THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE ACTORS: ITS DEBATED EXISTENCE AND UNDISCOVERED SCOPE

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ABSTRACT

The existence of a right of self-defence against non-State actors and its possible scope of operation are two of the most controversial questions in international law today. This thesis examines whether, and to what extent, the rules of international law permit States to use force extraterritorially in self-defence against non-State actor attacks and threats. It is argued that customary international law evolved over time to recognise such a right and that its scope, though dependent on the factual circumstances of each case, is regulated by the well-established principles of necessity and proportionality.

As a theoretical foundation, this thesis submits that although Article 51 of the UN Charter functions as an exception to the general prohibition of the use of force contained in Article 2(4) for the State exercising its right of self-defence, the right of self-defence is not predicated on a violation of Article 2(4). Further, the right of self-defence is recognised in Article 51 as a right already existing in customary international law and, therefore, subject to changes in the practice and *opinio juris* of States.

Following on that conclusion, the thesis widely explores the content of customary international law as evidenced by State practice, principally the rationalisations offered by States for their uses of force in response to non-State

actor attacks and threats, and the response of the international community to such claims, concluding that the right of self-defence against non-State actors is in fact recognised in international law. It is also argued that the jurisprudence of the ICJ is largely unhelpful and faulty, as the Court has failed to meaningfully engage with changes in State practice since its *Nicaragua* Case.

It is further argued that the principles of necessity and proportionality provide meaningful restraints on the exercise of the right and safeguards for the rights and interests of the State on whose territory the right of self-defence against non-State actors may be exercised. Finally, the thesis considers the place of the right of self-defence against non-State actors in the collective security system created by the UN Charter and offers brief reflections on the need for greater oversight by the UN Security Council and the international community as a whole to ensure accountability in the exercise of the right of self-defence against non-State actors.

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TABLE OF ABBREVIATIONS

9/11	September 11, 2001
ASIL	American Society of International Law
DRC	Democratic Republic of the Congo
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
Keesing’s	Keesing’s World News Archive
NATO	North Atlantic Treaty Organisation
OAS	Organisation of American States
OEF	Operation Enduring Freedom
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
US	United State of America
WMD	Weapons of Mass Destruction

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INTRODUCTION

THE inherent right of self-defence is undoubtedly at the core of international law on the use of force. Following the conclusion of the United Nations (UN) Charter, States have almost invariably justified extraterritorial uses of force as legitimate exercises of the right of self-defence embodied in Article 51 of the Charter.[1] The United States' invocation of the right of self-defence to justify its use of force in Afghanistan in October 2001, however, appears to be a break from the more usual course. Its resort to self-defensive force followed terrorist attacks against its territory, rather than an attack or invasion by another State. These events brought to the fore, and intensified, a debate of earlier vintage on the existence of a right of self-defence against non-State actors in international law. The 2018 final report of the ILA Committee on the Use of Force concludes that the issue of self-defence against non-State actors remains keenly contested.[2]

The shifting landscape of threats, coupled with frequent stagnation of the collective security system, has obvious implications for how the right of self-defence is interpreted and applied. As the only irrefutable basis for the resort to unilateral force in international law, its limits have been pushed and stretched to accommodate new and varied claims. It is critical, more now than ever, that the applicable rules be carefully delimited and defined.

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[1] James Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 3.

[2] ILA Committee on the Use of Force, *Final Report on Aggression and the Use of Force* (Sydney Conference 2018) <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6> accessed 28 September 2020, 14

The right of self-defence in international law is most commonly viewed as an inter-State concept, heavily intertwined with notions of State responsibility. Even where the attack triggering self-defence was perpetrated by a non-State actor, the thrust of analysis remained an inter-State one. This has been the consistent approach of the International Court of Justice, the principal judicial organ of the UN, in its jurisprudence on the use of force over the period of two decades. Contemporary State practice, however, has tended to challenge this approach. Increasingly, States are invoking the inherent right of self-defence as recognised in Article 51 of the Charter to justify the extraterritorial use of force against non-State actor targets.

Parameters of Thesis

This thesis aims to explore the above-mentioned tensions and to offer reasoned conclusions on the existence and scope of the right of self-defence against non-State actors. The central question to be answered is whether, and to what extent, recent developments in customary international law permit a State to use force in self-defence against an actual or threatened attack by non-State actors. Emphasis is placed on ascertaining the substance of customary law through careful examination of State practice, the rationalisations offered by States for their uses of force in response to non-State actor attacks and threats, and the response of the international community as a whole to such claims.

While it is fundamentally important to explore and assess contemporary State practice, it is perhaps equally critical in this area of the law to understand what self-defence represents as a concept in international law and the role that it plays in the post-war paradigm created by the UN Charter. Legal disputes on the content of the law of the *jus ad bellum*, particularly the right of self-defence and its possible expansion to cover non-State actor attacks, are often reflective of disagreements about deeper theoretical questions.[3] Chapter I provides the theoretical foundation of the thesis through an assessment of the historical evolution of the concept of self-defence and the impact of the gradual prohibition of the use of force on the right's operation and content. Specifically, the Chapter highlights the nature of self-defence as an 'exceptional right'[4] within the UN Charter paradigm and maps the inextricable link between the right as recognised in Article 51 and its existence in customary international law. It concludes that there are no theoretical impediments to the conceptualisation of a right of self-defence against non-State actors in the dispensation of international law created by the UN Charter.

Part II of the thesis goes on to examine State practice in a two-fold assessment. First, Chapter II provides a detailed examination of incidents of practice involving the use of force against non-State actors both before and after the Charter. It is argued that the right of self-defence against non-State actors is in fact recognised in the practice and *opinio juris* of States, not through some modern cataclysmic event such as the 9/11 attacks, but by an evolutionary process of reinterpretation and change. Given the important role ICJ jurisprudence has played in the formation and elaboration of the law on use of force,[5] Chapter III then critically assesses the decisions of the Court on the matter of self-defence,

[3] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe tr, Hart 2012) 4.

[4] DW Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 3.

[5] Green (n 1) 2.

particularly its judgments in the *Nicaragua* Case,[6] *Israeli Wall* Advisory Opinion,[7] and *Armed Activities* Case,[8] *vis-à-vis* contemporaneous developments in customary international law.

While the existence of a right of self-defence against non-State actors remains debated in many quarters, most recent commentaries have tended to shift the focus of emphasis to examining the precise scope and practical operation of such a right.[9] Part III of the thesis explores the modalities of how a right of self-defence against non-State actors might be carried out. Chapters IV and V, as the remaining substantive chapters of this thesis, evaluate how the core principles of necessity and proportionality apply in the non-State actor context to produce meaningful restraints on the State's right of self-defence. The peculiar position of the territorial State in the matrix is given particular consideration.

Overall, this thesis aims to present a complete framework of the progression and operation of the right of self-defence against non-State actors in the practice of States; a right, which it concludes, is consistent with the principles underlying the UN Charter and its design, and which, from a practical perspective, can be

[6] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United State of America) (Merits Judgment, 27 June 1986) [1986] ICJ Rep 14.

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion [2004] ICJ Rep135.

[8] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic Congo v. Uganda) (Merits Judgment, 19 December 2005) [2005] ICJ Rep 108.

[9] See eg Daniel Bethlehem, 'Self-defence against an Imminent or Actual Armed Attack by Nonstate Actors', (2002) 16(4) AJIL 769; Christian J Tams and James G Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence', 45(1) Israel L.R. 91; Kimberley N Trapp, 'Back to Basics: Necessity, Proportionality and Right of Self-Defence against Non-State Terrorist Actors', (2007) 56 ICLQ 141

further affirmed and regulated through greater oversight by the collective security system established by the UN Charter

PART I

CHAPTER I

THE NATURE OF SELF-DEFENCE IN INTERNATIONAL LAW: PRINCIPLE AND PARADIGM

A. INTRODUCTION

FOLLOWING the atrocities of the First World War, the international legal system underwent an unprecedented move towards the limiting of recourse to force by States. The first attempt at comprehensively prohibiting recourse to force came in the form of Article I of the Kellogg-Briand Pact of 1928.[1] Whereas the proscription on the use of force came into existence over time alongside developments in international political and legal thinking, the concept of self-defence, a salient part of contemporary discourse on the use of force, finds its existence rooted in far more historical a source. However, the role that the concept of self-defence played in the international legal order, and therefore its legal definition, evolved with the advent and progression of the prohibition of the use of force.

While it is generally accepted that States may resort to self-defensive force, the principles identified to govern such action have been subject to challenge in recent times. From as early as 1837, the principles of necessity and proportionality have been recognised as the applicable constraining factors, but no consensus exists on the precise levels of such constraint. Equally debated are the circumstances in which self-defence is believed to arise. Although these uncertainties did not prove fatal to the operation of the law previously, they are

[1] The General Treaty for Renunciation of War as an Instrument of National Policy (Paris, 27 August 1928) 94 LNTS 57 ('Kellogg-Briand Pact').

greater cause for concern in the contemporary context. The changing landscape of warfare has refocused and magnified these difficulties in identifying and applying the relevant legal principles. The right to act preventively in self-defence and against non-State actors, rights increasingly relied upon in the contemporary context, represent two aspects of self-defence on which agreement proves difficult to find.

In times past, when States possessed freedom to resort to war, an absolutely precise delimitation of the scope of a right of self-defence was not crucial.[2] In the current age of the general prohibition of the use of force, which arguably represents the cornerstone of the present international legal order,[3] it is essential that self-defence, as an exception to this core value, be properly delimited and defined. Any understanding of the concept of self-defence must also be garnered in the context of this contemporary prohibition, and before it, the prohibition of recourse to war. The express recognition of an inherent right of self-defence in Article 51 of the UN Charter has not brought consensus. Considerable disagreement persists amongst States and commentators concerning the proper interpretation of Article 51. When considering attacks emanating from non-State sources specifically, several commentators question whether the international law on self-defence is applicable in that context at all.[4]

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[2] Stanimir Alexandrov, *Self-Defense against the Use of Force in International Law* (Kluwer 1996) 1.

[3] Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol 1 (3rd edn OUP 2012) 203.

[4] See eg Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law'* (Christopher Sutcliffe tr, Hart Publishing 2012) 162-64.

Much of this disagreement can be traced to substratal differences of opinion on the rules governing the interpretation and application of sources of international law, together with different appreciations of the historical context in which the principles on the use of force arose.[5] The methodological approaches adopted for the examination of customary and Charter law in this area have varied. Clarity on method, the legal categories and interpretative techniques relevant to a proper identification of the law, could, therefore, go a far way in reconciling diverging views on the rules governing the use of force in self-defence.[6]

The present Chapter, as the initial chapter of this thesis, addresses the fundamental issues of methodology relevant to the right of self-defence against non-State actors. First, it aims to identify the nature and core tenets of the right of self-defence more generally through an examination of the historical evolution of both this right and the prohibition of the use of force. A proper understanding of the relationship between the two concepts as they developed will assist in demarcating the right of self-defence in its contemporary context, including as a response to actual or threatened attacks by non-State actors. Next, the Chapter explores the source of the right of self-defence. More specifically, it examines the interaction between, and applicability of, Article 51 of the UN Charter and customary international law. As a corollary to this, the Chapter outlines the adopted approach to the identification and assessment of customary international law. Ultimately, these methodological approaches provide the framework for determining whether,

[5] Georg Nolte and Albrecht Randelzhofer 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary,* vol 2 (3rd edn, OUP 2012) 1401.

[6] Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretative Method' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 284.

conceptually, the right of self-defence recognised in Article 51 can be invoked in the event of an armed attack by an extraterritorial non-State actor.

B. Self-defence as a Legal Concept – Historical Perspectives on a Current Problem

In international law, self-defence is widely viewed as a narrow exception to the prohibition of the use of force contained in Article 2(4) of the UN Charter and mirrored in customary international law.[7] The prominence of self-defence as a legal concept became manifest with the prohibition of the use of force in international relations.[8] This is not to suggest, however, that self-defence had no conceptual existence prior to this development in international law. While the impact of the prohibition of the use of force on the evolution of the right of self-defence is significant, as a legal concept pre-existing the prohibition, it would be disingenuous and paradoxical to divorce an examination of its meaning in the current context from notions of self-defence in international law before this time.

At the most fundamental level, self-defence can be conceptualised as a right common to all legal systems and summed up in the Latin maxim *vim vi repellere omnia jura permittunt* - all laws, written and unwritten, permit force to be repelled by force.[9] The role and measure of the notion of self-defence, however, vary with the degree of maturity attained by the system of law in which it is

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[7] Nolte and Randelzhofer (n 5) 1399.

[8] Yoram Dinstein, *War, Aggression and Self-Defence (*6th edn, CUP 2017) 203.

[9] DW Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 3.

situated.[10] In its earliest form, the international legal system was characterised by the complete absence of any centralised machinery for the promulgation and enforcement of law and the protection of the rights of States.[11] It is not unnatural, therefore, that self-defence featured as a basic, fundamental right of every member of the international community, applicable in their relations centuries ago.[12]

I. *Self-defence and War*

Legal discourse on a right of self-defence in international law can be traced back to the just war doctrine that governed the resort to force by States up to the late 17th/early 18th century. In this sense, the defence against a wrong committed was deemed to be a just cause of war.[13] Because of the perceived universality of a right of self-defence, early natural lawyers of this period viewed the right as grounded in natural law; as being a natural, inherent right of every State beyond the effect of proscriptions of positive law.[14]

With the rise of the modern system of nation States and the development of notions of State sovereignty, came the dissipation of the just war doctrine and the rise of 'free war'. Even during this period in the 19th and 20th centuries where war was considered to be completely within the prerogative of States and there was, therefore, no need to offer a justification for such resort to force, self-defence still

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[10] Bowett (n 9) 3.

[11] Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge 1993) 3.

[12] Bowett (n 9) 4; Dinstein (n 8) 203.

[13] Alexandrov (n 2) 3.

[14] Bowett (n 9) 4-5; Alexandrov (n 2) 6.

featured as a concept of international law. State practice, particularly in the 19th century, evidenced reliance by States on a right of self-defence to justify forcible action where conditions of war *de jure* did not exist.[15]

Admittedly, the right of self-defence held limited practical significance in this era since it was permissible to resort to forcible measures without any need for justification or restriction.[16] Further, the status of self-defence as a right or privilege enjoyed by States was questionable since free war allowed for defensive measures to be resisted by force.[17] Invocations of self-defence in this period were largely, therefore, a political exercise.[18] However, while the factual circumstances created by the use of force in self-defence, governed by the law of peace, could equally be those created by war *de jure* if the parties so classified them, the two situations were treated as fundamentally distinct as a matter of law.[19] The practice of this era, therefore, may provide useful guidance on the right of self-defence as a concept of international law, outside of its political usage.

Significance must be accorded to the instances in which self-defence was invoked as a justification for the use of force in circumstances short of war. In this sense, self-defence operated as a legal justification since the use of force in time

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[15] Bowett (n 9) 117; Dinstein (n 8) 188.

[16] Bowett (n 9) 118.

[17] ibid 119.

[18] Robert Ago, Addendum to the Eighth Report on State Responsibility (Part I), Agenda Item 2, 32nd Session of the International Law Commission (1980) UN Doc. A/CN.4/318/Add.5-7, para 82; Nolte and Randelzhofer (n 5) 1399.

[19] Bowett (n 9) 117.

of peace was in fact restricted by international law.[20] The oft-cited *Caroline* incident of 1837 makes this point well. The *Caroline*, used by Canadian insurrectionaries to ferry men, supplies and arms from the US mainland, was attacked by British armed forces while it docked in a US port.[21] In diplomatic exchanges between the US and British governments concerning the incident, both States noted their agreement on the applicable general principles of international law, including the respect for the inviolable character of the territory of independent nations and the 'possible exception to which it is liable' – self-defence.[22] In circumstances where no state of war existed between Britain and the United States, Britain categorised the defensive conduct of its forces as 'perfectly justifiable by the Law of Nations.'[23] It is evident that what was being asserted was a legal justification, rather than a mere political or moral appeal.

It is true that the diplomatic exchanges evidence some conflation of the concept of self-defence *per se* with the wide array of action permissible in the sphere of self-preservation, an approach arguably characteristic of that era.[24] The attempt to give content to, and to delimit, the notion of self-defence as a legal concept, however, should not be discounted. Both governments expressly and repeatedly referenced 'self-defence' as the applicable principle within the Law of Nations. It is not remarkable, therefore, that the so-called 'Webster formula' is

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[20] Nolte and Randelzhofer (n 5) 1399.

[21] Hunter Miller (ed), 'The Caroline' in *Treaties and Other International Acts of the United States of America,* vol 4 (Washington: Government Printing Office 1934) <http://avalon.law.yale.edu/19th_century/br-1842d.asp> accessed 26 August 2020.

[22] ibid.

[23] RY Jennings, 'The Caroline and McLeod Cases' (1938) 32(1) AJIL 82, 87.

[24] ibid 91; Alexandrov (n 2) 23.

frequently endorsed as an authoritative statement of elements of the law governing self-defence in international law. It is not asserted that Webster's statement of the law in 1841 represents the current law on self-defence.[25] It is, however, an important precursor to the development of the modern law of self-defence and holds significance in that sense, a fact which is evident in the formula's considerable reuse in the centuries following the incident.[26]

II. ***Self-defence in the Post-War Period***

The discarding of the concept of *bellum justum* by legal positivists brought with it the recognition that war was 'a circumstance beyond the power of the law to control'.[27] The materialisation of the First World War highlighted the need for steps to be taken towards the prohibition, or at least restriction, of war in international law. Some limited restriction was introduced in the Covenant of the League of Nations,[28] and later, in the 1928 Kellogg-Briand Pact, contracting States expressly condemned the recourse to war and renounced it as an instrument of national policy in their relations with each other.[29] With the resort to war more restricted than ever was the case previously, the right of self-defence gained even more legal significance. Although there was no specific reference to the right in the text of the

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[25] Indeed, doubts have been raised as to whether Webster's formula reflected the law at that time – See James A. Green, 'Docking the *Caroline:* Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006) 14 Cardozo JIL 429, 440-41.

[26] ibid 444-45.

[27] Bowett (n 9) 119 citing Eagleton, 'Attempt to Define Aggression', (1930) *Int. Concil* 583.

[28] Covenant of the League of Nations (Paris, 28 April 1919) [1919] UKTS 4 (Cmd. 153) Articles 10 and 12.

[29] Kellogg-Briand Pact (n 1) Article I.

Pact, it was generally recognised that it was solely in the exercise of self-defence that war could still be lawful.[30] In fact, it was a necessary condition for the conclusion of the Pact that interested States agreed beforehand on the reservation of the right of legitimate defence.[31]

This shift to *jus contra bellum* necessitated a reformation of the concept of self-defence. No longer was it sufficient for the concept to hold largely political significance. As an accepted basis on which the resort to war could still be lawful, notwithstanding the limitations of the Pact, it was essential that self-defence be defined with legal certainty. The United States Note of 23 June 1928 accompanying the Pact gives some insight into the legal form that the right of self-defence took in this context. According to that Note, the anti-war treaty would not restrict or impair in any way the right of self-defence, which is 'inherent in every sovereign State and is implicit in every treaty.'[32] Pursuant to this right every State would be free at all times to defend its territory from attack or invasion.[33] This position was expressly accepted or 'noted' by other States Parties or reiterated by them in their own statements.[34]

Evidently, the concept took on a more limited, technical form compared to its usage in previous eras, where self-defence was considered a creature of natural

[30] Nolte and Randelzhofer (n 5) 1399.

[31] Ian Brownlie, *International Law and the Use of Force by States* (first published 1963, Oxford: Clarendon 1981) 235-36; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010) 54.

[32] Identic Notes of the Government of the United States to the Governments of Australia, Belgium et al., (1928) 22 AJIL Supp 109-115.

[33] ibid.

[34] Bronwlie (n 31) 235-37.

law, and appeared to overlap with the broader notions of self-help and self-preservation. The notion of self-defence now existed within the legal order created by the Pact.[35] This was necessarily the case since a broad, unabridged right of self-defence as previously articulated would undermine the general prohibition of the Pact.[36] Notably, self-defence was repeatedly identified as being permissible in the event of an attack or invasion. Practice immediately preceding and following the conclusion of the Pact tends to confirm this precondition for the exercise of the right of self-defence. In the practice of States Parties to the Pact, self-defence permitted a riposte to the use or threat of force against the territory of a State.[37]

III. ***Self-defence in the UN Charter***

Despite the early 20th century developments towards the restriction of the right of unilateral resort to war, several loopholes remained. Most notably, the Pact did not improve on the League Covenant's 'resort to war' formula which had acquired a restrictive connotation in the practice of States. The UN Charter, concluded in the wake of the Second World War, had as one of its principal aims redressing the shortcomings of the Kellogg-Briand Pact. Most significantly, Article 2(4) of the Charter prohibits the threat or use of force,[38] which covers war as well as other uses of force short of war.[39]

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[35] Peter Haggenmacher, 'Self-Defence as a General Principle of Law and its Relation to War' in Arthur Eyffinger, Alan Stephens and Sam Muller (eds) *Self-Defence as a Fundamental Principle: Hague Colloquium on Fundamental Principles of Law* (Hague Academic Press 2009) 7.

[36] Brownlie (n 31) 240.

[37] ibid 241.

[38] Charter of the United Nations (San Francisco, 26 June 1945) 1 UNTS XVI.

[39] Dinstein (n 8) 87.

The comprehensive nature of this prohibition is significant. Reasonable arguments have been made that the proscription in Article 2(4) is, by its express terms, limited to threats and uses of force directed ‘against the territorial integrity or political independence of any State’.[40] These words, however, should not be read as words of limitation.[41] This conclusion is supported by an interpretation of the provision, not in isolation, but in the context of the Charter as a whole, particularly Article 51 and Articles 39 and 53,[42] which make provision for the right of individual and collective self-defence and collective security action through the Security Council respectively. Undoubtedly, the Charter intended to effect a shift towards centralisation and collective security in the international legal order. Article 1(1) identifies as one of the primary purposes of the organisation ‘the maintenance of international peace and security, and to that end: to take effective collective measures’ to prevent and remove any threats to or breaches of the peace. A comprehensive prohibition on the use of force is consistent with this aim.[43]

This construction is further supported by the drafting history of the Charter which reveals that States were not opposed, in principle, to the inclusion of an unqualified obligation to refrain from ‘the use or threat of force in their international relations in any manner inconsistent with the purposes of the Organisation.’[44]

[40] See Brownlie (n 31) 266 assessing such arguments.

[41] Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP 2002) 12-13; Dinstein (n 8) 90; Dörr and Randelzhofer (n 3) 215.

[42] Dörr and Randelzhofer (n 3) 208.

[43] ibid 203.

[44] Brownlie (n 31) 266; Leland Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, Columbia University Press 1969) 44.

There is no indication in the *travaux préparatoires* of the Charter that the added words were intended to have limiting effect.[45] On the contrary, they indicate that the words were included to satisfy the demand of smaller States that there be some express guarantee of their sovereignty.[46] Article 2(4) itself should also be construed in its totality. It goes on to prohibit the threat or use of force 'in any other manner inconsistent with the Purposes of the United Nations.' As previously highlighted, paramount amongst these is the maintenance of international peace and security. This elaboration, therefore, is to be interpreted as a 'catch all', confirming the comprehensive nature of the prohibition.[47] Dinstein succinctly concludes: 'the correct interpretation of Article 2(4), ...is that any use of inter-State force by Member States for whatever reason is banned, unless explicitly allowed by the Charter.'[48]

Seen through the prism of the comprehensive prohibition of the use of force, the right of self-defence can be rationalised as an exception.[49] This characterisation inevitably has implications for the scope of the right in practice. This shift in perception is reflected also in the shift of the focus of legal argument

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[45] Franck (n 41) 12.

[46] Brownlie (n 31) 267; Goodrich, Hambro and Simons (n 44) 44-55.

[47] Dörr and Randelzhofer (n 3) 216.

[48] Dinstein (n 8) 90.

[49] Norman Bentwich and Andrew Norman, *A Commentary on the Charter of the United Nations* (2nd edn, Routledge & Kegan Paul 1969) 108. See also Bowett (n 9) 3:

> 'For, if, in the interest of general peace and good order, society takes to itself the task of protecting the rights of individuals within society and prohibits the exercise of force by individuals, the right of self-defence assumes the character of an exceptional right, an exception to the general prohibition which must be carefully circumscribed.'

in matters concerning the use of force, where emphasis now lies on establishing the exceptions to the basic rule and on their prerequisites.[50]

Despite the centrality of the prohibition of unilateral force to the legal order created by the UN Charter, self-defence is expressly reserved as an inherent right of every State in Article 51 of the Charter, in contrast to the Pact of Paris. Beyond the need to recognise the importance of self-defence as an exceptional circumstance for the use of force, other practical considerations influenced its express inclusion. Regional security arrangements already existing needed to be accommodated within the new framework.[51] Further, discussions at the San Francisco Conference signalled potential difficulty over assigning to the Security Council complete control over enforcement measures, particularly those to be taken by such regional arrangements, where positive action would require the concurrence of all permanent members of the Council, thus giving to any one permanent member the power of veto.[52] The utopian collective security system aspired towards was subject to a shortcoming – the possibility of inaction in critical situations based on a lack of consensus.[53]

The potential ineffectiveness of collective security under the Charter encouraged, therefore, express recognition of the right of collective self-defence, exercisable through regional arrangements, but also the right of individual self-defence. The result, in the words of Franck, is a:

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[50] Dörr and Randelzhofer (n 3) 218-19.

[51] Goodrich, Hambro and Simons (n 44) 343.

[52] ibid 342.

[53] ibid 345. See also Bentwich and Norman (n 49) 106.

> …bifurcated regime, one that postulates a common, absolute global response to aggression, but which also makes realistic allowance for State action during the potentially prolonged transition from contemporary realpolitik to an ideal future of UN-orchestrated collective security.[54]

Perhaps more importantly, this express reservation in the Charter text underscores the fundamental nature of the right to the interests of States. It was agreed that the provision would be situated in the Chapter covering 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' rather than on 'Regional Arrangements' to emphasise the reservation of a right to Members individually rather than a special exemption from Security Council authority over regional arrangements.[55] Even in a perfectly centralised and effective system of collective security, the right of self-defence must have a place:

> …for no matter how effective the means of protection afforded by the centralised machinery of society are, there will inevitably exist circumstances in which certain essential rights or interests of the individual can only be protected by conceding to the individual the right to take initial measures of protection until the centralised machinery comes into operation.[56]

While Article 51 of the Charter does not provide a definition of self-defence, it gives important cues for the concept's application and interpretation. First, it recognises self-defence as an 'inherent' right of States. Secondly, it conditions the right of self-defence on an 'armed attack'.

[54] Franck (n 41) 2.

[55] Goodrich, Hambro and Simons (n 44) 343-44.

[56] Bowett (n 9) 3.

The Inherent Right of Self-defence

Not only is individual and collective self-defence expressly identified in Article 51 as a right unimpaired by the Charter, it is also classified as one 'inherent' in every State. This term is the key to unlocking the content of the right as reserved in Article 51 of the Charter but controversy surrounding the meaning to be accorded to it has been a feature since the Charter's entry into force. The term naturally evokes a reference to natural law conceptions.[57] Although the *jus natural*e is of historical significance to the proper understanding of self-defence in international law,[58] it provides little help in identifying the content of the right as recognised in Article 51.[59] The term has often been used to suggest that the right is inherent in, or arises from, the sovereignty of States. The United States' note of reservation to the Kellogg-Briand Pact appears to utilise the term in this sense.[60] From the US' note, it can be deduced that the inherent right of self-defence is one unaffected by the terms of any subsequently created treaty. In the context of Article 51, however, the use of the term in this sense would be redundant, since the provision expressly provides that the right is unimpaired by the Charter. This construction sheds no real light on the theme of self-defence and its legal meaning.[61]

What is clear is that the provision was intended to be declaratory, though not in the manner suggested by writers such as Bowett.[62] Article 51 first provides

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[57] Bowett (n 9) 187.

