Clearing Uncertainties of the Jurisprudence of the ICJ on Self-Defence Against Non-State Actors

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The recent strikes by the United States against the Islamic State in Syria have again caused a fierce controversy about self-defence against non-state actors.[1] However, there is no indication of settlement of disagreement among scholars. A part of its reasons lies with the fact that they do not necessarily share common understanding of the position of the International Court of Justice (ICJ) on "armed attack *ratione personae*". This article aims to contribute to some clarification of uncertainties about the ICJ's jurisprudence on this matter.

The starting point for discussion is the following sentence in the *Wall* case: "Art. 51 of the Charter … recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State."[2] Some authors understand this as leaving room for self-defence against non-state actors.[3] Actually, *C. Gray* emphasises that the ICJ "does not say there is a right of self-defence *only* in the case of an armed attack by one state against another state."[4] According to this, the ICJ merely indicates the typical case for self-defence, namely attacks by a State, and does not exclude acts by non-state actors from "armed attack".

However, such a reading is problematic. First, by holding that "Art. 51 of the Charter has no relevance in this case",[5] the ICJ decides that the measures by Israel are not justified under Art. 51. It is important to note that to reach this conclusion, the ICJ mentions as follows: "Israel does not

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[1] The topic of self-defence dates back to the 19th century. See *C. Kreß*, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater, 1995, 219 et seq.

[2] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 194 (para. 139).

[3] See e.g. *C. Gray*, International Law and the Use of Force, 3rd ed. 2008, 135; *K. Trapp*, State Responsibility for International Terrorism, 2011, 49.

[4] *C. Gray* (note 3), 135 (italics in the original).

[5] *Wall* case (note 2), 194 (para. 139).

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claim that the attacks against it are imputable to a foreign State."[6] Considering this line of reasoning, the ICJ substantially limits the scope of self-defence under Art. 51 to the case that "armed attack" is conducted by a State.

Second, by criticising the ICJ's decision, some judges advocate self-defence against non-state actors. Especially, Judge *R. Higgins* states that "I do not agree with all that the Court has to say on the question of the law of self-defence", and insists that "nothing in the text of Art. 51 … stipulates that self-defence is available only when an armed attack is made by a State."[7] In light of the objections by some judges, the ICJ appears based on the inter-state construction of "armed attack" under Art. 51.

In addition to this, one more ambiguous sentence appears in the *Wall* case: "The situation is … different from that contemplated by Security Council resolution 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence."[8] In this part, the ICJ distinguishes two circumstances at issue, and avoids deciding whether those resolutions recognised self-defence against non-state actors.

Indeed, *C. Gray* evaluates that this sentence "could be interpreted as leaving open the possibility of self-defence against non-state actors in situations like those contemplated in Security Council resolutions 1368 and 1373."[9] However, we have already demonstrated that as far as Art. 51 is concerned, the ICJ's assumption lies in the state-centric approach to self-defence. Accordingly, in terms of logical coherence, those who defend the above interpretation need to prove that those resolutions recognised self-defence against non-state actors under *customary international law*.

Nevertheless, the ICJ doesn't investigate legal weight of the fact that a right of self-defence was recognised by those resolutions. In this author's view, there is a possibility that they recognised the legality of self-defence against non-state actors in relation to 9/11, but making reference only to them is not enough to show the existence of *usus* and *opinio juris* necessary for customary international law.

Besides the *Wall* case, another perplexing sentence emerges in the *Armed Activities* case: "Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contempo-

6 *Wall* case (note 2), 194 (para. 139).
7 Separate opinion of Judge *Higgins*, *Wall* case (note 2), 215 (para. 33).
8 *Wall* case (note 2), 194 (para. 139).
9 *C. Gray* (note 3), 136.

rary international law provides for a right of self-defence against large-scale attacks by irregular forces."[10] This passage was understood as not ruling out self-defence against non-state actors by some authors.[11]

In keeping consistency with the *Wall* case, the following interpretation might be possible: Self-defence against non-state actors is in principle illegal, but in case of "large-scale attacks" by them, it is exceptionally permitted. However, in assessing the normative meaning of the above sentence, it is necessary to look at the fact that both Congo and Uganda disputed the legality of self-defence against territorial state, not that of self-defence against non-state actors.[12]

Considering such a factual situation surrounding the *Armed Activities* case, this author believes that the ICJ just thought it unnecessary to judge whether self-defence against non-state actors is lawful. From this view, the above sentence does not have any special meaning on self-defence against non-state actors. In fact, several authors evaluate that the ICJ's state-centric approach to self-defence was unaffected.[13]

An indispensable question that the ICJ in this case must address is what degree of involvement is required between the territorial state and non-state actors. In this regard, the ICJ mentions "sending" or "substantial involvement" provided in Art. 3 (g) of the General Assembly (GA) resolution on the Definition of Aggression as an appropriate standard,[14] which has been already presented in the *Nicaragua* case.[15]

These involvements are characterised as primary rules of international law by some authors.[16] However, the ICJ's qualification may be different. By holding that attacks "still remained *non-attributable* to the DRC", the Court seems to treat these involvements as secondary rules of international law.[17] This leads to the question of relationship between Art. 3 (g) of the

[10] *Armed Activities on the Territory of the Congo*, ICJ Reports 2005, 223 (para. 147).

[11] See e.g. *K. Trapp*, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors, ICLQ 56 (2007), 144; *C. Tams*, The Use of Force against Terrorists, EJIL 20 (2009), 384.

[12] See Memorial of the Democratic Republic of the Congo, para. 5.17; Counter-Memorial of Uganda, para. 359.

[13] See e.g. *J. Kammerhofer*, The Armed Activities Case and Non-State Actors in Self-Defence Law, LJIL 20 (2007), 96; *O. Corten*, Le droit contre la guerre, 1st ed. 2008, 702 et seq.

[14] *Armed Activities* case (note 10), 223 (para. 146).

[15] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 103 (para. 195).

[16] See e.g. *T. Becker*, Terrorism and the State, 2006, 176 et seq.

[17] *Armed Activities* case (note 10), 223 (para. 146) (italics added).

GA resolution and the rules of attribution in the International Law Commission (ILC)'s Articles on State Responsibility.

As for this issue, Art. 55 of the ILC's Articles is relevant. It provides for *lex specialis derogat legi generali*. According to the Commentary, "there must be … a discernible intention that one provision is to exclude the other" for this principle to apply.[18] Therefore, in case of inconsistency between Art. 3 (g) of the GA resolution and the rules of attribution like Arts. 8 and 11 in the ILC's Articles, the former could prevail over the latter.

In conclusion, it is fair to say that although there are ambiguities in the advisory opinions and judgements of the ICJ, its jurisprudence consists of two propositions: (1) "armed attack" must be originated from a State; (2) "armed attack" requires close involvement between territorial state and non-state actors such as "sending" or "substantial involvement" provided in Art. 3 (g) of the GA resolution.

[18] *J. Crawford*, The International Law Commission's Articles on State Responsibility, 2002, 307.