
Chapter: (p. 335) 16. Collective Security and the use of Armed Force

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16.1 Introduction

One of the main problems of the modern international community, at least since the 1648 Peace of Westphalia, has been to devise ways to keep the use of armed force under control and determine when and under what conditions States were entitled to resort to war. Under traditional international law, a few fundamental tenets emerged with regard to the use of (armed) force in interstate relations: (i) the unfettered freedom of States to use force; (ii) the consequent lack of a clear-cut distinction between enforcement proper (that is, resort to coercive action to compel observance of law) and use of force for realizing one’s own interests; (iii) the licence to use force without previously getting an international authority to establish whether a subjective right of the State resorting to force had in fact been violated; (iv) the absence of any ‘solidarity link’ between the injured party and any third State, authorizing the latter to intervene to protect the rights of the former; international wrongs remained a ‘private’ occurrence between the delinquent State and the aggrieved party, except for those instances where there were already

links based on treaties of alliance, in which case an ally might be affected by the wrongdoing and feel authorized to intervene; (v) the lack of any international agency capable of at least co-ordinating resort to force by individual States. In short, the ‘old’ law favoured major Powers: minor States derived no protection from general rules and consequently their own safeguard lay in the conclusion of treaties of alliance with one or more Great Powers.

In the twentieth century, in the immediate aftermath of the First World War, States had already tried to limit resort to war by creating the League of Nations (1919). At that time, however, the Covenant did not manage to prohibit resort to armed force, it merely proceduralized the decision to use force and subjected it to a ‘cooling off’ period (see 2.4.3). Moreover, the League of Nations had other weaknesses which made it unsuitable for the task of restraining the willingness of States to go to war. In 1928, with the Kellogg-Briand Pact, an additional step was taken whereby the adhering States were renouncing war as an instrument of international politics.

However, it was only in 1945, after the Second World War, that consensus emerged to the effect that peace should constitute the overriding purpose of all members of the world community. Consequently, States agreed that the maintenance of peace should become a ‘public’ affair, that is to say, a matter of general concern, and that no country should be allowed to break or even jeopardize peaceful relations. The ensuing legal position is as follows:

(1) The previously untrammelled right to use force has been suppressed; any unilateral use of armed force except in self-defence is totally banned. It should be noted, however, that the new international law has not abrogated the norms concerning the modalities of the use of force. In other words, if a State legally or illegally engages in military action, it is bound to respect certain general principles and rules placing restraints on such action (see Chapter 17), the purpose being, of course, to ensure that any breaches of the general prohibitions referred to above do not degenerate into barbarism.

(2) There is an international organization, the UN, which, at least in theory, is endowed with collective responsibility both for safeguarding peace, irrespective of any action taken by the aggrieved party (hence also in the event of its remaining passive in the face of aggression), and, more specifically, for enforcing the law in extreme cases (i.e. when breaches of international rules jeopardize peaceful relations). Serious international breaches have become ‘public’ events, of concern to the whole international community.

(3) Theoretically, the UN has a monopoly of force, in that it should intervene militarily in all the extreme cases just referred to.

(4) Whenever international rules are disregarded without the breach falling within the category of ‘armed attack’, States are not authorized to react by force. Self-help, although still allowed, must be confined to peaceful reaction to international wrongs.

(5) Even peaceful countermeasures must be preceded by resort to other, peaceful, means of conflict resolution. Judicial adjudication, however, is not made compulsory. It may suffice for some peaceful settlement mechanism to be used. Thus, even contemporary international law has not yet reached the stage typical of domestic legal systems, where ascertainment of legal situations must precede law enforcement.

(6) A marked distinction between peaceful measures of enforcement—which are lawful—and other instances of use or threat of military force—which are unlawful—has emerged. Thus, gradually, international law has come to uphold a distinction which is of fundamental importance and has for centuries been acted upon in municipal legal systems. As in municipal systems, in international law only the supreme collective body, the Security Council, is authorized to depart in exceptional circumstances from this distinction in the interest of the whole community. It can both enforce the law and exercise ‘police power’. Unfortunately, what strongly differentiates the world community from domestic legal systems is both the rudimentary character of the international enforcement machinery and also the fact that this distinction becomes somewhat blurred, in practice, owing to disagreement among States over the exact boundaries of the classes of lawful and unlawful use of force.

In many respects this legal regime is a great innovation as compared with the previous one, but in the most important area, namely, the status of Great Powers, it has left the existing position almost unaffected. While in the past the lack of substantial restraints on the use of force simply confirmed that these Powers were the overlords in the world community, now the law goes as far as consecrating their might, providing, as it does, that while they must not use force contrary to the UN Charter, transgression will not invite sanction under Chapter VII of the Charter owing to the veto power conferred on each of them. In spite of this huge shortcoming in the law, the UN Charter system was designed to afford legal and institutional protection to smaller or middle-sized countries, whenever they were not involved in a fight against one of the major Powers. To this extent the Charter made much headway towards the introduction of some kind of safeguard for peace. In addition, one should not pass over in silence a major factor which helps to forestall the most serious breaches of international law by States: the role of public opinion, especially in democratic countries.¹

The system envisaged in the UN Charter for the maintenance of international peace and security has never been implemented as designed. In the era of a bipolar world the antagonism of the two blocs prevented the adoption, by the Security Council, of the measures not involving the use of armed force (for the few exceptions, see 16.2.2),

provided for in Article 41 of the UN Charter, nor were the special agreements for the establishment of UN armed forces under Article 43 ever concluded. Hence, the two limbs of the collective security system seemed to remain a dead letter.

Nonetheless, the Security Council and the General Assembly, being unable to take the measures provided for in the Charter, fell back on different measures, labelled ‘sanctions’, which, although devoid of coercive force, at least served to stigmatize some deviant State conduct (and in more recent times also the conduct of individuals or groups of individuals). Furthermore, the inability to set up UN armed forces led to the establishment of an innovative alternative mechanism: peacekeeping operations.

Only at the end of the Cold War was the Security Council able to take some of the measures short of force under Article 41 and to develop the practice of ‘authorizing’ the use of armed force by States, acting individually or within the framework of regional organizations, in the face of serious threats to the peace or breaches of the peace. It was a practice which became accepted and was largely considered to be in keeping with the UN Charter system; and it became a substitute for the use of force by the UN.

16.2 Measures Short of Armed Force and the UN System

16.2.1 General

Article 41 of the UN Charter provides that:

[t]he 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.

Clearly these measures are not a substitute for military action, which would still be possible in the Charter system under Article 42. It is however a fact that the relative failure of the UN collective system, and even of the imaginative substitutes subsequently set up, of necessity led to magnification of the role and importance of these ‘sanctions’. They have been resorted to, both to respond to serious violations of international law amounting to a threat or a breach of peace, as well as to react to situations which, although not constituting a violation of international law, imperilled peace and security (triggering powers under
Chapter VII presupposes a threat or breach of international peace and security under Article 39).

Often resort to these so-called sanctions is inversely proportional to their coerciveness; in other words, the less coercive they are, the more frequently and effectively they are used. The reason is simple: States and international institutions cannot do without ‘sanctions’. In the face of paralysis of collective enforcement machinery, the solution lies in relatively mild forms of pressure or exposure not provided for in Article 41. When there is agreement in the Security Council, these measures at least serve to express collective condemnation of misbehaviour by States. However, the effectiveness of the measures taken by the Council under Article 41 depends first and foremost on the level of support they actually enjoy among all member States (as they may only be implemented with the active support of UN member States) and, secondly, on the quality of targeting.

It is worth adding a few words with regard to the targets of the ‘repressive’ measures decided upon by the Security Council. Although Article 41 does not explicitly clarify this matter, it would seem that these measures, or at least those enumerated in the provision, may be taken by the Council to impel a State, ‘guilty’ of threatening or breaching peace, to discontinue its deviant conduct. However, the spread of international terrorism, and the criticism of sanctions against States primarily affecting an innocent population, have led the Security Council to also decide upon measures against individuals or groups of individuals, for instance, the measures adopted against Al-Qaeda and its members, as well as those against ISIS/Daesh, but also in the context of other situations against those responsible for jeopardizing peace processes or engaging in serious violations of international humanitarian law.

More broadly, targeted or smart sanctions as they are also called (i.e. sanctions targeting individuals, e.g. suspected terrorists, high-level State officials, or groups of individuals, including rebels and other non-State actors as well as their leaders) have become a new tool for the Security Council to overcome the criticism of measures that did not distinguish between those that were actually responsible for the violations of international law and those (often the people) who were among the first victims of their own governments.

When adopting sanctions, the Security Council does not normally cite any specific provision of the Charter, but generically refers to Chapter VII. Yet, under Article 41, which is presumably the legal basis for SC sanctions, there are a variety of available measures: economic, political, technical, as well as institutional (e.g. the establishment of subsidiary organs, such as the Sanctions Committees or the UN Ad Hoc Tribunals for the former Yugoslavia and Rwanda, the ‘ICTY’ and the ‘ICTR’: see 19.3). The characteristic that these measures share is that they do not entail use of armed force against a State.

Since 1966, the Security Council has established some 30 sanction ‘regimes’ (in 2020, 14 are still operational) from Southern Rhodesia to South Africa, from the former Yugoslavia to Haiti, from Iraq to Yemen, from South Sudan to Mali, as well as specific mechanisms against ISIS/Daesh, Al-Qaeda, and the Taliban. Security Council sanctions have taken a number of different forms, in pursuit of a variety of goals. The Security Council has applied sanctions to support peaceful transitions, fight against terrorism, stigmatize human rights violation, and pursue non-proliferation policies. Measures have ranged from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions.

One of the criticisms advanced against targeted measures (i.e. those imposing limitations on physical or legal persons) has been that they do not give sufficient consideration to the due process rights of those involved. In 2005, even the General Assembly called on the Security Council to improve the fairness and due process for the imposition of sanctions measures. As a consequence, for example, in the framework of the Al-Qaeda Committee (established under resolutions 1267(1999) and 1989(2011)), the UN established an Office of the Ombudsperson to which individuals can apply to have their situation examined, and focal points for delisting requests were established. Nonetheless, the progress made has been deemed insufficient by many, including the Court of Justice of the European Union, which has considered unlawful certain targeted measures for violation of due process rights (see e.g. the Kadi case). In addition, the improvement made has been sectoral as it did not entail broader consideration of due process rights of the targeted individuals under the other sanctions regimes.

16.2.2 Economic and Other ‘Sanctions’

As mentioned earlier in the chapter, sanctions can be characterized according to their nature, for example, in a few cases the Security Council has decided that member States should take certain economic or commercial measures against a State. Cases in point have been Southern Rhodesia (1966–79) and South Africa (1977–94), when the Council explicitly acted under Article 41 of the Charter, imposing an embargo on the import and export of certain goods, in the former case, and an embargo on the import of arms and other military materials, in the latter. After the end of the Cold War, the Council imposed economic sanctions or military embargoes on a number of occasions in different situations ranging from those against Iraq after the invasion of Kuwait in 1990 (resolution 661 of 6 August 1990) to those against the former Yugoslavia in the 1990s (resolution 757 of 30 May 1992, followed by many resolutions against the FRY in 1992–93) to more recent measures concerning Eritrea (2009, lifted in 2018) or the Central African Republic (2013), North Korea (2006), or South Sudan (2018). In most of these more recent situations the Security Council has established a ‘sanction committee’ (composed of representatives of the 15 States which are members of the Council) acting as a subsidiary organ to work out the

details of the sanction regime and handle the concrete determination of the measures adopted.