[58] Dinstein (n 8) 191.

[59] ibid. See also Bowett (n 9) 187.

[60] US Identic Notes (n 32).

[61] Dinstein (n 8) 192.

[62] Bowett (n 9) 87. He argues that the provision in Article 51 is 'declaratory' in the sense that it is illustrative of one circumstance in which the right of self-defence may be exercised, that is, in the

that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence'. This phrasing is indicative of something not created by the Charter but pre-existing it.[63] While the UN Charter differs from the Pact of Paris in that it expressly recognises self-defence in its terms, its recognition of self-defence as an 'inherent' right is reminiscent of the US note of 1928 in that it signals that the right is not created by the treaty instrument.[64] In fact, as was the case with the Covenant of the League of Nations and the Pact of Paris, initial drafts of the UN Charter text contained no express reservation of the right of self-defence. The general understanding was that the right, which was extant, had not been excluded by the terms of the newly drafted Charter and was consistent with the principles and purposes of the organisation to be created.[65] Self-defence is, therefore, recognised in the text of Article 51 of the UN Charter as an 'existing right'.[66]

Self-defence in the Event of an 'Armed Attack'

Article 51 of the Charter provides for 'the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. The ordinary meaning to be given to the words as used in the provision is that the

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circumstance of an armed attack. As is argued below (text to nn 71-78) the provision in Article 51 that self-defence arises 'if an armed attack occurs' is declaratory of the right in its entirety rather than merely illustrative.

[63] Bowett (n 9) 187:

> Perhaps its only significance lies in its indication that the right is an existing right, independent of the Charter and not the subject of an express grant, so that it has a certain importance in refuting Kelsen's own view that the right has only such content as Art 51 gives it.

[64] Haggenmacher (n 35) 5.

[65] Alexandrov (n 2) 78-79.

[66] Bowett (n 9) 87.

occurrence of an armed attack is, *prima facie,* a precondition for the exercise of the right of self-defence.[67] There are those who assert, however, that the right of self-defence recognised in Article 51 is not contingent on an armed attack. This assertion rests on the foundational position that Article 51 of the UN Charter preserves a much broader pre-existing right of self-defence à la 19th/20th century customary international law. Bowett, for instance, argues that it does not follow that the right is limited to the circumstances of an armed attack because the terms of the Charter may suggest it is.[68] On this view, an actual or threatened armed attack is merely one instance in which a State may exercise self-defence; self-defence may also be legitimate in response to measures taking forms other than an 'armed attack', such as a threat to nationals abroad or to economic interests.[69] In other words, Article 51 should not be construed as though it was worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, *and only if,* an armed attack occurs…'.[70]

Several difficulties arise with this view. First, no convincing explanation is offered for the inclusion of the words 'if an armed attack occurs' in the text of Article 51. If, as argued, Article 51 was intended to safeguard the customary right of self-defence and not to restrict it, to recognise rather than to diminish the pre-

[67] Ruys (n 31) 59.

[68] Bowett (n 9) 187.

[69] ibid 188; JL Kunz, 'Individual and Collective Self-defense in Article 51 of the Charter of the United Nations' (1947) 41 AJIL 872, 877.

[70] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits Judgment, 27 June 1986) [1986] ICJ Rep 14, 347 (Dissenting Opinion Judge Schwebel para 173) (emphasis mine).

existing right of self-defence,[71] the inclusion of the condition of 'armed attack' would suggest that this limitation was already part of the right to be safeguarded.

To the extent that the suggestion is that the right of self-defence as recognised in Article 51 is in fact limited to the circumstances of an armed attack while a broader, unfettered right of pre-existing custom persists alongside the Charter regime, the suggestion must be rejected *in limine.* As Ago notes, 'It is almost inconceivable that, at the same moment in history and in consequence of the same historic events' nearly all States at the time would bind themselves to such a specific limitation under the UN Charter while maintaining in their legal thinking and practice a more permissive notion.[72] Further, this could not be the intended state of affairs where the Charter regime was envisioned and created to be the standard for the regulation of the use of force in international law. A more permissive rule in general international law would operate to undermine the stated purposes and principles of the Charter, including the centralised maintenance of international peace and security,[73] the comprehensive prohibition of the use of force contained in Article 2(4) and, significantly, the desire for Charter standards to govern matters of international peace and security even amongst non-Members.[74] The latter provision especially signals the intended universality of the ideals contained in the Charter.

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[71] Bowett (n 9) 188.

[72] Ago Report (n 18) 63.

[73] UN Charter (n 38) Art 1(1).

[74] ibid Art 2(6).

Secondly, the view advanced by Bowett and other ‘counter-restrictionists’[75] is in clear conflict with State practice. Most claims to self-defence made by States today are accompanied by an allegation of an actual or threatened armed attack. Similarly, ICJ jurisprudence assessing the right of self-defence has ventured no further than the enquiry into whether the victim State was the object of an armed attack. In its *Nicaragua* decision of 1986 the Court identified the existence of an armed attack as the ‘condition *sine qua non* for the exercise of the right of… self-defence.’[76] The claims of both States Parties before the Court in that case support the overlap of Article 51 and customary international law in this regard. Nicaragua took the view that the provisions of the UN Charter on the use of force correspond ‘in essentials’ to those found in customary international law.[77] The United States went further to assert their total identity in content.[78]

Several international treaty instruments concluded after the Charter also reflect this restriction. Article 3 of the Rio Treaty, for instance, provides for collective self-defensive action in meeting an armed attack.[79] Similarly, the North Atlantic Treaty of 1949 recognises the right of individual or collective self-defence ‘if such

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[75] Arend and Beck (n 11) 106-07.

[76] *Nicaragua* Merits Judgment (n 70) para 237. The Court also noted that the text of Article 51 makes actual reference to pre-existing customary international law in mentioning the ‘inherent right’ of self-defence, ‘which “nothing in the present Charter shall impair” and *which applies in the event of an armed attack’* (para 76, emphasis mine). See also *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits Judgment 6 November 2003), [2003] ICJ Reports 161, paras 51, 71.

[77]*Nicaragua* Merits Judgment (n 70) paras 187-88.

[78] ibid para 181.

[79] Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947) 21 UNTS 77, Article 3(1).

an armed attack occurs'.[80] Although the influence of the Charter text on the wording of these provisions is overwhelming,[81] it is difficult to imagine continuous predication of the right of self-defence on an armed attack in subsequent agreements if States believed they possessed a broader right consistent with the provisions of Article 51.

Finally, a broader view of the terms of Article 51 ignores, or misrepresents, the state of customary international law on the matter of self-defence immediately preceding the conclusion of the Charter. While Bowett argues that the limitation of self-defence to responses to armed attacks was unsupported by the practice of States in the decades following the conclusion of the Charter,[82] and supposedly therefore at the time of its conclusion, no unequivocal illustration of this practice is provided. Customary law as it existed in 1945, and as it developed thereafter, is the largely relevant factor in the assessment.[83] It is difficult to accept that the right of self-defence in customary law immediately preceding the Charter was not influenced by the shift in the regulation of the use of force following the First World War. A broad right of self-defence would run counter to the general renunciation of force as an instrument of national policy contained in Article I of the Kellogg-Briand Pact.[84] As already noted, the express position of signatory States on the question of self-defence confirms the restriction of the right of self-defence as a riposte to

[80] North Atlantic Treaty (Washington DC, 4 April 1949) 34 UNTS 243, Article 5.

[81] Brownlie (n 31) 254.

[82] Bowett (n 9) 188.

[83] Brownlie (n 31) 280.

[84] Ian Brownlie, *International Law and the Use of Force by States – Revisited: A Europaeum Lecture delivered at the Graduate Institute of International Studies, Geneva, on February 1, 2001* (Oxford: Europaeum 2001) 7.

armed attacks or invasion.[85] In Brownlie's assessment, State practice after 1920 and up to 1945 overwhelmingly followed this trend.[86] The stipulation in Article 51 of an inherent right of self-defence in the event of an armed attack was at that time, therefore, a reflection of the customary legal reality rather than a break from it.

C. ARTICLE 51 OF THE UNITED NATIONS CHARTER AND CUSTOMARY INTERNATIONAL LAW

I. ***Article 51 and Pre-existing Custom***

As previously discussed, the inherent right of self-defence recognised in Article 51 is not created by the Charter text. On the contrary, self-defence is recognised as a right unimpaired by the Charter and inherent in every State. This could only be so if the right of self-defence existed as a legal concept before and outside of the Charter. The inherent right of self-defence as recognised in Article 51 was, at the time of conclusion of the Charter, a legal right already vested in Member States, which could only be so vested by customary international law. This position finds support in the *Nicaragua Merits* judgment of the ICJ. The Court concluded that Article 51 'is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary

[85] See text to nn 32-37 above.

[86] Brownlie (n 31) 231-35, 247-49, 274-75; Brownlie, *Revisited* (n 84) 6-7. Brownlie notes, for instance, that in the decade following the conclusion of the League Covenant, legitimate defence appeared always in the context of the threat or use of force. By way of illustration, the 1925 Locarno Treaties between Germany and Belgium and Germany and France reserved a right of self-defence in terms of opposing a violation of the undertaking to refrain from any attack or invasion, or resort to war.

nature, even if its present content has been confirmed and influenced by the Charter.'[87]

While the Court disagreed with the United States' assertion that the customary law and Charter law governing use of force were completely identical in content,[88] it stressed that on one essential point, the Charter itself refers to pre-existing customary international law – 'this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right"… of individual or collective self-defence, which "nothing in the present Charter shall impair"…'[89] The Court went further to note that the definition of 'armed attack' to which Article 51 refers is to be found in customary international law, since no such provision is made in the text of the Charter. Similarly, the Court found that the requirements of necessity and proportionality, though absent from the treaty text, applied in the assessment of the right of self-defence as recognised in Article 51, their existence being 'established in customary international law'.[90] While Article 51 was drafted as a term of the newly created treaty in 1945, its phrasing points to its inextricable link with customary law.

[87] *Nicaragua* Merits Judgment (n 70) para 176.

[88] ibid para 175.

[89] ibid para 176.

[90] ibid para 194. The Court has consistently used these customary law criteria in its interpretation and application of Article 51 in subsequent cases – see *Oil Platforms* Merits Judgment (n 76) para 43; *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic Congo v. Uganda) (Merits Judgment, 19 December 2005) [2005] ICJ Reports 108, para 147.

II. ***Article 51 and Evolving Custom***

When considering the interaction of customary international law and Article 51, reference must first be had to customary law at the time of the conclusion of the Charter. Despite the apparent identity of Article 51 and pre-existing custom, customary international law governing the use of force and self-defence is not subsumed by the Charter rules, a conclusion supported by the judgment of the ICJ in its *Nicaragua* case. The Court held that the codification or embodiment of customary principles in the form of treaty text does not mean that those principles 'cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.'[91] Specifically the United States advanced the view that the express incorporation of a right of self-defence in Article 51 of the Charter precluded the independent existence of governing rules in custom. In rejecting that argument, the Court concluded that Article 51 is not a provision which 'subsumes and supervenes' customary international law.[92] The Court noted that while Article 51 recognises the inherent right of self-defence it does not go on to regulate directly all aspects of the content of that right, including the well-entrenched requirements of necessity and proportionality, and the definition of armed attack which it expressly identifies as the relevant trigger.[93] Such rules continue to be binding as part of customary international law.

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[91] *Nicaragua* Merits Judgment (n 70) para 174.

[92] ibid para 76.

[93] ibid.

Customary international law is, by its nature, dynamic[94] – susceptible to changes in *opinio juris* and State practice. While the Charter rules on the use of force have influenced the content and development of the customary law on self-defence, it is possible to imagine shifts in that customary law which would, in turn, be relevant for the interpretation of the Charter. Specifically, any changes in the way an armed attack is defined, or in how the criteria of necessity and proportionality are applied in customary international law, relate directly to the right of self-defence recognised in Article 51. It is necessary, therefore, not only to assess the impact of pre-existing custom on the interpretation of Article 51, but also to bear in mind any evolution in the customary principles governing self-defence.

It is difficult to envision that Article 51 of the Charter merely preserves a pre-existing customary right of self-defence at a point in time, unaffected by subsequent changes in that customary law. A static Article 51 would be undermined by a co-existing and evolving body of customary rules on self-defence to the extent that those customary rules may evolve to become more permissive of the use of force, for example, through an expansion of the concept of armed attack. As has already been argued in relation to pre-existing customary law, the coexistence of more permissive rules of custom alongside Article 51 and its contextual provisions, including Article 2(4) of the Charter, would significantly impair the Charter's object of comprehensively regulating the use of force in international law.[95]

[94] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 73.

[95] See text to nn 72-74.

On the contrary, it is by design that Article 51 constantly interacts with customary international law as it evolves. This must be taken to be the intention of the framers of the Charter in their recognition of the inherent right of self-defence in Article 51. The interpretation of treaty terms is capable of evolving over time where that is determined to be the intention of the parties upon the conclusion of the treaty.[96] In tethering Article 51 of the Charter to the 'inherent right of self-defence' existing in customary law, the Charter drafters must be taken to have intended an evolutive interpretation of the relevant Charter terms. While it is accepted that Article 51 as drafted in 1945 made reference to customary international law as it existed at that time, it is not accepted that Article 51 must continue to be interpreted in light of that customary law, immutable in meaning.

This position reflects the well-established rules of treaty interpretation which are applicable to the interpretation of the UN Charter.[97] The primary rule of interpretation calls for a treaty to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[98] To be taken into account with the 'context' as defined in the Vienna Convention[99] are 'any relevant rules of international law

[96] Report of the International Law Commission, Seventieth Session (2018), Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries (2018), UN Doc A/73/10, 16, 64 (Conclusion 8 and commentary). See further Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

[97] Stefan Kadelbach, 'Interpretation of the Charter' in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* vol I (3rd edn, OUP 2012) 8. The rules reflected in the Vienna Convention on the Law of Treaties are applicable to the interpretation of the Charter as reflecting rules of customary law only, since the Charter preceded the Vienna Convention.

[98] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 UNTS 331, Art 31(1).

[99] ibid Art 31(2).

applicable in the relations between the parties',[100] including customary international law. The inclusion of 'armed attack' in Article 51, as a technical notion in customary law, without an accompanying definition, would tend to suggest the intention for reference to be had to its customary meaning.[101] The provision that the relevant rules must be 'applicable in the relations between the parties' indicates that reference must be made to rules as they currently apply between the parties. Judicial authorities also support this approach, particularly where the treaty in question was not intended to be a treaty of limited or fixed duration.[102] In the *Namibia* case, for instance, the ICJ held that the interpretation of Article 22 of the League Covenant, which was applicable to the mandate for South West Africa, could not remain unaffected 'by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.[103] Consequently, the principle of self-determination was made applicable to the non-self-governing territory under the mandate.[104]

It must be noted that as the customary right, and therefore the Article 51 right, is liable to expand with changes in state practice and *opinio juris*, so too is it equally susceptible to restriction. In this regard, it has been repeatedly noted that

[100] VCLT (n 98) Art 31(3)(c).

[101] Ruys (n 31) 20.

[102] ibid 21. Ruys notes, in particular, the position of the Arbitral Tribunal in the *Iron Rhone* arbitration that 'an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule'. See also Kadelbach (n 97) 12.

[103] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion 21 June 1971) [1971] ICJ Reports 16, para 53.

[104] ibid para 52.

the conclusion of the UN Charter in 1945 had a direct impact on the way in which the customary rules on the use of force and self-defence were thereafter interpreted.[105] As the ICJ has noted, customary law has continued to develop under the influence of the Charter.[106]

It is this interaction between Article 51 and evolving customary international law that allows us to attempt to situate contemporary claims regarding non-State actors within the rubric of Article 51 of the Charter, notwithstanding past practice which may have ruled out the applicability of Article 51 to such claims. The customary rules on self-defence, evolving alongside Article 51 of the Charter, remain pertinent to the interpretation and application of the treaty provision.

III. ***The Methodological Approach to the Assessment of Customary International Law Governing Self-defence***

Identifying and determining the applicable customary rules is the main endeavour necessary for addressing the central concern of this thesis. The methods adopted for the determination of customary international law are generally undertheorised and imprecise.[107] As a precursor to the substantive discussion in the Chapters to follow, it is useful to articulate the adopted approach to the identification of the evolving rules of customary international law. In general terms, whether non-State actor attacks are 'armed attacks' within the meaning of customary international law

[105] See eg Brownlie (n 31) 280, arguing that a broad, unfettered right of self-defence in customary law would have been, at least after the Charter, modified by that instance of practice.

[106] *Nicaragua* Merits Judgment (n 70) para 181 ('…that law has in the subsequent four decades developed under the influence of the Charter…').

[107] Christian Marxsen and Anne Peters, 'Self-Defence against Non-State Actors – The Way Ahead' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War*, vol 1 (CUP 2019) 267.

and Article 51 of the Charter is a question of the actual practice and *opinio juris* of States.[108] To discern whether non-State actor attacks are armed attacks triggering the right of self-defence, 'one must look at what States actually do and seek to determine whether they recognise an obligation or a right to act in that way.'[109]

Identifying and examining the practice and *opinio juris* of States is notoriously difficult in circumstances where States often do not adhere to what Koh calls a 'duty to explain'.[110] State action is frequently unaccompanied by an express rationale for action taken and sometimes appears to be inconsistent with previous action. This phenomenon is evident in the practice of States concerning the use of force. Clarity on the methodology is particularly important in the present context where pragmatic and policy considerations are heavily relied upon by some commentators to substantiate a particular understanding of the law of self-defence. States are faced with novel circumstances, but more is required to produce a change in the law.[111] While there is general agreement on the two-element approach to the identification of customary rules, in the context of the law

[108] This thesis adopts the widely held view that the existence and content of customary international law is to be found in the practice and *opinio juris* of States, that is, that there must be a general practice that is accepted as law. This so-called 'two element' approach forms the basis of the 2018 ILC Draft Conclusions on customary international law and is consistently adopted in the jurisprudence of the ICJ – See International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries 2018, Report of the International Law Commission, Seventieth Session, Chapter V, UN Doc A/73/10, pp. 122 – 156, Conclusion 2. See further *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits Judgment, 20 February 1969) [1969] ICJ Rep 3, para 77; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Merits Judgment, 3 February 2012) [2012] ICJ Rep 99, para 55.

[109] ILC Draft Conclusions on Customary Law (n 108) 125, Conclusion 2 Commentary.

[110] Harold Hongju Koh, 'The Legal Adviser's Duty to Explain' (2016) 41(1) YJIL 89.

[111] Raphaël van Steenberghe, 'State Practice and the Evolution of the Law of Self-defence: Clarifying the Methodological Debate' (2015) 2(1) JUFIL 81, 85.

governing the use of force, specifically as it relates to the right of self-defence against non-State actors, both elements raise appreciable problems in practice.

State Practice

A rule of customary international law must be evidenced by a general practice of States. This means that the practice must be 'sufficiently widespread and representative, as well as consistent.'[112] The ICJ has identified the extensiveness and uniformity of the considered practice as relevant criteria.[113] While it is not possible to stipulate an absolute standard as to how many and which States must be engaged in the particular practice to satisfy the generality criterion,[114] it is clear that the support of *all* States is not required. On the other hand, a practice cannot be described as general where it is not supported by a significant portion of the international community as whole. An essential component of the generality of State practice is its representativeness. Due consideration must be given not only to the number of States engaged in or supporting a particular practice but also the various interests at stake and geographical regions represented.

Evidencing a general practice in the context of the right of self-defence against non-State actors is particularly important in light of the fierce methodological debate surrounding which States' practice matters for the purpose

[112] ILC Draft Conclusions on Customary Law (n 108) 135, Conclusion 8.

[113] *North Sea Continental Shelf* Merits Judgment (n 108) para 74.

[114] In the view of the ILC, the threshold that needs to be attained for the extensiveness and uniformity of the relevant practice has to be assessed taking into account the peculiar context of the rule under consideration - ILC Draft Conclusions on Customary Law (n 108) 136, Conclusion 8 Commentary.

of establishing the right's existence and content.[115] Admittedly, it cannot be asserted that the majority of States have used force extraterritorially in self-defence against non-State actor attacks. It must be specially noted, however, that relevant State practice for the determination of the customary right is much broader in scope. Together with physical and verbal acts,[116] inaction by States may also be relevant to the assessment of the extensiveness of practice.[117] Each mode of practice is equally weighted in the determination of customary international law.[118] Consequently, the ILC concludes that it is sufficient for a relatively small number of States to be engaged in a particular practice, alongside the inaction of other States,[119] provided that that limited engagement is accompanied by the general support of the international community of States as expressed in their acceptance of that practice as law (*opinio juris*).[120]

The ILC, in Conclusion 3 of its Draft Conclusions on Identification of Customary International Law, makes the point that in assessing evidence of practice, 'regard must be had to the overall context, the nature of the rule and the

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[115] See Jutta Brunnée and Stephen J Toope, 'Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 ICLQ 263.

[116] The ILC notes that while some have argued that consideration must be given to what States 'do' rather than what they 'say', it is now widely accepted that verbal conduct counts as practice for purposes of identifying customary international law - ILC Draft Conclusions on Customary Law (n 108) 133, Conclusion 6 Commentary.

[117] ILC Draft Conclusions on Customary Law (n 108) 133, Conclusion 6(1).

[118] ibid 133, Conclusion 6(3) ('There is no predetermined hierarchy among the various forms of practice.')

[119] The ILC has noted that in these circumstances, it is indispensable to take into account the practice of those State 'specially affected'. It is not considered that that consideration arises in the present context.

[120] ILC Draft Conclusions on Customary Law (n 108) 136, Conclusion 8 Commentary (see specifically note 715 and accompanying text).

particular circumstances in which the evidence in question is to be found.'[121] Specifically, the ILC notes that certain types of practice or certain forms of evidence of *opinio juris* may be of particular significance depending on the context.[122] In the present context, it is significant that the right being asserted takes the form of an exception to the well-established prohibition on the use of force. It is to be expected, therefore, that there will not be evidence of widespread use of force against non-State actors by States substantiating the existence of a customary right. Significant emphasis must be placed on the responses or reactions of other States in the international community to such uses of force. Such responses, where evident, are very likely to take the form of verbal acts, such as diplomatic statements in UN Security Council debates or other fora, or might take the form of military support. Otherwise, this is an area of law largely characterised by silence or inaction on the part of non-participating States, or those neither directly nor indirectly impacted by the particular use of force.

What value, if any, is to be ascribed to the silence of States in the customary international law assessment? It is not asserted that the silence or inaction of States is to be invariably counted in favour of the rule or right asserted. Silence *may* count as relevant practice given certain circumstances.[123] More specifically, inaction must be deliberate – a conscious or intentional abstention from acting in a given situation.[124] Knowledge of the factual circumstances, actual or

[121] ILC Draft Conclusions on Customary Law (n 108) 126, Conclusion 3(1).

[122] ibid 127, Conclusion 3 Commentary.

[123] ibid 133, Conclusion 6(1)

[124] ibid 133, Conclusion 6 Commentary; Michael Wood and Omri Sender, 'State Practice' in *Max Planck Encyclopaedia of Public International Law* (OUP 2015); Dustin A. Lewis, Naz K Modirzadeh, and Gabriella Blum, 'Quantum of Silence: Inaction and *Jus ad Bellum*', (Harvard Law School Program on International Law and Armed Conflict 2019),

constructive, would appear to be a relevant factor for this determination.[125] The greater consideration is whether State inaction is supported by an *opinio juris* in favour of the rule or right being asserted, that is, whether State inaction expresses tacit approval as distinct from absence of legal position or interest. It is only in circumstances where the genuine conviction of States that a certain conduct is permitted or commanded by law can be deduced that silence generates legal effect.[126]

Finally, there is no requirement for rigid consistency in the practice of States.[127] Some inconsistency and variation in the relevant practice is not necessarily an impediment to a determination of the generality of the practice. What is necessary is that the considered acts of States are not discordant to such an extent that no discernible pattern of behaviour can be observed.[128] In those circumstances, no general practice, and therefore no rule of customary international law arises.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420959> accessed 26 August 2020, 23-26.

[125] Quantum of Silence (n 124) 25-26.

[126] Paulina Starski, 'Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility' (2017) 4(1) JUFIL 14, 21.

[127] In the *Nicaragua* Merits Judgment (n 70) para 186, the ICJ ruled that:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect… The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. …the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules…

[128] ILC Draft Conclusions on Customary Law (n 108) 137, Conclusion 8 Commentary.

Opinio Juris

Not only must a particular practice be generally followed or supported by States with a degree of uniformity for a rule of customary law to be found to exist, it must also be shown that States accept the binding nature of that practice.[129] The ILC's Draft Conclusion 9 provides that this requirement means that 'the practice in question must be undertaken with a sense of legal right or obligation.'[130] In other words, a rule of customary international law exists only where State action is undertaken because States believe themselves to be legally compelled or entitled so to act by reason of that rule of customary law. Similar to the State practice element of customary international law, it is not necessary to establish that all States have accepted the particular practice as law. Rather, 'it is broad and representative acceptance, together with no or little objection, that is required.'[131]

The *opinio juris* of States must also be evidenced. The *opinio juris* of a State is best substantiated by an express public statement made on behalf of the State which outlines its position on whether the considered practice, whether its own or that of other States, is required, allowed or prohibited by a rule of customary international law.[132] Acceptance as law may also be evidenced by, among other things, government legal opinions, diplomatic correspondence, decisions of national courts, and conduct in connection with resolutions adopted by an

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[129] ILC Draft Conclusions on Customary Law (n 108) 138.

[130] ibid 138, Conclusion 9(1). See further *North Sea Continental Shelf* Merits Judgment (n 108) para 77.

[131] ibid 139, Conclusion 9 Commentary.

[132] ibid 141, Conclusion 10 Commentary.

international organisation or at an intergovernmental conference.[133] Difficulty arises in canvassing the *opinio juris* of States since they sometimes act without clear articulation of the legal basis for action. In the context of the *jus ad bellum*, for instance, States have on occasion used force on the territory of other States, supposedly in self-defence, without the required Article 51 communication to the Security Council or any public statement of the legal basis for such action. Those circumstances make the task of evidencing *opinio juris* a more complex endeavour.

In that regard, it should be noted that *opinio juris* serves to distinguish those practices that may be mere usage or habit from general practice reflecting customary international law.[134] In the context of the *jus ad bellum,* it must be borne in mind that an identified general practice of using force extraterritorially cannot be written off as mere usage or habit. Given the comprehensive and fundamental nature of the prohibition on the use of force, in using force States are acting either in contravention of the prohibition or in assertion of an exception. It is to be expected, therefore, that States using force will, even if not clearly, assert the legality of forcible action, usually on the basis of self-defence. This emphasises the centrality of discerning other States' reactions to such assertions and the reasons, legal or otherwise, underlying favourable and unfavourable responses. Unfortunately, the use of force by States is often met with no evident response from States other than those using force.

[133] ILC Draft Conclusions on Customary Law (n 108) 140, Conclusion 10(2).

[134] ibid 138, Conclusion 9(2).

