

Is the State's use of force legal?

1. State the general rule Art 2(4) - *All members shall refrain in their international relations from the threat or use of force against the territorial integrity or sovereignty of any state, or in any other manner inconsistent with the purposes of the United Nations* - general prohibition on the unilateral use of force by states under any circumstances. Art 2(4) provides a general prohibition on the use of force, with only very limited exceptions. **2. Does an exception apply?**

i. Self Defence "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...": Art 51 UN Charter. **Necessity and Proportionality** - any use of force in self-defence must be both a necessary and proportionate response to the original armed attack on the state - *Nicaragua (Merits)* ***Is it necessary?*** Necessity - act of self-defence must be a response to an instant and overwhelming threat/attack with no choice of alternate means and moment of deliberation - must be of utmost necessity in the moment: *Caroline case*. ***Is it proportionate?*** Defending state can only do what is reasonably necessary in order to negate threat of attack, nothing more: *Caroline Case*

Oil Platforms Case: The Rule - confirms statement in *Nicaragua* that use of force in self-defence must be both a necessary and proportionate response to an original armed attack. Test - look at nature of original armed attack and ask what countermeasures are reasonably in order to deter or sufficiently prevent future attack/threat of attack.

Armed Activities in Congo - 1. Example - even if Uganda could claim self-defence, its actions in engaging in long term occupation of a huge portion of Congo was hugely disproportionate to the relatively minor cross-border raids by armed rebels from Congo.

Nuclear Weapons Advisory Opinion - no definitive statement on whether use of nuclear weapons could ever be a proportionate and necessary use of force in self-defence.

No Self-Defence for Territorial Disputes - self-defence cannot be used as a justification for the settling of territorial disputes - too dangerous to allow otherwise - *Ethiopia's Claims 1-8*

ii. Collective Self-Defence - collective self-defence is right of states to come to mutual defence of other states subject to armed attack. Usual rules of self-defence apply, in addition to two further requirements which determine the legality of the intervention of the third party states: - *Nicaragua (Merits)*; Art 51

a. **Statement by victim state** – there must be an official statement made by the state victim of the of armed attack that such an attack has occurred, AND

b. **Request for Assistance** - victim state must make a discrete request for assistance to the intervening state for them to provide help.

Can self defence be exercised against a non-state actor? Non-state actor: entity that participate or acts in international relations; organizations with sufficient power to influence and cause a change even though they do not belong to any established institution of a state; eg. NGO's, Multi-national corporations, International media, Violent non-state actors (rebel groups/ISIS), Religious groups (Amnesty, Oxfam, Greenpeace). Contentious area of law.

Wall Advisory opinion: Distinguished from the 9/11 attacks as threat originates from inside the territory. Judge Kooijmans and Buergenthal suggested that the right of self defence does not only apply to attacks by state actors. *Democratic republic of Congo v Uganda*: Kooijmans and Simmons JJ reaffirmed this idea that self defence can be exercised against a non-state actor.

Anticipatory self-defence – Controversial. **iii. Security council resolution.**

Is the State responsible for the act?

This area of law is mainly governed by the Draft articles on state responsibility. **RULE:** Article 1 states that every internationally wrongful act of a state entails the international responsibility of that State. Art 2 provides that there is an internationally wrongful act when conduct: (1) is attributable to that state under international law; and (2) the conduct constitutes a breach of an international obligation of that state. **1. Is there an internationally wrongful act?** *i. Did the state breach an international legal obligation?* There is a breach of an int obligation by a State when an act of that State is not in conformity with what is required of it by that obligation: art 12. The conduct must be in breach of an int legal obligation: arts 3; *Eletronica Sicala SpA (ELSI)* (United States v Italy). *ii. Was the state bound by the obligation at the time?* The State must be bound by the obligation in question at the time the act occurs: art 13. Articles 14-15: It is important to determine the time of the occurrence of the acts, which can be of the following types: Non-continuing character: the breach of an int obligation occurs when the act is performed; continuing character: the breach of an int obligation extends over the entire period when the act continues; State's obligation is to prevent an act: the breach of an int obligation occurs when the event occurs and extends over the entire period it remains; Composite acts: breach of an int obligation occurs when the action or omission occurs and extends over the entire period. **2. Is the wrongful act attributable to the state?** It is not enough only to have a wrongful act. The wrongful act concerned must also be attributed to the State: arts 4-11. **i. Is the conduct by an organ of the state?** Art 4 deals with the conduct of organs of a State: exercising executive, legislative and judicial functions of the State – or any other functions of the State eg. Army, police and other government instrumentalities. Once it has been found the instrumentality was an organ of the State, this is sufficient to satisfy the requirement of attributability. It does not matter that the State has not authorised the behaviour concerned or that the domestic law prohibited the behaviour concerned. An unlawful act may be imputed to the state even where it was beyond the legal capacity of the official involved, providing, as Verzijl noted in the *Caire* case, that the officials 'have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity'.

This was seen in the case of *Youman's Claim*. Where Mexico argued that the soldiers acted outside the scope of their authority/ have exceeded their powers through conducting illegal acts and therefore cannot be imputed to the State. Held that the participation of the soldiers in the murder at Anganguero cannot be regarded as acts of soldiers committed in their private capacity as it was clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer.

ii. If not an organ of the state, when is the state still responsible for the act? A *State is responsible for the conduct of a person or entity (not a State organ) exercising governmental authority: **Art 5**. *A state is responsible for the conduct of an organ placed at the disposal of the State: **Art 6**. eg. The health professionals of the first country are working at the disposal of the receiving country – the receiving country is responsible, country. *A State is responsible for the conduct of a person or entity when the State organ, person or entity exceeds its authority or contravenes instructions: **Art 7**. eg. Police or armed forces sent by state to protect foreign nationals: The state would still be liable for their armed forces – must look at whether acting in official capacity. *A State is responsible for the conduct of a person or group of persons acting on the instructions, under the direction or control of the State: **Art 8**. Difficulties have arisen in seeking to define the necessary direction or control required for the second proposition. In the *Nicaragua* case, the IC declared that in order for the conduct of the contra guerrillas to have been attributable to the US, who financed and equipped the force, 'it would in principle have to be proved that that state had effective control of the military or paramilitary operation in the course of which the alleged violations were committed'. In other words, general overall control would have been insufficient to ground responsibility. *A state will be liable for the conduct of a person or group of persons exercising governmental authority in the absence or default of the official authorities: **Art 9** *A state will be liable for the conduct of an insurrectional or other movement: **Art 10** eg. Rebel group challenging the main govt. if successful in forming own govt. state would be liable. *A state will be liable for the conduct (not attributable to the State under the above articles) acknowledged and adopted by a State as its own: **Art 11**.

iii. Did the state have control? - Control is an essential element of the doctrine of attribution. *Test for Degree of Control Necessary:* Two tests for the degree of control that needs to be exercised by the state over the person/group for liability to arise: a. "Effective Control" - state