

The Applicability of Article 51 UN Charter to Asymmetric Wars

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1 Introduction

Academic interest in the applicability of Article 51 of the UN Charter to asymmetric wars, is, at least in its present dimension and terminology, of rather recent origin.

The term “asymmetric war”, as it is known, is not a formal legal term in international law. In its broadest sense it denotes situations of war where there is a disparity between the factual and the legal situation applying to the various actors.¹ In this sense a divide in the power between the participants would suffice to qualify a situation of war as “asymmetric”. In the present context, however, this term clearly relates to the legal qualification of the actors, i.e., to the question whether one or more Non-State actors are participating and therefore, whether Article 51 of the Charter applies at all. Again, this question could be posed in respect to a broad range of subjects but due to constraints of space exclusive consideration shall be given to one category, to which most attention is paid in theory and practice, to that of terrorists.

As no legal definition for terrorism exists in international law this article shall use the “working definition” for this phenomenon, drafted by the former UN Secretary General Kofi Annan, which now enjoys broad recognition. According to Annan, “any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a

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¹ See generally on asymmetric wars, W. Heintschel von Heinegg, *Asymmetric Warfare*, 2010, in: Max Planck Encyclopedia of Public International Law, at www.mpepil.com (all accessed on 14 November 2014).

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population or compelling a government or an international organization to do or abstain from doing any act”.²

2 Self-defense in UN Law and Resolution 1368 of 2001

Self-defence refers to an exception to the prohibition on the use of force which is probably the single most important rule within the entirety of UN law. In view of the constitutional importance of this prohibition for the order created in 1945 and in consideration of the fact that self-defence is seen as an exception to this prohibition, the right to self-defence is usually construed narrowly. On the other hand, however, the right to self-defence forms a *jus cogens* norm, as stated by Hans Kelsen in his 1950 commentary of the UN Charter.³

The prohibition on the use of force was an important step in the history of human mankind, but believing such an interdiction would be respected all the time is utopian. Through the prohibition, States lost what had previously been one of their most important instruments for unilateral law enforcement or, respectively, for the enforcement of their will. Thus, it stands to reason that States’ would be highly tempted to resort to the concept of self-defence as the only meaningful exception to the prohibition of the use of force at the disposal of individual States at any time a State had difficulties to respect Article 2(4).⁴

Therefore, few provisions of the UN Charter have become so deeply enmeshed within the discussion about the inner limits and the danger of abuse of charter norms.

In this context, reference to self-defence against Non-State actors, in the more distant past, was an absolute rarity. In the first decades following the drafting of the UN Charter it mostly concerned cases of colonial countries fighting against insurgents (qualified as criminals or terrorists by the colonial rulers) or by the apartheid regimes of South Africa and Rhodesia.

² K. Annan, In Larger Freedom. Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, para. 91; on this report as well as on the various attempts to define terrorism see P. Hilpold, Reforming the United Nations: New Proposals in a Long-Lasting Endeavour, in: *Netherlands International Law Review* 52 (2005), pp. 389–431; UN Doc. A/Res/60/288; on the various attempts to define terrorism in international law, see C. Walter, Terrorism, in: *Max Planck Encyclopedia of Public International Law*, at www.mpepil.com.

³ See H. Kelsen, *The Law of the United Nations*, London 1950, p. 791.

⁴ See A. Bianchi, The International Regulation of the Use of Force: the Politics of Interpretative Method, in: L. van den Herik/N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order*, Cambridge 2013, pp. 283–316, at p. 301 referring to ICJ, *Armed Activities in the Territory of the Congo*, Judgment of 19 December 2005. See on this judgment R. Uerpman-Witzack, *Armed Activities on the Territory of the Congo Cases*, in: *Max Planck Encyclopedia of Public International Law*, at www.mpepil.com.

Israel has also regularly referred to its right to use self-defence against Palestinian insurgents even though most members of the international community have flatly rejected this justification each time it was made.⁵

On 11 September 2001 the situation changed radically after a group of Taliban-sponsored Al Qaeda terrorist attacked the Twin Towers in New York. For the first time, terrorists demonstrated the ability to perpetrate acts that are comparable in effect to an armed attack by a State. The Security Council reacted accordingly. In Resolution 1368 of 12 September 2001, the Security Council qualified the terrorist attacks committed the day before as a “threat to the peace”. While it is true that the Security Council had used similar qualifications in the past,⁶ it should be highlighted that the respective passage in Resolution 1368 of 2001 is preceded by the clause “like any act of international terrorism”. Such a strong and sweeping condemnation of international terrorism was new and marked the beginning of a new era. Admittedly, the Security Council did not use the exact formula contained in Article 51 of the Charter as no mention was made of an “armed attack”, the key foreseen by the Charter to unleash measures of self-defence. Nonetheless, Resolution 1368 refers to the “inherent right to individual and collective self-defence”, leaving no doubt as to the option for reaction open to the US and possibly to all States victims of international terrorism.

