

Evaluating the Role of the ICJ in interpreting the UN Charter's Prohibition on the Use of Force and Providing Clarity on States' Inherent Right of Self-Defence

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Abstract

This paper discusses how the International Court of Justice (ICJ) has contributed to the interpretation of the UN Charter's prohibition on the use of force through its decisions in many landmark cases. There are two questions this paper proposed to address. First, how does the ICJ interpret the UN charter's prohibition on the use of force. Second, to what extent does the ICJ's judgements and advisory opinions have provided clarity on states' inherent right of self-defence. To answer the questions, literature-based research, including legal sources such as case-law, legislation and legal doctrines are used. According to this research, in deciding the cases concerning the use of force, the ICJ mainly based its judgement on the customary international law on prohibition of the use of force instead of referring to the UN Charter's prohibition on the use of force, until in the *Nicaragua* case when it provides details on what actions are equivalent to the use of force. Furthermore, by providing a definition of armed attack and using the customary international law on the principles of Necessity, Proportionality and Immediacy, the ICJ has clarified states' right of self-defence through its judgments and advisory opinions in several cases.

Keywords: International Court of Justice; Use of Force; Self-Defence



Introduction

According to Article 1(1) of the UN Charter, the main objective of the United Nations is to maintain international peace and security. In order to achieve this objective, the United Nations prohibits the use of force amongst States. The prohibition on the use of force can be found in Article 2, paragraph 4 of the UN Charter, which states that "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" (UN Charter, 1945: art 2). According to the Charter, member states are obliged to settle "their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (UN Charter, 1945: art 2).

However, the Charter also recognises the exceptions to the prohibition on the use of force. These exceptions are the use of force authorised by the Security Council under Chapter VII on the cases amount to a "threat to peace, breach of peace and act of aggression" (UN Charter, 1945: art 39) and the right of individual or collective self-defence to use force under Article 51 of the Charter. According to Article 51 of the United Nations Charter, states have an "inherent right of individual or collective self-defence" (UN Charter, 1945: art 51). Therefore, apart from these two particular circumstances, the use of force is not permitted.

As the United Nations' main judicial organ, the main task of the International Court of Justice (ICJ) is to help the United Nations secure international peace, by settling disputes and developing rules of international law. Since 1945, the ICJ has been called upon by the United Nations to interpret the UN Charter provisions on the use of force (Kreß, 2015), particularly regarding the prohibition on the use of force in the Article 2 (4) and the acknowledgement of the right of individual and collective self-defence in Article 51 of the UN Charter.

It is supposed that the ICJ has made a significant contribution to the interpretation of the UN Charter's prohibition on the use of force through cases involving the use of force, such as *Corfu Channel*, *Nicaragua*, *Oil Platforms* and *DRC v Uganda*. The legality of the use of force has also been discussed in the ICJ's Advisory Opinions such as *The Nuclear Weapons Opinion* and the *Wall Opinion*. However, it is suggested that in making its decisions on cases involving the use of force, The ICJ has a very strict approach to the UN Charter on the provisions on the use of force. Therefore, this essay will assess the role of the ICJ in interpreting the UN Charter's prohibition on the use of force and will go on to analyse the extent to which the ICJ's judgements and advisory opinions have provided clarity on states' inherent right of self-defence.

The Role of the ICJ in Interpreting the UN Charter's Prohibition on the Use of Force

The first occasion for the ICJ to interpret the UN Charter Prohibition on the Use of Force was done through its judgment on the *Corfu Channel* (*Corfu Channel* case, 1949). The UK brought an action against Albania for the damage done by mines to British warships passing through the Corfu Channel, an international strait located in Albanian territorial waters. The ICJ held that the UK was responsible for its use of force and rejected its claim that they acted on behalf of the international community. The ICJ also rejected the UK's narrow interpretation of the prohibition of the use of force in their argument that they are allowed to exercise the use of force whose purpose was not to take down the government or seize a state's territory (Gray, 2011).

