

COMMENTARY

The 'Armed Activities' Case:

Unasked Questions, Proper Answers

André de Hoogh*

Another day, another dawn, and yet another case emerges of the International Court of Justice (hereinafter: the Court) grappling with the contentious relationship between the use of armed force and self-defence. While the Court set out the law in an extensive, if not somewhat confusing, manner in the *Nicaragua case*¹ (1986), in recent times it has failed to shed further light on the more controversial issues of the case, such as the nature and goals of self-defence and the question of threshold of an armed attack. Its recent judgment in the case concerning the *Armed Activities on the Territory of the Congo (DRC v. Uganda)*² may once again attract criticism for failing to provide definitive answers to the most contentious questions in this area of international law, but the judgment will at least serve as a wake up call to the States of this troubled region of Africa that legal limitations to their actions have now been clarified.

In its judgment the Court takes sides regarding the interpretation (albeit implicitly) of article 2(4), when it characterises Uganda's actions as a violation of the *territorial integrity* of the Congo.³ As no suggestion can be made, at all, that Uganda was interested in territorial gain, the Court's observation can only be taken to mean that territorial integrity is equivalent to *territorial inviolability*. The Court, however, first deals with the question of self-defence (and consent) before turning to the question of whether or not Uganda has violated article 2(4) of the Charter.⁴ An explanation for this approach may perhaps be found in the view taken by Judge Tomka that when the use of armed force constitutes a lawful exercise of the right to self-defence, the measures at hand fall outside of the scope of the prohibition contained in article 2(4).⁵

* Dr André de Hoogh is a senior lecturer in Public International Law at the University of Groningen.

¹ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*): Judgment (Merits), 27 June 1986 (Hereinafter: *Nicaragua case*).

² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*: Judgment, 19 December 2005 (Hereinafter: *Armed Activities case*).

³ *Ibid.*, at para. 165.

⁴ *Ibid.*, at paras. 106-147 and 148-165 respectively.

⁵ *Armed Activities case*: Declaration of Judge Tomka, paras. 10-12 (French text only).

This view appears to mischaracterise the relationship that exists between articles 2(4) and 51, which is one of general prohibition and justification. Any use of armed force necessarily falls within the scope of the prohibition, more so when territorial integrity is interpreted to mean territorial inviolability. The Court's conclusion, that Uganda violated the prohibition,⁶ testifies to this in that article 2(4) does not exclude certain specific armed measures or activities from its scope. Thus such action is in need of justification, which may be found in self-defence, authorisation by the Security Council, or some other ground recognised under international law. This is only different in relation to consent. If the territorial State agrees to the use of armed force by another State on its territory, e.g. to suppress armed bands or pursue terrorists, there will not be a violation of article 2(4) because such force will not be against the territorial integrity or political independence of the former State, nor inconsistent with the purposes of the United Nations.

One common feature of three more recent ICJ awards - *Oil Platforms case*⁷ (2003), *Wall Opinion*⁸ (2004), and the present *Armed Activities case*⁹ (2005) - appears to be the emphasis on the attribution of an armed attack to a State for another State to be allowed to invoke and exercise its right of self-defence. In the case at hand the Court finds that the armed bands or irregulars engaging in attacks in Uganda were not sent by the Congo and did not act on behalf of the Congo. Consequently, those attacks were not attributable to the Congo, and therefore Uganda could not have exercised a right of self-defence against the Congo.¹⁰

This choice for the emphasis on attribution without much analysis or motivation, had already been censured by individual judges in the *Wall Opinion*,¹¹ and is criticised once more in the *Armed Activities Case*.¹² These judges reproach the Court for not addressing the possible change in interpretation or law resulting from the 9/11 attacks (purportedly planned and executed by Al-Qaeda), and the Security Council's recognition or reaffirmation of the right of self-defence in relation to terrorist acts in resolutions 1368 and 1373 (2001).

However, lacking in these opinions is any reference to the US invocation of self-defence against Afghanistan in response to the 9/11 attacks. What the judges have in mind, though, appears to be that the 9/11 attacks, more likely than not, *cannot be attributed* to Afghanistan. As no serious challenges have been made to the US invocation of self-defence against Afghanistan, this more than anything else seems to be an acceptance of the view that self-defence may be invoked even when the attack is not in itself (is not *directly*) committed by another State.

⁶ *Armed Activities case*: Judgment, para. 165.

⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003 (Hereinafter: *Oil Platforms case*).

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*: Advisory Opinion of 9 July 2004 (Hereinafter: *Wall Opinion*).

⁹ *Armed Activities case*: Judgment, 19 December 2005.

¹⁰ *Ibid.*, at paras. 145-146.

¹¹ *Wall Opinion*: Declaration of Judge Buergenthal, para. 6; *Wall Opinion*: Separate Opinion of Judge Higgins, para. 33; *Wall Opinion*: Separate Opinion of Judge Kooijmans, para. 35.

