The 21st Century Challenges to Article 51

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FLAVIO PAIOLETTI, JUN 30 2011

The foundation of the United Nations took place in a world shocked by the atrocities and the extensive moral and physical damages of World War II. As a result, the primary focus of the members was to build an international order that could assure and maintain international peace and security, and develop friendly relations among nations (Joyner ed.: 1997, p.97). Central in the project of establishing a new international order were the provisions devoted to the prohibition of the use, or threat, of force. The importance of the prohibition is emphasised by the fact that the drafters decided to devote to it one of the very first Articles of the UN Charter, art. 2(4) [1]. The ban contained in such Article does not allow any exception apart from those provided by the Charter itself and has been acknowledged by the international community of states as part of *jus cogens*, i.e., international norms recognized and accepted by states which have a peremptory character, and therefore can not be derogated by states (Simma: 1999, p. 3).

This paper will focus on Article 51[2] of the UN Charter, which provides one of the two exceptions to the prohibition expressed in Article 2(4). According to Article 51, States victims of an armed attack are allowed to resort to the use of military force claiming an inherent right of self-defence. Debates aroused over the years concerning many aspects of Article 51, especially about the scope of the right of self-defence. In particular, much of the legal debate took place on questions about what constitutes an armed attack, the gravity of an attack triggering the right of self-defence and the requirements of necessity and proportionality shaped the theoretical debate. Yet, as a consequence of recent events such as terrorist attacks of 09/11 and the proliferation of weapons of mass destruction especially within non-state actors, the very concept of “security” seem to have shifted from the one that dominated the Cold War period. The contemporary debate, thus, is centred on the policy challenges who are deemed to “pose challenges for the UN Charter regime” (Waxman: 2011, p.1) who is considered by some to be ineffective for the purpose of dealing with the contemporary threats.

Thus, the paper will quickly go through the main debates mentioned in order to answer the question whether or not the rules of Article 51 suits the current challenges to States’ security.

Article 51

A first, common disagreement generally turned on the interpretation of Article 51. Scholars such as Evans and Gray distinguish two main categories. At one end of the spectrum those who support a wide right of self-defence generally and argue that Article 51 preserved an earlier customary international law right of self-defence expressed in the words “inherent right” (Clark-Arend: 2003, p. 90). In addiction, such a right was wider than Article 51 and allowed protection of nationals abroad and anticipatory self-defence (Gray: 2008, p.117 and Evans: 2010, p. 625).

At the opposite end of the spectrum, scholars supporting a narrow right of self-defence state that such an interpretation of Article 51 would deny its very purpose, i.e., the prohibition of the use of force posed at the basis of the international community and that can be broken only when the exceptions provided by the UN Charter occur. In addition, these scholars “deny that customary law in 1945 included a wide right of self-defence which was preserved by Article 51” (Evans: 2010, p. 625): in any case, as Cassese claims, Article 51 overcame all pre-existing law, “and did not leave any room for self-defence except in the form it explicitly authorized” (Cassese: 2005, p. 259).

The other important set of disagreements is the one concerning the scope of the right of self-defence and can be deemed as comprising questions on what constitutes an armed attack, the gravity of attack and the requirements of necessity and proportionality.

Looking at the first question listed, Article 51 provides for the authorization to a state to react to an armed attack: yet the Article does not afford a precise definition of "armed attack". A good description of it can be found in the "Chatham House principles of International Law on the use of force in self-defence" where it is stated that "an 'armed attack' therefore is an intentional intervention in or against another State without that State's consent or subsequent acquiescence, which is not legally justified" (Wilmshurst: 2006, p. 965). Controversies arise when the attack is not conducted by a regular army and thus state involvement could be not that clear. When the International Court of Justice faced the very famous *Nicaragua* case[3], it came to the conclusion that the sending of irregular forces performing acts of armed attack against another state "of such gravity as to amount to an actual armed attack conducted by regular forces" can be deemed an armed attack. Problems aroused on how to 'quantify' the degree of state involvement, given a general acceptance by the international community of the view that military interventions perpetrated by irregulars can constitute an armed attack. The Court stated that provision of weapons or logistical support do not amount to 'armed attack' even if such assistance can be regarded as unlawful (Murphy: 2002, p. 44). Active rather than passive support seemed needed to meet the requirement of 'armed attack' (Glennon: 2002, p.542).

The matter of gravity of armed attack was raised particularly by the *Oil Platforms* judgement, which quoted a famous passage of the *Nicaragua* case stating that "It is necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms"[4]. In practice, in the Oil Platform case the Court denied the argument held by the USA that an accumulation of events of smaller scale could amount to an armed attack of grave proportions capable of triggering the right of self-defence (Gray: 2008, p.146).