In other instances, either the Security Council or, when the Council is unable to make a determination, the General Assembly, has recommended the adoption of measures such as the breaking off of diplomatic relations: for example, against South Africa (since 1962 on account of apartheid and later on also because of its illegal occupation of Namibia) and Portugal (between 1963 and 1975 because of its colonial policy). Some of these decisions or recommendations have gone unheeded, owing to the lack of unanimous and substantial (p. 340) support by the whole international community (often the target State was aided by one or more Powers, which inevitably undermined UN condemnations). In other cases, these measures have been successful and have contributed to peaceful settlement. It should be emphasized that often the success of the measures depends on whether they are coupled with a sufficiently robust engagement for a political process, and, in any case, they always require sustained coherence and consistency by member States in their implementation.

16.2.3 Non-Recognition of Illegal Situations

On several occasions, faced with the unlawful behaviour of States that it was not in a position to terminate, or against which it proved unable to recommend or enjoin effective sanctions, the UN has fallen back on declaring the non-recognition of the illegal situation. As already mentioned (see 1.7), the doctrine of non-recognition was first enunciated in early 1932 by US Secretary of State Stimson, and, soon afterwards, the Special Assembly of the League of Nations adopted on 11 March 1932 a resolution along the same lines. In 1938, at Lima, the Conference of American States passed a resolution on the non-recognition of acquisition of territory by force.

In the UN era, the Security Council has resorted to this class of sanctions with respect to a number of States: Israel, South Africa, Southern Rhodesia, Cyprus, and, in 1990, Iraq (by resolution 662 of 9 August 1990, the Council stated that the annexation of Kuwait by Iraq was null and void). In cases where the Security Council is not in a position to take such a stance (generally owing to the veto or prospective veto of one of its permanent members), similar pronouncements have been passed by the General Assembly. For example, referring to the situation of Crimea, on 27 March 2014, through resolution 68/262, the General Assembly ‘[c]alls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the [above-mentioned] referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status’. A non-recognition request was also issued by the General Assembly in relation to the US decision to move their embassy in Israel from Tel-Aviv to Jerusalem. After a failed attempt in the Security Council, on 21 December 2017 the
General Assembly convened in the resumed tenth emergency session, and adopted a text (very similar to the one vetoed in the Council) as resolution ES-10/19 (by 129 votes in favour, nine against, with 35 abstentions), whereby it ‘[a]ffirms that any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council, and in this regard calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478 (1980)’ and ‘[d]emands that all States comply with Security Council resolutions regarding the Holy City of Jerusalem, and not recognize any actions or measures contrary to those resolutions’.

What is the import of UN pronouncements on non-recognition? Politically they rest on the idea that all actions contrary to certain basic values commonly accepted by the world community amount to deviations that should not be legitimised. Their aim is to isolate the delinquent State and compel it to change the situation that has been condemned. They constitute a political measure in those cases where the UN has proved unable to bring about a return to legality by resorting to the ‘sanctions’ provided for in the Charter: since the international organized community cannot nullify power, it must confine itself to emphatically withholding its endorsement.

Legally speaking, these UN pronouncements entail a mutual undertaking on the part of the supporting States. States pledge themselves to avoid any international or internal act capable of turning the de facto situation into an internationally legal one. It follows that domestic courts of all those States must treat acts and transactions carried out with unlawful authority as null and void; on an international level, no act should be performed that might result in legalising the situation in any way. The ensuing state of affairs is likely to be very complex: although many customary rules of international law have in fact been modified to take account of the universal principles which have emerged and been consolidated (see Chapter 3), those States which do not vote in favour of the UN resolutions cannot be forced to take the view that the effective situation is contrary to international law. Invoking the principle of effectiveness (see 1.7), they can claim that they are entitled to consider that situation lawful and act accordingly. By contrast, the States that support the UN resolutions are authorized to regard the effective situation as unlawful, and to behave accordingly. Here, as in many other instances, one is confronted with a split in the attitude of the world community. Current international law makes allowance for this rift: although it does not render both tendencies legally warranted, it affords no means of making the majority view prevail.
16.2.4 The Establishment of International Criminal Tribunals

On two occasions the Security Council, acting under Chapter VII, has set up international criminal tribunals designed to prosecute and punish the authors of atrocities perpetrated during armed conflict (see 19.3). It first established the ICTY, in 1993, and one year later the ICTR. They can be classified as measures not involving the use of force provided under Article 41 of the Charter, as the ICTY Appeals Chamber held in the Tadić (Interlocutory Appeal) (at §§31–40).

The Council resorted to a similar measure, although with the consent of the territorial State, with regard to the establishment of the Special Tribunal for Lebanon (see 19.3), which is based on an agreement between the government of Lebanon and the UN that entered into force, under Chapter VII, on the basis of SC resolution 1757 (2007).

16.2.5 Action by the General Assembly in Case of Gross Violations of International Law

The failure of the UN Security Council to get to grips with the tremendous problems posed by forcible implementation of international law has impelled it to fall back on yet another ‘sanction’: public exposure of gross violations. This ‘sanction’ normally consists in the adoption by the General Assembly of resolutions condemning the unlawful conduct of States and in calls for the discontinuation of the deviant behaviour. So far the General Assembly has passed resolutions of this class on several occasions, chiefly when member States have violated human rights or when they have disregarded basic principles of the Organization (as in the case of South Africa and Israel).6

Similarly, in other recent cases, the General Assembly has adopted resolutions expressing concern for serious human rights violations and abuses in Syria, in Myanmar (relating to the treatment of the Rohingya), and in Ukraine.

Of course, one should not expect too much from this category of ‘sanction’, for more often than not the State concerned turns a deaf ear to international organizations. However, the beneficial effects of public condemnation can be appraised in the long term. It appears that States increasingly endeavour to avoid public strictures. In particular, they try to avoid being the target of repeated moral chastisements.

A recent evolution of the power of the General Assembly to intervene in these areas, on account of the inability of the Security Council to take any steps, has been the establishment of mechanisms to support investigations into the crimes committed in Syria and in Myanmar. Through resolution 71/248 (21 December 2016) the General Assembly has contributed to the promotion of accountability for serious human rights violations by creating the International Independent and Impartial Mechanism to support investigations into crimes committed in Syria since 2011. This Mechanism represents an interesting experiment that goes...
beyond condemnation and entrusts this body with the task of gathering materials and prospective evidence of serious crimes for future prosecution before competent domestic authorities (or international trials should the international community find an agreement to do so). In other words, the UN acts as a repository for evidentiary materials to which domestic prosecutorial entities may be able to resort when bringing to justice those responsible for war crimes, crimes against humanity, and genocide committed in Syria. The Human Rights Council, through resolution 39/2 on 27 September 2018, adopted a similar decision to establish an ongoing independent mechanism to collect, consolidate, preserve, and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011 and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional, or international courts or tribunals that have, or may in the future have, jurisdiction over these crimes, in accordance with international law. Thereafter, the creation of such a mechanism was welcomed by the General Assembly in its resolution 73/264, adopted on 22 December 2018.

Broadly speaking, all these alternative measures (the implementation of which is very much dependent on their voluntary implementation by States given their non-binding nature) demonstrate the willingness of the majority of States in the General Assembly to be innovative in resorting to the tools provided for by the UN system and try to address gross violations of international law, particularly when the Security Council is unable to act due to the veto or the threat of the veto by one of the five permanent members.

16.3 Peace Operations—From Peacekeeping to Peace Enforcement and Peace Building

In some instances, the UN is able to act more incisively and set the stage for putting boots on the ground. Although the ‘enforcement’ system envisaged in the Charter did not become a reality, as early as 1956—exploiting a temporary convergence between the two superpowers (the US and USSR)—the Secretary-General (Dag Hammarskjöld at that time) and the General Assembly filled the vacuum left by the Council. In the context of the Suez Crisis, the elaboration of a new and imaginative scheme was devised: the creation of ‘peacekeeping’ forces (generally known, on account of their headgear, as the UN Blue Berets). On that occasion, to circumvent the British and French vetoes the General Assembly entrusted the Secretary-General with the establishment of UNEF (United Nations Emergency Force), a military force mandated to secure the cessation of hostilities and the withdrawal of British, French, and Israeli forces from Egyptian territory, and—after the withdrawal—to serve as a buffer force between the Egyptian and Israeli armies.
UNEF provided the model for what were to become traditional peacekeeping operations, which have the following distinguishing features:

(1) They are composed of military personnel put at the disposal of the UN by member States and deployed in a troubled area with the consent of the territorial State.

(2) They are generally under the exclusive authority of the Security Council (but can occasionally be under the authority of the General Assembly, as happened with the creation of UNEF). The Council therefore bears responsibility for their overall political direction. In addition, their executive direction and command is entrusted to the UN Secretary-General, while command on the ground is given to the Chief of Mission.

(3) They have no power of military coercion, but can resort to arms only in self-defence (see, however, later in the chapter).

(4) They are always requested to act in a neutral and impartial way.

(5) They are financed through regular contributions by the member States. The expenditure for peacekeeping forces relates to the maintenance of international peace and security; therefore, they are obligatorily allotted by the General Assembly under Article 17(2), as confirmed by the ICJ in its Advisory Opinion on Certain Expenses (at 151). Given the high costs of peacekeeping operations, the General Assembly has occasionally established Special Funds inviting voluntary contributions from member States to cover expenses.

Since 1956, the UN has established a large number of peacekeeping operations in different areas of the world. Classical peacekeeping operations, created on the basis of the UNEF model, have the main function of separating the contending parties, forestalling armed hostilities between them, and maintaining order in a given area. However, over the years they have come to perform a variety of tasks. Their number and complexity have greatly expanded since the end of the confrontation between Western and Eastern blocs: whereas 15 operations were set up before 1988, more than 50 operations have been established since that date.

Over the years, peacekeeping operations have evolved through peace enforcement, into peace operations tout court and there has been an increasing tendency towards attributing more complex tasks to UN missions. Innovation related especially to the abandonment of the principle providing for the use of force only in self-defence, but also to a more general (p. 344) broadening of the mandate which now may range from providing capacity building to support for national institutions in specific areas, to forms of territorial administration where required.

As early as 1961, the United Nations Operation in Congo (ONUC) represented the first remarkable exception: the Security Council authorized ONUC to use force ‘if necessary, in the last resort’ to prevent ‘the occurrence of civil war in the Congo’ (resolution 161 (1961)) and

later on to arrest and bring to detention foreign military and paramilitary personnel and mercenaries (resolution 169 (1961)). After the end of the Cold War, in the 1990s, the Security Council radically altered the nature of the peacekeeping operation in Somalia (which was thus transformed from UNOSOM I into UNOSOM II), endowing it with enforcement powers under Chapter VII of the Charter (resolution 814 (1993)). Through resolution 836, adopted in June 1993, it also authorized UNPROFOR (the peacekeeping operation deployed in the territory of Bosnia and Herzegovina), ‘acting in self-defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties’. In all three cases, UN forces were deployed where there was actually no peace to keep—that is, in situations of ongoing conflicts within States—and where a partial or total breakdown of governmental authorities had taken place. This trend of entrusting peacekeeping forces with enforcement functions has however been strongly criticized and did not develop to the point of creating a special category of UN peace-enforcement units, as Secretary-General B. Boutros Ghali had envisaged in his ‘Agenda for Peace’ in 1992.

The vast majority of UN forces have responded to intrastate conflicts or have intervened in internal disorder or immediate post-conflict situations. Several forces were established as a result of comprehensive peace agreements which, among other provisions, asked the UN to supervise respect for and implementation thereof (UNAVEM I, II, and III in Angola; ONUMOZ in Mozambique; UNAMIR in Rwanda; ONUSAL in El Salvador; and UNTAC in Cambodia). Accordingly, UN forces have included a large civilian component engaged in several other activities, including providing humanitarian assistance, furthering national reconciliation and promoting respect for human rights and fundamental freedoms, organizing and monitoring elections, and occasionally also assisting in rebuilding institutions and national capacities.

