceptions to the "Prohibition on the Use of Force" under Article 51 of the UN Charter. The Boundary between Lawful and Unlawful Intervention.

a) The Inherent Right of Individual and Collective Self-Defense

Despite significant controversies surrounding the term *"armed attact"* [53], specifically by what criteria an act of violence is classified as an armed attack against another State that triggering the right of self-defense, The central interpretative tension resides in the opening clause "*nothing... shall impair*" and the characterization of self-defense as an "inherent" right within Article 51[54] have led several scholars to argue that the UN Charter was never

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[52] Johnston, Katie, , EJIL:Talk! (last visited May 1, 2026), https://www.ejiltalk.org/author/kjohnston/.

[53] Sean Murphy, *Principles of International Law* (2nd edn, West Academic Publishing 2012) 509, citing UNGA Res 3314 (XXIX) (14 December 1974). An "armed attack" is generally seen as the gravest "use of force," which includes invasion, bombardment, and an attack on another State's armed forces. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, 103, para 176. *"Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defense, is not provided in the Charter, and is not part of treaty law."*

[54] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art 51. "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*."

intended to restrict the broader customary right of self-defense as it existed prior to 1945 [55]. As further clarified in the Nicaragua *v. United States* case, the International Court of Justice (ICJ) resolutely affirmed the existence of this right in which any State possesses in the event of an armed attack encompasses both collective and individual self-defense. Consequently, The Court concluded that the Charter itself testifies to the existence of the right of self-defense under customary international law,[56] provided that forceful measures are permissible only under two strict conditions: (a) I*f an armed attack occurs* and (b) *provided that* t*he Security Council has not yet taken the measures necessary to maintain international peace and security* [57]

The first conditional phrasing—mirrored in the equally authentic French version *"dans le cas oú un Membre des Nations Unies est l'objet d'une agression armée"* is the precondition that triggers the right to self-defense.[58] While the French use of *"agression armée"* semantically permits a broader interpretation of a hostile state of affairs than the localized English *"armed attack,"* this linguistic divergence must be reconciled under Article 33(4) of VCLT, which mandate the meaning that best reconciles the texts in light of the treaty's object and purpose must be adopted, should the conflict between authentic texts occurs. [59]. As it was reiterated following the *Nicaragua* judgment, the Court resolved this tension by favoring the narrower, more restrictive English threshold, reinforcing that a state can only exercise its right to self-defense if it has first been the victim of an actual armed attack. This strict

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[55] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art 51. Article 51 employs two specific terms to describe the right of self-defense: The English version: uses the phrase "...the inherent right of individual or collective self-defense..." (emphasizing its intrinsic nature tied to national sovereignty). The French version: uses the phrase "...le droit naturel de légitime défense, individuelle ou collective..." (emphasizing the nature of a "natural right", which exists objectively even if not codified in writing). Both expressions affirm a fundamental legal principle: the right of self-defense was not "created" by the UN Charter; rather, the Charter merely "recognizes" a right that already exists in customary international law. See also. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, para 176. The Court explicitly observed that 'the Charter itself testifies to the existence of the right of collective self-defense in customary international law' by its use of the textual terms 'inherent' and 'naturel'.

[56] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, 101, para 193

[57] Charter of the United Nations , 1945 1 UNTS 16, Art 51.

[58] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, 103, para 195.

[59] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 33(4).

requirement established what is known as the “Nicaragua gap”, a legal gray area that separates a prohibited, low-level use of force from a full-scale armed attack that justifies a military response.[60] Such a requirement was further exemplified through the ICJ’s ruling in which Nicaragua had not committed any armed attack, even though the US argued that its military actions against Nicaragua were warranted as collective self-defense for Costa Rica, Honduras, and El Salvador in reaction to armed assaults on those nations by Nicaragua. Upon referring to General Assembly Resolution 3314 Article 3 (g) *the Definition of Aggression* [61] The court then established a clear demarcation where the only the most grave forms of the use of force are to be considered an “armed attack”, thus reinforce the statement in which Nicaragua’s support for the insurgents in El Salvador including the provision of weapons or logistical support did not reach the threshold of “scale and effects” necessary to trigger the right of self-defense under Article 51, even though it could be illegal intervention. Consequently, “less grave” acts of the use of force are excluded from the scope of an armed attack. This mean that while Nicaragua had provided weapons and logistical support to insurgents in El Salvador and engaged in minor cross-border incursions, these actions were merely "Frontier Incidents" or unlawful intervention. Because they did not constitute an "armed attack," they did not legally trigger a right to self-defense under Article 51 of the UN Charter.

The inherent right of a State to use force in the territory of another State in individual or collective self-defense, yet remains at the heart of a major interpretative divide. For instance, Oliver Corten notes that some states and commentators argue the term "inherent" (French "droit naturel" literal translation “Natural Law”) implies that Article 51 preserves a wider, pre-existing customary right to use force preventively before an attack materializes. At the same time, he also contends that such an expansive interpretation is fundamentally irreconcilable with the status of the prohibition of force as a peremptory norm (jus cogens), which make it cannot be derogated through secondary customary excuses. As a result, allowing an unrestricted customary right to persist alongside the Charter would render the specific limitations of Article 51 effectively void, undermining the entire legal framework

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[60] Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 266.

[61] UNGA Res 3314 (XXIX) (14 December 1974) art 3(g); see also 'Report of the International Law Commission on the work of its thirty-second session' (5 May–25 July 1980) UN Doc A/35/10, reprinted in (1980) II(2) YILC 43, para 22. “T*he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement there*in.”

governing international peace and security.[62] Furthermore, through its ruling in the *Nicaragua* case, the Court also established that collective self-defense is governed by specific customary requirements which go beyond those of individual self-defense. For a third-party state to legally intervene, the purported victim must first formally and publicly declare that it has sustained an armed attack. In addition, the right to collective action is not automatic due to the fact that it can only be activated if the victimized state explicitly requests military assistance from its allies. [63] . This leads to an intriguing conclusion: Although the United States' support for the Contras violated the prohibition of the use of force and the principle of non-intervention, the U.S. could not justify its actions as collective self-defense, since Nicaragua's prior conduct did not amount to an armed attack warranting such a response. At the time when the US began its intervention, the victim State (El Salvador) had not declared itself the victim of an armed attack, nor had it formally requested assistance from the U.S. In the absence of such a declaration by the State concerned, the right of "collective self-defense" does not qualify for activation.

The right of self-defense, strictly limited as interpreted above, has received significant support from academia, where "Not every use of force is prohibited by Art. 2(4) of the Charter constitutes an 'armed attack' in the sense of Art. 51 " . Such prevailing opinion holds that when force is used on a relatively large scale and with significant effect does it amount to an armed attack [64] Nonetheless , Customary Law by 1945 had already evolved to recognize

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[62] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, 2nd edn, French Studies in International Law, vol 7 (Oxford, Hart Publishing, 2021) Chapter 4: "Can Circumstances Precluding Wrongfulness be Invoked to Justify a Use of Force?" 204–246. See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) [1986] ICJ Rep 14, para 190; International Law Commission, 'Draft conclusions on peremptory norms of general international law (jus cogens)' (2022) UN Doc A/77/10, Annex (a). The jus cogens nature of the prohibition of the use of force was affirmed by the ICJ in the Nicaragua case. Doctrinally, because Article 2(4) is subject to exceptions (self-defence), the ILC (2022) clarified that the absolute core of this principle is strictly the 'prohibition of aggression', forming a boundary that no state is permitted to transgress.

[63] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, paras 195, 199, 211."It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation. Where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack"

[64] Albrecht Randelzhofer, 'Use of Force' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 4 (North-Holland 1982) 271; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, 93, para 195. Randelzhofer view that only acts of using force reaching a large scale and causing serious consequences can trigger the right of self-defense (Article 51). This was later reaffirmed by the International Court of Justice (ICJ) in the Nicaragua case (1986) with the equivalent phrase "scale and effects," as seen in the following judgment excerpt: " The Court sees no

only a very limited scope for self-defense, in which the debate was heavily influenced by competing policy perspectives regarding whether a broad or narrow application of self-defense is more pragmatic in modern international relations. Even The travaux préparatoires confirmed that the San Francisco community drafters of the Charter intended to leave no scope for unilateral armed actions not explicitly provided for in the text, by stating it as "*neither authorized nor admitted*" outside of the strict, institutionalized objectives of the UN [65] . As a result, the ICJ's decision to categorize certain military actions as 'mere frontier incidents' remains a point of significant legal contention, given that small-scale border incidents involving lethal force are not excluded from the legal definition of an "armed attack" and can legitimately trigger a nation's right to self-defense. Such interpretation was further put to a critical test before the International Court of Justice (ICJ) in the *Corfu Channel* [66], in which the court asserted " The respect for territorial sovereignty as an essential foundation of international relations". When the United Kingdom swept mines in Albanian waters during its Operation Retail, it argued that its unilateral naval operation did not violate Albania's territorial integrity or political independence under Article 2(4). The ICJ rejected this narrow reading, branding the mine-sweeping operation as a violation of sovereignty and a manifestation of a prohibited "policy of force." The ruling reinforced the view that the Charter framework was designed to eliminate loopholes, treating Article 51 as a tightly confined exception rather than an open door to broader pre-existing customary remedies.

Depending upon the interpretations given to the thresholds of 'use of force' and 'armed attack', linking 'force' directly to 'armed attack' , on one hand, is dangerous because it lowers

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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", For an analytical overview of the initial debate on this threshold, see also. Peter Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 705, 757.

[65] UNCIO, vol 6, at 477 (13 June 1945); see also UNCIO, vol 4, 512

[66] Corfu Channel Case, Pleadings, Vol. III, p. 296; reprinted in DJ Harris, Cases and Material on International Law (6th ed, Sweet and Maxwell, 2004), 892. Corfu Channel (United Kingdom v. Albania), Judgment of 9 April 1949, (Merit) ICJ Rep. p. 4 . The dispute centered on British warships sweeping mines in Albanian waters after being fired upon by an Albanian battery. In its defense, the United Kingdom relied on a narrow reading of Article 2(4), arguing that its naval operations threatened neither the territorial integrity nor the political independence of Albania, as the state suffered no permanent territorial loss or deprivation of its sovereign functions

the threshold for justifying self-defense and increases the frequency of war. For instance, limiting the ban on force exclusively to military or armed actions ensures that countries still have legal avenues to pressure states that violate international law [67]. If the prohibition were expanded to encompass non-military coercion, it would effectively outlaw legitimate diplomatic and economic tools, such as trade embargoes or financial sanctions. On the other hand, separating the two concepts creates a legal gap that might encourage aggressive nations to utilize coercive force just below the threshold of an armed attack, knowing that their actions would not reach the legal threshold required for the victim to respond in kind. Ultimately, international law must choose the risk between expanding the right to self-defense and leaving states vulnerable to strategic violence that stays intentionally beneath the trigger for a legal counter-strike [68]. The traditional legal distinction between a mere "use of force" and a full "armed attack" is quite narrow, in which very few cross-border military actions fail to justify a defensive response, shifting the legal focus from a gravity threshold toward the standards of necessity and proportionality.

b) Necessity and Proportionality

The boundary between legal stability and adaptation of prohibition use of force is inherently fragile. Should the UN Charter be permitted to evolve based solely on the unilateral actions of global powers, the international community risks reaching a point where legitimate self-defense becomes indistinguishable from raw aggression disguised as legal necessity. This danger reflects the specific concern raised by Lauterpacht, who cautioned that such a trajectory would result in the distinction between a breach of international law and a valid legal evolution becoming " Hopelessly Blurred." [69] . In response to this trend, the ICJ in the *Nicaragua* case established stringent criteria aimed at maintaining legal stability. Although

[67] Albrecht Randelzhofer and Oliver Dörr (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012), *See.* Chapter 1: Purpose and Principle, Article 2(4)' , V. Threat of Force, paras 42-43. *See also* A*rmed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 148.

