

## Editorial comment

### The ‘additional’ criteria for collective self-defence: request but not declaration

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#### 1. *Nicaragua* and the additional criteria for collective self-defence

This editorial considers briefly the ‘additional’ criteria for the lawful exercise of collective self-defence: the requirements of ‘declaration’ and ‘request’.<sup>1</sup> The commonly agreed (in terms of their existence) but commonly disputed (in terms of their nature and scope) criteria for self-defence *in genere* – armed attack,<sup>2</sup> necessity,<sup>3</sup> proportionality<sup>4</sup> and the further criteria relating to the Security Council (the reporting requirement<sup>5</sup> and the ‘until clause’<sup>6</sup>) – all apply to collective self-defence just as they do to individual self-defence.<sup>7</sup> However, on top of these ‘usual’ requirements for self-defence, two further criteria are often said to exist specific to collective self-defence. These additional criteria were most famously set out by the International Court of Justice (ICJ) in the 1986 *Nicaragua* merits decision:

1. The ‘victim’ state must *declare* itself to be the victim of an armed attack.<sup>8</sup>
2. The ‘victim’ state must *request* military aid in response.<sup>9</sup>

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\* All websites accessed 1 April 2017.

<sup>1</sup> As is well-known, the Charter of the United Nations (1945) 1 UNTS XVI, art 51 sanctifies not only states’ right of individual self-defence, but the ‘inherent right of individual or *collective* self-defence’ (emphasis added).

<sup>2</sup> See Tom Ruys, ‘*Armed Attack*’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press, 2010).

<sup>3</sup> See Mary Ellen O’Connell, ‘The Limited Necessity of Resort to Force’ in Dale Stephens and Paul Babie (eds), *Imagining Law: Essays in Conversation with Judith Gardam* (University of Adelaide Press, 2016) 37.

<sup>4</sup> See Sina Etezazian, ‘The Nature of the Self-Defence Proportionality Requirement’ (2016) 3 *Journal on the Use of Force and International Law* 260.

<sup>5</sup> See James A Green, ‘The Article 51 Reporting Requirement for Self-Defense Actions’ (2015) 55 *Virginia Journal of International Law* 563.

<sup>6</sup> See Ruys (n 2) 74-83 and 517-8.

<sup>7</sup> See, e.g., Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th edn 2011) 292-7.

<sup>8</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, para 195.

<sup>9</sup> *Ibid*, paras 165 and 199.

As one of my co-editors eloquently has discussed elsewhere,<sup>10</sup> the identification of these criteria in 1986 by the ICJ has faced a degree of criticism, including from within the Court itself at the time, for a number of reasons. First, it has been argued that requiring a declaration and a request by the victim state acts to situate collective self-defence, conceptually, as defence of the ‘other’, not of the ‘self’.<sup>11</sup> This is at odds with the (now minority) view that collective self-defence is an extension of the right of individual self-defence.<sup>12</sup> Secondly, the requirements have been seen as overly formal/impractical, and, thus, as unnecessary and unhelpful procedural restrictions on the exercise of the inherent right of self-defence.<sup>13</sup> Thirdly, in the *Nicaragua* decision, the ICJ provided almost no evidence in support of the existence of the requirements, bringing their status as rules of customary international law into question.<sup>14</sup> Finally, the Court was not at all clear as to the legal consequences of complying (or, more pertinently, *not* complying) with the criteria: it gave mixed messages as to whether it considered the declaration and request requirements to be legally *determinative* for collective self-defence claims, or merely indicative/evidentiary.<sup>15</sup>

Irrespective of these various concerns regarding the ICJ’s identification in 1986 of the additional requirements of ‘declaration’ and ‘request’, these criteria continue repeatedly to be identified in the literature.<sup>16</sup> To some extent, perhaps this is unsurprising, because they have a compelling policy goal underpinning them. It is undesirable – certainly if one adopts the majority view that collective self-defence is the (misnamed) defence of the ‘other’ – for ‘white knight’ states to make the decision to intervene unilaterally, and ‘ride in’ to other sovereign

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<sup>10</sup> Ruys (n 2) 83-91. See also D W Greig, ‘Self-Defence and the Security Council: What Does Article 51 Require?’ (1991) 40 *International and Comparative Law Quarterly* 366, 370-9.

