Has Practice Led to an "Agreement Between the Parties" Regarding the Interpretation of Article 51 of the UN Charter?

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It is generally recognised that the *jus contra bellum* regime enshrined in the Charter of the United Nations (UN Charter) is composed of peremptory norms.[1] That does not mean that its meaning is frozen once and for all. On the contrary, it can evolve and be adapted to new circumstances, including by taking practice into account as it has been the case, for example, with the powers of the Security Council. In this case, however, a new interpretation of the rule has been "accepted and recognised by the international community of States as a whole" (Vienna Convention on the Law of Treaties [VCLT], Art. 53) or, if one prefers to use the classical means of interpretation set out in Art. 31.3 of the VCLT, been the object of an "agreement between/of the parties" to the Charter.

The current debate about the scope of self-defence is often framed as follows: Does the expression "armed attack" contained in Art. 51 of the Charter apply to a use of force by a non-State actor (NSA)? In fact, the question is biased, or rather largely irrelevant. Indeed, an affirmative answer has been evident for decades. In 1974, after decades of debates, all the UN Members adopted a definition of aggression in which the possibility to respond to some uses of force led by NSAs was specifically recognised (Art. 3 g)). This definition has been regularly reaffirmed by States, notably in 2010 when they adopted a definition of the crime of aggression in the context of the International Criminal Court (ICC) statute. Moreover, the definition is considered by the International Court of Justice (ICJ) as reflecting customary international law, without any objection on behalf of the judges of the Court.[2] The problem thus lies not in the invocation of self-defence in the case of an armed attack launched by an NSA, but rather in the possibility to invoke self-defence against a *State* which is not itself the direct author of the armed attack, and is therefore entitled to the protection of its sovereignty

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1 *O. Corten*, The Law against War, 2010, 200 et seq.

2 See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986 and *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports 2005.

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and its political independence under Art. 2.4 of the UN Charter. In other words: How can an actor A (a State) invoke a use of force attributable to an actor B (an NSA) to justify using force against another actor C (a State whose territory is used by the NSA)? Different arguments have been advanced in this respect: Establishing that the territorial State has "sent" the NSA, or has been "substantially involved" in its activities (option A, corresponding to Art. 3 g) cited above); proving another form of complicity between this State and this NSA (option B); considering that the State would be "objectively responsible" for what the NSA did (option C, corresponding to a situation of "inability" or of a "Failed State"); invoking necessity as the only criterion justifying the intervention against the NSA, without even searching to establish a form of responsibility of the territorial State (option D).

Practice has been invoked in support of some of those options, and it is true that many States interpreted Art. 51 beyond the parameters laid down in Art. 3 g). However, the result is undoubtedly mixed. Actually, the only precedent having given rise to an implicit general endorsement of a broad interpretation of Art. 51 is the war against Afghanistan launched in 2001. This precedent could be interpreted as an illustration of options A (if we consider that the Taliban regime was "substantially involved" in the activities of Al Qaeda) or B (if we prefer to characterise it as a mere situation of complicity) presented above. However, this precedent was not followed by others, at least not of similar magnitude. The wars launched by Israel against Lebanon (2006) and in Gaza (in 2009 and 2014) were widely condemned, and not only because of the disproportional character of the ripostes. The Non-aligned Movement (NAM) adopted a statement in September 2006 denouncing a "relentless Israeli aggression",[3] without any reference to the criterion of proportionality, and similar statements were issued to denounce the military interventions in Palestine.[4] Finally, the fight against Islamic State of Iraq and Syria (ISIS) in Iraq and Syria provides a topical example of the diversity of the position of States about the scope of self-defence, options A to D having been invoked by some, without any possibility to establish a common understanding of what international law could mean.[5]

[3] NAM, Havana, 11.-16.9.2006, Final Document, 19.9.2006, A/61/472 – S/2006/780.

[4] NAM, 16th Summit of Heads of State or Government, Final Document, August 2012, para. 28.2.

[5] *O. Corten*, The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?, LJIL 29 (2016), 777 et seq.

Given this brief overview of the existing practice, we have to deal with two different conclusions.

- If we turn to formal and multilateral declarations made by States, the classical reading of the UN Charter, as reflected in the definition of aggression, still prevails. The NAM, composed by some 120 States (in other words, by the majority of the UN Members) regularly reaffirmed that "consistent with the practice of the UN and international law, as pronounced by the ICJ, Art. 51 of the UN Charter is restrictive and should not be re-written or re-interpreted";[6]
- If we observe unilateral or regional practice, those statements are clearly not respected. Many large-scale or (more often) limited military operations have been conducted in the name of a broad conception of self-defence, beyond the criteria enshrined in Art. 3 g) and applied regularly by the ICJ in its jurisprudence.

However, if we chose to apply the general principles of interpretation laid down in the VCLT, it would be difficult to understand how a clear "agreement between the parties" (Art. 31.3 a)) could be challenged by an erratic and ambiguous practice, particularly as far as it has not led to any new "agreement of the parties" (Art. 31.3 b)). No principle of interpretation could be cited in favour of any disappearance of the law in those circumstances. In other words, and as in any other field of international law, every State is obliged to respect the treaty as long as it has not been changed, either formally (in an amendment or revision) or informally (by the way of an informal – but established – agreement between the parties).

At this stage, two possibilities are open, each of them reflecting a certain conception of international law. The first would be to consider that, even if formally in force, the rule doesn't have any relevance any more, in view of its incapacities to address the current problems and challenges of the new "fight against terror". This "realistic" view could offer an "option E", consecrating the (provisional?) "death" of Art. 2.4. Another possibility, chosen by the ICJ in order to preserve the very existence of international law, is to refuse to consider that deeds are more important than words. In this perspective, practice, even in contradiction with the rule, cannot challenge the existence of this rule as such. The two positions are in theory equally respectable even if, as an international law scholar, it could be more logical to follow the second.

[6] NAM, 17th Summit of Heads of State or Government, Final Document, September 2016, para. 25.2.