

# Conditions for the legal commencement of an armed attack

Vita Upeniece

Rīga Stradiņš University, Riga, Latvia

**Abstract.** The Charter of the United Nations provides that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs. . .”. In certain cases, it is difficult to find a clear answer to the question – what action is recognised as an armed attack according to the Article 51 of the UN Charter. The aim of the research is to analyze this problematic question, as well as the issue – when an armed attack begins, and as a result of the analyses of these issues, to describe the conditions for the legal use of force for self-defence.

**Key words:** armed attack, anticipatory self-defence.

## 1 Introduction

According to the Article 51 of the Charter of the United Nations the force may be used for self-defence against an armed attack. Some scholars recognize as lawful the use of force for self-defence in response to an armed attack which has not actually started. The others do not exclude the possibility of repelling an armed attack that has been launched, but not completed.

Therefore, the aim of the research is to find out what action is recognized as an armed attack, which is mentioned in the Article 51 of the UN Charter, and when such attack is considered to be started. Analysing the above-mentioned issues, by using historical, analytical, comparative and systematic methods, the author describes and analyses the main problems the international society is facing nowadays and explores the conditions for the legal use of force for self-defence.

## 2 Discussion

There is a point of view that the concept of an “armed attack” used in the Article 51 of the Charter has a narrower meaning than the notion of the “use or threat of force” embodied in the Article 2(4). Therefore, not all violations of the Article 2(4) can be recognized as an armed attack [1]. It is also alleged that an armed attack must reach a certain degree of gravity in order to be recognized as an “armed attack” within the meaning of the Article 51 of the Charter:

- The International Court of Justice emphasized the necessity to distinguish the gravest forms of the use of force (those constituting an armed attack) from the less grave forms and mentioned that an action would be classified as an armed attack, if it achieved a certain scale and effect. The Court did not classify the mere frontier incidents, carried out by regular armed forces, as an armed attack, if it had not achieved a certain “scale and effect” [2]. At the same time the Court did not exclude “that the mining of a

single military vessel might be sufficient to bring into play the “inherent right of self-defence” [3].

- Some scholars base their opinion on the above-mentioned Court’s decisions, and state that an armed attack constitutes the force which is used in a large scale and with essential effect [4]. However, a clear list of conditions, according to which the scale and effect of such use of force should be recognized as essential, is not provided.

Another group of scholars do not base on the assessment of the gravity of the offender’s use of force in each certain case and on the definition of a hypothetical threshold of the gravity of its attack. Their view is based on the belief that the use of force by the offender triggers the right to self-defence, while the gravity of the offender’s action affects the strength and means of defence (the principle of proportionality). So C.Greenwood notes that the International Court of Justice was probably concerned about the possible “opening the door” to excessive use of force in minor incidents and did the worst – it widened the gap between the use of force prohibited in the Article 2(4) of the Charter and the use of force which triggers the right to self-defence according to the Article 51. The Court highlighted that in cases where the use of force did not exceed “mere frontier incident”, even if they constitute an infringement of the fourth paragraph of the Article 2 of the Charter, the victim state does not have the right to use self-defence. C. Greenwood rightly believes that there is no clear textual reason in the Charter of the United Nations to exclude such attacks, which are armed attacks but are below the threshold of the courts specified violence intensity. Moreover, the right to self-defence includes the requirement to respect the principles of necessity and proportionality, which are already prohibiting the excessive self-defence response [5].

Y. Dinstein admits that the Court’s conclusion about the “mere frontier incidents” is a reason for thinking that in the cases where the state soldier fired over the border of another state hitting a tree or a cow is not considered as an armed attack. However, he emphasizes that it would be a mistake to automatically recognize all border incidents as “mere frontier incidents”, because some of them may be insignificant, but others may be very serious. Many border incidents include a large military engagement and an attempt to separate them from other types of armed assaults would not be correct. Furthermore, the concept of “armed attack” means that armed attack is not legal, then any armed attack, even a small border incident, is illegal. Thus, there is no reason to remove armed attacks of a small scale from the spectrum of armed attacks. Moreover, the Article 51 of the Charter contains no restriction due to large, direct or significant attacks [6].