In the late 1990s, operations were entrusted with the task of administering a region for a transitional period: for example, the UN Mission in Kosovo (UNMIK), which was created by resolution 1244 (1999) to perform, inter alia, basic civilian administrative functions where and for as long as required, organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; supporting, in co-ordination with international humanitarian organizations, humanitarian and disaster relief aid; maintaining civil law and order, including establishing local police forces and meanwhile, through the deployment of international police personnel to serve in Kosovo, protecting and promoting human rights and assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.

Similarly, the UN Transitional Authority in East Timor (resolution 1272(1999)), established after the riots following the referendum granting the people independence from Indonesia, was assigned the...

following tasks: to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the co-ordination and delivery of humanitarian assistance, rehabilitation, and development assistance; to support capacity building for self-government; and to assist in the establishment of conditions for sustainable development. The precedent for this kind of operation was set in 1962 when the General Assembly established—upon the request of Indonesia and the Netherlands—a temporary executive authority (UNTEA) to administer the territory of West New Guinea pending its transfer to Indonesia (where it now forms the province of Irian Jaya).

Complex situations have occasionally affected two other critical features of traditional peacekeeping operations: consent of the territorial State and impartiality. In some cases, peacekeeping operations proceeded on the basis of a partial consent, in that they lacked the consent of one or more of the parties involved. As a consequence, impartiality too was jeopardized. Nonetheless, the UN has always referred, and still does, to these features as the distinguishing features of peacekeeping operations.

The ‘peacekeeping’ system—like the ‘authorizations regime’—is at odds with that envisaged in Chapter VII of the UN Charter. Nevertheless, it has become one of the most important UN tools—often the only available one—and at present is universally recognized as consistent with the Charter.

On balance, peacekeeping operations have proved useful principally for the purpose of making the contending parties stop fighting, thereby avoiding more bloodshed. They have also turned out to be very helpful in assisting in the fulfilment of complex peace processes where the parties were willing to co-operate and build for the future. They are not actually designed to compel the parties to accept a solution imposed by the UN, but serve to help put into practice, on the spot, the solution agreed upon by the contending States. However, in the long run, peacekeeping operations may turn out to be counterproductive, for they freeze the situation without providing a real solution to the basic problems at the root of the conflict.

One of the crucial problems the Organization faces regarding its operations is how to devise appropriate ‘exit strategies’ from situations in which it had to establish a presence on the ground (and there are several instances in which the UN cannot leave a country for decades, e.g. Cyprus or Democratic Republic of the Congo (DRC)) and the cost of the operations is a matter of concern for the member States, which repeatedly invoke the need for financial cuts.

Conscious of these concerns, the UN has been trying to find ways to reshape its approach to peacekeeping operations. It moved from peacekeeping to peace building, and more recently has placed stronger

emphasis on the need for preventive action so as to try to avoid the need to establish peace operations.

In 2005, on the basis of the World Summit Outcome document, a new organ was established, the Peace Building Commission (a subsidiary organ of both the Security Council and the General Assembly), to assist—including with country-specific configurations—the relevant political processes and help provide financial support with external resources. In 2010 a review of peace operations was launched, laying the groundwork for UN peace operations in the new millennium.

Broadly speaking, the approach is that peace operations of a new generation tend to be developed in ways that acknowledge the fact that peacekeeping is often closely linked with, and needs to provide support for, State (re-)building processes, requiring broader mandates for UN missions on the ground, while at the same time integrating political processes within the scope of UN action. All this without jeopardizing the fundamental principles of impartiality and neutrality.

To sum up, it might be useful to recall that, at least since the 1990s, the UN has periodically reflected on its peacekeeping dimension. The vision of UN peacekeeping has been the object of a fundamental tension between two strands of opinion. On the one hand, those who consider it necessary to expand the tasks and roles assigned to peacekeepers, giving them broader mandates, which should include an enforcement dimension. On the other, those that deem it more prudent to stick to a traditional notion of peacekeeping as mere interposition with very limited (or no) enforcement tasks, strict adherence to the mandate, and always requiring the consent of the territorial state and leaving to political negotiations the organization of the post-conflict dimension of territorial administration and reconstruction.
These tensions re-emerge periodically. For example, they surfaced on the occasion of the adoption of some recent SC resolutions regarding UN operations in the DRC and in Mali, where the Council eventually opted for the creation of ‘intervention brigades’ within those UN peacekeeping missions. These resolutions have assigned the relevant UN forces the task of ‘neutralizing armed bands’. In these cases, and for the limited purpose of enforcing the resolutions, the UN forces are acting, in a way, as domestic enforcement authorities. The tension between an interventionist and a more traditionalist vision of peace operations is confirmed, *inter alia*, by the express statement in those resolutions that such a measure (the establishment of the intervention brigade) shall not constitute a precedent and that the (three) basic principles of peacekeeping are reaffirmed (i.e. consent of the parties, impartiality, and non-use of force except in self-defence; to the latter category, in recent times, the expression ‘and in defence of the mandate’ has been added to justify the enforcement dimension of new peace operations).

**16.4 Enforcement Action upon Authorization of the Security Council**

Being unable to set up the UN armed forces envisaged in Article 43 of the Charter, especially after the end of the Cold War, the UN Security Council has gradually developed a practice of authorizing the use of force by individual member States or coalitions of States, including regional organizations. This practice has taken three forms: (1) on some occasions the Security Council has authorized States to resort to force after a State had engaged in acts of aggression against another State, which had reacted in individual (and collective) self-defence; in other instances, (2) the Council has authorized States to use force individually or to establish multinational forces, to confront threats to the peace, which included ongoing international or internal armed conflicts, humanitarian crisis, or other varied situations.

(1) On a few occasions, the Security Council has authorized States to use force against another State that had committed a breach of the peace or had engaged in aggression. In 1950, taking advantage of the absence of the Soviet delegate (who did not attend SC meetings in protest over the failure of the UN to allow China to be represented in the UN by the People’s Republic of China rather than nationalist China), the Security Council authorized member States, acting under US command, to assist South Korea in repelling by force the aggression of North Korea and allowed them to use the UN flag in the course of military operations (resolutions 82, 83, and 84 (1950)). Similarly, in 1990 the Council authorized member States to use all necessary means—that is, to use force on a large scale—to repel the Iraqi aggression against Kuwait (resolution 678 (1990)). In 2001, after the terrorist attack by Al-Qaeda against the US (Twin Towers, Pentagon, Pennsylvania), under resolution 1368 (2001) on 12 September, the Council condemned the attacks while

"[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter".

(2) In other instances, the Security Council has authorized States to use force when faced with a threat to the peace. This has in particular occurred with humanitarian crises. Indeed, the Security Council has gradually established a direct link between humanitarian crises and threats to the peace, one of the three possible conditions that could trigger SC action under Chapter VII. The Council has thus considerably enlarged the concept of threat to the peace laid down in Article 39 of the UN Charter, so as to include humanitarian crises (p. 347) within one State, which once were deemed to fall primarily within domestic jurisdiction. It has subsequently authorized member States to use force to establish a secure environment for humanitarian relief operations. For example, efforts were made to protect safe havens in Bosnia and Herzegovina on the basis of resolutions 836 and 844 (1993) authorizing member States, through the use of air power, to deter attacks against the safe areas. Operation Restore Hope in Somalia and Operation Turquoise in Rwanda were launched, respectively, on the basis of resolutions 794 and 929 (1992 and 1994). They consisted of large-scale military operations conducted by two ‘coalitions of the willing’—led respectively by the US and France—in order to achieve humanitarian objectives such as providing security and support for the distribution of relief supplies or ensuring the protection of displaced persons, refugees, and civilians at risk.

However, this practice of elevating humanitarian crises to threats to the peace is not without its dangers. The Security Council is eager to retain discretionary power in this matter and tends to avoid explaining the nature of the link and the reasons for its action. As a result its practice lacks consistency and turns out to be selective. For instance, African countries have railed against the fact that some humanitarian disasters in Africa, such as that in Sierra Leone, have not motivated the Security Council as strongly as some previous crises, such as that in Somalia.

Through the enlargement of the notion of ‘threat to the peace’ the Security Council also authorized member States, acting nationally or through regional organizations or arrangements, to use force with a view to restoring democracy or public order. By resolution 940 (1994) the Council, after condemning the behaviour of the illegal de facto regime set up in Haiti, authorized member States to establish an international force and to use all necessary means to facilitate the departure of the military leaders and allow the return of the legitimately elected President, Jean-Bertrand Aristide.

In 1997, following a request by Albania for SC action, the Security Council authorized member States to intervene there (resolution 1101 (1997)). It also authorized intervention in East Timor (resolution 1264 (1999)) to prevent internal disorders from degenerating into combat
situations, as well as in Liberia, pursuant to resolutions 1497 (2003) and 1509 (2003).

In 2004, after a new conflict erupted in Haiti, the Council intervened again by authorizing a Multinational Force (mainly consisting of US troops) which subsequently was converted into a UN stabilization force (under resolution 1542 (2004)) and thereafter a mission.

More recently, on 17 March 2011, the Security Council, through resolution 1973 (2011), authorized States ‘acting nationally or through regional organizations or arrangements […] to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’. This authorization, which implied the availability to member States of the option to resort to armed force (all necessary means), permitted the NATO operation against the Libyan armed forces acting under the instructions of the government of Colonel Gaddafi. The intervention soon became contested in the international community as it appeared to aim at replacing the existing government rather than being merely protective of the civilian population. Nonetheless, it represented a form of authorization of the use of armed force in the implementation of the so-called ‘responsibility to protect’ doctrine.

The Security Council also authorized member States to use force for several other different purposes. For instance, it adopted numerous authorizations to enforce economic measures previously decided upon under Article 41. This happened first in 1966, when the Council called upon the UK to halt, ‘by the use of force if necessary’, ships carrying oil destined for Southern Rhodesia in flagrant breach of the embargo imposed by the Council against that country (resolution 221 (1966); there ensued the incident of the Greek ship Manuela). Since then, particularly after the end of the Cold War, the Security Council has often recommended States to undertake a limited use of force to secure compliance with economic sanctions previously adopted. Thus, for instance, by resolution 665 of 25 August 1990, the Security Council invited member States to inspect and verify the cargo and destination of every ship crossing the Gulf in order to ensure that they were not violating embargo measures imposed on Iraq. The Security Council also requested States to halt all inward and outward maritime shipping to ensure strict implementation of economic measures decided upon against the Federal Republic of Yugoslavia (resolutions 787 (1992) and 820 (1993)), Somalia (resolution 794 (1992)), Haiti (resolutions 875 (1993) and 917 (1994)), Liberia (resolution 1083 (1997)), and Sierra Leone (resolution 11 (1997)). Similarly, the Council authorized NATO air strikes against Serb forces in Bosnia and Herzegovina.

Similar authorization measures (albeit with the consent of the coastal States) were adopted for the purpose of ensuring antipiracy activities off the coast of Somalia in resolution 1846 (2008). And the same approach was taken with regard to the authorization of the EU mission in the
Southern Mediterranean (EUNAVFOR MED), off the coast of Libya, to prevent violations of the arms embargo, as well as countering all forms of trafficking under resolution 2292 (2016).

Over the years, the ‘authorization regime’ has evolved along three main lines. First, with regard to the purpose of the use of force authorized by the SC, this body has increasingly defined in a clearer manner the objectives States were to pursue when using force. It is necessary only to think, in contrast, of the broad purpose of the use of force set out in resolution 678 (1990) concerning Iraq. The Security Council decided that States had to use all means necessary ‘to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area’. This sweeping mandate enabled some States (in particular the US and the UK) to argue that the air raids against Iraq designed to ensure respect for the subsequent SC resolutions were authorized by resolution 678 (1990). Clearer and more specific objectives were set forth in resolution 1511 (2003) and, even more, in resolution 1546 (2004) (see e.g. §§9–14), both on Iraq.

