

Scarcely Reconcilable with the UN Charter

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Considering among other things the fundamental goal of the United Nations (UN) of saving succeeding generations from the scourge of war, the most convincing view of the provisions on the use of force in the Charter of the United Nations (UN Charter) is the one claiming that the prohibition on the unilateral use of force is very broad and that the exception to the prohibition in the form of the right of self-defence against an armed attack is very narrow. Effective collective measures including military measures for the suppression for instance of acts of aggression or other breaches of the peace were supposed to be taken by the Security Council. For that purpose the UN Members conferred on the Security Council primary responsibility for the maintenance of international peace and security.

Today developments around the world suggest that states have a right not only to take measures in self-defence against armed attacks carried out by other states, in exceptional circumstances, but that states have a right to take measures in self-defence against armed attacks carried out by non-State actors. The crucial issue is to what extent if at all the provisions making up the collective security system under the UN Charter have been affected by the events we see unfolding on the ground. The conditions presumably qualifying the exercise of this potential right of states of self-defence against armed attacks by non-State actors are still highly unclear.

One argument in favour of an emerging right of self-defence against armed attacks by non-state actors is that the Security Council is not capable of responding adequately and that therefore the persuasive force of the collective security system under the UN Charter is weakened, both it would seem in terms of rules on competence and in terms of substantive content. If the Member States cannot rely on the Security Council they are entitled to take matters into their own hands and from the substantive point of view the right of self-defence can be interpreted a bit more freely and thus becomes a bit less exceptional. At the same time the fundamental prohibition of the unilateral use of force is necessarily narrowed. It would seem as if this argument presupposes that the original broad prohibition on the use of force together with the narrow right to self-defence are dependent on the UN collective security structure in its entirety and especially on a function-

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ing Security Council. There is some strength to this argument, and it also illustrates the potential fragility of the collective security system. Whether one wants it or not, the collective security system is dependent on all its parts in order to stay intact.

Another argument in favour of a right of self-defence against armed attacks by non-state actors is that it has always been there in the text of the relevant provision of the UN Charter: Member States have a right of individual or collective self-defence if an armed attack occurs, nothing more nothing less. The target of the armed attack is pointed out – the (Member) State –, but not the source of the armed attack, the text could or could not implicitly include attacks carried out by non-state actors. No support can be had from the *travaux préparatoires* in figuring out exactly what was on the mind of the drafters of the UN Charter in this respect. An answer to the question whether self-defence against an armed attack by a non-state actor was or can be, or for that matter should be, contained within the meaning of the text of the UN Charter is a matter of interpretation in different forms.

Judging from state practice and from reactions on the part of states who are not part of the actual practice, as well as from the acquiescence on the part of other states who could react, it would seem, either one wants it or not, as if there is a development taking place towards the recognition of a right of self-defence against an armed attack by a non-state actor. It is relatively easy for those in power in different states around the world to unite against those challenging the powers that be, at least and in particular if the challengers use violent means to pursue their cause and/or are labelled terrorists.

The potential consequences of this development legally and otherwise are incalculable. There are great risks inherent in such a development and whether they outweigh or not the potential benefits whatever they may be, is impossible to say. It would seem unlikely in any case that military self-defence measures would be an effective way of eradicating terrorism. It would also seem likely that the easing of the prohibition on the international use of force and the relaxing of the exceptional nature of the right of self-defence risk leading to more international use of force. That would be in complete contrast with the overarching goal of the UN Charter.

Perhaps the risks inherent in what seems to be today's developing practice could be limited by the normative obscurity pervading the next step, after a right of self-defence against an armed attack by a non-state actor has potentially been found. From the normative point of view, in this case of the *jus ad bellum*, the circumstances that should surround the exercise of a potential right of self-defence against an attack by a non-state actor remain

largely unclear, including the issue whether military measures can be used in third countries at all, presuming that the armed attack cannot be attributed to the third state in question. The stipulations of necessity and proportionality which are crucial to the lawfulness of self-defence in the inter-state context have yet to be translated to the non-state context, if an armed response is lawful at all in a third country. Consider also the territorial integrity and sovereign equality of states which are at stake.

If the criteria for legality of self-defence against an armed attack by a non-state actor are so difficult to fulfil that any exercise of such self-defence would break the law, then in practice this potential right on the part of states would become useless. A parallel could perhaps be drawn *mutatis mutandis* to the pronouncement of the International Court of Justice (ICJ) in the *Nuclear Weapons Case* on the legality of the use of nuclear weapons in the light of international humanitarian law: The use of such weapons in fact seems scarcely reconcilable with respect for the requirements of international humanitarian law, says the ICJ. Similarly, the exercise of a right of self-defence against an armed attack by a non-state actor, should such a right exist, seems hardly reconcilable with the remaining *jus ad bellum*, as it currently stands. Imagine if a dangerous development of the law could stop there.