M.N. Shaw mentions that the Court had adopted a minimum approach to the meaning of the notion of the armed attack, which however requires some attention, because an attack can take place in different dimensions, considering current political and psychological conditions. The incident which in one context may seem relatively insignificant, may gain considerable significance in the other, creating the need to respond with the use of force in self-defence [7].

There is also a point of view that the right of states to defend themselves allows preventing armed attacks that would otherwise have occurred and to deter future armed attacks. Therefore, the Court’s opinion needs some comments, because, otherwise it may be considered as a suggestion to restrict the right to self-defence, which will diminish rather than strengthen the international peace and security. The requirement that an attack reaches a certain level of gravity prior to the use of force in self-defence can make the use of force more frequent, because it can encourage the aggressor to engage in small-scale military attacks with the hope that these actions will not become the subject to the response for self-defence. Moreover, if a state is required to wait until the attacks reach a high level of gravity before

using the force in response, the response will probably be much greater, making it more difficult to resolve the dispute which has turned into a full-scale military conflict [8].

There is no common point of view either between the states or in the legal doctrine about the time at which the right to self-defence arises [9]. Y. Dinstein points out that the sowing death, rather than the actual fire, is launching an armed attack. Instead of judging who has fired the first, he suggested to find out who has undertaken seemingly irreversible actions while crossing the Legal Rubicon. By analyzing three hypothetical Pearl Harbor events scenarios, assuming, that the United States were clearly aware of Japanese plans, he concludes that as soon as the airplanes were launched, there would be no doubt that the United States as a target country, would have the right to consider the Japanese armed attack like started and to stop it. The similar situation would be with the Japanese navy interception. If Americans, perhaps by breaking Japanese naval codes, had got convincing evidences about the aim of the navy mission and determined the location of the Japanese fleet, they should not give up the possibility to intercept it. On the other hand, if the Americans tried to destroy the Japanese fleet before it began fulfilling its mission, that is, at a time when it participated in the military trainings for the mission, by playing the war, it would be preventive (illegal) use of force before the attack that has not yet occurred. According to Y.Dinstein trainings of warfare and previous preparations do not break the red line of an armed attack [10].

There is still no consensus about the use of force for self-defence when the radar of a missile is locked on a victim state plane. Some countries consider as the beginning of the attack the moment when the missile radar is locked on and is ready to fire. For example, the shooting of an Iraqi missile complex by the United States in 1998, because its radar was locked on the allied British planes which patrolled the no-fly zone. The United States pointed out that the Iraqi radar illuminated British planes and such action is an intention to shoot. Iraqi officials, in turn, indicated that no radar was open [11]. Thus, there was a dispute over whether the radar was actually locked on (as well as whether the planes were entitled to fly above Iraq), but the idea that the armed attack starts with the radar locked on was obviously accepted by Iraq and other countries [12].

There is an opinion that this issue relates to the problem of an imminence of the attack, though there may be circumstances where such situation just before the opening of fire should already be seen as part of an attack. In reality an armed attack can begin with an insignificant military movement (for example in an empty uninhabited zone) with the aim to deceive the future victim state before the main movement of the forces. Such victim state, correctly interpreting this initial movement, faces the question about the use of force for self-defence. Considering the rapid development of technologies, the question may be answered that this situation, or the situation when the radar is locked on an aircraft, can be considered as an imminent attack or even as the beginning of an attack [13]. In any case the state that sees itself as a victim, will be obliged to prove the fact of the beginning of an attack or the imminence of an attack.

As the International Court of Justice mentions in the case *Islamic Republic of Iran v. United States of America* (2003) the obligation to prove the existence of an attack rests on the country which has exercised the right of self – defence. [14] In the case *United Kingdom v. Albania* (1949) the Court emphasizes that the evidence may appear from the findings of the facts if they do not leave the place for reasonable doubt [15].