Secondly, the duration of the mandate given by the Security Council has been increasingly defined. Initially this duration was not specified (see e.g. resolution 678 (1990) concerning Iraq, resolution 770 (1992) relating to the former Yugoslavia, and resolution 794 (1992) concerning Somalia). At present the Council tends to provide for a time limit in its resolutions authorizing the use of force. Sometimes this limit is a ‘functional deadline’, as is the case with resolution 940 (1994) concerning Haiti, which provides in §8 that the multinational force will terminate its mission as soon as ‘a secure and stable environment has been established and UNMIH [UN Mission in Haiti] has adequate force capability and structure to assume the full range of its functions’ (a determination entrusted to the Council itself). In other situations (e.g. the counterpiracy operations in Somalia, or countertrafficking measures in Libya) the timeframe has been set at 12 months. The practice of providing for a time limit is important, particularly when a permanent member of the Council takes part in the military operations, given that, if the permanent member for its own reasons is not interested in the cessation of the operations, it could veto any SC decision designed to terminate the authorization to use force.

Thirdly, the Security Council has increasingly imposed upon States the duty to report to it, frequently and in a detailed manner, on the conduct of military operations.10

Clearly, this evolution of UN practice tends to make such practice more consonant with the UN Charter. The Security Council now increasingly tends to exercise control over and supervision of the way States put into effect its authorization to use force. It is thus gradually recovering that primary authority and responsibility in the area of peace and security that the Charter had bestowed upon it. This evolution is however opposed by

those States which, in participating in military operations, prefer to act outside international restraints and supervision.

The practice, which has gone unopposed, whereby the Security Council authorizes States to use force is not envisaged in the UN Charter and indubitably constitutes an innovation, since no provision of the Charter may be held to warrant it, not even by implication. One cannot argue that the practice is implicitly justified by Article 51 on collective self-defence, for the actions undertaken now do not need to meet the requirements of immediacy, necessity, and proportionality (and, in addition, they do not necessarily constitute a response to an armed attack). Nor can one argue that the Security Council, being empowered under the Charter to establish a UN multinational force, is implicitly authorized to delegate such power to member States: indeed, the lynchpin of the Charter provisions is the notion that the use of force is kept in the hands of a central body, whereas the new system hinges on the idea of such force being spread out among States, that is, being ‘decentralized’, albeit upon authorization of that body.

The question therefore arises of whether the practice, initially contrary to, or at least deviant from, the UN Charter, is now legally sanctioned by international law. Given the lack of any significant opposition and the widespread resort to such practice, it is reasonable to argue that a customary rule has evolved in the international community, which is also operative within the UN legal system, in that it broadens the scope of Chapter VII of the Charter.

16.5 Self-Defence and its many Faces

16.5.1 Individual and Collective Self-Defence

When States are not authorized by the Security Council, they must refrain from the use of armed force, unless they act in self-defence. As pointed out earlier in this book (see 3.4), under Article 2(4) of the UN Charter (and the corresponding customary rule of international law) ‘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’. In the Charter scheme, member States can resort to armed force only if ordered or authorized by the Council or if they act in self-defence. This latter inherent right to act in individual or collective self-defence is clearly recognized in Article 51 of the UN Charter. Both rules are generally considered to correspond to customary international law, and the prohibition on using armed force—particularly the ban on aggression—is part of jus cogens (see 11.4.3).

Self-defence is the lawful reaction to an ‘armed attack’, that is, to massive armed aggression against the territorial integrity and political independence of a State that imperils its life or government (‘less grave forms of the use of force’ may not be considered as armed attack, as the

ICJ held in 1986 in Nicaragua (Nicaragua v United States of America) (at §191) and confirmed in 2003 in Oil Platforms (Islamic Republic of Iran v United States of America), at §§51, 64, and 72). In addition, the attack must be of such magnitude that one cannot repel it otherwise. Contrary to what the ICJ states in Nicaragua (at §195) and in 2004 in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (at §139)—a holding highly criticized by Judge Higgins in the Separate Opinion she appended to the latter Court’s pronouncement (at §33)—the aggression need not come from a State; it can also emanate from a terrorist organization or even from insurgents (aggressing a State other than the one on whose territory they operate). Including attacks by such groups within this concept may provide an explanation of the overall positive reaction of the international community to the US reaction against Afghanistan following the 9/11 terrorist attack on the Twin Towers in New York and the Pentagon in Washington DC.

Since aggression constitutes a violation of the sovereign rights of the victim, in resorting to self-defence the latter engages in legal enforcement. This implies that self-defence must limit itself to rejecting the armed attack; it must not go beyond this purpose. As the ICJ stated in Nicaragua, self-defence only warrants ‘measures which are proportional to the armed attack and necessary to respond to it’ (at §176; see also Legality of the Threat or Use of Nuclear Weapons, at §141, and Oil Platforms, at §§51, 73, and 76–77; in this case the Court found that the forcible measures taken by the US against Iran were not ‘a proportionate use of force in self-defence’, at §77). The requirements of necessity and proportionality must be strictly construed, so as to restrict States’ room for manoeuvre: as the ICJ held in Oil Platforms, ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measures of discretion”’ (at §73).

Consequently, (i) the victim of aggression must use an amount of force strictly necessary to repel the attack and proportional to the force used by the aggressor; (ii) it may only attack ‘legitimate military targets’ (Oil Platforms, at §51), in keeping with principles and rules of international humanitarian law; also, the necessary precautions must be taken to minimize incidental damage to civilians; (iii) the State that has been the target of an ‘armed attack’ must not occupy the aggressor State’s territory, unless this is strictly required by the need to hold the aggressor in check and prevent him from continuing the aggression by other means. Furthermore, (iv) self-defence must be terminated as soon as the Security Council steps in and takes over the task of putting an end to the aggression. This, however, does not imply that self-defence must cease if the Security Council simply pronounces on the matter; self-defence may continue until the Council has taken effective action rendering armed force by the victim State unnecessary and inappropriate, and hence no longer legally warranted. If the Security Council fails to take action, (v) self-defence must cease as soon as its purpose, that is, repelling the
armed attack, has been achieved. In other words, Article 51 and the corresponding norm of general international law do not authorize or condone any military action overstepping mere opposition to, and repelling of, aggression. In particular, they prohibit prolonged military occupation and annexation of territory belonging to the aggressor.

In addition, Article 51 grants any member State of the UN the right to use force in support of another State which has suffered an armed attack. This right has been interpreted to the effect that the intervening State must not itself be a victim of the armed attack by the aggressor (in which case it would act by way of ‘individual’ self-defence). Both the NATO treaty and the Treaty on the Warsaw Pact (now extinct) pointed in this direction. However, what is required is a prior bond (e.g. a treaty) between the two States acting in self-defence or, if such a bond is lacking, an express request by the victim of the attack. In other words, a State cannot use force against a country which has attacked another State, without the request or the previous consent of the latter. In addition, it is for the victim State to establish that it has been militarily attacked. As the ICJ held in Nicaragua:

> [I]t 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 of customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.¹²

So far ‘collective’ self-defence (that is, intervention by one or more States in favour of the victim) has been invoked on a few occasions.¹³ The relative paucity of reliance on this category of use of force—in itself no doubt a felicitous feature of the present world community—is due to the tendency of States to hold aloof as much as possible from international armed conflicts or to side with one of the contending parties merely by sending arms and military equipment.

As we shall see, other instances of unilateral resort to force (protection of citizens abroad, armed intervention with the consent of the territorial State, armed reprisals against unlawful small-scale use of force, use of force to stop atrocities) are instead legally doubtful, for it is not clear whether customary international rules have evolved on the matter, derogating from the general ban on the unilateral use of armed force, laid down in the body of law just referred to. Furthermore, it is a matter of dispute whether a similar derogation has evolved with regard to peoples or racial groups fighting for their self-determination to the effect that such groups or peoples are authorized, subject to some stringent conditions, to use military violence to achieve self-determination.
As stated earlier, the failure of the UN collective system for enforcing peace resulted, among other things, in an expansion of resort to self-defence; in other words, it led to the invocation by States of Article 51 in cases which hardly amounted to self-defence or even in cases that were clearly not covered by the provision at issue.¹⁴

States, particularly Great Powers, have tended to abuse this right. In addition to some of the cases mentioned below, under various headings, mention may be made of some instances where the US has invoked Article 51 to justify military actions that, in fact, had strong punitive connotations and also pursued a primarily deterrent purpose.

On several occasions States have invoked self-defence in an expansive way; one example is the US attack on Libya carried out on 14 April 1986, made in response to the bombing, in West Berlin, on 5 April, of the La Belle disco, allegedly carried out by Libyans. Another instance was the launch of a number of missiles, on 26 June 1993, against Baghdad, allegedly in response to a planned terrorist attack on the former US President, Bush, which was due to have occurred two months earlier (on 14 April 1993), on a visit by Bush to Kuwait. The terrorist attack was not carried out but the reaction took place. In the UN Security Council the US delegate justified the American attack as follows: ‘From all the evidence available to our intelligence community, we are ... highly confident that the Iraqi Government, at its highest levels, directed its intelligence services to carry out an assassination attempt against President Bush ... [T]his was a direct attack on the US, an attack that required a direct US response ... as we are entitled to do under Article 51 of the UN Charter, which provides for the exercise of self-defence in such cases. Our response has been proportionate and aimed at a target directly linked to the operation against President Bush. It was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism and deter acts of aggression against the US’ (UN Doc. S/PV.3245, at 6). And again on 20 August 1998, US submarines fired missiles against a military training camp in Afghanistan and a chemical plant in Sudan as a response to terrorist attacks organized by the group led by Osama bin Laden, including the shelling of the US embassies in Kenya and Tanzania. The justification given by the US President on 21 August 1998 was as follows: ‘The US acted in exercise of our inherent right of self-defense consistent with Article 51 of the UN Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against US personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat. The targets were selected because they served to facilitate directly the efforts of terrorists specifically identified with attacks on US personnel and facilities and posed a continuing threat to US lives’ ((1989) 83 AJIL 162).

Clearly, after the attacks of 11 September 2001, broad resort to the notion of self-defence in the wake of what became known as the ‘war on terror’ has become a distinctive trait of the first 20 years of the twenty-

first century, posing new threats of erosion to the ban on the use of armed force in international relations and the UN Charter system.

The war in Afghanistan (2001-02), subsequently the invasion of Iraq (2003-04), and more recently the protracted conflict in Syria (since 2010) have created a number of instances in which the provisions of the Charter have again been severely tested and Article 51 has been invoked beyond its literal terms.

The conflict in Syria, with its multiple phases and faces, has determined developments in State practice that might be hard to disentangle. While some States intervened in the conflict to support the Syrian government in reacting to internal threats from a variety of sources (in ways which are amenable to being characterized as intervention with the consent of the territorial State), others intervened invoking Article 51 against ISIS/Daesh and the fact that attacks (or threats of attacks) attributable to Daesh had occurred in their territories, by essentially confirming that the armed attack (or threat thereof) may also originate from a non-State entity and that armed force can be resorted to against such entity even in the territory of a third State. This is particularly true when such a State is unable to prevent the terrorist entity from attacking the ‘intervening’ States. For instance, States such as the US, France, the UK, and Germany intervened by making reference to Article 51 of the Charter, linking their intervention to the threat or the actual occurrence of terrorist attacks in their territories and more broadly on the threat ISIS/Daesh posed to peace and security. In so doing they seem to have shown agreement with a broader notion of armed attack under Article 51, triggering the right to engage in self-defence. In these cases not only was the Security Council kept informed, but it also somehow endorsed some aspects of these positions, which included reference to the right of collective self-defence by the EU Member States (under Article 42(7) of the EU Treaty)—see, for example, resolution 2249 (2015) adopted in the immediate aftermath of the terrorist attacks in Paris on 13 November 2015.