It is considered that in its *Corfu Channel* judgement, the ICJ did not pronounce any language referring to Article 2 (4) of the UN Charter. Instead, the Court, in examining the question of the legality of the UK's use of force, stated that "the UK violated the sovereignty" of Albania (*Corfu Channel* case, 1949: 36). This issue of language choice later became a controversial issue at the time. Therefore, Judge ad hoc Ecer in his Dissenting Opinion held that, as the juridical instrument of the UN, the ICJ's role is to promote peaceful relations between states. Therefore, the ICJ should have mentioned Article 2(4) and Article 42 of the UN Charter in a more specific way (Gray, 2012: 3).

Furthermore, in its subsequent decisions, the ICJ continued to be very careful in choosing language regarding the legality of the use of force. The ICJ had not utilised the UN Charter's provision on the use of force as a direct reference in making its Dispositifs. As it happened in the *Corfu Channel* case, this act of self-restraint by the ICJ has also created dissents between the judges in *Oil Platforms*, a case concerning the US's intervention on the conflict between Iran and Iraq during 1980sh (*Oil Platforms* case, 2003: 161). In its claim, Iran alleged the US for its use of force against Iranian oil platforms. The US defended itself by claiming that their actions were a form of self-defence against mines attacks carried out by Iranian missiles, particularly on its US-flagged oil tanker (*Oil Platforms* case, 2003: 48). The US justified its action of self-defence as "necessary to protect its essential security interests" (U.N.T.S. 93, 1955: art XX). Although the ICJ claimed that it could not be justified for the US to exercise self-defence using the reference of Article XX of the 1955 treaty, the ICJ still did not express any provision of the UN Charter in its Dispositif. The ICJ's hesitancy in pronouncing the language was thus regretted by several judges. Therefore, in their Separate and Dissenting Opinions, three judges mentioned that the ICJ should have reemphasized the final rules of the Charter and that it should also have expressly stated that the USA's actions had violated the UN Charter provision on the use of force (*Oil Platforms* case, 2003).

The ICJ showed similar caution in its language concerning the legality of the use of force through its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case. In its judgement, the ICJ provided only a single paragraph regarding international law on the use of

force (Advisory Opinion, 2004). This unclear formulation of the paragraph was considered has raised a significant amount of commentary.

It is supposed that after the *Corfu Channel*, no cases on the use of force were decided on their merits, until in 1989 when the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* was brought to the ICJ (Greenwood, 1996: 373). In its claim, Nicaragua argued that the United States not only carried out its military and paramilitary actions against Nicaragua, but it had also actively supported the armed activities conducted by opposition groups against the new Government of Nicaragua from 1981 to 1984 (*Nicaragua case*, 1986). The United States justified its action by referring to the Article 51 of the UN Charter of an inherent right of collective self-defence arguing that they provided “proportionate and appropriate assistance” (*Nicaragua case*, 1986: 126, 128) to Costa Rica, Honduras, and El Salvador in response to Nicaragua’s acts of aggression against those countries. However, in deciding the case, the Court did not make reference to the UN Charter law. Instead, the ICJ based its judgement on customary international law prohibiting the use of force (*Nicaragua case*, 1986: 187-201). The ICJ has also clarified that the UN Charter and customary international law as a source of law continue to apply, by holding that “States in question are bound by these rules both on the level of treaty-law and that of customary international law” (Akande, 2011).

Apart from that, the ICJ had made a significant contribution to the UN Charter on the use of force is when it provides a detailed clarification of what actions constitute as "use of force" in its finding in *Nicaragua case*. The ICJ stated that the support given to armed opposition groups in the form of arms supply and training could constitute the use of force, excluding financial support (Kreß, 2015: 574). This wide interpretation of the prohibition of the use of force by the ICJ rests on the formulation of the eighth and ninth paragraphs of General Assembly Resolution 2625. Additionally, through its judgement in this particular case, the ICJ recalled the view expressed by the International Law Commission (ILC) in 1966 that the prohibition of the use of force constitutes *jus cogens* (Jean, 2017).