[68] Harold Hongju Koh, 'International Law in Cyberspace' (Speech to the USCYBERCOM Inter-Agency Legal Conference, Fort Meade, MD, 18 September 2012) 7. In our view, there is no threshold for a use of deadly force to qualify as an "armed attack" that may warrant a forcible response. But that is not to say that any illegal use of force triggers the right to use any and all force in response—such responses must still be necessary and of course proportionate. We recognize, on the other hand, that some other countries and commentators have drawn a distinction between the "use of force" and an "armed attack," and view "armed attack"—triggering the right to self-defense—as a subset of uses of force, which passes a higher threshold of gravity.

[69] Hersch Lauterpacht, as cited in Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2004) 9

the Court did not directly rule on the lawfulness of responding to imminent threats, the judgment clearly defined the moment at which the legal right of self-defense arises [70] By doing so, they affirmed that the right of self-defense is not a “Blank Check” but is always circumscribed by strict standards under the criteria of necessity and proportionality [71] particularly when they determined in its ruling that the US’s actions failed to meet the basic legal criteria for self-defense. These can be classified as foundation legal concepts and the ICJ has noted that: “The exercise of the right of self-defense being subject to the conditions of necessity and proportionality is a customary international law rule” [72] Thus, the evaluation of both necessity and proportionality can only be occur if the initial objective is lawful. A state cannot justify an illegal use of force simply by claiming its actions were executed in a necessary or proportional manner. Instead, these principles only become relevant once it has been established that the state’s actions qualify, in principle, as legitimate act of self-defense. [73] When evaluating these requirements individually, the Court noted that even if Nicaragua’s support for Salvadoran rebels had reached the level of an armed attack, the U.S. military response failed the necessity test because it occurred months after the rebel offensive had already been defeated. Furthermore, the U.S. operations, specifically the mining of ports and strikes on oil facilities, were deemed disproportionate to the actual scale of aid Nicaragua provided to the opposition. [74]

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[70] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, 14.

[71] *Ibid* para 194

[72] *Ibid*, para 174 ” The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. “. See also. Evan J. Criddle & William C. Banks, *Customary Constraints on the Use of Force: Article 51 with an American Accent*, 29 Leiden J. Int'l L. 65 (2016). Page 2-3. American legal scholars who seek to constrain the use of force tend to focus on legal principles derived from sources outside Article 51. These principles include substantive requirements of necessity, proportionality, and cost-benefit reasonableness Although these substantive and procedural principles do not appear explicitly in the Charter’s text, American restrictivists argue that these principles represent binding norms of customary international law (some incorporated into jus ad bellum from jus in bello), general principles of law accepted by the international community of states, and basic principles of legality that are constitutive of international legal order).

[73] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, para 174. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly al1 aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law

[74] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, para 237

While the ICJ generally considers the principle of necessity and proportionality as distinct criteria, separating them in practice is difficult because they are deeply interconnected. At its heart, the legal right to self-defense relies on necessity, which dictates that military force should only be used as a final option when no other alternatives exist to stop an assault, thus effectively acting as a filter for the " imminence or immediate" of a threat [75]. If a forecasted attack is not occurring in the immediate future, a state usually has the opportunity to pursue other diplomatic or non-violent solutions . In such instances, launching a strike would not qualify as a genuine last resort. This view prioritizes reasonable judgment to determine if there is a "necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack.", ensuring that the charter remains a functional tool for international peace rather than a suicide pact for vulnerable states [76]. Proportionality, on the other hand, guarantee that the defensive action is strictly limited to repelling the attack rather than pursuing broader strategic or punitive goals. Although a state is not restricted to using the same tactics or weaponry as its aggressor, the scale of its response must not exceed what is required to repel the attack.[77] In reality, the two concepts overlap so heavily that an unnecessary act of force is inherently disproportionate, and an excessive response can rarely be justified as truly necessary. [78] Whereas necessity and proportionality are distinct criteria, proportionality operates as a balance between two conflicting elements. Specifically, actions taken in self-defense must be proportional to the initial armed attack. Within this framework, the legitimate objectives of a proportionate

[75] Gayathri U, 'Limits of Self-Defense in International Law with Specific Reference to the Modern-Day Use of Force' (LLM thesis, University of Madras 2026), stating that the principle of immediacy serves as the temporal anchor for the right to self-defense, requiring that the defensive action be taken in close proximity to the armed attack that triggered it, and noting that 'This principle also evolved from the Caroline doctrine, as timing is important in deciding whether a state of emergency exists and whether such use of defensive force is justified'; see also Christopher O'Meara, Necessity and Proportionality and the Right of Self-Defense in International Law (OUP 2021) 114.

[76] Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 American Journal of International Law (AJIL) 769, 775.

[77] James A Green, 'The *Ratione Temporis* Elements of Self-Defense' (2015) 2(1) Journal on the Use of Force and International Law , 8-9 https://centaur.reading.ac.uk/39860/. Citing. Ruth Wedgwood, 'Proportionality and Necessity in American National Security Decision Making' (1992) 86 American Society of International Law Proceedings 58, 59 "Consequently, the legal mandate for self-defense expires the moment the security threat is successfully averted. "This means that the proportionality criterion is not merely a requirement for a numerical equivalence of scale or means, but rather that the force employed must not be excessive with regard to the goal of abating or repelling the attack being responded to. A state can use whatever force is required (in terms of scale and/or means) to abate the attack against it, but no more"

[78] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 149–153.

response are “The cessation of the ongoing attack and the prevention of any further attacks.”[79] It thus follows the question of whether the harm inflicted as part of self-defense is justified by the success in meeting these goals.

The legal standard for the principle of necessity dictates that any actions taken in self-defense must be strictly essential to fulfilling a legitimate protective objective. Such requirements are referred to the "Webster Formula”, born from *1837 Caroline* incident and the subsequent diplomatic dialogue between Great Britain and the United States, which established the criteria for when a state's preemptive use of force is considered unavoidable and therefore legally justifiable [80] Upon revisiting the formula, the crucial requirement that there be "*no moment for deliberation*" is inseparable from the requirement that there be "*no choice of means*" [81] both conditions serve to prove that a situation has reached a critical point of necessity. Despite contemporary conceptual blurring by states seeking broader justification, proponents of a restrictive interpretation contend that self-defense must be used strictly to stop or push back an aggressor rather than to seek revenge or punishment. Limiting the use of self-defense strictly to the termination of an ongoing assault aligns most effectively with the core purposes of the UN Charter and significantly reduces the legal windows available for states to resort to military force. [82]

c) Anticipatory and Preemptive Self-Defense

The right of self-defense under Article 51 of the UN Charter serves as a critical exception to the prohibition on the use of force, yet its modern application requires a clear distinction

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[79] Elizabeth Wilmshurst, 'The Principles of International Law on the Use of Force by States in Self-Defence' (Chatham House International Law Programme Working Paper 05/01, October 2005) 52–57 ('Question 5: What does the criterion of “proportionality” mean?' answered by F Berman, C Greenwood, M Shaw and M Wood).

[80] R Jennings, 'The Caroline and McLeod Cases' (1938) 32 American Journal of International Law, 82. See also James A Green, 'Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006), 14. Cardozo Journal of International and Comparative Law, 429.

[81] British and Foreign State Papers (1841–1842) vol 30, 1129–1137 (Correspondence between Great Britain and the United States respecting the Destruction of the Steamboat *Caroline*). See also. Letter from Daniel Webster to Lord Ashburton (27 July 1842), reprinted in Kenneth Bourne (ed), *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print* (University Publications of America 1986); see also (1841–42) 30 British and Foreign State Papers 1129, 1131 (italics added). .” The necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation…. [T]he act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it”

[82] David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 European Journal of International Law 235.

between the legal source of the right and the criteria that limit its execution. When analyzing the legal triggers of self-defense, one must first determine if the argument rests upon treaty law or customary international law. As mentioned above, Article 51 codifies treaty-based rights that are explicitly contingent upon the occurrence of an "armed attack", a threshold in which the ICJ in the Nicaragua case restricted to the most grave forms of state-on-state violence, as well as the right to self-defense only arises when one state attacks another. However, legal scholars such as Marc Weller argue that this treaty provision does not extinguish the pre-existing customary right to preemptive action, provided such measures adhere to the rigorous standards of the Webster Doctrine. notably through the *Caroline* case where " *an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation*". [83] This enduring authority is further reinforced by the recognition of the Nuremberg Military Tribunal, suggesting that the 19th-century customary international law has become a standard for assessing whether an anticipatory attack is deemed a lawful self-defense, as well as establishing such standards as valid measures for distinguishing legal protection from illegal aggression.[84]

While the UN Charter serves as the foundational framework for modern state conduct, a significant lack of consensus remains within legal doctrine regarding whether Article 51 forbids or permits military action prior to an actual armed attack. State practice since the dawn of the 21st century has presented legal scholars with an urgent demand to examine a broader interpretation of Article 51 of the UN Charter regarding the temporal trigger of the right to self-defense specifically concerning the concepts of anticipatory and preemptive self-defense [85] . Moving beyond the traditional parameters established in the nineteenth century, some proponents such as Abraham Sofaer argue for a right broader than the immediate

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[83] Marc Weller (ed.), The Oxford Handbook of the Use of Force in International Law, OUP, 2015, p 20. See also. Letter from Lord Ashburton to Daniel Webster (July 28, 1842), *reprinted in* 2 John Bassett Moore, A Digest of International Law 412 (1906).

[84] J*udgment of the International Military Tribunal (Nuremberg)* (1 October 1946) 22 IMT 411, 435 https://www.legal-tools.org/doc/45f18e/pdf/. "It must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment of deliberation'".

