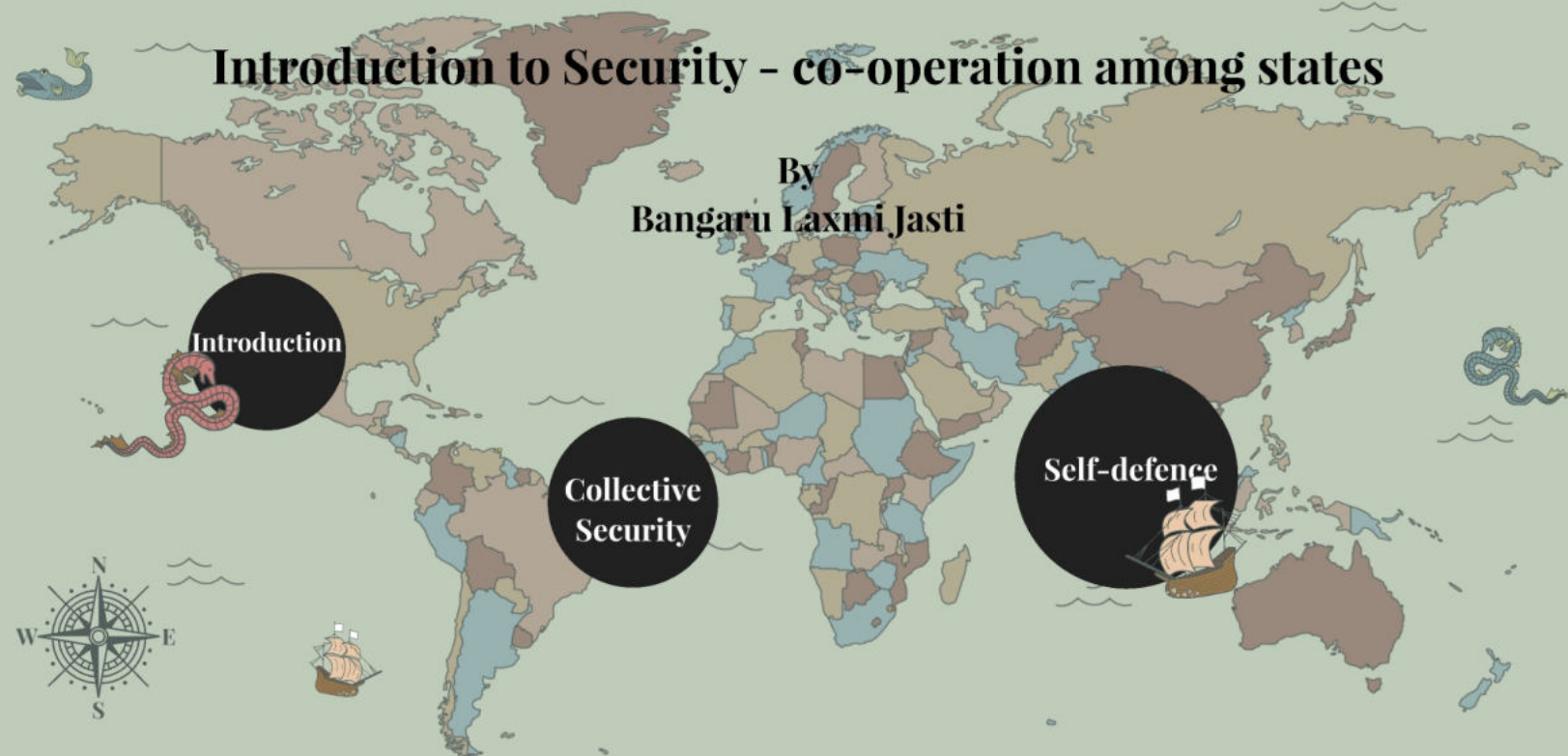


Centre for Aerospace and Defence Laws, NALSAR University of Law





Use of Force

Article 2(4) UN Charter:
'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.'