As has been noted, while inaction may count towards the establishment of a general practice, *opinio juris* in support must be evidenced. The failure of States to clearly, or at all, communicate their legal convictions makes the process of determining *opinio juris* difficult. This is true where States take positive action without articulating the legal basis on which they purport to act, but even more so where inaction is coupled with silence. In the former instance, it may be possible to distil the legal position of a State from the act itself and its surrounding context. In the latter circumstance, the point of view of the State is left completely obscure. Identifying the genuine belief or conviction of States becomes the major difficulty when assessing the potential impact of State silence on the evolution of a norm.[135]

The true motive or intent of a State in maintaining silence is, evidently, undiscernible. Silence may, nevertheless, be taken to convey a legal position on an asserted customary norm. The ICJ has endorsed the notion that State silence may serve as evidence of acceptance as law in certain circumstances. In its *Fisheries Case* for instance, the Court concluded that the general toleration of the international community of Norway's constant, sufficiently lengthy, and public practice, 'bears witness to the fact that they did not consider it to be contrary to international law.'[136] Similarly, ILC Draft Conclusion 10 on the forms of evidence of acceptance as law provides that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law…'.[137]

[135] Starski (n 126) 21.

[136] *Fisheries Case (United Kingdom v Norway)* (Merits Judgment, 18 December 1951) [1951] ICJ Rep 116, 139.

[137] ILC Draft Conclusions on Customary Law (n 108) 140, Conclusion 10(3).

It is necessary that such an approach be adopted where silence is a usual feature of international relations.[138] Caution must be taken in reaching a conclusion, however, particularly in the context of the *jus ad bellum* where, as discussed in this Chapter, customary international law developments also have far reaching consequences for the interpretation and application of the UN Charter. In fact, as the ILC has noted, decisions of international courts and tribunals make clear that acceptance of practice as law by way of silence or inaction is not easily established.[139] Consequently, not all instances of State silence will have probative value as evidencing legal acceptance. Silence is, of itself, neutral and is given evidentiary significance by the circumstances or conditions in which it is placed. The ILC, in its recent work on the identification of customary international law, identifies two conditions under which silence may be accorded probative value – that the silent State be in a position to react and that the circumstances call for some reaction.[140]

That the circumstances call for some reaction on the part of States is at the heart of discerning those instances in which silence may be accorded evidentiary value. The ICJ has specifically endorsed this requirement in the context of acquiescence and opposability of claims as between States. In the *Pedra Branca*

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[138] Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, 'Silence and the Use of Force in International Law', EJIL Talk! Blog (18 July 2019) <https://www.ejiltalk.org/silence-and-the-use-of-force-with-a-new-catalogue-of-article-51-communicationsl/> accessed 26 August 2020. See also Starski (n 126) 30, noting that customary international law would be to a large extent non-existent if its emergence required even the majority of States to positively act in the face of an emerging norm.

[139] ILC Draft Conclusions on Subsequent Agreements (n 96) 80.

[140] ILC Draft Conclusions on Customary Law (n 108) 140, Conclusion 10(3). The ILC also adopted the same approach in relation to subsequent practice relevant to the interpretation of treaties – see Draft Conclusions on Subsequent Agreements (n 96) Draft Conclusion 10.

Case, for example, the Court concluded that 'silence may also speak, but only if the conduct of the other State calls for a response.'[141] Whether silence can be properly treated as evidence of *opinio juris* in the context of customary law formation similarly requires that a response is called for. By way of illustration, some reaction to practice is said to be called for when the practice affects, usually unfavourably, the rights or interests of the State failing to act.[142] In the *Lotus Case*, the PCIJ found that customary international law permitted concurrent criminal jurisdiction of the flag State and other States in respect of collision cases in circumstances where concerned States consistently failed to object to criminal proceedings before the courts of a country other than that of the country whose flag was flown.[143] In other words, the repeated silence of flag States in the face of exercise of criminal jurisdiction by other States in collision cases evidenced an *opinio juris* in support of concurrent jurisdiction. Recurring silence on the part of States directly affected by the conduct of other States evidences 'a shared belief that the acts were not in breach of an international obligation.'[144] A State's failure to object to the apprehension of a terrorist leader on its territory by another State, for example, together with that act of extraterritorial apprehension, has the effect

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[141] *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Merits Judgment, 23 May 2008) [2008] ICJ Rep 12, para 121. See also *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits Judgment, 15 June 1962) [1962] ICJ Rep 6, 23.

[142] ILC Draft Conclusions on Customary Law (n 108) 142, Conclusion 10 Commentary. It is worthy of note that the ILC considers it possible that a certain practice might be seen as affecting all or virtually all States. It did not, however, exemplify such a case.

[143] *Case of the SS Lotus (France v Turkey)* [1927] PCIL (ser A) No 10, 29.

[144] Etienne Henry, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (With Special Refence to the *Jus Contra Bellum* Regime)' (2017) 18 Melbourne JIL 260, 267. Henry goes as far as to argue that, as a rule, support can be inferred from a lack of reaction by the directly affected State if no other factor explains the choice.

of contributing to the process of generating new customary international law in the absence of other explanation.[145]

With regard to a particular use of force against non-State actors, it is almost certain that the territorial State will be the only State directly affected. In those circumstances, the silence of other States cannot be similarly construed as *opinio juris* in support of that practice. The absence of reaction by third States whose interests are not directly affected should not be casually treated as evidence of a benevolent *opinio juris*.[146] States are not compelled to expressly and publicly object to an asserted development in customary international law with which they may disagree, although to do so would undoubtedly be in their interest. States will not react to each perceived violation of customary law of which they are aware. As a result, much more caution must be applied in assessing the legal significance of the silence of States not directly affected. A reaction by States not directly affected by an incidence of practice can be said to be called for where that practice possesses 'precedential value', that is, the ability to initiate or confirm a new dispensation or a shift in customary legal doctrine.[147] This might be the case, for example, where a State's legal claim challenges a longstanding customary rule or substantially redefines the scope of a customary right. Where a significant portion of the international community has *in fact* reacted to an instance of practice (whether positively or negatively), that is a strong indication that the circumstances

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[145] Michael P Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 Case Western Reserve JIL 1, 24-25.

[146] Henry (n 144) 260.

[147] Claus Kreß and Benjamin K Nußberger, 'The Entebbe Raid – 1976' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-based Approach* (OUP 2018) 230-33.

are such calling for a reaction by States. The more contested a customary norm becomes as a result of repeated contrary claims, the greater the expectation will be that States will react in a legal manner.[148]

For the reaction of States, or lack thereof, to be construed as support for a particular legal position, the State conduct to which those States are responding must itself be capable of conveying that legal position. Consequently, practice accompanied by a legitimacy claim – an acknowledgment that action is justified by extra-legal considerations – or a denial of the facts amounting to a potential breach of existing customary law cannot be ascribed precedential value.[149] While a legal claim need not be express,[150] State silence cannot have effect to support a legal position that is not advanced by the acting State itself. In those circumstances, the silence of States cannot be taken as acceptance of a particular legal position since no reaction could be said to be called for.

Further, for the silence of States to serve as evidence of a supportive *opinio juris,* those States must also be in a position to react to the relevant practice. This means that States must possess both the capacity to react and knowledge of the legal claim advanced.[151] States must also have had sufficient time and opportunity to react.[152] In the *jus ad bellum* context, the concern has been raised that UN Member States are not routinely advised of Article 51 communications submitted

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[148] Starski (n 126) 37.

[149] ibid 33-34.

[150] ibid 32.

[151] ibid 35-36.

[152] ILC Draft Conclusions on Customary Law (n 108) 142, Conclusion 10 Commentary.

to the organisation so that their silence may result from unawareness.[153] The absence of standardised communication to UN Member States introduces a degree of uncertainty about the possibility of properly assessing the legal positions of silent States in relation to Article 51-related reporting.[154] In this regard, it is important to note that a State's ability to react need not be based on actual knowledge. In the view of the ILC, knowledge may be assumed where an instance of practice and the associated legal claim are given considerable publicity.[155] When assessing the evidentiary weight of silence, therefore, it is necessary to keep in view all the surrounding circumstances. It is arguable that State silence bears great evidentiary significance in an instance of large scale and globally noted use of force where the *jus ad bellum* claim is unequivocal, even if there is no Article 51 communication accompanying action.

While State silence may serve a role in confirming or establishing a rule of customary international law, it is essential to reiterate that its role is merely evidentiary. State silence, of itself, has no direct and immediate legal effect.[156] Legal effect results from the circumstances surrounding that silence; specifically, the circumstances must be such that the expression of a legal position by States is called for, and States must be in a position to do so.

[153] Lewis, 'Silence and the Use of Force' (n 138).

[154] Quantum of Silence (n 124) 59.

[155] ILC Draft Conclusions on Customary Law (n 108) 142, Conclusion 10 Commentary. See also Starski (n 126) 36 (arguing that acts carried out publicly are considered as being known).

[156] Henry (n 144) 268.

D. Putting a Finger on the Trigger: '…If an Armed Attack Occurs'

Article 51 of the Charter recognises the inherent right of self-defence 'if an armed attack occurs against a Member of the United Nations'.[157] The preceding assessment of the development of the right of self-defence in customary international law points to the notion of 'armed attack' as the crux. The definition of the concept can be distilled into three theoretical considerations each of which is important for determining the applicability of the right of self-defence in concrete cases, particularly those involving non-State actor attacks – the central concern of this thesis. The three central questions are: *When* does an armed attack occur triggering the right of self-defence? *What* actions qualify as an armed attack? *Who* can perpetrate an armed attack? Each of these will be dealt with in turn.

I. ***When Does an Armed Attack Occur?***

Article 51 of the Charter speaks of the 'occurrence' of an armed attack. The use of this term would tend to suggest that an actual armed attack must precede the exercise of self-defence. While rejecting the view of counter-restrictionists that Article 51 is merely declaratory of one circumstance in which the right of self-defence arises, that is, in the event of an armed attack, it is possible to accept their criticism that the Article 51 formulation of the right of self-defence 'if an armed attack occurs' is *prima facie* inconsistent with previous practice permitting self-defence in response to threatened armed attacks.[158]

[157] UN Charter (n 38) Article 51.

[158] See, for example, Bowett (n 9) 188-89.

Prior to the conclusion of the Charter, there existed evidence in State practice of the use of force in self-defence in anticipation of an attack.[159] The *Caroline* incident provides the quintessential illustration. The destruction of the *Caroline* was justified by Britain, not as a response to attacks previously suffered, but as action taken to forestall further reinforcements and supplies reaching rebels in an effort to thwart future planned attacks against British forces.[160] This right to act in anticipatory self-defence was generally held to apply throughout the pre-UN Charter era.[161]

Claims of anticipatory self-defence continued in the practice of some States immediately following the conclusion of the Charter on the basis that the provisions of Article 51 of the Charter did not restrict the customary right to act in self-defence against threatened attacks. By way of example, in the discussions of the Sixth Committee of the General Assembly on the definition of aggression in 1952, Belgium, Greece, the United Kingdom and the United States all noted the legal possibility for a State threatened with an attack to act first in self-defence.[162] States also expressly relied on a right of anticipatory self-defence before the Security Council in justifying forcible actions taken. In the context of the Cuban missile crisis in 1962, for instance, the United States justified its military blockade as a measure

[159] Bowett (n 9) 189; Anthony Clark Arend, 'International Law and the Preemptive Use of Military Force', (2003) Washington Quarterly 89, 90. The term 'anticipatory self-defence' is used in this thesis to refer to forcible action taken to thwart an imminent armed attack.

[160] Jennings (n 23) 83-84.

[161] Arend (n 159) 91.

[162] Bowett (n 9) 189.

to protect against anticipated Soviet or Cuban use of force.[163] Similarly, Israel relied on self-defence within the meaning of customary law and Article 51 of the Charter when it destroyed an Iraqi nuclear reactor in 1981.[164]

There was no clear endorsement of anticipatory self-defence in the Security Council debates on these events. A few States rejected anticipatory self-defence outright.[165] However, this rejection was not generally evident. States opposing the claims of self-defence made in those particular circumstances did so along pre-established political lines[166] or instead rejected that the conditions for its exercise were met on the facts, suggesting an acceptance in principle of the underlying legal doctrine.[167] For its part, the ICJ has been equivocal in its treatment of the question of anticipatory self-defence. In its *Nicaragua* decision, the Court avoided ruling on the legal validity of claims to use force in self-defence in anticipation of an attack since the issue was not specifically raised on the facts of the case before it.[168] Similarly, in its *Armed Activities* decision, the Court skirted the issue of advance action in self-defence noting only that self-defence would not seem to align with the claim of using force to 'secure Uganda's legitimate security interests', which

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[163] Letter dated 22 October 1962 from the Permanent Representative of the United States of America addressed to the President of the Security Council, UN Doc S/5181. See also UNSC 1024th Meeting (24 October 1962) UN Doc S/PV.1024.

[164] UNSC 2280th Meeting (12 June 1981) UN Doc S/PV.2280, paras 57-59.

[165] See eg UNSC 2281st Meeting (13 June 1981) UN Doc S/PV.2281, para 70 (per Pakistan); UNSC 2282nd Meeting (15 June 1981) UN Doc S/PV.2282, para 19 (per Uganda).

[166] Arend (n 159) 95.

[167] See eg UNSC 2282nd Meeting (n 165) para 106 (per UK); UNSC 2283rd Meeting (15 June 1981) UN Doc S/PV.2283, paras 25-26 (per Ireland, noting the requirement of an 'imminent attack').

[168] *Nicaragua* Merits Judgment (n 70) para 194.

were essentially pre-emptive.[169] The Court left open the question whether a more limited right of anticipatory self-defence existed.

Whether it was unsettled as a customary rule at the time of conclusion of the Charter and in the decades following that event, there now appears to be growing acceptance that the right of anticipatory self-defence is a feature of contemporary State practice informing the interpretation of Article 51. In 2004, the High-level panel established by the UN Secretary-General noted in its report that 'long-established' customary international law permitted military action in self-defence where the threatened attack is imminent.[170] The Secretary-General, in his subsequent report in 2005 echoed that Article 51 covers imminent threats.[171] Similar statements are found in the Chatham House Principles[172] and Leiden Policy Recommendations.[173]

While a controversial case, the US invasion of Iraq in 2003 partially rested on a right of self-defence. In its letter to the Security Council, the US asserted that necessary steps were being taken to 'defend the US and the international community from the threat posed by Iraq'.[174] The US claim to self-defence based

[169] *Armed Activities* Merits Judgment (n 90) para 143.

[170] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (United Nations 2004), para 188.

[171] Report of the Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for All', (21 March 2005) UN Doc A/59/2005.

[172] Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-defence' (2006) 55 ICLQ 963, 965-66.

[173] Schrijver and van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (Grotius Centre for International Legal Studies, 1 April 2010) para 45.

[174] Letter dated 20 March 2003 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/2003/351.

on the so-called 'Bush doctrine of pre-emption' reignited the discussion on the permissible use of force to meet threatened attacks. While largely rejected by States and commentators, the debate surrounding the Bush doctrine does reveal a general acceptance of a right to act in self-defence before an attack has materialised; but rather than a broad right of pre-emption as argued by the US, agreement centres on the applicability of the imminence requirement.[175] Most recently, several States have invoked the right of individual self-defence to justify use of force against ISIS and other military groups in Syria where they have not previously suffered attacks from those sources.[176]

It has been argued that an overly legalistic interpretation of Article 51, restricting action in self-defence to circumstances in which an actual armed attack has occurred, is manifestly absurd[177] or unrealistic in practice.[178] Where the expected attack may yield extensive, and possibly decisive, destruction, the right of self-defence becomes ineffective if it must await such an attack.

More importantly, the right of anticipatory self-defence is not, in principle, different from self-defence following an actual armed attack. Even where a State has suffered a previous attack, it is the threat of continuation of that attack or further

[175] Nolte and Randelzhofer (n 5) 1423.

[176] See Letter dated 23 September 2014 from the Permanent Representative of United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695 (concerning the Khorosan group); 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 and Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland addressed to the President of the Security Council, UN Doc S/2015/928 (concerning ISIS).

[177] SM Schwebel, 'Aggression, Intervention and Self-defence in Modern International Law' in *Collected Courses of the Hague Academy of International Law* (Hague Academy of International Law, 1972, vol 136) 479-81.

[178] Chatham House Principles (n 172) 964.

armed attacks that justifies action in self-defence, not the attack that has passed. In this sense, all action in self-defence is preventive. Interpreting 'if an armed attack occurs' in the context of Article 51 to mean that action taken in self-defence is in response to, or a reaction to, that attack that has passed would be to equate the right permitted by Article 51 to armed reprisal, which is no longer countenanced by international law. Where an armed attack has occurred, that fact may provide evidence of a likely continuation of attacks, and is, arguably, the strongest indication of a continuing threat. It does not follow, however, that an actual armed attack is the only evidence capable of establishing the threat of likely future attack. Where that threat can be substantiated by other credible evidence, there is no reason why a right to act against an imminent attack, in the absence of a past attack, should be denied.

An examination of the equally authoritative French text of the Charter supports this interpretation. Article 51 reads:

> Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, *dans le cas où un Membre des Nations Unies est l'objet d'une agression armée*, jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales[179]

Rather than requiring the *occurrence* of an armed attack, the French text of the Charter recognises self-defence where a Member State is the *object* of an armed attack. It is conceivable that a State may be the object of an attack that has not yet materialised, but which is expected with a degree of certainty. Reading the texts together, Article 51 can be interpreted as permitting self-defence where an armed

[179] Emphasis mine.

attack occurs against a Member State or where that State is the object of an anticipated attack.

Wilmshurst notes that, as a matter of practicality, there may be little separating the two schools of thought. Many commentators who accept a narrow interpretation of Article 51 as demanding an actual armed attack, take a flexible approach to when such an armed attack can be said to have commenced. In their view advanced active preparations of an attack, together with intent and capability, would be sufficient to trigger the right of self-defence.[180] Those favouring a right of anticipatory self-defence require similar evidence to establish the imminence of an attack. Similarly, with regard to use of weapons having particular characteristics, some States consider an armed attack to be initiated on the completion of certain preparatory acts and before an actual attack.[181]

The objections noted by Brownlie to anticipatory defence in the State to State context are even more apposite to the non-State actor context.[182] While a State is given latitude to assess its security need in the first instance, objective criteria apply in the determination of the correctness of that assessment. As with all other action in self-defence, the extent to which States may act in self-defence in anticipation of an armed attack is governed by the criteria of necessity and

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[180] Chatham House Principles (n 172) 965.

[181] Christine Gray, *International Law and the Use of Force* (4th edn OUP 2018) 135 (discussing radar-guided missiles and naval mines).

[182] Brownlie (n 31) 259. Brownlie observes that, as a matter of principle and policy, anticipatory self-defence is objectionable as it involves a determination of the certainty of attacks, an assessment which is extremely difficult to make, and may lead to a serious conflict if there is a mistaken assessment of the situation. He further remarks that there is room for abuse where the State has latitude in the first instance to decide on the necessity of defensive action.

proportionality.[183] In particular, necessity would enjoin the State to pursue alternative action short of an attack, including soliciting the intervention of the territorial State where the expected attack originates from a non-State source, an alternative difficult to circumvent where an attack is anticipated. The elements of necessity and proportionality are given further, and extensive, treatment in Part III of this thesis.

II. ***What Actions Qualify as an Armed Attack?***

While the term 'armed attack' is expressly employed in Article 51 of the UN Charter it is not defined in that provision or elsewhere in the Charter. The ICJ has made reference to customary international law to determine its content.[184] As the term itself suggests, it is generally agreed that armed attack encapsulates only uses of armed force.[185] The point of contention does not concern what kind of force may amount to an armed attack but rather what specific degree of force, if any, identifies a use of armed force as an armed attack for the purposes of self-defence.[186] Is there a qualitative dimension to the determination?

As is the case with several key issues in the law governing the use of force, the ICJ's judgment in *Nicaragua* provides relevant dicta on this qualitative dimension of the concept of armed attack. In its decision, which the Court

[183] In the words of Webster, the State exercising self-defence must show 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation' and that it did 'nothing unreasonable or excessive'.

[184] *Nicaragua* Merits Judgment (n 70) para 176.

[185] Chatham House Principles (n 172) 965.

[186] *Nicaragua* Merits Judgment (n 70) para 178.

expressed was aimed at the determination of the substance of the customary rules relating to the use of force, the Court states that 'it will be necessary to distinguish *the most grave forms of the use of force (those constituting an armed attack)* from other less grave forms.'[187] The statement is made unembellished by authorities supporting this conclusion. It is unsurprising, therefore, that this portion of the Court's judgment has been heavily criticised.

It has been argued that the gravity requirement espoused by the Court should be confined to the particular circumstances of the *Nicaragua* case, where the alleged attack was committed through irregular armed bands sent by a State, rather than applied as a general requirement in all cases of self-defence.[188] Similarly, the suggestion has been made that the gravity requirement as enunciated by the Court ought to be limited to purported exercises of collective self-defence as a threshold to be reached before third party participation can be deemed lawful. In this way, the internationalisation and escalation of certain conflicts would be avoided, leaving unhindered the individual right of States to take defensive measures in the face of lesser uses of force.[189]

Judge Simma also suggests that the gravity requirement should be confined to specific circumstances. In his view a distinction is to be made between 'full-scale' self-defence in Article 51 and low-level defensive action falling below the

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[187] ibid para 191 (emphasis mine).

[188] William H Taft, 'Self-Defense and the Oil Platforms Decision' (2004) 29 YJIL 295, 301-02.

[189] R St J Macdonald, 'The Nicaragua Case: New Answers to Old Questions', (1986) 24 Can YBIL 127, 149. Judge Jennings, in his dissent, also sympathised with the strict approach taken by the Court when he recalled that collective self-defence is open to abuse – *Nicaragua* Merits Judgment (n 70) 543.

standard of Article 51.[190] While the former would require an armed attack of a particular gravity as per the majority opinion in the *Nicaragua* case, no particular threshold of force would apply in the latter situation, where proportionate defensive action would be permissible. The Court appears to have left room in its decision for such an interpretation. Having put forward the gravity requirement above, the Court goes on to pose, but not answer, the question whether, in the circumstances of a dispute in which unlawful use of force is alleged, a State has a right to respond in self-defence to 'measures which do not constitute an armed attack but may nevertheless involve a use of force.'[191]

While critical of the Court's pronouncements, Taft and Judge Simma, and other advocates of these views, do not dismiss outright the relevance of a gravity requirement in the law governing self-defence under Article 51 of the Charter, but instead question whether the requirement should not be confined to particular circumstances rather than be of general application. Other critics reject outright the existence of a *de minimis* threshold requirement as a part of the armed attack element of self-defence.[192] Rosalyn Higgins, for instance, argues against the need to distinguish between uses of force triggering the right of self-defence on the basis of gravity since all uses of force in self-defence are subject to the requirements of necessity and proportionality. The result would be that lesser uses of force would be met with equally minor uses of force, providing a sufficient restraint on the

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[190] *Oil Platforms* Merits Judgment (n 76) 174-75 (Separate Opinion of Judge Simma, paras 12-13).

[191] *Nicaragua* Merits Judgment (n 70) para 210.

[192] Wilmshurst, for instance, argues that, in general, an armed attack means any use of armed force, and does not need to cross some threshold of intensity – Chatham House Principles (n 172) 966. See further John Lawrence Hargrove, 'The *Nicaragua* Judgment and the Future of the Law of Force and Self-defense' (1987) 81(1) AJIL 135, 139.

excessive use of force.[193] Proponents of this view appeal to practical considerations – were a gravity threshold to be imposed, aggressors would be encouraged to carry out a sustained campaign of low-intensity force falling below that threshold thereby increasing the incidence of violence in international relations.[194]

Arguments against the relevance of a gravity requirement can be countered. First, they fail to account for the difference in terminology used in Article 2(4) and Article 51. While Article 2(4) prohibits 'the threat or use of force', Article 51 uses the language of 'armed attack'. This differentiation in wording cannot be discarded as insignificant. Considering the provisions together, 'armed attack' suggests a narrower concept than 'threat or use of force.'[195] This conclusion is supported when 'armed attack' is considered alongside the term 'aggression' and its definition in international law. Specifically, it is suggested that armed attack is the more limited of the two, both being subcategories of the broader notion of 'threat or use of force'.[196] For its part, the *Definition of Aggression* makes clear that it is only 'the most serious and dangerous form of the illegal use of force' that amounts to aggression.[197] Gravity expressly features as an overriding consideration in defining

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[193] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 251; *Oil Platforms* (n 76) 175 (Separate Opinion of Judge Simma, para 13).

[194] W Michael Reisman, 'Allocating Competences to Use Coercion in the Post Cold-War World: Practises, Conditions and Prospects' in David Scheffer and Lori F Damrosch (eds), *Law and Force in the New International Order* (Westview Press 1991) 39-40.

[195] Nolte and Randelzhofer (n 5) 1401; Dinstein (n 8) 207.

[196] Nolte and Randelzhofer (n 5) 1408. See also Ruys (n 31) 149, highlighting that the *travaux préparatoires* of the Definition of Aggression evidence a cascading relationship amongst the concepts.

[197] UNGA Resolution 3314 (XXIX) 'Definition of Aggression', 14 December 1974, UN Doc A/Res/29/3314, preamble.

an act of aggression – Article 2 provides that lack of sufficient gravity can negate a *prima facie* finding of aggression where there is a use of force by a State in contravention of the UN Charter.[198] While the *Definition of Aggression* itself was not intended to regulate the circumstances in which self-defence could arise within the meaning of the Charter[199], the ICJ's reference to the *Definition of Aggression* in its attempt to define an armed attack[200] establishes that, in the view of the Court, an armed attack is qualitatively similar to an act of aggression. The Court's description of the concept was, in fact, consistent with State practice and the practice of the Security Council.[201]

Despite criticisms of its *Nicaragua* decision, in interpreting and applying international law governing the use of force almost two decades later in its *Oil Platforms* decision, the Court again endorsed the gravity requirement, citing without qualification its previous pronouncement in the *Nicaragua* case that the most grave forms of the use of force are to be distinguished from other less grave forms.[202] The US had argued it was acting in self-defence when it attacked Iranian offshore oil installations. While unconvinced that Iran was responsible for these attacks, the Court concluded that, even taken in aggregate, the series of attacks relied upon by the US could not be deemed a 'most grave' form of the use of force amounting to an armed attack.[203] It is noteworthy that the Court does not again

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[198] *Definition of Aggression* (n 197) Article 2.

[199] ibid Article 6. See also Nolte and Randelzhofer (n 5) 1407.

[200] *Nicaragua* Merits Judgment (n 70) para 195.

[201] Gray (n 181) 137.

[202] *Oil Platforms* Merits Judgment (n 76) paras 51, 64.

[203] ibid para 62-64.

acknowledge the question whether forcible defensive action is permissible to meet uses of force falling below the required threshold for armed attack.[204]

Arguments in favour of limiting the *Nicaragua* gravity requirement to the use of force by armed bands and/or instances of collective self-defence also face challenge. In its assessment of customary international law in the *Oil Platforms* case, the ICJ reaffirmed the threshold requirement in the context of a claim of direct use of force by a State[205] rather than indirect use of force through armed bands, as was the case in *Nicaragua.*[206] Further, a closer examination of the dicta in the *Nicaragua* case reveals that the gravity requirement is contemplated as arising also in relation to uses of force between States. In the language of the Court, the armed attack classification applies to 'the sending by a State of armed bands to the territory of another State, if such an operation, *because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces*.'[207] This makes clear that the threshold is equally applicable to direct aggression by the regular armed forces of a State.[208] Additionally, the *Oil Platforms* case and the *Eritrea-Ethiopia Claims* decision[209] provide examples of the application of the gravity requirement in cases

[204] Judge Simma criticized the Court for this in his Separate Opinion in that case – *Oil Platforms* Merits Judgment (n 76) 175, para 13.

[205] *Oil Platforms* Merits Judgment (n 76) para 25.

[206] For the application in the context of a direct use of force by a State see also Eritrea-Ethiopia Claims Commission*, Partial Award:* Jus Ad Bellum – *Ethiopia's Claims 1-8* (19 December 2005), RIAA Vol XXVI 457-469.

[207] *Nicaragua* Case (n 70) para 195 (emphasis mine).