[85] Bruno Simma (eds), The Charter of the United Nations: A Commentary, Volume I (3rd edn, Oxford University Press 2012), Article 51, para 34, p 675. The connotations of these two concepts are viewed as follows: "Anticipatory self-defense"—interpreted based on the existence of an imminent threat, such as the overt mobilization of army, navy, or air forces in preparation for an attack—and "Preemptive self-defense," understood as self-defense against a potential armed attack that has not yet materialized or will only emerge in the future.

anticipatory self-defense outlined in the historic *Caroline* case. [86] He contended that the stringent criteria formulated by the U.S. Secretary of State Daniel Webster fails to account for contemporary, twenty-first-century security threats. Given that the right of self-defense is viewed not as a static rule created in 1945 but as an "inherent" principle of self-preservation, the UN Charter did not seek to challenge its customary roots, which are famously traced back to the 1842 Webster-Ashburton correspondence.

The tension lies between the literal text of the Charter and adapting evolutive customary norms, which led to a broader interpretation that expands the scope of self-defense beyond traditional state-on-state conflict to include responses directed at non-state actors. Therefore, it is argued that the language of Article 51 is flexible enough to imply that states may even have a duty to intervene to counter violations of fundamental international norms committed by non-state actors. This argument is further reinforced by the Security Council's recognition of the “ Inherent right of individual or collective self-defense” in response to a terrorist attack following the events of September 11, 2001. [87] Thomas M. Franck further supported this standpoint by stating that the UN Charter should not be viewed as a static contractual instrument, but as a “Living constitution capable of dynamic adaptation”.[88] Under this perspective, the Charter evolves through interpretive practice to maintain its relevance amidst shifting geopolitical realities, particularly following the events of September 11, 2001, in which a specific narrative has emerged to validate preventive warfare by linking non-state actor (NSA) such as "terrorist organizations," "rogue nations," and the possession of "weapons of mass destruction (WMD)." Most notably, in *The National Security Strategy of the United States of America* , Washington reinterpreted the right of self-defense by expanding traditional legal concepts to counter new challenges posed by such challenges. The document argues that the exercise of self-defense need not wait until an actual attack occurs,

86 Abraham D Sofaer, 'On the Necessity of Pre-emption' (2003),14. European Journal of International Law 209, 212–214. For his modern, post-millennial expansion arguing that Webster's strict temporal imminence criterion must be functionally adapted to combat modern non-state threats and weapons of mass destruction,

87 UN Security Council, Resolution 1368 (2001), U.N. Doc. S/RES/1368 (12 September 2001). See also UN Security Council, Resolution 1373 (2001), U.N. Doc. S/RES/1373 (28 September 2001)

88 Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2004) 97-99.

but can be triggered as soon as a threat begins to emerge. [89] Furthermore, the US significantly stretched the traditional international law standard of an "imminent threat" through subjective rhetoric. This theoretical framework allows the state to unilaterally assess the necessity of using force based on presumptions, despite the absence of concrete evidence [90]

Another significant point of contention regarding responses to completed armed attacks involves how the legitimate objectives of self-defense are defined.[91] One restrictive perspective maintains that defensive force should only be used to stop or drive back an attack while it is actively occurring. In contrast, a broader interpretation holds that while halting an ongoing assault is essential, self-defense also justifies measures intended to prevent additional, anticipated attacks that are likely to follow given the current situation.[92] While this does not authorize all-out war aimed at total destruction, it does permit force for the state to prevent the future continuation of attack rather than just repelling a single, isolated moment of violence. It is also equally important to clarify an alternative scenario often used in these debates, for instance the case of a nuclear missile that has been fired but has not yet crossed into the target nation's borders. It would be illogical to force a country to wait for its borders to be physically breached before it can legally defend itself. By neutralizing a missile in

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[89] White House, The National Security Strategy of the United States of America (September 2002), 1. *"And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed"*

[90] Ibid, 15 "*The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack"* See also Corten, Olivier. "« La Guerre Antiterroriste', Un Discours De Pouvoir » in O. Corten Et B. Delcourt (Eds.), Les Guerres Antiterroristes," 2005. 145-146. With reference to *The National Security Strategy of the United States of America*, the concept of "preventive war" (guerre préventive) contradicts the legal definition of self-defense in two ways. First, it would be impossible to wait until one is actually attacked before reacting; a mere "threat" (menace) would be sufficient to justify military action. This notion should be made more flexible to be "adapted to the capabilities and objectives of our adversaries today" ["*adaptée aux capacités et aux objectifs de nos adversaires d'aujourd'hui*"]. Secondly, it should also be noted that self-defense is no longer exercised solely against states, but can also, more generally, target terrorist groups, wherever they may be located ["*la légitime défense ne s'exerce plus seulement contre des Etats, mais peut aussi, plus généralement, viser des groupes terroristes, où qu'ils se situent*"].

[91] Rainer Hofmann, 'International Law and the Use of Military Force Against Iraq' (2002) 45 German Yearbook of International Law 11. Hoffmann posed a fundamental question: "... Under what circumstances states might resort to the use of armed force in "response" to armed attacks which have not yet occurred but are considered to be either imminent (anticipatory self-defense) or likely to occur in a not too distant future (preemptive self-defense). See also Brun-Otto Bryde, 'Self-Defense' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 4 (North-Holland 2000), 361.

[92] Georg Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer' (2013) 24 European Journal of International Law, 283 – 290

flight, a state is responding to an armed assault that has already physically commenced. [93] The core of this argument is that legal frameworks would be rendered futile if they prevented a state from defending itself in face of unconventional threats simply because a formal attack was not yet fully cumulated.

1.3. Exception to Prohibition use of force: Collective Enforcement through authorization of The Security Council following Article 39 and 42

The legality of any use of force depends entirely on its consistency with UN purposes, notably it must either be sanctioned by the Security Council under Chapter VII or meet the strict criteria for self-defense under Article 51. Under this framework, the role of the Security Council in maintaining international peace and security remains crucial, provided that the right of self-defence may only be exercised until "*the Security Council has taken measures necessary to maintain international peace and security*". Such regulations concerning the competence for implementing this "'collective enforcement" regime are set forth in Articles 39, 42, and 43. International law recognizes that a state's right to protect itself remains active if Security Council interventions are purely symbolic or fail to provide actual security . This legal window closes once the Council issues a binding demand for a ceasefire that is respected by the aggressor. In such instances, the necessity that justifies self-defence under Article 51 vanishes, which leads to any further use of force by the defending state would then be classified as an illegal armed reprisal rather than a lawful defensive act.[94]

While Article 39 provides the Security Council with the exclusive prerogative to determine thresholds of threats to the peace, creating a premise for interventions that supersede the unilateral will of member states [95], in addition to Article 42, which authorizes to deploy large-

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[93] Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press 2005), 151–153.

[94] Christian Henderson and Noam Lubell, 'The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions' (2013) 26 Leiden Journal of International Law, 369.

[95] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art 39. "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"*

scale military operations [96], the “special agreements” for providing armed forces under Article 43 have never been concluded due to the fact that the Council has no army of its own [97]. Furthermore, what is considered essential is the language that clearly grants permission for military action. Although the Council rarely uses the literal phrase “use of force,” it traditionally employs the standardized shorthand “*all necessary means*” or “*all necessary measures*.” These specific terms are internationally understood to include the use of armed force, making their inclusion vital for establishing clear legal authority [98]. As Bruno Simma pointed out, this very deficiency has resulted in Article 42 not being applied according to its original design in the Charter's text . The case of the campaign against Iraq in January 1991, notably Operation Desert Storm, stands as the sole example where armed force was applied pursuant to a Security Council decision. Through a process of “practical adaptation”, The Security Council has exercised its responsibilities under Chapter VII, where it adopted the “ Mechanism of authorization or delegation” upon empowering Member States and regional organizations to use force through the inclusion of the term “*All necessary means*” [99] instead of strictly adhering to the pre-established procedures of Article 42 . This mechanism has become a “central pillar of collective security” since 1990, and its legitimacy has been widely recognized in practice.

Given that such mechanism regulating the use of force under the United Nations Charter only legitimizes the resort to force in cases of collective action at the request of the Security Council acting under Chapter VII, and in cases of responding to an armed attack as provided

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[96] Ibid. Art 42 *”Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”*

[97] Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) vol 1, Art 2(4), para 47. See also Thomas M Franck, *Recourse to Force: Threats and Armed Attacks* (CUP 2002) 25. Lacking the standing military forces envisioned by Article 43 of the UN Charter, the Security Council authorized a coalition of member states to launch Operation Desert Storm in response to Iraq’s invasion of Kuwait, mirroring the strategy used decades earlier in Korea.

[98] Niels Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 213. It has been suggested that the term “all necessary means” might have a narrower scope than “all necessary measures”. However, while the Security Council tended to use the former when authorizing force in the 1990s, and the latter when authorizing force since 2000 (with “all necessary means” being more commonly reserved for post-millennial peacekeeping operations), there is little to suggest that the differing terminology has any implications for the scope of the authorization of the Council in practice.

[99] UN Security Council. (1990). *Resolution 678 (1990) / adopted by the Security Council at its 2963rd meeting, on 29 November 1990* (S/RES/678).

for in Article 51 of the Charter. Only explicit and sufficiently specific resolutions of the Security Council can be deemed an authorization to use force, thus " Requires the Security Council to explicitly grant an authorization and to envisage a forcible course of events in a sufficiently concrete manner" [100]. In legal essence, the authorization uses of force must adhere to the principle of necessity and proportionality, as the Council should only trigger military options when peaceful alternatives are insufficient, and the result of military action must be limited to what is required to restore peace. As The Security Council's authorization under Article 42 also allows member states to use force on behalf of the international community, the requirement for using forced is also applied the same way to them as they are being bound to use only the amount of force essential to fulfil the specific mandate granted, which must be proportional to the goals established by the authorization[101]. There is every reason to fear that such widespread recognition could give rise to a controversial issue, namely the "Presumed Authorization", wherein states claim the right to use force based on prior resolutions or the conduct of the Security Council, whether before or after the initiation of military action[102] . Therefore, to interpret a Security Council resolution, one must look beyond just the final text and consider the entire context surrounding its creation, which includes reviewing the official explanations and debates provided by Council members during the adoption process to clarify the intended meaning. [103] Crucially, the legal authority to use force must be explicit, and that there is no middle ground for Presumed Authorization, as legal force is either clearly granted by the text of the resolution or it is prohibited. Nevertheless, in subsequent practice, the US constructed its legal defense around the concept of Presumed Authorization to justify its military interventionist diplomacy. Rainer Hoffman foresaw this on the eve of the 2003 Iraq War, in which " The United States administration has made it clear that it would strongly prefer if such action could be based upon a pertinent United Nations Security Council resolution expressly authorizing, under the provisions of

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[100] Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) vol 1, Art 2(4), para 48

[101] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 188–212.

