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Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization

18–26 February 2020

Identification of new subjects

Analysis of the application of Articles 2 (4) and 51 of the Charter of the United Nations

Working paper submitted by the delegation of Mexico

I. Objectives

- Create a space for discussion by all United Nations Member States of Article 51 of the Charter, in the light of its interrelation with Article 2 (4), and enable an exchange that will provide a clearer understanding of the positions of Member States with regard to the operation, scope and limits of the right to self-defence.
- Analyse recent practice with regard to the submission of reports under Article 51 of the Charter, in particular those concerning actions taken against non-State actors, including responses to such reports, or lack thereof, and the precedents such actions may set for future situations.
- Analyse the substantive, procedural, and transparency and publicity issues related to Article 51 with a view to providing greater clarity on the implementation of the Article.

II. Background

1. As noted in reports [A/73/33](#) (paras. 83–84) and [A/74/33](#) (paras. 85–87), at the seventy-third and seventy-fourth sessions of the United Nations General Assembly Mexico brought to the attention of the Committee a recent increase in the number communications submitted to the Security Council under Article 51 of the Charter, in particular in connection with counter-terrorism operations. In that context, it expressed concern regarding recent interpretations of the right to self-defence in response to armed attacks perpetrated by non-State actors and proposed, inter alia, that the Special Committee “consider the substantive and procedural aspects of the issue, in order to clarify the interpretation and application of Article 51 and avoid possible abuse of the right to self-defence”.



2. The above-mentioned reports indicate that various delegations expressed interest in the proposal and encouraged the representative of Mexico to present a written proposal for consideration.

3. It is worth noting that the members of the Community of Latin American and Caribbean States (CELAC), in their joint statement to the Sixth Committee on 3 October 2018, during the seventy-third session of the General Assembly, stated the following:

“We take note with concern of the increase in the number of letters to the Security Council under Article 51 of the Charter submitted by some States in order to have recourse to the use of force in the context of counter-terrorism, most of the time *ex post facto*. We reiterate that any use of force which is not in compliance with the Charter of the United Nations is not only illegal but is also unjustifiable and unacceptable. Furthermore, consideration should be given to the possibility of convening an open and transparent debate on the topic.”

4. Similarly, at the fourth informal meeting of Latin American legal advisors (AJL) on international public law, held on 26 October 2018, it was made clear, following a presentation entitled “Reflections on recent invocations of Article 51 of the Charter of the United Nations”, that there was agreement with regard to the scope of self-defence under the Charter; the importance of transparency; and the need for the international community to address terrorism, a serious threat to international peace and security, through strong action firmly grounded in international law and carried out with respect for international human rights law, international humanitarian law and refugee law. At that meeting, there was general consensus on the particular relevance of the topic and on the advisability of taking measures to ensure that it was adequately considered within the United Nations.

5. As a next step in the process, and with a view to establishing a space for open and transparent discussion among the States Members of the United Nations, the delegation of Mexico is submitting this working paper, entitled “Analysis of the application of Articles 2 (4) and 51 of the Charter of the United Nations”, for the consideration of the Special Committee.

6. This discussion will, without undermining the competence of the Security Council, provide a clearer understanding of the positions of Member States with regard to the operation, scope and limits of the right to self-defence, not only with regard to recent cases but also in relation to other situations involving non-State actors that may arise in the future, while recognizing at all times the gravity of terrorist acts, their high humanitarian, political and social cost and the threat they pose to international peace and security.

III. Issues for consideration

7. Article 1 (1) of the Charter states that one of the purposes of the United Nations is to maintain international peace and security. To that end, in Article 2 (4) of the Charter the principle is established that Members of the Organization “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”.

8. Under the legal framework of the Charter, there are two exceptions to the prohibition of the use of force between States: (i) when it is authorized by the Security Council, on the basis of Article 42; and (ii) in the exercise of the inherent right of individual or collective self-defence provided for in Article 51.

9. Article 51 of the Charter reads as follows:

“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.”

10. The following have been identified as elements of self-defence: (i) there has been a prior armed attack; (ii) the response to the armed attack is necessary and proportional; and (iii) the Security Council is notified immediately of measures taken in self-defence and such measures are halted when the Security Council takes the necessary action, if any.

11. Recently there have been some cases where the right to self-defence enshrined in Article 51 of the Charter has been invoked to justify the use of force in the territory of another State, allegedly in response to – or in the most extreme cases, to prevent – armed attacks by non-State actors, in particular terrorist groups.

12. The aim is therefore to analyse the legal scope of the above-mentioned obligations and identify elements for discussion among Member States, taking into consideration not only the interpretation that has been given to these provisions of the Charter in the context of counter-terrorism but also the precedents that the aforementioned actions could set for other cases in the future. In that context, it would be useful for the Special Committee to consider, inter alia, the following issues:

(a) **Substantive issues:** Given that under Article 51 the right to self-defence may only be invoked if there has been an armed attack:

(i) What must be included in reports submitted to the Security Council under Article 51?

(ii) What level of detail is required in reports under Article 51 as a precondition for the invocation of self-defence?

(iii) How should Article 51 be interpreted with regard to attacks perpetrated by non-State actors, in particular, but not exclusively, terrorist attacks?

(iv) Under Article 51 of the Charter, can self-defence be invoked in respect of another State when that State is considered to lack the capacity or the will to address an armed attack?

(b) **Procedural issues:** Given that the inherent right to self-defence may be exercised, under Article 51, “until the Security Council has taken measures necessary to maintain international peace and security”, and that “measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council”:

(i) What is a reasonable time frame for the submission of a report under Article 51 following an armed attack?

(ii) Must a report under Article 51 be submitted before the use of force in self-defence, or can it be submitted afterwards?

(iii) Is it desirable and necessary for the Security Council to discuss, examine and consider reports submitted to it under Article 51?

(iv) Is it necessary for the Security Council to take measures necessary to maintain international peace and security after a State has invoked its right to self-defence?

(v) How can a lack of action by the Security Council following receipt of a report under Article 51 be interpreted, in particular with regard to recurring reports concerning the same situation?

(c) **Transparency and publicity issues:** Since reporting under Article 51 is an obligation under the Charter and is directly related to issues of international peace and security, it serves the interests of all Member States. In this regard:

(i) How can the transparency and publicity of reports submitted under Article 51 be improved?

(ii) What can be done to facilitate the access of Member States to these reports?

(iii) What can be done to facilitate the access of Member States to any responses and reactions to these reports?

(iv) What can be done to improve access to information, taking into account the delay in the publication of the Repertoire of the Practice of the Security Council?

(v) How can the lack of responses from Member States to reports submitted under Article 51 be interpreted, taking into account the current lack of transparency and publicity?