At last, it is appropriate to look over the requirements of necessity and proportionality: even if they are not included in UN Charter provisions, they are part of International Customary Law and attention must be paid to them as expressing states practices and beliefs. It is generally agreed to trace back the two requirements to the 1837 *Caroline* incident. According to the necessity criteria, a state resorting to the right of self-defence need to demonstrate that, given the imminence and the lack of other means, it had no other choice than a forcible action. The proportionality requirements, on the other hand, "the state using force in self-defence would be obliged to respond in a manner proportionate to the threat" (Clark Arend: 2003, p.91). It is worth noting that in less recent cases, as the Nicaragua case and the Oil Platforms ones previously mentioned, the Court treated necessity and proportionality as marginal considerations, taking them into account only after having discussed the legality of the use of force on other grounds. On the other hand, it must be said first that in state practice these two international customary law requirements are often the principal means in deciding the legality of an action; and second that in the recent developments in the debates on Article 51 and the right of self-defence, especially when connected to the argument of anticipatory actions, relying on necessity and proportionality allowed states not to go through more doctrinal arguments (Gray: 2008, p. 154).

Recent Debates

The terrorist attacks of 9/11 sparked a revolutionary challenge to the principles of self-defence, which had to deal first of all with the very nature of the international community and the fact that the attacks did not come from a state actor but from a terrorist group operating in the territory of a state. Second, many scholars stated a fracture between the de *jure system*, i.e. the rules governing the use of force among states, and the *de facto* system, i.e. state practice and the emergence in the international community of non-state actors and the widespread of new kind of weapons such as WMD that bring new and threats to states security (Glennon: 2002, p. 540).

One of the most discussed issues has been whether the September 11 incidents constituted an "armed attack" triggering the right of self-defence. Scholars as Gray claim that Security Council Resolution 1368 (2001) "implicitly

affirmed the right of self-defence in response to terrorist attacks for the first time" (Gray: 2008, p. 193). Others, such as Murphy, preferred to highlight the scale of the incidents and the perceptions by the USA of a military attack. If we go back to the issues of gravity discussed above, we look at the language of Article 51, which is silent on who need to commit an armed attack in order to justify self-defence, and we deal with reactions from the international community to the attacks, we can conclude that actually a terrorist attack of such a gravity can be deemed triggering the right of self-defence.

Second, the so-called 'Bush doctrine', developed in the 2002 *National Security Strategy,* raised the issue of pre-emptive self-defence. In order to face the new challenges coming from terrorism and the widespread of WMD, the USA claimed a right of anticipatory military actions, going beyond the requirement of necessity. The idea behind the 'Bush doctrine' is that as it could be impossible to detect an imminent threat until it is underway or even finished, and as the consequences of such attacks are devastating, "the USA must be prepared to stop rogue states and global terrorists from threatening the use of weapons of mass destructions against it" (Evans: 2010, p.631).

Clearly what USA explicitly argued was that the challenges coming from new kind of threats as WMD and global terrorism, needed to be faced with a revision of the principles governing self-defence deemed to be unsatisfactory. Scholars such as Glennon and Clark Arend, who state that the UN Charter regime is not adequate, back this vision. They seem to limit the focus of the prohibition of the use of force to intra state conflict, claiming that "for all practical purposes, the UN Charter framework is dead. If this is indeed the case, then the Bush doctrine of pre-emption does not violate international law because the charter framework is no longer reflected in state practice" (Clark Arend: 2003, p. 101).

Conclusion

The use of force is a matter of central importance as one capable of affecting directly state's security. State practice showed several breaches to the International law use-of-force regime set out in the UN Charter. This led some scholars, on one hand, to argue that in the light of these breaches the UN Charter regime was failed in its purpose of regulating the use of force (Clark Arend: 2003, p. 101). On the other hand, scholars as Glennon argued that the UN Charter regime should be revisited taking into account "practice that reveal, with solid empirical evidence, what regulation of force is possible and what is not" (Glennon: 2002, p. 557) and bearing in mind the new security challenges that the international community has to face (Global terrorism, WMD).

What is important to remember when considering such arguments is that the primary role and purpose of the UN, and of the Security Council particularly as the body responsible for the use of force, is the promotion and restoration of peace. In such a view, successes have been achieved by the UN Charter regime in the fact that do not deny to be bound by international rules and when they resort to the use of force, "they rest their justifications on factual assessments or interpretation that would bring them within the law" (Schacter: 1989, p. 263). A narrow application of Article 51 would allow keeping control on unilateral use of force, at least given the awareness by states of the political costs of unlawful actions. Widening the scope of self-defence could bring the erosion of the basic purpose of the UN Charter regime, i.e. the ban of military force in inter-state relations and the promotion of peace.

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[1] Article 2(4) states that: "*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, or in any other manner inconsistent with the Purposes of the United Nations*".

[2] Article 51 states that: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*".

[3] Nicaragua case, ICJ Reports (1986)

[4] Nicaragua case, ICJ Reports (1986) 14 para 191

Written by: Flavio Paioletti
Written at: Cardiff University
Lecturer: Dr. Edwin Egede
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