Furthermore, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held that provisions on the use of force under Article 2(4) UN Charter do not specify the types of weapons, by holding that use of force is prohibited ‘regardless of the weapon employed’ (ICJ Rep, 1996: para 39). Nevertheless, the provision on the threat of force in Article 2(4) of the Charter was also stressed by the ICJ in its *Nuclear Weapons Opinion*. The ICJ held that the threat of force stated under Article 2(4) arises when a state is ready to exercise the use of force it envisaged would violate the law. Article 2(4) points that “if the use of force is unlawful the threat of it is also unlawful” (UN Charter: 1945, art 2 (4)), which means that the threat of force is an integral part of the use of force. This contradicts the opinions of some commentators who held that the prohibition of threats of violence in Article 2 (4) does not depend on the prohibition of the use of violence (Stürchler, 2007).

The most prominent case that shows the ICJ's caution regarding the language choice of the use of force is *DRC v Uganda (Case Concerning Armed Activities, 2005)*. This case arose out of Uganda's intervention on The Democratic Republic of the Congo's complex conflict from 1998 to 2003. By referring to the Definition of Aggression and the jurisprudence of the ICJ, the DRC claimed that Uganda had committed aggression, which contradicts Article 2 (4) of the UN Charter. However, despite being competent to decide the case based on Article 2(4) of the UN Charter, the ICJ chose to define Uganda's actions as a violation of the "principle of not using force in international relations" (*Case Concerning Armed Activities, 2005: para 23*). This shows that for more than a few decades, the ICJ had avoided using the provisions of the UN Charter on the use of force as a direct reference in dealing cases concerning the use of force.

The ICJ Provides Clarity on States' Inherent Right of Self-defence

1) Defining an Armed Attack

As mentioned earlier, one of the main provisions of the UN Charter dealing with the use of force is the recognition of the right of individual and collective self-defence in Article 51 (Wood, 2016). The first sentence of Article 51 of the UN Charter 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 State of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (UN Charter, 1945: art 51). This notion of states' right of self-defence is also acknowledged under the customary international law, which rules that a state has the right to exercise self-defence through use of force only when there is an armed attack (Mrazek, 1989). However, as argued by the ICJ, the source of armed attacks that give rise to the right of self-defence is not mentioned in Article 51 of the Charter. Therefore, in addressing the issues on the cases concerning self-defence which were not covered by the Charter, the ICJ relied on the principles of customary international law that underlies the right to self-defence.

It is suggested that the ICJ has clarified states' right of self-defence through its judgments and advisory opinions of cases concerning the use of force, such as *Nicaragua, Oil Platforms*, and *DRC v Uganda*. The main question raised in these cases is whether an armed attack justifying the use of force in self-defence had taken place. In the *Nicaragua case*, the crucial questions were whether Nicaragua had committed armed attacks against El Salvador, Costa Rica and Honduras and whether attacks by irregular forces could be regarded as armed attacks by a State to justify its use of force (Gray, 2012: 14). The US had failed to demonstrate that Nicaragua was responsible for armed attacks on El Salvador, although there was some proof of its involvement in providing arms to groups opposed to El Salvador's government (*Nicaragua case, 1986: para 130 155-160*). The US has also carried out several cross-border invasions from Nicaragua to Honduras and Costa Rica (*Nicaragua case, 1986: para 161, 3*). To examine this question, the ICJ referred to the Article 3(g) of the Definition of Aggression (UNGAOR, 1974), by holding that

the definition of “armed attack” could extend to cover attacks by “armed bands, groups, irregulars, or mercenaries”, and only if the actions were “a sending by or on behalf of a state” (*Nicaragua* case, 1986: para 195). It shows that although the ICJ recognised that there could be an armed attack by irregular forces, that is, by Non-State Actors, the ICJ did not include in its *Nicaragua* judgement that states' right of self-defence can be used against the NSAs' attacks (McKeever, 2009).

