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**Идентичные письма Временного поверенного в делах
Постоянного представительства Мексики при Организации
Объединенных Наций от 10 января 2025 года на имя
Генерального секретаря и Председателя Совета Безопасности**

Имею честь настоящим препроводить документ с изложением позиции Мексики по вопросу о толковании и применении статьи 51 Устава Организации Объединенных Наций, касающейся неотъемлемого права на самооборону (см. приложение)*.

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Временный поверенный в делах

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**Приложение к идентичным письмам Временного поверенного
в делах Постоянного представительства Мексики при
Организации Объединенных Наций от 10 января 2025 года
на имя Генерального секретаря и Председателя Совета
Безопасности**

**Mexico’s position paper on the interpretation and application of
Article 51 of the Charter of the United Nations**

I. Introduction

1. The prohibition on the use of force enshrined in Article 2(4) of the United Nations Charter is “the cornerstone of the United Nations Charter,”¹ and of the international legal order.² This prohibition is subject to two exceptions: enforcement measures under Chapter VII of the Charter, and the right of self-defence under Article 51. However, over the past decade, the interpretation and application of Article 51, governing the right of self-defence, has become increasingly controversial, especially when it has been invoked against non-state actors. Since 2014, at least thirteen States have notified the Security Council of military actions purportedly undertaken on the grounds of individual or collective self-defence which go beyond the scope of Article 51. Notably, since 2021, Article 51 has been invoked on at least 78 occasions, raising concerns about its misuse and expansive interpretation, considering its risks to the collective security system and, hence, to international peace and security. Even when these invocations of self-defence began in 2014 in the context of counter-terrorism activities against a particular non-state actor, nowadays they have expanded considerably to other contexts and scenarios, including beyond counter-terrorism-related matters, making this practice more arbitrary and worrisome.

¹ *Armed Activities on the Territory of the Congo (Congo v Uganda)* [2005] ICJ Rep 168, para. 148.

² Gibson John S, ‘Article 51 of the Charter of the United Nations’ [1957] 13(2) *India Quarterly* 121–138; see also Kolb Robert, *International Law on the Maintenance of Peace* (Edward Elgar 2018) 322–23 (calling Art. 2(4) an “axiom of modern international law”).

2. Central to this debate is the so-called “unwilling or unable doctrine”, which has been defined as “a proposed mechanism for states to justify the extraterritorial, unilateral and unconsented use of force in another state against threats posed by non-state actors”³; controversially including the pre-emptive use of force, against non-state actors operating within another State’s territory without its consent. So far, this purported doctrine has been embraced mainly by a few Western states.⁴ Some Member States have indeed reacted and either directly opposed,⁵ or seriously questioned this interpretation.⁶ However, many Member States have not been in a genuine position to react to such practices, largely as a result of the institutional lack of transparency of the Security Council’s procedure on reports submitted under Article 51.⁷ This silence cannot be considered acquiescence on this novel interpretation of Article 51, nor a formation of a norm of customary international law.⁸

3. In this context, Mexico presents this paper with a view to explain and clarify its legal position regarding the interpretation and application of Article 51 of the U.N.

³ Alonso Gurmendi Dunkelberg, “‘Bombable geographies’ and the international Monroe: a global south history of the unwilling or unable standard” (2024) 11(1-2) *Journal on the Use of Force and International Law* 240.

⁴ Brunnée Jutta and Toope Stephen J., ‘Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable To Change International Law?’ [2018] 67(2) *British Institute of International and Comparative Law* 263–286; UN SC “Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council” (23 October 2023) UN Doc [S/2023/813](#); UN SC “Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council” (27 March 2023) UN Doc [S/2023/227](#); UN SC “Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council” (26 August 2022) UN Doc [S/2022/647](#); UN SC “Letter dated 27 February 2021 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council” (27 February 2021) UN Doc [S/2021/202](#); UN SC “Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General” (23 September 2014) UN Doc [S/2014/695](#); UN SC “Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council” (20 August 1998) UN Doc [S/1998/780](#); UN SC “Letter from the Chargé d’affaires of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council” (10 December 2015) Un Doc [S/2015/946](#); UN SC “Letter from the Chargé d’affaires of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council” (31 March 2015) UN Doc [S/2015/221](#); UN SC “Letter from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council” (9 September 2015) UN Doc [S/2015/693](#); UN SC “Letter from the Chargé d’affaires of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council” (24 July 2015) UN Doc [S/2015/563](#).