Article 2(4) = jus cogens (Nicaragua Merits 1986 para. 190)

Notion

Exceptions

What does the modern notion of force comprise?

- Political and Economic Force?
- Physical Non-Armed Force?
- Armed Force (Friendly Relations Declaration, GA Res. 2625 (XXV), 24 October 1970)
- Indirect Force?
- Cyber Operations?

Contd..

Use of Force?

- Incursion into the territory of another state?
- Acts that kill or injure persons?
- Cross frontier expulsion of populations?
- Supplying arms and training to rebels?
- Cyber-attack on the London stock market?
- Stuxnet?

Exceptions to Use of Force

There are 2 exceptions to the Use of Force which is prohibited under Article-2(4) of UN Charter

1. Collective Security (with/with out security Council authorisation)
2. Self-defence (Individual or collective)

Other Than the above two exceptions, there are other scenarios where Use of force may be permitted-

1. In Humanitarian Intervention/R2P
2. Protection of Nationals abroad
3. wars of National Liberation
4. State of Necessity
5. Hot Pursuit

Collective Security – Meaning

- Collective Security is a device of crisis management which postulates a commitment on the part of all the nations to collectively meet an aggression that may be committed by any state against another.
- Collective security stands for meeting any war or aggression by the creation of a global preponderance of power of all nations against the aggression.
- Collective Security is also regarded as a deterrent against aggression in so far as it lays down that the collective power of all nations will be used to repel aggression or war against any state.
- It is based on the principle, 'Aggression against any one member of the international community is an aggression against international peace and security. As such it has to be met by the collective efforts of all the nations'.

Collective Security– Definitions

- (1) “Collective Security is machinery for joint action in order to prevent or counter any attack against an established international order.” —George Schwarzenberger
- (2) “Collective Security clearly implies collective measures for dealing with threats to peace.” —Palmer and Perkins
- (3) “In essence, Collective Security is an arrangement among states in which all promise, in the event any member of the system engages in certain prohibited acts (war and aggression) against another member, to come to latter’s assistance.” —Schleicher

In simple words, Collective Security system guarantees the security of each state of the world against any war or aggression which may be committed by any state against any other state. It is like an insurance system in which all the nations are bound to protect the victim of an aggression or war by neutralizing the aggression or war against the victim.

Nature of Collective Security

Collective Security stands for preserving security through collective actions. Its two key elements are:

1. Security is the chief goal of all the nations.
2. The term 'collective', as a part of the concept of collective security, refers to the method by which security is to be defended in the event of any war or aggression against the security of any nation.

‘One for All and All for One’

Characteristics of Collective Security

1. A Device of Power Management
2. It accepts Universality of Aggression
3. All Nations are committed to pool their power for ending Aggression
4. Global Preponderance of Power
5. Admits the presence of an International Organisation
6. Collective Security System is a Deterrent against War
7. Aggression/war is the enemy and not the State which commits it

Collective Security and UN

Collective Security has been laid down in Chapter-VII "Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". (Article-39-51)

Article 39 UN Charter

‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’

Article 42 UN Charter

‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’

