conflict has overcome its rudimentary status. While it has been impossible in this review to do full justice to these four important publications, I hope to have been able to demonstrate that all of them, whilst each from a different angle, make a significant contribution to our understanding of the contemporaneous law of non-international armed conflict after two decades of a stunning development. The overall picture is one of a strongly increased density of the legal regulation coupled with significant complexity, a few important remaining gaps and a number of unresolved fundamental tensions. All this culminates in Sandesh Sivakumaran's monumental work, which makes it the book of our time on the law of non-international armed conflict.

Claus Kreß
University of Cologne
doi:10.1093/bybil/brt010

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice. By Tom Ruys. Cambridge University Press, Cambridge, 2010. xxx + 585 pp. £96.00.

In the *Nicaragua* case, the International Court of Justice (ICJ) opined that '[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks' (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, Merits, (1986) ICJ Rep 103, para. 195). If this were true, one would find it difficult to see the usefulness of a voluminous monograph devoted to the concept of armed attack. But, as Tom Ruys observes right at the beginning of his study, the ICJ's *dictum* is 'somewhat puzzling' (1), and, after having gone through this book, the reader wonders whether this assessment is not somewhat of an understatement. It is therefore a worthwhile scholarly effort to contribute to the clarification of the meaning of the term 'armed attack'. Ruys's overarching question is 'whether and to what extent recent evolutions have altered the customary boundaries of the right to self-defence' (3). In exploring this theme, the analyis (unsurprisingly) considerably extends the concept of 'armed attack' and also touches upon the other conditions of self-defence, such as necessity and proportionality (91-125) and the procedural obligations in Article 51 of the Charter (that is, the reporting obligation and the 'until clause'; 83) as well as the concept of collective self-defence (83-91). Enlightening as these passages are, the present review will focus on the book's main contribution, that is the elucidation of the concept of 'armed attack' and its possible evolutions.

Ruys begins his study with the important observation that the 'methodological approach one adopts to a large degree determines the outcome of any inquiry into the substantive content on the use of law' (6). It constitutes a praiseworthy feature of his book that it does not leave it there, but sets out to engage in a sophisticated methodological reflection in order to make the structure of the arguments fully transparent. The guiding principles are as follows: For States parties to the UN Charter, the law on the use of force contained in that treaty has rendered inapplicable incompatible rules of pre-existing custom by virtue of the *lex posterior* rule (13/4). The Charter law on the use of force has also had the effect of modifying incompatible pre-Charter custom because the quasi-universal ratification of the Charter implies the clear intention to accept more than

merely conventional law and because the practice of non-State parties does not reveal the will to uphold any incompatible pre-Charter custom (15-19). By virtue of the customary principle codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), the Charter law on the use of force, including the concept of 'armed attack' in Article 51, is open both to an evolutive interpretation (22) and to a modification based on post-Charter custom (24). The case of modification arises where the new customary rule cannot be fitted into any of the plausible meanings that can be given to the treaty text (23). As both Articles 2(4) and 51 of the Charter form part of *jus cogens* (27), their modification by subsequent custom requires the passing of the particularly stringent threshold of acceptance and recognition by the international community of States as a whole (28). Specific incidents involving a use of force as well as abstract statements by States pertaining to the law on the use of force qualify as materials relevant to the customary process (43). Yet, the State practice related to a specific incident usually carries relatively greater weight (32, 43) because it tends to be less non-committal. At the same time, the practice of a State directly involved in an incident must not be reduced to physical action but the latter acquires its meaning only in light of the specific legal explanation given to it by the State concerned (34-36). The impact of an incident for the customary process is the more important the more fully and widely it forms the subject of an inter-State legal discussion, the most significant forum for such debate being the Security Council (37-41). To properly explain the legal significance of a State's omission to comment on a particular use of force poses a particular challenge. Such silence may amount to the tacit acceptance of the legal claim underlying the use of force, but caution is due as no clear-cut criteria exist to evaluate acquiescence. State practice must finally be sufficiently general in order for a change of custom to occur (44). While the position adopted by the permanent members of the Security Council is of particular significance in the specific context of the use of force, the practice of no other States may be discarded (46-7). The need for a certain time lapse has become less important in our times, but it is conceivable more in theory than in practice that the customary law on the use of forces may change 'instantly', for example as the immediate consequence of one single incident (48-51).

