

LW4635 Independent Research

**Resolving the conundrums in Articles 2(4) and 51 of
the Charter of the United Nations –
A Matter of Treaty Interpretation**

In Memory of Sir Ian Brownlie (1932 – 2010)

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I. Introduction

Articles 2(4) and 51 of the Charter of the United Nations (UN Charter)¹ have long been and are still the twin scourges of public international law. The prohibition on the threat or use of force and the right of self-defence are both “subject[s] of fundamental disagreement”.² Such disagreement has been debated time and again in countless numbers of occasions, ranging from proceedings that take place before the International Court of Justice, the highest of all judicial organs, to moots in which law students are involved, such as the renowned Philip C Jessup International Law Moot Court Competition.

In his authoritative commentary on the UN Charter, Bruno Simma identified the cause of the dispute over Article 2(4):

“The prohibition of the [threat or] use of force in contemporary international law is burdened with uncertainties resulting from the, undoubtedly ambiguous, wording of the relevant provisions of the UN Charter, as well as from their unclear relations to one another.”³

As for Article 51, Christine Gray pointed out that:

“The divisions over the scope of the right of self-defence, especially as to whether anticipatory... self-defence... are lawful, are much discussed and date back to the creation of the United Nations.”⁴

Quite apart from the controversy arising from each of these provisions when they are considered individually, the disagreement extends to the situation where both provisions are considered together. The most noticeable difficulty that has to be surmounted is the relationship between the two provisions.

As precisely indicated by Sir Ian Brownlie, all these problems “[present] some questions of interpretation”.⁵

¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter)

² Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 30, 114

³ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 135

⁴ Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 114

⁵ Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, Oxford 2008)

The purpose of this paper is to critically analyse the significant problems that have arisen from Articles 2(4) and 51, starting with first an exposition of the rules of interpretation of treaties that are used in public international law, followed by a detailed discussion of Articles 2(4) and 51, both individually and collectively, and rounding off with a conclusion on the importance of interpretation to the process of solving problems in a treaty. The discussion will explore the notions underlying these two provisions, as well as the problems that are existent in them. Each problem will be closely examined in turn using a three-step approach. First, the problem will be identified. Second, the methods of interpretation that have been previously proposed by other scholars in this field of law to solve the problem, if there are any, will be set out. Third, the author's views on the proper course to take in resolving the problem will be proffered.

Due to the limited length of this paper, it is impossible to explore each and every problem, however minute, that can be found in Articles 2(4) and 51. Therefore, this paper only aims to cover the relatively more eye-catching issues of these two provisions.

II. The rules of interpretation of treaties under public international law

As the problems that are found in Articles 2(4) and 51 of the UN Charter raise questions of interpretation, it is both crucial and convenient to lay down the most important rules of interpretation of treaties in the outset. They are listed in Section 3 of the Vienna Convention on the Law of Treaties (Vienna Convention),⁶ which is entitled "Interpretation of Treaties". Article 31 provides the general rule of interpretation:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

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⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331 (Vienna Convention)

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”⁷

Article 32 further provides the supplementary means of interpretation:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”⁸

In the following section on the discussion of the problems that are existent in Articles 2(4) and 51 of the UN Charter, reference will be made to these rules of interpretation of treaties from time to time.

III. Article 2(4) of the UN Charter

A. The notion of prohibition on the threat or use of force

Article 2(4) of the UN Charter provides that:

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

⁷ Vienna Convention art 31

⁸ Vienna Convention art 32

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁹

In order to better understand the purpose served by the prohibition on the threat or use of force, it is worthwhile to study its historical background. Before the 20th century, the *bellum iustum* principle was not recognised as law.¹⁰ As there was no prohibition whatsoever on the use of force, the freedom of states to go to war was absolute. It was only after this period did nations feel the need to restrict such arbitrary recourse to war. To state the obvious, such restriction was not first introduced by the UN Charter. Article 1 of the Hague Convention III relative to the Opening of Hostilities imposed the procedural requirement of giving a prior, express warning.¹¹ Article 1 of the Hague Convention II respecting the Limitation of the Employment of Force for the Recovery of Contract Debts precluded the use of armed force in recovering contract debts.¹² Articles 10, 12, 13 and 15 of the Covenant of the League of Nations altogether set up a sliding scale of conditions, ranging from postponement in instigating war to unqualified prohibition on waging war.¹³ Article 2 of the Geneva Protocol for the Pacific Settlement of International Disputes made a great leap by providing that recourse to war should not be allowed, save for the purposes of self-defence and collective enforcement of obligations.¹⁴ Article I of the Briand-Kellogg Pact laid down a general bar on war as a method of dispute resolution, while reserving an implied right of self-defence.¹⁵ What can be seen from this series of legal instruments as a whole is the progressive development of the law, which leads to the culmination of the prohibition found in Article 2(4) of the UN Charter.

The importance of the prohibition on the threat or use of force is reflected by the immense volume of literature that has been dedicated to it, amongst which it has been described as “the corner stone of peace in the Charter, the heart of the United Nations

⁹ UN Charter art 2(4)

¹⁰ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 114-115

¹¹ Hague Convention III relative to the Opening of Hostilities (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention III) art 1

¹² Hague Convention II respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention II) art 1

¹³ Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) arts 10, 12, 13, 15

¹⁴ Geneva Protocol for the Pacific Settlement of International Disputes (adopted 2 October 1924) art 2

¹⁵ Briand-Kellogg Pact (signed 27 August 1928, entered into force 24 July 1929) art I

Charter or the basic rule of contemporary public international law”.¹⁶ More specifically, this is reflected by the status that this prohibition has acquired in public international law. Speaking of status, it is relevant at this point to mention Article 38 of the Statute of the International Court of Justice (ICJ Statute),¹⁷ which governs the sources of law. It states:

- “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”¹⁸

The prohibition on the threat or use of force falls within paragraphs (a), (b) and (c) of Article 38(1) of the ICJ Statute. It is an international convention because it is contained in Article 2(4) of the UN Charter. It is an international custom, as affirmed by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*,¹⁹ in which the United States was held to have breached the obligation under customary international law to refrain from using force against another state. It is a general principle of law, as shown by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Declaration on Principles of International Law),²⁰ which, despite lacking legally binding effect, is considered as a vital tool of interpretation of the provisions in the UN Charter.²¹ To go even further than the sources of law provided by Article 38(1) of the ICJ Statute, it is recognised as *jus cogens* by the International Court of Justice and the International Law Commission.²²

¹⁶ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 117

¹⁷ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (ICJ Statute)

¹⁸ ICJ Statute art 38

¹⁹ [1986] ICJ Rep 14

²⁰ UNGA Res 2625 (1970) GAOR 25th Session

²¹ Robert Rosenstock, ‘The Declaration of Principles of International Law concerning Friendly Relations: A Survey’ (1971) 65 AJIL 713, 713

²² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14; ILC, ‘Report of the International Law Commission on the Work of its 18th Session’ (4 May-19 July 1966) UN Doc A/6309/Rev.1

B. The problems of Article 2(4) of the UN Charter

In recalling Bruno Simma's critique on Article 2(4) in his commentary, the problems lie in two areas, namely the vague wording of the provision and the baffling relationship between the clauses in the provision.²³ The former points to the scope of the term "force", whereas the latter hints at the effect of the clause "against the territorial integrity or political independence of any state" on the prohibition on the threat or use of force.

1. The scope of the term "force"

(a) The problem

The wording of Article 2(4) of the UN Charter does not specify whether the term "force" includes only military force or all types of force, regardless of whether it is military or non-military in nature.²⁴

For the purpose of illustrating the concept of non-military force, it is useful to take a brief look at Article 41 of the UN Charter:

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."²⁵

This provision contains a non-exhaustive list of non-military measures which can be used by the United Nations Security Council (UN Security Council) to enforce its decisions.²⁶ Among all the items in the list, the "complete or partial interruption of economic relations" is by far the most important measure, of which arms embargoes form the greatest proportion.²⁷ For instance, when Iraq invaded Kuwait in 1990, the

²³ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 135

²⁴ Richard Kearney and Robert Dalton, 'The Treaty on Treaties' (1970) 64 AJIL 495, 534-535

²⁵ UN Charter art 41

²⁶ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 740

²⁷ The Department of Political Affairs of the United Nations, 'The Experience of the United Nations in

UN Security Council imposed an arms embargo on the export of weapons and other military equipment to Iraq,²⁸ with the aim of inducing the Iraqi Government to immediately withdraw its military forces from the territory of Kuwait as required under the Security Council Resolution 662.²⁹

(b) The existing methods of interpretation

The uncertainty of the scope of the term “force” causes two camps to emerge. One camp holds the view that the term only includes military force, whereas the other considers it as encompassing all types of force, irrespective of whether it is military or not.

The former draws on support for its standpoint from the UN Charter itself. Paragraph 7 of the Preamble to the UN Charter indicates that it is essential:

“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 (emphasis added)

The *travaux préparatoires* to the UN Charter demonstrates that the prohibition on the threat or use of force is only directed to military force.³¹ In 1945, the Brazilian proposal to expand the scope of force to include economic force had been turned down at the United Nations Conference on International Organisation held in San Francisco.

Besides, Article 51 of the UN Charter, which will be further elaborated below, explicitly limits the exercise of the right of individual or collective self-defence to situations where an armed attack has occurred.³²

Instead of focusing on the UN Charter, the latter relies on other legal instruments to substantiate its position. According to the Declaration on Principles of International Law, states have the:

Administering Arms Embargoes and Travel Sanctions’

<<http://www.un.org/Docs/sc/committees/sanctions/background.pdf>> accessed 14 April 2010

²⁸ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 462

²⁹ UNSC Res 662 (9 August 1990) UN Doc S/RES/662

³⁰ Preamble to the UN Charter

³¹ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 118

³² UN Charter art 51

“duty... to refrain... from *military, political, economic or any other form of coercion* aimed against the political independence or territorial integrity of any state”.³³ (emphasis added)

Article 1(1) of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) states that:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their *economic, social and cultural development*.”³⁴ (emphasis added)

Moreover, Article 32 of the Charter of Economic Rights and Duties of States (CERDS) lays down the rule that:

“No State may use or encourage the use of *economic, political or any other type of measures* to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.”³⁵ (emphasis added)

(c) The author’s views

The contention that the term “force” covers all types of military and non-military force is unsustainable. Article 31(1) of the Vienna Convention requires a term to be interpreted in its context.³⁶ The context in which the prohibition on the threat or use of force comes into play is that of “international relations”.³⁷ This can be distinguished from the contexts which are applicable to the Declaration on Principles of International Law, the ICESCR, the ICCPR and the CERDS. For the Declaration on Principles of International Law, the duty to refrain from “military, political, economic or any other form of coercion” is imposed in the context of “[non-intervention] in matters within the domestic jurisdiction of another State”.³⁸ The freedom to pursue “economic, social and cultural development” under the ICESCR and the ICCPR is

³³ UNGA Res 2625 (1970) GAOR 25th Session

³⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 1(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 1(1)

³⁵ UNGA Res 3281 (1974) GAOR 29th Session art 32

³⁶ Vienna Convention art 31(1)

³⁷ UN Charter art 2(4)

³⁸ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 118

conferred in the context of self-determination.³⁹ Last but not the least, the proscription of the use or the encouragement of the use of “economic, political or any other type of measures” of coercion under the CERDS is laid down in the context of preservation of sovereign equality.⁴⁰

The line of reasoning limiting the scope of “force” to military force derives support from the Preamble, the *travaux préparatoires* and Article 51 of the UN Charter. References to the Preamble and the *travaux préparatoires* are permitted under Articles 31(2) and 32 of the Vienna Convention respectively.⁴¹ Article 51, being part of an international convention, is also a valid source of law under Article 38(1)(a) of the ICJ Statute.⁴² A further policy argument can be used to reinforce this line of reasoning:

“were this provision [Article 2(4) of the UN Charter] to extend to other forms of force, States would be left with no means of exerting pressure on other States that violate international law. That consequence would be unacceptable at the present stage of development of international law, where compliance with the law is not effectively ensured through international organs.”⁴³

2. The effect of the clause “against the territorial integrity or political independence of any state” on the prohibition on the threat or use of force.