Article 27(3) – authorisation is subject to P5 veto

Examples/Instances of use of CS by UN

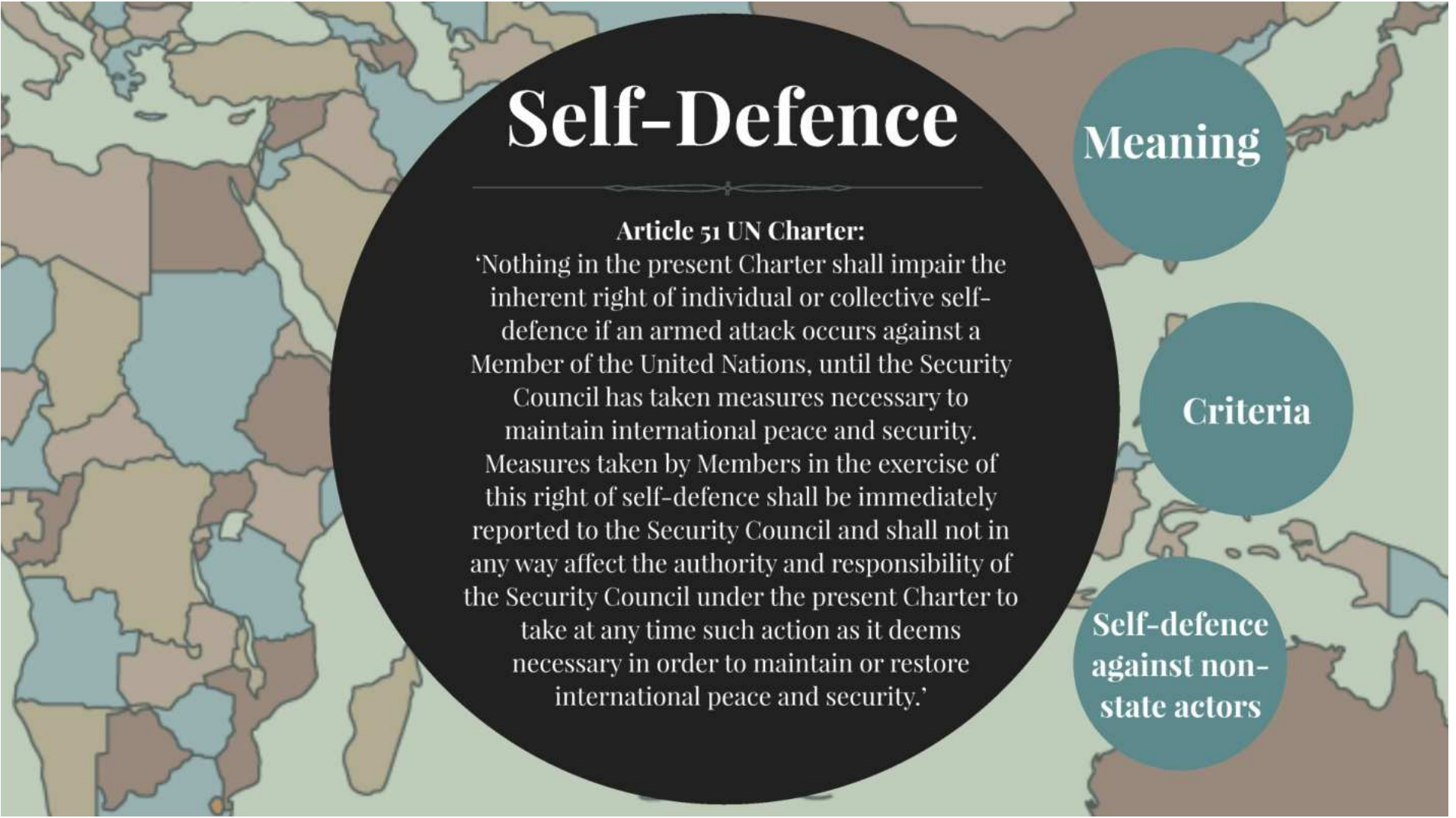
- Korean Crisis (1950)
- Suez Crisis (1956)
- Hungarian crisis of 1956

(during the period 1956-90 Collective Security system under the United Nations failed to work successfully in securing international peace and security because of several factors)

- Lebanon crisis, the Iran-Iraq War - failed
- Iraqi act of aggression - Gulf War - 1990-1991
- Kosovo - 1999 - Not approved
- Afghanistan's Al Qaeda's terrorist regime - 2001
- war against Iraq - 2003 - Not approved

Criticism

- ◊1. It is Idealistic in Nature and Scope
- ◊2. At times it is not possible to identify the Aggressor
- ◊3. Admits War as a means
- ◊4. Rules out 'Neutrality' in times of War
- ◊5. A Limited Concept
- ◊6. Absence of a Permanent International Peace Keeping Force
- ◊7. Lack of provisions for the termination of Collective Security Action
- ◊8. Dependence on Powerful States
- ◊9. Dangerous



