"Proceduralising" Article 51

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The unilateral use of force by a State against a non-State actor in another State is nowadays routinely justified by invoking Art. 51 of the Charter of the United Nations (UN Charter).[1] The preference for a Charter-based exception has moved alternative legal bases to the background.[2] The reliance on Art. 51 in a non-State actor context has provoked intense debate whether self-defence is indeed available as a legal basis for such uses of force, and if so under what exact conditions and threshold criteria. In interpreting the applicable law, there are, as is well-known, two main camps, referred to as the "expansionists" and the "restrictivists".[3] Those two camps seem to become ever more entrenched in their positions without much appetite for compromise.

In light of this state of affairs, it may be useful to complement the substantive debate with some thoughts of a more procedural nature. It is suggested that there is merit in reflecting on processes that could, for instance, deepen the reporting obligation of Art. 51,[4] thereby insisting that this requirement goes beyond mere notification also demanding that States make formal articulations on the scope of self-defence in concrete situations and that they make an effort to substantiate claims of self-defence, both legally and factually. Hence, and somewhat analogous to the sophisticated architecture that has been designed in the past decades in UN sanctions and coun-

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1 *N. Lubell*, The Extraterritorial Use of Force against Non-State Actors, 2010, 74.

2 *C. Tams*, Self-Defence Against Non-State Actors, in: A. Peters/C. Marxsen (eds.), Max Planck Trialogue on the Law of Peace and War, forthcoming.

3 As noted by *Christian Tams*, see note 2, with further references to two relevant LJIL symposia edited by *J. Kammerhofer*, The Future of Restrictivist Scholarship on the Use of Force, LJIL 29 (2016), 13 et seq. and *T. Christakis*, International Law and the Fight Against ISIS, LJIL 29 (2016), 737 et seq.

4 For an analysis on the status of the reporting obligation, see further *Y. Dinstein*, War, Aggression and Self-Defence, 5th ed. 2011, 239 et seq., with reference also to the ICJ's statement in the *Nicaragua* Judgement that, "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence". ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), Judgement of 27.6.1986, para. 200. Also see, *J. A. Green*, The Article 51 Reporting Requirement for Self-Defense Actions, Va. J. Int'l L. 55 (2015), 563 et seq.

ter-terrorism context, some thinking should go into the creation of bodies or platforms, and ideally perhaps even panels of experts, at Security Council level that offer a more elaborate institutional environment to evaluate claims of self-defence. The underlying idea would be that the creation of a space for formal self-defence discourse encourages States, including third States, to be explicit in their position on the scope of self-defence. This will foster processes of internalisation and it may also assist in operationalising the principles of necessity and proportionality in a non-State actor setting.[5] Over time, such processes can thus contribute to establishing or consolidating international consensus over the applicable rules on self-defence.[6]

In line with the exceptional nature of self-defence, it has repeatedly been emphasised that States invoking Art. 51 of the UN Charter should provide appropriate justification, especially also in a non-State actor context.[7] Indeed, the *Leiden Policy Recommendations,* which offer expert perspectives aimed at clarifying the law and which highlight areas in which greater consensus needs to be pursued, underscore this obligation of States to justify their actions. As the excerpts below demonstrate, the Recommendations insist on several occasions on the burden of States using force in self-defence to make their case. They state:

> "Self-defence may also be necessary if the armed attack cannot be repelled or averted by the territorial State. States relying on self-defence *must therefore show* that the territorial State's action is not effective in countering the terrorist threat."

> "As the application of [the principle of necessity and proportionality] is heavily fact-dependent, States using force in self-defence should be prepared to make publicly available information and data that will support the necessity and proportionality of their conduct. International law does not prevent third States from scrutinizing the necessity and proportionality of self-defence operations from requesting further evidence."

> "Any use of force in anticipatory self-defence should be justified publicly by reference to the evidence available to the State concerned; the facts do not speak for themselves, and the State should explain, as fully as it is able to do, the nature of the threat and the necessity for anticipatory military action."[8]

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5 Effectively, this idea builds on *T. M. Franck*, On Proportionality of Countermeasures in International Law, AJIL 102 (2008), 715 et seq.

6 See Leiden Policy Recommendations on Counterterrorism and International Law, NILR 57 (2010), para. 28.

7 Leiden Policy Recommendations (note 7), para. 36.

8 Leiden Policy Recommendations (note 7), paras. 42, 44, 48 respectively (emphasis by author).

These excerpts principally focus on the requirement to factually substantiate a claim of self-defence. As a preliminary step though, States relying on self-defence should also be encouraged to construct their justifications in a legally plausible sense that adheres to the strictures of Art. 51, and if the situation so requires, to tailor those to the particularities of self-defence against non-State actors.[9] Arguably, an enabling environment could entice States in this regard and it could similarly animate third States to challenge or scrutinise claims of self-defence. To be more concrete, proceduralising Art. 51 could include some of the following:

- Holding a routine debate once Art. 51 is invoked.
- The set-up of a database collecting Art. 51 letters.
- Developing best practices on when exactly and how often letters should be submitted.
- Developing best practices on what letters should contain.
- The creation of a subsidiary body that collects and monitors submission of Art. 51 letters.
- The creation of panels of experts to gather, examine and analyse relevant information from States, including from third States, and possibly to make *prima facie* evaluations.

Although some of these measures may be modest, while others too bold, it is still submitted that contemplating procedures and a more refined institutional structure that would facilitate formal self-defence discourse does constitute another avenue, of a more procedural nature, that should be explored and that could ultimately help to reach greater consensus on the law of self-defence, and particularly also the law of self-defence against non-State actors.

[9] In their Article 51-letters, States have a tendency to focus on the nature of the initial armed attack, rather than explaining and justifying their own actions, see *A. Green* (note 4), 602 et seq.