<sup>11</sup> See, e.g., Dinstein (n 7) 295; *Nicaragua* (merits) (n 8) dissenting opinion of Judge Sir Robert Jennings, 545-6.

<sup>12</sup> Johanna Friman, *Revisiting the Concept of Defence in the Jud ad Bellum: The Dual Face of Defence* (Hart, 2017) 94-6.

<sup>13</sup> See, e.g., Fred L Morrison, ‘Legal Issues in the *Nicaragua* Opinion’ (1987) 81 *American Journal of International Law* 160, 163; *Nicaragua* (merits) (n 8) dissenting opinion of Judge Sir Robert Jennings, 544-5; *ibid.*, dissenting opinion of Judge Schwebel, para 191.

<sup>14</sup> See e.g., Omar Abubakar Bkhashab, ‘The Relationship between the Right of Self-Defence on the Part of States and the Powers of the Security Council’ (1996) 9 *Journal of King Abdulaziz University: Economics and Administration* 3, 9-10; Greig (n 10) 375-6.

<sup>15</sup> See, e.g., *ibid.*, 376-8; James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart, 2009) 53-4.

<sup>16</sup> See, e.g., Sir Michael Wood, ‘Self-Defence and Collective Security’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 649, 654; Friman (n 12) 94; Dino Kritsiotis, ‘A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence under International Law’ in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post Bellum* (Routledge, 2013) 170, 185-7; Johan D van der Vyver, ‘Military Intervention in Syria: The American, British and French Alternatives and the Russian Option’ (2015) 48 *De Jure* 36, 42, footnote 20; Christopher Greenwood, ‘Self-Defence’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law*, vol. IX (Oxford University Press, 2012) 103, 110, para 39; Josef Mrazek, ‘Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law’ (1989) 27 *Canadian Yearbook of International Law* 81, 93.

states' territories unneeded and/or unwanted.<sup>17</sup> The declaration and request criteria aim to stop states from claiming collective self-defence as a pretext for using force for other purposes.

Ultimately, however, debates over the (un)desirability of the criteria, while important, do not have a direct bearing on their existence, at least as a *lex lata* matter. For example, just because the ICJ did not provide evidence supporting the existence of the criteria in custom – or clarify their legal implications – in 1986 does not mean that no such evidence existed, or that the criteria have not been crystallised into binding customary requirements through state practice/*opinio juris* since. For all of the critique of the Court's identification of the two additional collective self-defence criteria, few commentators have gone on to test them against what states actually *do*.<sup>18</sup> Like many other writers, in the past I have been guilty of accepting uncritically the existence in law of the two additional criteria for collective self-defence.<sup>19</sup> However, having recently begun work on a wider project aimed at investigating the right of collective self-defence, I am now less sure. To put it simply, I believe that a legal requirement in custom for the victim state to request aid does exist, but there is no separate requirement for it to declare formally that it has suffered an armed attack.

## 2. Declaration and request in state practice

Contrary to what has been suggested by some writers,<sup>20</sup> the requirement that the victim state requests aid in collective self-defence was not 'invented' by the ICJ in 1986. Such requests have been common in relevant state practice from the inception of the UN onwards. At the same time, a separate declaration by the victim has never been a meaningful feature of practice in the UN era. While an editorial of this kind does not allow for a detailed analysis of the state practice concerning collective self-defence, this section sets out a small number of examples, which are intended to illustrate a wider trend in this regard.

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<sup>17</sup> *Nicaragua* (merits) (n 8) dissenting opinion of Judge Sir Robert Jennings, 544-5; Yoram Dinstein, 'The Jurisprudence of the Court in the *Nicaragua* Decision: Remarks' (1987) 81 *American Society of International Law Proceedings* 266, 268; Christine Gray, *International Law and the Use of Force by States* (Oxford University Press, 3rd edn 2008) 184.