Self-Defence

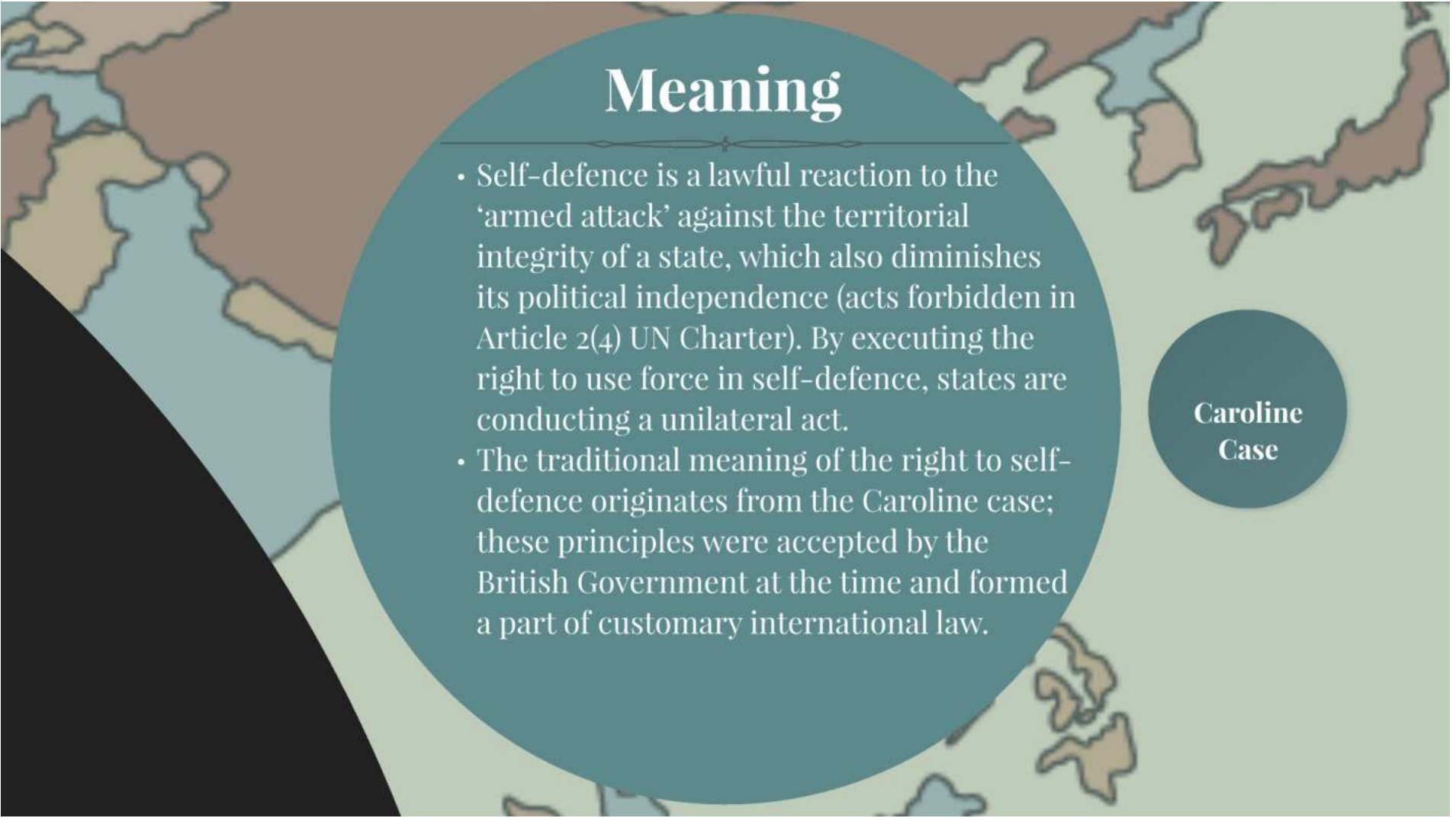
Article 51 UN Charter:

‘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.’