This is an ambitious methodological framework with which I find myself largely in agreement. This is particularly so with respect to the significance accorded to the practice of States subsequent to the Charter's entry into force and in relation to concrete incidents of the use of force. I would also agree with Ruys that the Charter's law of the use of force has been exerting from the beginning a strong pull towards changing any incompatible pre-existing customary law. In my view, however, such a change did not invariably have to occur. In cases of disagreement among States about the interpretation of the Charter law, it may well be possible that while better reasons support a more prohibitive construction of the Charter, a more permissive customary regime on the use of force continues to exist. (In such a case, and that might be a further nuance *vis-à-vis* the position adopted by the author, only the more permissive customary regime could qualify as a candidate for *jus cogens*.) Of course, and here I again agree with the author, in case of a discrepancy between Charter and customary law, the former would prevail for UN member States. On a final point of methodology, the reader wonders why the author has relied on the subsequent practice of States exclusively within the context of the emergence of new customary law instead of using this practice primarily as a primary (cf. Article 31(3)(b) VCLT and the underlying customary principle) or subsidiary (cf. Article 32 VCLT and the underlying customary principle) means of treaty interpretation. This point will be taken up in somewhat greater detail later in this review.

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

As a starting point of the interpretation of the Charter law, the author adopts the long-standing position of the ICJ, which is also clearly predominant among writers, that the right of self-defence as recognized in Article 51 requires an armed attack (67). Ruys skillfully lists all the well-known arguments in support of this interpretation. Interestingly, he goes one step further and argues that the Charter is unambiguous in that respect because neither text nor *travaux préparatoires* would offer any indication pointing in the direction of the more permissive position according to which the Charter leaves the more permissive pre-existing customary right of self-defence unimpaired (60, 67). This additional finding is important because, following the book's methodological framework, it implies that it would amount not just to an evolutive interpretation, but to a modification of the Charter law on the use of force to recognize the legality of a transborder use of force by a State in the absence of an armed attack. I agree with Ruys and the predominant view that text and *travaux préparatoires* of Articles 2(4) and 51 of the Charter strongly suggest that the right of self-defence is limited to the case of an armed attack. In light of the text of Article 2(4) of the Charter ('against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations') and the fact that the *travaux préparatoires* contain certain elements in support of the view that Articles 2(4) and 51 taken together should not impair the pre-existing right of self-defence, I remain hesitant, however, to go so far as to say that the Charter does not contain any ambiguity which would allow some limited room to argue in favour of the more permissive position. I am even more hesitant to accept that already soon after its entry into force, the Charter had caused the pre-existing customary law of self-defence to become confined to the case of an armed attack. Ruys himself acknowledges (135) that the United Kingdom firmly stressed during the work on UN General Assembly (GA) Resolution 3314 that, in our context, States 'had long been divided between two schools of thought'. The United Kingdom may have somewhat over-emphasized the division, but the latter certainly existed after 1945. As long as it did (or does it perhaps still?), I find it difficult to postulate that a change of customary international law has occurred.

After having (perhaps slightly too) firmly entrenched the centrality of the concept of 'armed attack', Ruys can turn his mind to its meaning. The initial question is whether the term 'armed attack' has already been defined by States through the adoption of Resolution 3314. This is rightly denied and in this context the author usefully recalls that the major Western powers successfully managed to prevent the work within the GA from developing into the direction of such a definition (137). Despite this latter fact, the author believes that Resolution 3314 is of some value in the search for the meaning of the concept of 'armed attack'. In trying to specify this value, the author runs into difficulties, however. On the one hand, he holds that 'the negotiations confirm the view (. . .) that, in general, a cascading relationship exists between the terms "force", "aggression", and "armed attack"' (138), but at the same time he states that 'one should refrain from excluding per se the recourse to self-defence against acts not constituting acts of aggression in the sense of Articles 1-3 of the Definition of Aggression, and keep open the theoretical possibility that the concept of 'armed attack' could in certain respects actually be broader than the one defined in Resolution 3314' (139). While there is no contradiction between those two carefully worded statements, it is difficult to ignore a certain tension between them. It is therefore crucial where the focus lies and here Ruys and I probably differ to an extent. While he tends, as subsequent passages of the book reveal, to rely on Resolution 3314 as rather strong evidence for the 'cascading relationship', I would rather emphasize that Resolution 3314 and the negotiations leading up to its

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

adoption leave quite some room for giving the term 'armed attack' a broader meaning than that of 'act of aggression'.