⁵ The Non-Aligned Movement, —composed by 120 countries—, has consistently rejected that anticipatory self-defense can ever be lawful (Cf. Jeffrey L Dunoff, Steven R Ratner, and David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (4th edn, Aspen Casebook 2015)), even the former UN Secretary-General, Kofi Annan, expressed strong reservations on anticipatory means of self-defense (Cf. Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004) 198-192).

⁶ Alex Moorehead, ‘Brazil’s Robust Defense of the Legal Prohibition on the Use of Force and Self Defense’ (Just Security, 20 April 2018) <https://www.justsecurity.org/55126/brazils-robust-defense-legal-prohibition-force/> accessed 2 December 2024; Dire Tladi, *The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Wither International Law?* in O’Connell and others (eds), *Self-Defence against Non-State Actors* (CUP 2019) 87.

⁷ ILC, Report of the International Law Commission on the Work of its 70th session (30 April–1 June and 2 July–10 August 2018), UN Doc [A/73/10](#) [141-142]; UNGA Res 203 (11 January 2019) UN Doc [A/RES/73/203](#) (11 January 2019) (see conclusion 10 (3)); Pablo Arrocha O., ‘An Insider’s View of the Life-Cycle of Self-Defense Reports by UN Member States’ (*Just Security*, 2 April 2019) <https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/> accessed 2 December 2024.

Charter. Mexico also encourages all Member States to study this issue carefully with a view to having an open and transparent discussion within the U.N., and it also seeks to obtain more transparency and accountability from the Security Council regarding the way in which this organ addresses current invocations of self-defence by Member States.

II. Background

4. Given the circumstances described above and the grave risk of eroding the collective security system established in the U.N. Charter, at the seventy-third and seventy-fourth sessions of the General Assembly, Mexico brought to the attention of the Special Committee on the Charter of the United Nations that there had been an increase in the number of communications submitted to the Security Council under Article 51, in particular in connection with counter-terrorism operations. In that context, it expressed concerns regarding recent interpretations of the right of self-defence in response to 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 of self-defence”.⁹ Various delegations expressed interest in the proposal and encouraged Mexico to present a written proposal for consideration.¹⁰

5. On 3 October 2018, the Community of Latin American and Caribbean States (CELAC), composed of 33 U.N. Member States, in its joint statement to the Sixth Committee, “took note with concern over the increasing number of reports submitted to the Security Council under Article 51 of the Charter by some States, most of the time *ex post facto*, to justify the use of force in the context of counter-terrorism operations.” In that statement, CELAC members reiterated that any use of force not in compliance with the Charter of the United Nations is not only illegal but unjustifiable and unacceptable. Furthermore, they emphasized the need to convene an open and transparent debate on the topic.¹¹

6. On 26 October 2018 at the fourth informal meeting of Latin American legal advisors on international public law, participants reached a clear agreement following a presentation titled “Reflections on Recent Invocations of Article 51 of the Charter of the United Nations”. They agreed on the scope of self-defence under the Charter, the importance of transparency, and the need for the international community to address terrorism through robust measures firmly rooted in international law. It was highlighted that these measures should be implemented with full respect for international human rights law, international humanitarian law, and refugee law, underscoring a general consensus on the relevance of the topic and the importance of its appropriate consideration within the U. N. framework.

⁸ DA Lewis, NK Modirzadeh, and G Blum, ‘Quantum of Silence: Inaction and Jus ad Bellum’ (*The Harvard Law School Program on International Law and Armed Conflict*, 2019) <https://pilac.law.harvard.edu/quantum-of-silence> accessed 2 December 2024.

⁹ UN GA Sixth Committee (73rd Session) “Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization” (1 March 2018) UN Doc [A/73/33](#) (83 - 84); UN GA Sixth Committee (74th Session) “Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization” (28 February 2018) UN Doc [A/74/33](#) (85 - 87)

¹⁰ *Ibidem*.

¹¹ UN GA Sixth Committee (73rd Session) “Measures to eliminate international terrorism” (3 October 2018) UN Doc [A/C.6/73/SR.1](#) (38).