Meaning

Criteria

Self-defence
against non-
state actors



Meaning

- Self-defence is a lawful reaction to the 'armed attack' against the territorial integrity of a state, which also diminishes its political independence (acts forbidden in Article 2(4) UN Charter). By executing the right to use force in self-defence, states are conducting a unilateral act.
- The traditional meaning of the right to self-defence originates from the Caroline case; these principles were accepted by the British Government at the time and formed a part of customary international law.

**Caroline
Case**



❖ The Caroline case (1837)

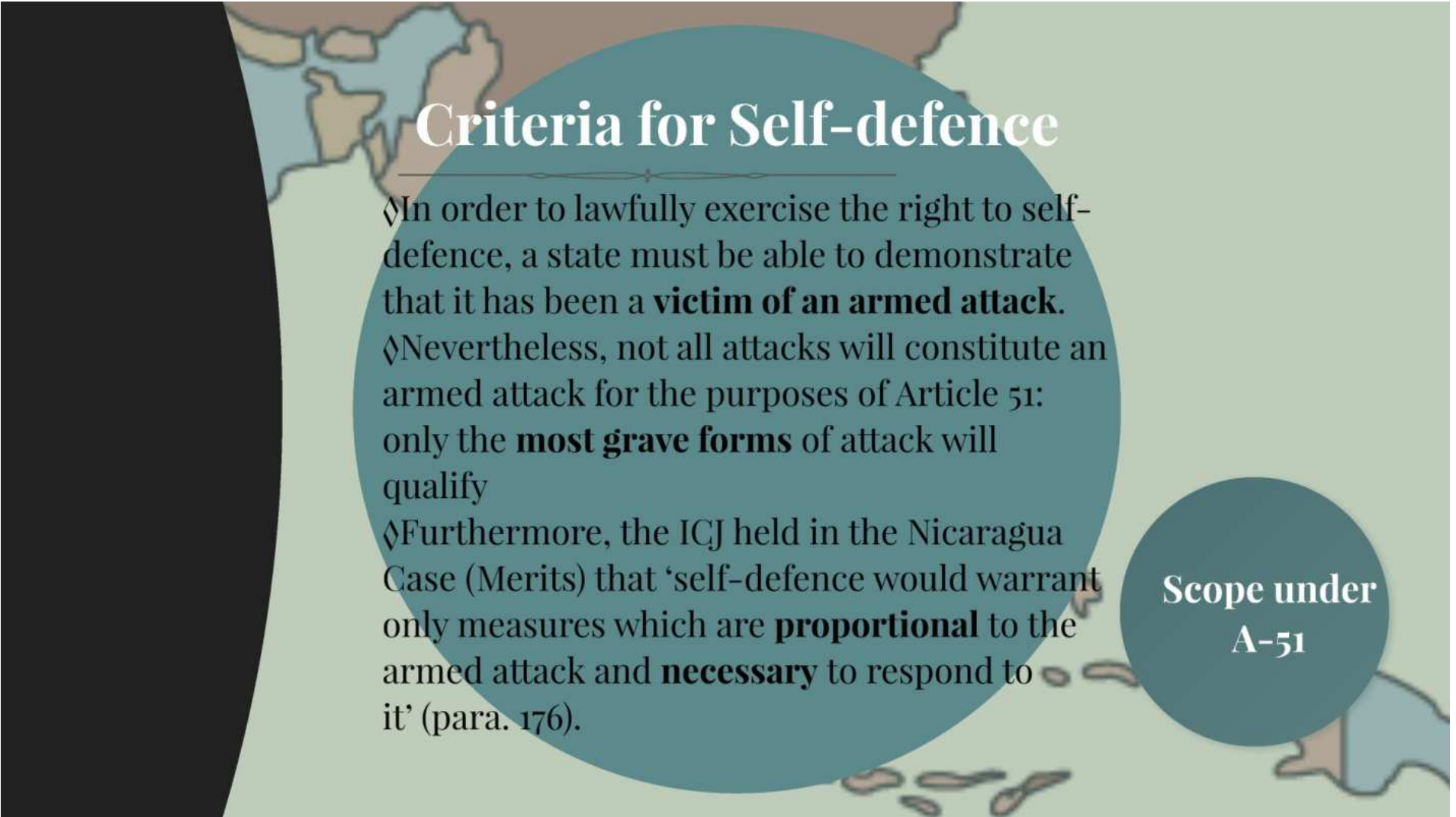
❖ This case sets out a customary international law definition of the right to self-defence.