(a) The problem

There is dispute as to whether the clause “against the territorial integrity or political independence of any state” has the effect of restricting the scope of the prohibition on the threat or use of force.

(b) The existing methods of interpretation

If the clause is interpreted narrowly,⁴⁴ the threat or use of force will be allowed under international law as long as it is not coupled with an intention to violate the territorial integrity or political independence of any state.⁴⁵ As a result, “substantial

³⁹ ICESCR and ICCPR art 1(1)

⁴⁰ UNGA Res 3281 (1974) GAOR 29th Session art 32

⁴¹ Vienna Convention arts 31(2) and 32

⁴² ICJ Statute art 38(1)(a)

⁴³ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 118

⁴⁴ Derek Bowett, *Self-Defence in International Law* (Manchester University Press, Manchester 1958) 152

⁴⁵ Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford

qualifications of the prohibition of the [threat or] use of force” will be created,⁴⁶ thereby curtailing the scope of the prohibition by a large extent. In contrast, the adoption of a wide interpretation will not only preclude such slashing effect from coming into existence, but instead manifest the absolute nature of the prohibition by placing particular emphasis on the inviolability of the territorial integrity or political independence of states.⁴⁷

The restrictive approach of interpretation has previously been put forward by states in international judicial proceedings to negate responsibility for the threat or use of force, including the United Kingdom. In *Corfu Channel (United Kingdom v Albania) (Merits)*,⁴⁸ a fleet of British warships at the port of Corfu navigated to the north via a channel, from which mines in the North Corfu Strait had been swept in the past. During the course of the voyage, one of the warships struck a mine and suffered serious damage outside the Bay of Saranda. Another warship was used to tow this damaged warship, but was also struck by a mine and suffered much damage. As a result, the United Kingdom conducted minesweeping operations in the North Corfu Channel, in which it discovered twenty-two mines. Sir Eric Beckett, on behalf of the United Kingdom, contended that the purpose of the minesweeping operations was merely to secure evidence for judicial proceedings from the Albanian waters and thus “threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor [loss to] any part of its political independence”.⁴⁹ Therefore, there could be no breach of Article 2(4).

Traces of the liberal approach can be seen from various sources of law. To start with, the *travaux préparatoires* to the UN Charter clearly shows that the imposition of a restrictive effect is contrary to the intention of the drafters of the UN Charter. To quote Sir Ian Brownlie’s words:

“The conclusion warranted by the *travaux préparatoires* is that the phrase under discussion [against the territorial integrity or political independence of any state] was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect. If it is asserted that the phrase may have a qualifying effect then writers

1963) 265-266

⁴⁶ Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, Oxford 2008) 732

⁴⁷ Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) 268

⁴⁸ [1949] ICJ Rep 4

⁴⁹ *Corfu Channel (United Kingdom v Albania) (Merits)* ICJ Pleadings 295-296

making this assertion face the difficulty that it involves an admission that there is an ambiguity, and in such a case recourse may be had to *travaux préparatoires*, which reveal a meaning contrary to that asserted.”⁵⁰

What is more is that it is in the *Corfu Channel* case where the International Court of Justice rejected the restrictive approach which was raised by the United Kingdom as a defence. It ruled that:

“The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”⁵¹

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty positively affirms that the liberal approach is the proper method of interpretation by providing that:

“[n]o state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats *against the personality of the state or against its political, economic and cultural elements*, are condemned.”⁵² (emphasis added)

The Declaration on Principles of International Law goes a step further to pronounce that such interference, if being brought about, will amount to breaches of international law.⁵³

(c) The author’s views

The belief that the clause “against the territorial integrity or political independence of

⁵⁰ Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) 267

⁵¹ [1949] ICJ Rep 4, 35

⁵² UNGA Res 2131 (1965) GAOR 20th Session

⁵³ UNGA Res 2625 (1970) GAOR 25th Session

any state” has the effect of restricting the scope of the prohibition on the threat or use of force is erroneous. The restrictive approach that was raised by the United Kingdom as a defence had been expressly rebutted by the International Court of Justice in the *Corfu Channel* case, which is a source of law under Article 38(1)(d) of the ICJ Statute.

The liberal approach is, in addition, backed up by the *travaux préparatoires* to the UN Charter, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, as well as the Declaration on Principles of International Law.

It may be argued that the restrictive approach is a result of the direct application of Article 31(1) of the Vienna Convention, whereby Article 2(4) of the UN Charter is “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context”.⁵⁴ However, bearing in mind that the aim of the UN Charter is “to ensure... that armed force shall not be used, save in the common interest” as stated in Paragraph 7 of its Preamble,⁵⁵ it will be “manifestly absurd or unreasonable” to limit the prohibition to those types of threat or use of force which are directed to the territorial integrity or political independence of a state.⁵⁶ Thus, there is a need to resort to supplementary means of interpretation in accordance with Article 32 of the Vienna Convention, such as the *travaux préparatoires* to the UN Charter, which upholds the liberal approach.

