Chapter 7
Irregular Forces and Self-defense Under the UN Charter

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Introduction
The traditional position that the right to self-defense under Article 51 of the Charter of the United Nations requires an armed attack by a State has come under increasing challenge in the recent past. The question, under what circumstances the conduct of irregular non-State actors amounts to an armed attack to permit the use of self-defense under Article 51 of the UN Charter, was most recently addressed by the ICJ in Congo v. Uganda. As I note below, the separate and dissenting opinions in that case illustrate the increasing challenge to the requirement of an armed attack attributable to a State prior to the exercise of the right of self-defense. With that challenge comes the possibility of lowering the barrier to the right to engage in armed conflict inconsistently with the UN Charter.

In addition to the ongoing debate among the ICJ’s judges, recent Security Council Resolutions have been cited as evidencing a move towards expanding the right of self-defense where attacks by irregular forces could not be attributed to a State. Expanding the right of self-defense to include attacks by irregular forces whose conduct is not attributable to a State is inconsistent with earlier Security Council criticisms of self-defense, especially by occupying countries. Although the Court’s opinion in Congo v. Uganda specifically


3 Members of the Security Council disapproved Israel’s claim in the 1960s and 70s that the call to arms or the implementation of force was justifiable as a response to
declined to address the permissibility of a right to self-defense, even against large-scale attacks by irregular forces,\textsuperscript{4} it nevertheless found Uganda not only to have occupied parts of Congolese territory but to have used force in violation of the prohibition of the use of force contained in Article 2(4) of the Charter. Since Uganda argued that it had suffered attacks from irregular forces which it sought to forcibly repulse, \textit{Congo v. Uganda} ought to be read as affirming the prohibition of the use of force in the absence of an armed attack attributable to a State. The refusal by the Court to expand the right of self-defense to include cases involving attacks by irregular forces that cannot be attributed to a State is an acknowledgment that the acceptance of an expanded right of self-defense would need more than its judicial imprimatur. Indeed, while the \textit{Nicaragua} decision affirmed self-defense as an inherent right,\textsuperscript{5} this inherent right to self-defense “must” ultimately “be regarded as limited and not only legitimated by law.”\textsuperscript{6}

\textbf{The Use of Force and Self-Defense under the UN Charter}

Except in the case of self-defense or as mandated by the authority of the Security Council, Article 2(4) of the UN Charter prohibits the use of force. Article 2(4) requires that “[a]ll 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.”\textsuperscript{7} The term “war” is not included within this prohibition, rather all uses of force whether equated to war or lesser actions are prohibited.\textsuperscript{8} Under

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\textsuperscript{4} Congo v. Uganda, 2005 I.C.J., at 53, para. 147 (Dec., 19). Here, the ICJ having concluded that the evidentially accepted facts of the current case lacked the necessary circumstances for the justifiable exercise of the right to self-defense by Uganda, stated “[a]ccordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.” \textit{Id.}

\textsuperscript{5} Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94, para. 176 (June, 27) [hereinafter Nicaragua].


\textsuperscript{7} UN Charter, art. 2(4).

\textsuperscript{8} Mary Ellen O’Connell, \textit{International Law and the Use of Force} 7 (2009).

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