7. On 7 February 2020, with a view to establishing a space for open and transparent discussions amongst Members of the United Nations, Mexico submitted a 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 at its 2020 session,¹² while acknowledging that the Security Council is the competent United Nations organ to take at any time such action as it deems necessary in order to maintain or restore international peace and security in accordance with Article 51 of the Charter.¹³

8. On 24 February 2021, Mexico, as an elected member of the Security Council, convened an Arria formula meeting on the theme “Upholding the collective security system of the Charter of the United Nations: the use of force in international law, non-state actors and legitimate self-defence”. As a result of this meeting, delegations stressed the importance of holding a dialogue on the interpretation of Article 51 of the Charter, as well as on its direct impact on the collective security system.¹⁴ The discussions and the number of participants in this informal meeting reinforced the need to have an appropriate forum for a universal, dedicated and focused discussion on these issues in an open and transparent manner. Despite the fact that there were only 3 hours allocated to the meeting and that Member States had only 3 minutes to intervene, 33 delegations participated showing a great array and divergence of views as well as great interest in this issue.¹⁵ Many delegations indicated that the three minutes allocated for their participation were not enough to fully address such a complicated and delicate topic, evidencing the need for a broader and deeper discussion on this issue.

9. It is important to recall that pursuant to Article 24 (1) of the U.N. Charter, the Security Council holds the primary responsibility for the maintenance of international peace and security. Under the first sentence of Article 51, a particular exercise of the right of self-defence is permitted only until the Security Council takes the necessary measures. To allow the Security Council to intervene promptly, the second sentence of Article 51 requires that any actions taken in self-defence must be reported immediately to the Council. However, although the reporting practice has steadily increased in recent years, countries are often not made aware of these reports submitted under Article 51. Moreover, despite the significance of the issues raised in these reports, the Security Council does not thoroughly discuss all reports submitted under Article 51. For instance, since 2020, the Security Council has reported to the General Assembly that it has not addressed the entirety of Article 51 submissions. Specifically, in 2023, four reports were not discussed;¹⁶ in 2022, one report was

¹² UN GA Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (2020 session) “Analysis of the application of Articles 2 (4) and 51 of the Charter of the United Nations” (7 February 2020) UN Doc [A/AC.182/L.154](#).

¹³ UN GA Sixth Committee (75th Session) “Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization” (2 March 2020) UN Doc [A/75/33](#) (84–87).

¹⁴ Naz K. Modirzadeh and Pablo Arrocha O., ‘A conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the origins, objectives, and context of the 24 February 2021 ‘Arria-formula’ meeting convened by Mexico’ [2021] 8(2) JUFIL 291–342; Adil Ahmad Haque, ‘The use of force against non-state actors: all over the map’ [2021] 8 JUFIL 278.

¹⁵ UN SC Agenda Item 128 (a) Strengthening of the United Nations system (75th session) “Chair’s summary of the Arria-formula meeting of the Security Council on the theme “Upholding the collective security system of the Charter of the United Nations: the use of force in international law, non-State actors and legitimate self-defence” UN Doc [A/75/993-S/2021/247](#).

¹⁶ UN SC “Report of the Security Council for 2023”, Part V Matters brought to the attention of the Security Council but not discussed at meetings of the Council during the period covered (17 May 2024) UN Doc [A/78/2](#) [see reports [S/2023/845](#), [S/2023/877](#), [S/2023/923](#); [S/2023/1070](#)].

overlooked;¹⁷ in 2021, seven reports were not addressed by the Council;¹⁸ and in 2020, ten reports were not considered.¹⁹ This lack of attention confirms the need for a wider discussion of this matter.