16.5.2 Is Anticipatory Self-Defence Admissible?

A connected problem that has cropped up on several occasions and which in modern international relations has become of crucial importance (on account of the kind of weapons that exist) is whether Article 51 allows anticipatory self-defence. This makes reference to a pre-emptive strike once a State is certain, or believes, that another State (or entity) is about to attack it militarily. Israel has resorted to anticipatory self-defence on various occasions: for example, in 1967 against Egypt, in 1975 against Palestinian camps in Lebanon, and in 1981 against Iraq (Israeli aircraft bombed Osiraq, an Iraqi nuclear reactor near Baghdad). Similarly, in 1980, in the Security Council, Iraq justified its armed attack on Iran by relying upon its right to strike pre-emptively at other countries preparing for war. In 2003, the US and the UK invoked pre-emptive self-defence to
justify their attack on Iraq, including on the basis of alleged possession of weapons of mass destruction by the regime of Saddam Hussein.

The rationale behind the doctrine of ‘anticipatory’ self-defence, stressed by all those who advocate it, is a strong meta-legal argument: in an era of missiles and nuclear weapons and of highly sophisticated methods of reconnaissance and intelligence, it would be naïve and self-defeating to contend that a State should await attack by another country, in the full knowledge that it is certain to take place and likely to involve the use of very destructive weapons. As McDougall, one of the leading proponents of this view, wrote, to impose on States the attitude of ‘sitting ducks’ when confronted with an impending military attack ‘could only make a mockery, both in its acceptability to States and in its potential application, of the Charter’s main purpose of minimizing unauthorized coercion and violence across State lines’. In 1981 the Israeli delegate echoed this doctrine in the Security Council.

This non-legal rationale has been given a legal foundation by claiming that Article 51 did not suppress the pre-existing international rule on anticipatory self-defence, which was, therefore, left unaffected by the Charter. The argument, developed by some eminent American and British jurists, and advanced by Israel in the Security Council in 1981, has been opposed by other distinguished publicists. These publicists have substantially made two points. First, the alleged customary rule did not envisage a right of anticipatory self-defence proper, but a right of self-defence and self-preservation. Secondly, Article 51 wiped out all pre-existing law, and did not leave any room for self-defence except in the form it explicitly authorized.

However, in Nicaragua the ICJ authoritatively placed a different interpretation on Article 51, contrary to the second point just mentioned. It held that ‘[o]n one essential point, this treaty itself [that is, the UN Charter in Article 51] refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence … 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 … customary international law continues to exist alongside treaty law. Moreover, the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of this content’ (at §176). Nevertheless, the Court did not specify the contents of the customary rules referred to in Article 51, in particular whether they included the old rule providing for a right to anticipatory self-defence. The Court noted that, as the parties to the dispute had not raised ‘the issue of the lawfulness of a response to the imminent threat of armed attack’, it did not intend to express any view on the matter (at §194). Thus, this important decision of
the Court cannot support any interpretation narrowing or broadening Article 51 with regard to the class of self-defence we are discussing.

If one undertakes a perusal of State practice in the light of Article 31 of the Vienna Convention on the Law of Treaties (see 10.6), it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence. On many occasions States have used anticipatory self-defence, without however formally invoking it, but rather relying on other legal justifications. In contrast, in other instances States formally invoked anticipatory self-defence or at least argued that it was lawful.

Analysis of State and UN practice thus shows that the overwhelming majority of States firmly believe that anticipatory self-defence is not allowed by the UN Charter. However, a number of States take the opposite view, and the emergence of a specific doctrine regarding the use of armed force against terrorist entities has provided further support. Given the importance and the role of these States, one may not conclude that there is universal agreement as to the illegality under the UN Charter of anticipatory self-defence.

This being so, it would seem that one should resort to the object and scope of Article 51 and, more generally, Chapter VII of the UN Charter or even, to use the words of the ICJ in Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 'the logic of the overall system contemplated by the Charter' (at §26). The purpose of these provisions is to safeguard peace as much as possible, and for this purpose to establish a collective and public mechanism designed to prevent or put a stop to armed violence. The only exception is the ‘private’ right of each State to protect itself against aggression pending the stepping in of collective bodies. Peace is regarded as the supreme value, and whatever may imperil or jeopardize such value should be removed or reined in as much as possible. If this is so, pre-emptive strikes should be banned, since they may easily lead to abuse, being based on subjective and arbitrary appraisals by individual States. It may thus be contended that, however unrealistic the ban on pre-emptive self-defence deriving from Article 51 may be in the present circumstances of warfare, States prefer to avoid risks of abuse. This should not be surprising. In any legal system, it is well known that some classes of action are not susceptible to being properly defined and circumscribed in advance, although they may have perilous consequences. In these instances, legal legitimation of such actions might produce pernicious effects. Many legal systems make provision for cases where actions may prove illegal but are in some respects justified on other grounds. Usually this is achieved, in criminal law, through the notion of ‘mitigating circumstances’. Or else judicial or enforcement bodies in fact decide not to legally respond to breaches of law (in a way, this has also happened in the UN: the General Assembly, which could be seen as the ‘world jury’, for better or worse, has sometimes harshly condemned recourse to force—for instance in the
cases of Hungary, Grenada, Panama, and Western Sahara—whereas on other occasions it has seemed to ignore or even approve such recourse: for instance in the cases of Goa, Tanzania and Uganda, and the Central African Republic).

As for anticipatory self-defence, it is more judicious to consider such action as legally prohibited, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation. This may in particular occur when the relevant State offers to the world community or to the UN convincing evidence of the impending attack, which it felt justified to pre-empt by use of force, and in addition shows that the anticipatory strike and the subsequent military actions have been proportionate to the threat, and limited to removal of such threat.

Although pre-emptive self-defence is not currently authorized by international law, no one can deny that, as international relations presently stand, not only terrorist action but also violence resorted to by States (or by insurgents attacking a State other than the one on whose territory they lie and against which they fight) may compel States to use force before being attacked. With regard to such extreme cases it may not seem injudicious to put forward legislative solutions de lege ferenda (that is, aimed at suggesting the adoption of new rules). These new rules should be designed to take account of exceptional exigencies of States, while at the same time making allowance for the need to avoid risks of abuse and dangerous escalations of armed violence. If gradually accepted, such new rules would on the one hand legitimize some justified security needs while, on the other, ensuring that restraints are placed on armed violence.

From the viewpoint of a possible development of law one could perhaps envisage the possibility of making anticipatory self-defence lawful subject to the following strict conditions: (i) the State that decides to resort to such self-defence must have available compelling evidence that another State or a terrorist organization abroad is about to unleash an armed attack; this evidence must be all the more determinative when monitoring inspection procedures, or if conciliation mechanisms are operating with regard to the State or organization suspected to be about to launch aggression (this was clearly the case with Iraq in 2003 before the US and UK attack); (ii) the attack is not only imminent and inevitable but also massive, such that it is likely seriously to jeopardize the population or even imperil the life or the survival of the State; (iii) the use of force in anticipatory self-defence must not be out of proportion to the attack it aims at averting; (iv) anticipatory self-defence must only aim at forestalling the attack; it must not pursue other goals such as the occupation of enemy territory or the overturning of a foreign government (occupation of territory may be temporary and strictly required by the aim of removing the threat of aggression; the overturning of a foreign government may also be an inescapable and natural consequence of the
armed attack, not one of its aims); (v) the State resorting to such self-
defence must immediately report to the UN Security Council; as soon as
the armed clash is over, it must produce convincing evidence to the
Council showing that, had it not made the attack, it would have been the
object of aggression; (vi) the State at issue must accept the Security
Council’s subsequent political assessment (if it is one of the five
permanent members, it must forgo its veto power when voting on the
issue); if the majority of the Council considers that the conditions for
resort to anticipatory self-defence were not met, the State must be ready
to submit to conciliation or arbitration, if resort to such procedure is
requested by the majority of the Council; (vii) if the Security Council or a
conciliatory or arbitral body concludes that anticipatory self-defence was
not warranted, or that the use of force was disproportionate, or that it
also pursued unwarranted goals, the State concerned must be ready to
pay compensation to the State attacked.

(p. 357) As it is difficult to amend the UN Charter (the amending
procedure being cumbersome and time-consuming), States could agree
upon the above (or other) conditions through a resolution unanimously
approved by the General Assembly, with the concurring vote of the five
permanent members (in which case, the resolution would amount to an
agreement in simplified form partly amending Article 27(3) of the UN
Charter, in derogation from Article 108 of the Charter).

16.5.3 Self-Defence Against Armed Infiltration and Indirect
Aggression

While Article 51 clearly refers to an actual use of force taking place at a
definite time (the crossing of frontiers by military troops, the bombing of
territory by foreign aircraft, large-scale attack on foreign ships on the
high seas, etc.), international practice shows that military aggression
increasingly takes the form of gradual infiltration of armed forces and
groups of volunteers supported by a foreign government into the territory
of another State. In such cases the ‘invasion’ of the territory of a State
does not take place all of a sudden and on a large scale, but over a long
period and piecemeal. This sort of aggression can also consist in
organizing, assisting, fomenting, financing, inciting, or tolerating
subversive or terrorist activities carried out against another State, either
to overthrow its government or to interfere in civil strife (so-called
indirect armed aggression). The problem arises of whether international
law extends self-defence to include reaction to invasion through
infiltration of troops and to indirect armed aggression.

The US invoked the former category of aggression in the case of Vietnam:
the American government consistently held that individual self-defence by
South Vietnam and collective self-defence by the US were legitimized by
the gradual infiltration of North Vietnamese troops and Vietcong into
South Vietnam. The attitude of other States towards this view does not
provide compelling evidence of the formation of a customary rule on the
matter. However, the view agreed upon by States in the Definition of

Aggression adopted in 1974 by the UN General Assembly through resolution 3314(XXIX) seems to reflect customary law, as the ICJ authoritatively held in Nicaragua (merits) (at §195). According to this view, one may consider as attacks justifying self-defence those armed attacks made by armed bands, groups, irregulars, or mercenaries sent by or on behalf of a State or a terrorist organization, and of such a gravity as to amount to an armed attack conducted by regular forces. Anything short of these requirements may not warrant self-defence.

Various States (chiefly the US, Israel, and South Africa) have claimed that ‘indirect aggression’ warrants self-defence. However, the reaction of the international community has never been one of full and convinced acceptance of the legal justifications propounded by Israel, Southern Rhodesia, and South Africa. Indeed, the debates that took place on various occasions in the Security Council show that most States were opposed to the invocation of Article 51 and regarded the various instances of resort to force as illegal. In addition, the discussions on the principle of non-intervention which took place in the UN Special Committee on Friendly Relations in the years 1966–70 were revealing.

Furthermore, in Nicaragua the ICJ distinguished between various classes of threat or use of force. It pointed out that training or providing economic, military, logistical, or other assistance to rebels fighting against the central authorities in another country may be regarded as a threat or use of force or as an intervention in the internal or external affairs of another State. However, it does not amount to armed attack (unless the provision of significant military support to an insurgency is major and demonstrable) (at §195). Hence, it does not entitle the target State to respond by self-defence against the assisting State (at §§195, 228, and 230).