<sup>18</sup> Although see, e.g., *ibid*, 184-7; Ruys (n 2) 81-91.

<sup>19</sup> See, e.g., Christopher P M Waters and James A Green, 'International Law: Military Force and Armed Conflict' in George Kassimeris and John Buckley (eds), *The Ashgate Research Companion to Modern Warfare* (Ashgate Publishing, 2010) 289, 297.

<sup>20</sup> See, e.g., R St J Macdonald, 'The *Nicaragua* Case: New Answers to Old Questions' (1986) 24 *Canadian Yearbook of International Law* 127, 150.

One of the earliest relevant post-1945 examples is South Korea's request in 1950 for aid to support it against the North.<sup>21</sup> While this request was, strictly speaking, directed at the Security Council *ut totum*, rather than individual states, the US, in particular, made much of South Korea's request in defending its decision to intervene.<sup>22</sup> The Korean War, thus, represents an early instance of a request for aid, and a corresponding reliance on that request to support a claim of collective self-defence.<sup>23</sup> At the same time, while South Korea 'declared' that it was the victim of an 'act of aggression' on the part of the North, this was merely subsumed within its request for help, and it made no reference to the notion of an armed attack.<sup>24</sup>

In 1958, Jordan made it very clear that it had formally requested that the UK and the US 'come to its immediate aid', in response to a threat from the United Arab Republic.<sup>25</sup> While Jordan made sure that its request was front and centre, it was rather less clear as to what the request that it made was in relation to.<sup>26</sup> Certainly it did not label the 'threat' it faced an armed attack or make any sort of formal declaration. The UK – which sent troops to Jordan – made a great deal of the 'appeal from a Government which felt certain that the independence and integrity of its country was imperilled' in justifying its use of force.<sup>27</sup> In rejecting the UK's claim of collective self-defence, the USSR questioned the validity of Jordan's request (largely on the basis that it was *ex post facto*)<sup>28</sup> and argued that the action could not be one of self-defence as the threat being responded to was illusory.<sup>29</sup> In other words, the Soviet Union rejected the lawfulness of the UK's action on the basis of a lack of 1) a (valid) request and 2) an armed attack. It made no mention of the need – or of the failure to meet the need – for a Jordanian *declaration* of the occurrence of an armed attack.

In relation to the military action by various Warsaw Pact states in Czechoslovakia in 1968, the USSR stressed repeatedly that it was acting in collective self-defence following a

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<sup>21</sup> UNSC Verbatim Record, UN Doc S/PV.473 (25 June 1950) 8.

<sup>22</sup> UNSC Verbatim Record, UN Doc S/PV.475 (30 June 1950) 10.

<sup>23</sup> It is contestable as to whether the legal basis of the action taken in the Korean War was Security Council authorisation or collective self-defence. However, it is submitted that the latter is the better view: see Julius Stone, *Aggression and World Order* (University of California Press, 1958) 189; Dinstein (n 7) 301-2; Wood (n 16) 650-1.

<sup>24</sup> UN Doc S/PV.473 (n 21).

<sup>25</sup> UNSC Verbatim Record, UN Doc S/PV.831 (17 July 1958) para 24.

<sup>26</sup> See, e.g., *ibid*, para 24.

<sup>27</sup> *Ibid*, paras 27-32.

<sup>28</sup> *Ibid*, paras 62-4.

<sup>29</sup> *Ibid*, paras 65-8.

request for aid.<sup>30</sup> Conversely, the US, Canada<sup>31</sup> and Denmark<sup>32</sup> all rejected the Soviet legal justification on the grounds that the request did not come from the legitimate representatives of the people of Czechoslovakia.<sup>33</sup> This instance of state practice did involve a rare formal ‘declaration’ by the victim state, but this was to the effect that the intervention by the states *claiming to be acting in collective self-defence* amounted to an ‘illegal occupation’.<sup>34</sup> As such, this was not a declaration that was then tied to a claim of collective self-defence, but one precisely used to refute such a claim. None of the states that contributed to the Security Council debates on the intervention mentioned any form of declaration requirement for collective self-defence.

