Guest editorial

The ILA's 2018 report on aggression and the use of force*

Noam Lubell

Professor of International Law, University of Essex, UK; Swiss Chair of IHL, The Geneva Academy of International Humanitarian Law and Human Rights, Switzerland; Rapporteur of the ILA Committee on the Use of Force (2010-2018).

CONTACT: nlubell@essex.ac.uk

Michael Wood

Barrister, 20 Essex Street Chambers, UK; Member of the UN International Law Commission; Chair of the ILA Committee on the Use of Force (2010-2018).

CONTACT: MWood@20essexst.com

***

The International Law Association Use of Force Committee's *Final Report on Aggression and the Use of Force* (2018) can be accessed at: https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6.

***

1. Introduction: the ILA and the use of force

The International Law Association (ILA) is a non-governmental organization, founded in 1873.[1] It works mainly through committees and study groups, and through its national Branches, as well as holding a major international conference every two years.

The law on the use of force (the *jus ad bellum*) has long been a central branch of international law. Yet it was only in 2005 (following such controversial episodes as Kosovo

* The views expressed in this guest editorial do not necessarily reflect those of the Committee or its members.

[1] Ted Stein, 'International Law Association (ILA)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law*, vol. V (Oxford University Press, 2012) 872–4. A good deal of information about the organisation can be found on the ILA's website: www.ila-hq.org/.

1999, Afghanistan 2001, and Iraq 2003, and especially 'the United States' position following the attacks of 11 September 2001 that it was involved in a "global war on terror"'),[2] that the ILA first established a Committee on the Use of Force (2005-2010). Professor Mary Ellen O'Connell (USA) chaired the Committee, with Professor Judith Gardam (Australia) acting as rapporteur. This first Committee's mandate was to prepare a report on the meaning of war or armed conflict in international law. Its Final Report[3] was adopted in 2010.[4]

In 2010 a second ILA Committee on the Use of Force was established ('the Committee'), with the authors of this editorial acting as chairperson and rapporteur. The Committee's mandate focused on aggression, but in practice the Committee found that it needed to place the consideration of aggression within a wider context. A wide-ranging Final Report was adopted in 2018.[5]

The 78th Conference of the ILA took place in Sydney from 19 to 24 August 2018. Following a debate at an open working session of the Committee, in resolution 4/2018 the Conference took note of the Committee's *Final Report on Aggression and the Use of Force* and commended it to all those concerned with the international law on the use of force.[6] The Conference endorsed the following conclusions set out in the Final Report:

(a) The UN Charter goal of collective peace and security depends upon strict adherence to the international law on the use of force;
(b) What is needed are not new rules on the use of force, but political will on the part of States, including members of the UN Security Council. The Security Council must use its powers proactively, positively and with clarity;
(c) Article 8 bis of the Rome Statute of the International Criminal Court (crime of aggression) is relevant only to the crime over which the International Criminal Court

[2] International Law Association, Committee on the Use of Force (2005-2010), *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference (2010) https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1266&StorageFileGuid=84ac02f3-e51a-4308-adf0-e94256758f38, 1.
[3] *Ibid*.
[4] International Law Association, Resolution 6/2010 (Use of Force), The Hague Conference (2010) https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1265&StorageFileGuid=bbfe9ebd-38e6-4a28-b0e8-586e14572c3a.
[5] International Law Association, Committee on the Use of Force (2010-2018), *Final Report on Aggression and the Use of Force*, Sydney Conference (2018) https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6 (hereafter, 'Report').
[6] International Law Association, Resolution 4/2018 (Committee on Use of Force), Sydney Conference (2018), https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11901&StorageFileGuid=6acd1681-d33f-440a-9726-758094d38cd5.

has jurisdiction; it neither affects the definition of 'act of aggression' within the meaning of Article 39 of the UN Charter nor should it lead to a diminished appreciation of the prohibition of the use of force under Article 2(4) of the UN Charter and customary international law, and the constraints on States resulting therefrom;

(d) Overall the current international law on the use of force, properly interpreted and applied, remains a solid 'cornerstone' for international peace and security.

