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# Can Attacks against Embassies Serve as a Basis for the Invocation of Self-Defence? A Reply to Gábor Kajtár and Gergő Balázs

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## Abstract

*In their article ‘Beyond Tehran and Nairobi’, Gábor Kajtár and Gergő Balázs examine whether attacks against embassies can qualify as ‘armed attacks’ and thus serve as a basis for the invocation of self-defence. Based on a survey of relevant state practice and opinio juris, and building on an impressive database encompassing more than 730 incidents, the authors conclude that this question must, in all likelihood, be answered in the negative. This Reply raises the question whether the analysis and the material unearthed ultimately corroborate the conclusion which the authors distil therefrom. Upon closer scrutiny, it is suggested that there may be other, more compelling, inferences to be drawn from the material explored than the one hinted at by Kajtár and Balázs.*

## 1 Introduction: Filling the Void

In ‘Beyond Tehran and Nairobi’, Gábor Kajtár and Gergő Balázs examine whether attacks against embassies can qualify as ‘armed attacks’ and thus serve as a basis for the invocation of self-defence.<sup>1</sup> As the authors observe, while scholars have expressed competing views on the issue, there has thus far been no ‘comprehensive analysis’ of this issue. This perceived ‘void in the scholarly literature’, as the authors label it, is ‘quite surprising, considering the significance of this problem’. After all, ‘at least one mission has been attacked every month since the Iran hostage crisis’ in 1980.

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<sup>1</sup> Kajtár and Balázs, ‘Beyond Tehran and Nairobi: Can Attacks against Embassies Serve as a Basis for the Invocation of Self-Defence?’, 32 *European Journal of International Law* (2021) 863.

Accordingly, ‘classifying such attacks as armed attacks would considerably widen the scope of Article 51 of the UN Charter’.<sup>2</sup>

The doctrinal debate on the issue – as helpfully mapped and synthesized by the authors – reveals significant disagreement, whereas the precedential value of the International Court of Justice’s (ICJ) *Tehran Hostages* judgment is ‘called into question’.<sup>3</sup> In light hereof, and in order to move the debate forward, the authors present a survey of relevant state practice and *opinio juris*, based on an impressive database encompassing more than 730 incidents.

The outcome of that analysis is clear: ‘Only one state [i.e. the United States] has ever invoked self-defence regarding attacks against its embassies, and it only did so on five occasions, which were all contested by the international community’.<sup>4</sup> By contrast, the overwhelming majority of (more than 700) incidents were regarded ‘as ordinary crimes or terrorist incidents to be handled within the ambit of diplomatic and consular law, as well as criminal law’, rather than as ‘armed attacks’ in the sense of Article 51 of the UN Charter. Ultimately then, the authors continue, one should ‘most probably’ exclude the possibility that attacks against embassies can trigger the right of self-defence.<sup>5</sup>

The overview of state practice by Kajtár and Balázs certainly provides an insightful and welcome addition to the existing literature on the topic. The authors moreover display a commendable sensitivity to the methodological pitfalls that plague the *ius ad bellum*,<sup>6</sup> such as the ‘arduous task’ of ascertaining *opinio juris*, and the difficulty of qualifying silence or reactions of solidarity.<sup>7</sup> In a similar vein, the authors rightly warn against the tendency to excessively focus on violations of the prohibition on the use of force (inevitably more salient than instances of compliance) – a tendency which risks creating a distorted picture whereby far-reaching claims are perceived as the norm rather than the exception.

## 2 *Quod erat demonstrandum?*

In spite of the foregoing, the question remains whether the analysis and the material unearthed ultimately corroborate the conclusion which the authors distil therefrom, and according to which the answer posed in the piece’s title must be answered – in all likelihood – in the negative. Upon closer scrutiny, I would suggest such conclusion is not the only possible one, and not even the most logical one. Instead, there may be other, more compelling, inferences to be drawn from the material explored than the one hinted at by Kajtár and Balázs.

<sup>2</sup> *Ibid.*, at 864.