With this rather uncertain state of affairs with respect to this important conceptual relationship, Ruys addresses the first substantive question of the definition of 'armed attack' *ratione materiae* which is the gravity requirement. As is well known, the ICJ has been suggesting the latter since *Nicaragua*, but the Court is far from unambiguous regarding the specifics, as the author demonstrates in great detail (140-143). Ruys is correct to believe that this is an issue of considerable practical importance because, as he demonstrates persuasively (146), there is no room for the idea alluded to by the ICJ in *Nicaragua* that there could be a right of individual forcible counter-measures 'short of Article 51 of the Charter' in case of a use of force 'short of an armed attack'. In the author's (questionable) view, the different wording used in Articles 2(4) and 51 of the Charter 'strongly suggests' that a gravity requirement exists, but he does also (correctly) accept that Article 51 of the Charter is unspecific as regards the precise nature of the gravity threshold (149). A most careful perusal of the relevant State practice leads Ruys then to set a fairly low gravity threshold. He suggests that a conduct which, by whatever means, causes or is liable to cause human casualties or considerable destruction of property will satisfy what he even calls a standard of 'minimal gravity' (176). On the basis of this finding he can further conclude that there will not often be the need to rely on an 'accumulation of events' in order to demonstrate that the gravity threshold is passed (177). Where necessary, however, he does not rule out the possibility to use the accumulation argument which, as he convincingly demonstrates, enjoys 'considerable support' (174) in State practice.

It is an important consequence of the 'minimal gravity threshold' that Article 51 of the Charter covers a wide spectrum of self-defence action depending on the intensity of the armed attack. Ruys politely disagrees with Yoram Dinstein's idea that the modality of self-defence action should be governed by three rather rigid categories ('on-the-spot reaction', 'defensive armed reprisal' and 'war') (for the most recent exposition of this view, see *War, Aggression and Self-Defence* (5th edn, Cambridge University Press, Cambridge 2011) 242-268). The author not only (rightly) questions the usefulness of the terms 'reprisal' and 'war' in that context (183), but also convincingly criticizes the undue rigidity of the three-partite categorization. In order to be operational, the latter would require reasonably clear-cut conceptual boundaries which Dinstein fails to provide (184).

Based on Article 2 of the annex to Resolution 3314 and the latter provision's *travaux préparatoires*, the case-law of the ICJ and State practice in a number of incidents, Ruys further holds that an 'armed attack' requires intent (166), but not any ulterior 'aggressive' purpose (160). Whether there can be an 'armed attack by mistake' is an intriguing question and the author deserves great credit for the exceptionally circumspective manner in which he confronts the question. While his case is certainly a strong one, the question inevitably arises whether a State can be left without lawful means of defence if confronted with significant lethal violence used against it by mistake. I would not consider the Charter unambiguous in that respect and I would doubt that an incident has already taken place which has placed this tough issue squarely on the international agenda.

When dealing with the gravity threshold, the author had also alluded to the possibility to characterize unlawful 'territorial intrusions' *per se* as armed attacks (176). In a particularly interesting subsequent section (184-199), he returns to this issue and gives special consideration to the much neglected question of whether a small-scale incursion by the military or police forces of a State into the territory of another State may be characterized as an armed attack triggering the latter State's right of self-defence even

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

if 'no shot is fired'. The author recognizes the practical importance to this matter because he (very plausibly) finds that a lethal response by the territorial State against the intruders amounts to a use of force within the meaning of Article 2(4) of the Charter although such forcible action does not have any cross-border effect (185-6). Ruys analyses a good number of incidents that have arisen in the inter-State practice, but he acknowledges the difficulty in coherently explaining this material in legal terms, because those incidents have not usually generated an elaborate exchange of legal claims and counter-claims. It is fairly clear from the materials presented, that the mere unlawful intrusion is not invariably being treated by States as an armed attack warranting a forcible reaction. One important criterion to determine the existence of an armed attack seems to be the 'hostile intent' of the intruding State organs, but the difficulties in pinpointing such an intent are considerable and the standard may vary depending on the land, aerial or maritime nature of the intrusion. Interestingly, while the necessary 'hostile intent' must be more than the (general) intent to unlawfully intrude, it does not require the intention to actually engage in combat. Instead, reconnaissance and surveillance flights may also amount to an armed attack under certain (though not entirely clear) circumstances. It would probably have been too much to hope that Ruys could have dispelled all legal uncertainty in this under-developed area of the law. Ultimately, this grey area reflects an underlying uncertainty with respect to the lower threshold of the term 'use of force against another State'. The author identifies a 'considerable degree of confusion' in this regard, but understandably he declares himself unwilling to eliminate it in this study (184-5).