[102] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021). See Chapter 6: Intervention Authorized by the UN Security Council, II. The Problem of Presumed Authorization, 353

[103] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 442, para 94.

Chapter VII of the United Nations Charter, such use of armed force; nonetheless, it has also insisted on its position that, in view of Iraq's persistent failure fully to comply with relevant Security Council resolutions, it would be legally entitled to "act alone," to use armed force without such a prior, express authorization by the Security Council".[104] Although there is no legal basis to recognize such a principle of authorization, its existence reflects an objective reality, namely the supreme principle of 'collective enforcement' and the Security Council's authority over diplomatic interventions that violate Article 2(4) remain unfeasible, and institutional reforms of the United Nations continue to be a distant prospect.

1.4. Exceptions to the Prohibition on the Use of Force: Consent and the Legal Doctrine of "Intervention by Invitation"

In addition to the formal mechanisms of Chapter VII and the explicit self-defense provisions of Article 51 of the UN Charter, the principle of state consent serves as a vital circumstance precluding the wrongfulness of the use of force. While direct armed confrontations between states, regardless of their intensity or duration, clearly fall within the prohibitive scope of Article 2(4) of the UN Charter, the question remains as to what extent when a legitimate, recognized government requests external military assistance to counter internal insurgent groups or conduct targeted localized missions, might trigger the threshold of the international prohibition on the use of force. Significantly, an intervening state can take action based on a broad commitment to global peace and security, in absence of a formal treaty. These procedural safeguards ensure that collective force is only used with the valid consent of the state directly involved, rather than as a unilateral justification for intervention by outside powers. [105] Though some scholars have suggested that an intervening state must have substantive rights or interests affected by an aggressor state's actions before it can lawfully come to a requesting state's aid, this suggestion has not gained traction. By characterizing such actions as "Intervention by Invitation," the legal framework shifts the focus from a violation of territorial integrity to a lawful exercise of interventional diplomacy,

[104] Rainer Hofmann, 'International Law and the Use of Military Force Against Iraq' (2002) 45 German Yearbook of International Law 9.

[105] George K Walker, 'Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said' (1998) 31 Cornell Int'l LJ pg. 321, 353

which is rooted in the sovereign right of a state to manage its internal affairs and seek external assistance to maintain peace and security.[106]

The legal legitimacy of such principle is strictly circumscribed by the rigorous standards under Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which dictates that consent only precludes the wrongfulness of an act if it is legally valid and remains within the precise limits of the authorization granted. [107] To satisfy the requirement of validity, the invitation must be issued by the recognized and legitimate government of the state, ensuring that the consent is genuine, voluntary, and entirely free from the "vitiating factors" of fraud, corruption, or coercion as conceptualized in Articles 48 to 52 of the Vienna Convention on the Law of Treaties (VCLT). The moment valid consent is withdrawn or the intervention exceeds its original scope, the action immediately transforms into an act of aggression and a grave violation of Article 2(4) as recognized under UN General Assembly Resolution 3314 Article 3 (e) [108] This stringent overlap of rules ensures that while sovereign states possess the right to seek external aid, they retain the unilateral power to nullify that legal protection at any time, as reinforced by the International Court of Justice in the *Armed Activities on the Territory of the Congo* case. [109] Such case ruling has highlighted the gap between legal interpretation and political application inherent within the ambiguous character of consent as a legal principle, most notably the limitation of the "invitation" doctrine, in which the intervenor's legal justification is entirely dependent on the "consent" that the host state can terminate unilaterally at any time. When Uganda failed to withdraw its troops following the DRC's clear demand, its actions could no longer be

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[106] M Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 Journal on the Use of Force and International Law 97, 99.

[107] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc A/56/10, Art 20.

[108] UNGA Res 3314 (XXIX) (14 December 1974), Art 3(e).

[109] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) (Judgment) 2005 ICJ Rep 168, 196, para 51. The Court noted that a "State is permitted to withdraw its consent without following "any particular formalities". The primary question before the Court was whether Uganda's use of force was lawful. Uganda argued its presence in the DRC was justified on two grounds: an invitation by the Congolese government to secure the border against rebel groups, and self-defense under Article 51 of the UN Charter. The DRC countered that it had revoked the invitation and that Uganda's true objective was supporting rebels attempting to overthrow the government. The Court clarified that once the DRC withdrew its consent—either explicitly or through clear diplomatic signals—the legal shield provided by the invitation vanished: *ibid* 196–199, paras 42–54. Furthermore, the Court found that by remaining on Congolese territory after consent had been revoked, Uganda's military presence shifted from a lawful intervention by invitation to an illegal use of force violating the DRC's territorial integrity: *ibid* 212, para 105.

precluded from wrongfulness under the framework of state responsibility. Yet, Due to the written text of the UN Charter containing no mention of intervention by invitation, its legal status rests entirely as an exception under customary international law, requiring an ongoing evaluation of consistent state practice and *opinio juris* to ensure that intervening nations act out of legal obligation rather than mere political expediency. [110]

Chapter 2: The Interventionist Use of Force by Major Powers: Case Studies

In its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice (ICJ) made a seminal observation: "Throughout its history, the development of international law has been influenced by the requirements of international life…" [111] . Indeed, legal norms do not exist in a static state; rather, they continuously evolve through the interplay between state practice and *opinio juris*. In this dynamic, state practice is frequently regarded by scholars as the pivotal element in shaping new legal standards [112]. However, this evolution raises a fundamental legal question: Under the pressure of geopolitical shifts, is the boundary between law- as a normative framework regulating state conduct, and law - as an instrument for the justification of power, becoming blurred?

Practical pressures not only shape but can also accelerate the formation of customary international law. As some perspectives have noted: "…Usually, customary international law changes slowly over many decades. But sometimes, world events are such that customary international law develops quite rapidly"[113] . The 2001 Afghanistan intervention is frequently cited as a watershed moment in this regard. Prior to 9/11, the traditional rule required that the use of force on the territory of another state be inextricably linked to that host state's

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[110] Committee on the Use of Force' in *Report of the Seventy-Eighth Conference held in Sydney* (ILA 2018) 7, 18.

[111] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174

[112] R Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 AJIL 828, 832 (Cambridge University Press).

[113] M Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 Case Western Reserve Journal of International Law 1, Pg. 4, 11. See also. Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) pg. 12.

substantial involvement in an armed attack. However, under the pressure of the international community post-2001, great powers began advancing the argument that military action against non-state terrorist groups on foreign soil could be conducted, regardless of whether the host state was directly involved [114]. Although this shift was insufficient to immediately establish an 'instant custom,' scholar Michael P. Scharf termed the 2001 turning point a 'Grotian Moment'—a term denoting the rapid formation and unusually widespread recognition of new rules and doctrines [115]. However, this 'acceleration' raises a skeptical question regarding the Charter's adaptability in the face of the burgeoning theories on the expansion of self-defense, which threatens to overshadow the Charter's primary objective of restraining the use of force. In practice, major powers now possess greater opportunities to interpret existing norms to legitimize their forceful interventions.

These case studies do not aim to seek the motives or causes behind the use of force; rather, they analyze and discuss how major powers have interpreted the law to justify their actual use of force. Through this, the core of the issue is examined from a legal perspective: Has the prohibition on the use of force (Article 2(4) of the UN Charter) been treated by major powers as a procedural hurdle to be cleared, rather than a binding peremptory norm (*jus cogens*) governing their conduct?

Case 1: Great Power Intervention in the Gulf War (1990–1991)

The Gulf War (1991) serves as a classic illustration of how international norms are applied when the collective self-defense rights of great powers are triggered in response to a violation of Article 2(4) by a minor state.

Summary of the facts.

Disputes over oil production and pricing in the Gulf region were the primary cause of the conflict. On August 2, 1990, Iraq launched a lightning invasion, occupying Kuwait and unilaterally declaring its annexation as Iraq's "19th Province," [116] forcing Kuwait's legitimate

[114] TM Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2004) pg. 29, 53–54. See also Corten (n 80) 12.

[115] MP Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments (Cambridge University Press 2013) 1–12

[116] See UNSC, 'Letter dated 2 August 1990 from the Permanent Representative of Kuwait to the United Nations addressed to the President of the Security Council' (2 August 1990) UN Doc S/21423; UNSC, 'Letter dated 8

government into exile. As Iraqi forces continued to advance toward the southern border, posing a direct threat to the sovereignty of Saudi Arabia, both nations (Kuwait & Saudi Arabia) formally invoked the UN Charter and requested an urgent intervention from the United Nations.

Is the Right of Self-Defense Limited?

On August 6, 1990, at session 2933, the Security Council reaffirmed the principle stipulated in Article 51 of the United Nations Charter: "Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter." [117]. Also during this session, the Security Council formally intervened in the Iraq issue by imposing economic sanctions under Resolution 661. [118]

At the 2934th meeting on August 9, the representatives of the United States and the United Kingdom announced that they had deployed forces to the region. Both representatives invoked Article 51 of the UN Charter, noting that the application of that Article to the situation between Iraq and Kuwait had been explicitly affirmed in Resolution 661 (1990). [119] Subsequently, Kuwait and Saudi Arabia formally submitted letters to the Security Council requesting official military assistance [120] . To fulfil the legal procedures regarding the right of self-defense, the U.S. and the U.K. also respectively sent formal notifications to the President of the Security Council on August 9 and August 13**.** [121] The four documents demonstrate that Kuwait's inherent right of self-defense was met by the international community promptly,

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August 1990 from the Permanent Representative of Kuwait to the United Nations addressed to the President of the Security Council' (8 August 1990) UN Doc S/21469; and UNSC Res 662 (9 August 1990) UN Doc S/RES/662 (declaring Iraq's instrument of annexation, UN Doc S/21479, to be legally null and void).

[117] UNSC Res 661 (6 August 1990) UN Doc S/RES/661, preamble.

[118] Ibid paras 3–4.

[119] UNSC Verbatim Record (9 August 1990) UN Doc S/PV.2934 (Provisional)

[120] The right of collective self-defense was duly invoked based on the official request from Kuwait on 12 August 1990, which 'request[ed] that some nations take such military or other steps as ... may be necessary to ensure the effective and timely implementation of Security Council Resolution 661 (1990)' (UN Doc S/21498). This was followed by a letter from Saudi Arabia on the same date, stating that it 'welcome[d] the forces of brotherly and other friendly nations, which have expressed their readiness to support the Saudi Arabian armed forces in defending the Kingdom' (UN Doc S/21554).

[121] UN Doc S/21492 (US) and UN Doc S/21501 (UK).

lawfully, and that the conditions for triggering the right of collective self-defense were fully satisfied [122]

However, the Verbatim Record of the 2934th Meeting also reveals that, alongside the absolute consensus demanding Iraq's withdrawal from Kuwait, there were profound concerns regarding the ongoing military actions by major powers outside the UNSC framework, invoked under the right of self-defense [123] . This raises a legal issue concerning the temporal limitation of the right of self-defense: Under Article 51, the right of self-defense may only be exercised " *Until the Security Council has taken the 'measures necessary*" to maintain peace. The question arises: are non-military enforcement measures, specifically economic sanctions, sufficient to suspend the right of armed self-defense of the victim State (Kuwait) and its allies?