Without doubt, Resolution 1368 of 2001 was a watershed in the sense that it opened the door for acts of self-defence by States against Non-State actors in situations of a “threat to the peace”. But was this an interpretative extension of Article 51 of the Charter, possibly applicable to all future terrorist attacks constituting a “threat to the peace”, or had this been a one-time exception in view of a particularly abhorrent attack hopefully never to occur again?

The subsequent practice is inconclusive in this respect as the UN organs have demonstrated an extreme reluctance to depart from the existing cautious and restrictive approach in the interpretation and application of Article 51.

⁵ See A. Cassese, *Terrorism is also Disrupting some Crucial Legal Categories of International Law*, in: 12 *European Journal of International Law* (2001), pp. 993–1001 (996) and C. Stahn, *Nicaragua is Dead, Long Live Nicaragua – the Right to Self-defence Under Art. 51 UN Charter and International Terrorism*, in: C. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?*, Berlin 2004, pp. 827–877 (832). National Courts were more likely to accept the contention that asymmetric conflicts by their country’s government against insurgents, often characterized as terrorists, were to be qualified as “armed conflicts”. This was the case for Peru’s National Criminal Chamber as to the Shining Path, the US Supreme Court with regard to Al Qaeda (in *Hamdan v. Rumsfeld*) and Israel’s Supreme Court. See A. Bianchi/Y. Naqvi, *International Humanitarian Law and Terrorism*, Oxford 2011, p. 28.

⁶ This is the case with regard to the attacks against aircraft at Lockerbie and Flight UTA 772 attributed to Libyan-sponsored terrorists, A. Bianchi/Y. Naqvi, *supra* note 5, p. 14.

3 The UN Organs and the Application of Art. 51 of the Charter

3.1 *The Security Council*

For a long time the Security Council had difficulties in facing the problem of terrorism squarely. This stemmed from a range of reasons: Terrorism was mainly a national phenomenon and international terrorism had not yet assumed the dimension we are confronted with today. In particular, Al-Qaeda-style terrorism was totally unknown. Further, the Security Council was considered to lack competence for intervention in this area. And finally, the cold war had been a strong deterrent to the Security Council acting in general and also on politically charged subjects such as terrorism.

The Twin Towers attack caused a general change of mind within the Security Council. From then on the Security Council, together with the UN General Assembly, vigorously took up the lead in the fight against this “scourge of mankind”.

In this, however, the Security Council focused on “non-forcible” measures,⁷ as set out in SC Res 1373 (2001) and further elaborated upon by the Counter-Terrorism Committee established by the SC. Res. 1373, and referred, in particular, to the following measures:

- Criminalization of the financing of terrorism;
- Freezing without delay of any funds related to persons involved in acts of terrorism;
- Denial of all forms of financial support for terrorist groups;
- Suppression of the provision of safe haven, sustenance or support for terrorists;
- Sharing of information with other governments in the investigation, detection, arrest, extradition and prosecution of those involved in such acts; and
- Criminalization of active and passive assistance for terrorism in domestic law and bringing violators to justice.⁸

Resolution 1624 (2005), which also determined the activity by the SC Counter-Terrorism Committee, called on UN Member States to prohibit incitement for terrorism by law, to prevent such conduct and deny safe haven to anyone “with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”⁹

The establishment of an individual sanctions regime against terrorist by the “Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities”

⁷ See M. Wood, *The Role of the UN Security Council in Relation to the Use of Force against Terrorists*, in: L. van den Herik/N. Schrijver (eds.), *supra* note 4, pp. 317–333 (319).

⁸ See the mandate of the Security Council Counter-Terrorism Committee as described on its homepage at <http://www.un.org/en/sc/ctc>.

⁹ *Ibid.*

has attracted most public attention. Further, this regime caused considerable irritation when individual sanctions were imposed, which clashed with compulsory human rights standards within the European Union's jurisdiction.¹⁰

As of yet, the Security Council has not authorized any forceful measures against terrorist activities and it is rather doubtful whether it will do so in the future, even if in theory, it could.¹¹ The measures adopted against piracy¹² and in the field of non-proliferation do not indicate preparedness by the Security Council to use forceful measures against terrorism, as they apply under very narrow and specific circumstances, free from delicate ideological or religious contexts, and on the basis of an almost universal consensus.

3.2 *The International Court of Justice*

The stance taken by the International Court of Justice ('ICJ') with regard to this subject has been both hesitant and cautious, if not contorted and short-sighted. The ICJ admitted that an armed attack, engendering the right to self-defence, can also be committed by Non-State actors, but in the Nicaragua case,¹³ relevant here, the court considered such Non-State actors only when instruments of a State. The ICJ examined whether the acts of insurgents and armed bands in the Nicaragua conflict were ultimately attributable to the State parties involved. However, the Court rebuked this allegation, not being convinced there was "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries".