The Conference further called on all states to observe strictly the rules of international law concerning the use of force.[7]

The second ILA Committee on the Use of Force had thus accomplished its mandate and was dissolved. However, there is clearly an appetite within the ILA to continue the study of this crucial area of international law. A third ILA Committee on the Use of Force was established in November 2018, with a mandate to consider *Military Assistance on Request* (an issue dealt with briefly in the Final Report of the second committee under the heading 'Consent'[8]). The co-chairs of the third Committee are Professor Claus Kress (Germany) and Professor Vera Rusinova (Russia), with Professor James A. Green (UK) and Professor Tom Ruys (Belgium) as co-rapporteurs.[9]

2. The work of the second Committee on the Use of Force and its *Final Report on Aggression and the Use of Force*

The Committee comprised 38 members (plus alternates) from 21 ILA Branches. The Committee itself held six meetings;[10] in addition there were meetings and open working sessions at the biannual ILA conferences in Sofia (2012), Washington (2014), Johannesburg (2016) and Sydney (2018). Given the difficulty of getting members together (the ILA has no funding for this purpose), much work was done by email. Each main draft of the Report was circulated to all Committee members for comment. Individual members prepared background papers, which were very helpful when it came to the preparation of the Report. As is stated therein, '[t]he Report is a result of collective work conducted in a contested field of law.'[11]

[7] *Ibid*.
[8] *Final Report on Aggression and the Use of Force* (n 5) section B.3.
[9] For information regarding the newly established third ILA Committee on the Use of Force, see www.ila-hq.org/index.php/committees (and select 'Use of Force: Military Assistance on Request').
[10] *Final Report on Aggression and the Use of Force* (n 5) 1.
[11] *Ibid*. See the members listed in footnote 1 of the Report.

The Committee was large by ILA standards, and there were inevitably differing views on some fundamental points. Nevertheless, as the Final Report records:

> While not all members can be committed to the precise formulation of each and every point in this report, it is believed that the report reflects a common general position on the current state of debate in the areas covered by the report.[12]

The Final Report is concise, just 30 pages long (in line with ILA requirements). It nevertheless covers a broad sweep of the *jus ad bellum*, without in any sense attempting to be comprehensive. It chiefly aims to state the law, but it does not hesitate to discuss questions of legal policy where appropriate, for example, in relation to Security Council authorization.

The Report is divided into the following parts and sections:

Part A: Context
- A.1. Introduction
- A.2. Clarification of *jus ad bellum* terms and concepts

Part B: Lawful uses of force
- B.1. Security Council authorization
- B.2. Self-Defence
  - B.2.a. Necessity and Proportionality
  - B.2.b. Anticipatory Self-Defence
  - B.2.c. Self-Defence against Non-State Actors
  - B.2.d. Rescue of Nationals Abroad
- B.3. Consent

Part C: Particular issues
- C.1. Humanitarian intervention
- C.2. Cyber operations

Part D: Aggression

Conclusions

[12] *Ibid*, 2.

The Report first deals with two terms in the UN Charter that are often not properly distinguished: 'use of force' (and especially the meaning of 'force') – Article 2(4); and 'armed attack' – Article 51.[13] Important legal and policy issues concerning the Security Council authorization of the use of force are then considered.[14]

Seemingly eternal, but nevertheless highly topical, issues of self-defence are covered next, and form a central part of the Report: they include anticipatory self-defence and self-defence against non-state actors.[15] The rescue of nationals abroad is also located in the part on self-defence, though that in itself may be rather question-begging. Two topical and controversial questions form the next part of the Report: humanitarian intervention, and cyber operations.

The section of the Report on a possible right of humanitarian intervention[16] first describes the various occasions on which such a right has been claimed, and the evolution of the 'responsibility to protect' concept. It then concludes that

> [a] minority of writers hold to the view that the use of force to avert a humanitarian catastrophe is lawful, whereas others emphasise that a use of force to avert a humanitarian catastrophe will, if stringent conditions are met, fall into a legal grey area. The existence of such minority positions means, at least, that it is difficult to conclude that a right of humanitarian intervention is unquestionably unlawful…[17]

On cyber operations, which is thus far an underdeveloped area of the international law on the use of force, the Report limits itself to describing briefly some of the legal issues.[18] Among other things, the Report notes that 'cyber operations are capable in principle of crossing the threshold into use of force, and in some circumstances if cyber operations directly cause significant damage, the question arises whether they can be said to constitute an armed attack giving rise to a right of self-defence on the part of the victim State.'[19] It goes on to note 'an emerging view … that cyber operations may constitute a use of force or even an armed attack if their scale and effects mirror those of a traditional kinetic use of force or armed attack.'[20]

---

[13] *Ibid*, section A.2.
[14] *Ibid*, section B.1.
[15] *Ibid*, section B.2.
[16] *Ibid*, section C.1.
[17] *Ibid*, 24.
[18] *Ibid*, section C.2.
[19] *Ibid*, 25.
[20] *Ibid*, 25.