Resolutions 661 and 662 clearly demonstrate the position that self-defense is an inherent right, which is only suspended when the measures taken by the Security Council achieve "actual effectiveness" in repelling the aggression [124]. This spirit was crystallized in Resolution 661 (1990), which established three key principles: (1) Imposing a comprehensive trade embargo; (2) Reaffirming that the inherent right of individual or collective self-defense of Kuwait under Article 51 remains preserved and (3) Explicitly providing that the sanctions do not prohibit military assistance to the legitimate Government of Kuwait [125] .

As long as the occupation persists on the ground, the Security Council has not yet accomplished the "*Measures necessary*" to maintain peace, the 'until' clause of Article 51 has not been satisfied. This position was subsequently affirmed when the UNSC adopted

[122] According to the *Nicaragua* precedent set by the ICJ, to qualify for the exercise of collective self-defense, the victim State must declare itself as having been the object of an armed attack; and the victim State must issue a formal request for assistance. Other States may not unilaterally invoke the right of collective self-defense without the consent or request of the State being attacked. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 104 (para 195).

[123] UNSC Verbatim Record (9 August 1990) UN Doc S/PV.2934, 8, 11–12, 18, 21–23. The US and UK publicly reaffirmed their ongoing unilateral military deployments under Article 51 following Resolution 661. This drew concerns from others (China, USSR) and calls for cessation from countries arguing that UNSC enforcement measures were already in place (Cuba, Malaysia)

[124] UNSC Verbatim Record (9 August 1990) UN Doc S/PV.2934. During this meeting, the Security Council adopted Resolution 662, which confirmed the factual situation following Resolution 661—namely, that Iraq maintained a 'comprehensive and permanent annexation' with Kuwait, there by reaffirming the right of self-defense established in Resolutions 660 and 661

[125] UNSC Res 661 (6 August 1990) UN Doc S/RES/661, para 9

Resolution 678, marking the transition from economic sanctions to the formal authorization of the use of “all necessary means” (including force) to definitively resolve the crisis.

In a separate development, during Meeting 2937 (18 August 1990), several nations argued that the naval blockade conducted by the U.S. and the UK in the name of Article 51 constituted a sophistry and an overreach of the Security Council's (UNSC) authority. They contended that the right of self-defense is strictly reserved for repelling direct armed attacks, rather than enforcing economic sanctions—a power that falls under the UNSC's jurisdiction pursuant to Articles 41 and 42 [126] . This controversy was promptly resolved by Resolution 665, which authorized multilateral forces to use proportionate measures to monitor maritime shipping [127].

Article 51 or Security Council Resolutions: Which serves as the legal basis for the use of force by great powers?

At its 2963rd meeting, the Security Council adopted Resolution 678 (1990), in which Paragraph 2 states:

“*Authorizes* Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph l above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore International peace and security in the area” [128]

Resolution 678 was adopted under Chapter VII of the UN Charter. Specifically, based on Article 39, the Security Council (UNSC) officially determined that Iraq's actions had crossed the threshold of a threat to the peace, thereby establishing the premise to trigger the authority to apply collective enforcement measures against the violating state. The phrase "all necessary means" stipulated in this Resolution has become a standard legal term of art confirming force as the ultimate instrument to enforce international law under Article 42. The essence of Resolution 678 is an “international enforcement action authorized by the United Nations under Chapter VII of the Charter, not a result of Article 51 and certainly not a war

[126] UNSC Verbatim Record (18 August 1990) UN Doc S/PV.2937, 6, 13–15, 18–20, 29–33.

[127] UNSC Res 665 (25 August 1990) UN Doc S/RES/665.

[128] UNSC Res 678 (29 November 1990) UN Doc S/RES/678.

between any of the allied countries and Iraq per se " [129]. However, the lack of a strict oversight mechanism right from Resolution 678 created a legal loophole, paving the way for major powers to "arrogate to themselves" the right to interpret the UNSC's mandate to serve their national objectives, leading to fierce debates over legality in contemporary international law.

Furthermore, the deadlock surrounding Article 43 during the Cold War compelled the UNSC to embrace “'practical adaptation”. Instead of strictly adhering to the pre-established procedure of independently directing military operations under Article 42, the Council discharged its Chapter VII responsibilities through an “authorization mechanism”. This mechanism granted Member States (prominently the US and the UK) the mandate to use force by virtue of the very legal phrase “all necessary means” mentioned above.

Debating the legal basis of Resolution 678, many states—particularly small and medium-sized nations—emphasized that: The essence of Resolution 678 is “ International enforcement action is authorized by the United Nations under Chapter VII of the Charter; it is not a result of Article 51 and is certainly not, by its nature, a war between any allied state and Iraq” [130] . In addition, the lack of a rigorous oversight mechanism in Resolution 678 created a legal loophole, paving the way for major powers to 'arrogate to themselves' the right to interpret the Council's authority. Subsequently, by relying on the resolution to revert to Article 51, they justified the use of force that exceeded the principles of proportionality and necessity—specifically in aerial military operations and deep-strike bombings within Iraqi territory related to 'no-fly zones.' In reality, such actions, despite invoking the right of self-defense, served to justify 'armed reprisals,' which are prohibited under UN Resolution 2625 (1970).

[129] UNSC PV 2963 (29 November 1990) 76. At a subsequent meeting, held on 15 February 1991, the representative of Malaysia stated his understanding that the military action against Iraq was a ‘United Nations-authorized international enforcement action under Chapter VII of the Charter, not a result of Article 51 and certainly not a war between any of the allied countries and Iraq per se’. The representative added that no country, however powerful, could ‘arrogate to itself the right to conduct the war entirely on the basis of its own imperatives and interests’: UNSC PV 2977 (Part II) (closed — resumption 1) (15 February 1991) pg. 171.

[130] UNSC ‘Provisional Verbatim Record’ (15 February 1991) UN Doc S/PV.2977 (Part II) closed — resumption 1

Conclusion of Case 1.

Resolution 678 established a precedent: the use of force only attains legitimacy when framed as the 'enforcement of international law.' The voting results reflected a rare consensus between Russia and the West. Within this context, China's abstention was viewed as a "Meaningful Silence"—a form of passive acquiescence toward new interpretations of the right of self-defense and the Security Council's authorization mechanisms. In reality, this vote was a product of diplomatic ritual and national interest calculations rather than a formal legal endorsement [131] .

Voting Distribution on Resolution 678 (1990)

Voting Category	Number	Percentage (%)	Specific Countries
In Favor	12	80.00%	P5: United States, Soviet Union, United Kingdom, France; E10: Canada, Colombia, Côte d'Ivoire, Ethiopia, Finland, Malaysia, Romania, Zaire
Against	2	13.30%	Cuba, Yemen
Abstention	1	6.70%	China

When small nations violate the prohibition on the use of force and great powers trigger the right of self-defense, legal gaps are not only broadly interpreted but also swiftly and decisively addressed through resolutions easily adopted by the Security Council. This is evidenced by the record-breaking 12 resolutions passed in the final four months of 1990

[131] Regarding China's silence, the analysis is grounded in the perspectives of P Starski, GP Buzzini, ME O'Connell, and J Salmon, as synthesized by Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021) 49–50. Corten notes that '[s]ilence is relatively common in practice, as many States do not officially express a legal position following a military attack. It is entirely possible to infer acquiescence from silence when, in a specific context, it effectively conveys acceptance, whether in the field of the prohibition of the use of force or in any other area ... and silence may also arise out of international comity or [political] convenience'.

regarding the Kuwait crisis, three of which were issued within the very first week . This reality seems to establish a precedent: the effectiveness of international law is directly proportional to the degree of consensus among the great powers.

Although Article 42 was activated on a large scale for the first time in 1990, the Security Council (UNSC) did not directly assume military command as prescribed by the Charter. Instead, this body established a practical precedent through an authorization mechanism. However, the very widespread acceptance of this precedent has been exploited by certain States to cultivate an expansive interpretative approach: the doctrine of "Presumed Authorization". This doctrine posits that a State may resort to the use of force by connecting previous resolutions or interpreting the silence of the UNSC, even in the absence of a new, explicit authorizing text [132]. The critical question that arises is: does this unilateral interpretation hold any standing in positive international law?

Case 2: United States-led military action against Iraq (March 2003 – May 2003)

The intervention of great powers in the 2003 Iraq War serves as a classic case study of a situation where great powers, led by the United States, proactively utilized unilateral force to attack another sovereign state under the pretext of destroying weapons of mass destruction (WMD) that threatened global security. Unlike the situation in 1990, Iraq did not carry out any armed attacks nor did it threaten any neighbouring country with armed aggression. Can this military action, therefore, be considered legally justified?

Summary of the facts.

The 1990 Gulf War came to an end, yet in the eyes of U.S. policymakers, it remained " Unfinished Business" [133] . In the face of clear signs of an imminent military attack on Iraq,

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[132] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021) 353.

[133] The Invasion of Iraq was not merely about Weapons of Mass Destruction (WMDs); rather, it was part of a long-term geopolitical strategy to establish a permanent US military presence in the Middle East: 'While the unresolved conflict with Iraq provides the immediate justification, the need for a substantial American force presence in the Gulf transcends the issue of the regime of Saddam Hussein.' Project for the New American Century, *Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century* (2000) pg. 14.

the United Nations Security Council held numerous meetings, focusing on two primary issues: Iraq's non-compliance with the Council's decisions and the U.S.-led military action against Iraq. On March 20, 2003, the U.S.-led coalition launched a **unilateral military intervention** in Iraq, toppling the Saddam Hussein regime without direct authorization from the Security Council.

Justification of the Use of Force Against Iraq as a Measure of Self-defense

At its 4644th meeting on 8 November 2002, the Security Council (UNSC) adopted Resolution 1441—the final pivotal legal instrument concerning the Iraq issue on the eve of the war. Structurally, Resolution 1441 established a strict compliance roadmap: determining that Iraq remained in "material breach" of its disarmament obligations (para 1); warning that any failure to cooperate or false declarations would constitute a “Further Material Breach” (para 4); yet simultaneously deciding to afford the country a “Final Opportunity” to comply (para 2); and instructing the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) to report “Immediately” on any developments regarding the inspection process (para 11). Specifically, the mechanism for addressing non-compliance was strictly prescribed in paragraph 12: should Iraq fail to comply, the UNSC must “convene immediately... to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security” [134]. Notably, this resolution was entirely devoid of any explicit provision authorizing the use of force against Iraq.