The similar approach was also shown in both its judgement on *DRC v Uganda* and its *Wall* Advisory Opinion. In *DRC v Uganda*, the ICJ reemphasized the same definition of armed attack it expressed in *Nicaragua*, answering the question on whether the acts of armed bands operating from the DRC constituted to an armed attack against Uganda (Gray, 2012: 15). The ICJ went on to state that self-defence could only be exercised if there was an armed attack carried out “by one State against another State” in its Advisory Opinion on *Wall* case (Advisory Opinion, 2004). This position by the ICJ was then criticized by Judge Higgins in her separate opinion, arguing that instead of limiting, the ICJ was broadening the potential for the actions of NSAs to comply with international rules on self-defence (*Nicaragua* case, 1986: para 195).

One of these famous comments established by the ICJ in its *Nicaragua* judgment state that “it will be necessary to distinguish the most grave forms of the use of force, which constitutes an armed attack, from other less grave forms” (*Nicaragua* case, 1986: para 191). This statement was regarding the ICJ's finding in *Nicaragua* that supplying arms did not constitute an armed attack (Gray, 2012: 15). The ICJ then held to the view that the right to exercise self-defence could be exercised if an armed attack had reached a certain gravity level. Moreover, the ICJ did not set limits on gravity requirements for attacks carried out by irregular forces (Gray, 2012: 15).

A similar attitude of the ICJ showing its commitment to the gravity requirement was shown in *Oil Platforms* case. The ICJ stated that, in order to justify its attacks on Iran's oil platforms, the United States needs to prove that Iran's attacks on its vessels had been identified as "armed attacks" under Article 51 of the UN Charter and as recognized by customary international law (*Oil Platforms*, 2003: para 51, 64). By relying on *Nicaragua*, the ICJ further argued that it was essential to differentiate between the most grave forms of the use of force, which amount to an armed attack, and other less grave forms. However, it did not provide a more detailed explanation of the words “grave form of the use of force” (Upeniece, 2016: 2). Therefore, it was decided by the ICJ that the missile attack on the US-flagged tanker was not an armed attack.

2) Using the Principles of Necessity, Proportionality and Immediacy

As the ICJ previously argued, the UN Charter does not provide more detailed aspects of self-defence, including the principle of necessity, proportionality and immediacy (Upeniece, 2016: 2). Therefore, the ICJ reaffirmed these principles are part of customary international law and using them as references in cases such

as *Nicaragua*, *Platform Oil*, *DRC v Uganda* and other cases. The principles of necessity and proportionality are accepted as essential and practical legal requirements for the right to self-defence (Simma, 2002: 805). The principle of necessity requires conditions where peaceful settlements are no longer an option. It means that when the situation is considered to threaten the survival of a state, only the use of force can improve the situation (Green, 2015: 101). This principle also needs conclusions consisting of facts about an imminent armed attack that requires an immediate response (Shaw, 2003: 1031). If the requirements are met, the use of force for self-defence can be carried out.

According to Cassese, “the principle of proportionality requires not only the insurance of the balance between the injury caused by the wrongdoing state and the countermeasures, or at least the insurance that the countermeasures do not seriously exceed the injury created by the wrongful act, but also follows the aim to force the offender to discontinue its wrongful conduct” (Cassese, 2005: 306). Furthermore, weapons used for self-defence do not have to be the same as weapons used for attacks, which underlie the fact that the prohibition on the use of nuclear weapons initially did not originate from the principle of proportionality (Simma, 2002: 805). Meanwhile, the ICJ could not make conclusive decisions about the legality or illegality of the use of nuclear weapons for self-defence, where the survival of a state is seriously threatened. As a result, the interpretation of this principle will likely change depending on the circumstances of each case.

The last requirement of self-defence is the principle of immediacy. According to this principle, if the time interval between an armed attack and an act of self-defence lasts long, the action is still considered lawful if the delay is assessed objectively (Dinstein, 2005: 242–243). It is therefore argued that the beginning of an armed attack no need to be sufficiently close to the action for self-defence. However, the interpretation of time in this principle between these two actions depends on the context of each condition.