<sup>3</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3 (hereinafter ‘*Tehran Hostages*’).

<sup>4</sup> Kajtár and Balázs, *supra* note 1, at 863.

<sup>5</sup> *Id.* at 886, 888.

<sup>6</sup> On the role of methodology in discussions on the law on the use of force, see in particular: O. Corten, *Le droit contre la guerre* (3rd ed. 2020), at 19–100.

<sup>7</sup> Kajtár and Balázs, *supra* note 1, at 866.

For starters, it is striking that the authors distinguish several types of attacks against embassies, namely ‘bombings’ (‘including explosions, grenade and rocket attacks’), ‘assaults’ (whereby attackers enter the embassy premises), ‘mob attacks’ and ‘shootings’.<sup>8</sup> While this typology provides useful information on the nature of the attacks and the threats faced by diplomatic personnel abroad, its legal relevance is less clear.<sup>9</sup> Conversely, it is easy to think of alternative variables that may carry greater legal relevance. Such variables would include (i) the gravity of the attack and whether it forms part of a *series* of attacks; (ii) whether the attack is imputable to a state, or whether a state is otherwise substantially involved in the attack; and (iii) (in the case of a non-state attack) whether the attack emanated from a ‘lone wolf’ or criminal gang, or rather from a non-state armed group with an established military presence abroad. Admittedly, none of these variables is easy to implement in the present context – in part since they announce themselves more as a continuum than a binary choice between option X or Y. Nor do the authors completely ignore these factors in their analysis. Rather, the authors indicate their intention to pay ‘special attention’ to incidents ‘the gravity and attributability of which would generally qualify an attack as an armed attack’.<sup>10</sup> Still, it is difficult to shake off the feeling that the abovementioned legal variables are addressed only *implicitly* at best – the reader can, for instance, readily presume that the category of ‘mob attacks’ are those committed neither by a state nor by an organized non-state armed group – and are not systematically engaged with in the analysis.

At this juncture, two simple observations are in order. First, it is no secret that virtually all attacks against diplomatic (or consular) missions in previous years and decades were conducted by non-state actors (*sensu lato*).<sup>11</sup> While there have, admittedly, been a number of incidents where a foreign state was suspected of being involved in attacks carried out by non-state actors, the suspected ‘state sponsor’ never claimed responsibility for the attack, and the existence and degree of such (clandestine) involvement have generally remained a matter of speculation.<sup>12</sup> By contrast, instances where attacks against diplomatic or consular missions were undeniably committed by state armed forces (or other state organs) are few and far between. Exceptions that come to mind include the US bombing of the Chinese consulate in Belgrade during the North Atlantic Treaty Organization (NATO) campaign against the Federal Republic of Yugoslavia in 1999 (a targeting error for which the United States apologized and offered compensation), as well as the Iraqi intrusion of Kuwaiti diplomatic premises following its military invasion of Kuwaiti territory or the Ethiopian ransacking of the Eritrean embassy residence in 1999 (two incidents that took place against the background of an ongoing

<sup>8</sup> *Id.* at 881–886.

<sup>9</sup> Recall, for instance, that the prohibition on the use of force does not refer to specific weapons or methods of attack, but applies regardless of the weapons employed. *Legality of the threat or use of nuclear weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 39.

<sup>10</sup> Kajtár and Balázs, *supra* note 1, at 881.

<sup>11</sup> We use the term here as encompassing both organized non-state armed groups, but also other non-state actors (including mobs, for instance).

<sup>12</sup> In the words of the authors, ‘[t]he host state’s involvement was also implied from time to time, either by act or omission’, at 882.

armed conflict). One could wonder whether there has ultimately been even a single instance where one state intentionally and openly attacked the diplomatic or consular premises of another state in the absence of an ongoing armed conflict between the two.<sup>13</sup> The Iran hostage crisis (1979–1981) presumably comes to mind. At the same time, readers of this Journal will surely recall that – as the ICJ established – the initial occupation of the US embassy was the work of a mob, rather than an operation imputable to the state of Iran. It was only later that the Iranian authorities accepted and acknowledged the *continued* occupation as Iran's own conduct.<sup>14</sup>

Apart from the fact that virtually all attacks against embassies emanate from non-state actors, a second observation is that the lion's share were small-scale in nature, far removed from the 1998 attacks against the US embassies in Dar es Salaam and Nairobi that cost over 200 lives.