Recognizing the unlikelihood of the UNSC adopting a resolution authorizing the use of force, the US-led coalition shifted its legal focus to invoking the right of self-defense to justify the invasion of Iraq without requiring any further UNSC decision. US Ambassador John Negroponte stated immediately following the adoption of Resolution 1441: “ Should the Security Council fail to act decisively in the face of further violations, “this resolution does not preclude any Member State from acting to defend itself against the threat posed by Iraq”[135]. UK Attorney General Lord Goldsmith observed that: “ The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective

[134] UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441, paras 1, 2, 4, 11, 12.

[135] UNSC Verbatim Record (8 November 2002) UN Doc S/PV.4644, 3.

fact "[136] and therefore each state has the right to make its own assessment in deciding to act, independent of existing international norms. Consequently, the justifications advanced by the US and UK governments regarding the legality of military action against Iraq, absent a subsequent UNSC resolution, revolved around the Saddam Hussein regime's non-compliance coupled with an imminent security threat.

The Revival Argument: A Justification for Armed Intervention or a Normative Interpretation?

In a legal advice report to Prime Minister Tony Blair, Attorney General Lord Goldsmith formally introduced the "Revival Argument" and warned of the adverse legal complications for the UK if it engaged in an attack on Iraq without UN Security Council approval [137]. However, his response to the House of Lords ten days later omitted these warnings, paving the legal path for the UK's intervention: "Authority to use force against Iraq exists from the combined effect of Resolutions 678, 687, and 1441" [138].

Goldsmith's interpretation comprised nine points, fundamentally based on the argument that Resolution 687 did not supersede Resolution 678. Instead, it established a "Conditional peace." Consequently, once Resolution 1441 identified a breach, the suspension of force was legally terminated, returning Member States to the status of authorized military action as prescribed under Resolution 678 [139] . Nevertheless, regarding the "Sufficiency of resolution 1441" this argument contradicts paragraphs 2, 4, 11, and 12. The " Revival Argument" to use force under Resolution 678 requires the Security Council to conclude that Iraq has committed a material breach of the ceasefire conditions. However, even with such a conclusion, this revival would not occur if the Council decided to prioritize non-forcible measures or other forms of action to ensure compliance. Operative Paragraph 12 of Resolution 1441, when interpreted correctly, implies that a further decision by the Council is required before authorizing the use of force for the purposes of disarmament and weapons control. The resolution contains no 'automaticity' regarding the use of force—a view held by the majority

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[136] Lord Goldsmith, 'Iraq: Resolution 1441' (Minute to the Prime Minister, 7 March 2003) in *The Report of the Iraq Inquiry* (HC 2016, 265-V) vol 5, 93–106, para 9.

[137] ibid paras 32–35.

[138] Lord Goldsmith, 'Iraq: Legal Basis for the Use of Force' (Statement to Parliament, 17 March 2003) HL Deb vol 646 cols WA2–3, as cited in The Report of the Iraq Inquiry (HC 2016, 265-V) vol 5, para 45.

[139] Ibid.

of nations during the 4644th session [140] . Furthermore, even if military measures are required, Article 42 must be invoked under the provisions of Chapter VII of the Charter. Without authorization from the Security Council, any unilateral action is unlawful.

Were the principles of necessity and proportionality disregarded by the US-UK coalition?

From the perspective of Collective Self-Defense (Article 51 of the UN Charter), the "revival argument" becomes increasingly tenuous due to the fundamental difference in the nature of Iraq's breaches between the two periods**.**

Criteria	**The Gulf War (1990)**	**The Invasion of Iraq (2003)**
Iraq's Actions	Armed attack and occupation of Kuwait.	No armed attack was launched to threaten other nations.
Purpose of the Resolution	Res. 678: To compel Iraq's withdrawal from Kuwait and restore peace.	Res. 1441: To compel Iraq's disarmament of weapons of mass destruction.
Legal Basis	The right to legitimate self-defense against actual aggression.	Absence of an "armed attack" as a prerequisite for the right to self-defense.

Furthermore, when examined under customary international law, it remains questionable whether the two prerequisites for a lawful act of self-defense were adequately met in accordance with the necessity and proportionality test:

- **The Principle of Proportionality:** Was a full-scale military invasion necessary to ensure Iraq's compliance with disarmament obligations (which were already under UN supervision)? Furthermore, did the overthrow of Saddam Hussein and subsequent regime change constitute a proportionate measure to achieve the goal of

[140] UNSC Verbatim Record (8 November 2002) UN Doc S/PV.4644, 6–12.

disarmament? This legal loophole was explicitly highlighted in Attorney General Goldsmith's own report [141].

- **The Principle of Necessity:** According to international standards, self-defense is only permissible when the necessity is "instant, overwhelming, leaving no choice of means, and no moment for deliberation". However, field reports from the IAEA and UNMOVIC in early 2003, after three months of "intrusive inspections", confirmed that Iraq was cooperating well and that they had "to date found no evidence or plausible indication of the revival of a nuclear-weapon programme in Iraq" [142]. Since peaceful measures and inspections were still proving effective, military force could not be considered a "last resort".

Preemptive Self-Defense: Is evil great enough to be confronted?

Although the comparison to the pre-World War II era was somewhat strained, British Foreign Secretary Jack Straw nonetheless employed this historical analogy as the core moral anchor during the 4701st meeting of the Security Council (5 February 2003). Following the US presentation on an "Imminent threat", Mr. Straw warned : "At each stage, good men said, "Wait. The evil is not big enough to challenge". Then, before their eyes, the evil became too big to challenge. We slipped slowly down a slope, never noticing how far we had gone until it was too late" [143]. This moral reasoning was fundamentally designed to bolster the US doctrine of "anticipatory action", which posits that the greater the threat, the higher the risk of inaction, thereby necessitating pre-emptive strikes even when the exact time and place of the enemy's attack remain undetermined. [144]

However, utilizing potential future threats— specifically Iraq's suspected weapons of mass destruction (WMD) program— as a pretext for initiating war met with vehement opposition

[141] Lord Goldsmith, 'Iraq: Resolution 1441' (Minute to the Prime Minister, 7 March 2003) in The Report of the Iraq Inquiry (HC 2016, 265-V) vol 5, 93–106, paras 12–13.

[142] UNSC Verbatim Record (7 March 2003) UN Doc S/PV.4714, 6, 8.

[143] UNSC Verbatim Record (5 February 2003) UN Doc S/PV.4701, 20.

[144] US White House, *The National Security Strategy of the United States of America* (2002) 15: "The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively."

from a majority of Security Council members. Through the lens of positive international law, this doctrine deliberately blurred the boundaries between the inherent right of self-defense and the collective security mechanism. If Iraq's intentions or plans genuinely posed a danger, they would merely constitute a "Threat to the peace" under Article 39 of the Charter. Consequently, all decisions regarding the form, measures, and timing of any intervention fall strictly within the exclusive competence of the Security Council under Chapter VII. Therefore, unilaterally invoking anticipatory self-defense against a non-imminent threat is entirely devoid of legal basis, rendering the military campaign against Iraq a violation of the Charter.

Conclusion of Case 2:

When great powers resort to the use of force against smaller nations, legal voids are often filled by economic and military might. With the exception of Resolution 1441, no other relevant resolution was adopted prior to or during the U.S.-led action against Iraq. On May 22, 2003, despite their lack of support for the war, the Security Council (including France and Russia) voted to adopt Resolution 1483 (S/RES/1483). This aimed to establish a legal framework for the administration and reconstruction of Iraq under U.S. and UK control, in order to avert a broader humanitarian crisis. British Foreign Secretary Jack Straw once confronted the United Nations with a historic test:

" This is a moment of choice for Saddam and for the Iraqi regime. But it is also a moment of choice for this institution, the United Nations" [145]. The defiance of multilateral norms by major powers dealt a severe blow to the institution's credibility, compelling the UN Secretary-General to urgently call for reestablishing " The rules governing the use of force" in order to salvage the organization's standing.

The most controversial legal gap in the 2003 U.S. military attack on Iraq was the question: Could the right to pre-emptive self-defense be recognized as customary international law? Addressing this issue, legal experts in the "Report of the High-level Panel on Threats, Challenges and Change" (United Nations, 2004) affirmed:

" In a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of

[145] UNSC Verbatim Record (5 February 2003) UN Doc S/PV.4701, 20.

unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.

We do not favor there writing or reinterpretation of Article 51". [146]

Case 3: The Ukraine War (2022).

In the aftermath of the 2003 Iraq War, Judge Bruno Simma warned: "More and more, legal justification of the use of force within the system of the Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force". [147] The 2022 conflict in Ukraine serves as a striking testament to that prediction. The Russian Federation has even gone a step further: through interpretative manipulation, it has reduced international law to a political game cloaked in a legal veneer. Critical legal scholars contend that this phenomenon reflects a descent of international law into the extreme of "Apology"—a condition wherein legal norms are stripped of their normativity to serve state power. [148] However, international law contains clear legal norms, particularly those relating to the prohibition of the use of force as presented in Chapter 1. The following section will scrutinize Russia's legal maneuvers to re-characterize its military aggression as a lawful exercise of the right to self-defense under Article 51 of the UN Charter.

Summary of the facts.

The escalation of the conflict in Ukraine traces back to 2014, when Russia annexed Crimea and backed separatist forces in the Donbas region, sparking an ongoing armed conflict in Eastern Ukraine. Tension reached a breaking point in early 2022 as Russia amassed massive military forces along the Ukrainian border, demanding a binding commitment from NATO that Ukraine would never be admitted. Events unfolded rapidly on February 21, 2022, when Russia formally recognized the independence of the two self-proclaimed entities, the Donetsk

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[146] UN, 'A more secure world: Our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change' (2004) UN Doc A/59/565, 63, paras 191–92.

[147] Bruno Simma, 'Foreword' in Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021)

[148] The concept of "apology" is drawn from Martti Koskenniemi's theory, describing a condition wherein international law loses its normativity and is reduced to a linguistic tool for states to legitimize their political interests and the use of force. See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 17-20.

People's Republic (DPR) and the Luhansk People's Republic (LPR), signing mutual military assistance treaties with them. Just three days later, on February 24, 2022, Russia launched a full-scale invasion of Ukraine; invoking Article 51 of the UN Charter, the Kremlin framed the assault as a “Special Military Operation.”

Invocation of Individual and Collective Self-Defense to Justify the Use of Force

The letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General clearly states: “I have the honour to forward herewith the text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence (see annex). I would ask you to circulate the present letter and its annex as a document of the Security Council” [149]. To confidently make such a claim, Russia orchestrated a meticulous, step-by-step legal playbook. The focus was to create an "objective reality" (based on unfounded facts) and establish a "legal facade," with the ultimate goal of justifying the use of force, thereby transforming an act of aggression into a lawful exercise of the right of self-defense under international law.