The examples set out thus far must, of course, be considered in the context of the climate of ‘mutually assured rejection’ of legal claims made across the iron curtain (in either direction) that defined UN debate during the Cold War. Nonetheless, when it came to collective self-defence, while the Eastern/Western blocs inevitably disagreed with each other as to whether the relevant request was ‘valid’, these very debates on validity highlight the shared view that there was a need for a request for aid on the part of the victim. This cannot, however, be said for the purported declaration criterion during the Cold War period.

The same pattern also can be identified in the less ideologically entrenched debates over collective self-defence actions in the post-Cold War era. For example, in 1990, following the invasion by Iraq, Kuwait requested military aid repeatedly, both formally and informally.<sup>35</sup> For its part, the US relied on the request(s) by Kuwait, as well as requests for military aid by other states, notably Saudi Arabia; the US explicitly linked these requests to Article 51, and stressed that they underpinned its exercise of collective self-defence.<sup>36</sup> The UK similarly made repeated

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<sup>30</sup> UNSC Verbatim Record, UN Doc S/PV.1441 (21 August 1968) paras 3, 75, 104 and 216.

<sup>31</sup> *Ibid*, paras 51 and 171.

<sup>32</sup> *Ibid*, para 185.

<sup>33</sup> *Ibid*, paras 11-2, 30, 36, 40, 46 and 248.

<sup>34</sup> *Ibid*, para 138 (Czechoslovakian representative, quoting from Declaration of the Ministry of Foreign Affairs, with the endorsement of the President of the Czechoslovak Socialist Republic and on behalf of the Government of the Republic (21 August 1968)).

<sup>35</sup> See, e.g., Sheik Jabir al-Ahmad al-Jabir Al Sabah, the Amir of Kuwait, letter to President George H W Bush (12 August 1990): see Statement by Press Secretary Fitzwater on the Persian Gulf Crisis (12 August 1990) [www.presidency.ucsb.edu/ws/?pid=18762](http://www.presidency.ucsb.edu/ws/?pid=18762); Letter dated 12 August 1990 from the Permanent Representative of Kuwait to the United Nations addressed to the President of the Security Council, UN Doc S/21498 (13 August 1990).

<sup>36</sup> See Statement by Fitzwater (n 35); Letter dated 9 August 1990 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/21492 (10 August 1990); UNSC Verbatim Record, UN Doc S/PV.2934 (9 August 1990) 7-8, 17-8; UNSC Verbatim Record, UN Doc S/PV.2938 (25 August 1990) 29-30. It is worth noting that the coalition action in the Gulf could be viewed as having its legal basis in collective self-defence, Security Council authorisation or both. See Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, 2010) 53-5.

reference to Kuwait's request for aid (as well as to separate requests by Saudi Arabia and Bahrain), linked these directly to the exercise of collective self-defence, and implied strongly that the various requests acted to validate its military action.<sup>37</sup>

As was the case during the Cold War, detractor states also focused on the request requirement at the start of the First Gulf War. For example, Cuba asserted that the US' military action was unlawful, based on a range of arguments concerning both Security Council resolution 661 and Article 51.<sup>38</sup> Of note for our purposes, though, is the fact that, *inter alia*, one of the issues that Cuba (counterfactually) stressed in asserting the unlawfulness of the action was that force had been used 'without any request from any quarter'.<sup>39</sup>

In relation to the declaration requirement, interestingly, Kuwait's representative in the Security Council did formally – and separately from its request for aid – stress that it had 'been subjected to attack in an armed military invasion.'<sup>40</sup> While Kuwait did not explicitly refer to this as an 'armed attack',<sup>41</sup> its declaration did look rather like what (seemingly) was envisaged by the ICJ in *Nicaragua*. However, while this represents a rare example in collective self-defence practice of a victim state making an express – and notably formal – declaration that it had been attacked, neither the states that intervened on its behalf nor those that debated the intervention went on to refer to this declaration at all.