The question as to whether the use of force against 'external manifestations of the State' may qualify as an armed attack is treated by the author in the context of the definition of 'armed attack' *ratione materiae*. (One might perhaps also view this question as being related to the meaning of the words 'against a Member of the United Nations' in Article 51 of the Charter, or - more directly - to the meaning of the concept of 'victim State' in the context of self-defence.) Interestingly, Ruys does not engage in any textual interpretation, but appears to assume that there is no insurmountable textual barrier to extend the concept of 'armed attack against another State' to (sufficiently serious) uses of forces against an 'external manifestation' of the victim State. Accordingly, Ruys does not find a difficulty in qualifying the (sufficiently serious) use of force against military units and installations of another State as an armed attack triggering the right of self-defence of that latter State (200). Ruys takes the same view with respect to embassies 'at least (in case of) *large-scale* attacks' (202), based on the ICJ's use of the term 'armed attack' in the *Tehran Embassy* case, the legal claim formulated by the USA both in that case and in the case of the 1998 terrorist bombings in Nairobi and Dar Es Salaam and the apparent lack of clear opposition to this claim (202). This position is likely to prove more controversial and it is interesting to note that the author uses a fairly generous standard in order to recognize a sufficient amount of State practice in order to support the suggested interpretation. In his view, the picture becomes less clear with respect to high-level State officials and diplomatic envoys. On the one hand, the Security Council debate on the 1993 US strikes against Iraqi intelligence headquarters in Baghdad in response to the failed attempt to assassinate former (*sic*!) President Bush displayed a striking measure of support for the self-defence claim advanced by the USA. But apart from this, State practice in support of the wide interpretation of 'armed attack' in question is virtually inexistent. In light of this, Ruys avoids a firm conclusion (204), and it would indeed seem that his methodological framework does not provide him with clear guidance in a situation of this kind. The author is back on safer ground with respect to the unlawful

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

use of force against merchant vessels. After a most illuminating analysis of the fairly extensive State practice in point, he draws the convincing conclusion that the concept of 'armed attack against another State' does not require the use of force against that State's entire merchant fleet, but extends to the use of force directed against an individual merchant vessel provided that such use of force is unlawful (209). Already up to this point, the analysis of the use of force against 'external manifestations of the State' has demonstrated that the concept of 'armed attack' extends beyond the list of 'acts of aggression' as contained in Article 3 of the annex of Resolution 3314.

The use of force against nationals of a foreign State pushes the idea of the external manifestation of the State to its limit. The almost 40 pages devoted to this classic controversy form just another extremely stimulating section of his book. If the debate about the legality of the forcible protection of nationals abroad continues to fascinate international scholarship, this is probably less due to an enormous practical significance, but to the fact that this scenario provides rich evidence for Ruys's assumption that the 'methodological approach one adopts to a large degree determines the outcome of any inquiry into the substantive content on the use of law'. The author had already made one important preliminary step to tackle the legal issue at an earlier stage of his study when he took the position that the Charter unambiguously excludes a right of self-defence in the absence of an armed attack. As a consequence hereof, he must now reject the position that the forcible protection of nationals abroad can be justified as part of a customary right of self-defence against a threat other than an armed attack, which Articles 2(4) and 51 of the Charter had left unimpaired (215). On the other hand, the author does not wish 'to rule out per se' that the attack against the nationals of a foreign State may constitute an armed attack against that State within the meaning of Article 51 of the Charter. Ruys thus acknowledges an ambiguity in the text of the Charter and this leads him to say that 'we must look to customary practice for answers' (216). His analysis of this practice is impressive and cannot be restated in this review. All in all, the author finds that there is insufficient practice to support '*de lege lata* a customary right of forcible protection of nationals' (243) and this must be read to imply that there is insufficient practice to support the extension of the concept of 'armed attack against another State' to the use of force against foreign nationals. The author believes that his statement of the law is also sound *de lege ferenda* as far as the forcible rescue of hostages is concerned: 'The Entebbe incident illustrates that hard cases can and do occur, yet hard cases eventually make bad law' (249). He suggests one exception, though. In situations of civil unrest, States, he believes, should be allowed to conduct 'non-combatant evacuation operations' without the consent of the territorial State in case of an imminent threat of injury to nationals abroad, if the latter State is manifestly unable or unwilling to offer protection and if it had proved impossible to obtain that State's consent to the evacuation. In such case, the evacuating State should also be entitled to use such force as might be necessary to protect the lives of the threatened nationals and the personnel involved in the operation (545). Such a 'non-combatant evacuation operation' could, the author suggests, be regarded 'as a special application of Article 51 UN Charter' (247). In light of the author's earlier observations on 'small scale intrusions', the question arises whether a 'non-combatant evacuation operation', in light of its very limited duration, scope and purpose, does perhaps not even amount to a use of force against the territorial State so that the remaining mere violation of the territorial sovereignty might be justified by reference to a state of necessity. If the presence of the evacuation forces on foreign soil could be considered legal on that basis, any attempt by the territorial State to forcibly obstruct the evacuation would constitute an armed attack against the evacuation State which could then use the

