SELF-DEFENSE, STATES’ SILENCE, AND THE SECURITY COUNCIL: EXAMINING ACQUIESCENCE CONCERNS AND ARTICLE 51 REPORTS

When is silence juridically relevant in international law? When is it pertinent to measures of self-defense? Under what circumstances does a State — or the United Nations Security Council — tacitly consent to another State’s conduct by not speaking out against it? Where do States, and where does the U.N. Security Council, have an obligation to publicly denounce unlawful conduct lest they acquiesce in the violative conduct and, possibly, in a revised interpretation or modification of the legal provision corresponding to that violative conduct?

The basic contours of the relevance of silence in international law are not new. They have resurfaced over centuries and across a range of contexts, touching on such matters as the attribution of territorial title, change of a land boundary, and derogation of a treaty. The (Draft) Articles on the Responsibility of States for Internationally Wrongful Acts (2001) recognized, for example, the loss of the right to invoke responsibility where the injured State is considered, by reason of its conduct, to have validly acquiesced in the lapse of the claim.

More recently, silence and inaction have been raised — in draft conclusions of the International Law Commission (ILC) — regarding two topics that pertain to (re)interpreting, or perhaps even modifying, legal provisions. One topic concerns treaties, and the other relates to customary international law. Both topics are under active consideration by the ILC in conjunction with U.N. Member States, and both may be relevant to self-defense. That is because the legal parameters concerning self-defense measures pertain not only to the U.N. Charter but also to customary international law.

The first ILC topic is the establishment of the agreement of parties to a treaty through subsequent practice. According to the ILC’s most recent draft conclusions regarding that topic, silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction. (Those draft conclusions also state that silence by a party shall not be presumed to constitute subsequent practice under Article 31(3)(b) of the Vienna Convention on the Law of
Treaties accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body. The second ILC topic is the identification of a rule of customary international law. According to the most recent ILC’s draft conclusions concerning that topic, relevant practice may, under certain circumstances, include inaction, and failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction.

The status of the norms and the corresponding treaty provisions and customary rules at issue — in particular, those concerning the prohibition of the use of force in international relations — may further complicate the legal analysis. That is because certain norms, including those recognized as reflecting obligations erga omnes or jus cogens, give rise to additional considerations. Those considerations might, for example, implicate a potential obligation of third States to cooperate to bring the breach to an end and to not recognize as lawful any situation created by the breach, as well as modalities through which the relevant norm may, or may not, be modified.

Today, foundational questions concerning the juridical relevance of silence resonate perhaps most significantly with respect to extraterritorial State military attacks that are (purportedly) conducted on a self-defense basis, that are directed against non-state armed groups, and that are undertaken (at least seemingly) without the consent of the territorial State. Such attacks directed against ISIS in Syria make up one prominent set of examples. But they are far from the only instances.

An ongoing debate among international lawyers concerns aspects of the legality of such resorts to force under the U.N. Charter and under customary international law. One subset of that debate concerns whether — and, if so, under what conditions — the international legal regime governing self-defense permits a State, without U.N. Security Council authorization, to resort to force by directing an attack against a terrorist group in circumstances where that group is neither directed nor controlled by, but operates in and emanates cross-border threats from, another State and where the attacking State does not have the consent of the territorial State. A related strand of debate relates to what, if any, legal effects may arise in the face of those resorts to force from silence — whether it is the silence of States other than the attacking State(s) or the territorial State(s) or the silence of the U.N. Security Council itself.

Against the backdrop of those debates, this project seeks to deepen and widen our understanding of the role, if any, of silence or inaction in discerning whether armed action directed against non-state armed groups in the identified circumstances fits
within the existing international legal order. Of the array of potential concerns in this thematic area, this project will focus on two linked sets of issues.

The first set of issues that this project will explore concerns the legal relevance, if any, of States’ silence or inaction in relation to the resorts to the use of force (purportedly) in self-defense raised above. Among the relevant stakes are whether — by not publicly protesting or otherwise denouncing resorts to force in the form of military attacks directed against non-state armed groups (seemingly) without the territorial State’s consent — certain States (perhaps especially States other than the attacking State and territorial State) and/or the U.N. Security Council may be considered to have tacitly consented to the validity of those resorts to force and/or of the legal rationales underlying them. We will explore normative parameters in light of subsequent practice of parties to the U.N. Charter and of State practice and opinio juris, as well as jurisprudence of international courts.

The second set of issues that this project will examine concerns so-called “Article 51 reports.” Article 51 of the U.N. Charter lays down 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.

We will explore the role of Article 51 reports within the normative regime as well as international legal aspects concerning the U.N. Security Council’s responses, or lack of responses, to those reports. In doing so, we will consider such issues as the accessibility of and transparency concerning those reports; trends and trajectories regarding the content (including legal arguments), form, and other substantive and procedural aspects pertaining to those reports; and the U.N. Security Council’s responses to those reports and/or its own silence or other forms of inaction regarding them.

RESEARCH ACTIVITIES

Primary Research Question and Anticipated Outcome

Against the backdrop sketched above, HLS PILAC researchers will examine whether — by not publicly protesting or otherwise denouncing resorts to force in the form of military attacks directed against non-state armed groups (seemingly) without the
territorial State’s consent — certain States (perhaps especially States other than the attacking State and territorial State) and/or the Security Council may be considered to have tacitly consented to the validity of those resorts to force and/or of the legal rationales underlying them. We anticipate that this research will contribute to a widening and a deepening of discussions on whether, or not, the relevant provisions in the U.N. Charter and/or the rules of customary international law in this area are — as at least some commentators have claimed — currently undergoing a process of reinterpretation or modification.

Methodology
In light of a recent surge in invocations of Article 51, we will undertake legal analysis based on those invocations, on assessments of (purported) subsequent practice of States parties to the U.N. Charter, on assessments of (purported) State practice and opinio juris, and on foundational and recent scholarship.

RESEARCH DISSEMINATION AMONG STATES
The subject-matter of this project pertains to matters of international concern in which all States may have various legal and other interests. In light of that universality of possible concerns at stake, we will seek to raise awareness of the research and analysis among all potentially interested States. That will include not only States that have undertaken (or are currently undertaking) the military action at issue or States on whose territory such action has been undertaken (or is currently being undertaken) but also other States as well.

PROOF OF CONCEPT

Initial Scoping of a Database for Researchers and Practitioners
A team of HLS PILAC researchers is seeking, as a proof of concept, to determine the feasibility of identifying, and making publicly and freely available online, Article 51 reports — not only from the contemporary period but also reaching back to the establishment of the United Nations.

INITIAL RESOURCE LIST

Academic Analyses and Resources

• HLS PILAC, Database of States’ Statements (August 2011–October 2016) concerning Use of Force in relation to Syria, May 2017
• Dustin Lewis and Jillian Ventura, New Database of States’ Approaches to Use of Force Concerning Syria, Lawfare Blog, May 24, 2017
• Paulina Starski, Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility, 4 J. Use of Force & Int’l L 14 (2017)

Documents
• U.N. doc A/CN.4/L.874
• U.N. doc A/RES/71/140
• U.N. doc A/CN.4/L.872

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