In the case *Nicaragua v. United States of America* (1986) the Court stated that the evidences should be adequate and direct. Examining whether the rebels acted on behalf of leadership of the United States, the Court indicated that despite subsidies and the other support provided by the United States there were no clear evidences that the United States had taken such level of control in all areas that would justify rebels' action on behalf of the United States [16]. Therefore the state's responsibility for rebels' actions can only arise in

the case of the existence of evidences which the Court will find clear. So, the Court did not provide a clear solution to the cases where the third countries aid rebels by supplying them with weapons or by providing them with the other forms of assistance, and where the actions of these rebels endanger the territorial integrity of the victim state. Such an approach left the unresolved question – is a country that is the victim of other state supporting grouping attacks entitled to respond with a military force, if this support does not reach the threshold set by the Court [17]?

This issue was not also resolved in the case *Bosnia and Herzegovina v. Serbia and Montenegro* (2007). In this case the Court referred to the case *Nicaragua v. United States of America* (1986), when considering the issue of state control over the activities of non – governmental armed groups and pointed out that it must be established that a person or entity is considered as a State organ, even if it has not been granted this status under national law. It must be also established that it acted in accordance with the instructions of the state or under the “effective control” of the state. In addition, the Court considers essential to establish that this “effective control” was carried out or that the state instructions were given for each individual operation resulting in an alleged infringement [18].

At the same time the problem of obtaining evidences does not prevent the Court from trailing the case. In the case *Cameroon v. Nigeria* (1998) Nigeria responded to the initial allegations of unlawful use of force by claiming that the Court must decline to exercise its jurisdiction in the light of the ongoing nature of the conflict and the possible difficulties connected with it. Nigeria stated that the complexity of the situation was reflected in the fact that Cameroon’s claims were vague and unfounded. These difficulties in obtaining evidences would make it impossible to guarantee a fair trial. The Court stated that the applicant should be responsible, if it substantiated the claim with inadequate facts and justifications. Therefore, the Court rejected Nigerian objections [19].

There is a growing consensus amongst both states and scholars that pre-emptive action for self – defence against an imminent attack may be lawful in strictly limited instances of the principles of imminence, necessity and proportionality which derive from Carolina case [20]. The point of view of the legal positivists that the apparently started armed attack may not be actually finished is partly justified. The scholars commonly base this view on the optimistic expectation that the potential aggressor can always withdraw the order to attack given to its armed forces or that launched missiles are guided and their course can be changed. However, it is difficult to believe that all states in all cases will be ready to wait until the attack actually takes place and causes damages. Doubts about the alleged attack can be justified by possible technical errors. In this case, after assessing all evidences in their context (namely, the incident is one; the guilty state has immediately provided the incident explanatory information or has expressed regret about what had happened; the suffered country has no information about the intention of the guilty state to attack) the suffered country’s response with the use of force most likely would be seen as aggression.

There are legal positivists who have stepped aside from the narrow literal reading of the Article 51. On the one side they emphasize that the purpose of the United Nations is to maintain international peace and security and that they do not recognize the right of anticipatory self-defence. But on the other side, they do not exclude the possibility of extended interpretation of the Article 51, depending on the actual aspects of each individual case, if the state offers the United Nations convincing evidences of the impending attack, which it considers to be a justification for the use of armed force and proves that the pre-emptive attack is proportional to the threat and limited by the elimination of these threats [21].

The use of principle of imminence in the case of preventive self – defence is evaluated critically, because this principle is related to the question of the proximity of the anticipated attack to the moment of the use of self – defence. The further in future the attack is foreseen, the more opportunities are to prevent it by other means, without the use of military force. In any case, the potential victim state should obtain convincing evidences that none of the peaceful means of the attack prevention has succeeded and could not succeed in the future. The evidences of the planned attack will also be more convincing if they are close to the date of an attack. On the other hand, if the moment of the future attack is so close that it is no longer avoidable, then the self–defence from preventive becomes pre-emptive.

