

Article 51 and the Realities of the Present Day World

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1. Art. 51 contains only one condition for using self-defence. Self-defence is lawful where an armed attack occurs. Of course, in most cases this armed attack will be carried out by a state. However, already long time ago it was argued that also non recognised entities, so called *de facto* regimes, may cause an armed attack. This was discussed in United Nations Committees already in 1956. With the development of international terrorism the issue is much more relevant in 2016.

2. It has been shown that there is considerable state practice based on the understanding that where an armed attack is caused by a non-state actor self-defence is lawful. This practice is quite widespread as shown by *Christian Tams*. I consider the position taken by the Security Council after 9/11 as well as in the resolution no. 2249 of 20.11.2015 concerning the activities of the Islamic State (ISIS) in relation to Iraq and Syria to be quite relevant. This shows the Council's view that under those circumstances self-defence is lawful. I also believe that the express non-repetition by the International Court of Justice in the *Congo Case* of the dictum in the *Wall Opinion* is of great importance. After the criticism launched against the position that only states may cause an armed attack which can be countered by self-defence the Court did not repeat that dictum. It expressly left open the question under which circumstances self-defence against non-state actors is possible.

3. The most important question seems to be which groups can be seen as non-state actors in this sense and what sort of armed action is an armed attack. Isolated armed action in border areas are not armed attacks in this sense. However, where an invasion by armed forces takes place as by ISIS into Iraq from Syria the requirement of armed attack is fulfilled. The same is true where rockets with highly dangerous explosives are being fired from foreign territory. A coherent system of international law cannot operate a distinction between the following two scenarios. Where a submarine captured by non-state actors fires rockets from the high seas armed reaction is automatically possible without any rule of international law prohibiting that. As soon as rockets of a highly dangerous nature are being fired by

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non-state actors from foreign territory the same armed reaction must be possible. Art. 51 is the legal basis for this reaction.

4. I do not consider that any issue of attribution to the state from whose territory the armed attack is being launched is necessary. Where the territorial state immediately intervenes and stops the armed attack no issue arises because any action by the victim state would not be proportionate since the armed attack has been already ended. Where the armed attack continues Art. 51 is the basis for self-defence action. International law is a system under constant threat by unilateral action. However a proper interpretation of the legal rules must not contribute to unilateral illegal action by overlooking the realities of the present day world.