¹² *Armed Activities case*: Separate Opinion of Judge Kooijmans, paras. 26-31; *Armed Activities case*: Separate Opinion of Judge Simma, paras. 4-12.

Although some of the positions taken by the Court are certainly not beyond reproof, the critical judges are themselves negligent on the issue. They do not engage in thorough analysis of the Charter either and seem to take the relevant paragraphs in the SC resolutions at face value. Interpreting article 51 in context makes clear that the use of armed force by State A against State B will fall under the scope of article 2(4), and hence constitutes a violation, unless State A can invoke the right to self-defence as a justification. But precisely because self-defence involves the use of armed force against another State, the justification of self-defence must be invoked *against that other State* and not merely against non-state actors operating from the territory of that other State.

As the Court found that the attacks of which Uganda complained¹³ were not attributable to the Congo, it declined to investigate whether a right of self-defence might exist in relation to *large scale attacks by irregular forces*.¹⁴ This raises the question whether any single attack or a series of incidents reaches the threshold of seriousness that the Court found to be implied in the concept of armed attack, and on the basis of which it held that attacks by armed bands ought to be tantamount, because of their scale and effects, to an attack by regular armed forces.¹⁵ Judge Kooijmans commented that the series of attacks of which Uganda was the victim could be considered an armed attack in the sense of article 51.¹⁶

With respect, on the basis of the facts presented, this latter comment may be disputed. The Court establishes the existence of five attacks over a two-month period, leading to a loss of life of 52 people and abductions of 125 persons.¹⁷ Though considerable this does not reach the scale and effect of an armed attack committed by regular armed forces. If one were to subscribe to the view held by judge Simma in the *Oil Platforms case*,¹⁸ as the present writer does, that a State may take strictly defensive (military) measures in response to incidents falling below the threshold of armed attack, the Ugandan military response might in principle have been justified. However, Judge Simma has indicated that such defensive measures would also have to comply with stricter standards of immediacy, necessity and proportionality. In light of that, the Ugandan response would fail the test and, most likely, would fail on all three counts.

Finally it may be noted that the Court does consider the goals of the military actions of Uganda,¹⁹ and observes that the objectives of the Ugandan operation 'Safe Haven'²⁰ were not consonant with the concept of self-defence. The Court, however, does not specify what goals may be pursued, or may not be pursued, in the course of self-defence.²¹

¹³ Armed Activities case: Judgment, paras. 131-135 and 146.

¹⁴ *Ibid.*, at para. 147.

¹⁵ Nicaragua case: Judgment (Merits), para. 195.

¹⁶ Armed Activities case: Separate Opinion of Judge Kooijmans, para 32; Also: Armed Activities case: Separate Opinion of Judge Simma, paras 13-14.

¹⁷ Armed Activities case: Judgment, para. 132.

¹⁸ Armed Activities case: Judgment, para. 132.

¹⁹ Armed Activities case: Judgment, paras. 110-111, 113, 119, 143, 148, 155, 163.

²⁰ *Ibid.*, at para. 109.

²¹ *Ibid.*, at para. 119.

The goals of self-defence have generally been regarded as limited to repelling an attack, reasserting control over territory occupied by an adversary, and preventing future attacks. With respect to the latter, a restriction is usually suggested in that this goal could be pursued only in a continuum of hostilities. As such, it is most clearly linked to the conditions of immediacy and necessity applicable to the exercise of self-defence.

For the second time since its judgment in the Nicaragua case, the Court has considered a situation in which non-state actors were intent upon overthrowing a government and the support given to such actors by foreign States.²² In both cases, the Court refrained from pronouncing on the actual existence of such a goal on the part of the relevant State, but concluded to violations of the prohibition of the use of force and intervention irrespective of such a particular goal. In view of rather recent discussions on the desirability of effecting 'regime change' in certain States, it would have been highly desirable for the Court to authoritatively pronounce on the goals of self-defence and thus make clear that overthrowing a government may not, in general, be contemplated within the context of self-defence.

The ICJ's Judgment, and the rather forthright determination of Ugandan responsibility for violation of the prohibition of the use of force is to be welcomed, and will hopefully contribute to an atmosphere of restraint on the part of African States when considering their responses to the complex situation existing in the Great Lakes region. While the judgment does contain some interesting and note-worthy developments, it would have been preferable if the Court had, as urged by some of the judges, approached the more controversial matters head on and, more particularly, provided substantive analysis for its views on the state of international law regarding self-defence. If it had done so, it might well have been considerably more successful in checking some of the worrying trends in the behaviour of States, not only in Central Africa, but indeed throughout the world.

²² Nicaragua case: Judgment (Merits), paras. 240-241; Armed Activities case: Judgment, para. 163.