To conclude this section with a much more recent example from state practice, it is worth considering the ongoing military operations in Syria against ISIS, since 2014; a number of states justify (or have justified) their uses of force in Syria as collective self-defence actions in support of Iraq. As the 'victim' state in this context, Iraq requested military aid on a number of occasions, including at the Paris conference on 15 September 2014 and, formally, in a letter addressed to the UN Secretary-General.<sup>42</sup> However, while – when making these requests for aid – Iraq referred, for example, to ISIS's actions in 'terrorizing citizens, carrying out mass executions, persecuting minorities and women, and destroying mosques, shrines and

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<sup>37</sup> See *ibid*, 48; Letter dated 13 August 1990 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/21501 (13 August 1990); *Hansard*, House of Commons (6 September 1990) [www.publications.parliament.uk/pa/cm/198990/cmhansrd/1990-09-06/Debate-1.html](http://www.publications.parliament.uk/pa/cm/198990/cmhansrd/1990-09-06/Debate-1.html), cols 734-5, 738.

<sup>38</sup> UNSC Verbatim Record, UN Doc S/PV.2937 (18 August 1990) 29-31.

<sup>39</sup> *Ibid*, 29.

<sup>40</sup> UNSC Verbatim Record, UN Doc S/PV.2932 (2 August 1990) 4-5.

<sup>41</sup> As noted by Kritsiotis (n 16) 187, footnote 91.

<sup>42</sup> Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691 (22 September 2014) (this letter not only requested military aid, but also referred to previous requests of this nature).

churches'<sup>43</sup> it did not come close to declaring itself to be the victim of an armed attack formally. It simply was contextualising its request for help.

Most of the states that invoked collective self-defence as the basis of their military action against ISIS noted Iraq's request for aid, without, at the same time, making any reference to a declaration requirement. Thus, Belgium, for example, asserted that it was using force 'in Syria in the exercise of the right of collective self-defence, in response to the request from the Government of Iraq,'<sup>44</sup> but did not mention any declaration by Iraq (or, more accurately, the *need for* any declaration by Iraq, given that there wasn't one). Similarly, Australia,<sup>45</sup> New Zealand,<sup>46</sup> The Netherlands,<sup>47</sup> Norway<sup>48</sup> and the UK<sup>49</sup> were all explicit that they were acting in collective self-defence on the basis of the Iraq's request for aid: yet, in so doing, none of these states mentioned a declaration criterion. Only Canada made reference to anything even close to such a requirement, stating that Iraq had made it 'clear that it was facing a serious threat of continuing attacks', before – like most other states asserting collective self-defence – going on to make much of Iraq's corresponding request for aid.<sup>50</sup>

Similarly telling is that, in formally asserting that the coalition's actions were unlawful, Syria made it clear that the request of Iraq was insufficient to legally justify the use of force, and that such a request needed to have come from Syria itself.<sup>51</sup> This raises crucial questions about who validly can request aid in collective self-defence,<sup>52</sup> but, for our purposes, it is enough to note that the request criterion was again – for a state that was rejecting the collective self-defence claims of others – fundamental. It is also worth noting that, while being less explicit in regard to the insufficiency of Iraq's request and the wider claim of collective self-defence,

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<sup>43</sup> Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/2014/440 (25 June 2014).

<sup>44</sup> Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc S/2016/523 (9 June 2016).

<sup>45</sup> Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693 (9 September 2015).

<sup>46</sup> Speech by New Zealand Prime Minister John Key (24 February 2015) [www.beehive.govt.nz/speech/prime-minister%E2%80%99s-ministerial-statement-isil](http://www.beehive.govt.nz/speech/prime-minister%E2%80%99s-ministerial-statement-isil).