It thus seems doubtful that Article 51 authorizes self-defence against indirect armed aggression, or that a general rule has evolved authorizing States to invoke self-defence to repel such specific category of aggression. It would seem that State practice shows that entitlement to the right of self-defence against a State supporting an insurgency or terrorism depends on (a) the level of such support, (b) the evidence of that support, and (c) the evaluation of that evidence by the ICJ or by another competent UN organ. It also depends, of course, on (d) the proportionality of the response and (e) the legality of the means used to respond.

16.5.4 Forcible Protection of Nationals Abroad

In various instances, States have used force for the purpose of protecting their nationals whose lives were in danger in foreign territory. In certain cases, force has been used without the consent of the territorial State. In other cases, military intervention was effected with the consent of the territorial State. In addition to these cases one should

mention the Larnaca incident of 1978. It is unique and anomalous and therefore cannot be put into the same category as those just mentioned.\footnote{27}

One thing is striking: in most cases of the use of force to protect nationals, the intervening State is a Western Power, and the State on whose territory the military action is carried out is a developing country. This situation is indicative of the present constellation of power in the world community. Of course, there is no denying that in nearly all the cases at issue there was either a real breakdown in the territorial system of public order, or inability on the part of the local government to prevent the perpetration of unlawful acts against foreigners.

The second remarkable thing is that mostly Western States have expressed the view that armed intervention for the protection of nationals is internationally lawful, being authorized either by Article 51 of the UN Charter or by a customary rule unaffected by the Charter (the US went as far as to adopt, in 1948, regulations laying down the right of the US to use force abroad to protect ‘the lives and property’ of American citizens ‘against arbitrary violence’: Article 0614, US Navy Regulations).\footnote{28}

\begin{pquote}
By contrast, other countries have consistently opposed the legality of this class of resort to force. Except for the German intervention in Somalia (where the territorial State gave its consent), foreign intervention has often been attacked as contrary to international law.\footnote{29}
\end{pquote}

On balance, it would seem that the objections of many States have not led to the obliteration of the general rule on the matter, evolved after the First World War. However, this rule—which might be subsumed under the general notion of self-defence pursuant to Article 51 of the UN Charter—may only be resorted to \textit{under very strict conditions}, dictated by the UN Charter system for the maintenance of peace and security. Its applicability in present-day conditions is justified by the weakness of UN collective enforcement (clearly, if the UN had SC armed forces at its disposal, to be dispatched immediately to places where human lives are in serious jeopardy, the rule would no longer be needed). The conditions to be fulfilled for the use of armed force to protect nationals abroad to be lawful, are as follows:

\begin{enumerate}
\item The threat or danger to the life of nationals—due either to terrorist attacks or to the collapse of the central authorities, or to the condoning by those authorities of terrorist or similar criminal activities—is serious.
\item No peaceful means of saving their lives are open either because they have already been exhausted or because it would be utterly unrealistic to resort to them.
\item Armed force is used for the exclusive purpose of saving or rescuing nationals.
\item The force employed is proportionate to the danger or threat.
\item As soon as nationals have been saved, force is discontinued.
\end{enumerate}

(6) The State that has used armed force abroad immediately reports to the Security Council; in particular, it explains in detail the grounds on which it has considered it indispensable to use force and the various steps taken to this effect.30

16.5.5 Armed Intervention with the Consent of the Territorial State

We should now ask ourselves whether the principle volenti non fit injuria (an illegal act is no longer such if the party whose rights have been infringed previously consented thereto), universally enshrined in State law, is also acknowledged as valid by the international community in the area of armed force.

In traditional international law this principle was obviously in full force—each member being on a par with the others, there were no limits to the freedom of States and all rules could be derogated from. Thus, each State was free to allow another to use force in any form on its own territory. Just as a State was able officially to sanction its own mutilation, dismemberment, or even its total extinction, so it could agree to allow another international subject to use force on its own territory.

Did the situation change once the use of force had been explicitly forbidden in the UN Charter and this ban had been enshrined as one of the mainstays of the international community, with only a few very circumscribed exceptions? Since these exceptions did not include consent, can consent become an implicit exception? A close scrutiny of the Charter allows for only one conclusion: by explicit consent a State may authorize the use of force on its territory whenever, being the object of an ‘armed attack’, it resorts to individual self-defence and in addition authorizes a third State to assist it in ‘collective self-defence’. What if the consenting State is not in fact the object of an ‘armed attack’? For example, if there is an insurrection within its territory, or if it is faced with serious disorders, and would like to appeal for help to another member of the international community?

A number of States tend to consider traditional law still fully valid and consequently hold that consent legitimizes the use of force because it precludes the violation of Article 2(4) of the Charter.31 A survey of practice also shows that some States all too readily claim their own military interventions to be lawful on account of consent (or request) by the State concerned. Thus, on more than one occasion, in cases of subversion in the territory of one State, other States have considered it quite legitimate to intervene, after a request to do so, either because the rebels were said to be receiving aid from third States, or because the consenting State was said to be the object of an ‘armed attack’, as laid down in Article 51.32

Clearly State practice makes extensive use of the consent exception, even though this practice hardly conforms to present-day international law. It would appear that most cases of so-called armed
intervention were unlawful, either because they were based on a misinterpretation of the relevant rules, or because the specific situation adduced to justify intervention differed in reality from the one depicted by the intervening State. Often the rebels were not in fact receiving any ‘external’ aid, and certainly not in the form of massive ‘military assistance’; or else, the individuals requesting or authorizing foreign intervention could not be regarded as the lawful authority of the ‘inviting’ State. Furthermore, whenever the intervening State (not to mention the ‘consenting’ State) justified the use of force by the need to ward off, in conformity with Article 51, an ‘indirect armed aggression’, the justification was based on a questionable interpretation of Article 51. Indeed, as noted earlier, normally this provision does not allow the use of force against that particular form of ‘aggression’.

The present legal regulation may be summarized as follows. First, consent must be freely given (that is, it cannot be wrested by any form of force, coercion, or duress: *coacta voluntas non est voluntas*); it must be real as opposed to merely ‘apparent’. Secondly, it must be given by the lawful government, that is, by the authority empowered thereto by the constitution. Thirdly, it may not be given as a blanket authorization for the future; it must be given ad hoc. Fourthly, it may not validly legitimize the use of force against ‘the territorial integrity or political independence’ of the consenting or requesting State, contrary to Article 2(4) of the UN Charter. For instance, a State may not authorize another State to use force on its territory with a view to establishing control over the population of the consenting State, or to appropriating a portion of territory of that State. Fifthly, consent cannot run counter to other principles of *jus cogens*. This would occur, for example, if force were authorized in order to deny or limit the right of peoples to self-determination, or if force involving atrocities were allowed for the purpose of putting down a rebellion or preventing secession.

### 16.5.6 Armed Reprisals Against Unlawful Small-Scale use of Force

A few States and also some commentators have contended that a particular class of armed reprisals, that is, military action short of war in response to a single and small-scale armed action by another State, is legally authorized either by Article 51 or by a general rule on the matter. (As for serious violations of rules of international law other than Article 2(4) of the UN Charter, we have seen earlier (see 15.3) that armed reprisals in response to them are prohibited by current international law, for only peaceful countermeasures are allowed, as even those who are in favour of the legality of the class of reprisals we are now discussing would admit.)

Before discussing this particular and narrow class of armed reprisals, it is fitting briefly to reconsider the legality of the *general category* of armed reprisals in modern international law. Some States have carried out acts that can be regarded as military reprisals. However, that no customary rule has evolved on this matter is evidenced by the fact that only some
Western States have insisted on the legitimacy of armed reprisals when they themselves took such reprisals (strikingly, some of them, that is, France, Britain, and the US, went as far as to criticize resort to those reprisals by other member States of the UN). That these reprisals are not authorized by Article 51, read in conjunction with Article 2(4), can be inferred from a literal and logical construction of those provisions and is corroborated by the subsequent practice of UN bodies, as indicative of the legal conviction of the States making up those bodies. In particular, mention may be made of various SC resolutions condemning reprisals ‘as incompatible with the purposes and principles of the United Nations’ (this pronouncement is, among other things, intended to rule out the possibility of founding this category of reprisals on the last part of Article 2(4)), as well as the statement in the 1970 GA Declaration on Friendly Relations (resolution 2625(XXV) adopted by consensus on 24 October 1970) whereby ‘States have a duty to refrain from acts of reprisals involving the use of force’ and, again, in 1981, in the GA Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (resolution 36/103, adopted by consensus on 9 December 1981).

However, as has been rightly pointed out, one should distinguish retaliatory armed force, which is normally a delayed response to the unlawful but small-scale use of force by another State, from an immediate armed reaction to a minor use of force. In the latter case, it is contended, the armed response is warranted, for otherwise the aggrieved State might turn out to be impotent in the face of a serious violation of international law by another State that causes an immediate and unavoidable threat to the life of the victims: in the end individuals belonging to law-abiding States would remain at the mercy of aggressive States. A commentator crafted a useful expression for designating this class of cases: ‘on-the-spot-reaction’. He suggested, as an example, the case of the patrol of a State that, moving along an international border, is hit by intense fire from military outposts of the neighbouring country; in this case, it is argued, the patrol can return fire. He also suggested another instance: the destroyer of one particular State on the high seas drops depth charges against the submarine of another State, ‘and the submarine responds by firing torpedoes against the destroyer’. It would seem that in these cases the employment of military force by the target State is justified either because (a) the unlawful action involving force, undertaken by the other State, does not constitute an ‘armed attack’ pursuant to Article 51 of the UN Charter (the ICJ in Nicaragua stated that ‘a mere frontier incident’ does not amount to an armed attack (at §195)), or (b) there was no other means of avoiding an immediate peril to the life of persons belonging to the victim State: the ICJ in Corfu Channel admitted that a warship passing through an international waterway was entitled to ‘retaliate quickly if fired upon’ by the batteries of the coastal State (at 31).

In any event, the armed response is only authorized if it fulfils the conditions of necessity and proportionality generally required for the
category of specific circumstances precluding wrongfulness of otherwise illegal acts, as well as that of imminence, inherent in the characteristic of this type of military response.

16.5.7 Humanitarian Intervention

In the aftermath of the NATO intervention in the Kosovo situation, arguments have been raised to try to ground justifications for the use of armed force to protect civilian populations from massive human rights violations—arguments very close to those invoked to justify humanitarian intervention. Subsequently, these principles were articulated in the doctrine of the ‘responsibility to protect’, which—however—allows resort to armed force, only through the United Nations.

Ultimately, despite attempts to broaden the legal basis for the use of armed force, it is apparent from the text and the context of the UN Charter that, although respect for human rights constitutes one of the main goals of the Organization, together with peace and self-determination, the Charter privileges peace to such an extent that it prohibits breaches of peace and security needed for ensuring observance of human rights. In other words, the Charter does not authorize individual States to use force against other States with a view to stopping atrocities. Such use may only be resorted to when the Security Council considers that this is exceptionally justified and acts accordingly, by authorizing the use of force. That this is the right interpretation of the Charter is borne out by the holding of the ICJ in Nicaragua (at §268). State practice confirms the proposition.

It is apparent from a survey of such practice that an international customary rule, legally entitling individual States to take forcible measures to induce a State engaging in gross and large-scale violations of human rights to terminate such violations, has not crystallized. Indeed, usus is extremely limited and opinio necessitatis, though widespread, does not fulfil the requisite conditions of generality and non-opposition (though, interestingly, Article 4(h) of the 2000 Constitutive Act of the African Union (a treaty ratified by 53 States) lays down ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly [which may decide by a two-thirds majority under Article 7(1)] in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity’). After the General Assembly resolution adopting the 2005 World Summit Outcome document (A/Res/60/1), the new concept of responsibility to protect was established (§§138–139 of the said resolution). Today, this notion has largely superseded the most relevant (and potentially lawful) aspects of what was previously labelled humanitarian intervention.