These observations are not insignificant. As is well known, considerable controversy exists as to whether, and under what circumstances, non-state attacks can qualify as 'armed attacks' in the sense of Article 51 of the UN Charter, triggering the right of self-defence. While Article 51 does not expressly limit the notion of 'armed attack' to attacks *by* a state, it has, throughout the Cold War era, been generally understood as covering (only) attacks imputable to another state, or in which another state was otherwise 'substantially involved'<sup>15</sup> – an approach famously underwritten by the ICJ in the *Nicaragua* case.<sup>16</sup> It is only since the 1980s, and especially since the 9/11 attacks, that, primarily in response to the growing threat stemming from trans-national terrorist groups such as Al Qaeda and ISIS, there has been increasing support for the view that either a lower *lex specialis* attribution threshold exists within the *jus ad bellum*,<sup>17</sup> or attacks by non-state armed groups can qualify as 'armed attacks' even in the absence of any state involvement, and can accordingly justify military action against the group's presence abroad under certain conditions.<sup>18</sup> At the same time, the controversy remains exactly that. A recent informal Arria-formula meeting convened at the initiative of Mexico in its capacity as non-permanent member of the UN Security Council in February 2021 well illustrates that states remain deeply divided on the permissibility of self-defence against non-state attacks, and that the last word on this issue has not been said.<sup>19</sup>

<sup>13</sup> The 'attack' against the US embassy in Baghdad on 31 December 2019 hardly constitutes a counter-example, as this attack emanated from an angry mob protesting against prior US military actions. See, e.g., Rashed and Ali, 'Protesters Burn Security Post at U.S. Embassy in Iraq; Pentagon Sending More Troops to Region', *Reuters* (31 December 2019), <https://reut.rs/3ivMjam>.

<sup>14</sup> *Tehran Hostages*, Judgment, 24 May 1980, ICJ Reports (1980) 3, paras. 69–75.

<sup>15</sup> C. Gray, *International Law and the Use of Force* (3rd ed. 2008), at 130–132.

<sup>16</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 195 (hereinafter '*Nicaragua*').

<sup>17</sup> There are, however, strong conceptual and other arguments to question the idea of such *lex specialis* imputability threshold. For an excellent analysis, see Milanovic, 'Special Rules of Attribution of Conduct in International Law', 96 *International Law Studies* (2020) 295.

<sup>18</sup> The main criterion put forward by states and scholars in this respect is the 'unable or unwilling doctrine', which is mostly seen as a concretization of the customary requirement of necessity.

<sup>19</sup> For a compilation of the numerous statements delivered by the participating states, see Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council, UN Doc. S/2021/247, 16 March 2021, Annex II.

The purpose of this brief Reply, however, is not to revisit this ongoing controversy. Rather, the point made here is merely that the non-invocation of ‘*jus ad bellum* language’ in relation to the hundreds of instances of non-state attacks against diplomatic or consular premises does not necessarily provide strong evidence that attacks *against such premises* cannot *a priori* amount to ‘armed attacks’. The alternative reading rather sees the relevant discourse as a reflection and confirmation of the fact that attacks by non-state actors were traditionally not – at least absent state imputability or substantial state involvement – regarded as ‘armed attacks’. By the same token, the increased use of ‘*jus ad bellum*’ language by the United States in connection with more recent attacks against embassies (think of Benghazi 2012 and Baghdad 2019) can be seen to reflect the growing tendency – at least in some corners – to include non-state attacks within the scope of Article 51 of the UN Charter. The US discourse with regard to these episodes may also offer a glimpse of what the future holds in store – and, given the sheer number of attacks against embassies, should probably give us pause as to the potential risks resulting from a further broadening of the right of self-defence.