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

force necessary to defend itself under Article 51 of the Charter. This would leave one with the 'hard case' of a forcible hostage rescue operation where it cannot be denied that the rescuing State uses force within the meaning of Article 2(4) of the Charter.

As a matter of legal policy, I find it difficult to see why the use of force which is strictly necessary to rescue hostages should receive a treatment different from the use of force which may occur in case of a forcible obstruction of a 'non-combatant evacuation operation'. I can see no categorical difference in duration, scope and purpose between these two instances of a use of force. Of course, this observation does not answer the question of the legality under the *lex lata*. In that respect, I agree with the author that the State practice in point carries considerable weight. I part from him, however, in my evaluation of that practice. This evaluation is, as the author aptly puts it, 'not a matter of exact science' (30) and there is perhaps no better *cas d'école* to demonstrate that point than the one before us. While Ruys, after a meticulous investigation, finds himself unable to identify even a dominant trend in customary practice towards the acceptance of a right to forcibly protect nationals abroad under certain circumstances, Werner Ader had already more than 20 years earlier and, after a similarly careful study, concluded that State practice in support of a limited right to forcibly protect nationals abroad had become strong enough to support the emergence of a new customary rule (*Gewaltsame Rettungsaktionen zum Schutz eigener Staatsangehöriger im Ausland* (Verlag V Florentz, München 1988) 260). I find myself in between those two camps and believe that there is a dominant trend towards the recognition of the right in question, but one which continues to face the opposition of a significant minority of States so that it has not (yet) reached the strength necessary for the emergence of a new rule of international law. This review is not the place to set out the reasons for this assessment in any detail. Suffice it to indicate that I read the State practice surrounding the crucially important 1976 *Entebbe* incident debate more in favour of a right to use force than Ruys does (226-229, 241) and that I attribute more weight than the author does (232-3) to the legal claim formulated by the Russian Federation in the 2008 Caucasus incident and to the international reaction hereto. Perhaps this important nuance between me and Ruys illustrates the omnipresent possibility that one's own policy preference influences the appraisal of the State practice in difficult border line cases. This is an element of subjectivity that cannot be eliminated and which should therefore be acknowledged. My view that there is a dominant trend in State practice, but no more, leads to another methodological problem. Assuming that Ruys had also been able to identify a dominant, but still sufficiently ambiguous trend in State practice, one must doubt whether his methodological framework would have enabled him to use this trend in order to support a wide interpretation of the concept of 'armed attack' through the 'customary process'. He would then be left with the result of his text-based assessment that the wide interpretation 'cannot be ruled out per se'. This uncertainty suggests that still more methodological subtlety is required. I would argue that a dominant trend in the subsequent State practice should be capable of decisively influencing the construction of the term 'armed attack against another State' if the scope of the possible ordinary meanings of this term is broad enough to also support that construction, if only weakly. A dominant trend in the subsequent State practice, while not providing evidence for an interpretive agreement in the sense of Article 31(3)(b) VCLT or as new customary law, should then still count as a supplementary means of interpretation in the sense of Article 32 VCLT. In my view, there are then two possible avenues to explain the existence of a right of self-defence to rescue nationals abroad under the *lex lata*. First, it may be seen as an instance of the pre-Charter individual right to self-defence which Articles 2(4) and 51 of the Charter have left unimpaired. This explanation is premised on the view (rejected by Ruys) that such a text and