<sup>47</sup> Letter dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council, UN S/2016/132 (10 February 2016).

<sup>48</sup> Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council UN Doc S/2016/513 (3 June 2016).

<sup>49</sup> Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2014/851 (26 November 2014).

<sup>50</sup> See Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015).

<sup>51</sup> Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/719 (21 September 2015).

<sup>52</sup> See n 63 and accompanying text.

Russia made a similar point, arguing that the intervention required the ‘unequivocal permission’ of Syria.<sup>53</sup> Neither Russia nor Syria made any mention of a declaration criterion.

### 3. Conclusion: request but not declaration

While the examples set out in the previous section necessarily provide only a ‘shorthand’ appraisal, they are representative of the wider practice: in the UN era, invocations of collective self-defence invariably have been coupled with a request on the part of the victim. Indeed, without claiming to have undertaken a comprehensive survey (as yet), I have been unable to identify a single instance of a claim of collective self-defence in the UN era where there has not also been an underpinning request for aid.<sup>54</sup> Of course, for the request requirement to have legal implications, it is not necessarily enough that states regularly make requests. Therefore, it also should be noted that states invoking collective self-defence *rely* on the victim’s request, stressing this in communications and debates concerning their action. Even more telling is that other states, on a number of occasions, have rejected collective self-defence claims on the basis that the request relied upon was in some way invalid.

In contrast, there is little evidence to indicate that a separate ‘declaration’ criterion has any basis in state practice. This is not to say that ‘victim’ states never declare, in the context of collective self-defence actions, that they have suffered an armed attack (or made such a declaration using broadly comparable terminology, such as ‘aggression’). However, this is almost never done in a formal manner, and is not discussed by third party states (and nor, more notably, is the absence of such a declaration). Declarations on the part of the victim state that it has suffered an armed attack, if made, are informal and/or are incorporated into its request for aid: the occurrence of the armed attack being part of, or implicit in, the request for help in responding to it. Ultimately – albeit with the same caveat about not yet being in a position to base the following assertion on a comprehensive survey – I have been unable to identify any instances in practice where the *absence* of a declaration that an armed attack has occurred was even noted (let alone seen as determinative) by other states considering a collective self-defence claim.

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<sup>53</sup> See ‘Russia Condemns US Strikes on Islamic State without Syria’s Approval’, *The Moscow Times* (25 September 2014) [www.themoscowtimes.com/news/article/russia-condemns-u-s-strikes-on-islamic-state-without-syria-s-approval/507784.html](http://www.themoscowtimes.com/news/article/russia-condemns-u-s-strikes-on-islamic-state-without-syria-s-approval/507784.html).

<sup>54</sup> See also Gray (n 17) 186-7 (stating, in 2008, that this holds true ‘[i]n every case’, emphasis added).



Moreover, not only is the declaration requirement not present in practice, it is also difficult to justify it on a policy level. The rationale advanced for the two requirements – to ensure that aid is truly needed/wanted, and that collective self-defence is not used as a pretext – surely is fulfilled by the request requirement alone.<sup>55</sup> One should keep in mind that the ‘armed attack’ requirement applies both to individual *and* collective self-defence; if the armed attack criterion is coupled with the requirement for a request for aid, then the need for the victim to also formally *declare* that the armed attack has occurred seems superfluous (and, indeed, as critics of this aspect of *Nicaragua* have stressed, overly formalistic/impractical).

In relation to the policy goal underpinning the *request* criterion, however, my co-editor, Tom Ruys, previously has suggested that

the request criterion is primarily aimed at securing the approval of the victim State. If this approval can be established in some other way, for example, if it is clear that the States’ military actions are closely coordinated or if the States jointly submit a report to the Security Council, a flexible interpretation should arguably prevail.<sup>56</sup>

As a policy matter, I agree with Tom’s (admittedly only tentative) suggestion. However, as I have argued herein, this is not reflected in the existing state practice. Therefore, at least one ‘test case’ would be required to establish whether states would accept that such alternative factors would satisfy the (legal) requirement to ensure the victim’s approval. Indeed, to me, such alternatives seem rather unlikely to occur or be necessary in practice, as surely the easiest way for a state to establish that it wants help is for it unequivocally to ask for it? As such, Tom’s suggestion perhaps remains hypothetical. To stress again, significantly, states invariably make such requests, rely on them, and critique them.

