Summary

This study examines how the risk of factual mistakes is distributed between the different actors under the law on the use of force of the United Nations Charter (UNC). It explores the legal consequences when an actor wrongly assumes the factual requirements of an exception to the prohibition of force to be fulfilled. The study distinguishes between mistakes in the context of unilateral uses of force, i.e., outside a Security Council mandate, and mistakes in the collective security system: the first main question is whether a state using force against another state violates the prohibition of force under Article 2 (4) UNC when it mistakenly believes the factual requirements of a unilateral exception to be met, e.g., it wrongly assumes itself to be the victim of an armed attack although no such attack is taking place. The second key issue is how to deal with "collective mistakes", i.e., the wrong assumption of the Security Council that a state poses a threat to the peace when adopting sanctions against this state, including resorting to force.

I.

For conceptual clarity, the situation where the actor is (erroneously) *convinced* that the factual requirements of a justification to use force exist ("mistake" in the strict sense) should be distinguished from the situation where the actor is aware of having incomplete knowledge but wrongly *assumes* that these justifying facts are likely ("false suspicion"). These two types of misperception, both referring to a current situation, may finally be distinguished from misperceptions about a *prognostic element* of the relevant justification ("false prognosis"), e.g., the case in which a state concludes from the present circumstances – which it assesses correctly – that an armed attack is imminent, but, as it turns out later, the attack would actually not have occurred.

The study departs from the finding that in other branches of international law – namely, in the law of armed conflict, human rights law, international environmental and health law, and even the often-called "objective" law of state responsibility – some facts are assessed from the perspective of a reasonable actor. These branches hence take into account, to a certain extent, *reasonable mistakes* by the actor.

As the *jus contra bellum* may not necessarily be ruled by the same principles, the study continues to examine whether analogies may be drawn to domestic law. It is argued here that the problem of mistaken self-defence in international law raises similar questions to mistaken ("putative") self-defence in criminal law, while mistaken Security Council action may be compared to mistaken police action under domestic law (e.g., a police officer killing a citizen in the mistaken belief that this citizen threatens the life of another person). These analogies are based on the fact that the same normative considerations apply: "necessity rights" such as self-defence in domestic criminal law exceptionally confer to a citizen the right to use force where the state, principally enjoying the monopoly of force, is not able to protect the latter effectively in exercise of its sovereign powers. A similar relationship can be identified between self-defence under Article 51 and the primary responsibility of the Security Council for the maintenance of international peace and security (Article 24 (1) UNC), prohibiting states from resorting to force unilaterally in principle (Article 2 (4) UNC). The study infers from this analogy that, as is the case in national law, there are reasons to assume that mistakes of fact may be considered relevant to a greater extent in the context of collective security action than in the context of unilateral use of force. This is because the collective security system is in particular dependent on being *effective*, as the international community's trust in the Security Council's peacekeeping function hinges on its capacity to act.

II.

In analysing the sources of international law (Article 38 ICJ Statute), the study first turns to mistakes with regard to *unilateral* exceptions to the prohibition of force. While the study also embraces the rescue of nationals and the humanitarian intervention – the latter being considered a unilateral exception possibly emerging under customary international law, at least in future – it focuses mainly on the right to reactive and anticipatory self-defence, both being considered as lawful *de lege lata*.

The analysis of state practice mostly leads to ambiguous results: at least it emerges clearly from state practice that unreasonable (i.e., avoidable) mistakes and false suspicions based on a very low probability do not protect the acting state from violating Article 2 (4) UNC. State practice is, however, less clear with regard to reasonable misperceptions: while a number of small-scale uses of force may be read as pointing slightly towards assessing the requirements of reactive self-defence on the basis of the evidence available at the moment of action ("objective *ex ante* perspective"),

this tendency being confirmed by statements made in the context of cyber war and anticipatory self-defence, incidents in the context of terrorism point in the opposite direction ("*ex post* perspective"). Many cases – for example, the Six-Day War of 1967, the Entebbe incident of 1976, or the Iraq War of 2003 – do not give any clear answer as to the perspective from which the requirements of self-defence must be assessed.

The study therefore continues to analyse the text of Articles 2 (4) and 51 UNC, taking into account the case law of the International Court of Justice and – based on the analogy established above and a comparison of seven legal orders – the solutions that national and international criminal law provide to the problem of mistaken self-defence. The study comes to the conclusion that, first, the wording and purpose of Article 51 UNC preclude that the requirements of self-defence be read from an (objective) *ex ante* perspective. For this would equate mistaken and actual self-defence, precluding without any valid reason the right of the victim state to defend itself. Second, it is not possible to consider the (reasonably) mistaken state as being merely *excused*, as Article 2 (4) UNC does not require the acting state to act *culpably* in the sense that it must be individually reproached for the Article 2 (4) violation. Third, however, in the author's view, Article 2 (4) UNC must be read as requiring the state using force to at least *be able to know* the facts from which it follows that the use of force is unjustified. This reading follows primarily from the fact that Article 2 (4) UNC must be construed as an obligation of conduct (and not of result) that by its nature supposes the non-respect of a due-diligence requirement. From this, it can be concluded that *a state that is mistaken although it acted diligently – and could hence not avoid its misperception – does not violate Article 2 (4) UNC*. Still, such state that is using objectively unjustified force may only be considered as "limitedly justified". As Article 51 UNC must be read as requiring only an "objectively" unjustified armed attack (regardless of whether the attacker acted negligently) for the right of self-defence to be triggered, the victim state retains its right to defend itself even against the unavoidably mistaken state that is limitedly justified. This rule must, fourthly, be nuanced in case the victim state itself provoked the misperception. It can be argued that if such provocation amounts to a prohibited threat or even a small-scale use of force under Article 2 (4) UNC, the victim state is precluded from invoking its right of self-defence and claiming that the unreasonably mistaken actor violated Article 2 (4) UNC. This preclusion may be based on the Clean Hands doctrine. It is, fifthly, only the "reasonable false prognosis" that may be considered as justifying the state's using force *completely*, as the uncertainty inherent in the prognostic