### 3 Conclusions

The need for achievement of a “certain threshold” may serve as a deterrent mechanism for the use of force. However, it is difficult to define precisely this threshold. Among other issues, it is important to consider the geographic features of the victim state. As M. Shaw has pointed out, Russia and China can absorb the initial attack and are able to regroup and attack in response even if they lose hundreds of miles of their territory. Other countries, which are not so well-geographically endowed, will not be able to do that [22]. The point of view that if this threshold is clearly defined, the offender will deliberately and purposefully use force that borders but does not violate it and, in this way, will disturb the peaceful existence of the victim state for a long time, is also correct. In such situations the cumulative approach provided by Y. Dinstein may be used. According to it a group of attacks is considered as one. However, such approach could provoke the rebukes about the failing to comply with the principle of proportionality [23]. In practice, this approach was used by Israel. But it was not accepted during the discussions in the Security Council [24]. It is also important to take into consideration the aim of the certain military action of the offender (the victim state should find an answer to the question – does the offender use the force against the territorial integrity or political independence of the victim state or is it just an unplanned incident, which is connected with technical mistakes and does not contain the intention to attack?). Thus, the right to self-defence should not primary depend on the severity of the force used by the offender. It should be based on the principles of necessity, imminence and proportionality. At the same time the severity of the armed action of the offender state should affect the nature and extent of self-defence activities applied within the framework of the principle of proportionality.

The diverging understanding of the criteria and conditions for anticipatory (preventive and pre-emptive) self – defence poses a greater threat to international peace and security than possible “opening the door” to pre-emptive self–defence in the regulatory framework. The hope that a bright case of anticipatory self– defence will be brought to the International Court of Justice and that it will not only assess the factual and legal circumstances of the case, but will set out a comprehensive set of conditions and criteria for the legal use of anticipatory self–defence may not be fulfilled. The present reality confirms the need for sufficiently clear legal framework for the use of force for self – defence before the victim state has actually suffered from an armed attack.

Thus, the use of force for pre-emptive self-defence could be based on the following conditions:

- 1) the existence of convincing evidences, proving soon completion of the preparations for the devastating attack or proving the attack itself at the moment of its actual commencement;

- 2) it is not possible to prevent the attack by other means and methods:
- the victim state has used the peaceful methods of settlement of conflict available to it and these actions have not changed the offender's intention to attack;
  - the use of the other methods of peaceful settlement of the conflict is an obvious waste of time or there is so little time until the beginning of an attack that its use only for the methods of peaceful attack prevention is inappropriate, namely, there is a reasonable belief that these methods will not change the intent of the offender to attack. However, the victim state does not have to fully abandon the search for and the use of peaceful methods of resolving the conflict after the use of force for self-defence.

These conditions for the use of pre-emptive self-defence correspond to the criterion of imminence and necessity and include a requirement to make efforts to settle a dispute peacefully before the use of force.

In addition to the above-mentioned conditions the principle of proportionality should be obeyed, namely, the response should be at the same time proportional to:

- the means and the scale of an imminent attack;
- the purpose of defending the victim state.

## References

- [1] A. Randelzhofer, *The Charter of the United Nations*, a commentary, Edited by Bruno Simmma, Second edition, volume I, Oxford University Press, 796 (2002)
- [2] International Court of Justice, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) Merits, §191, 195, 228 (1986). Available at: <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>
- [3] International Court of Justice, Case concerning oil platforms (Islamic Republic of Iran v. United States of America), §72 (2003). Available at: <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>
- [4] A. Randelzhofer, *The Charter of the United Nations*, a commentary, edited by Bruno Simmma, second edition, volume I, Oxford University Press, 796 (2002)
- [5] C. Greenwood, Self-Defence, Max Planck Encyclopedia of Public International Law, Oxford Public International Law (2011). Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL>
- [6] Y. Dinstein, *War, Aggression and Self – Defence*, New York: Cambridge University Press, Fourth edition, 195 (2005)
- [7] E. Wilmshurst, *Principles of International Law on the use of force by states in self – defence*. ILP WP 05/01, Independent Royal Institute of international Affairs: Chatham House, 18 (2005). Available at: <https://www.chathamhouse.org/publications/papers/view/108106>
- [8] W.H. Taft IV., *Self-Defense and the Oil Platforms Decision*, Yale J. Internat. Law, **29**(2), article 3, 295, 300 (2004). Available at: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1232&context=yjil>
- [9] A. Randelzhofer, *The Charter of the United Nations*, a commentary, edited by Bruno Simmma, Third edition, volume I, Oxford/New York: Oxford University Press, 1421 (2012)