The two Declarations, as United Nations General Assembly (UN General Assembly) resolutions, are not legally binding, but only recommendatory.⁵⁷ However, they are capable of reflecting state practice and *opinio juris*, which are the two elements that are needed to establish customary international law under Article 38(1)(b) of the ICJ Statute as held in *North Sea Continental Shelf Cases*.⁵⁸ State practice is revealed in “the way states vote in the General Assembly”.⁵⁹ The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty has been adopted with 109 votes, with only 1 vote of abstention, while the Declaration on Principles of International Law has been adopted without vote. According to the *Nicaragua* case, *opinio juris* can be extracted

⁵⁴ Vienna Convention art 31(1)

⁵⁵ Preamble to the UN Charter

⁵⁶ Vienna Convention art 32

⁵⁷ DHN Johnson, ‘The Effect of Resolutions of the General Assembly of the United Nations’ (1955-1956) 32 *British Ybk Intl L* 97, 106-107

⁵⁸ [1969] ICJ Rep 3

⁵⁹ Malcolm Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 115

from “the circumstances surrounding the adoption and application of a General Assembly resolution”.⁶⁰ In consenting to the adoption and application of the two resolutions, numerous states have indicated their intention to be legally bound by them.

IV. Article 51 of the UN Charter

A. The notion of right of self-defence

Article 51 of the UN Charter provides that:

“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.”⁶¹

Along with the enforcement actions taken by the UN Security Council with respect to threats to the peace, breaches of the peace and acts of aggression under Chapter VII of the UN Charter, the right to self-defence under Article 51 forms an exception to the prohibition on the threat or use of force under Article 2(4) of the UN Charter.⁶²

The historical development of the right of self-defence is closely linked to that of the prohibition on the threat or use of force. Before the 20th century, the right was underdeveloped due to the poor regulation of recourse to war. The appearance of Article I of the Briand-Kellogg Pact, which created a general bar on war yet reserved an implied right of self-defence, acts as the catalyst in accelerating the materialisation of the right.⁶³

In shifting our attention back to the ICJ Statute, the right of self-defence falls within paragraph (a) of Article 38(1). It is an international convention because it is contained

⁶⁰ Malcolm Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 115

⁶¹ UN Charter art 51

⁶² Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 789

⁶³ Briand-Kellogg Pact (signed 27 August 1928, entered into force 24 July 1929) art I

in Article 51 of the UN Charter. Whether it is an international custom, thus falling within paragraph (b) of Article 38(1), will be discussed below in the context of the legality of anticipatory self-defence.

B. The problems of Article 51 of the UN Charter

In directing our focus back to Christine Gray's remark on Article 51 that has been quoted at the very beginning of this paper, much controversy in relation to this provision is dedicated to the scope of self-defence.

1. The scope of the term "self-defence"

(a) The problem

The arguable existence of anticipatory self-defence has blurred the scope of the term "self-defence", thereby creating a penumbra to the right of self-defence in Article 51 of the UN Charter.

The concept of anticipatory self-defence is concisely summarised by Michael Reisman as follows:

"Anticipatory self-defense, the claim to "do unto others *before* they do unto you," promised to vouchsafe the security of the intended victim when he who struck first could deliver an unacceptable measure of damage, if not win outright."⁶⁴

A historical example exemplifying such concept is the Arab-Israeli Conflict. In 1967, Israel launched an attack against Arab after Egypt had blocked its southern port of Eilat and entered into a military pact with Jordan. Although it was open to Israel to justify its attack as an act of self-defence in reaction to the use of force by Egypt in the form of a blockade,⁶⁵ it was equally possible to perceive such attack as an act of anticipatory self-defence, which prevented Israel from suffering further harm that might be inflicted on it after the Egyptian Government had mobilized its military forces to station at the border of Israel and kept the United Nations Emergency Force

⁶⁴ Michael Reisman, 'Assessing Claims to Revise the Laws of War' (2003) 97 AJIL 82, 84; Michael Reisman, Mahnoush Arsanjani, Siegfried Wiessner and Gayl Westerman, *International Law in Contemporary Perspective* (Foundation Press, New York 2004) 1050

⁶⁵ Yoram Dinstein, *War, Aggression and Self-defence* (4th edn Cambridge University Press, Cambridge 2005) 192

out from the vicinity.

For avoidance of doubt, it is worthy to elucidate the difference between anticipatory self-defence and pre-emptive self-defence, which has often been overlooked. The distinguishing feature is the threshold that has to be met before the right of self-defence can be exercised. The test of “palpable and imminent threat of attack” for anticipatory self-defence has been drastically lowered to the test of “conjectural and contingent threat of possible attack” for pre-emptive self-defence.⁶⁶ The oft-cited example of pre-emptive self-defence is the Bush Doctrine that was introduced in the 2002 and 2006 National Security Strategy of the United States,⁶⁷ which allows “preemptive force [to be used] against putative enemies before they have the capability to attack the United States”.⁶⁸ The appearance of this doctrine can be solely accounted by the tragic September 11 attacks launched by al-Qaeda on the United States in 2001. In acknowledging that this doctrine has been severely criticised since its inception, especially by the UN Security Council,⁶⁹ it will be a fruitless exercise to engage in a fictitious debate on the legality of pre-emptive self-defence. Therefore, it is appropriate to put this concept to rest at this point.

(b) The existing methods of interpretation

The proponents of anticipatory self-defence ground their arguments on the wording of Article 51 of the UN Charter, the status of the right of self-defence as customary international law and the policy of providing sufficient safeguards against rapid advancement in weaponry.

