‘Armed Attack’ and article 51 of the UN Charter: Evolutions in customary law and practice

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The use of force by states in the pursuit of policy objectives remains a salient issue of the international system in our day and age, the legality of which continues to tax the minds of law advisers to states and international organisations, and of academics. The NATO intervention in Kosovo in 1999 and the attack against Iraq by a United States-led coalition in 2003, resulted in a deep and rich debate on the legality of the use of force in academic circles and public fora. Belgian legal practitioner and academic Tom Ruys uses an equally seismic event, the 9/11 attacks on the United States, as point of departure for this work, based on his doctoral thesis. He looks at the use of force through the prism of article 51 of the United Nations Charter, which provides for the ‘inherent right of individual or collective self-defence if an armed attack occurs.’ The work aims to address the vexing questions of what constitutes an armed attack, and the relationship between article 51 and the general prohibition of inter-state use of force in article 2(4), and the relationship between article 51 and the right to self-defence in customary international law.

The work proceeds from the premise that while there has always been scholarly division on the scope of article 51, most international lawyers interpret the prohibition on the use of force as being extensive, with the right to self-defence consequently being interpreted restrictively. This has resulted in a delicate equilibrium that was fundamentally disturbed by the 9/11 attacks

and subsequent events, resulting in new, more expansive interpretations of the scope of article 51 and its relationship with the prohibition on the use of force. (From a 2014 perspective, one can add that contemporary events in the Middle East and Africa, notably the activities of non-state actors like Boko Haram and the Islamic State, will support this development.) The author poses the research question for this work against the background of these new interpretations and subsequent state practice: whether and to what extent have these developments altered the customary boundaries of the right to self-defence, from both a *de lege ferenda* and a *de lege lata* perspective. Central to this analysis is the question of what constitutes an armed attack, with the most controversial aspect being whether self-defence can only be lawful once an armed attack has already occurred. The meaning of the armed attack-requirement is analysed from three perspectives: *ratione materiae; ratione temporis;* and *ratione personae.* The *ratione materiae* requirement begs the question what kind of acts qualify as an 'armed attack' – is there a minimum threshold required and can small-scale attacks be 'accumulated' to reach such a threshold? The *ratione temporis* requirement is used to consider whether self-defence can only take place after an armed attack has occurred; while *ratione personae* considers the origin of attacks: in order to trigger the right to self-defence, can the attacks originate only from states, or also from non-state actors like terrorist groups?

The study continues on the premise that the evolution of the *ius in bellum* is state driven. Methodologically the author analyses state practice and statements by states regarding the content of the norms under consideration from 1945 until the study's conclusion in 2009, while employing case law of the International Court of Justice and legal doctrine as subsidiary sources of interpretation.

The first chapter analyses the relationship between pre-existing customary rules relating to the use of force and the Charter rule, quickly dispensing with the theory of the existence of two tracks of international law on the use of force, one custom-based and the other Charter-based. Proceeding from the viewpoint that the Charter is a dynamic instrument open for interpretation, the role of custom in treaty interpretation and modification, and the nature and sources of state practice and *opinio iuris* are then considered. The next chapter gives an overview of the historical development of the Charter law proscribing the use of force and its relationship with the self-defence exception. Interpretations of article 51 and the conditional nature of the use of force are analysed in some detail in light of relevant state practice, while the principles of necessity and proportionality as substantive prerequisites for the lawful recourse to self-defence, are also explored. His conclusion is that these must be interpreted on a case-by-case basis within the applicable context.

The analysis of the *ratione materiae* requirement in Chapter 3 starts off by exploring the relationship between the concepts of 'armed attack' and 'aggression' (the Kampala definition within the context of the Rome Statute of the International Criminal Court unfortunately fell outside the temporal scope of this study). It is concluded, in line with the Kampala definition, and with reference to the *Nicaragua* and *Oil Platforms* cases, that a certain gravity threshold is required. However, the limit of this threshold may vary, and small-scale border attacks may meet the required threshold, depending on the intention behind such events and their effects. The 'accumulation of events' doctrine may also play a role and be relevant with respect to the proportionality of action taken in self-defence. Finally, the questions of whether article 51 applies to external manifestations of the state abroad (embassies and diplomatic envoys, civilian aircraft, and merchant vessels), and whether military intervention in a state aimed to protect or rescue nationals of the intervening state is permissible after 1945, are discussed. The author's investigation of state practice with respect to the protection of nationals as well as of expressions of *opinio iuris* leads to the conclusion that only a small number of states support the post-Charter existence of such a right. He concludes that this stalemate may require out-of-the box *de lege ferenda* action by replacing the old 'protection of nationals' discourse with that of 'non-combatant evacuation' and proposes some guidelines in this regard.

Chapter 4, on the *ratione temporis* requirement is the heart of the work, reflecting the doctrinal discourse since 9/11. The analysis is conducted on the basis of two related questions hinging on the interpretation of the verb 'occurs' ('if an armed attack occurs') in article 51: are there situations where self-defence can be exercised prior to an armed attack; and at what moment does an armed attack commence? The author does this by analysing customary practice and scholarly debate since 1945, and how this may have changed since 9/11.