- [10] Y. Dinstein, *War, Aggression and Self – Defence*, New York: Cambridge University Press, fourth edition, 190–191 (2005)
- [11] S. Schaffer, *U.S. jet fires on Iraqi site*. The Associated Press (1998). Available from: [https://products.kitsapsun.com/archive/1998/07-01/0075\\_u\\_s\\_\\_jet\\_fires\\_on\\_iraqi\\_site.html](https://products.kitsapsun.com/archive/1998/07-01/0075_u_s__jet_fires_on_iraqi_site.html)
- [12] C. Gray, *International Law and the Use of Force*, New York: Oxford University Press, 96 (2000)
- [13] E. Wilmshurst, *Principles of International Law on the use of force by states in self – defence*. ILP WP 05/01, Independent Royal Institute of international Affairs: Chatham House, 18 (2005). Available at: <https://www.chathamhouse.org/publications/papers/view/108106>; Shaw M.N., *International Law*, Fifth edition. United Kingdom: Cambridge University Press, 2004, p. 1027
- [14] International Court of Justice, Case concerning oil platforms (Islamic Republic of Iran v. United States of America), §64, 72 (2003). Available at: <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>
- [15] International Court of Justice, Corfu channel case (United Kingdom v. Albania), §48 (1949). Available at: [http://www.worldcourts.com/icj/eng/decisions/1949.04.09\\_corfu\\_1.htm](http://www.worldcourts.com/icj/eng/decisions/1949.04.09_corfu_1.htm)
- [16] International Court of Justice, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), §109, 111 (1986). Available at: <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>
- [17] M.N. Shaw, *International Law*, fifth edition, United Kingdom: Cambridge University Press, 1026–1027 (2004)
- [18] International Court of Justice, Case concerning application of the Convention on the prevention of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), §398-401 (2007). Available at: <http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>
- [19] International Court of Justice, Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), §101–102 (1998). Available at: <http://www.icj-cij.org/files/case-related/94/094-19980611-JUD-01-00-EN.pdf>
- [20] J.A. Green, *The rationetemporis elements of self–defence*, *Journal on the Use of Force and International law* **2**, 104–105 (2015). Available at: <https://www.tandfonline.com/doi/abs/10.1080/20531702.2015.1043097>
- [21] A. Cassese, *International Law*, Oxford University Press, 357–362 (2005); S.S. Alexandrov, *Self-Defense Against the Use of Force in International Law*, The Hague/London/Boston: Kluwer Law International, 100–101 (1996); R. Värk, *The Legal Framework of the Use of Armed Force Revisited*, *Baltic Security and Defence Review*, **15**(1), 73 (2013)
- [22] E. Wilmshurst, *Principles of International Law on the use of force by states in self – defence*. ILP WP 05/01, Independent Royal Institute of international Affairs: Chatham House, 48 (2005). Available at: <https://www.chathamhouse.org/publications/papers/view/108106>
- [23] Y. Dinstein, *War, Aggression and Self – Defence*, New York: Cambridge University Press, Fourth edition, 230–231 (2005)
- [24] C.J. Tams, *The Use of Force against Terrorists*, *Eur. J. Internat. Law*, **20**, 370 (2009) Available at: <http://www.ejil.org/pdfs/20/2/1793.pdf>