With regard to the wording of Article 51, emphasis is laid on the “inherent right” of self-defence.⁷⁰ The right is inherent in the sense that it originates from customary international law, but is only later partially codified in Article 51.⁷¹ The question then boils down to whether this inherent right under customary international law is broad

⁶⁶ Michael Reisman, ‘Assessing Claims to Revise the Laws of War’ (2003) 97 AJIL 82, 84; Michael Reisman, Mahnoush Arsanjani, Siegfried Wiessner and Gayl Westerman, *International Law in Contemporary Perspective* (Foundation Press, New York 2004) 1050

⁶⁷ The White House, ‘The National Security Strategy of the United States of America’ (17 September 2002) <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf>> accessed 17 April 2010; The White House, ‘The National Security Strategy of the United States of America’ (16 March 2006) <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/nss2006.pdf>> accessed 17 April 2010

⁶⁸ Tai-Heng Cheng and Eduardas Valaitis, ‘Shaping an Obama Doctrine of Preemptive Force’ [2009] 82 Temp L Rev <http://www.temple.edu/law/tlawrev/content/issues/82.3/82.3_Cheng_Essay.pdf> accessed 17 April 2010

⁶⁹ Michael Reisman, Mahnoush Arsanjani, Siegfried Wiessner and Gayl Westerman, *International Law in Contemporary Perspective* (Foundation Press, New York 2004) 1078

⁷⁰ UN Charter art 51

⁷¹ Malcolm Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 1132

enough to cover the concept of anticipatory self-defence.

The surfacing of the right of self-defence as customary international law materialises in *The Caroline* case.⁷² In 1837, some British citizens seized and destroyed *The Caroline*, a vessel in an American port which had been carrying groups of American citizens who had been raiding the territory of Canada.⁷³ In response to this happening, Daniel Webster, the Secretary of State of the United States, entered into correspondence with the authorities of the United Kingdom, from which the most cited passage in relation to the right of self-defence could be located. It read:

“It [is for the British] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”⁷⁴

It has been alleged that the Webster formula creates a right of self-defence under customary international law that is broad enough to cover the concept of anticipatory self-defence. This is relatively wider than the right of self-defence that is provided in Article 51 of the UN Charter, which only allows such right to be exercised after an armed attack has occurred.

Above all, a policy argument can be used to boost the legality of anticipatory self-defence. The urge to expand the scope of self-defence is imperative in light of the proliferation of increasingly powerful weapons in modern society. The underlying rationale is that:

“the opportunity for meaningful self-defense could be irretrievably lost if an adversary, armed with much more destructive weapons and poised to attack, had to be allowed to initiate (which could mean, in effect, to accomplish) its attack before the right of self-defense came into operation.”⁷⁵

⁷² (1837) 29 BFSP 1137

⁷³ Malcolm Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 1131

⁷⁴ *The Caroline* (1837) 29 BFSP 1137, 1137-1138

⁷⁵ Michael Reisman, ‘Assessing Claims to Revise the Laws of War’ (2003) 97 AJIL 82, 84; Michael Reisman, Mahnoush Arsanjani, Siegfried Wiessner and Gayl Westerman, *International Law in Contemporary Perspective* (Foundation Press, New York 2004) 1050

In other words, the invention of highly advanced weapons will rob the right of self-defence of all purpose if such right can only be exercised after the fatal blow has been struck against the targeted state.

Ironically, there is a flipside to each of these three grounds of wording, customary international law and policy.

A literal reading of Article 51 shows that the right of self-defence can only be exercised “if an armed attack occurs”.⁷⁶ Where it is anticipated that an armed attack will occur in the future, no matter how imminent, the right cannot be invoked to offer protection to the potential victim state.

The right of self-defence as customary international law is also not immune from challenge. The exchange of correspondence between the United States and the United Kingdom in *The Caroline* incident took place between 1838 and 1842, the period during which the customary international law had been formed. Yet, the UN Charter was drafted in 1945. Even by assuming that the Webster formula does cover anticipatory self-defence, the position under customary international law from 1838 to 1842 is undoubtedly anachronistic and should be subjected to review.⁷⁷ On this note, it is proper to consider the current state practice with regard to anticipatory self-defence. For instance, Israel attacked a nuclear reactor owned by Iraq in 1981, causing the UN Security Council to unanimously adopt Resolution 487 so as to “strongly [condemn] the military attack... [as a] clear violation of the Charter of the United Nations and the norms of international conduct”.⁷⁸ What can be deduced from here is that current state practice does not support anticipatory self-defence.⁷⁹

On the basis of policy, the unease with the concept of anticipatory self-defence rests in the radical change from an objective standard of “armed attack” to a subjective standard of “anticipated attack”.⁸⁰ The consequence naturally flowing from this change is that the right of self-defence will be subjected to abuse, resulting in a sudden surge of acts of aggression, which are defined in Article 1 of the UN General Assembly Resolution 3314 as:

⁷⁶ UN Charter art 51

⁷⁷ Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, Oxford 2008) 734

⁷⁸ UNSC Res 487 (19 June 1981) UN Doc S/RES/487

⁷⁹ Antonio Cassese, *International Law* (2nd edn Oxford University Press, Oxford 2005) 362

⁸⁰ Michael Reisman, ‘Assessing Claims to Revise the Laws of War’ (2003) 97 AJIL 82, 84; Michael Reisman, Mahnoush Arsanjani, Siegfried Wiessner and Gayl Westerman, *International Law in Contemporary Perspective* (Foundation Press, New York 2004) 1050

“the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations”.⁸¹

This definition is more or less the same as the wording used in Article 2(4) of the UN Charter. It logically follows that acts of aggression have been outlawed by the prohibition on the threat or use of force.

(c) The author’s views

What has to be settled here is the tug-of-war which hinges upon the three elements of wording, customary international law and policy.

