Self-Defence Against Non-State Actors – A Practitioner's View

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Lawyers advise on law, not policy. A lawful use of force is not necessarily wise; it may be disastrous. And, in the eyes of some, an unlawful use of force is not always bad. But these are not matters for the legal adviser, acting as such. Those giving legal advice need to distinguish between law and policy if their advice is to be respected. They may hold strong views, based on personal or moral beliefs, but that should not affect the legal advice. There is no room for lofty claims about the one true meaning of Art. 51.

A lawyer advising a Government whether or not force may lawfully be used in particular circumstances needs a clear view of the applicable international law on the use of force (the *jus ad bellum*). He or she cannot simply say that the law is unclear, or controversial, or merely a "process". Clear advice has to be given, in light of such facts as are known at the time. Moreover, such advice may need to be given in light of the Government's established position on the matter.

Art. 51 of the Charter of the United Nations (UN Charter) cannot be viewed in a vacuum. It needs to be interpreted in light of State practice, not least recent events such as the struggle against Da'esh. The last couple of years have seen some interesting practice on familiar issues.[1]

The present comments address some points that arose in our discussion about whether the inherent right of self-defence recognised in Art. 51 entitles a State to defend itself against attacks by non-Sate actors within the territory of a third State that does not bear responsibility for the attacks.

- Can an attack by a non-State actor be an "armed attack" within the meaning of Art. 51? There is no textual basis in Art. 51 for limiting self-defence to attacks by States. A "brief and opaque"[2] passage in the *Wall* Opinion has sometimes been invoked as authority for the proposition that to give

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[1] *M. Wood*, The Use of Force in 2015 with Particular Reference to Syria, Hebrew University, Jerusalem, 5.1.2016, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-05), <http://papers.ssrn.com>; *M. Wood*, The Use of Force Against Da'esh and the *jus ad bellum*, Asian Yearbook of Human Rights and Humanitarian Law (forthcoming, 2017).

[2] *C. Gray*, The International Court of Justice and the Use of Force, in: C. Tams/J. Sloan (eds.), The Development of International Law by the International Court of Justice, 2013, 237, at 259.

rise to a right of self-defence an armed attack has to be launched by a State.[3] The same goes for a "not altogether clear" passage in *Armed Activities*.[4] Yet it seems improbable that the Court intended this; rather, it left the question open.

- Is it necessary to find that the armed attack is imputable to the territorial State, in accordance with the rules of international law on State responsibility? On the facts of *Nicaragua*, the Court applied the test in Art. 3 (g) of the 1974 Definition of Aggression, but that does not preclude other approaches. There is no reason to suppose that Art. 3 (g) was intended to establish the sole applicable test (see Art. 6, which is often overlooked).
- If one looks beyond Art. 3 (g), what is the test to be applied? There is considerable support in State practice and writings for the "unwilling or unable" test, which has a long and principled pedigree.[5]
- How strong the legal basis has to be before a State embarks upon a use of armed force – or assists another State to use force? This is ultimately a policy question. But lawyers can and should advise both on the strength of the legal arguments, as well as on the risks inherent in acting on the basis of a "reasonable", or "arguable" or "reasonably arguable" case.[6]
- States acting in self-defence need to be ready to explain the legal and factual basis for their actions. In addition to the immediate reporting requirement under Art. 51 of the Charter, a State which has used armed force, or assisted another State to do so, may be required, at least after the event, to demonstrate that the facts as known to it prior to the use of force were such as to justify, as a matter of international law, the resort to force under

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at 194, para. 139.

[4] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports 2005, 168, at 223, para. 147. The description come from Judge *Kooimans*' Separate Opinion, *Democratic Republic of the Congo v. Uganda* (note 4), 311, para. 20.

[5] See *A. Deeks*, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, Va. J. Int'l L. 52 (2012), 483 et seq.; *E Wilmshurst*, The Chatham House Principles of International Law on the Use of Force in Self-Defence, ICLQ 55 (2006), 963; Leiden Policy Recommendations on Counter-Terrorism and International Law, NILR 57 (2010), 531; also published, with background studies, in *L. van den Herik/N. Schrijver*, Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges, 2013, 706 et seq.; *D. Bethlehem*, Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors, AJIL 106 (2012), 770 et seq.

[6] *M. Wood*, The International Law on the Use of Force. What Happens in Practice?, I.J.I.L. 53 (2013), 345, at 355 et seq.

the circumstances.[7] This might happen in a court of law, at the United Nations, in parliament, or before an inquiry.

In short, Government lawyers advising on use of force issues need to take account of their Government's practice and previously expressed views. The law indeed may be the least contentious aspect of the advice. The main problem is often to ascertain and assess the facts.

[7] Leiden Policy Recommendations (note 5), paras. 44 and 48. See also *M. Wood* (note 6), 350; *F. Berman*, The UN Charter and the Use of Force, Singapore Year Book of International Law 10 (2006), 9, at 14.