1. Abusive Interpretation of the Right of Individual Self-Defense.

The right of individual self-defense under Article 51 of the United Nations (UN) Charter is an exception permitting the use of force, bound by strict legal norms. To establish a legal basis justifying the attack on Ukraine—which Russia terms a “special military operation”—Russia fabricated an "objective reality" to demonstrate an "imminent threat" from Ukraine. In his February 24 speech, Putin outlined two reasons for Russia to invoke the right of self-defense: Ukraine's threat to Russian territory and its threat to Russian citizens in Ukraine.

Russia alleged that Russian-speaking populations in the Donbas region were being persecuted by the Ukrainian government. Moscow referred to this as a “Nightmare” and “ A genocide against millions of people,” claiming these victims had no choice but to place their absolute hope of salvation in Russia [150]. However, addressing this allegation, the International Court of

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[149] UNSC, 'The letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General' (24 February 2022) UN Doc S/2022/154.

[150] UNSC, 'Annex to the letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General' (24 February 2022) UN Doc S/2022/154.

Justice (ICJ) concluded on March 16, 2022, that: “At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory” [151]. The Court subsequently issued an Order on Provisional Measures, demanding that Russia “Immediately suspend the military operations” in Ukraine [152] . Since the genocide allegation has been dismissed by the international judicial body, the ensuing analysis will focus exclusively on the remaining core issue: whether Ukraine posed a genuine threat to Russian territory, and if so, to what extent.

According to the document submitted by the Russian Federation to the United Nations, Moscow defines Ukraine as a "constant threat," asserting that Russia "cannot feel safe, develop, and exist" while facing risks emanating from adjacent territories—which it characterizes as "historical Russian lands"—that are being transformed into an “”Anti-Russia” [153]. However, an examination of the factual context reveals a discrepancy: Ukraine had not engaged in military actions threatening Russian sovereignty. Conversely, since the 2014 annexation of the Crimean Peninsula by Russia, Ukraine's territorial integrity has remained compromised, a situation that international legal instruments have yet to help it recover.

To bridge the logical gap between the "threat theory" and the "non-threat reality" posed by Ukraine, Russia shifted the focal point of its argument to a third actor: NATO. Moscow reasoned that this “Imminent” and “Existential” threat actually stems from the fact that “NATO is continuously expanding eastward, and its military infrastructure is moving ever closer to the Russian border” . The Russian President acknowledged that the West views this expansion merely as a strategy to “Containment of Russia”, however, for Russia, it constitutes “ a matter of life and death, the question of our historical future as a people” and an intolerable “Red Line”. Through a conceptual manipulation that equates a geopolitical

[151] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, Art 59.

[152] Ibid, Article 86(1).

[153] UNSC, 'The letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General' (24 February 2022) UN Doc S/2022/154.

shift with an armed attack, Russia concluded that it had no other option but to protect Russia.[154]

The critical legal question is whether Russia's claim of a security threat from NATO constitutes a sufficient basis to invoke the right of self-defense under international law, especially when the Russian President himself conceded that no armed attack from either Ukraine or NATO had “Already occurred” or was “Currently underway”

Pursuant to Article 51 of the UN Charter, the right of self-defense is triggered exclusively upon the occurrence of an "armed attack." Furthermore, under customary international law—as epitomized by the *Caroline* test—the use of force in "anticipatory self-defense" is strictly restricted. It is legally permissible only when the threat is "instant, overwhelming, leaving no choice of means, and no moment for deliberation" (satisfying the criteria of imminence and necessity). Notably, the doctrine of "preventive self-defense" against remote future threats of unspecified time and location—famously invoked by former U.S. President George W. Bush—is not recognized as positive international law (*lex lata*).

Applying these legal standards to the arguments presented in the *Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General* and in President Putin's February 21, 2022 declaration, Russia's reasoning leans heavily toward legal fallacy:

Firstly, concerning the criterion of imminence: President Putin's assertion of a present threat stemming from Ukraine's desire to join NATO “ If not tomorrow, then the day after tomorrow” [155] implicitly concedes that this constitutes a potential risk in an undetermined future. In practice, Ukraine's aspiration to join NATO, along with the alliance's open-door policy is a protracted political process spanning several years; consequently, they by no means constitute an imminent armed attack.

Secondly, regarding the criterion of necessity: As of February 24, 2022, diplomatic channels, such as the Normandy format and various high-level negotiations, remained fully operational.

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[154] Ibid

[155] Vladimir Putin, 'Address by the President of the Russian Federation' (The Kremlin, 21 February 2022) <http://en.kremlin.ru/events/president/news/67828> accessed 25 May 2026. This perspective is explicitly captured in the well-known statement by Russian President Vladimir Putin: ‘A number of NATO member states are still very sceptical about Ukraine joining NATO. We are getting signals from some European capitals telling us not to worry since it will not happen literally overnight. In fact, our US partners are saying the same thing as well. "All right, then" we respond, "if it does not happen tomorrow, then it will happen the day after tomorrow. What does it change from the historical perspective? Nothing at all’.

[156] Consequently, Russia's use of force was not a measure of last resort employed only after all diplomatic avenues had been exhausted. Russia's invocation of individual self-defense regarding NATO's enlargement functions primarily to rationalize the use of force against an ambiguous threat, predicated entirely on a subjective assessment. This approach parallels the expansive interpretation of self-defense characteristic of the Bush Doctrine—a legal posture that international law has decisively repudiated since 2003. At its core, the foundational norms of public international law cannot be dismantled or supplanted by unilateral interpretations, whether advanced by Russia in 2022 or previously by the United States in 2003.

2. Abusive Interpretation of the Right of Collective Self-Defense

Just three days prior to launching its military operation, Russia officially recognized the two breakaway regions of Donetsk and Luhansk (DPR and LPR) as "independent states," simultaneously accusing the Ukrainian government of attacking and committing "genocide" against the local population. On the same day, Russia signed Treaties of Friendship, Cooperation and Mutual Assistance with the DPR and LPR. One day before the armed attack on Ukraine, during a United Nations Security Council meeting, the representative of the Russian Federation informed the Council that the Russian President had decided to launch a special military operation in the Donbas. This decision was stated to be made in accordance with Article 51, with the approval of the Federation Council of the Russian Federation, and pursuant to the *Treaties of Friendship, Cooperation and Mutual Assistance signed with the Donetsk and Luhansk People's Republics* [157]. On 24 February 2022, the Russian Federation launched military operations in Ukraine and concurrently submitted a letter of notification to the United Nations Security Council regarding its act of 'self-defense. The Russian President declared: "The people's republics of Donbas have asked Russia for assistance " [158].

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[156] During a one-hour and 45-minute phone call on 20 February 2022, French President Emmanuel Macron attempted to persuade President Vladimir Putin to agree to a summit with US President Joe Biden in Geneva. See David M Herszenhorn, Giorgio Leali and Suzanne Lynch, 'Kremlin lashes out at Ukraine and NATO after first call with Macron' *Politico* (20 February 2022) https://www.politico.eu/article/kremlin-vladimir-putin-call-emmanuel-macron-volodymyr-zelenskiy-france-russia-ukraine-nato/ accessed 25 May 2026. Furthermore, the United Nations' diplomatic efforts continued right up to the eve of Russia's armed attack on Ukraine. During a Security Council meeting, the UN Secretary-General issued an urgent appeal: 'President Putin, stop your troops from attacking Ukraine. Give peace a chance. Too many people have already died", UNSC, Verbatim Record (23 February 2022) UN Doc S/PV.8974, 2.

[157] UNSC, Verbatim Record (23 February 2022) UN Doc S/PV.8974, 11-12.

[158] UNSC, 'Annex to the letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General' (24 February 2022) UN Doc S/2022/154.

From a legal perspective, Russia's argument initially bears a resemblance to the customary international law doctrine of "intervention by invitation" as codified in Article 20 of ARSIWA. However, an examination of the full text of the Russian President's statement reveals that the central justification for the use of force remains the invocation of individual self-defense and collective self-defense. [159] The fundamental question thus arises: Does the Russian Federation's invocation of collective self-defense satisfy the lawful exceptions required to preclude a violation of Article 2(4) of the UN Charter? International law explicitly dictates that the right of collective self-defense can only be triggered upon the request of a sovereign state. Consequently, the legal crux of the matter is whether the DPR and LPR constitute independent states, as unilaterally recognized by Russia, or if they are, in essence, merely separatist entities located within the sovereign territory of Ukraine.

A review of the UN Security Council meeting record 8974 reveals that Russia's legal reasoning is predicated on a manipulated interpretation of the 'Safeguard Clause' within the 1970 Declaration on Friendly Relations. Specifically, the Russian representative posited that the principle of territorial integrity applies exclusively to: “States [...] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour” [160] . Invoking this condition, Russia accused the Kyiv authorities of discrimination and "genocide" against the population of the Donbas region, thereby asserting that Ukraine had forfeited its right to the protection of its territorial integrity under the 1970 Declaration. This chain of reasoning served as the foundation for Russia to implicitly invoke the doctrine of “remedial secession” [161] for the Donbas region, constructing a legal pretext to recognize these two "states" and subsequently accept their request for "collective self-defence”.

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[159] Ibid. “The People's Republics of the Donbass appealed to Russia for help. In this regard, in accordance with Article 51 of the Charter of the United Nations, I have decided to conduct a special military operation with . [...] pursuant to the treaties of friendship and mutual assistance with the Donetsk People’s Republic and the Lugansk People’s Republic, as ratified by the Federal Assembly on 22 February this year ”.

[160] UNSC, Verbatim Record (23 February 2022) UN Doc S/PV.8974, 11.

[161] The right to "remedial secession" is a controversial legal doctrine positing that a population has the right to secede and establish an independent state as a "last resort" if they are denied internal self-determination by the central government and subjected to gross human rights violations. Many legal scholars argue that Russia has invoked this doctrine to fabricate statehood for the LPR and DPR. See further JA Green, C Henderson and T Ruys, 'Russia’s attack on Ukraine and the *jus ad bellum*' (2022) 9(1) Journal on the Use of Force and International Law 18.

However, this justification is entirely devoid of legal merit and contradicts objective reality on three distinct grounds:

First, this reasoning is in direct contravention of the Minsk II Agreement itself—an instrument to which Russia is a signatory and which was endorsed by the UN Security Council. This agreement is firmly anchored in the respect for Ukraine's sovereignty and territorial integrity, explicitly stipulating that the Donbas region remains an integral part of Ukrainian territory (albeit designated for a proposed autonomous status.