In *Nicaragua case*, the ICJ argued that the UN Charter “does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (*Nicaragua case*, 1986: para 176). The ICJ also assess the principle of immediacy, emphasizing that “the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated” (*Nicaragua case*, 1986: para 237).

The ICJ referred to the principle of necessity and proportionality in *Oil Platform case*, by holding that “the United States must also show that its actions were necessary and proportional to the armed attack made on it and that the platforms were a legitimate military target open to attack in the exercise of self-defence” (*Oil Platform*, 2003: para 51). While at the same time in *DRC v Uganda*, the ICJ held that “since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the ICJ has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances

of necessity and in a manner that was proportionate” (*Case Concerning Armed Activities*, 2005: para 147). However, the ICJ did not address questions of whether the use of force for self-defence could be carried out against the threat of use by the opposing armed forces.

Furthermore, the right of collective self-defence of Article 51 of the UN Charter was also discussed by the ICJ, particularly in *Nicaragua case*. In *Nicaragua*, the USA claimed its use of force as a form of collective self-defence against Nicaragua. In response to that, the ICJ thus provides that collective self-defence required a statement of the victim state of an armed attack declaring that they have been attacked. This decision by the ICJ was supported by the customary international law, ruling that a state is not permitted to exercise the right of collective self-defence that based on its own valuation of the situation (Schrijver, 2016: 12). Moreover, the ICJ held that collective self-defence could not be exercised without the request of the victim state (*Nicaragua case*, 1986: para 195-199). This decision is based on the ICJ’s finding in *Nicaragua* that there was no declaration made by El Salvador, Costa Rica or Honduras that they had been victims of an armed attack. The ICJ also found that, before carrying out their actions, these states did not make statements asking for assistance from the US (*Nicaragua case*, 1986: para 231-234).

Although criticised, the ICJ continued to rely on its decision on the scope of collective self-defence in subsequent cases. In *DRC v Uganda*, collective self-defence was discussed in brief when the ICJ declared that the DRC had the right to request assistance from Sudan (*Armed Activities*, 2005: para 128). In *Oil Platforms*, the ICJ recognised that the United States had not exercised collective self-defence (Taft, 2004). It then took a chance to reaffirm the requirement of a request, holding that “The USA has not claimed to have been exercising collective self-defence on behalf of neutral states engaged in shipping in the Persian Gulf; this would have required the existence of a request made to the United States by the State which regards itself as the victim of an armed attack” (*Oil Platforms case*, 2003: para 51). Therefore, it can be argued that the ICJ, in making its decisions regarding cases concerning the right to self-defence, has always relied on the customary international law.

Conclusion

It is considered that in dealing with cases relating to the use of force, the ICJ seemed to avoid referring to the UN Charter’s prohibition on the use in its judgements. Instead, the ICJ based its judgement on the customary international law on prohibition of the use of force, especially in earlier cases such as *Corfu Channel*, *Oil Platform and Wall*. The Court began to refer to the UN Charter’s prohibition on the use in its judgement of *Nicaragua case* when it provides a detailed explanation of what actions amount to the use of force. Furthermore, in interpreting the UN Charter’s provision on self-defence, the ICJ relied more on customary international law underpinning the states’ right of self-defence. It reflected on its judgements in *Nicaragua*, *Oil Platforms*, and *DRC v Uganda* when the ICJ produced the definition

of armed attack that justifies the right of self-defence. While acknowledging that armed attacks can be carried out by Non-State Actors in its judgements of *DRC v Uganda* and *Nicaragua*, the ICJ, in its *Wall* Advisory Opinion, did not recognise the use of force for self-defence against the NSAs. The ICJ also made references to the principles of Necessity, Proportionality and Immediacy as part of customary international law when establishing requirements for the right to self-defence.

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