[208] This construction is supported by Ruys (n 31) 140.

[209] *Eritrea-Ethiopia Claims* (n 206).

of individual, rather than collective, self-defence. Most recently in the *Armed Activities* case, the ICJ rejected Uganda's expansive reading of armed attack in favour of its narrower definition in the *Nicaragua* case.[210] The text of Article 51 itself conditions both individual and collective self-defence on an armed attack. If the gravity requirement is to be limited to claims of collective self-defence, it would make nonsense of the plain text of Article 51.

Policy considerations raised in opposition to a gravity element in defining an armed attack face weightier counterargument. Concerns for increase in low intensity conflict or the likelihood of States to engage in a series of small-scale military attacks have been dismissed as having not materialised in State practice since the handing down of the *Nicaragua* judgment.[211] Unlawful uses of force falling below the threshold for armed attack would nevertheless amount to breaches of Article 2(4) of the UN Charter for which remedy may be sought either through peaceful attempts at resolution or through the mechanisms of the Security Council. Further, a key feature of the Charter design is the limitation of individual State power to resort to force in favour of a centralised, collective machinery for the maintenance of international peace and security. Restricting resort to individual force in self-defence to circumstances meeting a particular threshold of gravity is consistent with the overall Charter scheme.

[210] *Armed Activities* Case (n 90) para 146.

[211] Gray (n 181) 157.

Gravity as an Element of 'Armed Attack': An Illusory Threshold?

How grave must a use of force be to qualify as an armed attack? In its *Nicaragua* judgement the ICJ noted that:

> …the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its *scale and effects*, would have been classified as an armed attack *rather than as a mere frontier incident* had it been carried out by regular armed forces.[212]

The Court identifies the scale and the effects of the attack as the relevant indicators of its gravity. This would suggest that the extent of the attack itself – its duration and location, and its consequences, including the destruction of lives and property – would be relevant in the assessment. Judge Simma, in his Separate Opinion in the *Oil Platforms* case, describes the threshold requirement of Article 51 within the Court's contemplation as 'considerably high'.[213] This is a reasonable conclusion to be drawn given, in particular, the Court's exclusion of 'mere frontier incidents' as being insufficiently grave to amount to armed attacks within the meaning of Article 51 of the Charter.[214] The Court also suggests that relevant to the assessment of gravity may be the circumstances of the attack and its motivations. As very little information on these was available to the Court in the circumstances of that case, it failed to elaborate on how these factors might be relevant.[215]

In practice, however, in exercising the right of self-defence States appear not to place emphasis on the gravity of force employed when attacked by another

[212] *Nicaragua* Merits Judgment (n 70) para 195 (emphasis mine).

[213] *Oil Platforms* Merits Judgment (n 76) 174 (Separate Opinion Judge Simma para 12).

[214] *Nicaragua* Merits Judgment (n 70) para 195.

[215] ibid para 231.

State.[216] The generally supportive attitude of States to the US military raid against the Iraqi intelligence headquarters in 1993 following a single failed assassination attempt on the life of former President Bush supports this view.[217] The ICJ's dictum seems to deny that the threshold set is particularly high as a matter of general application. In the *Oil Platforms* case the Court did not 'exclude the possibility that the mining of a single military vessel might be sufficient' to meet the Article 51 standard of 'armed attack' bringing into play the inherent right of self-defence.[218] The Court's pronouncement suggests that the gravity standard is to be assessed on a case-by-case basis looking to the scale of the action taken and the effects produced in the context of the particular incident.[219]

It is puzzling, therefore, that the Court used the term 'frontier incidents' in contradistinction to 'armed attack'. It is not inconceivable that a frontier incident between States could result in significant damage and loss of life, factors undoubtedly relevant to the gravity determination. As Fitzmaurice notes, 'there are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave.'[220] To this extent, the judgment of the Court in *Nicaragua* ought not to be read as excluding all frontier incidents as armed attacks. In its judgment, the Court entertained the possibility that the border incidents for which Nicaragua was

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[216] Tarcisio Gazzini. *The Changing Rules on the Use of Force in International Law* (Manchester University Press 2005) 133.

[217] Ruys (n 31) 153.

[218] *Oil Platforms* Merits Judgment (n 76) para 72.

[219] Corten (n 4) 403.

[220] GG Fitzmaurice, 'The Definition of Aggression' (1952) 1 ICLQ 137, 139.

responsible could amount, singly or collectively, to an armed attack.[221] What is required is that the use of force produces, or is capable of producing, significant consequences 'epitomised by territorial intrusions, human casualties or considerable destruction of property.'[222] While the terms 'armed attack' and 'threat or use of force' are to be differentiated, practice suggests that, in the inter-State context, it is only those uses of force producing the most insignificant of aftereffects which are excluded from categorisation as an 'armed attack'.[223]

On the contrary, where States allege an armed attack by non-State actors, substantial force is consistently endorsed as a requirement. The Leiden Policy Recommendations, for example, advance that in the event of an armed attack not attributable to a State, Article 51 of the Charter requires that the attack be 'large-scale' in order to trigger the right of self-defence.[224] The same is echoed by the Chatham House Principles on Self-defence.[225] This approach parallels the thresholds for the determination of armed conflicts in International Humanitarian Law; while any state of fighting between States constitutes an international armed conflict, a non-international armed conflict between a State and a non-State entity requires that there be protracted violence.[226] Such an approach would be

[221] *Nicaragua* Merits Judgment (n 70) para 231.

[222] Dinstein (n 8) 208.

[223] By way of example, the *Eritrea-Ethiopia* Claims Commission (n 206) para 12 considered that the 'geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border' were not of sufficient gravity to be classified an armed attack by either State within the meaning of Article 51 of the UN Charter.

[224] Leiden Policy Recommendations (n 173) para 39.

[225] Chatham House Principles (n 172) 969.

[226] ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 70.

especially warranted given the need to counterbalance the victim State's right of defence against the territorial rights of other States from which low level violence by non-State actors may emanate.[227]

The ICJ avoided the opportunity to make an authoritative pronouncement on the right of self-defence against non-State actor attacks in its *Armed Activities* case, rejecting the invitation to respond to the contention of the parties as to 'whether and under what circumstances contemporary International Law provides for a right of self-defence against *large-scale attacks by irregular forces*.'[228] The language employed by the Court to express the question it considered not necessary to answer is indicative; use of the qualifier 'large-scale' suggests that self-defence against non-State actors is contemplated only in that context.

Accumulation of Events

Practice does seem increasingly to evidence, however, a series of attacks by non-State actors as collectively amounting to an armed attack giving rise to the right of self-defence within the meaning of Article 51 of the Charter. This development is significant as such actors tend to employ a series of sporadic, geographically isolated attacks as their *modus operandi*. In this way, States may use force in self-defence to eliminate the continuing threat of attacks from the non-State actor

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[227] Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 51. See also the Leiden Policy Recommendations (n 173) para 39:

> The heightened threshold stems from the critical role of the state(s) on whose territory terrorists operate and the primary responsibility of such state(s) for the prevention and suppression of such acts. It recognizes that such a state or states would be affected by the force used in self-defence and ensures that self-defence and the consequences for that state or states that flow from a military response are not triggered too soon.

[228] *Armed Activities* Merits Judgment (n 90) para 143 (emphasis mine).

source. Most recently,[229] several States have based a right to use force in self-defence against ISIL on Syrian territory on a determined pattern of terrorist attacks. In its communication to the Security Council, Iraq cited the repeated 'attacks against Iraqi territory from eastern Syria'[230] as substantiating its need to take defensive action and to invite foreign assistance to eliminate the continuing threat against its territory and citizens.[231] In its own communication to the Security Council notifying the exercise of its right of collective self-defence in the circumstances, the United States also relied on the series of continuing attacks with which Iraq was faced as constituting a sufficient trigger of Article 51 of the Charter.[232]

For its part, the ICJ can be said to have implicitly affirmed the validity of this 'accumulation of events' or 'pin prick' approach. In its *Nicaragua* judgment the Court noted that the lack of information made it difficult for it to determine whether the trans-border incursions imputed to Nicaragua could be 'treated for legal purposes as amounting, *singly or collectively*, to an "armed attack" by Nicaragua'.[233] Similarly, citing the United States' failure to prove that Iraqi actions were aimed specifically at the United States and its vessels, the Court concluded in its *Oil Platforms* case that the acts of force under examination '*even taken*

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[229] For a survey of more historical claims see Ruys (n 31) 169-72.

[230] 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.

[231] 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.

[232] US September 2014 Letter (n 176).

[233] *Nicaragua* Merits Judgment (n 70) para 231 (emphasis mine).

cumulatively… do not seem to the Court to constitute an armed attack on the United States.'[234] The language used by the Court in both these instances would tend to suggest that were sufficient evidence provided to substantiate all relevant claims, the incidents could be assessed collectively to determine whether the threshold requirement of Article 51 was met. Similar phraseology was used by the Court in examining uses of force emanating from a non-State source. In rejecting Uganda's claim of self-defence against the DRC in the *Armed Activities* case, the Court took the view that, on the evidence before it, 'even if this series of deplorable attacks could be regarded as cumulative in character', Uganda failed to establish that the DRC held responsibility for them,[235] suggesting that an armed attack could be found from an aggregation of incidents.

The accumulation of events theory also enjoys considerable academic support.[236] The theory has been specifically noted in relation to attacks emanating from the same non-State entity or irregular force and from the same territory.[237] The accumulation of events theory goes some way to meeting the concern of opponents of the gravity requirement that aggressors would be given latitude to carry out a protracted campaign of low-intensity force without consequence. While some commentators remain hesitant to accept the accumulation of events as a

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[234] *Oil Platforms* Merits Judgment (n 76) para 64 (emphasis mine).

[235] *Armed Activities* Merits Judgment (n 90) para 46.

[236] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 202-2; Ago Report (n 18) 69-70; Nolte and Randelzhofer (n 5) 1409; Ruys (n 31) 169; Dinstein (n 8) 202, 206-07, 230-31; Carsten Stahn, 'Terrorist Acts as "Armed Attacks": The Right of Self-Defense, Article 51 (½) of the UN Charter and International Terrorism' (2003) 27(2) Fletcher F World Aff 35, 46.

[237] Leiden Policy Recommendations (n 173) para 39.

feature of contemporary law governing the use of force it appears to be increasingly endorsed in the practice of States.

III. ***By Whom Can an Armed Attack be Committed?***

The wording of Article 51 is neutral as to the source of an armed attack. The cross border armed activities of irregular and terrorist forces, however, have stirred debate as to whether an armed attack must come from a State source, or whether it is possible for non-State entities to independently carry out armed attacks within the meaning of Article 51. The debate stems largely from divergent views on the relationship between Articles 2(4) and 51 of the Charter.

The Relationship between Article 2(4) and Article 51 of the UN Charter

Within the UN Charter framework the right of self-defence recognised in Article 51 operates as an exception to the prohibition of the use of force in Article 2(4) for the State exercising its right of self-defence; that is, where a State uses force in self-defence in response to an armed attack the wrongfulness of that State's action under Article 2(4) of the Charter is precluded by the right of self-defence.[238] This conclusion is undisputed, but questions have been raised as to whether this reflects the full extent of the relationship between the two provisions.

Various commentators have suggested that the two provisions are more intricately connected than Article 51 merely operating as an exception to the obligation contained in Article 2(4). Several of these commentators, particularly in

[238] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, [2001] Yearbook Intl. L. Comm. Vol. II Part II, Article 21 Commentary para 1.

reference to the debated existence of a right of self-defence against non-State actors, argue that the right of self-defence recognised in Article 51 may be invoked only in response to violations of Article 2(4) of the UN Charter, specifically armed attacks.[239] According to this view, an 'armed attack' within the meaning of Article 51 is *always* a use of force contrary to Article 2(4) of the Charter.[240] The ultimate conclusion arrived at from this position is that, within the UN Charter framework, the right of self-defence arises solely in an inter-State context, since only States may commit violations of Article 2(4).[241] No clear basis is offered by these writers for the assertion that the intended design of the UN Charter was to limit action in self-defence to responding to violations of Article 2(4). This conclusion is stated as self-evident.[242] Tladi goes further to argue that since Article 51 is an exception to Article 2(4), it is to be expected that both provisions regulate similar conduct, that is, the use of force by a State.[243]

Bowett also argues that the use of force in self-defence is, as a general rule, permissible only against a use or threat of force which is contrary to international law, more specifically, Article 2(4) of the Charter.[244] Unlike contemporary

[239] Dörr and Randelzhofer (n 3) 214; Corten (n 4) 160-61.

[240] Nolte and Randelzhofer (n 5) 1409.

[241] Dörr and Randelzhofer (n 3) 213-14; Corten (n 4) 161.

[242] Corten (n 4), for example, asserts that recognising the possibility of invoking and exercising self-defence within the meaning of Article 51 against non-State actor attacks automatically translates to extension of the Article 2(4) prohibition to those activities.

[243] Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law' in Peters and Marxsen (n 107) 37,62.

[244] Bowett (n 9) 9, 149. It is interesting to note that Bowett takes the position that other breaches of international law, not being a breach of Article 2(4) of the Charter, may justify the use of force in self-defence, though such situations would be particularly exceptional. As already argued, this position is inconsistent with the text of Article 51, as well as pre- and post-Charter practice.

proponents of this view, Bowett offers a theoretical basis for his conclusion; in order to be regarded as a legal concept rather than a mere political justification, self-defence must arise from the breach of a legal duty owed to the State acting in self-defence – the 'precondition of delictual conduct'.[245] By so doing, Bowett also suggests that the right of self-defence arises solely in an inter-State context since States only may commit delictual conduct in breach of international law, specifically Article 2(4).

It is not disputed that the prohibition contained in Article 2(4) is an obligation imposed only on States. The provision expressly provides that 'All Members shall refrain in their international relations from the threat or use of force', and membership in the organisation is limited to States.[246] It is open to challenge, however, whether the right of self-defence as recognised in Article 51 of the Charter must respond to delictual conduct of another State, particularly a breach of the prohibition in Article 2(4). It has been repeatedly asserted, even by proponents of this view, that Articles 2(4) and 51 of the Charter do not correspond in scope, since 'armed attack' must be read as a narrower notion than 'threat or use of force'.[247] Not every breach of Article 2(4) amounts to an armed attack within the meaning of Article 51. Similarly, there is no obvious basis on which to conclude that every armed attack within the meaning of Article 51 must also be a breach of Article 2(4) of the Charter. While an armed attack carried out by a Member State

[245] Bowett (n 9) 9: 'The essence of self-defence is a wrong done, a breach of a legal duty owed to the State acting in self-defence.' See also Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations' (1948) 42 AJIL 783 – 'a violation of rights… against the state responsible for the violation'.

[246] UN Charter (n 38) Articles 3-4.

[247] Nolte and Randelzhofer (n 5) 1401; Corten (n 4) 403; Dinstein (n 8) 207.

will undoubtedly amount to a breach of Article 2(4) by that State, the breach itself is incidental to the question of self-defence, rather than the very essence of it. Rather, as Grotius notes, self-defence ‘has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor. Wherefore, even if the assailant be blameless, …the right of self-defence is not thereby taken away.’[248]

For his part, Tladi fails to recognise that despite the inclusion of non-State actor attacks within the meaning of ‘armed attack’ in Article 51 of the Charter, both Articles 2(4) and 51 continue to regulate the same conduct, that is, the conduct of a State. The extraterritorial use of force in self-defence against a non-State actor involves an inter-State use of force as contemplated in Article 2(4). The acceptance of non-State actor self-defence does not, therefore, present a challenge to the regulatory framework created by the Charter. It is significant to note also, that Security Council authorisation for the extraterritorial use of force, which similarly acts as an exception to Article 2(4), is not similarly argued to be limited to responding to State actions which may disrupt international peace and security.[249]

Further, the suggested nexus between Articles 2(4) and 51 is not evidently consistent with self-defence as a concept, particularly in the UN Charter era. While power to enforce international legal obligations is reserved to the collective machinery, self-defence is reserved as an exceptional right, the essence of which is the need to protect against the danger posed by a particular factual occurrence

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[248] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (London: printed for W. Innys and R. Manby, J. and P. Knapton, D. Brown, T. Osborn, and E. Wicksteed, 1738) Book II, Ch. I, § iii.

[249] Christian J Tams, ‘Self-Defence against Non-State Actors: Making Sense of the ‘Armed Attack’ Requirement’ in Peters and Marxsen (n 107) 117-19.

– an armed attack. In other words, 'self-defence is a right triggered by an act, rather than the actor.'[250] To rationalise the right contained in Article 51 as arising from a breach of Article 2(4) by the State against whom force is used in self-defence, would be to return to the ideals of self-help.

Finally, and most importantly, State practice neither before nor after the Charter appears to support the conclusion that the right of self-defence is fundamentally dependent on a breach of a legal duty by another State. In the *Caroline* incident, Britain asserted a right of self-defence to act forcefully against a non-State actor threat. The British Minister noted the necessity of defence as arising from the failure of US laws to prevent the use of US territory, citizens and resources for the coordination of attacks against British forces, rather than a breach of a legal duty owed by the US to Britain.[251] Such claims have increased in frequency in the post-Charter era. This body of practice, broadly explored in Parts II and III of this thesis, are consistent with the very rationale of self-defence as a response to an act, rather than an actor.

[250] International Law Association, *Final Report on Aggression and the Use of Force* (Sydney Conference 2018) 14.

[251] Miller, *The Caroline* (n 21) per Mr Fox.

PART II

CHAPTER II

THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE ACTORS IN INTERNATIONAL LAW: A MATTER OF PRACTICE

A. INTRODUCTION

THOUGH a right of self-defence against non-State actors is not excluded by the terms of Article 51 of the UN Charter, the right has arisen primarily in an inter-State context.[1] More recently, international law governing the use of force has had to regulate the increasing use of force by non-State actors. In some sense, the 1986 decision of the ICJ in the *Nicaragua* case considered the place of non-State actors in the landscape of the *jus ad bellum*, but even there, the emphasis remained an inter-State one. Early scholarly interpretations of Article 51 of the UN Charter have aligned with this position – excluding the possibility of defensive action against attacks by private individuals or entities, unless it could be found that a particular degree of State involvement in such acts existed.[2] Since the time of the *Nicaragua* judgment, however, the role of non-State actors has become more prominent. Individuals and private entities now possess previously unimagined capacity to act singularly, unconnected from the machinery or even the support of a State, in producing credible threats and deadly attacks. This development has implications

[1] Noam Lubell, *Extraterritorial Use of Force against Non-state Actors* (OUP 2010) 16; Christine Gray, *International Law and the Use of Force*, (4th edn OUP 2018) 10.

[2] JL Kunz, 'Individual and Collective Self-defence in Article 51 of the Charter of the United Nations' (1947) 41 AJIL 872, 878; H Kelsen, 'Collective Security and Collective Self-Defence Under the Charter of the United Nations', (1948) 42(4) AJIL 783, 791; Antonio Cassese, 'The International Community's "Legal" Response to Terrorism', (1989) 38 ICLQ 589, 596-97.

for the application of the rules of the *jus ad bellum*, particularly the concept of 'armed attack' in customary law.

The events of September 11, 2001, or 9/11 as it is commonly referred to, brought the notion of 'armed attack' into sharp focus. On that date, 19 individuals hijacked four US commercial passenger jets, crashing them into the towers of the World Trade Centre in New York, the Pentagon (the headquarters of the Department of Defence) near the country's capital in Washington DC, and the Pennsylvania countryside.[3] The attacks resulted in the deaths of over 3000 persons and extensive damage to infrastructure, particularly at the New York site.[4] Following large-scale criminal investigations, the US concluded that the perpetrators of the attacks were connected to the Al-Qaida terrorist network under the leadership of Osama bin Laden. In a letter to the UN Security Council setting out its findings on responsibility for the terrorist atrocities in the US, the United Kingdom wrote that it had come to the 'clear conclusion' that bin Laden 'and Al Qaida, the terrorist network which he heads, planned and carried out the atrocities on 11 September 2001' and possessed 'the will and resources to carry out further atrocities.'[5] Evidence of planned and imminent further attacks was also unearthed.[6] In response to these attacks, the US first made demands of the Taliban regime in

[3] 'Terrorist Attacks on World Trade Centre and Pentagon' in Sean D Murphy (ed), 'Contemporary Practice of the United States Relating to International Law', (2002) 96 AJIL 237. See also Keesing's Record of World Events (2001) 47(1) 44333 ("Keesing's").

[4] ibid.

[5] Letter dated 8 October 2001 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/2001/949. See also Murphy, 'Contemporary Practice' (n 3) 240-41 for details of UK-provided evidence linking the hijackers to bin Laden.

[6] Murphy, 'Contemporary Practice' (n 3) 243.

Afghanistan; it requested, *inter alia,* that the Taliban hand over to the US for prosecution all the leaders of Al Qaida present in Afghan territory and that it dismantle terrorist training camps in Afghanistan.[7] When those demands went unmet, the US, with the assistance of the UK, launched attacks against Al Qaeda and Taliban targets in Afghanistan on 7 October 2001. In its required report to the Security Council pursuant to Article 51 of the Charter, the US stated that it had initiated actions in the exercise of its inherent right of self-defence, following the 'armed attacks of September 11.'[8]

For many commentators, September 11, 2001 represents a critical date in the development of the customary law governing self-defence.[9] In the post 9/11 era however, there has been considerable debate concerning what, if any, effect State response to the events of 9/11 and other subsequent instances of practice have had on the scope of the 'armed attack' criterion. As foreshadowed in the preceding Chapter, the answer to this question lies in a detailed examination of the practice and *opinio juris* of States, principally in the rationalisations offered by States when justifying or condemning a particular use of force, in order to identify the customary rules governing the use of force in self-defence against non-State actor attacks. Specifically, this Chapter considers the narrow 'threshold question'[10] whether non-State actor attacks are classified as 'armed attacks' in the practice of

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[7] Murphy, 'Contemporary Practice' (n 3) 243.

[8] Letter dated 7 October 2001 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/2001/946.

[9] Gray (n 1) 200.

[10] Christian J Tams, 'Self-Defence against Non-State Actors: Making Sense of the 'Armed Attack' Requirement' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War*, vol 1 (CUP 2019) 91.

States thereby triggering the right of self-defence recognised in Article 51. While the events of 9/11 are integral to this assessment, they do not represent a 'Grotian moment'[11] as some would argue.[12] The claim of self-defence made by the US in the context of terrorist attacks is not novel. This Chapter will demonstrate that, in the post-Charter era of international law, the classification of non-State actor attacks as 'armed attacks' triggering the customary right of self-defence developed over the course of decades and remains evident in the practice of States beyond September 2001.

The chronology begins with Israel's claims of self-defence in the face of cross-border attacks by irregular forces present in neighbouring countries in the 1960s. While these claims concerned attacks by non-State actors, they had a distinct inter-State character since self-defence was claimed against the territorial State itself. A shift in Israel's practice becomes evident in the late 1970s. At that time, Israel claimed a right to use force in self-defence notwithstanding the fact that no responsibility on the part of the territorial State for the attacks suffered was invoked. The survey of practice evidences that, beginning in the 1990s, several other States, such as Iran, Turkey and the United States, adopted this approach. Alongside this chronicle of State claims, the Chapter also provides a chronological account of the responses of States to such claims. This chronology reveals a

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[11] Michael P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change', (2010) 43 Cornell Int'l LJ 439.

[12] See eg Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', (2001) 12 EJIL 993, 996-97 noting that:

> It would thus seem that in a matter of a few days, practically all states… have come to *assimilate* a terrorist attack by a terrorist organization to an armed aggression *by a state,* entitling the victim state to resort to individual self-defence and third states to act in collective self-defence (at the request of the former state).

progressively more receptive response of the international community to invocations of a right of self-defence against non-State actor attacks, which provides relevant historical context for the proper evaluation of the international response to the events of 9/11.

The conclusion to be drawn is that the right of self-defence against non-State actors evident in contemporary practice evolved over time and is now established in customary international law. Beyond that, the historical and theoretical underpinnings of the right of self-defence, outlined in the preceding Chapter, are relevant to the assessment of the recent State practice. As will be shown, the development of customary international law permitting States the right to use force in self-defence against attacks by non-State actors as qualifying ‘armed attacks’ are consonant with the Charter framework on use of force and self-defence, rather than a threat to its integrity.

The Defining Feature of 9/11: A Concerted International Legal Response to a Determinate Legal Claim

The terrorist attacks on the World Trade Centre and the Pentagon in September 2001 are often cited as a turning point in the development of the law governing self-defence against non-State actor attacks. Yet, international law has recognised and grappled with the regulation of international terrorism and other forms of violence perpetrated by non-State groups for decades. From as early as the League of Nations, efforts have been made to delineate and criminalise the act of 'transnational terrorism' by non-State actors.[13] The events of September 11, though previously unseen in magnitude,[14] can hardly be described as novel. Their significance for the present analysis lies not in the attacks themselves, but in the concerted international legal response to them. For the first time, the overwhelming majority of the international legal community expressly and unequivocally endorsed the right of a victim State to act in self-defence, in accordance with Article 51 of the UN Charter, after suffering terrorist attacks.

In the immediate aftermath of the attacks, and in reference to them, the UN Security Council expressly recognised 'the inherent right of individual or collective self-defence in accordance with the Charter' in its unanimously adopted Resolution 1368 (2001).[15] In its Resolution 1373 (2001), also adopted without dissent or abstention and prompted by the attacks of 9/11, the Security Council again reaffirmed the right of self-defence in the context of a resolution imposing obligations on Member States to combat threats to international peace and security caused by terrorist acts.[16] Following a closed meeting of the Council convened at the request of the representatives of the US and UK, in which members of the Council noted the letters sent by the US and UK pursuant to Article 51 of the

[13] Convention for the Prevention and Punishment of Terrorism, 16 November 1937 (League of Nations Document C546M 383(1937)) reprinted in 7 International Legislation 862 (Manley O Hudson (ed) 1941).

[14] 'The magnitude of yesterday's acts goes beyond terrorism as we have known it so far…' UNSC 4370th Meeting (12 September 2001), UN Doc S/PV.4370, 3 (per representative of Ukraine).

[15] UNSC Resolution 1368 (12 September 2001), UN Doc S/RES/1368(2001) Preamble.

[16] UNSC Resolution 1373 (28 September 2001), UN Doc S/RES/1373(2001) Preamble.

Charter[17] and both States informed members of the action initiated by them in Afghanistan and the relevant justification, the President of the Security Council noted that the members of the Security Council ‘were appreciative of the presentation made by the United States and the United Kingdom’[18] and that the unanimous support previously expressed by the Council in its Resolutions 1368 and 1373 ‘is absolutely maintained’.[19]

In a similar vein, following the 9/11 attacks, the North Atlantic Treaty Organisation (NATO) invoked, for the very first time, Article 5 of the Washington Treaty[20] which provides for the right of collective self-defence as recognised in Article 51 of the UN Charter, [21] confirming its application in the circumstances after it was definitively determined that the attacks against the US had been directed

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[17] US October 2001 Letter (n 8); Letter dated 7 October 2001 from the Chargé d’affaires a.i. of the Permanent Mission 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/2001/947.

[18] UN Press Release, ‘Press Statement on Terrorist Threats by Security Council President’ (8 October 2001), UN Doc AFG/152-SC-SC/7167.

[19] Christopher S Wren, ‘A Nation Challenged: World Forum; US Advises UN Council More Strikes Could Come’, The New York Times (9 October 2001) <http://www.nytimes.com/2001/10/09/world/a-nation-challenged-world-forum-us-advises-un-council-more-strikes-could-come.html> accessed 27 August 2020.

[20] North Atlantic Treaty, (Washington DC 4 April 1949) 34 UNTS 243. Article 5 provides:

> ‘The Parties agree that an armed attack against one or more of them… shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.’