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

travaux préparatoires-based interpretation of the Charter, while not preferable, is possible so that a dominant trend in State practice in that direction may be relied upon. Second, the right in question may be seen as an instance of the right of self-defence in case of an armed attack within the meaning of Article 51 of the Charter, if one accepts Ruys's position that such a construction remains with the spectrum of possible meanings of the term 'armed attack against another State'. To find out whether this second avenue could also support the existence of a right of collective self-defence to rescue nationals, would require an additional reflection.

The next chapter of the book is a small monograph on its own stretching to more than one hundred pages. Under the title '"(t)he armed attack" requirement *ratione temporis*' Ruys turns up the page of the 'never-ending saga' of anticipatory self-defence. He uses this term generically to encompass 'preemptive self-defence' against imminent and 'preventive self-defence' against non-imminent armed attacks. 'Interceptive self-defence' is said to cover the moment in time where an armed attack has been launched, but has not yet struck. This case is convincingly distinguished from the two cases of anticipatory self-defence (253-4). At the outset and in light of his position developed earlier in the book, Ruys must reject the possibility to justify any form of anticipatory self-defence by reference to the pre-Charter right of self-defence (259-60). The crucial question then is whether there is any room for a text-based argument that Article 51 of the Charter could extend to one of the two cases of anticipatory self-defence. The author is clear with respect to 'preventive self-defence': '(T)here can be no doubt that the concept of 'preventive' self-defence ignores the text of Article 51 and defeats the object of the UN Charter' (267). Regarding 'preemptive self-defence', however, the formulations are more nuanced: '(T)his doctrine is not covered by the plain meaning of Article 51 and also over-steps the spirit of Charter rules' (...). On the other hand, it could be argued that the realities of modern warfare necessitate an evolutive interpretation of Article 51, allowing for recourse to force when the threat of attack is 'imminent'. This possibility must not be ruled out *a priori*, yet the *onus probandi* falls on those supporting pre-emptive action' (266). This makes an important difference. It means that accepting a right of preventive self-defence would amount to a modification of the Charter while recognizing the right of preemptive self-defence could be considered to stay within the confines of (evolutive) interpretation. It is interesting to observe that Ruys is open to an evolutive interpretation in a case where the textual basis for such interpretation is weak. Perhaps even more interestingly, he seems prepared to accept that in such a case a dominant trend in State practice may suffice to turn the balance. At this point of his analysis, Ruys therefore seems to be willing to implicitly refine his methodological framework along the lines suggested in this review. What follows is again a masterful examination of the relevant State practice. This analysis leads him (rightly) to conclude that the post '9/11' attempt by the USA to move the law towards the acceptance of some form of 'preventive self-defence' has found virtually no support so that no such right exists under present international law (336). With respect to 'preemptive self-defence', Ruys not only acknowledges that a majority of scholars now accept its legality (324-326), he also notes an increasing support for such a right in State practice culminating in the endorsement of this view in the UN Secretary General's report *In Larger Freedom* (338). Yet, Ruys holds that the recognition of a right of 'preemptive self-defence' has not become the majority view in State practice. The two main reasons for this are that there is no clear incident-related State practice in support of it (267-294) and that a considerable number of States have registered their opposition in the abstract in response to the affirmative statement *In Larger Freedom* (339-341). In the author's view, it is therefore 'impossible to identify *de lege lata* a general right of preemptive (...) self-defence (342). Ruys specifically adds that

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

this statement of the law does (and should) not suffer from an exception even in case a nuclear weapons State adopts a hostile attitude towards another State (355-367). It is important to read this restrictive finding together with Ruys's persuasively developed view that the necessity requirement leaves a limited room for forcible self-defence action after an armed attack is factually over ('*post facto* defensive measure') when there is 'compelling evidence that further attacks will imminently follow' (343 in conjunction with 99-108).