This formula was taken from the UN General Assembly definition of Aggression of 1974,¹⁴ and it can do well for a judgment on the specific conflict the ICJ was

¹⁰ See with regard to this subject N. Lavranos, UN Sanctions and Judicial Review, in: J. Wouters/P. A. Nollkaemper/E. de Wet (eds.), *The Europeanisation of International Law*, The Hague 2008, pp. 185–204; N. Lavranos, The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC, in: P. Eeckhout/T. Tridimas (eds.), *Yearbook of European Law* 2009, Oxford 2010; P. Hilpold, EU Law and UN Law in Conflict: The Kadi Case, in: A. von Bogdandy/R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 13, Leiden/Boston 2009, pp. 141–182; P. Hilpold, UN Sanctions Before the ECJ: the Kadi Case, in: A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts*, Oxford 2010, pp. 18–53 and G. de Búrca, The European Court of Justice and the International Legal Order After Kadi, in: *Harvard International Law Journal* 51 (2010), pp. 1–50.

¹¹ See M. Wood, *supra* note 7, p. 322.

¹² By SC Resolution 1816 (2008) of 2 June 2008, States co-operating with the Transitional Federal Government of Somalia were authorized to enter the territorial sea of Somalia for the purpose of repressing acts of piracy and armed robbery at sea and to use, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress such acts.

¹³ International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, Judgment of 27 June 1986.

¹⁴ UN Doc. A/Res/3314 (XXIX).

seized with in the mid-1980s even though also in that specific context strong criticism was voiced against the restrictive attitude taken by the Court.¹⁵

When the General Assembly requested an advisory opinion in 2003 about the legality of the wall being built by Israel in the Occupied Palestinian Territory, Israel had grounds to believe it could rely on an argument of self-defence, particularly given the strong statements contained in SC Resolution 1368, which states that terrorism gives rise to a right to self-defence. The ICJ, however, missed the opportunity to give guidance on this delicate subject and instead rejected Israel's plea in a short but highly contorted passage, where it maintained that the right to self-defence mentioned in Article 51 of the Charter applied only in case of an attack by one State against another State.¹⁶ As the attacks referred to by Israel did not originate in another State but in the occupied territories Article 51 was found to be inapplicable.

This statement left most commentators puzzled as Article 51 of the Charter does not contain such a limitation, and the ICJ did not explain why the State community should abide by a restrictive interpretation of self-defence, particularly given the events of 2001.

Soon after, in *Armed Activities on the Territory of the Congo* (2005), the ICJ had the opportunity to clarify this subject. Again, the ICJ by-passed this highly contentious matter by stating on the one hand that the attacks by armed groups operating from the Democratic Republic of Congo ('DRC') and entering into Uganda could not be attributed to the DRC and therefore the Nicaragua-formula for self-defence against Non-State actors did not apply. On the other hand, the Court did not feel the need to answer the question whether self-defence applies against "large-scale attacks by irregular forces".¹⁷ If one is to take an optimistic view it can be stated that at least the respective question was left open by the ICJ.

Additionally, it is interesting to note that ICJ's position was rejected in 2011 by the Secretary-General's Panel of Inquiry on the Israel attack on the Turkish flotilla near Gaza.¹⁸

¹⁵ International Court of Justice, *supra* note 13, Dissenting Opinion by Judge Sir Robert Jennings, p. 533.

¹⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 139. Also see Judge Higgins, Separate Opinion as well as Judge Buergenthal, Declaration.

¹⁷ *Id.*, paras. 146–147.

¹⁸ Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, July 2011, Annex I, para. 41, 93, cited according to St. R. Ratner, *Self-defence against Terrorists: the Meaning of Armed Attack*, in: L. van den Herik/N. Schrijver (eds.), *supra* note 4, pp. 334–355, at p. 337.

4 Approaching the Issue of Self-defence from the “Ivory Tower” and by the Civil Society

As we have seen, neither a binding agreement nor an official statement by the Security Council or the ICJ has provided detailed guidance on the issue of self-defence against Non-State actors. The Security Council is not prepared to play the international policeman and to adopt forcible measures to this end. It would be wrong to accuse the ICJ of narrow sightedness or incompetence for its handling of this issue, despite its material outcome being totally unsatisfactory. The ICJ is conscious of the limits of its authority and powers and is wary not to overstretch them.

What should be done in a situation where those primarily responsible for the development and the interpretation of the law have their hands tied and their voices muted?