[21] North Atlantic Council, Press Release 124 (Brussels, 12 September 2001) <www.nato.int/docu/pr/2001/p01-124e.htm> accessed 27 August 2020.

from abroad.[22] While recognising that the commitment to collective self-defence embodied in Article 5 of the Treaty was coined in reference to circumstances 'very different' from those in which it was invoked, the organisation expressly affirmed its validity and relevance in the context of international terrorism.[23] The Organisation of American States also invoked its collective defence machinery[24] under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).[25] The Meeting considered the 'terrorist attacks'[26] against the United States to be attacks on all States of the Americas, and mandated all States Parties to the Rio Treaty to provide effective reciprocal assistance to address the attacks, and the threat of any similar attacks.[27] The mutual defence pact of the Security Treaty between the

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[22] Statement by NATO Secretary General Lord Robertson (2 October 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm> accessed 27 August 2020. See also NATO Update: 'Invocation of Article 5 Confirmed', (2 October 2001) <http://www.nato.int/docu/update/2001/1001/e1002a.htm> accessed 27 August 2020. The US opted not to act through NATO, but NATO provided military assistance to the operations conducted by the US in Afghanistan.

[23] NATO Press Release 124 (n 21). The US itself took a strict inter-State approach to Article 5 of the North Atlantic Treaty at its conclusion. The June 1969 Report of the Senate Committee on Foreign Relations on the topic of the treaty noted that *'the words 'armed attack' clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another'* – US Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty (6 June 1949), S.Ex.Rep. No. 8, 81st Cong., 1st Session.

[24] Meeting of Consultation of Ministers of Foreign Affairs, 'Terrorist Threat to the Americas' Resolution adopted at the first plenary session, held on September 21, 2001, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs (21 September 2001) OEA/Ser.F/II.24 RC.24/RES.1/01 <http://www.oas.org/OASpage/crisis/RC.24e.htm> accessed 27 August 2020.

[25] Inter-American Treaty of Reciprocal Assistance (2 September 1947) 21 UNTS 77, Article 3(1):

> 'The High Contracting Parties agree that an armed *attack by any State* against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations.' (emphasis mine)

[26] OAS States considered Article 3 of the Treaty to apply in the context of a 'terrorist threat to the Americas' notwithstanding the provision's prescription of 'an armed attack by any State' as the relevant trigger, suggesting that American States had moved on from an inter-State conception of self-defence in their practice by that time.

[27] 'Terrorist Threat to the Americas' Resolution (n 24) para 1.

United States, Australia, and New Zealand (ANZUS Treaty), applicable in circumstances of 'armed attack…on any of the Parties'[28] was also invoked.[29] The European Union expressed its solidarity and cooperation with the US, declaring: 'a riposte by the US is legitimate' in light of the attacks and continuing threat against the US.[30] Countries associated with the European Union, including Cyprus, Hungary, Iceland, Liechtenstein, Malta, Norway, Poland and Turkey all aligned themselves with the EU position as communicated to the United Nations.[31] Arab States also expressed general support – the six-member Gulf Cooperation Council, in a joint statement, expressed willingness to participate in any joint action with clearly defined objectives and which enjoyed the support of the international community, and Saudi Arabia and the United Arab Emirates, in a show of solidarity, broke diplomatic relations with the Taliban regime.[32] In fact, only Iraq directly challenged the legality of the US military response.[33]

The United States' invocation of its inherent right of individual self-defence in accordance with Article 51 of the Charter was further supported by express claims of collective self-defence by several States, in their individual capacities, in

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[28] Security Treaty between the United States, Australia, and New Zealand ('ANZUS') (1 September 1951) 131 UNTS 83, Article IV.

[29] Letter dated 23 November 2001 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1104.

[30] European Council, Extraordinary Meeting Conclusion Document (21 September 2001) <https://www.consilium.europa.eu/media/20972/140en.pdf> accessed 27 August 2020; European Commission Press Release MEMO/01/32 (Brussels, 15 October 2001) <http://europa.eu/rapid/press-release_MEMO-01-327_en.htm> accessed 27 August 2020. See also Letter dated 8 October 2001 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General, UN Doc S/2001/967.

[31] Belgium October 2001 Letter (n 30) 2.

[32] Murphy, 'Contemporary Practice' (n 3) 245.

[33] Gray (n 1) 201.

communications to the Security Council – Australia,[34] Canada,[35] France,[36] Germany,[37] the Netherlands,[38] New Zealand,[39] Poland[40] and the United Kingdom.[41] The UK itself directly participated in the very first airstrikes against targets in Afghanistan, while other NATO allies, Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey and Uzbekistan, provided access to airspace and facilities.[42] Following the initiation of strikes against Al Qaida and Taliban targets in Afghanistan, China, Egypt, Mexico and Russia also announced support for the US campaign.[43] According to official US documentation, over 70 States made pledges of military and intelligence support for the campaign, in addition to the EU, NATO and OAS.[44] Given the momentousness of the September 11 attacks and the US coalition response, the silence of other States may be taken to evidence their acceptance of the legal claim made by the US and

[34] Australia November 2001 Letter (n 29).

[35] Letter dated 24 October 2001 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/2001/1005.

[36] Letter dated 23 November 2001 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1103.

[37] Letter dated 29 November 2001 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1127.

[38] Letter dated 6 December 2001 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1171.

[39] Letter dated 17 December 2001 from the Permanent Representative of New Zealand to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1193.

[40] Letter dated 15 March 2002 from the Permanent Representative of Poland to the United Nations addressed to the President of the Security Council, UN Doc S/2002/275.

[41] UK 7 October 2001 Letter (n 17).

[42] Murphy, 'Contemporary Practice' (n 3) 248.

[43] ibid.

[44] CRS Report for Congress, 'Operation Enduring Freedom: Foreign Pledges of Military & Intelligence Support' (17 October 2001) <https://www.globalsecurity.org/military/library/report/crs/RL31152.pdf> accessed 27 August 2020.

its allies. The overwhelming conclusion from this survey of practice is that the US was entitled to, and did, act in response to the terrorist attacks of September 11 pursuant to a right of self-defence generally recognised by the international community of States. Since an 'armed attack' is 'the condition *sine qua non'* for the exercise of the right of self-defence,[45] the fundamental legal enquiry is whether an armed attack within the meaning of Article 51 and customary international law had occurred justifying the United States' self-defensive use of force against targets in Afghanistan.

The assertion that non-State actor attacks may be classified as qualifying armed attacks has been met with valid reservations. In the quintessential case of self-defence, where an armed attack is carried out by the regular forces of State A against State B and, therefore, where the responsibility of State A for the attack is beyond question, State B's use of force against the territory of State A is readily justifiable. The State on whose territory force is used in self-defence is the State responsible for the armed attack that triggered the self-defensive use of force. Judicial consideration of the notion of armed attack by the ICJ, from 1986 in its *Nicaragua* judgment[46] to as recently as 2005 in the *Armed Activities*[47] case between the DRC and Uganda, has consistently focussed on the level of territorial State involvement as the defining feature. In relation to the terrorist attacks of 9/11, the position of Afghanistan, the State on whose territory force was used in self-

[45] See text to nn 67-78 in ch I.

[46] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits Judgment, 27 June 1986) [1986] ICJ Rep 14.

[47] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v. Uganda)* (Merits Judgment, 19 December 2005), [2005] ICJ Rep 108.

defence, is less significant. This causal connection between State responsibility[48] for the initial attack and liability to defensive attack against territory does not explain the United States' military response on the territory of Afghanistan to the 9/11 attacks. On the contrary, responsibility for the attacks was expressly attributed to the Al Qaeda organisation.[49]

The legal classification of the US response in Afghanistan as self-defence and, indeed, the more recent armed responses of States such as Israel, Ethiopia, Russia, Colombia, Iraq, Turkey and France to attacks or threats of attack by non-State actors outside their borders would tend to suggest that the involvement of the territorial State is less pivotal to establishing an armed attack. Despite this tendency in practice, there are those who maintain that such a conclusion would be 'problematic'.[50] It is critical to question, therefore, whether the notion of armed attack, as the cornerstone of the inherent right of self-defence, is, and if so whether it must remain, delimited by the extent of territorial State involvement, particularly in an era of international law when State and non-State actor conflicts are prevalent.

[48] 'State responsibility' is loosely used here to refer to the responsibility of the territorial State for the armed attack triggering the right of self-defence. This thesis does not explore legal questions on the secondary rule of State responsibility more broadly nor does it examine the full gamut of internationally wrongful acts for which a State may be responsible in connection with the transnational use of force by non-State actors from its territory.

[49] US October 2001 Letter (n 8).

[50] Myjer and White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7(1) JCSL 5, 7.

B. ATTACK BY A NON-STATE ACTOR AS AN ARMED ATTACK BY A STATE: THE USUAL SUSPECT

It is not disputed that the right of self-defence may arise in the context of actions taken by non-State actors. Disagreement arises in relation to whether State involvement is a necessary element for that to occur. Whenever a State suffered an attack carried out by non-State actors located on the territory of another State, it was common to allege the territorial State's responsibility for that attack as a basis for self-defensive action against that State.[51] The territorial State is the usual suspect. International law has long recognised that States may indirectly carry out armed attacks through non-State actors.[52] In the *Nicaragua* Merits Judgment the ICJ pronounced that, in certain circumstances, the use of armed force by non-State actors could amount to an armed attack by a State giving rise to a right of self-defence. In that case, the United States claimed that it was entitled to act in the collective self-defence of El Salvador against Nicaragua, following attacks by the Salvadoran insurgency, which it alleged acted with the support of Nicaragua. In considering the claim, the Court stated:

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also *"the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces*, "or its substantial involvement therein".[53]

[51] Gray (n 1) 143.

[52] Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 ICLQ 731.

[53] *Nicaragua* Merits (n 46) para 195 (emphasis added).

This definition, based on Article 3(g) of the *Definition of Aggression* annexed to UNGA Resolution 3314(XXIX), was identified as being reflective of customary international law.[54] In general terms, this dictum signals a two-fold test that must be met in order for an attack by a non-State actor to amount to an 'armed attack' within the meaning of Article 51 of the UN Charter and customary international law. First, the non-State actor must have been sent by or on behalf of a State – an 'attribution requirement', and secondly, that non-State actor must carry out acts of armed force against another State of sufficient gravity or intensity to be classified an armed attack – a 'gravity requirement'.

The Court examined Nicaragua's involvement with the Salvadoran insurgency to determine whether the US was entitled, as it alleged, to exercise collective self-defence together with El Salvador against Nicaragua. The Court concluded, having found insufficient proof of Nicaraguan State involvement in the flow of arms to the Salvadoran insurgency,[55] that El Salvador had not suffered an armed attack giving rise to a right of collective self-defence, which would justify the US attacks against Nicaragua.[56] The Court went further and expressly rejected that the concept of armed attack could include assistance to rebels in the form of the provision of weapons or logistical or other support.[57] The standard set for indirect armed attacks was, therefore, a high one, requiring organisational and operational control. Critically, there was no consideration by the Court, or argument by the

[54] *Nicaragua* Merits (n 46) para 195.

[55] ibid para 160.

[56] ibid para 230.

[57] ibid para 195.

Parties,[58] on whether a right of self-defence could arise following an attack by non-State actors even where the *Definition of Aggression* conditions had not been met.

Unsurprisingly, it has been suggested that the links between Al-Qaeda and the Taliban government of Afghanistan were in fact sufficiently close to establish the State's responsibility for the attacks and that the US legal approach was to found a right of self-defence against Afghanistan itself on the basis of these ties.[59] Byers, for example, argues that the US was able to implicate the Taliban regime as the latter gave refuge to Bin Laden and Al-Qaeda, directly facilitated and endorsed his actions, and issued subsequent statements endorsing the terrorist acts, thereby engaging the State's legal responsibility.[60] Although the US communication to the Security Council suggests that the Taliban regime offered support to the Al-Qaeda organisation, and by its omissions allowed Al-Qaeda to operate from its territory, it stopped short of asserting that Al-Qaeda acted on behalf of, or was sent by, the State of Afghanistan.[61] The communication singles out the Al-Qaeda organisation only as having 'a central role in the attacks' and

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[58] It is important to note that the US withdrew from the proceedings and made no submissions on the merits of the case. Consequently, the judgment of the Court was not aided by complete and fully argued submissions by the respondent State on the applicable law. However, in its Counter-Memorial on jurisdiction and admissibility, the US focused its claims as to self-defence on the actions of Nicaragua in support of the Salvadoran guerrillas. The *Nicaragua* Case is further discussed in Chapter III.

[59] Michael Byers, 'Terrorism, Use of Force and International Law after 11 September' (2002) 51 ICLQ 401, 408; Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002) 54, 66-7.

[60] Byers (n 59) 408. See also Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe (tr), Hart 2012) 179, 181.

[61] Gray (n 1) 208.

posing an 'on-going threat to the United States and its nationals'.[62] No allegation of an armed attack or act of aggression by Afghanistan was ever made.

Similarly, States invoking the right of collective self-defence in communications to the Security Council made clear that their actions were aimed at combating the continuing threats from the Al-Qaeda terrorist network;[63] the Taliban regime was recognised by them only as 'supporting' Al-Qaeda in its actions.[64] The Taliban distanced itself from the attacks, and even showed itself to be unaware of the factual circumstances, denying that bin Laden had the capability to carry out such attacks.[65] It can also be noted briefly that subsequent endorsement by the Taliban as a basis of attribution can be excluded. The Taliban regime's general anti-US stance, and its failures and facilitation of Al-Qaeda in Afghanistan are insufficient to establish acknowledgement and adoption of the actions as its own.[66] The totality of facts indicates that Al-Qaeda acted independently in carrying out the attacks against the US.

Further, the abovementioned pronouncements of the UNSC, NATO and OAS were made in the immediate aftermath of the attacks when the possible role of the Taliban was completely unclear. UNSC Resolution 1368 was adopted prior

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[62] US October 2001 Letter (n 8).

[63] UK 7 October 2001 Letter (n 17); Poland March 2002 Letter (n 40).

[64] See eg UK 7 October 2001 Letter (n 17); Canada October 2001 Letter (n 35); New Zealand December 2001 Letter (n 39).

[65] Davis Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and other Responses' (2003) 11 Cardozo JICL 1, 11.

[66] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Resolution 56/83 (12 December 2001), UN Doc A/Res/56/83 Article 11; *United States Diplomatic and Consular Staff in Tehran* (US v Iran) (Merits, 24 May 1980) [1980] ICJ Rep 3, paras 17, 57-59, 70-74.

to any negotiation with the Taliban over possible extradition of the culprits and before the subsequent apportioning of blame to the Taliban.[67] No language in this Resolution, or Resolution 1373, indicates that the Security Council believed that the terrorist acts would first have to be attributed to Afghanistan to trigger the right of self-defence in the circumstances; nor did the Secretary-General or Council members, in considering and voting on the draft of Resolution 1368, assume Afghanistan's responsibility for the attacks.[68] To conclude that the recognition of the United States' right of self-defence at this stage was premised on a finding that the attackers were acting on behalf of, or sent by, the Taliban regime, or that the State of Afghanistan itself was responsible for the attacks, would not be based on the facts. On the contrary, the wide scale endorsement of the victim State's inherent right of self-defence at this stage tends to show that the right to use self-defensive force on the territory of Afghanistan was at that time considered to arise, and, therefore, that an armed attack had occurred, even where the standard enunciated in the *Nicaragua* Merits judgment was not met. The assertion that the United States' use of force was justified by a right of self-defence against an armed attack by Afghanistan itself must be questioned.

[67] Lubell (n 1) 34.

[68] Sean D Murphy, 'Self-defence and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ? (2005) 99 AJIL 62, 67.

C. NON-STATE ACTORS AS AUTHORS OF ARMED ATTACKS: INDICTING THE REAL CULPRITS

Although there is a strongly held view amongst some commentators that an armed attack requires State involvement, State practice substantiates the conclusion that non-State actor attacks may be classified as armed attacks giving rise to the right of self-defence. The Security Council's recognition of the US right of self-defence in Resolutions 1368 and 1373 and near universal State endorsement of the victim State's own claim to be acting in self-defence against Al-Qaeda following the attacks are inconsistent with the position that State involvement is a requirement of the law.

Gray suggests that it may be open to question whether the events of 9/11 have resulted in a radical and lasting transformation of the law of self-defence or whether their impact should be limited to the specific circumstances of that case, a 'one-off… response to a particular incident based on Security Council affirmation and (almost) universal acceptance by States.'[69] To classify the legality of the US response to the attacks of 9/11 as a 'one-off' on the basis of overwhelming State endorsement is to take a cynical view of the rule of law and the well-established procedure for the formation of customary rules of international law. To accept this position would be to suggest that States are able to sanction otherwise illegal uses of force by mere, though extensive, political agreement. As has been argued, the landscape of the *jus ad bellum* is such that State resort to the use of force, and subsequent receptive responses, cannot be explained away as mere usage or

[69] Gray (n 1) 201. See also Dire Tladi, 'The Non-consenting Innocent State: The Problem with Bethlehem's Principle 12' (2013) 107(3) AJIL 570, 575 describing the events as exceptional.

comity.[70] Even if taken as novel, the overwhelming endorsement by States of the US right of self-defence in the wake of the 9/11 attacks would tend to support a newly formed, or forming, rule of law. As the ICJ has noted, 'reliance by a state on a novel right or an unprecedented exception to a principle might, if shared in principle by other states, tend towards a modification of customary international law.'[71]

In any event, the Security Council's affirmation of the inherent right of self-defence enshrined in Article 51 of the UN Charter and the invocation of mutual defence treaty arrangements by NATO and the OAS must be recognised as legal responses and not mere political ones. More importantly, since Article 51 of the UN Charter is expressly conditioned on the occurrence of an armed attack, and both Article 5 of the North Atlantic Treaty and Article 3(1) of the Rio Treaty link their collective defence mechanisms to the inherent right of self-defence recognised in Article 51, these institutional responses affirm the recognition of non-State actor attacks as 'armed attacks'. The weight of academic support has also shifted in favour of the position that a non-State actor attack, absent sufficient or even any State involvement, may amount to an armed attack within the meaning of Article 51 and the customary law on self-defence.[72]

[70] See text to n 134 in ch I.

[71] *Nicaragua* Merits (n 46) para 207.

[72] See eg Lubell (n 1); Yoram Dinstein, *War Aggression and Self-defence* (6th edn CUP 2017) 245-6; Christopher Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78(2) International Affairs 301, 307-8; Murphy, 'Self-defense and *Wall'* (n 68); Jordan J Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond (2002) 35 Cornell ILJ 533; Kimberley N Trapp, *State Responsibility for International Terrorism* (OUP 2011) ch 2.

I. *'The More Things Change…'*
The Right of Self-Defence against Non-State Actors in the Post 9/11 Era of International Law

To classify the extensive recognition of the US right of self-defence in the wake of the 9/11 attack as a 'one-off' would also be to suggest that this practice was not subsequently followed. On the contrary, international legal practice since that time has witnessed increasing assertions of a right of self-defence against attacks by non-State actors absent State involvement. Israel is considerably engaged in this practice, but States of varying geographical classifications such as Russia, Ethiopia, Colombia, and Turkey have also made such claims, providing evidence of a more general practice.

Beyond 9/11: Uses of Force against Non-State Actors in the Middle East, Africa, Europe, and South America.

MIDDLE EAST

Immediately preceding the events of 9/11, and continuing after those events, Israel made numerous claims of self-defence in response to attacks by non-State entities. Between 2001 and 2005 Israel suffered continuous attacks by Hezbollah and other terrorist groups against positions of the Israeli Defence Force (IDF) and other targets within its territory. In response, the IDF carried out military attacks in Lebanese territory in defence against continuing terrorist attacks.[73] In communications to the UN Secretary-General reporting military action taken in Lebanon pursuant to Article 51 of the Charter, or reserving the right to take such action following a terrorist attack directed from Lebanese territory, Israel alleged

[73] 2001 UNYB 448; 2002 UNYB 473; 2003 UNYB 516; 2004 UNYB 505; 2005 UNYB 551.

that the attacks were directed against its territory by the non-State group Hezbollah, with the active or passive support of Lebanon, the Syrian Arab Republic and Iran. In one such letter addressed to the Secretary-General in April 2001, Israel reported that following 'an act of aggression perpetrated by Hizbullah… Israel was compelled to respond. In light of the above, Israel exercised its legitimate right to self-defence…'. Israel further stated that its military operation was 'aimed at preventing the recurrence of such aggression from Lebanese soil.'[74] Similarly, in October that year, Israel further claimed:

> …Hizbullah, with the assistance of both the Lebanese and Syrian Governments, continues to launch attacks against Israel across the Blue line…. The continuation of unprovoked cross-border attacks on Israeli territory is due not only to Lebanon's failure to fulfil its international obligations, but to the ongoing support of the Government of the Syrian Arab Republic for Hizbullah's terrorist operations…[75]

Like the US did in its letter to the Security Council after the 9/11 attacks, Israel identified Hezbollah, the non-State entity, as the perpetrator of the attacks, rather than the State of Lebanon, on whose territory defensive force was used. In fact, Lebanon was recognised as a State unable to fulfil its international obligations.[76]

Israeli use of force on Lebanese territory and its claims of self-defence between 2001 and 2005 were not extensively considered in the Security Council. The Council's consideration of the situation of hostility on the Israeli-Lebanese

[74] Letter dated 18 April 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2001/385.

[75] Letter dated 24 October 2001 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General, UN Doc S/2001/1012. See further Letter dated 8 July 2002 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2002/743; Letter dated 11 January 2005 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2005/14.

[76] It is worthy of note that the Syrian Arab Republic, accused of providing active support to Hezbollah, was not targeted with defensive force.

border during this period overlooked Israel's claims of self-defence and instead focussed on the extension of the mandate of the United Nations Interim Force in Lebanon (UNIFIL) to broker a lasting peace in Lebanon. The Security Council condemned, in general terms, acts of violence across the Blue Line, from both sides of the border, resulting in death and injury, but did not specifically address Israel's alleged self-defensive operations on Lebanese territory over the period.[77] The international community as a whole also remained silent on Israel's claims, except in April 2001, when Israel's bombing of a Syrian position in Lebanon, resulting in damage to a Syrian radar installation, was strongly condemned by the European Union as 'an excessive and disproportionate reply'[78] and by Yemen as an act of aggression.[79]

Israel's use of force in Lebanon in 2006, however, received considerable international attention and was extensively discussed in the Security Council. Following the July 12 Hezbollah cross-border attack on Israeli forces in northern Israel, Israel wrote to the Security Council alleging Lebanon's responsibility for what it described as a 'belligerent act of war'.[80] Following protests before the Security Council by Lebanon and its denials of involvement,[81] Israel clarified its

[77] See eg UNSC Resolution 1461 (30 January 2003), UN Doc S/RES/1461; UNSC Resolution 1583 (28 January 2005), UN Doc S/RES/1583.

[78] Letter dated 23 April 2001 from the Permanent Representative of Sweden to the United Nations addressed to the Secretary-General, UN Doc S/2001/426.

[79] Note Verbale dated 23 April 2001 from the Permanent Mission of Yemen to the United Nations addressed to the Secretary-General, UN Doc S/2001/407.

[80] Identical Letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security, UN Doc S/2006/515.

[81] Identical Letters dated 13 July 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security, UN Doc S/2006/518; Identical Letters dated 17 July 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General

legal position, stating that it was not at war with Lebanon but was 'compelled to act repeatedly, not against Lebanon, but against the forces which Lebanon had allowed itself to be taken hostage by.'[82] It is clear that Israel considered it was within its inherent right of self-defence to act against Hezbollah on Lebanese territory, even without Lebanon's responsibility for the initial attacks.

In the Security Council's consideration of the matter, most participating States recognised Israel's right of self-defence as a matter of principle in the circumstances,[83] an evident shift in response when juxtaposed against the reception of Israel's similar claims of the 1980s. In its resulting Resolution 1701, the Security Council recognised the Hezbollah attacks as the trigger of the current crisis.[84] While it does not recognise Israel's right of self-defence in its text, the Resolution confirms that the affirmations of Israel's right of self-defence in the preceding Council debates and discussions were made in the context of attacks by Hezbollah, a non-State group. The Resolution itself calls for an end to all hostilities, particularly all attacks by Hezbollah and all '*offensive* military operations'[85] by Israel, suggesting that its provisions were without prejudice to Israel's defensive operations. This reading is supported by statements made in the Security Council before the vote on the Resolution; the US representative, for

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and the President of the Security, UN Doc S/2006/529; UNSC 5489th meeting (14 July 2006), UN Doc S/PV. 5489, 4.

[82] [2006] UNYB 580. In the Council meeting Israel reiterated that it 'has no quarrel with Lebanon. Israel has no battle with Lebanon. Israel has no war with Lebanon.' – UNSC 5503rd Meeting (31 July 2006) UN Doc S/PV.5503, 4.

[83] UNSC 5488th Meeting (13 July 2006) UN Doc S/PV.5488; UNSC 5489th Meeting (n 81); UNSC 5511st Meeting (11 August 2006), UN Doc S/PV.5511.

[84] UNSC Resolution 1701 (11 August 2006), UN Doc S/RES/1701.

[85] ibid (emphasis mine).

example, noted that the Resolution accomplished the objective of putting in place a full cessation of hostilities while ‘reserving the right of any sovereign State to defend itself.’[86] The Council of the European Union also recognised Israel’s inherent right of self-defence following the July 12 attacks.[87] Criticisms or condemnations of Israeli military action in Lebanon in 2006 were largely based on the perceived disproportionality of the operation,[88] which featured massive air strikes against Lebanese infrastructure and civilian targets, alongside extensive ground and naval operations, resulting in very many civilian deaths and casualties.[89]

Since the passage of Resolution 1701, Israel has resumed the use of military force against Hezbollah on Lebanese territory. In January 2015, following the killing of two Israeli soldiers and the injuring of seven others in an ambush on their convoy by militants of the Lebanese Hezbollah, Israeli forces directed airstrikes and artillery fire against Hezbollah positions in southern Lebanon.[90] Israel made no report to the Security Council pursuant to Article 51 of the Charter in relation to this incident, but the US Government issued a statement recognising

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[86] UNSC 5511st Meeting (n 83) 5 (per US), 10 (per Greece).

[87] Council of the European Union, Press Release 2744th Council Meeting (17-18 July 2006), 11575/06 (Presse 219) <http://data.consilium.europa.eu/doc/document/ST-11575-2006-INIT/en/pdf> accessed 31 August 2020.

[88] See UNSC 5489th Meeting (n 81) 7 (per Russia), 9 (per Argentina), 10 (per Qatar), 11 (per China), 12 (per Japan). See further Letter dated 19 September 2009 from the Permanent Representative of Cuba to the United Nations addressed to the Secretary-General, UN Doc A/61/472, paras 142-5, noting the Non-Aligned Movement’s condemnation of the Israeli use of force as indiscriminate and inconsistent with international humanitarian law and the law of the Charter.

[89] Gray (n 1) 213.

[90] Keesing’s (2015) vol 61(1) 53826.

Israel's right of self-defence in the circumstances.[91] The meeting of the Security Council on that same day focused on the ongoing conflict in Syria and the implementation of relevant Security Council Resolutions. There was no consideration of the Israeli use of force against Hezbollah positions in Lebanon.[92] Similarly, the members of the Security Council did not comment on later Israeli defensive action following rocket fire and an explosive device attack carried out by Hezbollah.[93] Israel did, however, on these occasions reserve, in letters to the Security Council, its right to take 'all necessary measures to protect its people'.[94]

Admittedly, Israel repeatedly used language in its communications that could be construed as suggesting Lebanese and/or Syrian responsibility for the attacks carried out against it. In its letter to the Secretary-General in April 2001, for example, Israel accused Lebanon of failure to exert its authority over terrorist elements and land under their control in the border area of its territory, and both Lebanon and Syria of encouraging and supporting the launch of provocative acts of terrorism and aggression from Lebanon's southern territory. As a consequence of this, Israel concluded that the Government of Lebanon, along with the Syrian Arab Republic, 'bears *direct responsibility* for violations emanating from Lebanese

[91] Jen Psaki (State Department Spokesperson), Press Statement – 'Hezbollah's Attack on Israeli Defense Forces' (28 January 2015) <https://2009-2017.state.gov/r/pa/prs/ps/2015/01/236884.htm> accessed 31 August 2020.