10. In this context, it is necessary and relevant to have a space open to all Member States to discuss these issues. With this in mind, Mexico brought a proposal to the Special Committee, given its mandate to “...examine in detail the observations received from Governments concerning suggestions and proposals regarding the Charter of the United Nations and the strengthening of the role of the United Nations with regard to the maintenance and consolidation of international peace and security; consider any additional specific proposals that Governments may make with a view to enhancing the ability of the United Nations to achieve its purposes; and list the proposals which have been made in the Committee and to identify those which have awakened special interest”.²⁰ This mandate is renewed on a yearly basis by the General Assembly, calling for the continued consideration of proposals concerning the question of the maintenance of international peace and security in all its aspects in order to strengthen the role of the United Nations,²¹ confirming that this organ has both the mandate and the competence to address this issue. The Special Committee is therefore a competent subsidiary organ of the General Assembly to clarify the interpretation and application of the United Nations Charter, as well as to review proposals for the maintenance of international peace and security, and to improve UN procedures that do not require amendments. This would not be duplicative of the role and mandate of the Security Council; it would be a technical legal discussion, and it would enhance transparency and the involvement of all Member States on a very relevant and timely issue.

11. Since 2022, Mexico has continued to resubmit its proposal to include an agenda item in the Special Committee to discuss the substantive and procedural aspects of the application and interpretation of Article 51 of the Charter. However, taking into consideration that the Special Committee operates by consensus, a minority of States – all of whom have invoked the purported “unwilling or unable doctrine” – have not allowed for the proposal to be included in the substantive agenda of the Special Committee, despite the growing and increasingly widespread support it has garnered in each session. This abuse of consensus has not only prevented the consideration of the proposal but has also rendered the Special Committee unable to adopt a report in all its chapters for three consecutive years.²²

¹⁷ UN SC Report of the Security Council for 2022, Part V Matters brought to the attention of the Security Council but not discussed at meetings of the Council during the period covered (30 May 2023) UN Doc [A/77/2](#) [see reports [S/2022/206](#)].

¹⁸ UN SC Report of the Security Council for 2021, Part V Matters brought to the attention of the Security Council but not discussed at meetings of the Council during the period covered (20 May 2022) UN Doc [A/76/2](#) [See reports [S/2021/209](#); [S/2021/285](#); [S/2021/614](#); [S/2021/623](#); [S/2021/693](#); [S/2021/736](#); [S/2021/790](#)].

¹⁹ UN SC Report of the Security Council for 2020, Part V Matters brought to the attention of the Security Council but not discussed at meetings of the Council during the period covered (16 June 2022) UN Doc [A/75/2](#) [See reports [S/2020/1264](#), [S/2020/90](#), [S/2020/242](#), [S/2020/479](#), [S/2020/729](#), [S/2020/1307](#), [S/2020/16](#), [S/2020/19](#), [S/2020/20](#), [S/2020/81](#)].

²⁰ UN GA Res [A/RES/3499 \(XXX\)](#) (15 December 1975).

²¹ UN GA Res [A/RES/78/111](#) (11 December 2023).

²² UNGA Sixth Committee (79th Session) “Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization” (22 November 2024) UN Doc [A/79/473](#) (OP16).

III. Mexico's legal position

12. Given this impasse and the growing number of reports submitted by Member States to the Security Council invoking purported measures of self-defence that go beyond the scope of Article 51, Mexico is compelled to clarify its legal position on this issue, without prejudice to the consideration of this issue in the Special Committee or in any other U.N. forum.

13. Mexico hereby submits its position paper on this matter in light of the fact that a few States are *de facto* blocking a conversation, and in order to reiterate that there is no general practice nor *opinio juris communis* to uphold the legal validity of the purported “unable and unwilling doctrine”.

14. 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, Article 2 (4) of the Charter establishes 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”.

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

16. 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.”

17. The following have been identified as legal elements concerning an exercise of the right of self-defence: (a) there has been a prior armed attack; (b) the response to the armed attack is necessary and proportional; and (c) the Security Council is notified immediately of measures taken in self-defence, and such measures are ceased when the Security Council takes the necessary action, if any.²³ Furthermore, the scope of Article 51 is limited to armed attacks from one State to another,²⁴ including non-states actors only insofar their acts are attributable to a State under the rules of the responsibility of States for internationally wrongful acts.²⁵

18. As mentioned before, recently there have been some cases where the right of 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 extreme

²³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [194, 237]; *Oil Platforms (Iran v USA)* [2003] ICJ Rep 161 [43, 51, 73–77]; *Armed Activities (n1)*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ GL No 131, [2004] ICJ Rep 136 [139]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [41].

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n23) [139]; *Nicaragua* (n23) [194]; *Armed Activities* (n1) [148-165]; J. S. Gibson (n2); Brunnée Jutta et al. (3).