And it warns that 'if a conclusion were to be reached that a cyber operation could properly be termed an armed attack, it should be noted that self-defence does not require using the same means as the attack which provided the trigger for its exercise: determining that a cyber operation was an armed attack would therefore unleash the possibility of kinetic force in self-defence.'[21]

Finally the Report turns, in its Part D, to aggression. It first describes the limited and uncertain role of the notion of aggression within the UN Charter collective security system, and then turns to the definition of the 'crime of aggression', which has now been incorporated into Article 8 *bis* of the Rome Statute of the International Criminal Court. The Report notes that 'concerns have been expressed about Article 8 *bis* of the ICC Statute, both in itself and because of its possible impact on the prohibition of the use of force and the crime of aggression under general international law.'[22] The Report concludes, in unambiguous terms, that

> it is clear that Article 8 *bis* of the ICC Statute is relevant only to the crime over which the ICC will have jurisdiction. It neither affects the definition of 'act of aggression' within the meaning of Article 39 of the UN Charter nor should it lead to a diminished appreciation of the prohibition of the use of force under Article 2(4) of the UN Charter and customary international law, and the constraints on States resulting therefrom.[23]

In the conclusions, the Committee recalls that

> From Iraq to Crimea and Afrin, there has been concern over a lack of respect for the prohibition of the use of force. At the same time, there has been growing concern at the failure to respond adequately to modern security threats (not least, transnational terrorism and the proliferation of weapons of mass destruction) and to humanitarian catastrophes (such as in Rwanda, Darfur and Syria).

The final words of the Report nevertheless strike a positive note, positive about the law if not about its application by states:

[21] *Ibid*, 26.
[22] *Ibid*, 28.
[23] *Ibid*, 29.

> [I]t is believed that overall the current international law on the use of force, properly interpreted and properly applied, remains a solid 'cornerstone' for international peace and security.[24]

***

As already indicated, the second ILA Committee on the Use of Force was large and reflecting different perspectives. While there was general agreement on many key points, inevitably on others the Report does not state firm conclusions but merely seeks to reflect the current state of the debate.

In addition to those points indicated above (such as on the possible effect of the definition of 'crime of aggression' for the purposes of the Rome Statute), there was general agreement within the Committee on the following important points, among others:

- that Article 2(4) is generally accepted as referring only to the use of 'armed' or 'physical' force;[25]
- that the prohibition on the use of force in Article 2(4) is not limited by the words 'against the territorial integrity or political independence of any state';[26]
- that the Security Council's powers have long been accepted as including the power to authorize states, or in some cases international organizations, to use force;[27]
- that it is desirable to have as much clarity as possible when the Security Council authorizes the use of force;[28]
- that the fact that the Council takes action to restore or maintain international peace and security after an unlawful (or questionable) use of force cannot in itself be seen as an endorsement of the original use of force.[29]

Issues on which the Report reflects 'the current state of the debate' included the following:

[24] *Ibid*, 30. *Cf. Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168, para 148.
[25] *Final Report on Aggression and the Use of Force* (n 5) 4.
[26] *Ibid*, 4–5.
[27] *Ibid*, 8.
[28] *Ibid*, 9.
[29] *Ibid*, 9.

- whether there is any threshold of seriousness below which a use of force does not fall within the Article 2(4) prohibition;[30]
- whether there is a gap between 'use of force' and 'armed attack';[31]
- the 'accumulation of events' theory;[32]
- with regard to armed attacks that have already occurred, between two approaches to defining the legitimate aims of action taken in self-defence: a narrower view allowing only for halting and repelling an ongoing attack; and a wider view that includes halting and repelling but also allows for preventing further attacks which are to be expected under the circumstances;[33]
- anticipatory self-defence;[34]
- self-defence against non-state actors;[35]

---

[30] *Ibid*, 5 ('While it has been claimed that there is a *de minimis* threshold, there is no conclusive evidence to support either this or the contrary view. Cases in which States did not claim a violation of Article 2(4) do not necessarily prove that an incident was below the force threshold, but may simply indicate a political decision not to invoke a violation of Article 2(4). There may also be law enforcement activities such as the enforcement of a State's fisheries jurisdiction, kept within a limit of reasonableness and necessity, which do not qualify as a use of force for the purposes of Article 2(4). Of course, a law enforcement situation may evolve into one involving a prohibited use of force. It may be that the differentiation in these cases should be based on the level of force or the nature of force (i.e. excluding such operations due to the nature of force being a recognised and allowed form of law enforcement, rather than considering them to be force that is below the Article 2(4) threshold.' (footnotes omitted)).