[92] See UNSC 7369th Meeting (28 January 2015), UN Doc S/PV.7369.

[93] Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006) (26 February 2016), UN Doc S/2016/189, paras 2, 8-10.

[94] Identical Letters dated 20 December 2015 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/1003; Identical Letters dated 4 January 2016 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2016/4.

territory.'[95] Most recently, in its communications to the Security Council following violent attacks by Hezbollah in December 2015 and January 2016, Israel noted that it 'holds the Government of Lebanon fully responsible for any attacks coming out if its territory.'[96] Gray suggests that Israel does not, by its language, expressly claim a right to act against non-State actors in the absence of territorial State involvement.[97]

It can be concluded, however, from the overall tenor of the Israeli communications and its military response in Lebanon that Israel considered its right of self-defence to arise following attacks from Hezbollah, with or without the support of Lebanon or Syria. While Israel alleged that those States had violated various international law obligations by their acts and omissions, particularly their obligations under Security Council Resolution 1373 to refrain from actively or passively supporting terrorist activities,[98] it does not, in any of its communications, accuse either State of an armed attack, or act of aggression, against it. It did, however, expressly make such accusations against Hezbollah.[99] Consistent with

[95] Israel 18 April 2001 Letter (n 74) (emphasis mine). For similar language see also Letter dated 6 February 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2001/111; Identical letters dated 16 February 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc S/2001/142; Letter dated 16 April 2001 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc S/2001/367; Letter dated 5 September 2002 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2002/986; Letter dated 27 January 2003 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2003/96; Identical letters dated 29 June 2005 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2005/423.

[96] Israel December 2015 Letter (n 94); Israel January 2016 Letter (n 94).

[97] Gray (n 1) 211, 214-15.

[98] See eg Israel October 2001 Letter (n 75); Israel September 2002 Letter (n 95).

[99] Text to nn 74-75.

this, with the exception of incidents between May and July 2001, Israel targeted only Hezbollah facilities and training camps situated within Lebanese territory.[100] While it may be debated whether Israel considered Lebanon, or Syria, legally responsible for the continuing attacks against it, it is clear that it considered that these States were responsible for the attacks in the sense of making them possible, and therefore, the Israeli use of force in self-defence necessary.[101]

Israel's most recent claims of Lebanese responsibility were made in the context of, and with specific reference to, UNSC Resolution 1701 which expressly emphasises the need for the Government of Lebanon to extend its control to all Lebanese territory and affirms that each party is responsible for ensuring that no action is taken contrary to the ceasefire called for by the Resolution.[102] To the extent that Lebanon had failed to prevent the attacks against Israel originating in the south of its territory, it bore responsibility for them within the meaning of the Resolution. Israel repeatedly maintained the absence of a conflict with Lebanon itself, an assertion which points to a non-State actor self-defence reading of the Israeli claims.

Israel has also invoked its inherent right of self-defence with respect to uses of force in the Occupied Palestinian Territories, following terrorist attacks. In October 2004 the Permanent Observer of Palestine brought to the UNSC a complaint of what it deemed an act of Israeli aggression in the Occupied

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[100] On diverse occasions between May and July in 2001, the targets Israel attacked within Lebanon included Syrian radar installations and military positions. See 2001 UNYB 448-450.

[101] See eg Israel January 2005 Letter (n 75) ('…terrorist attacks against Israelis *enabled by the complicity of the Government of Lebanon,* have continued unabated…, *and with the support of the Syrian and Iranian regimes that have long sponsored, trained and financed these terrorist groups.*')

[102] UNSC Resolution 1701 (n 84).

Palestinian Territories. It reported a significant launching of troops, tanks and helicopters, resulting in deaths and injury to civilians, demolition of homes, nurseries and schools, and the destruction of farmlands, economic installations, and other infrastructure such as roads and water and electricity networks.[103] In response, Israel alleged that Qassam rockets fired from northern Gaza had struck a civilian home, killing 2 children, as the last in a continuing onslaught of terrorist incidents. The non-State group Hamas, classified by many States as a terrorist organisation, claimed responsibility for the attack.[104] Noting the failure of the Palestinian Authority to halt the firing of Qassam rockets on Israeli communities, Israel concluded that it was 'compelled to act in accordance with its recognised right and duty of self-defence in an effort to halt the firing of these rockets and the murder of its citizens.'[105]

Israel's use of force in northern Gaza was overwhelmingly condemned in the Security Council for its disproportionality, going well beyond what was required to crush the activities of the extremists.[106] Arab States condemned the operation as an act of aggression outright.[107] Despite this, there was clear and express recognition of Israel's inherent right of self-defence in the circumstances. Germany declared that there was 'no doubt' that Israel had the right to act in self-defence to

[103] UNSC 5049th Meeting (4 October 2004), UN Doc S/PV.5049, 3.

[104] ibid 5.

[105] ibid.

[106] UNSC 5049th Meeting (n 103) 8 (per Algeria), 9 (per Spain), 10 (per Brazil), 12 (per Russia and Germany), 13 (per Benin), 14 (per Angola), 15 (per France), 19 (per Netherlands on behalf of the EU).

[107] ibid 17 (per Tunisia on behalf of the Group of Arab States).

protect its citizens against militant attacks.[108] Express recognition of Israel's Article 51 right also came from Spain, Romania, Chile, the UK, and the Netherlands on behalf of the EU.[109] A draft Resolution condemning the Israeli action as excessive was vetoed by the US on the basis that the Resolution failed to acknowledge the legitimate need for Israel to defend itself following the rocket attacks.[110]

Hamas and Palestinian Islamic Jihad rocket fire against Israel persisted in the following years, prompting varied military responses by Israel, including large-scale military operations in northern Gaza,[111] with the objective of halting rocket fire against Israeli towns and destroying tunnels dug by militants to facilitate the smuggling of weapons in Gaza.[112] On each occasion Israel justified its action as self-defence.[113] Most recently, Israel reported military action taken in November 2019 against Baha Abu al-Ata, a senior commander of the Palestinian

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108 UNSC 5049th Meeting (n 103) 12.

109 ibid 9 (Spain), 10 (Romania and Chile), 16 (the UK), 19 (Netherlands).

110 See eg UNSC 5051st Meeting (5 October 2004), UN Doc S/PV.5051, 2 (per US).

111 Israel launched large-scale military operations in November 2006 (*Operation Autumn Clouds*), December 2008 (*Operation Cast Lead*), November 2012 (*Operation Pillar of Defense*), and July 2014 (*Operation Protective Edge*). In January 2010 Israel also carried out a precision strike against Hamas targets in Gaza – see Identical Letters dated 12 January 2010 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2010/21.

112 See e.g. UNSC 7214th Meeting (10 July 2014), UN Doc S/PV.7214, 6 (per Israel).

113 Identical Letters dated 3 October 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2006/798; Identical Letters dated 27 December 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2008/816; Identical Letters dated 12 November 2012 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2012/826; Identical Letters dated 7 July 2014 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2014/474.

Islamic Jihad terrorist organisation, in Gaza which it classified as a 'defensive response' to planned 'additional attacks targeting southern Israel in the near future.'[114] As happened in 2004 following its military incursion into northern Gaza, most States in the Security Council, in cases where there was an assessment, condemned Israel's use of force as disproportionate or as inconsistent with international humanitarian law in the light of the high number of civilian casualties and extensive infrastructure damage,[115] yet confirmed Israel's right to respond to Hamas attacks from inside Gaza in exercise of its right of self-defence.[116] It is clear that Israel considered each attack against it as directed by a non-State actor, without the support of any State. It consistently classified its defensive action as a response to terrorism[117] and expressly attributed the attacks against it to Hamas and other Palestinian terrorist organisations including the Palestinian Islamic Jihad.[118]

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[114] Identical Letters dated 12 November 2019 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2019/874.

[115] In 2006, for example, the UN Assistant Secretary-General for Political Affairs reported 82 persons killed, 260 injured and extensive infrastructure damage including the demolition of at least 18 homes, a mosque and NGO offices in the week-long *Operation Autumn Clouds* – UNSC 5564th Meeting (9 November 2006) UN Doc S/PV.5564, 3. Over 1300 persons were reported killed in Israel's 2008 *Operation Cast Lead* – see Amnesty International UK, 'Gaza: Operation 'Cast Lead'' <https://www.amnesty.org.uk/gaza-operation-cast-lead> accessed 31 August, 2020.

[116] UNSC 5564th Meeting (n 115), 11 (per France), 12 (per Slovakia), 13 (per US), 14 (per Congo), 15 (per Greece and Denmark), 16 (per UK), 18 (per Argentina), 22 (per Finland, on behalf of the EU). See also UNSC 6060th Meeting (31 December 2008) UN Doc S/PV.6060 per representatives of South Africa, Italy, Vietnam, Costa Rica, Belgium, and Croatia; UNSC 7220th Meeting (18 July 2014) UN Doc S/PV.7220 per representatives of United States, Nigeria, Lithuania, Luxembourg, United Kingdom, Russia, and Rwanda.

[117] See e.g. UNSC 5049th Meeting (n 103) 5 ('…if not for terrorism, there would be no Israeli defensive action.')

[118] See eg Identical Letters dated 22 December 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2008/807.

Israel's defensive use of force in the Occupied Palestinian Territory is of particular legal significance. A right of self-defence has been claimed by Israel, and expressly recognised by States, in circumstances where no State opponent can be determined to exist – the Palestinian Authority, internationally recognised as the representative of the people of Palestine, was not at the time of the majority of Israel's defensive actions, recognised by Israel and a vast number of the international community, and institutionally within the UN, as the governing entity of an established State.[119] Further, the territory from which attacks were directed against Israel was not under the authority of another State. On the contrary, this territory was under the authority of Israel, as Occupying Power. Israel's claims of self-defence against the non-State actor group Hamas, and the international recognition of those claims, indicate that States recognise a right of self-defence arises against a non-State actor's attacks absent State involvement. It is also of note that States recognised Israel's right of self-defence in the face of threats emanating from the Occupied Palestinian Territory even after the International Court of Justice appears to have excluded that possibility in its *Israeli Wall* Advisory Opinion.[120]

The international legal response to Israel's use of force in Syria following non-State actor attacks, however, represents an anomaly in this survey of practice.

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[119] The UNGA passed a motion changing Palestine's 'entity' status to 'non-Member observer State' by a vote of 138 to 9, 41 abstentions – UN Doc. A/67/L.28 (26 November 2012).

[120] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, para 138:

> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

In 2003, Israeli fighter jets carried out airstrikes against an alleged training camp for Palestinian terrorists, including Palestinian Hamas and Palestinian Jihad. The strikes were carried out the day following a suicide bomb attack in the northern Israeli town of Haifa, which killed at least 21 people. Islamic Jihad was identified as the perpetrator of the attack.[121] Israel alleged that Syria provided safe harbour, training facilities, funding and logistical support to Islamic Jihad in violation of international law, particularly Security Council Resolution 1373, and claimed to be acting in accordance with Article 51 of the Charter in its response to the Haifa massacre.[122] In making its case to the Security Council, Israel argued that its action against terrorist facilities in Syria was 'no different than the forcible measures recently taken by other States against terrorist groups and their state sponsors, with the support of the international community.'[123] For its part, Syria classified the Israeli act as an aggression against it and denied that the target was a terrorist training camp, but rather a private residence to a small number of Palestinian refugees.[124]

Unlike its uses of force in Lebanon and in the Occupied Palestinian Territories, Israel's use of force in Syria received total condemnation from the vast majority of States before the Security Council. There was no recognition of Israel's right to act in self-defence in the circumstances. On the contrary, a few States expressly rejected Israel's Article 51 justification. Pakistan, Morocco and Jordan

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[121] Keesing's (2003) vol. 49(10) 45673.

[122] Identical letters dated 8 October 2003 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2003/972. See also UNSC 4836th Meeting (5 October 2003) UN Doc S/PV. 4836, 5-7.

[123] ibid.

[124] Keesing's (2003) vol 49(10) 45673.

all considered that Israel's use of force did not meet the strict requirements set out in the Charter for the exercise of the right of self-defence, seeming to suggest that Israel had not suffered an armed attack within the meaning of Article 51 triggering the right of self-defence.[125] It is unclear, however, whether these States were rejecting a right of self-defence against non-State actor attacks absent involvement of the territorial State or whether they considered Article 51 inapplicable because they deemed prior forceful actions by Palestinians to be legitimate.[126]

The general condemnation of Israel's forcible measures in Syria need not be construed as a rejection of a right of self-defence following non-State actor attacks. Statements in the Security Council largely focussed on Israel's use of force as a detour from the 'road map' for peace initiated earlier that year as a guide to a lasting Israeli-Palestinian peace settlement, a term of which was an unconditional ceasefire between the parties. Most States centred their responses on the implications of Israel's use of force in Syria for the success of the initiative, while leaving its claim of self-defence unaddressed.[127] The utility of this practice for mapping the law on self-defence against non-State actor attacks is, therefore, much reduced.

Overall, Israel's claims of a right of self-defence against non-State actor attacks in connection with its uses of force during this period, and the international legal response to them, support the existence of a right to use force directly against

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[125] UNSC 4836th Meeting (n 122) 8 (per Pakistan), 17 (per Morocco), 18 (per Jordan).

[126] Pakistan, for instance, stated that 'State power must distinguish between acts of terrorism and the legitimate struggle of peoples under foreign occupation for self-determination and liberation.' - ibid 8.

[127] UNSC 4836th Meeting (n 122) 9-10 (per China, UK, Russia, Germany, and France).

non-State actors in the exercise of self-defence as was asserted by the United States following the 9/11 attacks. Even where Israel's uses of force were condemned as disproportionate, such condemnation was tempered by express recognition of its right of self-defence by some States, and arguably implicitly by others since condemnation on the basis of disproportionality presupposes the application of the law governing self-defence to the instances under consideration.

Beyond Israel, a notable number of other States in the Middle East have also recently claimed a right to act in self-defence against non-State actor attacks and threats emanating from foreign territory. While critical of Israel's claims to self-defence against non-State groups in Lebanon and the Occupied Palestinian Territories on occasion, some members of the League of Arab States have themselves asserted the right to use force against terrorist elements in neighbouring countries. In response to a request of the President of the Republic of Yemen based expressly on 'the right of self-defence set forth in Article 51 of the Charter of the United Nations',[128] Bahrain, Qatar, Saudi Arabia, the United Arab Emirates and Kuwait jointly communicated to the Security Council their claim to use military force 'for the protection of Yemen and its people and to help Yemen to counter terrorist organisations',[129] specifically the Houthi militias allegedly backed by Iran. While the claim of collective self-defence of Yemen is questionable where the Houthi insurgency operates within Yemeni territory rather than

[128] Identical Letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/217, 4.

[129] ibid 2. These letters are believed to be the first instance of collective reporting pursuant to Article 51 of the Charter – see Sievers and Daws, *The Procedure of the UN Security Council* (4th edn, OUP 2014), Update to Chapter 7 § 12 (online supplement) <https://www.scprocedure.org/chapter-7-section-12> accessed 31 August 2020.

extraterritorially,[130] the States also claimed to be acting in the collective defence of Saudi Arabia against an imminent Houthi attack.[131]

Iran has also expressly relied upon the right of self-defence recognised in Article 51 of the Charter to justify military action in neighbouring territories following terrorist attacks. In a September 2018 letter to the Security Council, Iran reported taking 'limited and measured military action… targeting a terrorist group located in northern Iraq.'[132] The military action was described as precisely directed against the headquarters and leadership of the terrorist group Democratic Party of Iranian Kurdistan (PDKI), which was undertaking cross-border attacks 'against the will and despite the objections of the Iraqi Government',[133] representing a distinct claim of non-State actor self-defence. In the following month, Iran again notified military action taken extraterritorially in the aftermath of a terrorist attack within its borders killing 24 nationals and wounding 60 others. As before, Iran relied upon the right of self-defence recognised in Article 51 of the Charter to justify action taken, in this

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[130] The use of force in Yemen at the request of President Hadi is better justified as an invitation of the legitimate government to intervene. The US has also conducted missile strikes on radar facilities in Houthi-controlled territory in Yemen with the consent of the government of Yemen. While it considered that a report pursuant to Article 51 was, therefore, unnecessary, the US nevertheless informed the Council of its actions – See Letter dated 15 October 2016 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/2016/869.

[131] Qatar March 2015 Letters (n 128) 5. In March 2018, the UK Foreign Secretary noted the UK's support for Saudi Arabia's right to defend its national security against missile attacks from Yemen – See 'Foreign Secretary remarks on the visit of Saudi Crown Prince Mohammed bin Salman' (8 March 2018) <https://www.gov.uk/government/speeches/foreign-secretary-remarks-on-the-visit-of-saudi-crown-prince-mohammed-bin-salman> accessed 31 August 2020.

[132] Letter dated 11 September 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2018/830.

[133] ibid.

instance, on Syrian territory.[134] While Iran did allege that members of the al-Ahvaziya group, which claimed responsibility, were recruited, trained, armed and funded by Saudi Arabia, no claim of self-defence was made against that country, neither was military action taken by Iran on its territory. While the Security Council condemned the terrorist attack on Iran in a press statement,[135] there was no institutional consideration of the subsequent self-defence claim.

Following terrorist attacks on its territory, Turkey has also claimed a right to act in self-defence against the PKK in Northern Iraq, rather than against the State itself. In 2007, after gun attacks killed 13 soldiers and 13 civilians on a bus, the Turkish legislature overwhelmingly authorised the use of force against PKK targets in Iraq.[136] Subsequently, Turkey began an operation with aerial bombardment of Kurdish rebel positions just inside the Iraqi border. By February 2008, Turkey's campaign had culminated in 'Operation Sun', a ground offensive involving the deployment of thousands of Turkish troops into northern Iraq.[137]

As with previous action against the PKK in Iraq between 1995 and 1997, Turkey made no report to the Security Council pursuant to Article 51 of the Charter.[138] It was clear, however, that Turkey was not acting with the consent of the Government of Iraq. While the States had signed a Memorandum of

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[134] Identical Letters dated 3 October 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2018/891.

[135] Security Council Press Statement on Terrorist Attack in Ahvaz, Iran (24 September 2018), SC/13523 < https://www.un.org/press/en/2018/sc13523.doc.htm> accessed 31 August 2020.

[136] Keesing's (2007) vol 53(10) 48219.

[137] Christian J Tams, 'The Use of Force against Terrorists' (2009) 20(2) EJIL 359, 379.

[138] See Gray (n 1) 147-49.

Understanding,[139] and subsequently an agreement,[140] for joint action aimed at dismantling the PKK safe haven in northern Iraq, the Iraqi authorities specifically rejected the Turkish military's request to be allowed to cross the border in pursuit of PKK elements.[141] Unlike Kenyan and Ethiopian uses of force in Somalia, where the consent of the territorial State may have also been present, [142] Turkey's use of force in Iraq could only be justified as a measure in self-defence. In responding to allegations of human rights abuses during the operation in a note to the Human Rights Council, Turkey classified its actions as a 'counter-terrorism operation'. Turkey emphasised that its use of force 'targeted solely the PKK/KONGRA-GEL terrorist presence in the region' and that it 'remains a staunch advocate of the territorial integrity and sovereignty of Iraq',[143] clearly signalling it believed Iraq had no part in the attacks to which it was responding with military force.

Before the start of Turkey's military operation, as the threat of action was mounting, the international community responded in a two-fold manner – States condemned the recent PKK attacks against Turkish civilian and soldiers and expressed understanding of Turkey's security concerns, but implored Turkey to use non-forcible and diplomatic measures to bring about an end to PKK attacks from northern Iraq to avoid bringing instability to the only part of the country not

[139] Keesing's (2007) vol 53(12) 48093.

[140] Keesing's (2007) vol 53(12) 48150.

[141] ibid.

[142] See text to nn 175, 181.

[143] Note Verbale dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office in Geneva addressed to the Secretariat of the Human Rights Council, UN Doc A/HRC/7/G/15.

then plagued by conflict.[144] Once the operation had begun, however, responses were generally more supportive. There appears to have been tacit US approval for the Turkish operation in northern Iraq. Within weeks of its start, President Bush offered to share US intelligence with Turkey and to increase political and military cooperation in counteracting the PKK, which he labelled a 'common enemy'.[145] In particular, the US provided direct assistance to Turkey in its operation against the PKK by supplying military intelligence about potential PKK targets and by clearing northern Iraqi airspace to enable Turkish strikes.[146] The EU repeatedly recognised Turkey's efforts as measures 'to protect its population and fight terrorism',[147] even though it expressed concern over the possible disproportionality of the military action as it extended in time and intensity.[148] There was, however, no principled condemnation of the Turkish military action or rejection of its right to act extraterritorially in self-defence against the PKK. While there was not, on the other hand, an unequivocal and express endorsement of Turkey's right of self-defence in the circumstances, the responses of States indicate a general acceptance of the Turkish action, with some reservations as to its proportionality, but not the basis

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[144] See Tom Ruys, '*Quo Vadit Jus ad Bellum*?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq', (2008) Melb JIL 334, 339-40 (noting declarations made by the European Union, the United Kingdom, the United States, France, and other countries).

[145] Keesing's (2007) vol 53(11) 48265.

[146] Ruys (n 144) 340.

[147] ibid 343 (citing EU Presidency Statement of 22 October 2007 on the Terrorist attacks of the PKK in Turkey). See also: Presidency of the EU, 'EU Presidency Statement on the Military Actions Undertaken by Turkey on Iraqi Territory' (25 February 2008) <http://www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html> accessed 31 August 2020.

[148] EU Presidency Statement of 25 February (n 147).

underlying the claim to legality. States considered Turkey to be acting in self-defence.

Turkey has since continued military action in Iraq. In response to Iraqi protests to Turkish deployment of military forces and the establishment of bases in Bashiqa in 2015, Turkey claimed to be acting to assist Iraq in its struggle against ISIS militants in Mosul.[149] Iraq strongly rejected Turkey's claim to be acting with Iraq's support, and asserted that any military movements within Iraqi territory aimed at countering terrorism must be preceded by consultation with the federal government and be done with its approval.[150] Before the Security Council, while maintaining that it acted with the consent of Iraq, Turkey also claimed to be under attack by Daesh and PKK terrorists in areas of Iraqi territory beyond the control of the Iraqi government and, therefore, that it was entitled also to act in its own defence.[151] Despite persistent protests from Iraq,[152] Turkey continued to assert its right to use force in self-defence on Iraqi territory to thwart attacks from Daesh and the PKK, while maintaining its respect for Iraq's territorial sovereignty.[153] There was very little discussion of the legality of Turkey's claims in the Security

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149 UNSC 7589th Meeting (18 December 2015), UN Doc S/PV.7589, 4-5.

150 Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2015/963. Iraq also reserved the right to defend itself against Turkish violation of its territory.

151 UNSC 7589th meeting (n 149) 5.

152 See eg Identical letters dated 17 October 2016 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2016/870; Identical letters dated 9 May 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2017/410.

153 See eg Letter dated 16 November 2016 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2016/973. Turkey continued to carry out airstrikes against Kurdish militants in 2018.

Council.[154] Arguably also, Iraq's protest ought not to be construed as a rejection of the classification of non-State actor attacks as armed attacks within the law of self-defence but rather as an assertion of the territorial State's right to be consulted before self-defence can be relied upon in the circumstances.[155]

More recently, Turkey has claimed the right to carry out defensive operations against non-State groups on the territory of the Syrian Arab Republic. In 2017, Turkey notified to the United Nations military action taken both in Iraq and Syria against PPK positions from which it alleged attacks were launched against Turkish territory, citizens and border guards.[156] While claiming its inherent right of self-defence, Turkey noted it remained 'unequivocally committed to the territorial integrity and unity of Iraq and Syria' and that it had 'surgically targeted PKK and its affiliates'.[157]

Again in January 2018, citing the 'recent increase in rocket attacks and harassment fire directed at… Turkey from the Afrin region of Syria, which is under the control of the PKK/KCK/PYD/YPG terrorist organization',[158] Turkey initiated a military operation against non-State actor elements on Syrian territory, targeting only the terrorists and their facilities and equipment. Turkey expressly based its

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[154] Gray (n 1) 224.

[155] In its letter to the Security Council (n 150), Iraq specifically lamented that Turkey's actions were 'taken without prior coordination or consultation with the federal Government of Iraq'.

[156] Identical Letters dated 25 April 2017 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2017/350.

[157] Turkey April 2017 Letters (n 156).

[158] Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2018/53, 1.

action on the right of self-defence 'as defined in Article 51 of the Charter' while maintaining its unequivocal commitment to the territorial integrity and political unity of Syria.[159] Similarly, in October 2019 Turkey launched Operation Peace Spring with the stated intention of countering imminent terrorist threats emanating from Syria territory.[160] The international community remained generally silent following Turkey's military operation in Afrin.[161] In closed-door talks at the Security Council, States encouraged Turkey to exercise restraint but appeared to have endorsed the claim of self-defence against the PKK/KCK/PYD/YPG in principle.[162]

THE AFRICAN CONTINENT

Several States across the African Continent have also claimed a right of self-defence against non-State actors in the past 19 years. In 2001, Liberia alleged that the Government of Guinea had allowed Liberian dissidents present in Guinean territory to carry out attacks against Liberia aimed at overthrowing the Liberian Government. It also accused the Guinean Army of providing military support to the dissidents.[163] In response, Liberia took forceful action against dissidents on

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[159] Turkey January 2018 Letters (n 158) 2.

[160] Letter dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2019/804.

[161] Anne Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs', EJIL Talk! Blog (30 January 2018) <https://www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs/> accessed 31 August 2020.

[162] Mail Online, 'UN Security Council Refrains from Condemning Turkey' (22 January 2018) <https://www.dailymail.co.uk/wires/afp/article-5299687/UN-Security-Council-refrains-condemning-Turkey.html> accessed 31 August 2020. NATO Secretary-General, Jens Stoltenberg, stated that 'Turkey… have the right to self-defence, but it is important that this is done in a proportionate and measured way' – NATO Joint Press Conference (25 January 2018) <https://www.nato.int/cps/en/natohq/opinions_151089.htm> accessed 31 August 2020.

[163] Letter dated 11 May 2001 from the Chargé d'affaires a.i. of the Permanent Mission of Liberia to the United Nations addressed to the Secretary-General, UN Doc S/2001/474; Letter dated 4 June 2001 from the Permanent Representative of Liberia to the United Nations addressed to the President of the Security Council, UN Doc S/2001/562; Letter dated 6 September 2001 from the

Guinean territory, claiming a right to act against them in self-defence in the wake of persistent armed attacks against its territory.[164] While Liberia alleged Guinean support for the dissident activity, it laid responsibility for the attacks with the 'dissidents opposed to the constitutionally elected Government of Liberia'.[165] Both the Secretary-General and the President of the Security Council, in separate statements,[166] acknowledged the attacks against Liberia and called upon States in the region to take action to prevent armed groups and individuals from using their territory to prepare and commit attacks on neighbouring countries. While both statements called for a resolution to the conflict through dialogue rather than violence, there was no comment on Liberia's self-defence claim in those or any subsequent statement. The Security Council considered the situation in Guinea generally and condemned Liberia for its role in the illicit diamond trade. However, it made no pronouncement on Liberia's claims of self-defence and they were not raised in discussion in the Council's proceedings.