❖ The US Secretary of State, Daniel Webster, emphasised that for the self-defence to be lawful in international law, the British Government must prove the:

necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation

and that assuming such a necessity existed at the time:

the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

The background of the slide features a stylized map of the Americas, with North and South America visible in shades of brown and tan against a light green background. A large, semi-transparent teal circle is centered on the slide, containing the main text. To the right of this circle, there is a smaller, solid teal circle containing the text 'Scope under A-51'.

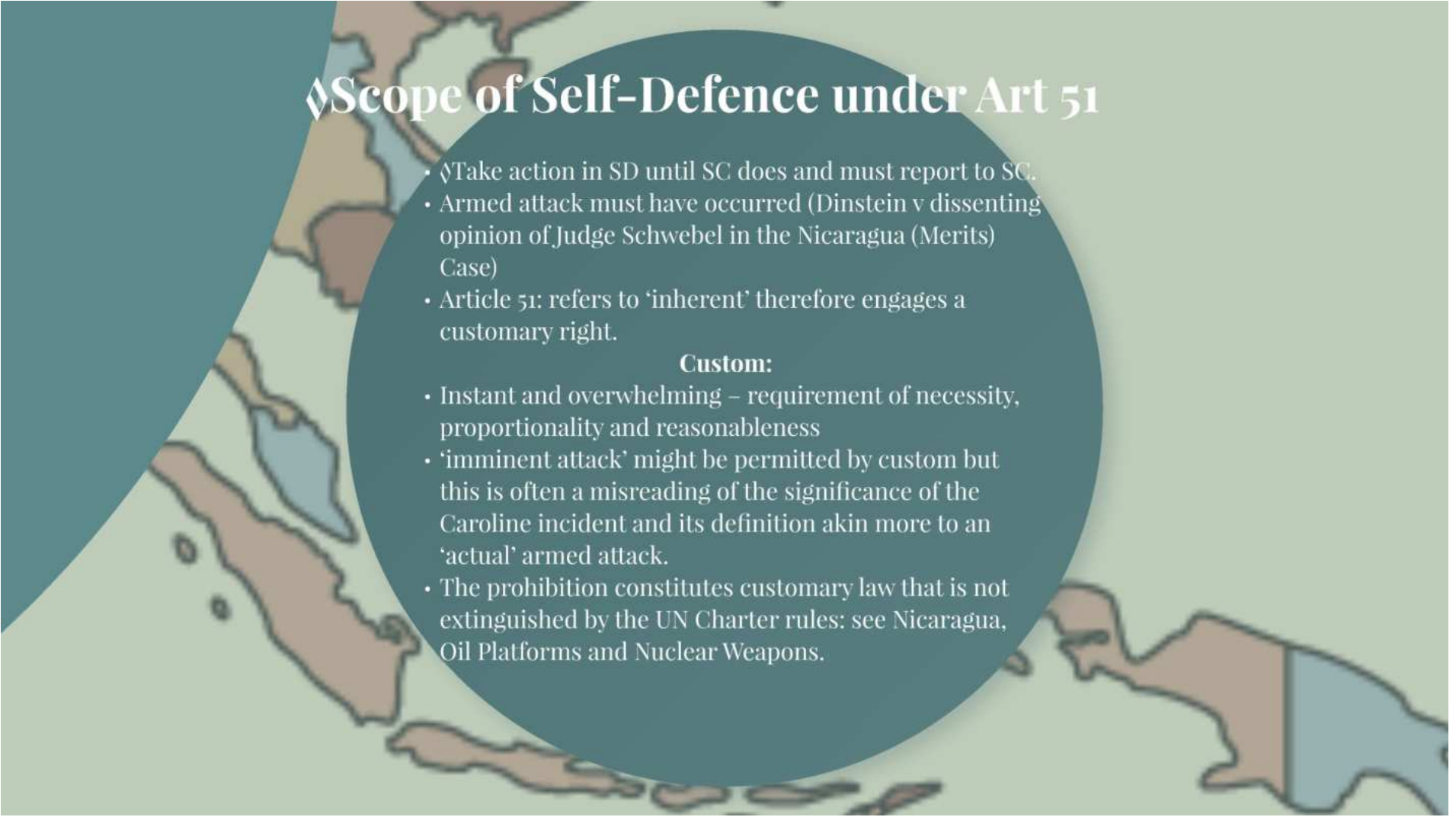
Criteria for Self-defence

◊ In order to lawfully exercise the right to self-defence, a state must be able to demonstrate that it has been a **victim of an armed attack**.

◊ Nevertheless, not all attacks will constitute an armed attack for the purposes of Article 51: only the **most grave forms** of attack will qualify

◊ Furthermore, the ICJ held in the Nicaragua Case (Merits) that 'self-defence would warrant only measures which are **proportional** to the armed attack and **necessary** to respond to it' (para. 176).

Scope under
A-51



◊ Scope of Self-Defence under Art 51

- ◊ Take action in SD until SC does and must report to SC.
- Armed attack must have occurred (Dinstein v dissenting opinion of Judge Schwebel in the Nicaragua (Merits) Case)
- Article 51: refers to 'inherent' therefore engages a customary right.

Custom:

- Instant and overwhelming – requirement of necessity, proportionality and reasonableness
- 'imminent attack' might be permitted by custom but this is often a misreading of the significance of the Caroline incident and its definition akin more to an 'actual' armed attack.
- The prohibition constitutes customary law that is not extinguished by the UN Charter rules: see Nicaragua, Oil Platforms and Nuclear Weapons.

♦Self-defence against non-state actors