The conclusions drawn from the interpretation of the words “inherent right” and “if an armed attack occurs” are both valid outcomes. They are plainly the results that are derived from the correct application of Article 31(1) of the Vienna Convention, which requires “a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context”.⁸²

Nevertheless, there is a difficulty with the allegation that the Webster formula is broad enough to accommodate the concept of anticipatory self-defence. From *The Caroline* case, it is apparent that the United Kingdom was relying on self-defence, as opposed to anticipatory self-defence. It, in seizing and destroying the vessel, was responding to the use of force in the form of a raid by the American citizens, rather than acting in anticipation of further attacks from the United States. The Webster formula is intended to address self-defence, and self-defence alone. Supposing, but not conceding, that the claim that the Webster formula also governs anticipatory self-defence is an authentic one, it is common sense that customary international law should progress with time. In line with this commonsense approach, Malcolm Shaw writes:

“As the community develops it will modernise its code of behaviour by the creation of legal machinery, such as courts and legislature. Custom, for this is how the original process can be described, remains and may also continue to evolve.”⁸³

Afterall, what is customary international law? It is a set of rules that are buttressed by

⁸¹ UNGA Res 3314 (1974) GAOR 29th Session

⁸² Vienna Convention art 31(1)

⁸³ Malcolm Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 72-73

the two fundamental building blocks of state practice and *opinio juris*. With a change in state practice, it is no longer permissible to nostalgically indulge in the status of customary international law in the period from 1838 to 1842.

In terms of policy, we are at present trapped in the dilemma of being exposed to the undesirable consequences attached to weaponry advancement on the one hand, and facing a dreaded skyrocketing of acts of aggression on the other. Various attempts have been made in the past to solve such dilemma. To name some obvious ones would be the flexible interpretation of the term “armed attack”⁸⁴ and the introduction of this new creature of “interceptive self defence”.⁸⁵ It would now be appropriate to dig into the feasibility of these proposals. If a flexible approach of interpretation is to be adopted, exactly how flexible should it be? In the absence of clear guiding principles, this approach will give rise to much unwanted uncertainty in the law. This so-called solution of flexible interpretation has added new problems instead of solving the pre-existing ones. A seemingly more plausible solution is to welcome the innovation of interceptive self-defence, which permits the right of self-defence to be invoked when the attacking state “has committed itself to an armed attack in an ostensibly irrevocable way”.⁸⁶ This novel concept has been comprehensively explored by Yoram Dinstein through a skilful twist of the Pearl Harbour incident that took place in December 1941.⁸⁷ He created this hypothetical situation, whereby it is supposed that the moves by the Japanese have been detected and put to a halt by the Americans prior to their completion. The Americans will be able to justify their action as interceptive self-defence once the Japanese have launched their aircraft from the air carriers and sent their fleet on its journey. This is because, by then, it can be said that the Japanese have irreversibly embarked on an armed attack. This should be distinguished from the situation where the Japanese are only gearing themselves up for the armed attack, which merely amounts to preparation of the armed attack. The ultimate take on this example is whether the actions carried out by the attacking state irrefutably manifest the commencement of an armed attack that is launched against the soon-to-be victim state. If this question is answered in the positive, it will be for the potential victim to secure sufficient evidence to prove such manifestation. As elaborated by Sir Humphrey Waldock:

⁸⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 347-348 (Dissenting Opinion of Judge Schwebel)

⁸⁵ Yoram Dinstein, *War, Aggression and Self-defence* (4th edn Cambridge University Press, Cambridge 2005) 190-192

⁸⁶ Yoram Dinstein, *War, Aggression and Self-defence* (4th edn Cambridge University Press, Cambridge 2005) 191

⁸⁷ Yoram Dinstein, *War, Aggression and Self-defence* (4th edn Cambridge University Press, Cambridge 2005) 190-192

“Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.”⁸⁸

The birth of interceptive self-defence has added value to the present law on the right of self-defence by easing the concerns on both sides of the dilemma. It preserves the effectiveness of the right of self-defence in light of the advancement in weaponry by bringing forth the point of time at which the right of self-defence can be resorted to. It also forestalls the arbitrary use of such right by imposing an evidential burden on the alleged victim state. It undeniably offers a win-win solution.

V. Articles 2(4) and 51 of the UN Charter

A. *The problems of Articles 2(4) and 51 of the UN Charter*

Not too surprisingly, problems of interpretation also arise when Article 2(4) is considered side by side with Article 51. As to date, the most appalling obstacle pertaining to the interrelationship between these two provisions lies in the scope of “use of force” and “armed attack”.

1. The scope of “use of force” and “armed attack”

(a) The problem

When Articles 2(4) and 51 of the UN Charter are considered together, the most conspicuous problem is whether the scope of “use of force” in Article 2(4) coincides with that of “armed attack” in Article 51.

A reminder should be made at this stage that Article 2(4) covers both the threat of force and the use of force.⁸⁹ In its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice defined a threat of force as a “signalled intention to use force if certain events occur”.⁹⁰ In the context of nuclear weapons, a threat of force will occur if nuclear weapons are possessed with the intention of using them for the purpose of defence, which does not conform to the

⁸⁸ Humphrey Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’ (1952) 81 RCADI 451, 498

⁸⁹ UN Charter art 2(4)

⁹⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 <<http://www.icj-cij.org/docket/files/95/7495.pdf>> accessed 17 April 2010 [47]

dual requirements of necessity and proportionality.⁹¹ Other general examples include a “piling-up of armaments”, a “shaping of alliances” and so forth.⁹² Being merely a warning that force will be used in the future upon the fulfillment of particular conditions, the concept of threat of force can in no way cover any use of force, let alone armed attack. It is unimaginable that a case can be made out by arguing that “threat of force” has an identical scope as “armed attack”. So, it is realistic to dispose of “threat of force” and solely focus on “use of force” in the following comparison exercise.

