Self-Defence Against Non-State Actors – A Practitioner’s View

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Lawyers advise on law, not policy. A lawful use of force is not necessarily wise; it may be disastrous. And, in the eyes of some, an unlawful use of force is not always bad. But these are not matters for the legal adviser, acting as such. Those giving legal advice need to distinguish between law and policy if their advice is to be respected. They may hold strong views, based on personal or moral beliefs, but that should not affect the legal advice. There is no room for lofty claims about the one true meaning of Art. 51.

A lawyer advising a Government whether or not force may lawfully be used in particular circumstances needs a clear view of the applicable international law on the use of force (the *jus ad bellum*). He or she cannot simply say that the law is unclear, or controversial, or merely a “process”. Clear advice has to be given, in light of such facts as are known at the time. Moreover, such advice may need to be given in light of the Government’s established position on the matter.

Art. 51 of the Charter of the United Nations (UN Charter) cannot be viewed in a vacuum. It needs to be interpreted in light of State practice, not least recent events such as the struggle against Da’esh. The last couple of years have seen some interesting practice on familiar issues.¹

The present comments address some points that arose in our discussion about whether the inherent right of self-defence recognised in Art. 51 entitles a State to defend itself against attacks by non-State actors within the territory of a third State that does not bear responsibility for the attacks.

- Can an attack by a non-State actor be an “armed attack” within the meaning of Art. 51? There is no textual basis in Art. 51 for limiting self-defence to attacks by States. A “brief and opaque”² passage in the Wall Opinion has sometimes been invoked as authority for the proposition that to give

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rise to a right of self-defence an armed attack has to be launched by a State. The same goes for a “not altogether clear” passage in Armed Activities. Yet it seems improbable that the Court intended this; rather, it left the question open.

- Is it necessary to find that the armed attack is imputable to the territorial State, in accordance with the rules of international law on State responsibility? On the facts of Nicaragua, the Court applied the test in Art. 3 (g) of the 1974 Definition of Aggression, but that does not preclude other approaches. There is no reason to suppose that Art. 3 (g) was intended to establish the sole applicable test (see Art. 6, which is often overlooked).

- If one looks beyond Art. 3 (g), what is the test to be applied? There is considerable support in State practice and writings for the “unwilling or unable” test, which has a long and principled pedigree.

- How strong the legal basis has to be before a State embarks upon a use of armed force – or assists another State to use force? This is ultimately a policy question. But lawyers can and should advise both on the strength of the legal arguments, as well as on the risks inherent in acting on the basis of a “reasonable”, or “arguable” or “reasonably arguable” case.

- States acting in self-defence need to be ready to explain the legal and factual basis for their actions. In addition to the immediate reporting requirement under Art. 51 of the Charter, a State which has used armed force, or assisted another State to do so, may be required, at least after the event, to demonstrate that the facts as known to it prior to the use of force were such as to justify, as a matter of international law, the resort to force under

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3 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136, at 194, para. 139.
the circumstances.\footnote{Leiden Policy Recommendations (note 5), paras. 44 and 48. See also \textit{M. Wood} (note 6), 350; \textit{F. Berman}, The UN Charter and the Use of Force, Singapore Year Book of International Law 10 (2006), 9, at 14.} This might happen in a court of law, at the United Nations, in parliament, or before an inquiry.

In short, Government lawyers advising on use of force issues need to take account of their Government’s practice and previously expressed views. The law indeed may be the least contentious aspect of the advice. The main problem is often to ascertain and assess the facts.