²⁵ *Nicaragua* (n23) [115-116]; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission, 2001, vol II, Part Two, article 8, commentaries (3) and (4).

cases, to prevent – attacks by non-state actors, in particular terrorist groups. This practice has increased, especially after the ICJ held that reports under Article 51 have an evidentiary significance to determine whether a State is or is not acting under self-defence.²⁶ This trend has coincided with a reliance by a few States on the contentious of the purported “unwilling or unable doctrine”.²⁷ However, a detailed analysis of the various communications invoking Article 51 under this framework reveals significant variations in tone and reasoning by States.²⁸ This lack of consistency highlights the absence of both uniformity and widespread acceptance of the purported “unwilling or unable doctrine”.²⁹ Moreover, several States have expressed views contrary to this interpretation,³⁰ With commentators indicating that this doctrine “remains controversial under international law, with various theoretical and practical problems surrounding its emergence”.³¹ Thus, the lack of a position of the Security Council, the limited and inconsistent extent of State practice, together with the divergence of opinions expressed on this matter, do not allow an inference that the purported “unwilling or unable doctrine” is now generally accepted among the international community of States. On the contrary, it shows that it cannot be invoked as a valid interpretation of Article 51 as a basis for invoking self-defence due to the lack of sufficient elements to determine an accepted practice amongst States. As stated in the most recent edition of the Oxford commentary to the U.N. Charter on this issue, “the unclear position of the Security Council and the limited extent of State practice **does not allow an inference** that the purported “unwilling and/or unable doctrine” is now generally accepted among the international community of State.”³²

19. Given that these invocations of self-defence go beyond the scope of Article 51 and that there is neither a general practice nor *opinio juris* to support these activities as a rule of customary international law, they are contrary to international law and the measures undertaken in connection with those invocations constitute and illegal use of force.

²⁶ *Nicaragua (Merits)* [200, 373].

²⁷ C.J. Tams, ‘Self-Defence against Non-State Actors: Making Sense of the “Armed Attack” Requirement in ME O’Connell and others (eds), *Self-Defence against Non-State Actors* (CUP 2019) 90, 149.

²⁸ O Corten, ‘The “Unwilling or Unable” Test: Has it Been, and Could it be, Accepted?’ (2016) 29 *Leiden J Int L* 777, 781; see also H.P. Aust, Article 51. in Bruno Simma (ed) et al, *The Charter of the United Nations: A Commentary* (4th Edition) (Oxford University Press 2024) 1773, 1796.

²⁹ J. Brunnée & Toope S.J. (n4) 263, 277; P Starski, ‘Right to Self-Defense, Attribution and the Non-State Actor: Birth of the “Unable or Unwilling” Standard?’ (2015) 75 *ZaöRV* 496-497.

³⁰ UN SC “Identical letters from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council” (22 September 2015) UN Doc [A/70/385-S/2015/727](#); UN SC “Identical letters from the Syrian Arab Republic addressed to the Secretary-General and the President of the Security Council” (29 December 2015) UN Doc [A/70/673-S/2015/1048](#); UN SC Statement of the Representative of Venezuela to the Security Council on the 7504th Meeting (17 August 2015) UN Doc [S/PV.7504](#) [3-4]; UN SC “Letter dated 3 March 2008 from the Chargé d’affaires of the Permanent Mission of Ecuador to the United Nations addressed to the President of the Security Council” (3 March 2008) Un Doc [S/2008/146](#); UN SC Statement of the Representative of Brazil to the Security Council on the 8262nd Meeting (17 May 2018) UN Doc [S/PV.8262](#) [44-45]; UN SC Statement of the Representative of the Russian Federation to the Security Council on the 7271st Meeting (19 September 2014) UN Doc [S/PV.7271](#) [18-19]; UN SC Statement of the Representative of Mexico to the Security Council on the 9221st Meeting (15 December 2022) UN Doc [S/PV.9221](#) [22].

³¹ Ch. Henderson, *The Use of Force and International Law* (2nd Edition) (Cambridge University Press 2024), 419. See also R. Goodman, ‘International Law on Airstrikes against ISIS in Syria’, (Just Security, 28 August 2014) <https://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/> accessed 9 January 2025.