It may be said that these are ideal preconditions for academics and members of civil society to intervene and in fact, in the last years, three highly sophisticated papers have been prepared and presented to this end:

- The Chatham House Principles of International Law on the Use of Force by States in Self-Defence of 2005
- The Leiden Policy Recommendation on Counter-Terrorism and International Law of 2010; and
- The Principles on “Self-Defense against an Imminent or Actual Armed Attack by Non-State Actors” presented by Daniel Bethlehem in 2012.¹⁹

These documents have different origins but bear considerable resemblance in the way they have come to life. The Chatham House principles are the result of an intense dialogue between several eminent British academics and practitioners. The Leiden Policy Recommendations also ensued from a process of several steps and rounds of dialogue between academics and practitioners, based at the Grotius Centre of Leiden University and with the involvement of Dutch and international experts.

The Bethlehem principles, finally, evidence most clearly the signature of one single expert, Daniel Bethlehem who, however, reports that his document is also the result of an intense dialogue with other experts.

Although none of these papers can claim authority to give a definite and uncontested answer to the questions treated, but when considered conjunctively they give a good impression of the prevailing opinion among leading experts in academia and practice.

¹⁹ See D. Bethlehem, Principles Relevant to the Scope of a State’s Right of Self-defense against an Imminent or Actual Armed Attack by Non-State Actors, in: *American Journal of International Law* 106 (2012), pp. 770–777.

- The role of the Security Council for the maintenance of international peace and security is emphasized and (unilateral) armed action in self-defence should be a measure of last resort.
- In clear contrast to the ICJ but in conformity with a broad majority in literature it is affirmed that Article 51 of the UN Charter applies also to attacks by Non-State actors “even when not acting on behalf of a State”.²⁰ In fact, as in the commentary to the Chatham house principle n. 6 is explained “the right to use force in self-defence is an inherent right and is not dependent upon any prior breach of international law by the State in the territory of which defensive force is used.”²¹
- In such case, however, the attacks must be of a large scale. As the Leiden Policy Recommendations explain, “[t]he heightened threshold stems from the critical role of the State(s) on whose territory terrorists operate and the primary responsibility of such State(s) for the prevention and suppression of such acts”.²²
- It suffices that a State is unwilling or unable to prevent attacks against another country. The Leiden Policy Recommendations remember that self-defence is “an inherent right” and therefore it does not “require that armed attacks by terrorists be attributable to the territorial State under the rules of States responsibility”.²³
- All documents accept the so-called “accumulation theory” according to which, in assessing the scale of the attacks, account may be taken not only of individual, discrete acts but also of a series of attacks emanating from the same territory and the same terrorist groups. It has to be mentioned that this accumulation theory meets with considerable opposition in theory and practice.²⁴
- Finally, they all accept a right to self-defence not only against an actual attack but also if an attack is imminent (so-called “anticipatory measures”). Pre-emptive or preventive measures are not considered to be legal if not authorized by the Security Council. This question was, however, never addressed by the ICJ.²⁵

²⁰ L. van den Herik/N. Schrijver, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 2010, para. 38; E. Wilmschurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, *International & Comparative Law Quarterly* 55 (2006), principle 6.

²¹ E. Wilmschurst, *supra* note 20, p. 12.

²² *Id.*, p. 13.

²³ *Id.*, para. 42; D. Bethlehem, *supra* note 19, principle no. 12.

²⁴ Several authors supported the accumulative theory, even though usually strict conditions were attached. See for example A. Cassese, *The International Community's “Legal” Response to Terrorism*, in: *International & Comparative Law Quarterly* 38 (1989), pp. 589–608, at p. 596.

²⁵ Anticipatory measures require that “the threat should be real, verifiable and leaving no choice of other means to deflect it. Only then may the use of force in anticipatory self-defence within the strict limits of proportionality be justified.” See N. A. Shah, *Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism*, in: *Journal of Conflict and Security Law* 12 (2007), pp. 95–126, at p. 103.

5 Conclusions

The documents shortly analyzed here, at least with regard to some essential elements, cannot and also do not purport to give a definite answer to the questions examined but the reaction among experts at least with regard to the first two sets of principles were overwhelmingly positive.

Of course, the discussion will continue. Some aspects remain highly contentious. Maybe it can be said that while the ICJ sticks too closely to the Nicaragua judgment, the principles mentioned above have abandoned the approach adopted in 1986. At any rate, these endeavours have to be appreciated. A large community of academics and practitioners have been brought together to discuss a subject that seemed to be too delicate to be further developed by the officially responsible institutions. While these attempts can, of course, not be considered as rule-making in the proper sense, they give evidence of the extraordinary flexibility of international law when it comes to sorting out what international consent at a certain moment in time is. And from a purely academic point of view they have furnished plenty of new elements for discussion that tight-lipped and over-cautious UN institutions were not willing or not in the position to provide.