The significance of ascertaining whether “use of force” coincides with “armed attack” in terms of scope is apparent. If these two concepts do not coincide, there will be situations where a state, though being subjected to a use of force, cannot exercise the right of self-defence when the use of force in question is not severe enough to constitute an armed attack, which is the gatekeeper of Article 51. It may be argued that the lacuna between Articles 2(4) and 51 can be filled with the device of countermeasure, which serves the same purpose as self-defence but is used to resist a use of force that falls short of the standard of armed attack. Just as Article 51 has ousted self-defence from the jurisdiction of the prohibition on the use of force under Article 2(4), the wrongfulness of countermeasure is precluded by Article 22 of the International Law Commission’s Articles on State Responsibility (ILC Articles),⁹³ which provides that:

“The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.”⁹⁴

The prerequisites that need to be satisfied before countermeasure can be used are set out by the International Court of Justice in *Gabčíkovo-Nagymaros Project*.⁹⁵

“In the first place it must be taken in response to a previous international wrongful act of another state and must be directed against that state... Secondly, the injured state must have called upon the state committing the wrongful act to

⁹¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 <<http://www.icj-cij.org/docket/files/95/7495.pdf>> accessed 17 April 2010 [48]

⁹² Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 124

⁹³ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) 168

⁹⁴ UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 art 22

⁹⁵ [1997] ICJ Rep 7

discontinue its wrongful conduct or to make reparation for it... an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question... its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and... the measure must therefore be reversible.”⁹⁶

These requirements have also been affirmed by several arbitral awards, such as the *Naulilaa case (Portugal v Germany)*,⁹⁷ the *Cysne case (Portugal v Germany)*⁹⁸ and the *Air Services Agreement of 27 March 1946 case (United States/France)*.⁹⁹ In the absence of armed attack being a precondition, countermeasure can be used to fight back against any use of force that does not reach the level of armed attack. Nonetheless, it is doubtful whether countermeasure is an effective means of enforcement of obligations that are imposed by public international law. As the main focus here is the interpretation of the terms “use of force” and “armed attack”, the author will shed some light on the effectiveness of countermeasure only after this relatively more important issue has been dealt with.

(b) The existing methods of interpretation

To some, there exists a difference in scope between “use of force” and “armed attack”. The term “use of force” is self-explanatory. The only point that is worthy of reiteration is the scope of the term “force” which, as thrashed out earlier on, should be confined to military force. The real challenge is posed by the term “armed attack”. Notwithstanding that it has introduced this concept into public international law, the UN Charter does not provide a definition for it. In spite of the fact that “aggression” is by far the closest relative of “armed attack”, the definition of aggression embodied in the UN General Assembly Resolution 3314 cannot provide any direct assistance. This has been made clear by paragraphs 2 and 4 of the Preamble of the Resolution:

“Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, 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...

⁹⁶ *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, 55-57

⁹⁷ (1928) 2 RIAA 1011, 1025-1026

⁹⁸ (1930) 2 RIAA 1035, 1052

⁹⁹ (1979) 18 RIAA 416

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations”.¹⁰⁰

It is evident that the UN General Assembly adopts this Resolution for the purpose of delineating the scope of “aggression”. To ensure clarity, Article 6 of the Resolution further provides:

“Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.”¹⁰¹

This leaves no room for disputing that the Resolution is reserved for some other concepts, apart from “aggression”, under the UN Charter. Furthermore, the *travaux préparatoires* to the Resolution reveals that there is no intention to define “armed attack”.¹⁰² Such intention is not merely absent, but has been expressly negated by members of the special committee which drafted the Resolution, including the United States and the Soviet Union.¹⁰³ Apparently, what seems to be even more unfortunate is that the International Court of Justice in the *Nicaragua* case had failed to explicitly define “armed attack”, but had only raised a few examples to illustrate the concept. However, it is in these examples where the value of the *Nicaragua* judgment lies. The illustrations given include “action by regular armed forces across an international border” and “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 (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein”.¹⁰⁴ The second example is actually Article 3(g) of the UN General Assembly Resolution 3314. The reference made by the International Court of Justice to Article 3(g) is a clear indicator of the utility of the Resolution with regard to the scope of “armed attack”. Although it does not define “armed attack”, it contains a list of acts of aggression, “all of which can, subject to certain qualifications, be taken to characterize ‘armed attacks’ within the meaning of Article 51”.¹⁰⁵ With

¹⁰⁰ UNGA Res 3314 (1974) GAOR 29th Session preamble [2], [4]

¹⁰¹ UNGA Res 3314 (1974) GAOR 29th Session art 6

¹⁰² Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 795

¹⁰³ Statement by the American representative (UN Doc. A/AC.134/SC.105, 17); Statement by the Soviet representative (UN Doc. A/AC.134/SC.105, 16)

¹⁰⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 103

¹⁰⁵ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 796

the reference to the Resolution being the only means by which the scope of “armed attack” can be determined, it is essential to cite its Article 3 in verbatim:

“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”¹⁰⁶

What can be deduced from this list is the characteristic that is common to all of these acts of aggression, which is a use of force “on a relatively large scale and with substantial effect”.¹⁰⁷ This feature begs for the conclusion that the scope of “armed attack” does not exactly correspond to that of “use of force”.

