

# Reconsidering the Legal Basis for Military Actions Against Non-State Actors

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The question of whether or not States may lawfully resort to actions in self-defence against non-State actors (NSA) is prompted by two elements: i) the emerging practice of States<sup>1</sup> resorting to force in self-defence against terrorist groups including the Islamic State in Iraq and the Levant (ISIL); and ii) United Nations Security Council (UNSC) resolutions seemingly legitimising self-defence against NSA (i.e. UNSC Res. 1368 [2001]; UNSC Res. 2249 [2015]). From a scholarly viewpoint, such developments would entail interpreting Art. 51 of the Charter of the United Nations (UN Charter) in a manner such as to encompass armed attacks carried out by states and NSA alike.<sup>2</sup>

The UN Charter envisages two exceptions to the prohibition on the use of force codified in Art. 2 (4) UN Charter: self-defence against an armed attack; and enforcement measures implying the use of force decided by the UNSC pursuant to Art. 42. In considering the adoption of military measures in response to threats and breaches of international peace and security, one may observe that Art. 42 UN Charter may actually serve as an appropriate legal basis for the adoption of military measures against ISIL, and has in fact the merit of preserving the system of collective security as it has been envisaged by the drafters of the UN Charter. In contrast, broadening the scope of Art. 51 UN Charter to grant states the right to self-defence against NSA is premised upon somewhat slippery bases.

This contribution intends to shed light on the shortcomings of invoking Art. 51 as a legal basis for military measures against ISIL, and presents the advantages of invoking Art. 42 instead. This would lead to:

1. no Pindaric interpretation of Art. 51 (stretched to the point of applying the “unwilling or unable state” doctrine);

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<sup>1</sup> E.g. the US claimed that the Operation Enduring Freedom against Afghanistan was grounded on Art. 51 UN Charter.

<sup>2</sup> The present contribution focusses on Art. 51 UN Charter. The author is aware that self-defence under customary international law may not fully coincide in scope with Art. 51 UN Charter.

2. compliance of Art. 51 interpretation with Art. 2 (4), which speaks about inter-state relations (Art. 51 would as a consequence be understood as an exception to use of force in inter-state relations, hence against an armed attack of another state); and
3. safeguards against abusive powers of states in determining actions in self-defence when an armed attack occurs.

The discourse surrounding Art. 51 triggers questions of a revisionary nature. Self-defence, qua a circumstance precluding wrongfulness, entails the existence of a wrongful act in the first place. Hence, it would in principle compel construing NSA as subjects of international law and, as such, bearers of the obligation to refrain from using armed force under public international law.<sup>3</sup> This conceptual hurdle has been questionably overcome by resorting to the “unwilling or unable state” doctrine, in order to satisfy the attributability-test of the NSA armed attack to the state where the NSA operates. Alternatively, the consent of the State hit by measures in self-defence has been considered determinant to exclude wrongfulness of such measures.

Although the term “armed attack” in Art. 51 does not specifically refer to a *state* armed attack, the joint reading of Arts. 51 and 2 (4) UN Charter is conducive to interpret self-defence within an inter-state dimension.<sup>4</sup>

Similarly, the temporal scope of self-defence, in particular in its anticipatory variant against ISIL’s threats to commit new attacks, poses questions of conformity with Art. 51 UN Charter insofar as it only concerns cases in which “*an armed attack occurs*”.

Remarkably, the UN collective security system is centred around the role of the UNSC in countering armed attacks. This is supported by the wording of Art. 51 which, while recognising the inherent right of states to self-defence, reaffirms the pivotal role of the UNSC in the resort to military force in the expression “*until the Security Council has taken the measures necessary to maintain international peace and security*”.

In the framework of Chapter VII, Art. 42 has been designed as a provision of last resort, in case of a failure of measures not implying the use of force pursuant to Arts. 40 and 41 UN Charter. This is consistent with the

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<sup>3</sup> In this respect, questions as to the capability of NSA (arguably, this umbrella-term encompasses a spectrum of actors with diverse capabilities) to actually launch an armed attack against a State for it to resort to self-defence incidentally arise.

<sup>4</sup> Art. 2 (4) reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state (...).” (emphasis added)

purposes of the UN enumerated in Art. 1 UN Charter, in particular with maintaining international peace and security (Art. 1 (1) UN Charter).

Notoriously, the practice of the UNSC has already developed towards imposing Chapter VII-measures against NSA (including individuals, groups of individuals, and legal entities)<sup>5</sup> and it would be no surprise if those actors were made the target of military actions agreed upon by the UNSC. Hence, the application *ratione personae* of Art. 42 would not raise the same controversies of Art. 51. Having an enforcement character, Art. 42-measures do not require the consent of the targeted state,<sup>6</sup> unlike – as mentioned earlier – cases of self-defence against NSA would require. Most importantly, Art. 42-measures may be resorted to in case of *breaches* of the peace (armed attack or lower threshold violations of the non-use of force) and *threats* to the peace alike, thus encompassing a broader spectrum of situations than Art. 51. This is noteworthy as state military actions against ISIL are arguably resorted to against *threats* of future attacks. Further, if the use of force is authorised pursuant to Art. 42 UN Charter, the UNSC is to determine the scope of the mandate, including a temporal delimitation for the resort to such measures.

The claim of an emerging practice corroborating the existence of a right to self-defence against NSA may prove appealing and perilous insofar as it would allow defensive actions against ISIL's "attacks" but would decentralise the use of force to the extent that States qualifying themselves as victims of an NSA's armed attack may resort to military force.<sup>7</sup>

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<sup>5</sup> E.g. UNSC Res. 1267 (1999); 1373 (2001); 1618 (2005); 2083 (2012); 2170 (2014).

<sup>6</sup> See B. Simma/H. Mosler/A. Randelzhofer/C. Tomuschat/R. Wolfrum/A. Paulus/E. Chaitobu (eds.), *The Charter of the United Nations – A Commentary*, Vol. 1, 2002, 754 et seq.

<sup>7</sup> Israel sustained this position against NSA in the occupied Palestinian territories. UNSC Res. 2249 (2015) questionably expands States' powers to resort to military measures at discretion.