Despite this very important qualification, the denial of a right of anticipatory self-defence in case of an imminent armed attack constitutes one of the most controversial positions adopted in this book. Perhaps it is worth mentioning the two main reasons why Björn Schiffbauer in a monograph published some time later (*Vorbeugende Selbstverteidigung im Völkerrecht* (Duncker & Humblot, Berlin 2012)), which devotes 490 pages to the meticulous study of the question of anticipatory self-defence, reaches the opposite conclusion. First, on the basis of a very detailed analysis of all authentic language versions, Schiffbauer finds the textual basis for the right in question to be stronger than it has been acknowledged by Ruys who almost exclusively relies on the English text. Second, Schiffbauer identifies more incidents than Ruys in the course of which a positive reference to the *Webster/Caroline* formula (the *locus classicus* for a narrowly defined right of anticipatory self-defence) was made and, contrary to Ruys, Schiffbauer does not believe that the weight of such statements and the sparsity of opposition to them is too much diminished because of the fact that in none of those cases the legality of the use of force turned on the question of anticipatory self-defence. This review is not the proper place to fully debate the matter. Suffice it to state that the author's careful argument for the more restrictive position should certainly provide a reason for caution to those who, on balance of all the arguments, see a limited room for anticipatory self-defence, in the ongoing debate about the possible relaxation of the standard of 'imminence' through the 'last window of opportunity' test.

Having reached page 368 of the book, the reader feels greatly enriched, but cannot fail to note that the author has still not identified one single important evolution in the international law on the use of force. The picture changes only with respect to the question whether an 'armed attack' must be committed by a State, that is, in the author's words, 'the "armed attack" requirement *ratione personae*'. The considerations on the next roughly 150 pages might again count as a small monograph on its own, including another masterpiece in the meticulous analysis of State practice, this time coupled with astute observations about the (possible) interplay(s) between the primary rules on the use of force and the secondary rules on State responsibility and, in particular, on attribution. Ruys clearly distinguishes between the two closely related, but analytically separate questions what kind of State involvement into a use of force by non *de iure* organs is needed in order to accept the existence of an armed attack by that State within the meaning of Article 51 and whether the term 'armed attack' extends to non-State armed attacks. As a matter of 'original Charter law', the author tends to favour the ICJ approach in *Nicaragua* to confine the right of self-defence to cases of armed attacks by States and to limit the concept of 'armed attack by a State' to those instances where the actual use of force is attributable to the State concerned under the stringent standard established by the ICJ (368-433). Ruys does not doubt the fact that the more recent State practice (and, in particular, that subsequent to '9/11') displays a tendency to move away from this most restrictive interpretation, but he finds it difficult to ascertain to what extent precisely a legal evolution has occurred. He does not believe that a *lex specialis* on attribution, which would have lowered the standard for the purposes of the application of Article 51 of the Charter, has come into existence (489-493). He takes a more open view,

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

though, with respect to the idea of a 'non State armed attack', yet with considerable reluctance and utmost circumspection. At the end of his extensive analysis of the relevant State practice, he concludes that 'the only thing that can be said about proportionate transborder measures of self-defence against attacks by non-State actors in cases falling below the *Nicaragua* threshold is that they are "not unambiguously illegal"' (487). Later on, he formulates somewhat less reservedly 'that it is the primary rules that are undergoing a process of modification (...) and that today non-State actors can (exceptionally) commit "armed attacks"' (493) in the international legal meaning of the phrase. As his 'Draft Definition of Armed Attack' at the end of the study shows, Ruys is prepared to endorse this 'modification' as a matter of legal policy under a set of well-defined further conditions (544).