Rwanda also alleged that its sovereignty and territorial integrity were continuously violated by armed forces operating from the territory of the Democratic Republic of Congo (DRC), which had carried out a series of attacks

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Permanent Representative of Liberia to the United Nations addressed to the President of the Security Council, UN Doc S/2001/851.

[164] Letter dated 20 March 2002 from the Minister of Foreign Affairs of Liberia addressed to the President of the Security Council, UN Doc S/2002/310. While Liberia did not specify where such measures were taken, it is evident that measures were directed against dissidents overseas.

[165] Liberia September 2001 Letter (n 163) 2.

[166] Secretary-General Press Release, 'Secretary-General Concerned by Upsurge of Fighting in Liberia; Appeals for Halt to Violence, Dialogue' (11 February 2002), SG/SM/8121 <https://www.un.org/press/en/2002/sgsm8121.doc.htm> accessed 31 August 2020; Press Statement on Liberia by President of the Security Council (12 February 2002) SC/7301 <https://www.un.org/press/en/2002/sc7301.doc.htm> accessed 31 August 2020.

resulting in civilian deaths (totalling 160 in one instance) and extensive damage to property.[167] Rwanda reserved the right to respond in self-defence if the Government of the DRC failed to remove the threat posed by ethnic Hutu rebels to Rwanda.[168] The international response to the Rwandan claim was lukewarm. There was no consideration of its claim of self-defence in the UN Security Council. Following informal consultations, the President of the Council, on its behalf, demanded that Rwanda withdraw any forces it may have had in the territory of the DRC. Although it recognised the threat posed by the presence and actions of ex-FAR/Interahamwe forces in the DRC, the Council considered that the threat or use of force by Rwanda would undermine peace initiatives adopted by that and other regional States less than a month prior.[169] Similarly, the UN Secretary-General urged Rwanda to refrain from any military action in deference to the established process for the disarming and repatriation of the ex-FAR/Interahamwe rebels still present in DRC territory.[170] The Peace and Security Council of the African Union, while acknowledging the presence of the ex-FAR/Interahamwe rebels in the DRC as a 'security problem for Rwanda', urged Rwanda to refrain from any unilateral

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[167] Letter dated 30 November 2004 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, UN Doc S/2004/933.

[168] Letter dated 6 December 2004 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, UN Doc S/2004/951, para 2. For an earlier express claim to self-defence see Letter dated 16 August 2004 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, UN Doc S/2004/652, 3.

[169] Statement by the President of the Security Council (Made on behalf of the Security Council at the 5095th Meeting, 7 December 2004), UN Doc S/PRST/2004/45.

[170] UN Secretary-General, Press Release SG/SM/9631 (3 December 2004) <http://www.unis.unvienna.org/unis/en/pressrels/2004/sgsm9631.html> accessed 31 August 2020.

action in the light of the implications for the on-going peace process.[171] While there was no express recognition of Rwanda's right of self-defence following non-State actor attacks, the international response signals sympathy for the Rwandan position and recognised the presence of the armed groups in the DRC as a credible threat. As was the case with Israel's use of force in Syria in 2003, general concern for the ongoing peace process shifted the focus of response away from Rwanda's self-defence claims.

Ethiopia similarly claimed a right of self-defence to resist repeated attacks from the Union of the Islamic Courts (UIC) based in Somali territory. On 30 November 2006 Ethiopia's legislature authorised military action 'to counter and stand up to any attacks or incursions on Ethiopia'.[172] Subsequently, Ethiopia launched its first major offensive on 24 December against the UIC, deploying ground troops deep into Somalia and conducting air strikes on Islamist positions and airports to cut off the supply of military supplies to the UIC. According to the Ethiopian Prime Minister, Ethiopia had no intention to 'meddle in Somalia's internal affairs'.[173] Although there was no official report by Ethiopia to the Security Council of action taken by it in self-defence, in Security Council proceedings, the special representative of the Secretary-General noted that Ethiopia's Prime Minister had declared in an official statement that his country had 'taken self-defensive measures and started counter-attacking the aggressive extremist forces of the

[171] Letter dated 8 December 2004 from the Chargé d'affaires a.i. of the Permanent Mission of Nigeria to the United Nations addressed to the President of the Security Council, UN Doc S/2004/966.

[172] Keesing's (2006) vol 52(11) 47562.

[173] Keesing's (2006) vol 52(12) 47620.

Islamic Courts and foreign terrorist groups.'[174] Though mention was made of a counter-offensive to UIC preparations for all-out war against the Transitional Federal Government (TFG),[175] action was clearly based, at least in part, on a right to act extraterritorially in self-defence against non-State actor elements. The international community remained silent following the Ethiopian defensive operation. The US appears to have tacitly supported the action.[176] Although the Ethiopian assertions were made known to the Security Council, there were no public discussions of the legality of its use of force in Somali territory in general, nor its claim of self-defence in particular.[177] No condemnation of the Ethiopian military response has been recorded.

Following a spate of al-Shabab kidnappings, Kenya sent troops into Somali territory to target the Islamist military group.[178] Prior to the operation, Kenya's Internal Security Minister claimed the country's 'territorial integrity is threatened with serious security threats of terrorism… It means we are now going to pursue the enemy, *who are the Al Shabaab,* to wherever they will be, even in their country.'[179] Kenya subsequently launched 'Operation Defend the Nation' to protect against Al-Shabaab kidnappings and attacks.[180] Again, a distinct claim of self-

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[174] UNSC 5614th Meeting (26 December 2006), UN Doc S/PV.5614, 3.

[175] Gray (n 1) 222.

[176] ibid 221.

[177] ibid 222.

[178] BBC News, 'Kenya sends troops into Somalia to hit al-Shabab' (17 October 2011) <http://www.bbc.co.uk/news/world-africa-15331448> accessed 31 August 2020.

[179] Daily Nation, 'Kenya declares war on Al Shabaab' (15 October 2011) <http://www.nation.co.ke/news/Kenya-declares-war-on-Al-Shabaab/1056-1255736-9x7xlbz/index.html> accessed 31 August 2020 (emphasis mine).

[180] Report of the Secretary-General on Somalia (9 December 2011), UN Doc S/2011/759, para 4.

defence against a non-State actor was made in circumstances where the territorial State had failed to prevent attacks against the responding State.[181] While the UN Security Council continued to consider the political and security crisis in Somalia in subsequent meetings,[182] it gave no consideration to Kenya's use of force or its claims of self-defence, making no pronouncement on their legality. There was also no condemnation from the international community. A subsequent agreement on joint Kenyan-Somali action against al Shabaab appears to have been achieved.[183]

Most recently amongst African States, Egypt asserted a right to act in self-defence against terrorist attacks. In a letter to the Security Council in May 2017, Egypt expressly invoked Article 51 of the Charter to justify airstrikes by Egyptian armed forces against terrorist organisations in Libya. Making clear the target of its strikes, Egypt stressed that its actions were 'directed solely at the members and positions of terrorist organisations, and not at the State of Libya'.[184] Egypt's strikes followed the pattern of United States action to capture Ahmed Abu Khattalah, reputed senior leader of the Ansar al-Sharia-Benghazi group, in Libya. Following

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[181] In a letter to the Security Council, Kenya also claimed to have received the sanction of Somalia for its operation – Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council, UN Doc S/2011/646. In a later joint communiqué with the Transitional Federal Government of Somalia issued on 31 October, Kenya stated that its military operation inside Somalia was aimed at eliminating the threat posed by Al-Shabaab to the national security of Kenya and was based on the legitimate right of self-defence recognised in Article 51 of the Un Charter – Secretary-General Report (n 180) para 5.

[182] See eg UNSC 6701st Meeting (11 January 2012) UN Doc S/PV.6701.

[183] Daily Nation, 'Kenya, Somalia Seal Pact to hit al Shabaab' (11 October 2011) <https://nation.africa/kenya/news/kenya-somalia-seal-pact-to-hit-shabaab--787260> accessed 31 August 2020.

[184] Letter dated 27 May 2017 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council, UN Doc S/2017/456. Egypt also claimed to be acting in coordination with the national army of Libya.

its military operation, the United States also reported its action in accordance with Article 51 of the Charter and expressly invoked its inherent right of self-defence.[185]

EUROPE

Following repeated terrorist attacks from Chechen terrorist based in the Pankisi Gorge region of Georgia, Russia asserted its right to use force in self-defence, pursuant to Article 51 of the UN Charter, on Georgian territory.[186] Its claim of self-defence was markedly made against the non-State actor element itself, rather than the State of Georgia.[187] Russia accused Georgia of failure to take adequate measures to halt terrorist attacks from its territory and other violations of its anti-terrorism obligations, including those prescribed in UNSC Resolution 1373, but did not claim to have been subject to any attack, or act of aggression, by the State.[188] On the contrary, in correspondence to the Secretary-General and the other four permanent members of the Security Council, Russia advised that measures to be taken would be 'to counteract the terrorist threat'.[189]

Russia's claim met little resistance. Georgia blamed Russia for the situation existing along the Georgian-Russian State border and, in relation to Russia's Article 51 claim, asserted that Russia had not been subject to an armed aggression

[185] Letter dated 17 June 2014 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/2014/417.

[186] Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, UN Doc S/2002/1012.

[187] Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-defence against Non-State Terrorist Actors' (2007) 56 ICLQ 141, 153.

[188] Trapp, 'Back to Basics' (n 187) 153.

[189] Keesing's (2002) vol 48(12) 44998.

from Georgia.[190] The US State Department issued a statement vowing to oppose 'any unilateral military action by Russia inside Georgia',[191] seeming to reject Russia's claims of self-defence against non-State actors.[192] However, no reason for its position was given, making it unclear whether it considered that the Russian claim against Chechen terrorists, in the absence of Georgian involvement in any attacks, was unsupported in principle, rather than merely in the circumstances of the particular claim.[193] As Tams notes, there was no principled condemnation from other quarters negating Russia's claim to use force extraterritorially in self-defence against non-State actors,[194] diminishing the effect of the US negative response.

SOUTH AMERICA

Colombia's 2008 military action in Ecuador was also expressly based on a claim of self-defence against a non-State group.[195] Specifically, Colombia acknowledged that the targeted faction of the Revolutionary Armed Forces of Colombia (FARC)

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[190] Identical letters dated 15 September 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2002/1033.

[191] Keesing's (2002) vol 48(12) 44998.

[192] Gray (n 1) 226.

[193] It is possible that US resistance to Russia's claim of self-defence in the circumstances was politically motivated. Though officially denied by both States, the question of Russian action in the Pankisi Gorge was believed to be ensnared in the US diplomatic campaign to win UNSC backing for military action in Iraq (Keesing's vol 48(12) 44998). Putin had previously expressed 'serious doubts' over the legal basis for strikes in Iraq (Keesing's vol 48(12) 45004), a position that proved a roadblock to the US objectives.

[194] Tams, 'Use of Force against Terrorists' (n 137) 380.

[195] Declaration of the Ministry of Foreign Relations of Colombia - No. 081 (2 March 2008) <http://web.presidencia.gov.co/comunicados/2008/marzo/81.html> accessed 13 May 2014. (Translated: 'Indeed, we anticipate that Colombia did not violate [Ecuador's] sovereignty but has acted in accordance with the principle of self-defence'). Admittedly, Colombia did not report its military action to the UNSC pursuant to Article 51.

was operating from Ecuador's territory without the consent of that Government.[196] Colombia claimed that following intense gun fire from guerrillas in Ecuador, it carried out an attack on members of the non-State group, killing the group's second highest in command and 21 other militants.[197] Subsequently, Colombia entered Ecuadoran territory to search the attack site and to remove the bodies of those killed.[198] Colombia's military incursion into Ecuador, though openly supported by the United States,[199] was deemed a violation of the sovereignty and territorial integrity of Ecuador by the Permanent Council of the OAS[200] and the Rio Group.[201] In its Resolution denouncing Colombia's use of force, the OAS reaffirmed the principle contained in Article 21 of its Charter, that 'the territory of a State is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State… on any grounds whatsoever.'[202] This appears to be a rejection of Colombia's express claim to self-defence against FARC terrorists in Ecuador.

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[196] Foreign Ministry of Colombia, News Release 'Response of the Colombian Foreign Ministry to the Government of Ecuador' (2 March 2008), <https://www.cancilleria.gov.co/en/newsroom/publiques/2008-03-02/1888> accessed 31 August 2020.

[197] ibid.

[198] ibid.

[199] Tom Casey, Deputy Spokesman US Government in Daily Press Briefing (Washington, DC 3 March 2008) <http://2001-2009.state.gov/r/pa/prs/dpb/2008/mar/101614.htm> accessed 31 August 2020.

[200] OAS, Resolution of the Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of Commission (5 March 2008), CP/RES/930 (1632/08).

[201] OAS, Declaration of the Heads of State and Government of the Rio Group on the Recent Events Between Ecuador and Colombia dated 7 March 2008 annexed to Note from Permanent Representative of Dominican Republic (10 March 2008), OEA/Ser.G CP/INF.5653/08.

[202] OAS Resolution 930 (n 200) para 1.

The Resolution of the OAS and the Declaration of the Rio Group, however, expressly lamented Colombia's failure to seek the consent of the Government of Ecuador for its operation.[203] As is more extensively argued in Chapter IV,[204] failure to seek the consent of the territorial State may render use of force in self-defence against a non-State actors situate there unnecessary, and therefore unlawful. The denunciation of Colombia's use of force in Ecuador, therefore, should not be read as a rejection by the OAS of the classification of non-State actor attacks as armed attacks within the meaning of the law on self-defence, but as an indication of the inapplicability of that law in the circumstances of Colombia's claim.[205] This conclusion is further supported by the Organisation's own express recognition of the right of self-defence against non-State actor attacks following the events of 9/11.

In sum, the surveyed incidents evidence a practice in post 9/11 international relations that is more widespread and representative than is sometimes acknowledged. While there has been an appreciable number of claims by diverse States using force extraterritorially in self-defence against non-State actor attacks in recent years, it is noted that these claims have not received as strong an endorsement as the US claim in 2001. Detailed examination of the circumstances surrounding these claims, however, reveals no principled rejection of the claimed right of self-defence against non-State actor attacks. In some instances, equivocal

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[203] ibid; Rio Group Declaration (n 201).

[204] Text to nn 127-38 in ch IV.

[205] It has also been suggested that Colombia did not, in fact, find itself under attack and, therefore, in a position to at all claim self-defence – see Alonso Gurmendi, 'State Practice regarding Self-defence against Non-State Actors: An Incomplete Picture', Opinio Juris Blog (17 October 2018) <http://opiniojuris.org/2018/10/17/state-practice-regarding-self-defence-against-non-state-actors-an-incomplete-picture/> accessed 31 August 2020.

responses can be attributed to the impact of other considerations, whether it be the perceived disproportionality of the defensive operation as with Israel in 2006 and Turkey in 2008, failure to first explore collaborative efforts or obtain the consent of the territorial State as in the case of Colombia, or the implications of any unilateral use of force, regardless of its defensive aim, for larger international peace initiatives being concurrently pursued as occurred in 2003 regarding Israel's use of force in Syria and with Rwanda in 2004.

In large part, the response of the international community to these claims has been characterised by silence. Given the more frequent and public reliance on a right of self-defence by States following non-State actor attacks, the maintained silence of very many States arguably signals a receptive stance, or benevolent *opinio juris,* of the international community as a whole to such claims. At the very least, the precedential value of the 9/11 events and the corresponding US claim of self-defence presented a situation in which the reaction of States was called for. That many States, individually or through regional arrangements, responded to the claim made by the US affirms the precedential value. The repeated invocation of self-defence following non-State actor attacks in recent years and the general acceptance of those claims by the international community support the conclusion that a right of self-defence in the absence of a State opponent, as asserted following the events of 9/11, was not peculiar to that case, but is a right accepted by States as existing in post-9/11 international law.

Use of Force against ISIS in Syria: An Unequivocal Claim, an Unequivocal Response

The uses of force by States against the Islamic State of Iraq and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL) or Da'esh, are of particular precedential value given the clear claims of self-defence that accompany them, and the generally receptive stance of the international community to those claims. While States continued to assert a right of self-defence against non-State actor attacks in the post 9/11 era with the general endorsement of the international community, it was not until military action against ISIS in Syria, in particular, that we see overwhelming, express and unequivocal international support for the claim of self-defence made, reminiscent of that which followed the 9/11 attacks.

The first occasion of extraterritorial use of force against ISIS was US air strikes against ISIS positions in the Sinjar area of northern Iraq in August 2014. Following the capture of towns in northern Iraq, ISIS launched an attack on the Yazidi monotheistic community in an attempt to 'purify' Iraq and neighbouring countries of non-Islamic influences. As a result, between 30,000 and 50,000 Yazidis fled into the mountains to escape ISIS atrocities, where they were trapped by the extremist forces. US airstrikes were ordered to avert a humanitarian crisis and likely genocide.[206] The legal basis for these strikes remains unclear.[207] Following a change of leadership, the Government of Iraq subsequently requested the assistance of foreign States to eradicate ISIS targets on Iraqi territory. Pursuant to this request, the United States launched

[206] Keesing's (2014) vol 60(12) 53535.

[207] Brian Egan, US State Department Legal Adviser, in his ASIL speech outlining the legal basis for the US counter-ISIL campaign, made no comment on the August 2014 attack instead noting September 2014 as the point at which US strikes commenced against ISIL in Syria. The likely basis appears to be humanitarian intervention – see Jack Goldsmith, 'The Obama Administration's Views on the Legality of Intervention in Syria Without Congressional or U.N. Security Council Support', Lawfare Blog (21 June 2016) <https://www.lawfareblog.com/obama-administrations-views-legality-intervention-syria-without-congressional-or-un-security-council> accessed 31 August 2020.

operation ‘Inherent Resolve’ in Iraq, supported by France, the United Kingdom and a number of other States.[208] In a speech in April 2016, the US State Department Legal Adviser noted that ‘beginning in the summer of 2014, United States’ actions in Iraq against ISIL have been premised on Iraq’s request for, and consent to, US and coalition military action against ISIL on Iraqi territory’.[209]

More significant for the present analysis, however, is the continuing use of force against ISIS in Syria, which has not received the sanction of the territorial State. This action has been expressly based on the right of self-defence as provided for in Article 51 of the UN Charter. In September 2014, President Obama announced the extension of the US campaign to include air strikes against ISIS targets in Syria. In the earliest stages of the operation, the US administration secured the support of over 40 States including a ‘core coalition’ of 9 other States (the UK, France, Australia, Canada, Germany, Turkey, Italy, Poland and Denmark) and a number of Arab nations including Bahrain, Jordan, Qatar, Saudi Arabia and the United Arab Emirates (UAE).[210] The Netherlands also provided critical air support.[211] Airstrikes commenced in the morning of 23 September, with the US carrying out strikes against positions of the newly identified Khorasan terrorist group, and against ISIS vehicles, training camps, and

[208] Keesing’s (2014) vol 60(12) 53535, 53594.

[209] Brian Egan ASIL Speech (1 April 2016) <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf > accessed 31 August 2020.

[210] Keesing’s (2014) vol 60(12) 53593, 53555. The Global Coalition is now listed as having 82 Partner States from Africa, Asia, Australasia, Central America, Europe and the Middle East, though not all engaged in military activity in Syria – see Global Coalition Partners webpage <https://theglobalcoalition.org/en/partners/> accessed 31 August 2020.

[211] See Netherlands Global Coalition Partner webpage <https://theglobalcoalition.org/en/partner/netherlands/> accessed 31 August 2020.

command and control facilities jointly with Bahrain, Jordan, the UAE and Saudi Arabia.[212]

In reporting its military action in Syria to the Security Council, the US made clear that its actions against ISIS targets in Syria were pursuant to the inherent right of self-defence recognised in Article 51, in circumstances where the territorial State was unwilling or unable to prevent the use of its territory for non-State actor attacks. According to the US correspondence:

> The Syrian regime has shown that it cannot and will not confront [ISIS] safe havens effectively itself. Accordingly, the US has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq…[213]

Notably, the US letter identifies the State of Iraq as the victim of the persisting ISIL threat of attack.[214] The US' claim to self-defence here is based on its right of collective self-defence under Article 51 of the Charter, rather than the right of individual self-defence following an attack, or in the face of an imminent attack, on the US itself. This position was reiterated in the US' statement before the Security Council over a year later concerning continuing action against ISIS targets in Syria; the US reported that it was at that time, in accordance with the Charter of the UN, 'working with Iraq… to

[212] Keesing's (2014) vol 60(12).

[213] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695.

[214] ibid. The letter states:

> Iraq made clear that it is facing a serious threat of continuing attacks from the Islamic State in Iraq and the Levant coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraqi people. For these reasons, the Government of Iraq has asked that the US lead international efforts to strike ISIL sites and military strongholds in Syria.

combat the threat that ISIL poses to the security of *that country's people and territory*'.[215]

Iraq's initial communication to the United Nations was less direct on the question of self-defence. In writing to the Security Council in June and September 2014, Iraq noted that ISIL had established a safe haven outside of Iraq's borders in Syria, giving the non-State group the ability to train for, plan, finance and carry out terrorist operations across Iraqi borders, a reality which posed a direct threat to its people and territory.[216] Iraq concluded:

> It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements… have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq's citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq's borders.

Iraq did not expressly invoke its right of individual self-defence or Article 51 of the UN Charter, a fact which Corten argues undermines the US claim of collective self-defence.[217] It is clear from the tenor of the communication, however, that this was the basis on which it requested US assistance in striking ISIS targets located in Syria. The declared aim of such strikes was to eliminate the constant threat posed to Iraqi security, a threat it previously identified as ISIS strongholds established in Syrian territory. Iraq's justification, which it described as according with international law and relevant bilateral and multilateral agreements, could be no other than its right of

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[215] UNSC 7565th Meeting (20 November 2015), UN Doc S/PV.7565, 4 (emphasis mine).

[216] 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; 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.

[217] Olivier Corten, 'The 'Unwilling' or 'Unable' Test: Has it Been, and Could it be, Accepted?' (2016) 29 LJIL 777, 785.

individual self-defence following attacks against its territory, and the threat of continuation of such attacks. The US' invocation of collective self-defence of Iraq would be nullified without a previous claim of individual self-defence by Iraq. Equally clear is the indication that the Iraqi and US' claims of self-defence were made against ISIS, a non-State actor, and not against the State of Syria itself. Both States identified the object of military action as ISIS targets located in Syria. The US State Department Legal Adviser, in offering comments on the continuing campaign against ISIS in Syria in April 2016, noted that the inherent right of individual and collective self-defence recognised in Article 51 of the Charter of the UN is not restricted to threats posed by States.[218]

Beyond the positive response received by Iraq and the US from numerous States in the form of express support for, or direct participation in, the anti-ISIS operation, further claims of collective self-defence were communicated to the Security Council. Letters were transmitted by the UK[219] in 2014, by Canada,[220] Australia,[221]

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[218] Brian Egan Speech (n 209). He noted:

> …for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As but one example, the oft-cited Caroline incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States.

[219] 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; Letter dated 7 September 2015 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/2015/688; Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland addressed to the President of the Security Council, UN Doc S/2015/928.

[220] 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.

[221] 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.

France[222] and Germany[223] in 2015, and most recently by Denmark,[224] the Netherlands,[225] Norway[226] and Belgium[227] in 2016. All these States, with the exception of Germany, which did not mention Iraq specifically, expressly reported taking measures against the terrorist organisation ISIS in the exercise of the right of collective self-defence of Iraq, in accordance with Article 51 of the Charter.[228] As is evident from the language employed in these communications, self-defensive action was justified as against ISIS, rather that the State of Syria itself. For the avoidance of doubt, several of these States explicitly noted that military actions 'are directed against ISIL, not against the Arab Republic of Syria' or the Syrian people.[229] Such statements must be interpreted as indicating that force is not directed against Syria *as the perpetrator of the armed attack* triggering the right of self-defence, since force is indisputably used

[222] Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/745.

[223] Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946.

[224] Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, UN Doc S/2016/34.

[225] 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 Doc S/2016/132.

[226] 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.

[227] 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.

[228] See eg Australia September 2015 Letter (n 221), claiming that Australia is 'taking measures against ISIL in Syria in support of the collective self-defence of Iraq in accordance with Article 51 of the Charter.'

[229] Norway June 2016 Letter (n 226). See also Canada March 2015 Letter (n 220); Australia September 2015 Letter (n 221); Germany December 2015 Letter (n 223); Belgium June 2016 Letter (n 227).

against Syria in the sense of Article 2(4) of the UN Charter, necessitating reliance on Article 51 to justify that *prima facie* violation.

In the aftermath of major ISIS attacks over the Sinai Peninsula and in Paris in October and November 2015,[230] the UN Security Council unanimously adopted Resolution 2249.[231] Noting Iraq's letters of June and September 2014, the Security Council determined that ISIS constitutes 'a global and unprecedented threat to international peace and security' and unequivocally condemned all ISIS terrorist attacks. In order to address the threat posed by ISIS, the Resolution:

> Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh… and to eradicate the safe haven they have established over significant parts of Iraq and Syria.

Several communications of collective self-defence came after the adoption of this Resolution, and specifically referred to it. Both Denmark and the United Kingdom, for instance, reported that they had initiated necessary and proportionate measures against ISIS in Syria in the exercise of the right of collective self-defence '*as called for by the Security Council in its Resolution 2249 (2015)'* and in response to the request of the Government of Iraq.[232]

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[230] On October 31, an ISIS bomb brought down a Russian jetliner over Egypt's Sinai Peninsula, killing all 224 people on board – see BBC News, 'Russia Plane Crash: 'Terror act' downed A321 over Egypt's Sinai' (17 November 2015) <http://www.bbc.co.uk/news/world-europe-34840943> accessed 31 August 2020. A couple of weeks later, gunmen and suicide bombers attacked a concert hall, a major stadium, restaurants and bars in Paris almost simultaneously, leaving 130 people dead and hundreds wounded – BBC News, 'Paris Attacks: What happened on the night' (9 December 2015) <http://www.bbc.co.uk/news/world-europe-34818994> accessed 31 August 2020.

[231] UNSC Resolution 2249 (2015) (20 November 2015), UN Doc S/RES/2249(2015).

[232] Denmark January 2016 Letter (n 224) (emphasis mine); UK December 2015 Letter (n 219). See also Germany December 2015 Letter (n 223), Netherlands February 2016 Letter (n 225), Norway

This sequence of events may suggest that the Security Council's request for States to 'take all necessary measures' was considered by them to be authorisation from the Security Council to take forcible action in Syria against ISIS. Resolution 2249, however, does not include a Chapter VII authorisation from the Council to use force against ISIS targets in Syria, or Iraq.[233] The Resolution 'calls upon' States to take all necessary measures and to coordinate their efforts to meet the threat posed by ISIS, in accordance with international law, particularly the UN Charter.[234] First, the Resolution is specifically directed towards increased cooperation and coordination of efforts already being taken by States in meeting the terrorist threat posed by ISIS. Secondly, the Resolution expressly calls for measures which are both necessary and in compliance with international law. The Resolution does not give to States a *carte blanche* to use force against ISIS in Syria or Iraq. As Akande and Milanovic argue, the wording employed in the Resolution suggests that measures taken by States should comply with other rules of international law, including the *jus ad bellum* rules in the Charter, and does not add to, or subtract from, authority States already have to take measures against ISIS under international law.[235] In the case of the UK in particular, despite expressly describing its military action in Syria as 'called for by the Council in Resolution 2249', it is clear that it did not recognise the Resolution as authorising its

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June 2016 Letter (n 226), and Belgium June 2016 Letter (n 227) all referencing UNSC Resolution 2249.

