

# Article 51 – What Matters Is the Armed Attack, not the Attacker

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The problem of the exercise of self-defence according to Art. 51 of the Charter of the United Nations (UN Charter) against armed attacks of non-State actors raises mainly two interconnected problems. The first one concerns the question whether Art. 51 UN Charter does at all apply to armed attacks not originating from a state (a). If this question is answered positively the question arises of how to cope with Art. 2 (4) UN Charter which guarantees the right of territorial integrity and non-intervention into a foreign state (b). In a nutshell, my view on these questions (c) is the following.

a) The terminology of Art. 51 is not absolutely clear. As at the times of the elaboration of the Charter international law was clearly state-oriented it may be argued that self-defence was understood to be admissible only against an armed attack by a state. However, it may also be argued that the authors of the Charter were wise enough not to exclude situations in which an armed attack could also originate from a non-State actor and thus voluntarily did not refer to states with regard to the author of the attack, but only with regard to the victim of the attack.

In this context it has to be recalled that the Charter was the first international treaty providing for the prohibition of the use of force which until then was an undisputed right of sovereign states. The renunciation to use force had, however, to be counterbalanced by the concession that states have not to support attacks of a certain gravity and have not to keep inactive until the Security Council acts, but that in such situation they are empowered to react themselves, even by using force. Thus, the focus of Art. 51 refers to the definition of the term “armed attack”. If states suffer from an armed attack in the sense of Art. 51 they have the right to react by using force irrespective of who is the author of the attack, a state or a non-State actor.

b) If this reading is correct the question arises whether Art. 51 overrides Art. 2 (4), a question that characterizes the long-lasting discussions on humanitarian intervention and its justification. The traditional justification which is supported by international court decisions, in particular those of

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the International Court of Justice (ICJ) in the *Nicaragua* case, the *Wall* advisory opinion and the *Congo* and *Uganda* cases, refers to the law on state responsibility, namely the imputability of the acts of the non-State aggressors to the state from where they act. The harboring doctrine, the doctrine of unwillingness or incapability are referred to in order to justify humanitarian intervention as well as self-defence against non-State actors which usually implies a violation of the sovereignty and territorial integrity of the state from where the attacks originate. Such reading has some merit in particular with a view to Art. 21 Articles on State Responsibility (ASR) according to which measures taken in self-defence are justified and do not constitute a breach of international law, of course provided that the other prerequisites, in particular necessity and proportionality, are respected. But this reasoning which does, in fact, justify possible violations of Art. 2 (4) UN Charter, is based on the state-related interpretation of Art. 51 which seems too narrow to give Art. 51 the weight that it deserves. Self-defence is an “inherent right”, “droit naturel” in the French version, which is triggered whenever an armed attack occurs against a state irrespective from whom it originates and irrespective of questions of imputability to the third state. Its exercise is not dependent on any permission of the Security Council (SC) and until the SC takes measures to maintain international peace and security the individual state or several states collectively have the (primary) right to react. Consent is not necessary when the third state from where the attacks originate, is evidently unable to effectively restrain the armed activities of the non-State actors. What is at stake is the maintenance or restoration of international peace and security and whenever peace and security are endangered, even by a non-State actor, the remedies provided for in the UN Charter are applicable.

c) It is evident that this reading of Art. 51 may be criticized because it may lead to jeopardizing the prohibition of the use of force and thus one of the very basic principles of the United Nations Charter. This criticism is well founded in particular with a view to the fact that action of the SC is again very often prevented so that the use of force by a state in self-defence against an attack by a non-State actor may lead to overstretching the understanding of the term “armed attack” without being corrected by action of the SC. But possible abuse or misuse of rights cannot be a reason for preventing rights to be exercised and cannot have the effect that states have to suffer attacks from non-State actors without reacting merely because these actors are based on some states’ territory and not on the high seas or in the open space. In order to keep self-defence against non-State actors limited, which, and I want to stress this again, is a right flowing from Art. 51 UN

Charter, the most urgent task is to define what is an “armed attack” and to oppose armed attacks to “mere” terrorist attacks which do not *per se* constitute armed attacks in the sense of Art. 51. This is admittedly a difficult task but state practice, Security Council resolutions and court decisions in the aftermath of 9/11 can give some guidance. In addition, international criminal law can and should play a more active part in this context. In case of an armed attack by a state or a non-State actor the victim state is empowered under Art. 51 UN Charter to take the same measures as the SC would be competent to take under Chapter VII, Art. 39, 41 and 42 UN Charter. As the SC has already explicitly stated (in particular Res. 1368 [2001] and 1373 [2001]) that also attacks of non-State actors, not only those of states, may endanger international peace and security the measures provided for in Chapter VII including the right to self-defence may be taken also in case of an armed attack by a non-State actor.