[31] *Ibid*, 5–6 ('State practice indicates that small-scale border attacks involving the use of lethal force are not excluded from the concept of "armed attack" and may give rise to the right of self-defence. Overall, it would appear that the determining criteria would more appropriately be centred upon questions of scale and effects of the attack. Moreover, in practice it appears that the gravity threshold attached to armed attacks is not markedly high, and would include most uses of force likely to cause casualties or significant property damage. As such, if there is a gap between "use of force" and "armed attack", it would be relatively narrow. The gravity of the attack would nevertheless be a crucial factor in assessing the necessity and proportionality of a forcible response.' (footnotes omitted)).

[32] *Ibid*, 7 ('There is some, not entirely consistent, support for the theory, but it is unclear whether it has been widely accepted. The accumulation of smaller attacks may, however, be relevant from the point of view of anticipatory self-defence insofar as these incidents might in some circumstances support the case for likelihood of an imminent attack. They could also affect the modalities of self-defence when assessing the necessity and proportionality of the force being used.' (footnotes omitted)).

[33] *Ibid*, 11.

[34] *Ibid*, 13–4 ('…, there would seem to be increasing support for the view that the right to self-defence does exist in relation to manifestly imminent attacks, narrowly construed. …. Although the matter remains unsettled, there may be reason to accept that when faced with a specific imminent armed attack based on objectively verifiable indicators, States may engage in measures to defend themselves in order to prevent the attack. Any such measures would have to conform to all the earlier stated requirements of armed attack, necessity and proportionality, which will further constrain the anticipatory use of force, and must give primacy to effective measures by the Security Council.' (footnotes omitted)).

[35] *Ibid*, 14–7 ('Although the issue is still debated, there is growing recognition – including through State practice – that there are certain circumstances in which a State may have a right of self-defence against non-state actors operating extraterritorially and whose attacks cannot be attributed to the host State. The military operations by numerous States from a variety of regions on Syrian territory against the so-called Islamic State since 2015 have, in particular, demonstrated the readiness of a considerable number of States to invoke Article 51 in the context of operations against a non-state actor. Nonetheless, the modalities of how self-defence might be carried out in this context do raise considerable challenges. [*The challenges are then explored*] Although recent State practice can be read as allowing self-defence in these circumstances, certain aspects of the above discussion continue to be

- rescue of nationals abroad;[36]
- consent.[37]

3. Assessment

It is difficult to predict the future impact of this Report. The ILA does not in and of itself have a formal authority to pronounce on the areas of law in its remit. Nonetheless, it is hoped and anticipated that the *Final Report on Aggression and the Use of Force* will carry significant weight in the field. It is, to the best of our knowledge, the only published work which effectively sets out the state of law in the field of use of force in a relatively brief manner, while simultaneously managing to extrapolate upon the most contested topics in this area. Given its comprehensive nature, as well as its format and length, the Report lends itself to becoming a key background text for all those interested in the international law on the use of force. It can thus serve not only as a teaching tool, but also as a primer for scholars, policy makers, journalists, and anyone with an interest in this field.

The collective nature of this endeavour undoubtedly presented challenges, most notably for the logistics of coordinating discussion and meetings of a large international group. The plurality of opinions also meant that on occasion the Report refrained from including definitive conclusions on certain topics,[38] in which a single-author report might have been more categorical. Notwithstanding, this should, in our view, demonstrate the strength of the Report as one which accurately portrays the current state of debate.

The assessment of ongoing debates reflects the evolving nature of the law, noting areas in which certain positions may be gaining strength,[39] even while remaining unsettled. Moreover, in other, newer, areas such as cyber operations, the Report explicitly notes the lack of state practice, thereby accepting that the law may yet develop in unpredictable directions.

---

debated. It must be noted, in this context, that the Security Council has the power to take action directed against threats to the peace by armed groups, and has taken measures of this nature in the past. By acting decisively in future situations of such type, the Council could reduce the risk of States taking matters into their own hands.' (footnotes omitted)).

[36] *Ibid*, 17–8 ('… the prevailing view is that, in the post-Charter era, only self-defence can provide for legal recourse to unilateral force that would otherwise violate Article 2(4). …. Reliance on the self-defence justification will also require abiding by the restrictions placed on the exercise of self-defence. This means that any operation will be subject to the self-defence principles of necessity and proportionality. These must be adhered to strictly in order to prevent the possibility of abusing claims of rescuing nationals as a cover for forcible operations with ulterior motives.').

[37] *Ibid*, 19–20. The discussion in the Report on intervention by invitation/military assistance on request will no doubt be of interest to the new ILA Committee on the Use of Force that was established in November 2018.

[38] Such as humanitarian intervention, and self-defence against non-state actors.

[39] Such as anticipatory self-defence.

Accordingly, the Report aims to give a current snapshot of the law at the time of its publication, while recognising its capacity to evolve in the future.