While the *Nicaragua* case is often returned to in relation to collective self-defence – for obvious reasons – it is notable that the ICJ has since presented a rather different view of the additional requirement(s) for collective self-defence. In both the 2003 *Oil Platforms* case<sup>57</sup> and

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<sup>55</sup> Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Bruylant, 2000) 182.

<sup>56</sup> Ruys (n 2) 91. See also Letter dated 22 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc A/63/662–S/2008/812 (24 December 2008) para 32 (Azerbaijan, considering the status of ‘declaration’ and ‘request’ as requirements for collective self-defence, and concluding that ‘one thing is clear: if a third State sends troops into the territory of the direct victim of the armed attack ... uninvited yet allegedly in order to offer military assistance against the armed attack underway by the attacking State ... this will be viewed as another armed attack against the [victim state]’).

<sup>57</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (merits) [2003] ICJ Rep 161, para 51.

the 2005 *Armed Activities* decision,<sup>58</sup> the Court indicated that collective self-defence required a request on the part of the victim state. However, in neither judgment did it make any reference to a separate, corresponding requirement that the victim first declare that it has suffered an armed attack. Of course, in neither case did the ICJ *reject* explicitly its earlier ‘declaration’ criterion either, but – while a request requirement twice has been reaffirmed by the Court since *Nicaragua* – a requirement of declaration has been notable by its absence in more recent ICJ jurisprudence. Similarly, while the *Nicaragua* ‘declaration + request’ formulation still commonly is repeated in the literature,<sup>59</sup> it is notable that there is an increasing tendency for commentators to identify the request criterion but *not* the declaration criterion. This has, most often, involved an acceptance of the request requirement with simply no mention being made of the declaration requirement (rather than an explicit rejection of it),<sup>60</sup> although some scholars have gone further and endorsed ‘request’ while at the same time expressly rejecting ‘declaration’.<sup>61</sup>

It should be noted that, even if one accepts my conclusion that a request is required under customary international law, a number of (crucial) questions remain regarding this criterion. These include to whom the request must be addressed,<sup>62</sup> who validly can make a request for aid,<sup>63</sup> the form of the request (e.g., whether it must be made publicly and/or formally)<sup>64</sup> and the non-coerced/genuine nature of the request.<sup>65</sup> I intend to return to such questions in the future. In this editorial I wished merely to highlight my view that the request criterion is, indeed, a binding requirement for the exercise of collective self-defence under customary international law, whereas the continued reaffirmation of the need for a declaration is both inaccurate and unhelpful.

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<sup>58</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (merits) [2005] ICJ Rep 223, para 128.

<sup>59</sup> See n 16.

<sup>60</sup> See, e.g., Marco Roscini, ‘On the “Inherent” Character of the Right of States to Self-Defence’ (2015) 4 *Cambridge Journal of International and Comparative Law* 634, 648; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 404; Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Routledge, 2013) 77, 103. See also Institut De Droit International, Session de Santiago – 2007 (27 October 2007) 10A Resolution EN, 10ème Commission, art 8.

<sup>61</sup> See, e.g., Constantinou (n 55) 178-83.

<sup>62</sup> See, e.g., Green (n 15) 52-3.

<sup>63</sup> See, e.g., Quincy Wright, ‘United States Intervention in the Lebanon’ (1959) 53 *American Journal of International Law* 112, 118-9.

<sup>64</sup> See Anthony Clark Arend and Robert J Beck, *International Law and the Use of Force* (Routledge, 1993) 36; Kritsiotis (n 16) 187, footnote 89.

<sup>65</sup> See, e.g., Constantinou (n 55) 181.