The system created by the UN Charter entails the existence of a corresponding customary rule whereby armed force cannot be resorted to unless under the strict conditions laid down in the Charter as reflected in the practice (i.e. in self-defence and through collective action authorized by the Security Council). All attempts to justify different forms of resort to armed force, albeit limited or value-oriented (humanitarian intervention,
or against rogue non-State actors), too easily translate into abuses and engender a potential for further violations of international law.

Notes:

1 In this regard, see the remarks of J. L. Brierly, on the enormous importance which international public opinion can and does have for the observance of the ‘law of nations’. He noted in 1931 that international public opinion contains an apparent paradox: ‘It is intrinsically a weaker force than opinion in the domestic sphere, yet it is in a sense more effective as a sanction of the law. For whereas an individual law-breaker may often hope to escape detection, a State knows that a breach of international law rarely fails to be notorious; and whereas again there are individuals so constituted that they are indifferent to the mere disapproval, unattended by pains and penalties, of others, every State is extraordinarily sensitive to the mere suspicion of illegal action’ (J. L. Brierly, ‘Sanctions’ (1931), in H. Lauterpacht and C. H. M. Waldock (eds), The Basis of Obligation in International Law (Oxford: Clarendon, 1958), 203).

2 A few logical and terminological distinctions about the notion of sanctions are necessary. By speaking of ‘sanctions’ (or sanctions lato sensu) reference is made here to all those measures taken by groups of States or bodies of international organizations for the purpose of reacting to deviant conduct of States or other international subjects. This broad category is thus an umbrella concept that embraces (i) collective countermeasures (measures in breach of international law taken by a multiplicity of States, without any authorization of an international organization, in response to a violation of international law by another international subject, which are lawful in that they are intended to react to that breach and force its author to obey international law); (ii) sanctions properly so called or sanctions stricto sensu (‘centralized’ countermeasures decided upon or recommended by an organ of an international organization); as well as (iii) political sanctions, that is, measures imposing hardship, which do not involve a breach of international law and are taken by international organizations in reaction to deviant conduct of a member State (regardless of whether or not such conduct contravenes international norms).


4 After the Japanese invasion of the Chinese province of Manchuria, H. L. Stimson, the US Secretary of State, declared that his government could not ‘admit the legality of any situation de facto nor does it intend to recognize any treaty or agreement entered into between these Governments or agents thereof which may impair the treaty rights of the

United States ... and ... it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Treaty of Paris of August 27, 1928' ((1932) 26 AJIL 342).

On 18 December 2017, at the initiative of Egypt, a draft resolution was tabled before the Security Council; the text obtained 14 votes in favour, but failed to be adopted owing to the veto by the US.

The fact that mere resort to exposure is seen as a ‘sanction’ need not surprise us. Time and again States themselves have admitted the importance that public exposure can have as a means of exercising leverage on States. Thus e.g. in 1975 the Greek representative said in the General Assembly: ‘Only intervention by various international and national organizations or protests of foreign Governments which truly respected the principles of freedom and democracy could exert an influence on dictators and guarantee some protection to political prisoners under totalitarian regimes’ (see GAOR, XXX Session, 3rd Committee, 2160th Meeting, §14). In the same vein, the UK delegate pointed out that ‘if it was accepted that exposure was the most potent weapon available for combating torture, then the responsibility of the UN was very great indeed and there was cause to be grateful for the response to the GA’s resolution [on torture, passed in 1975]’ (ibid., 2167th Meeting, at §1).


This Greek ship was stopped and searched by a British man-of-war without opposition from the Greek authorities. Another Greek ship, the Joanna-V, had been searched on the high seas off the coast of Beira, Mozambique, prior to the SC resolution, triggering strong protests from the Greek government. On these two incidents see, for the relevant references, V. Gowlland-Debbas, Collective Responses to Illegal Acts in International Law (Dordrecht, Boston, and London: Nijhoff, 1990), 400 as well as B. Conforti, The Law and Practice of the United Nations, 2nd edn (The Hague, London, Boston: Kluwer, 2000), 280.

Initially this obligation was not stringent. E.g. resolution 678 (1990), on Iraq, simply provided that States were ‘to keep the Security Council regularly informed on the progress of actions undertaken’ (at §4). In

fulfilling this broad obligation some States confined themselves to submitting to the Security Council short and general reports on the military operations that were under way. At present, this obligation is no longer general and loose. In some cases the Security Council also requests the Secretary-General to report on the conduct of operations, so as to have other standards of appraisal available in addition to (or in place of) the information given by States. E.g. resolution 1546 (2004) concerning Iraq provides in §30 that the Secretary-General must ‘report to the Council within three months from the date of this resolution on UNAMI [UN Assistance Mission for Iraq] operations in Iraq, and on a quarterly basis thereafter on the progress made towards national elections and fulfillment of all UNAMI’s responsibilities’.

11 Article 51 states 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.’

12 Nicaragua (Nicaragua v United States of America), §§195 and 199. See also Oil Platforms (Islamic Republic of Iran v United States of America), §51.

13 The US relied on this defence in the case of Vietnam (in various official pronouncements, in particular the State Department Memorandum of 4 March 1966, the US invoked Article 51 for its military action in support of South Vietnam) and in Nicaragua, in 1981–84, as did Britain in 1964 when it attacked Yemen to assist the Federation of Southern Arabia, and the Soviet Union in the case of Czechoslovakia (1968) and Afghanistan (1979). Collective self-defence was also referred to in the preamble to the resolution adopted by the Security Council after the Iraqi attack on Kuwait in 1990 and the request for assistance by the Kuwaiti government in exile (resolution 661 of 1990). However, as is well known, in that instance the Security Council authorized States to react to the Iraqi aggression against Kuwait.

14 Instances where Article 51 was invoked include: the USSR intervention in Hungary in 1956; the US intervention in the Dominican Republic in 1965; the US participation in the Vietnam War in 1966; the Israeli attack on Egypt in 1967; resort to force by the US in the Mayaguez incident in 1975; the USSR intervention in Afghanistan in 1979; Israel’s use of unilateral force in Uganda in 1976 (Entebbe airport), in Iraq in 1981 (Osiraq nuclear power station), and against Lebanon a number of times since 1978; the numerous attacks by South Africa on neighbouring States (Angola, Zambia) between 1976 and 1979 allegedly to stop terrorism

from abroad; the military action of the UK against Argentina after the latter’s invasion of the Falklands/Malvinas in 1982; and the US intervention in Grenada in 1983, in Libya in 1986, and in Panama in 1989.


He declared that the scope of the concept of self-defence had ‘broadened with the advance of man’s ability to wreak havoc on his enemies. Consequently, the concept took on new and far wider application with the advent of the nuclear era. Anyone who thinks otherwise has simply not faced up to the horrific realities of the world we live in today, and that is particularly true for small States whose vulnerability is vast and whose capacity to survive a nuclear strike is very limited.’ See UN Doc. S/PV.2288, at 40; 19 ILM (1981), 989.


18 With reference to the attack on Osiraq, the Israeli delegate stated the following: ‘In destroying Osiraq, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the UN Charter. A threat of nuclear obliteration was being developed against Israel by Iraq, one of Israel’s most implacable enemies. Israel tried to have that threat halted by diplomatic means. Our efforts bore no fruits. Ultimately we were left with no choice. We were obliged to remove that mortal danger. We did it cleanly and effectively.’ See UN Doc. SPV.2280, 2 June 1981, in ILM (1981), 970.


20 E.g. in 1962 the US instituted a ‘naval quarantine’ forcibly to intercept on the high seas ships carrying missiles to Cuba; however, it relied on the legal endorsement by a regional organization, the OAS. In 1967, Israel launched a pre-emptive strike against Egypt (the United Arab Republic), Jordan, and Syria, but claimed that it was a reaction to the ‘act of war’ constituted by Egypt’s preventing the passage of Israeli vessels through the Straits of Tiran. In 1988, the US military ship USS Vincennes shot down an Iranian civilian aircraft during the Iran–Iraq war; the US authorities justified the downing of that aircraft by claiming that, as Iranian aircraft and patrol boats had previously fired on American helicopters and ships, the Americans had simply reacted to those attacks.

21 In 1975, Israel did so when it launched a pre-emptive strike against Palestinian camps in Lebanon. In 1980, Iraq claimed that in attacking Iran it had exercised its right of pre-emptive self-defence (but then quickly changed its attitude and argued that it had reacted to a previous attack by Iran). In 1981, Israel again invoked anticipatory self-defence when it destroyed the Iraqi nuclear reactor at Osiraq. South Africa too relied on the same legal ground when it attacked military bases of the ANC in neighbouring countries (Zambia, Lesotho).

22 In particular, Israel, on the occasion of its attacks against Palestinian camps in Lebanon (1970–83) and in Tunisia (in 1985); Southern Rhodesia (when it attacked Zambia (1978–79)); and South Africa, on the occasion of its attacks on SWAPO camps and troops in Angola and its raids into Lesotho, Zambia, and Swaziland (between 1976 and 1985), claimed that the violation of sovereign rights of the attacked State was justified by the fact that the latter tolerated or actively supported terrorist activities of guerrilla groups against the territory and assets of the attacking States.


24 In 1964, the UK proposed proclaiming the right of any country to seek military assistance from third States, should it become the victim of unlawful intervention in the form of ‘subversive activities leading to civil strife in which the dissident elements are receiving external support and encouragement’. In 1966, a group of Western countries (Australia, France, Canada, Italy, the UK, and the US) took up and broadened that proposal, suggesting that the ‘right of States in accordance with international law to take appropriate measures to defend themselves individually or collectively against intervention is a fundamental element of the inherent right of self-defence’. However, this proposal was strongly
attacked in the Special Committee by a number of socialist and Third World countries, including Czechoslovakia, the United Arab Republic, Ghana, India, Lebanon, Algeria, and Mexico. They argued that the proposal was ‘a dangerous departure from the UN Charter and from international law as generally accepted’; in particular, it ignored Article 51 and led to a dangerous broadening of the range of eventualities in which self-defence could be exercised under that provision of the Charter. As a result of that criticism, the resolution’s sponsors withdrew it and the final text of the Declaration on Friendly Relations simply refers to the ‘relevant provisions of the Charter’. It should also be noted that the UN Special Committee for the Definition of Aggression eventually took the same stand, as is apparent, in particular, from the debates which took place within the Committee.

Belgium intervened in the Congo in 1960; the US in the Dominican Republic in 1965; the US in Cambodian waters in 1975 (to rescue an American cargo boat and its crew captured by Cambodian armed forces); Israel in Uganda in 1976; and the US in Iran in 1980. In addition, as recalled earlier in the chapter, the US bombed Libya in 1986, Baghdad in 1993, and Afghanistan and Sudan in 1999 as a reaction to terrorist attacks on US nationals. In the first two cases, the territorial State was not responsible for the threat to the life of foreign nationals, for such threat resulted from the collapse of the public order system. By contrast, in the third and fourth cases, the local government was answerable, for it did not protect the lives of foreigners, but tolerated or even aided and abetted the activity of private individuals endangering foreign nationals.