element – the element that the state's misperception refers to here – is already factored into the prognostic exceptions to Article 2 (4) UNC, such as anticipatory self-defence.

The study then sets out to specify the requirements for a "diligent misperception" that protects the state from violating Article 2 (4) UNC. It can mainly be inferred from state practice that a state, in order to "err unavoidably" (in case of a mistake) or "assume diligently" (in case of a false suspicion), must (1) *identify* all relevant evidence diligently, (2) *assess* this evidence diligently in order to determine whether an armed attack is taking place or is imminent, and (3) in case it is uncertain about the existence or the origin of the attack (the case of the false suspicion), not act unless the probability of the attack exceeds a certain *de minimis* threshold. Such threshold depends on the respective costs of a false-positive decision (the decision to use force although no attack actually occurred/was imminent) and a false-negative one (the decision not to act although an attack actually occurred). Depending on whether there is a risk that the conflict may escalate and whether the force used exceeds or falls short of the assumed threat, the probability threshold may vary from a preponderance of evidence to a high probability or even a conviction beyond a reasonable doubt. Further, whether a state was mistaken depends only on the perception of the decisionmaker, while a mistake may be considered as avoidable as soon as any state organ possesses or could possess the relevant information and could be expected to transmit this information to the decisionmaker. The state's decision may be completely reviewed by a potential Court or the Security Council. There is no reason to assume that a state using force unilaterally enjoys any margin of discretion, even with regard to the assessment of evidence, for which there is no single correct result, as such assessment requires a subjective judgement of probability. Finally, in order for the international community to be able to assess whether the state formed its conviction on justifying circumstances diligently, the state must in principle reveal the relevant evidence to the public. Legitimate interests in the confidentiality of the information may only be taken into account to the extent that the international community is still in a position to review the action.

III.

With regard to collective mistakes by the Security Council – i.e., its member states – the study is based on the idea that Article 39 UNC contains material requirements that must be met for the Security Council to adopt measures under Chapter VII of the UNC. It further assumes that even if a

state does not need to have breached international law to become the target of a Security Council sanction, it must in some way be responsible for the relevant threat. For otherwise, the Security Council would disregard its obligation not to act arbitrarily, a principle stemming from the rule of law that the Council, in the author's view, is bound by.

On this basis, state practice clearly indicates that a threat to the peace does not require the relevant facts from which the threat and the targeted state's responsibility stem to exist *ex post*. A "reasonable suspicion" of the existence of these facts suffices to trigger the Security Council's power to intervene. It is in line with the textual interpretation of Articles 39 and 42 UNC, case law, and the above-mentioned analogy to national police law that the factual requirements for the threat to the peace hence need only exist from an objective *ex ante* view. This follows already from the generally recognised *discretionary competence of the Security Council* to determine the existence of a threat to the peace under Article 39 UNC, reflecting the mentioned concern that the Security Council's action must be particularly effective. However, state practice indicates that this prerogative and the resulting margin of discretion do not extend to the entire formation of the collective conviction that a threat to the peace exists but only refer to the *assessment* of evidence and the definition of the necessary probability threshold for the relevant facts to exist. For it is only these operations that necessitate an evaluative decision. As there is hence no single correct answer as to the result of these operations, it is for the Security Council, which is primarily responsible for maintaining international peace and security, not the International Court of Justice – the only organ that might potentially be able to review the action – to make these evaluative decisions. The margin of discretion may however not embrace the duty to collect the relevant evidence, as this duty does not as such include any evaluative assessment. Finally, it is argued that even where the Council's margin of discretion applies, it is limited by the prohibition of acting arbitrarily, hence excluding contradictory, incomplete, or otherwise irrational assessments. Further, the Council is bound by basic procedural obligations, notably the duty to hear the state concerned and to respect basic transparency requirements.

IV.

In sum, the analysis demonstrates that, as at the national level, factual mistakes are considered to a greater extent in the collective security system than in the context of unilateral uses of force. Nevertheless, both situations are closer together than is sometimes claimed: neither does the Security

Council hover above the Charter, nor do states using force unilaterally bear the complete risk of mistakes. This result, in the author's view, is not only the *lex lata* but also appropriately reflects the interests concerned. In this way, the *jus contra bellum* fits in well with the landscape of international law.