Selected aspects of the right of self-defence under public international law

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I. Introduction

Art. 51 of the Charter of the United Nations stipulates that nothing 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations'. Yet a closer look at this right of self-defence raises numerous questions as to the specific criteria to be met in order for a state to permissibly strike with force, and to whether the very framework of the right of self-defence under contemporary international law is equipped to tackle modern day threats.

In this context, preemptive self-defence remains a particularly controversial topic. While there are tendencies within international law to construe an extensive right of preemptive self-defence, emphasis should be placed on the character of the right of self-defence as an exception to the general ban of force, thus requiring a narrow set of criteria for legal preemptive strike.

II. "Armed Attack"

Judicial consideration of the right of self-defence under Art. 51 makes it clear that not all armed activities can amount to an 'armed attack', sufficient to trigger permissible self-defence.

In *Eritrea Ethiopia Claims Commission*,[1] the Commission stated that localized border encounters between small infantry units, even if they involve loss of life, do not constitute an 'armed attack' for the purposes of the Charter. This also echoed in the *Armed Activities on the Territory of the Congo Case*.[2] Not every unlawful use of force necessarily constitutes an armed attack under Art. 51. In the *Oil Platforms Case*[3], the USA argued that rather than a major episode, a series of repeated, relatively small-scale incidents over a period of time such as rocket launches, isolated attacks and small armed incursions can constitute an armed attack. Yet, the ICJ found that the USA could not prove that the incidents were attributable to Iran, wherefore it did not consider whether self-defence would have been justified because of such an accumulation of attacks. On the other hand, the fact that the Court avoided deciding whether in principle such events could trigger self-defence could be seen as support for the US' view. Regarding an attack on merchant or naval vessels flying a state's flag, the Court did not exclude the possibility that this might be sufficient to amount to an armed attack under Art. 51.[4]

In *Nicaragua v USA,* the USA claimed its actions were justified as they assisted the governments of El Salvador, Honduras and Costa Rica in the form of collective self-defence against Nicaragua which was assisting rebels. Yet, the ICJ held that Nicaraguan assistance to rebels did not constitute an 'armed attack' under Art. 51. The Court's definition was that an armed attack requires the sending of armed bands by or on behalf of the aggressor state, to conduct an operation that meets the Court's 'scale and effects' test.[5] Contrary to customary international law, most cases of indirect use of force by assisting rebels would therefore not generate the right of self defence.

The suggestion of a less restrictive interpretation of the requirement of an 'armed attack' can be found in the dissenting opinion of Sir Robert Jennings[6], arguing that the mere provision of arms cannot amount to an armed attack but when coupled with other kinds of involvement, such as logistical or other support, it may amount to an armed attack.

However, the 1974 Resolution on the Definition of Aggression[7] already provides states with the possibility to take proportionate countermeasures against the intervening state in circumstances where the assistance may not amount to an armed attack. Therefore, a restrictive interpretation of the criterion of an 'armed attack' seems adequate and the 'scale and effects' test is a suitable way of measurement.

III. Non-State Forces

Art. 51 initially envisaged the right of self-defence against attacks by a state, when responsibility was attributed to that state. Thus, questions arise regarding the degree of directness and involvement of a state needed to constitute a qualifying attack by non-state actors.

In *Nicaragua v USA,* the Court held, that the US had infringed the rule prohibiting the threat or use of force by 'arming and training the contras', but it had not done so by 'the mere supply of funds'.[8] While assisting rebels may be an indirect use of force contrary to customary international law, the degree of assistance that constitutes a qualifying attack remains debated. The Court distinguished between forms of

1 Eritrea Ethiopia Claims Commission, Partial Award, Jus Ad Bellum Ethiopia's Claims 1-8 (The Federal Democratic Republic of Ethiopia v The State of Eritrea) (2006).
2 Democratic Republic of the Congo v Uganda.
3 Islamic Republic of Iran v United States of America.
4 Nicaragua v USA Judgment, para. 64, 72.
5 Nicaragua v USA Judgment, para. 195.
6 I.C.J. Rep. 1986, p.543.
7 Resolution on the Definition of Aggression 1974, General Assembly resolution 3314 (XXIX).
8 Nicaragua v USA Judgment, para. 228.

assistance: Financial assistance was seen as more indirect and remote, echoing the fact that the Principle of Use of Force of the 1970 Declaration[9] does not expressly prohibit financial assistance, whereas the 1965 Non-Intervention Declaration[10] does. Therefore a state's establishment, organization or control of a rebel force which transforms it into an arm of the state itself, or the giving of material support such as logistic support and bases is needed to trigger self-defence.