³² Aust (n28),1797 (emphasis added).

20. The United Nations Charter must be interpreted according to the general rules on treaty interpretation reflected in the Vienna Convention on the Law of the Treaties.³³ Although, in principle, the rules governing treaty interpretation do not preclude the possibility of modifying the content of Article 51 utilizing the techniques of interpretation,³⁴ such interpretation should reflect the agreement of the parties to the U.N. Charter. Due to its paramount importance within the U.N. Charter and the international legal order, any interpretation of Article 51 must be strict.³⁵ Hence, one or more reports reflecting a wide re-interpretation of Article 51 would carry legal significance only if they reflect the agreement of the States parties to the U.N. Charter and evolve into an established practice that gained widespread acceptance among Member States.³⁶ In the present case, neither element is met. Whereas no general practice by States exists, also none of those few cases of interpretation is accepted as legally valid.

21. On the issue of silence as acquiescence regarding customary international law aspects of the right of self-defence, the conclusions of the International Law Commission on the “Identification of customary international law” indicate that “failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), *provided that States were in a position to react and the circumstances called for some reaction.*”³⁷ Moreover, in its commentary to this conclusion, the International Law Commission asserts that for inaction to imply consent or acknowledgment of a practice under customary international law, two conditions must be met: the State must have been in a position where a response was expected, and it *must have had knowledge of the practice*—either directly or through its public nature—as well as *sufficient time and ability to respond*. If the State lacked awareness or a reasonable opportunity to react, its silence cannot be taken as acceptance.³⁸

22. Following this analysis, the perceived “silence” of many Member States regarding reports invoking self-defence under Article 51 and the purported “unable or unwilling doctrine” cannot be equated with acquiescence.³⁹ This silence stems partly from the lack of transparency in the handling of Article 51 communications within the Security Council. Although formally public, they are difficult to access for non-Council members. They are not circulated to all Member States, require specific information to retrieve from the U.N. documents system, and are often excluded from timely updates in the Repertoire of the Practice of the Security Council. This opacity is compounded by resource limitations faced by many delegations, which hinder their staff capacity to undertake this difficult research and to engage in meaningful debate or challenge questionable practices. As a result, most Member States are in practice excluded from discussions on critical legal interpretations related to the use of force, leaving them unable to voice concerns and to partake in the processes which may lead, or not, to the development of customary international law.⁴⁰

23. Consequently, and in line with this legal analysis, Mexico categorically rejects the notion of the purported “unable or unwilling doctrine” as a justification for invoking Article 51 of the U.N. Charter and the use of force,

³³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) [A/CONF.39/11/Add.2](#) (VCLT) Art 31-33.

³⁴ *Ibidem* Art 31 (3) (b).

³⁵ D. Akande and KA Johnston, ‘Implications of the Diversity of the Rules on the Use of Force for Change in the Law’ (2021) 32. *EJIL* 679, 685

³⁶ Aust (n28) 1774.

³⁷ ILC (n7) Conclusion 10.3. Emphasis added.

³⁸ *Ibidem* pp 141-142.

³⁹ Cf. *Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1961] ICJ [23].

⁴⁰ P. Arrocha O. (n7).

including preventively, against non-state actors. This purported “doctrine”, referenced by only a handful of States, contravenes customary international law and far exceeds the limits established by Article 51 itself. The argument that a State is “unwilling” or “unable” to control threats to its or another State’s security is very vague and can be applied arbitrarily and disproportionately against any State, particularly the most vulnerable ones, such as postcolonial and Global South countries.⁴¹ This purported “doctrine” contradicts the principles of sovereignty and territorial integrity and paves the way for abuses and expansive interpretations of the right of self-defence, which could severely undermine the collective security system.

24. The very notion of “non-state actors” in this context is extremely broad, extending beyond international law, and provides for a significant risk of abuse stemming from unilateral political classifications. The concept is open-ended and allows States to use it as a *carte blanche* to frame almost any group as a threat in order to justify the illegal use of force in other State’s territory without its consent.