To others, the scope of “armed attack” fits in nicely with that of “use of force”. There is, however, a divergence in the methodology that is used to establish the existence of

¹⁰⁶ UNGA Res 3314 (1974) GAOR 29th Session art 3

¹⁰⁷ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 796

such coincidence. One approach is to interpret the term “use of force” restrictively, causing Article 2(4) of the UN Charter to prohibit only force that is used “on a substantial scale and with considerable effect”¹⁰⁸ and thus matching the scope of “armed attack”. Another approach is to interpret the term “armed attack” widely, enabling victims of “use of force” of any degree to invoke Article 51 of the UN Charter to defend themselves.¹⁰⁹

(c) The author’s views

The existence of the loophole created by the non-conformity in scope between Articles 2(4) and 51 of the UN Charter is confirmed by Article 3 of the Definition of Aggression. Although the provision itself is not legally binding as part of a UN General Assembly Resolution,¹¹⁰ its ability to strengthen the argument that there is indeed a gap between Articles 2(4) and 51 is reflected by the International Court of Justice’s express incorporation of the provision into the ruling of the *Nicaragua* case, which is recognised as a source of law under Article 38(1)(d) of the ICJ Statute.¹¹¹

The attempts in raising the standard of “use of force” and lowering the threshold of “armed attack” are questionable moves because they are in outright defiance of Article 31(1) of the Vienna Convention. Not only do the artificial tightening of the term “use of force” and expansion of the term “armed attack” distort the ordinary meaning of these words, they also defeat the object and purpose of Articles 2(4) and 51 of the UN Charter, which are “to cut to a minimum the unilateral use of force in international relations”.¹¹² If Article 2(4) only prohibits force that is used “on a substantial scale and with considerable effect”, states will be free to use force, provided that they do not cross the red line of “armed attack”. In the reverse, if Article 51 allows states to resort to self-defence as a response to any use of force, states will also be free to use force to defend themselves. Such outrageous interpretation can never, and should never, be allowed to set foot in the regime of treaty interpretation.

In finding that there is in fact a gap between Articles 2(4) and 51, the next item to consider in the agenda is whether countermeasure is capable of bridging the gap.

¹⁰⁸ Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 791

¹⁰⁹ Quincy Wright, *The Role of International Law in the Elimination of War* (Manchester University Press, Manchester 1961) 60

¹¹⁰ DHN Johnson, ‘The Effect of Resolutions of the General Assembly of the United Nations’ (1955-1956) 32 *British Ybk Intl L* 97, 106-107

¹¹¹ ICJ Statute art 38(1)(d)

¹¹² Bruno Simma, *The Charter of the United Nations: A Commentary* (2nd edn Oxford University Press, New York 2002) 791

Countermeasure has traditionally been known as “legitimate reprisal”, which should be distinguished from “belligerent reprisal”.¹¹³ The main difference between the two is that only the latter, but not the former, may entail the use of force. Despite the recent emergence of the view that countermeasure may involve a use of force,¹¹⁴ the author is of the opinion that such view should not be upheld. With the enforcement actions taken by the UN Security Council under Chapter VII and the right of self-defence under Article 51 being the only circumstances where force can be used under the UN Charter, all other uses of force are strictly prohibited by Article 2(4). As countermeasure does not fall within the two exceptions, it cannot include a use of force. As a result, countermeasure is in effect a “measure not involving the use of armed force”, to which the list of non-military measures in Article 41 of the UN Charter can give some insight as to what it encompasses.¹¹⁵ The ineffectiveness of countermeasure can be explicated by using the example of “complete or partial interruption of economic relations” once again.¹¹⁶ Taking into consideration that states nowadays are economically dependent on each other, to use countermeasure against any state which has used force that does not reach the level of armed attack is to cause economic harm to other states, including the victim state. This is more so when the target of the countermeasure is a powerful, self-sufficient state, such as the United States. Up to this point, the lacuna between Articles 2(4) and 51 is still left to be filled by a device which is more ideal than countermeasure. However, owing to the scope of this paper, the author can only leave the venture of law reform into the hands of some other learned academics.

VI. Conclusion

The way in which the problems in Articles 2(4) and 51 of the UN Charter have been solved above attests to the power of treaty interpretation. The tool of interpretation helps to answer various questions, amongst which include the following:

- (i) Whether the term “force” in Article 2(4) refers to military force only, or both military and non-military force?
- (ii) Whether the clause “against the territorial integrity or political independence of any state” in Article 2(4) can restrict the scope of the prohibition on the threat or use of force by states?

¹¹³ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) 168

¹¹⁴ John Lawrence Hargrove, ‘The *Nicaragua* Judgment and the Future of the Law of Force and Self-defence’ (1987) 81 AJIL 135, 138

¹¹⁵ UN Charter art 41

¹¹⁶ UN Charter art 41

- (iii) Whether the term “self-defence” in Article 51 covers anticipatory self-defence?
- (iv) Whether the non-conformity in scope between the term “use of force” in Article 2(4) and the term “self-defence” in Article 51 gives rise to a lacuna between the prohibition on the use of force and the right of self-defence?

The existence of uncertainty in the wording of a treaty provision is not a problem which is inherent only in the UN Charter. As it is essential for a treaty provision to be broad enough to encompass a variety of legal situations, regardless of whether they are foreseeable or not at the time of drafting, it is inevitable that the cluster of words, which are available to the lawmakers, will import a considerable degree of uncertainty. This is a reality which has to be faced.

With the problems of uncertainty being indispensable, the way out is to fall back on a comprehensive set of rules of interpretation. Although the rules under Section 3 of the Vienna Convention can often offer a solution, there are times where the manner in which the rules, in particular Articles 31 and 32, should be applied raises questions of difficulty. What exactly does “good faith” mean? What meaning should be regarded as “ordinary”? What result is to be considered as “manifestly absurd or unreasonable”? Like the problems of uncertainty in the wording of a treaty, these questions arise due to the general nature of the rules of interpretation. Yet, such generality is required to avoid the rules from becoming “unwieldy instruments instead of the flexible aids which are required”.¹¹⁷

At the end of the day, we are only left with the option of unravelling problems that arise in a treaty in a piecemeal approach through a meticulous application of the rules of interpretation. That said, the author hopes that her effort in exercising this option in this paper has helped to make both Articles 2(4) and 51 less of a scourge in public international law.

¹¹⁷ Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press, Oxford 2008) 631

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