He proceeds by reviewing the terminology used in the present discourse and arranging self-defence into three categories: reactive (an armed attack has occurred); interceptive (a situation where an attack has been launched, but has not yet struck the 'defending' state); and anticipatory, which can take the form of pre-emptive self-defence against an imminent armed attack, or preventive self-defence against non-imminent threats (the departure point of the US National Security Strategy). An in-depth discussion of the doctrinal debates and state practice with respect to anticipatory self-defence from 1945 to 2001 follows, which leads the author to conclude that the position that a state can act in self-defence before the occurrence of an armed attack, based on the survival of a pre-Charter right post-1945, is artificial and fundamentally flawed. He notes that a restrictionist approach held the upper hand in academic

discourse pre-2001: self-defence can only be undertaken in case of armed attack; imminent threats must be submitted to the Security Council, a position that he supports, conceding that there is space for an evolutionary interpretation of article 51 given the realities of modern warfare. This conclusion is supported by the analysis of customary precedent, notably the Cuban missile crisis the Six Day Arab-Israeli War, the Israeli attack on the Osirak nuclear reactor in Iraq, and the General Assembly negotiations on a definition of aggression.

The author then turns to the great doctrinal debate following the 9/11 attacks on the United States and the adoption of the US National Security Strategy explicitly endorsing anticipatory self-defence. He concludes that while the scale has tipped towards a more expansionist interpretation allowing for preventive force to be used against non-imminent threats, the legality of such action remains highly contested. However, he agrees with the view that the theory of interceptive self-defence can be developed to strike a balance between security concerns and legality, exploring some ideas in this respect at the end of the chapter. An analysis of the positions adopted by states finds that a broad trend can be distinguished in state practice: while support for anticipatory self-defence has increased, it is being restricted to imminent threats and that this developing support cannot yet be considered widespread. A brief discussion of when an armed attack occurs, addresses possible exceptions to the rule against anticipatory self-defence and some borderline cases.

The *ratione personae* requirement is addressed in Chapter 5, the question being from whom an armed attack must emanate to trigger the right to self-defence. This discussion is divided into two periods: the decolonisation period spanning the first forty years after the adoption of the Charter; and the more recent period characterised by the threat emanating from international terrorism and state failure. The crucial question is posited on an intersection of the article 2(4) prohibition and the doctrine of state responsibility: while it is uncontroversial that a right to self-defence exists when attacks by non-state actors can be imputed to a state, may a victim state exercise the right to self-defence in the absence of state imputability? A third norm now enters the equation: the 'due diligence' norm which holds that a state has a duty to prevent its territory from being used as a launch pad for attacks against other states. Possible legal justifications for cross-border interventions, including the ill-fated hot pursuit over land doctrine invoked by South Africa in the 1980s, the doctrine of necessity and indirect aggression, and the use of force in pursuit of self-defence are investigated. The conclusion is that state practice is too limited and restricted to issues relating to colonialism for any firm conclusions to be drawn, although some contours in this respect were provided by the ICJ in the *Nicaragua* decision.

Turning to self-defence against non-state actors in the post-9/11 era, the author asserts that the end of the decolonisation process and the threat posed by terrorism to international security, appear to have resulted in a shift to a more flexible position regarding the permissibility of the recourse to force against terrorist attacks. This is especially manifested in an emerging *opinio iuris* that the 'substantial involvement' threshold of *Nicaragua* can be lowered, following the widespread international support for the US actions against Al Qaeda and the Taliban in Afghanistan. However, customary practice after 9/11 was limited to a small number of states, while the judgment of the ICJ in the *Palestinian Wall* case appears to stick to a restrictive and state-centric construction of article 51, maintaining the *Nicaragua* threshold.

The author, therefore, concludes that the legal situation on whether non-state actors can commit an 'armed attack' falling within the scope of article 51 as the legal basis for self-defence, remains uncertain. Although state practice has evolved, no new rule has as yet crystallised. Factors which may influence the development of such a rule with regard to the *ratione personae* threshold may include the gravity of the terrorist action, whether the source of the attack is external to the victim state, and whether peaceful means of settling the dispute have been exhausted before the use of self-defence as a last resort. The author concludes, however, that these criteria are so tentative that the principles of proportionality and necessity should rather be applied in such a determination.

In the final chapter, Ruys returns to the original question of the extent to which developments in the international security environment and consequential state practice and *opinio iuris* have influenced the customary boundaries of the right to self-defence. He notes that while fundamental changes to *opinio iuris* and state practice have taken place since 2001, the responses by states were not coherent, leaving us with only the broadest of contours of a possible new regime: 'The Great African War seems a painful reminder that self-defence against non-State actors must be approached with extreme caution' (534).

His proposed solution is that states should resurrect the UN General Assembly's project of interpreting article 51 and adopt a 'Definition of Armed Attack' as a General Assembly resolution, taking the first step by providing a draft definition which includes references to the external manifestations of states, the imputability to states of attacks by non-state actors, and in cases of non-imputability, providing criteria for cross-border attacks by non-state actors to reach the 'armed attack' threshold, as well as elaborating on the conditions required for recourse to self-defence.

This work weaves different strands of international law into a rich and intricate tapestry that provides a picture of how the interpretation of article 51

can develop in a fast-changing international security climate. The author's proposal for a definition of the concept of 'armed attack' is sound and the proposed text will provide a solid foundation for future negotiations. Such a definition, together with the Rome Statute definition of the crime of aggression (even if the relevant amendments to the Rome Statute do not enter into force in 2017), will provide definitive criteria for the interpretation of future actions involving the use of force, and for the development of *lex lata* norms.

However, a work of this scope and depth on such a topical subject should not suffer from the lack of a bibliography, the expression of an apparent modern trend that should urgently be reconsidered by publishers.

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