The key questions are:

- When (if at all) may a state lawfully use force against non-state actors?
- May states exercise pre-emptive self-defence in anticipation of attack?

ICJ
Practice

Attribution

SC
Resolution
1378

Is state involvement required by Article 51?

ICJ AO Wall Case 2004: Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State”

ICJ Congo v. Uganda 2005: pointed out that attacks were “non-attributable to the DRC” and left open “whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces “

◊Self-defence against non-state actors

New rules on attribution?

- “effective control”-test (Nicaragua)
- [“overall control”-test (Tadic)]
- Complicity / aiding and abetting
- Unable and/or unwilling
- Safe haven

SC Resolution 1373

Soon after the 9/11 attacks, the UN Security Council issued Resolution 1373 of 28 September 2001. The language of this resolution may suggest an almost unlimited mandate to use force against terrorist groups. It reads:

Acting under Chapter VII of the Charter of the United Nations, [...]

2. Decides also that all states shall:

(b) Take the necessary steps to prevent the commission of terrorist acts [...].

In addition, the UN Security Council established a Counter-Terrorism Committee, mandated with the implementation of the resolution.

**Pre-emptive
Self Defence**

- 
- A stylized world map with a large teal circle in the center. The map uses muted colors: teal for landmasses and light green for oceans. The circle contains two bullet points in white text.
- doctrine of pre-emptive self-defence assumes the right to use force without international authorisation in order to prevent the development of a possible future attack by another state. The USA's National Security Strategy (US Government, 2002) used the term of pre-emptive self-defence, particularly with reference to terrorist attacks.
 - The idea is extremely controversial, as it goes against the core principles of international law regulating the use of force.

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