25. Mexico reiterates that acts of force by irregular armed groups are not armed attacks within the scope of Article 51,⁴² and that in any event, attribution of conduct to the state according to the law of state responsibility is required to exercise the right of self-defence.⁴³ The purported “unwilling or unable doctrine” does not provide criteria for attribution of an armed attack, being instead “amenable and open to subjective judgments”,⁴⁴ which is also why on these grounds, Mexico categorically rejects it.

26. The jurisprudence of the International Court of Justice reinforces this position. In its *Nicaragua* judgment,⁴⁵ the Court determined that self-defence applies only to “armed attacks” between States. This was reaffirmed in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁴⁶ and in the *Democratic Republic of the Congo v. Uganda* judgement,⁴⁷ where the Court reiterated that international law prohibits the use of force against non-state actors within the territory of another State without its consent and without the Security Council’s authorization.

27. Mexico also denies any possibility for a State to use force in preventive self-defence,⁴⁸ including against non-state actors, within the territory of another State without its consent. Pre-emptive self-defence is clearly illegal under the *jus ad bellum* and the U.N. Charter.⁴⁹ Article 51 establishes that the use of force in the exercise of

⁴¹ A. Rodiles, *Coalitions of the Willing and International Law – The Interplay between Formality and Informality* (CUP 2018), at 63; see also D.I. Ahmed, ‘Defending Weak States against the “Unwilling or Unable” Doctrine of Self-Defence’, (2013) 9 *Journal of International Law and International Relations* 1, at 16; A.B. Lorca, ‘Rules for the “Global Law on Terror”: Implying Consent and Presuming Conditions for Intervention’ (2012) *NYU Journal of International Law & Politics* 1, 44; M Hakimi, ‘What Might (Finally) Kill the Jus ad Bellum?’ (2021) 74 *Current Legal Problems* 101, 113.

⁴² Aust (n28), 1795.

⁴³ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Article 8.

⁴⁴ Rodiles (n41), 64.

⁴⁵ *Nicaragua* (n23) [194-195].

⁴⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (n23) [139].

⁴⁷ *Armed Activities* (n23) [148-165].

⁴⁸ T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (CUP 2010) 253–254; AS Deeks, ‘Taming the Doctrine of Pre-Emption’ in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 661, 662–63

⁴⁹ Rodiles (n41), at p. 61.

the inherent right of self-defence is permissible only “if an armed attack occurs”. Therefore, the notion of a pre-emptive or preventive right of self-defence is contrary to the wording of Article 51, as well as to its objective and purpose, which is to reduce to a minimum the unilateral use of force in international relations.

IV. Conclusion

28. In conclusion, the purported “unwilling and unable doctrine” does not reflect a valid interpretation of the U.N. Charter, and it also lacks both elements of customary international law: a) general state practice and b) widespread acceptance among the international community. Moreover, it is contrary to international law given its vague and expansive nature, which goes beyond the terms of Art. 51 and, therefore, it risks undermining the principles of sovereignty, territorial integrity, the prohibition on the unilateral use of force enshrined in the Charter, and the collective security system, on which the object and purpose of the Charter, that is the maintenance of international peace and security, ultimately rests.

29. The lack of transparency in the handling of Article 51 reports further exacerbates this issue, preventing meaningful debate and scrutiny. Mexico has consistently argued that the purported “doctrine” contradicts the strict requirements of Article 51 and opens the door to arbitrary and disproportionate uses of force. Upholding the Charter’s foundational principles is essential to maintaining international peace and security and ensuring that interpretations of self-defence remain strictly aligned with customary international law and the purposes and principles of the United Nations. In light of the gravity of the matter, the Security Council, as the organ mandated to receive the reports submitted by States when they invoke Article 51, should make sure that these reports are available and known to all Member States enhancing transparency; and it should also improve the seriousness of its consideration of said reports in order to effectively fulfil its mandate under the U.N. Charter.

30. Finally, Mexico advocates for caution in addressing potential fractures within the already fragile collective security regime established by the Charter of the United Nations. The vague and expansive interpretation of Article 51 through the purported “unwilling or unable doctrine” raises significant concerns, as it creates more problems than solutions. This issue merits closer scrutiny and a broader and more inclusive dialogue amongst all Member States. Mexico urges all States to engage in this discussion. The prohibition on the use of force and the collective security system enshrined in the Charter of the United Nations must be safeguarded by all States for the interest of all States.