In the *Palestinian Wall Advisory Opinion*, the Court portraits a similarly strict view on the directness of the state's involvement, assuming that Art. 51 is available only in the event of a *state's* armed attack on another.

Even though this issue is left unresolved in the *Armed Activities on the Territory of the Congo Case*[11], Judges Kooijimans and Simma addressed it, arguing that self defence may extend to armed attacks by non-state actors whenever they emanate from a territory where there is an almost complete absence of governmental authority by the respective state. [12] This is contrary to the Court's opinion in the *Palestinian Wall* case[13] but in line with state practice after the 9/11 attacks, which led the Security Council to its first-time recognition of self-defence against terrorist attacks.

This view exceeds the traditional model of self-defence. It widens the concept of an armed attack by holding that a terrorist attack by a non-state actor on another state's territory may constitute an 'armed attack' by the state harboring those responsible. The initially very high degree of state involvement required thus seems to have decreased in light of modern day threats.

IV. Preemptive Self-Defence

Possibly one of the most controversial issues regarding the right of self defence is whether it may be executed preemptively.

A number of states argue that aggression can take many forms. Besides classical attacks against territory, attacks against state interests such as economic assets or nationals abroad can be equally destructive. Though it remains a topic of debate whether this is sufficient to trigger a forceful response in self-defence.

Under the regime of customary international law, before the UN Charter was adopted, it was generally accepted that preemptive force was permissible in self-defense. In the *Caroline* incident, a doctrine of anticipatory self-defense was formulated that established two criteria for (preemptive) self-defence: Necessity and proportionality. Consequently, the customary right of self-defence permitted the use of force in anticipation of an immediate armed attack or threat to the state's security, as it was for example alleged by Israel as justification for its strike against an Iraqi nuclear reactor in 1981. Self-defence could also be exercised in response to a threatened attack against state interests, such as territory, nationals, property and rights guaranteed under international law. It was even permissible when the attack did not involve any measures of armed force, only economic aggression and propaganda. The sole requirement was an instant and overwhelming necessity for forceful action.[14]

With the introduction of Art. 2(4) of the UN Charter, the right of self-defence became significantly narrower as it constituted an exception to the general ban on the use of force, though the extend of the right of preemptive self-defence remains controversial. Art. 51 does not stipulate that it is solely triggered if an armed attack occurs, or that this attack must emanate from a state. Therefore, it is not undisputed whether the pre 1945 right of anticipatory self-defence and the right of protection of nationals abroad still exist.

The history of Art. 51 suggests that it was meant to safeguard, not restrict the right of anticipatory self-defence.[15] Ultimately, no state can be expected to await an initial attack which, in the present state of armaments, may destroy that state's capacity for further resistance and jeopardize its very existence. On the other hand, the ordinary meaning of the phrasing of Art. 51, *'an armed attack occurs'*, seems to preclude preemptive action and the drafting of the Charter does not suggest that something broader than implied by the wording was intended.

If the right of self-defence was phrased and intended as an exception, then it should be limited to actual armed attacks that are clear, unambiguous subject to proof, and that are not easily open to misinterpretation or fabrication, thus discouraging states to strike first under the pretext of prevention.[16] Although, due to the restrictive definition of an "armed attack",[17] one might argue that the scope of potential claims is considerably limited already.

In *Nicaragua v USA*, the issue of the legitimacy of preemptive self-defence was expressly reserved by the Court. The majority tended to favour the restrictive view, whereas Judge Jennings and Schwebel argued that the Charter had not removed the customary right of taking preemptive action. Eventually, it was the tragical events of 9/11 that brought a revolutionary challenge to the doctrine of self-defence and led to a reassessment in the law of this area.[18] While the use of force in response to terrorist attacks had been highly controversial, and Israel and the USA had been the only states claiming to exercise a preemptive right of self-defence, the *Operation Enduring Freedom* received massive support.