For those rare instances where a state was the author of an attack against an embassy (as previously highlighted in this section), other arguments can easily be adduced to explain why these were not conceived as ‘armed attacks’, justifying a response in self-defence. Such explanations would include their resulting from an ‘error’<sup>20</sup> or their nexus to an ongoing armed conflict.

The second observation, viz. the fact that the lion’s share of attacks were small-scale incidents, is equally relevant. In accordance with the ICJ’s distinction between ‘less grave’ uses of force and the ‘most grave’ uses of force qualifying as an ‘armed attack’,<sup>21</sup> it is often argued that only attacks reaching a certain ‘gravity’ are capable of triggering the right of self-defence. Again, this position is not uncontested: the US view, for instance, is that *any* use of force can qualify as an ‘armed attack’ and justify a response of self-defence, provided that the response is strictly proportionate.<sup>22</sup> Importantly, however, even those that would question the existence of a general gravity threshold under Article 51 of the UN Charter, and that tend to accept that the right of self-defence extends to attacks by non-state armed groups, would still argue that, *at least with regard to non-state attacks*, gravity matters.<sup>23</sup> This is, for instance, the position reflected in the *Leiden Policy Recommendations on Counter-Terrorism and International Law*.<sup>24</sup> In a similar vein, the Chatham House *Principles of International*

<sup>20</sup> On the role of ‘error’, see, e.g., P. Fischer, *Das Irrtumsrisiko bei den Ausnahmen des völkerrechtlichen Gewaltverbotes* (2020), at 580.

<sup>21</sup> *Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 191.

<sup>22</sup> US Department of Defense, *Law of War Manual*, June 2015, para. 1.11.5.2, available at [https://dod.defense.gov/Portals/1/Documents/pubs/DoD\\_Law\\_of\\_War\\_Manual\\_-\\_June\\_2015\\_Updated\\_Dec\\_2016.pdf](https://dod.defense.gov/Portals/1/Documents/pubs/DoD_Law_of_War_Manual_-_June_2015_Updated_Dec_2016.pdf).

<sup>23</sup> See further T. Ruys, ‘*Armed Attack*’ and Article 51 of the UN Charter (2010), at 499–500.

<sup>24</sup> ‘Leiden Policy Recommendations on Counter-Terrorism and International Law’, in L. Van den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (2013) 706, para. 39: Article 51 does not include a scale requirement for an armed attack, and there is disagreement on the existence and contours of such a requirement in the case of an attack by one state on another. In the case of an attack by terrorists that is not attributable to a state, Article 51 should be read to require that the attack be large scale in order to trigger the right of self-defence.

*Law on the Use of Force by States in Self-Defence* stress that for the right of self-defence to apply to attacks by non-state actors, such attacks ‘must be large scale’.<sup>25</sup>

By analogy to the point made earlier, then, it could be argued that the non-invocation of ‘*jus ad bellum* language’ in the incidents examined by Kajtár and Balázs does not demonstrate that attacks against embassies can *never* amount to ‘armed attacks’. Rather, it may simply reflect and confirm the view that, especially with regard to attacks originating from non-state actors, *small-scale* attacks cannot trigger Article 51 of the UN Charter. Further, from a *lege ferenda* perspective, the omnipresence of small-scale incidents of this sort arguably provides a compelling reason to preserve a gravity threshold in respect of non-state attacks.

### 3 Conclusion: Of Pink Elephants and Black Swans

In conclusion, examining state practice and *opinio juris* is a useful and indispensable travail in order to properly understand international law’s restrictions on the recourse to armed force, and the authors merit praise for compiling and analysing a particularly rich dataset. Yet, this travail is not an exercise in exact science, and there are inevitable limits to what can be achieved in light of the available material at hand.<sup>26</sup> To put it in the absurd – and readers will forgive my exaggeration – states have never claimed the right of self-defence in response to attacks against (state-owned) pink elephants. *Ergo*, attacks against pink elephants can never qualify as ‘armed attacks’. Or can they?