Thus, the US sent its troops to Lebanon in 1958 (although the principal grounds for American intervention, adduced by both the US and Lebanon, were the request of the Lebanese government and the applicability of Article 51 of the UN Charter; the US delegate to the Security Council also emphasized that US troops had been sent to Lebanon in order to protect American lives; he pointed out that US forces ‘will afford security to the several thousand Americans who reside in that country’). Belgium did the same, with help from the US, in the Congo in 1964. The Federal Republic of Germany sent a commando unit to Mogadishu with the consent of Somalia in 1977. In 1978, French and Belgian troops intervened in the Shaba area at the request of Zaire. In 1983 the US sent armed forces to Grenada. (They claimed that this was done at the request of the British Governor-General, due to the collapse of local authorities (see (1984) 78 *AJIL* 200, 662); independent reports disclosed that there was actually no imminent threat or danger to the lives of American citizens; the fact that

US troops were stationed on the island after evacuating the American nationals confirmed that the ground for landing troops adduced by the US authorities was indeed a mere pretext for unlawful forcible intervention. The UN General Assembly did not uphold the legal grounds adduced by the US and, by resolution 38/7 of 1984, deplored the US intervention. In 1989 the US sent armed forces to Panama, among other things ‘to protect American lives’ after ‘the legitimate democratically elected government of Panama [had been] consulted and [had] welcomed [the US] action’ (see (1990) 84 AJIL 545, 547).

27 In February 1978, two terrorists killed the Egyptian Secretary-General of the Afro-Asian Peoples Solidarity Organization during a meeting of the Organization in Nicosia. After seizing hostages, among whom there were a few Egyptian nationals, the terrorists left Cyprus by aircraft but, being refused access by various countries, were obliged to return to Larnaca airport. While negotiations were under way between the Cypriot authorities and the terrorists, an Egyptian aircraft was allowed to land at Larnaca. When the Cypriot authorities realized that it carried a commando unit, they refused to authorize it to intervene. The Egyptians nevertheless opened fire against the terrorists, whereupon the Cyprus national guard in its turn fired on the Egyptians. As a result of the shoot-out several Egyptians and Cypriots were killed or wounded and the Cypriot authorities arrested the terrorists. A dispute between Egypt and Cyprus ensued. The former—while conceding that Cyprus had not authorized the use of force—claimed that it had not violated Cypriot sovereignty and had acted upon the principle of fighting terrorism. Cyprus, however, rejected Egyptian claims and firmly asserted that its sovereignty had been violated. The case clearly does not fit into the class of incidents where States use force to protect their own nationals, first, because Egypt claimed that its sole aim was to combat terrorists, and, secondly, because it contended that it had used force after being authorized by Cyprus to send a military aircraft to Larnaca (it would seem that in the view of Egypt, such authorization entitled it at least to send in armed forces, from which it followed that it did not breach the sovereignty of Cyprus).

28 In 1993, the UK Foreign Minister stated in the House of Commons that ‘[f]orce may be used in self-defence against threats to one’s nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other State in support of terrorist attacks against one’s nationals; (b) there is, effectively, no other way to forestall imminent further attacks on one’s nationals; (c) the force employed is proportionate to the threat’. See (1993) 64 BYIL 732.

29 Thus e.g. on the occasion of the armed action by the US in Lebanon in 1958, Ethiopia stated in the General Assembly: ‘Ethiopia strongly opposes any introduction or maintenance of troops by one country within the territory of another country under the pretext of protection of national interest, protection of lives of citizens or any other excuse. This is a recognized means of exerting pressure by stronger Powers against...’
smaller ones for extorting advantages. Therefore, it must never be permitted’ (see GAOR, 3rd Emergency Special Session, 742nd Plenary Meeting, 20 August 1958, §75). On the same occasion Poland argued that the protection of nationals abroad constituted an ‘old pretext’ (ibid., 740th Plenary Meeting, at §84). And in 1978, on the occasion of the French and Belgian military operation in Zaire, the Soviet official news agency TASS stated that ‘humanitarian intervention’ was merely ‘a fig leaf to cover up an undisguised interference in the internal affairs of Zaire’ (see Keesings’ Contemporary Archives (1978), 29128).

30 It follows from this enumeration of conditions that the military interventions of Belgium in the Congo in 1960, of the US in the Dominican Republic in 1965, and of Israel in Uganda in 1976 were lawful. In contrast, the US intervention in Grenada in 1983 was unlawful (in particular, under the heading we are discussing—protection of citizens abroad). Similarly, the US bombing of Libya in 1986, of Baghdad in 1993, and of Afghanistan and Sudan in 1998 were contrary to the UN Charter.

31 E.g. in 1958, the British Foreign Secretary asserted: ‘The structure of the Charter preserves the customary law by which aid may be given to a nation of the kind which I have described [in the face of civil strife fomented from abroad] … I do not believe that either the spirit or the letter of the Charter takes away the customary, traditional right’ (quoted by Brownlie, International Law (n 19), 326).

32 E.g. the Soviet intervention in Hungary in 1956 (when the USSR did not invoke Article 51); that of the US in Lebanon, and of Britain in Jordan, both in 1958 (when both States invoked Article 51, as well as receiving consent); that of the US in the Dominican Republic in 1965 (when the Americans also invoked the Charter of the OAS), and in Grenada in 1983 (when the US also referred to a regional treaty and to the ‘right to protect nationals abroad’); not to mention Soviet intervention in Czechoslovakia in 1968 and in Afghanistan in 1979 (when the USSR both invoked Article 51 and allegedly received the consent of the territorial State in question). To justify its armed intervention in Cyprus in 1964 and 1974, Turkey invoked before the UN Security Council the 1960 Treaty of Guarantee between Cyprus, Greece, Turkey, and the UK, Article IV of which provided that in the event of a breach of the Treaty, and in so far as no common or concerted action proved possible, each of the three Guaranteeing Powers reserved ‘the right to take action with the sole aim of re-establishing the state of affairs’ created by the Treaty. Before the Security Council, Greece and Cyprus rejected this interpretation, insisting that no ‘military’ action had been explicitly envisaged in the Treaty and in addition there had been no ‘specific’ consent by Cyprus to foreign military intervention. The Panama Canal case should also be mentioned. Article V of the 1977 Panama Canal Treaty, laying down the principle of ‘non-intervention in the internal affairs of the Republic of Panama’, was unilaterally interpreted by the US as authorizing the use of force by the US in Panama. When the Treaty was submitted to the US Senate for the necessary authorization to ratification, Senator De Concini proposed a

clause, accepted by the Senate as a ‘condition’ to ratification, whereby, ‘[n]otwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be’ (see the text of the relevant documents online at http://lcweb2.loc.gov/frd/cs/panama/pa-appnb.html). The Panamanian government accepted the clause, without submitting it to a new plebiscite (the Treaty had already been approved by plebiscite). However, President Torrijcos stated that Panamanians would not accept US intervention for defending or reopening the Canal, unless the US was specifically invited. In addition, Torrijcos appended a declaration to the Panamanian instrument of ratification, stating among other things that Panama’s ‘political independence, territorial integrity and self-determination [were] guaranteed by the unshakable will of the Panamanian people’ (see W. I. Jorden, Panama Odyssey (Austin, TX: University of Texas Press, 1984), 585). The Declaration went on to provide that ‘[t]herefore, the Republic of Panama will reject, in unity and with decisiveness and firmness, any attempt by any country to intervene in its internal or external affairs’ (§3 of the Panamanian Declaration). It would seem that the Panamanian response to the US ‘condition’ was intended to stultify its purpose of authorizing armed intervention. However, the State Department construed the Panamanian statement as not excluding or modifying ‘the De Concini Condition or any other provision of the Treaties as ratified by the Senate’ (see (1984) 78 AJIL 204). Whether or not this view was correct, it seems indisputable that, as some distinguished American commentators have rightly pointed out, the US invasion and occupation of Panama in 1989 was not lawful, either on this ground (consent) or on any of the other three grounds put forward by the US government, namely ‘to safeguard lives of American citizens’, to ‘help restore democracy’, and ‘to bring General Manuel Noriega to justice’ (statement by the US President G. Bush, 3 January 1990, Office of the Press Secretary, the White House). (See V. P. Nanda, ‘The Validity of United States Intervention in Panama Under International Law’ (1990) 84 AJIL 500; L. Henkin, ‘The Invasion of Panama Under International Law’ (1991) 29 CJTL 302–3, 309–10. A contrary view was put forward by A. D. Sofaer, ‘The Legality of the United States Action in Panama’ (1991) 29 CJTL 287. See also D. Wippman, ‘Treaty-Based Intervention: Who Can Say No?’ (1995) 62 U Chi L Rev 680.)


34 They are all in the Western area: Britain, Israel, the US, France, and Portugal. E.g. in 1964, when the US undertook bombing raids against

North Vietnam in reply to the Gulf of Tonkin incident, the US Secretary of State, McNamara, spoke of ‘retaliation’; the 1965 US air strikes against the same country following the North Vietnamese attacks at Pleiku were termed by the White House ‘appropriate reprisal action’. In 1968, the Israeli Chief of Staff, General Bar Lev, defined as ‘reprisals’ both an Israeli attack against Egyptian installations and a raid against Beirut. Israel has resorted to this class of armed reprisals in many instances since the early 1960s. It would seem that also some cases where a State employed armed force under the cover of self-defence in fact fall into the category of armed reprisals: e.g. the US attack on Libya in 1986 (see 16.5.1), as well as the US attacks on Sudan and Afghanistan in 1998 (see 16.5.1).

35 See e.g. SC resolution 111 of 19 January 1956; SC resolution 171 of 9 April 1962; SC resolution 188 (1964), §1; SC resolution 270 (1969).

36 See e.g. Brownlie, International Law (n 19), 305.

37 Dinstein, War, Aggression and Self-defence (n 19), 214.

38 In Nicaragua, the ICJ mentioned that the parties agreed ‘in holding that whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence’ (at §194), and seemed implicitly to uphold this view.

39 Cf. Dinstein, War, Aggression and Self-defence (n 19), 215.

40 India justified its armed intervention in East Pakistan in 1971 as (among other things) an act of self-defence against the Pakistani aggression and also on account of the inhuman conditions of the Bengali population in what later became Bangladesh. However in the Security Council, the US objected to the use of force, and in the General Assembly, opposition came from China, Albania, Jordan, Sweden, and other States (for the appropriate references see Ronzitti, Rescuing Nationals Abroad (n 25), 95; S. D. Murphy, Humanitarian Intervention (Philadelphia: University of Pennsylvania, 1996), 99). When Vietnam intervened militarily in Cambodia in 1978, relying upon the notion of self-defence, in the ensuing debate in the UN Security Council many States clearly asserted that the UN Charter did not allow foreign intervention for the alleged purpose of safeguarding human rights (for references see Ronzitti, Rescuing Nationals Abroad (n 25), 98; Murphy, Humanitarian Intervention, 103). When Tanzania attacked Uganda, in 1979, thus toppling the dictator Idi Amin, it to some extent relied on humanitarian grounds, citing the atrocities ordered or committed by the Ugandan dictator. However, although the attack was not discussed in the UN Security Council or in the General Assembly, it would seem that eventually the international community did not endorse or condone the intervention, although it did not pronounce on its illegality (for references see Ronzitti, Rescuing Nationals Abroad (n 25), 102; Murphy,

*Humanitarian Intervention*, 105). When the French intervened in 1979 against Emperor Bokassa of the Central African Republic, after the atrocities had been condemned by the OAU Judicial Commission, there was no official pronouncement on that intervention. On the occasion of the 1999 NATO armed intervention in Kosovo, which had not been authorized by the Security Council, a number of States claimed that resort to force was legally warranted by the urgent need to put a stop to a ‘humanitarian catastrophe’ or, as other States put it, to the atrocities being perpetrated by the Serbs in Kosovo. (This stand was taken by such States as the US, the UK, France, Canada, Belgium, the Netherlands, Italy, and others.) However, many other States (including Russia, China, Cuba, Belarus, Ukraine, Namibia, and India) strongly objected to that military action, arguing that it was blatantly contrary to the UN Charter, as it had not been authorized by the Security Council (for the indication of the position of various States see A. Cassese, ‘A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*’ (1999) 10 *EJIL* 791).