9 Resolution adopted by the General Assembly 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

10 Resolution adopted by the General Assembly 2131 (XX). Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.

11 Democratic Republic of the Congo v Uganda.

12 Armed Activities Case judgment, paras 9 et seq.

13 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 ILM (2004), 1009

14 Dixon, International Law (7th edn 2013), p.328.

15 Bowett, Self defence in International Law (1958), pp. 188-192.

16 Henkin, How Nations Behave, (2 edn 1979), pp.141 f.

17 Nicaragua v USA.

18 Byers (2002) 51 I.C.L.Q 401.

Except for Iraq and Iran expressly challenging the legality of the operation, it was nearly universally accepted as the exercise of self-defence. The NATO evoked Art. 5 of its treaty and even many states that in the past had rejected the legality of preemptive self-defence now accepted this wide right of self-defence that the US claimed with their Operation. For the first time, the Security Council recognized the right of self-defence against terrorist attacks.

Though in the case of such a series of attacks against a state, preemption is not necessarily the core issue. The USA and its allies were arguably simply engaging in standard self-defense against an ongoing, armed attack. A general standard for terrorism, particularly in cases where a group has not yet committed an action but seems likely to act at some point in the near future, cannot be concluded from this incident. Opinions continue to differ on the criteria to be met, in order for a state to lawfully preempt a group whose behaviour falls short of an imminent attack.

The USA makes a very ambitious claim to the right of preemptive self-defence and proposes its adaption to the modern day circumstances so as to exclude the requirement of imminence. In its National Security Strategy[19], it stated that for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. According to this view, the condition for the legitimacy of preemption which used to be the existence of an imminent threat such as visible mobilization of armies, navies and air forces preparing for attack, must be adapted to fit the objectives of modern day adversaries, rogue states and terrorists using unconventional means of attack.

Neither weapons of mass destruction nor terrorist actors were envisioned in the UN Charter framework and both WMD and terrorism can strike at states in ways that have not extensively been addressed in customary international law either. However, the relaxation of the criterion of necessity entails great risks as to where to draw the line. If imminence were no longer a prerequisite for preemptive force, what would restrict the right of self-defence in an equally reasonable and predictable way? With respect to WMD, would the sole possession of such weapons be sufficient?

One might consider hostile intent as a criterion, meaning that if the state that possesses these weapons has hostile intent towards other states, this would justify preemption. But a hostile-intent approach might be even more permissive. In a way, Israel was making this claim when it struck the Osirak reactor in 1981 and this was clearly rejected by the Security Council.

Even though the invasion of Afghanistan was generally supported and had an implied approval by the Security Council,[20] it remains unclear whether this can be construed as a general acceptance of anticipatory self-defence outside the context of terrorism and there is a lot of controversy regarding the scope of this right. Though the proposal to reconsider the notion of imminence in the light of new threats to international peace and security[21] has not undergone great approval. There is no right of self-defence if the threat of an armed attack is not imminent. In situations where there are good arguments for a preventive military action, with good evidence to support them, the matter may be brought to the Security Council which can authorize action if it chooses to. The ban of force, the global order and the principle of non-intervention ultimately outweigh a right of unilateral preventive action.[22]

V. Conclusion

The right of self-defence is an inalienable right and in order to effectively serve its purpose, States should be able to exercise this right preemptively.

However, great dangers lie within preemptive self-defence and the potential for abuse is high. Especially in regard to terrorist attacks, the focus should be redirected towards the necessity aspect of self-defence. The right of self-defence should not be misconstrued into a right of retaliation. Defence implies a counteraction to minimize an imposed threat or attack. Yet, it seems doubtful whether classical symmetric warfare is even suitable to efficiently deal with the asymmetric threat posed by terrorism.

Though a true and appealing notion lies within the principle that '*the right need not yield to the wrong'*, as the increasing popularity of 'stand your ground' laws shows, fear remains to be a poor advisor. The criteria for the right to self-defence need to be narrowed, not widened, and emphasis should be put on the exceptional character of the right of self-defence. It is an exception to the ban of force, to the limitation of armed conflict, and to peace, the very purpose of international law.

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[19] US National Security Strategy (2002) 41 I.L.M 1478.
[20] SC resolution 1368 expressly recognizing the right of self-defence.
[21] Foreign Affairs Committee, Second Report 2002-3, HC 196, para.150.
[22] Evans, International Law (2nd edn 2004), p.604.