The point again is that, notwithstanding the high number of non-state attacks against diplomatic and consular missions around the globe, one is hard pressed to identify even a single instance of an intentional attack of some gravity by one state against an embassy of another state outside the context of an ongoing armed conflict. There are surely good reasons why states tend not to use armed force against the diplomatic premises of other states. After all, the inviolability of diplomatic premises has been a sacrosanct principle of international law for centuries (further confirmed by the acceptance that such premises cannot be the object of countermeasures under the law of international responsibility). Any such attack would be likely to be widely condemned by the international community (for good reason). Conversely, one would expect there to be, overall, little military interest for states in pursuing such attacks. In international humanitarian law (IHL) lingo, such premises would additionally qualify as civilian infrastructure that cannot form the target of attack.

The absence of such precedent makes it difficult to pronounce on the question whether such attack would or would not come within the scope of Article 51 of the UN Charter. Some scholars would probably point to the non-inclusion of any reference to attacks against embassies in the list of ‘acts of aggression’ in the 1974 Definition of

<sup>25</sup> Chatham House, *Principles of International Law on the Use of Force by States in Self-Defence*, October 2005, at 11, 13, available at [www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf](http://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf).

<sup>26</sup> On the fragmentary picture resulting from available practice, including with respect to attacks against embassies, see, e.g., Ruys, *supra* note 23, at 512.

Aggression.<sup>27</sup> One wonders, however, whether that absence is not itself a consequence of the fact that states do not attack other states' embassies and that the drafters of the Definition of Aggression therefore simply did not contemplate that such a scenario could materialize.

The reader will permit me a short excursion from the pink elephant from earlier to the 'black swan' problem, as presented in the work of Karl Popper<sup>28</sup> and later popularized by Nicholas Taleb. In his 2007 bestseller, Taleb explains how:

Before the discovery of Australia, people in the Old World were convinced that *all* swans were white, an unassailable belief as it seemed completely confirmed by empirical evidence. The sighting of the first black swan might have been an interesting surprise for a few ornithologists . . . but that is not where the significance of the story lies. It illustrates a severe limitation to our learning from observations or experience and the fragility of our knowledge. One single observation can invalidate a general statement derived from millennia of confirmatory sightings of millions of white swans. All you need is one single (and, I am told, quite ugly) black bird.<sup>29</sup>

As Kajtár and Balázs explain, the past decades have seen dozens, even hundreds, of incidents involving non-state attacks against diplomatic and consular premises. These incidents have generally been treated as matters for diplomatic and consular law, and criminal law, rather than as 'uses of force' or 'armed attacks' in the sense of the Charter norms of the use of force (and rightly so). Given their particular features, especially the absence of state involvement in addition to the mostly small-scale nature, it is, however, doubtful whether these cases – our 'white swans' as it were – tell us much about the 'black swan' scenario, being that of a deliberate large-scale attack by one state against another state's embassy (outside of an existing armed conflict). To play the devil's advocate: do the authors really believe that if state *A* were to conduct an (intentional) airstrike against the embassy of state *B* on the territory of state *C* – and let us assume for the sake of the hypothesis that state *C* has consented to the operation – such attack would not be seen as an 'armed attack?' And if it were to be treated as an 'armed attack', mustn't the conclusion be that attacks against diplomatic or consular missions are *not automatically excluded* from the purview of Article 51 of the UN Charter? But perhaps the best we can hope for is that practice will not compel us any time soon to conclusively answer that question altogether.

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Gábor Kajtár and Gergő Balázs continue the debate with a Rejoinder on EJIL: Talk!

<sup>27</sup> GA Res. 3314 (XXIX), 14 December 1974, art. 3.

<sup>28</sup> K.R. Popper, *Logik der Forschung: Zur Erkenntnistheorie der modernen Naturwissenschaft* (1935).

<sup>29</sup> N.N. Taleb, *The Black Swan: The Impact of the Highly Improbable* (2007), at xxi.