The author's thorough and thoughtful treatment of 'the armed attack requirement *ratione temporis*' gives rise yet to another set of fascinating methodological questions. One is whether the State practice between 1945 and 2001 in fact offers as little support for the idea of a limited right of self-defence against non-State armed attacks as Ruys (and a considerable number of other writers) believe. Once again, nuances in the evaluation matter as the author himself rightly recognizes that already the first series of relevant incidents brought to light 'very little *opinio iuris* explicitly dismissing self-defence in response to armed bands per se' (404) and as he also correctly observes that the repeated Turkish incursions into Iraqi territory especially in the 1990's 'constitute another step in customary practice towards a more flexible position' (433). The other question is again that of the appropriate standard to be met. Quite irrespective of the more difficult assessment of the early practice, there can be little disagreement (especially after Ruys's own skilful analysis of the matter on 433-473) that the practice since 2001 points in the direction of the wider interpretation of the concept of 'armed attack'. In light of this, the need for the author's conspicuous reluctance in accepting the more permissive interpretation is not apparent. The situation might be different had Ruys demonstrated at the outset that the textual basis for this more permissive interpretation is weak. But he had stated the following: 'The final version of Article 51 simply refers to "armed attacks", without further ado. Even if the Article constitutes an exception to the prohibition on the use of force *between States* laid down in Article 2(4) UN Charter, the implication seems to be that the ratione personae aspect was left to be worked out in customary practice, without establishing a Charter baseline' (emphasis in the citation) (370). If the more permissive interpretation is thus perfectly possible as matter of Charter exegesis (and more could have been said in support of this view), the reader is left to wonder why the relevant State practice must satisfy the very stringent standard Ruys appears to have set. In the end, while I agree with the book's (reluctant) formulation of the law, I remain unconvinced that a legal evolution has occurred. This, of course, is largely a matter of theoretical interest. Two questions of practical importance remain, however, one is well-known and one has been thoughtfully put forward by the author. The first question pertains to the permissible scope of self-defence action in a case of 'harbouring' like '9/11' where the State involvement is appreciable, but falls short of the high threshold for attribution so that an armed attack by that State must be denied. In his 'Draft Definition of Armed Attack', the author opens a window for the extension of self-defence action to targets belonging to the involved State, but only if that State 'actively opposes' the self-defence measures against the non-State presence on its soil in the first place (544). It would seem very hard to justify that part of *Operation Enduring Freedom*, which was directed against the Taliban, under this standard and Ruys accordingly downplays the precedential value of this incident on the basis of its 'extraordinary context' (495). This is open to question and will therefore certainly remain a matter for

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014

discussion. The second question is whether a right of self-defence against a non-State armed attack is to be denied if the State victim of the armed attack had (one should probably add: unlawfully) contributed to the situation which gave rise to self-defence. Ruys does not think so because he fears that the criterion of 'contribution by the victim State' would 'confuse(.) the legal evaluation of the intervention with the political context and impede(.) an objective approach to the problem under consideration' (509). It is to be regretted that the analysis stops there. As a matter of principle, there is much to be said in favour of the said criterion because the case of self-defence against a non-State armed attack borders at a situation of necessity (for which the relevance of the criterion is accepted), at least where the involvement of the territorial State is only nominal. At the same time, the criterion offers an interesting tool to explain why a right of self-defence had often been denied to States such as (occupying) Israel, (colonial) Portugal and (racist) South Africa *in concreto* without excluding the possibility of the existence of such a right *in abstracto*. It is therefore to be hoped that Ruys's incisive question will be revisited by him or be taken up by others in the future.

Tom Ruys has written one of the most important books on the Charter law on the use of force. His study is meticulously researched, methodologically sensitive, extremely thoughtful, and elegantly written and on top of all this, it shows balanced judgment. It must therefore be included in the rather short list of significant monographs on the subject-matter, such as Bowett's *Self-Defence in International Law* and Brownlie's *International Law and the Use of Force by States*, to name just two early examples. It would seem that the time of the rather sharp scholarly opposition between a quite permissive (widely) Anglo-American and a much more restrictive (largely) continental school on the international law on the use of force is over and that we are moving towards a more narrow and nuanced spectrum of legal views with important differences remaining. On the whole, Ruys's work perhaps leans slightly more towards the restrictive end of the spectrum while some of my questions may be pointing in the opposite direction. When questions of life and death are at stake, any legal nuance matters. But if seen from a broader historical perspective, it should perhaps also be appreciated to what point the international law on the use of force has consolidated that scholars can now focus on the in-depth debate of a limited number of fairly well-circumscribed remaining grey areas. As I consider the 'original Charter law' somewhat more ambiguous than Ruys does, I am not sure whether I share his concern that 'recent events have (...) diminished the 'determinacy' of Article 51 UN Charter'. I am sure, however, that by having written this splendid book, Ruys has rendered the determinacy of this crucially important body of law a most valuable service.

Claus Kreß
University of Cologne
doi:10.1093/bybil/brt011
Advance Access published on 28 November 2013

International Law and the Classification of Conflicts. By Elizabeth Wilmshurst (ed.). Oxford University Press, Oxford, 2012. 568 pp. £85.00.

As the historian Geoffrey Best observed in 1994 about international humanitarian law: '[p]eople become real in it only in certain situations or when they are doing certain

Downloaded from http://bybil.oxfordjournals.org/ at Cambridge University Library on March 9, 2014