Second, in factual terms, the instability in the Donbas region since 2014 is inextricably linked to the direct involvement and backing of the Russian Federation for separatist armed forces. From the perspective of international law, the act of intervening in and directing non-state armed groups operating on the territory of a sovereign state constitutes a grave violation of the prohibition of the use of force and the principle of territorial integrity. Therefore, Russia's invocation of the conflict—which originates from its own unlawful intervention—to deprive Ukraine of its right to territorial integrity and to serve as a premise for the two separatist groups to declare independence, is a legal fallacy. Furthermore, the move to recognize the independence of these two separatist entities—mirroring the 2014 Crimea scenario—bears the hallmarks of the classical legal doctrine *ex factis jus oritur* (sovereignty arises from factual possession). This approach runs entirely counter to the foundation of the contemporary international legal order, which is firmly built upon the principle of *ex injuria jus non oritur* (a legal right cannot arise from an unlawful act). [162] Because the existence of the DPR and LPR is the direct result of unlawful armed intervention, any effort to create a facade of independent statehood for the purpose of partitioning and controlling territory is entirely nullified. This aligns with the established norm of international law: “No territorial acquisition resulting from the threat or use of force shall be recognized as legal”. [163]

[162] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136. In addition to being a rule of customary international law, this is also a fundamental principle 'recognized by civilized nations', enshrined in key legal instruments: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 52; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10, art 41(2). This principle is also reaffirmed in the authoritative interpretation of the UN Charter, namely UNGA Res 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States' (24 October 1970).

[163] UNGA Res 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970), First Principle, para 10.

Third, the allegations of 'discrimination' or 'genocide' leveled against Ukraine—which constituted the prerequisite for Russia's invocation of the 1970 Safeguard Clause—are entirely unsubstantiated. In its Order on Provisional Measures issued on 16 March 2022, the International Court of Justice (ICJ) explicitly stated that it was not in possession of any evidence substantiating the allegations of genocide advanced by the Russian Federation to justify its military operations. [164]

Under such circumstances, Russia's premature recognition of a secessionist region as a new state while an internal armed conflict remains ongoing constitutes a breach of international law. In October 2022, the UN General Assembly adopted Resolution ES-11/4 with an overwhelming majority of 143 member states, collectively rejecting the purported statehood of the DPR and LPR. The resolution condemned the illegal "referendums" and Russia's annexation of Donetsk, Luhansk, Kherson, and Zaporizhzhia (the latter two being territories occupied during the subsequent course of the war since February 2022), explicitly demanding that all States refrain from recognizing any alteration to the status of these regions. [165] Although this resolution does not possess the legally binding enforcement authority of a Security Council resolution, it unequivocally reflects the collective will and legal standpoint of the international community as a whole.

Conclusion of Case 3.

On the morning of 23 February 2022 (New York time), a profound legal paradox unfolded: at the precise moment the Russian Federation was holding the Presidency and chairing emergency meeting 8974 of the United Nations Security Council, the Russian President officially launched a military campaign into Ukrainian territory. Whereas the UN Secretary-General unequivocally characterized this action as "attacking Ukraine," the Russian representative persistently employed the term "special military operation" aimed at protecting the population of the Donbas region—territory universally recognized as falling strictly under Ukrainian sovereignty. This terminological manipulation transcends mere rhetoric; it

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[164] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures) [2022] ICJ Rep 211, para 59.

[165] UNGA Res 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970), First Principle, para 10.

constitutes a calculated effort to circumvent the definitions of international law in order to evade the "crime of aggression".

Looking back at history in 1990, when Iraq attacked Kuwait, the United Nations' collective security mechanism was swiftly activated, allowing for a multinational military intervention to repel the act of using force. The nature of Russia's action in Ukraine possesses similar constitutive elements, but Russia's legal standing is entirely different from that of Iraq. As a Permanent Member (P5), it is precisely Russia's privilege that has completely paralyzed this highest organ of power. At least two draft resolutions condemning the war were vetoed, and the Security Council had to adopt Resolution 2623 (on 27 February), activating the "Uniting for Peace" mechanism to transfer the authority to handle the crisis to the General Assembly. The collective security structure of the United Nations was effectively rendered inoperative.

Although controversies persist regarding the privileges of major powers, and the ambiguity surrounding the timeframe for applying "all necessary measures" has created loopholes for these powers to "arrogate to themselves the right to unilateral intervention," the 1990 Iraq incident demonstrates that international law continues to play a role in regulating state behavior. At that time, major powers still had to await a UN Security Council resolution explicitly authorizing the use of force. Even during the 2003 Iraq War, the US-led coalition sought to expansively interpret existing resolutions in an attempt to cling to a veneer of legal justification. However, the events of 2022 mark a severe regression in international legal norms. Just as scholar Bruno Simma forewarned, war is waged seemingly without even a "fig leaf" to disguise its true motives. [166] Russia openly conflated routine defense cooperation between a sovereign state and a military alliance with an "imminent armed attack." This strained argument was weaponized to justify the use of force, the true objective of which is to redraw territorial borders.

The precedent set by the 2003 armed intervention in Iraq highlights a severe legal implication: once the threshold for invoking the right to "self-defense" is lowered, other actors can readily replicate and weaponize this rationale. Tacitly permitting a major power to use force based on its subjective assessment of future threats establishes a dangerous precedent, paving the way for all other nations to act similarly. [167] In practice, the Russian

[166] Bruno Simma, 'Foreword' in Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Hart Publishing 2021).

[167] UN, 'A more secure world: Our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change' (2004) UN Doc A/59/565, 63, paras 191–92.

President directly inherited and expansively interpreted the 2003 U.S. doctrine of "preventive self-defense" to serve as a pretext for the invasion of Ukraine. As noted in the literature, the “vagueness of the resulting rule”[168] inherent in pre-emptive doctrines primarily benefits great power, allowing them to “define its content in later situations as they please” [169]. Russian President Putin has done exactly that. This continuation of past violations into the present is likely to be replicated by great powers in the future, posing a profound challenge to international legal norms.

Conclusion

The ultimate goal of the UN Charter is to restrain the use of force, yet war seems never to have been absent from this planet. As former ICJ Judge Bruno Simma once observed, restraining the use of force remains an arduous struggle for humanity [170]. It is no coincidence that the 2025 Nobel Prize in Literature was awarded to László Krasznahorkai; the Hungarian author's depictions of chaos authentically reflect the current state of the world—a world slipping through an incredibly difficult period. [171] It is against this backdrop that the issue of the use of force in interventionist diplomacy has never lost its contemporary relevance.

In the architecture of modern international law, this principle serves as a vital constitutional foundation, yet its integrity faces unprecedented challenges from the interventionist practices of major powers. The following thesis has addressed two fundamental research questions to explore this tension: Firstly. *how the legal boundaries between the prohibition and its exceptions are delineated within the contemporary framework?* Secondly, *whether Article 2(4) of the UN Charter has been treated by great powers as a binding peremptory norm or merely a procedural hurdle to be cleared?*

Amidst extensive research and complex legal debates surrounding the prohibition of the use of force and its exceptions, the methodological approach of legal positivism has revealed to

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[168] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 European Journal of International Law 396, p 395.

[169] Ibid, 395.

[170] Bruno Simma, ‘The Impact of decolonization on the Use of Force’ (1989) 209 Recueil des Cours 161, 190.

[171] Nobel Prize Outreach AB, ‘The Nobel Prize in Literature 2025’ (NobelPrize.org, 2025) https://www.nobelprize.org/prizes/literature/2025/summary/ accessed 5 June 2026.

be fruitful in maintaining a resolute separation between law and politics to protect the autonomy of the legal system from instrumentalization for political purposes. Rather than pursuing interdisciplinary studies or engaging with geopolitical and security justifications, the research examines the practices of major powers strictly through existing legal norms. This approach focuses on clearly demarcating the line between lawful and unlawful uses of force under both treaty and customary law. Notably, the methodology employed a two-element approach to identify the scope of customary law through analyzing state practice and *opinio juris* and applied this to three emblematic case studies: the Gulf War, the 2003 Iraq War, and the 2022 Ukraine conflict, which overall serves as a basis to evaluate the interventionist practices of major powers

The analysis results thus reveal a systemic trajectory of legal and institutional erosion. In the 1990 Gulf War, the use of force achieved legitimacy as a collective enforcement action, yet established a precedent for "authorization mechanisms" that major powers later exploited. By 2003, the US-led coalition in Iraq utilized the "Revival Argument" and "Preemptive Self-Defense" to bypass the Security Council, thereby circumventing the strict conditions required for collective self-defense. Finally, the 2022 Ukraine conflict demonstrates the cynical weaponization of legal concepts, where Russian President Putin invoked the very same controversial doctrine of preemptive self-defense previously applied by the US as a facade to justify his act of aggression against Ukraine. Furthermore, he argued that the West had also conducted numerous military interventions resulting in regime change, using this as a pretext to legitimize his own violations. However, through the lens of Legal Formalism, these specious justifications are entirely devoid of legal merit. The core principle of international law clearly dictates: past violations hold no value in establishing lawful precedents, nor can they negate the illegality of current violations. [172] Therefore, President Putin's invocation of wrongful interventionist precedents set by the West does not generate any customary norm to legitimize acts of aggression, but merely constitutes a continuation of breaches of Article 2(4) of the UN Charter.

This argument matters profoundly because the expansion of exceptions creates "grey zones" that push the collective security system toward a state where force operates beyond restraint.

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[172] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 186. As the International Court of Justice (ICJ) forcefully reaffirmed in the *Nicaragua* judgment (1986): "*Instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule*."

Given that major powers seek every means to circumvent the stringent barrier of the prohibition on the use of force, as well as to interpret and expand the exceptions to this prohibition in order to justify their armed interventions, delineating these boundaries is a vital effort to prevent international law from degenerating into a mere legitimizing instrument for power, especially as the survival of smaller nations depends on Article 2(4) as their only legal shield. Nevertheless, whenever major powers violate the prohibition on the use of force, such actions are invariably accompanied by 'legal diplomatic campaigns' aimed at invoking exceptions to the prohibition in order to justify their violations. This practice demonstrates a fundamental reality where no state dares to publicly deny the existence of this prohibition. As the International Court of Justice (ICJ) aptly observed in the *Nicaragua* case [173]. Such reality serves to fortify, rather than undermine, the absolute legal validity of Article 2(4) concerning the prohibition of the use of force. Article 2(4) remains the ultimate bulwark safeguarding the world against the peril of war, even if, at times, that bulwark appears profoundly fragile.

Although certain limitations remain that warrant further in-depth research, the thesis has achieved its core objective, which is establishing a framework to demarcate the boundary between the unlawful use of force and permissible exceptions. For future research, the methodology used here is highly replicable and can be applied to other contexts such as cyber-warfare or interventions involving non-state actors. Significant gaps remain for further study, including the legal status of "intervention by invitation" which lacks explicit mention in the Charter, and the urgent need for institutional reforms to prevent the neutralization of the Security Council by its Permanent Members. Ultimately, while the bulwark against war appears fragile, the persistent effort by states to justify their actions through legal exceptions serves to confirm, rather than weaken, the absolute validity of the prohibition of the use of force.

[173] Ibid. " *If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule*"

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