[233] Christian Marxsen and Anne Peters, 'Dilution of Self-Defence and its Discontents' in Peters and Marxsen (n 10) 7. The ILA noted in its 2018 report on the use of force that such authorisations are normally expressly included in a resolution by which the Security Council exercises its Chapter VII powers – ILA, *Final Report on Aggression and the Use of Force* (Sydney Conference 2018) 8.

[234] For contrast in language see UNSC Resolution 1031 (15 December 1995), UN Doc S/RES/1031(1995), paras 15-17 authorising measures including the use of force ('The Security Council, …[a]cting under Chapter VII of the Charter of the United Nations, … [a]uthorises the Member States… to take all necessary measures…'

[235] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', EJIL Talk! Blog (21 November 2015) <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 31 August 2020.

use of force.[236] The UK considered that legal justification to take military action in Syria existed long before the adoption of the Resolution, as early as November 2014, when it made its first report to the Security Council on forcible measures taken in Syria on the legal basis of collective self-defence of Iraq.[237] Further, the right of individual and collective self-defence recognised in Article 51 of the Charter, on which Iraq and its allies expressly rely, operates without prior Security Council authorisation.

UNSC Resolution 2249 does, however, hold significance. While not authorising force, the Resolution contemplates within its scope measures States could take pursuant to Article 51 of the UN Charter in support of the lawful self-defensive operation already underway at that time. As the proponent of the draft Resolution, France noted that the Resolution serves the purpose of framing the collective action 'within the framework of international law and in respect for the Charter of the United Nations' and 'creates the conditions for an international mobilisation.'[238] Similarly, the German Government, in seeking Parliamentary approval for military action in Syria, outlined that action already taken against ISIS by the US and other States in collective self-defence under Article 51 of the Charter 'is covered by Resolution 2249 (2015).'[239]

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[236] UK December 2015 Letter (n 219). While acknowledging that military action was called for by the Resolution, the UK expressly noted that action was taken 'in exercise of the inherent right of individual and collective self-defence.'

[237] In debates in the UK House of Commons in September 2014, the Prime Minister made clear that UK military action in Syria against ISIL targets would be 'to help Iraq defend itself from ISIL' and that 'legal basis for action [was] founded on the request of the Iraqi Government.' HC Deb 26 September 2014, col 1263.

[238] UNSC 7565th Meeting (n 215) 2.

[239] Anne Peters, 'German Parliament Decides to Send Troops to Combat ISIS Based on Collective Self-defence "in conjunction with SC Res. 2249"' EJIL Talk! Blog (8 December 2015) <http://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-−-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/> (citing the Official German Request to Parliament) accessed 31 August 2020.

Corten, on the other hand, argues that the absence of reference to, or even evocation of, self-defence in the text of the Resolution bears great significance for the legal consequences to be attached to it.[240] Similarly, Tladi submits that the better construction of Resolution 2249 is as an endorsement of consensual use of force in Syria.[241] While not expressly recognising the right of self-defence in like manner as Resolutions 1368 and 1373 (2001), considering the circumstances of its adoption, Resolution 2249 can be similarly construed as unanimous confirmation by the Security Council that the defensive use of force against ISIS in Syria is legally permissible.[242] Arguments such as put forward by Corten and Tladi are blind to the actual defensive action being taken in Syria, without that State's consent, at the time of the Resolution's conclusion, 'missing the forest amidst the trees' to use the words of Tams.[243]

Security Council Resolution 2249 also expressly recognises the claims made by Iraq which form the basis for action in self-defence. Specifically, the Resolution notes Iraq's letters of June and September 2014 both of which state that Da'esh has established a safe haven outside Iraq's borders that is a direct threat to the security of Iraqi people and territory. Further, in its operative part, the Resolution notes that

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[240] Corten, 'Unwilling' (n 217) 791.

[241] Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective security and the Rise of Unilateralism: Whither International Law?' in Peters and Marxsen (n 10) 75.

[242] Akande and Milanovic (n 235) arguing that the Resolution 'is clearly designed to provide legitimacy for the measures being taken, and to be taken, against IS by giving the Council's imprimatur to such measures.' See also Michael Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 Case Western Reserve JIL 1, 51 and 66; Michael Wood, 'The Use of Force in 2015 with Particular Reference to Syria', (2016) Hebrew University of Jerusalem Legal Studies Research Paper Series 16-05, 8.

[243] Tams (n 10) 151. See further, Paulina Starski, '"Legitimized Self-defence" – Quo Vadis Security Council', EJIL Talk! Blog (10 December 2015) <https://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/> accessed 31 August 2020, arguing that Resolution 2249 has a legitimising effect on the self-defence narrative employed by States using force in Syria.

Da'esh has the capability and intention to carry out further attacks.[244] In this way, the Resolution gives factual credibility to the claims of self-defence made by Iraq and other States and signals a clear endorsement of the claims as made against Da'esh, a non-State actor.

It should also be noted that the use of force against ISIS in Syria is not based only on the claim of individual self-defence made by Iraq, supported by collective self-defence claims of other States, but that several other States have claimed a right to act in individual self-defence against ISIS in Syria. While the US communications and statements to the Security Council appear to suggest that its actions in Syria are based solely on the collective self-defence of Iraq,[245] the US has made clear that it considers itself as acting in its own self-defence, and in the collective self-defence of other States apart from Iraq. The then Legal Adviser stated that:

> … although the United States maintains an individual right of self-defence against ISIL, it has not relied solely on that international law basis in taking action against ISIL. …[I]n Syria, US operations against ISIL are conducted in individual self-defence and the collective self-defence of Iraq and other States.[246]

Alongside its claim of self-defence against ISIS, the US also initiated military action in Syria against Al-Qaida elements known as the Khorasan group on the basis of individual self-defence, to address threats posed to the US by that group.[247] Its initial strikes in Syria included attacks against this group. While this particular claim

[244] UNSC Resolution 2249 (n 231) para 1.

[245] See text to nn 213-14.

[246] Brian Egan Speech (n 209).

[247] US September 2014 Letter (n 213).

has remained uncommented, overshadowed by the more significant threat of ISIS, Security Council Resolution 2249 does recognise the need to take measures not only against ISIS, but also against 'all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups' with safe haven in Syria.[248]

Further, Canada considered that ISIS posed a threat not only to Iraq, 'but also to Canada and Canadians'.[249] As such, it claimed to be acting in accordance with the inherent rights of both individual and collective self-defence reflected in Article 51 of the Charter. For its part, the UK alleged that members of ISIS are known to be actively engaged in planning and directing attacks against the UK from Syria, prompting the UK to take necessary and proportionate measures against ISIS targets in the exercise of the inherent right of individual self-defence.[250] Accordingly, UK armed forces carried out a precision airstrike against an ISIS vehicle in which Reyaad Khan, a UK national known to be a member of ISIS, was travelling.[251] It is interesting to note that these States do not claim to have been subject to a specific armed attack by ISIS triggering the right to act individually in self-defence but base their claims on threats of attacks against them posed by the non-State group. The same can be said of the US claim to be acting in individual self-defence. While these claims raise questions about the imminence

[248] UNSC Resolution 2249 (n 231) para 5.

[249] Canada March 2015 Letter n 220).

[250] UK December 2015 Letter (n 219).

[251] Syria directly challenged the UK's claim to self-defence as a distorted reading of Article 51 – see 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.

of the threats posed by ISIS necessitating action in self-defence, they confirm that States consider the right of self-defence against non-State actors as capable of arising even before an actual armed attack against them occurs.

Turkey also joined the Global Coalition in taking action in Syria following the July 2015 terrorist attack in Suruç that claimed 32 lives.[252] In doing so, it invoked its right both to individual and collective self-defence. Turkey claimed to have faced threats and attacks from the beginning of the conflict and that the latest terrorist attacks reaffirmed the imminent threat of continuing attack against it. Considering that the regime in Syria was neither capable nor willing to prevent threats against Turkey emanating from Syrian territory, Turkey was compelled to act in its defence.[253] Syria strongly contested Turkey's claims. In its own communication to the Security Council, Syria rejected that Turkey had a right to claim self-defence in circumstances where Turkey was collaborating with, and exporting, terrorists into Syria.[254] Beyond this, doubts have been raised about Turkey's claim of collective self-defence, supposedly of Iraq.[255] While questions surround the credibility of Turkey's claims to self-defence in the circumstances, it is clear that they follow the

[252] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2015/563. Turkey appears to have been previously involved in the conflict in Syria. The basis of prior intervention is unclear – see Gray (n 1) 194.

[253] Turkey July 2015 Letter (n 252) 1.

[254] Identical Letters dated 29 July 2015 from the Permanent Representative of the Syrian Arab Republic addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/574, 2-3.

[255] In its letter to the Security Council, Turkey did not refer to a request for assistance from Iraq or any other State on which its claim to collective self-defence was based. See further Gray (n1) 194-95. Gray suggests that Turkey's claim to collective self-defence may be a pretext to justify Turkey's actions against the Kurds in Syria.

pattern of other States as being directed against non-State groups present on Syrian territory as distinct from the State of Syria itself.

Following the Paris attacks in November 2015, France also claimed a right of individual self-defence against ISIS in Syria. Before the Security Council, France described the events of 13 November as 'an armed aggression against France' notwithstanding that the attacks were committed by French and Belgian nationals.[256] Having informed the Security Council of its military action undertaken on the basis of collective self-defence previously, it concluded that its action 'can now also be characterised as individual self-defence, in accordance with Article 51 of the Charter of the United Nations.'[257] On 17 November, France also invoked Article 42(7) of the Lisbon Treaty (TEU),[258] the first ever activation of the provision in the treaty's history, requesting the aid and assistance of other Member States of the European Union, in accordance with Article 51 of the UN Charter.[259] EU Member States unanimously pledged their full support and aid in line with their obligations under the treaty, recognising the Paris attacks as armed attacks giving rise to the right of collective self-defence of France.[260] Some Member States

[256] UNSC 7565th Meeting (n 215) 2. France alleged that the attacks were decided on, planned and prepared in Syria.

[257] ibid.

[258] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community ('Lisbon Treaty') (1 December 2009) 2702 UNTS 3, Article 42(7). It provides:

> If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter.

[259] European Parliament Briefing, 'The EU's Mutual Assistance Clause; The First Ever Activation of Article 42(7) TEU' (27 November 2015) <https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)572799> accessed 24 October 2020.

[260] Specifically, EU Defence Ministers 'expressed their unanimous and full support for France and their readiness to provide all the necessary aid and assistance.' – See Council of the European

provided direct and indirect military assistance to anti-ISIS operations.[261] In its letter to the Security Council, Germany also expressly claimed to be acting in collective self-defence of France following the ISIS attacks, referencing Article 42(7) of the TEU.[262] France's invocation of Article 51 of the UN Charter and Article 42(7) of the TEU following the Paris attacks perpetrated by ISIS, signals that it recognised those attacks as armed attacks within the meaning of Article 51 of the UN Charter notwithstanding ISIS being a non-State actor.[263] In this view, it was supported by 27 other European States.

It has been argued with reference to the practice of States using force against ISIS in Syria that the justifications offered have been inconsistent and cannot, therefore, be taken together as evidence as to an established agreement amongst these States as to the meaning of Article 51 of the Charter.[264] While the language employed by these States in their respective communications has differed, it is possible to distil a common thread; all have clearly invoked self-

Union, Outcome of the Council Meeting, 3426th Council Meeting, Foreign Affairs, Brussels (16-17 November 2015), Doc. 14120/15, 6.

[261] European Parliament Briefing, 'Activation of Article 42(7) TEU: France's Request for Assistance and Member States' Responses' (December 2015) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/573883/EPRS_BRI(2015)573883_EN.pdf> accessed 24 October 2020, 3, 5-9.

[262] Germany December 2015 Letter (n 223).

[263] In its 2019 declaration on International Law in Cyberspace, France stated that it 'does not recognise the extension of the right to self-defence to acts perpetrated by non-state actors whose actions are not attributable, directly or indirectly, to a State.' It classified the use of force against ISIS as an 'exceptional case' on the basis of ISIS possessing the characteristics of a 'quasi-State'. While this raises doubts about France's current support for a more general rule of non-State actor self-defence, it is to be noted that its Opération Chammal in Syria is ongoing despite ISIS' loss of any significant territorial possession in Syria since March 2019 – see Ministère des Armées, *International Law Applied to Operations in Cyberspace* (2019) <https://www.defense.gouv.fr/content/download/567648/9770527/file/international+law+applied+to+operations+in+cyberspace.pdf> accessed 31 August 2020, 8-9.

[264] See eg Tladi (n 241) 76 placing emphasis on the variation in language used by the various coalition States.

defence within the meaning of Article 51 as the legal basis for action and have categorised ISIS attacks and threats as armed attacks within the meaning of that provision.[265]

For its part, Syria stridently opposed the military actions of the coalition and of individual States on its territory. Specifically, Syria lamented the failure of States to consult with the governing power in their operations and repeatedly asserted Syria's preparedness to cooperate with any bilateral or multilateral endeavour against terrorist groups active on Syrian territory. In Syria's view, 'any attempt to invoke Article 51 of the Charter to justify military action on Syrian territory without coordination with the Syrian government 'manipulates, distorts, and misinterprets the provisions of that Article.'[266] Significantly, Syria opposed the basic legal position articulated by the international coalition and Turkey, arguing that Article 51 and the *Wall* Advisory Opinion of the ICJ stipulate that only State attacks, and not those from individuals or terrorist organisations, may give rise to the right of self-defence.[267] States in the Security Council have not commented on Syria's protests. As was the case following the US use of force in Afghanistan in October 2001, apart from those States openly supportive of and participating in the coalition action in Syria, the remainder of the international community has been relatively silent on the question of the legality of the operation.

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[265] As argued in Chapter IV, variations in wording are relevant to each State's description of the circumstances necessitating the use of force in self-defence.

[266] Identical Letters dated 29 December 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/2015/1048, para 4.

[267] Identical letters dated 1 February 2018 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2018/82, 1.

Considered as a whole, the post-2001 State practice overwhelmingly indicates a continued acceptance of the right of self-defence against non-State actors as claimed in the aftermath of the 9/11 attacks. The international response has varied in strength from claim to claim, but the practice of the past 19 years has not revealed any principled rejection by the international community of States as a whole of the right of self-defence against non-State actor attacks. On the contrary, recent State practice, particularly that relating to the use of force against ISIS in Syria 'by numerous States from a variety of regions',[268] confirms that the positive expression of support for the US claim of self-defence after 9/11 was not a 'one-off', special event in international law, but part of a broader, consistent corpus of practice evidencing the existence of a legal right to use force in self-defence against non-State actors.

II. *'…The More They Remain the Same'*
The Right of Self-Defence against Non-State Actors Before 9/11

While there exists a considerable body of evidence of a widespread practice of self-defence against non-State actors in the post-9/11 era of international law, it must be considered together with previous State practice where claims to a right of self-defence against non-State actors were made absent any or significant State involvement to gain a full understanding of the development of customary law in this area. With regard to the *Caroline Incident* of 1837, regarded as 'a formative case in the development of the rules of self-defence',[269] neither the United States

[268] ILA Report (n 233) 15.

[269] Lubell (n 1) 35.

nor Britain appeared to have difficulty applying the international legal rules governing the use of force where the considered threat was posed by non-State actors.[270] In an era where self-defence as a legal concept held some significance in the absence of a state of war,[271] the invocation of the right of self-defence in the *Caroline* incident provides a useful reference for our understanding of the possible sources of an armed attack triggering self-defence, just as the *Caroline* has provided significant influence in other aspects of the modern law of self-defence.[272] In the decades following the conclusion of the UN Charter, non-State actor self-defence claims were frequently made by a handful of States, most notably Israel and the US. These instances of practice serve the useful role of spotlighting the significance of the events of 9/11 which came after. As shown, that significance lies, not in the nature or source of the attacks, but rather in the concerted and positive international legal response to the US claim of self-defence following the 9/11 attacks.

Shifting Claims

In the immediate post Charter era, Israel, most notably, was involved in cross-border military actions against irregular forces in neighbouring countries following attacks on its nationals and territory. Israel frequently invoked a right of self-

[270] See text to n 251 in ch I. See further Christopher Greenwood, 'Caroline, The' in Rudiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law,* para 6.

[271] Text to n 15 in ch I.

[272] For a detailed examination of the influence of the *Caroline* on the criteria of necessity and proportionality in the modern law of self-defence see James A. Green, 'Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense', (2006) 14 Cardozo JIL 429. Significantly, Green notes (at 478) that a 'detailed examination of the *Caroline* can further elucidate upon the nature of the law of self-defense today, beyond the traditional reading of the "key" sentence from Webster's letter.'

defence to justify its actions. Markedly, these claims of self-defence were made against the territorial State, rather than the irregular group directly responsible for the attacks. In 1968 Israel launched a series of attacks against targets in Lebanon. In May and October, it shelled a number of Lebanese villages and border positions, and in December it launched an attack against the civil International Airport of Beirut in response to an attack on an Israeli plane in Athens by members of the Palestinian Liberation Front, who Israel alleged had come from Beirut for that purpose.[273] The December attack caused the destruction of the main portion of Lebanon's civilian aircraft fleet.[274] Israel expressly claimed to be acting in self-defence in all three instances, and alleged that Lebanon had joined other Arab Governments in pursuing a policy of belligerency against Israel by, through its complacency, allowing the use of its territory for terrorist warfare against Israel.[275] Before the Security Council, Israel labelled the attacks 'Lebanese provocations'[276] and 'warfare against Israel through the instrumentality of irregular forces'.[277] According to Israel, Lebanon bore responsibility for the attacks – 'The Government's responsibilities are clearly established. *They are direct responsibilities, not vicarious ones.'* [278]

[273] UNSC 1460th Meeting (29 December 1968) UN Doc S/PV.1460, 3.

[274] For Lebanon's complaint against the Israeli attack see: 'Consideration by the Security Council' (29-31 December 1968) [1968] UNYB 228, 229.

[275] ibid.

[276] UNSC 1460th Meeting (n 273) 4 (per United States).

[277] ibid 5.

[278] UNSC 1460th Meeting (n 273) 4 (emphasis mine).

The Security Council, in its Resolution 262 (1968), unanimously condemned Israel's use of force in Lebanon as an act of aggression.[279] While sharing Israel's concern over the Athens attack, the US concluded that that action did not justify Israel's retaliation against Lebanese territory and rejected that the Government of Lebanon bore any responsibility for the occurrence in Athens.[280] States also questioned whether the matter of the Athens attacks properly belonged on the agenda of the Security Council. Russia, for instance, felt that the matter of attacks by individuals should be dealt with by domestic criminal procedures.[281] In a similar vein, the representative from Hungary highlighted that 'similar acts of sabotage have never been brought before the Council for the simple reason that the Council is entitled to deal only with problems and conflicts between sovereign States and their Governments.'[282] Since the attacks were not considered to be acts of the State of Lebanon, absent any connection between the perpetrators and the State itself, States in the Security Council rejected the applicability of the right of self-defence under international law in the circumstances.[283]

Despite this condemnation, Israel continued to make such claims of self-defence with frequency throughout the next decade. In 1969, for example, Israel alleged that it had suffered 21 attacks against Israeli localities directed from Lebanese territory, resulting in military and civilian casualties. In response, Israel

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[279] UNSC Resolution 262 (31 December 1968), UN Doc S/RES/262.

[280] UNSC 1460th Meeting (n 273) 6.

[281] ibid 3.

[282] ibid 10.

[283] ibid 2 (per Brazil), 3 (per France), 5 (per Russia), 10 (per Hungary).

carried out military action against terrorist encampments in Lebanese territory.[284] Israel claimed that Lebanon's failure to put an end to the utilisation of its territory for attacks against Israel carried with it responsibility for the attacks and had compelled Israel to respond in self-defence.[285] Similarly, a year later, following an alleged series of 61 attacks against it by Palestinian guerrillas, Israel claimed a right to act against Lebanon in self-defence, declaring that 'the Government of Lebanon bears full responsibility for armed attacks carried out from its territory against Israel – whether by regular or irregular forces.'[286] These claims continued in the following years.[287]

Israel's use of force on Lebanese territory was repeatedly condemned throughout the period.[288] Although discussions in the Security Council on Israeli action largely revolved around questions of proportionality and the potential for jeopardising the peace process in the Middle East, States also spoke directly to Israel's claim of self-defence against Lebanon, particularly rejecting Israel's assertions of Lebanese responsibility for the attacks Israel faced. After the Israeli invasion in 1972, for instance, in condemning Israel's use of force in Lebanon, States in the Security Council noted that Lebanon had applied its best efforts

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284 [1969] UNYB 200.

285 [1969] UNYB 201.

286 UNSC 1537th Meeting (12 May 1970) UN Doc S/PV.1537, 5.

287 For further such claims see [1971] UNYB 177-8; UNSC 1643rd Meeting (26 February 1972) UN Doc S/PV.1643, 3-5; UNSC 1705th Meeting (12 April 1973) UN Doc S/PV.1705, 5-7; [1974] UNYB 206-8; [1975] UNYB 224-5.

288 See eg UNSC Resolution 270 (26 August 1969) UN Doc S/RES/270; UNSC Resolution 280 (19 May 1970) UN Doc S/RES/280; UNSC Resolution 332 (21 April 1973) UN Doc S/RES/332; UNSC Resolution 347 (24 April 1974) UN Doc S/RES/347; [1975] UNYB 229 noting that the US vetoed the proposed Resolution condemning Israeli action as an aggression, but that it received overwhelming support amongst other Members of the Council.

towards controlling the activities of irregular forces present in its territory and could not be held liable for attacks against Israel, even where they originated from within Lebanese territory.[289] These pronouncements signal a rejection of Israel's claimed right to use force in self-defence against a State from whose territory non-State actor attacks emanated, in circumstances where the non-State actors were not acting on behalf of the territorial State.

Following Israel's use of force in Lebanon in 1978 a shift in the claim of self-defence became evident. After Israel suffered a deadly terrorist attack in Tel Aviv, IDF forces were deployed into Lebanon to counteract terrorist elements present there. The attacks, and their source, were not different from those Israel had suffered in the previous decade; Israel, however, adjusted the focus of its legal justification for its use of force in Lebanon. Contrary to its prior claims of self-defence, no direct statement on Lebanese responsibility was made. Instead, Israel highlighted the actions of the Palestine Liberation Organisation (PLO) operating from southern Lebanon as the trigger for its defensive action and identified its aim in using force as the creation of conditions in which the Government of Lebanon could restore control in its southern region.[290] Before the Security Council, Israel expressly justified its use of force as being solely for the purpose of neutralising terrorist elements present in Lebanon.[291] Lebanon's failures in its obligations as territorial State no longer formed the crux of Israel's claim to self-defence. While

[289] UNSC 1643rd Meeting (n 287) 9 (per Saudi Arabia), 12 (per France), 18 (per Somalia). See also UNSC 1541st Meeting (15 May 1970), UN Doc S/PV.1541, 4 where China noted that the Israeli military action was more regrettable 'in view of the fact that it was directed against a country which did not participate in the June 1967 attack' and which 'has tried to use every means at its disposal to restrain the guerrillas'.

[290] 'The Situation in the Israel-Lebanon Sector: Security Council Consideration' (1978) UNYB 297.

[291] ibid.

the Security Council called for respect for Lebanon's territorial integrity and the withdrawal of Israeli troops, it did not expressly condemn Israel's use of force as it had done in previous Resolutions.[292]

Israel continued to pursue this new course in subsequent years. In justifying its continuing use of force in Lebanon before the Security Council in 1979, Israel maintained that it supported the national sovereignty and territorial integrity of Lebanon, and that its actions were specifically directed against concentrations of terrorists in Lebanon. Specifically, Israel argued that in 'striking at the terrorist bases from which the murder gangs of the PLO launch their criminal raids against… Israel', it was 'exercising its inherent right of self-defence, …a right which has found expression also in Article 51 of the Charter.'[293] Israel made its claim of self-defence against the PLO itself more express in 1981. In response to PLO attacks, Israel carried out heavy airstrikes in Lebanese territory resulting in the destruction of bridges, factories, a school, an oil pipeline terminal and refinery, and other civilian and economic targets. Israel grounded its forceful action on the right of self-defence, claiming that:

> …if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defence. The Government of Israel is in fact exercising the inherent right of self-defence enjoyed by every sovereign State, a right also preserved under Article 51 of the Charter of the United Nations. …Israel's actions are specifically directed against concentrations of PLO terrorists in Lebanon. …Israel has no fight with Lebanon.[294]

[292] UNSC Resolution 425 (19 March 1978) UN Doc S/RES/425.

[293] UNSC 2146th Meeting (31 May 1979) UN Doc S/PV.2146, 4.

[294] UNSC 2292nd Meeting (17 July 1981) UN Doc S/PV.2292, 4-5.

Israel also carried out airstrikes and occupied southern Lebanon in 1982, alleging that the erosion of Lebanon's sovereignty in the south of its territory and its unwillingness or inability to prevent the activities of PLO terrorists operating from its territory against Israel opened Lebanese territory up to defensive measures taken by Israel.[295] While its use of force was on Lebanese territory, Israel maintained that it had no quarrel with Lebanon, but 'only with those who have subjugated it.'[296] Israel's claims of self-defence following uses of force in Lebanon in 1984 and 1985 also bear this signature. Israel asserted that its actions were directed solely and specifically against terrorist installations and bases and reiterated its support for the territorial integrity and independence of Lebanon.[297] Lebanon's inability to assert sovereignty over its territory made action in self-defence necessary.[298]

Similarly, Israel bombed targets in Tunisia in late 1985 following attacks on its nationals in Israel and in Cyprus by the PLO directed from its headquarters in Tunisia.[299] Israel described its action as a legitimate act of self-defence in response to acts of terrorism, a 'surgical strike aimed at the culprits, and at the culprits alone' not against Tunisia as host country.[300] Israel considered its use of force on

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[295] [1982] UNYB 430, 434.

[296] UNSC 2375th Meeting (6 June 1982) UN Doc S/PV.2375, 8. See also page 4 where Israel reiterated its respect for Lebanese independence and territorial integrity.

[297] See Letter dated 13 January 1984 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/16276; UNSC 2568th Meeting (28 February 1985) UN Doc S/PV.2568, 7.

[298] UNSC 2552nd Meeting (29 August 1984) UN Doc S/PV.2552, para 118.

[299] Letter dated 27 September 1985 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/17502, 1.

[300] UNSC 2611th Meeting 02 (October 1985) UN Doc S/PV.2611, 5-6.

Tunisian territory justified since Tunisia knowingly harboured the PLO and allowed it freedom of action and thereby took upon itself the risk of use of force on its territory in defence against the PLO.[301] As with its claims made regarding its use of force against PLO targets in Lebanon in the preceding years, Israel made clear that its self-defensive action was directed against the non-State group, and not Tunisia.

In all these instances Israel's claims of self-defence were made against the PLO, a non-State actor, rather than Lebanon or Tunisia. A shift in claim is evident, away from the responsibility of the territorial State for the attacks towards its unwillingness or inability to address the threat posed to Israel. Israel's emphasis on the territorial integrity and independence of these States makes clear that it considered itself able to act in self-defence even where the host State bore no fault.

Israel's claims of self-defence against non-State actors during this period were not limited to the PLO. Following Lebanese complaints of Israeli attacks on, and occupation of, Lebanese territory in January, May and December 1988, Israel relied on a right of self-defence against Hezbollah and other non-State groups, which it alleged were backed by Iran and Syria.[302] Israel asserted that its measures were designed solely to protect its northern population centres against repeated attacks emanating from Lebanese territory, and that such measures were necessary so long as Lebanon was unable to exercise its authority and prevent

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[301] ibid 6.

[302] UNSC 2783rd Meeting (18 January 1988) UN Doc S/PV.2783, 33; 1988 UNYB 219-220.

such attacks.[303] Israel continued to make claims of self-defence against Hezbollah and other terrorist organisations, such as the so-called Popular Front for the Liberation of Palestine – General Command, into the 1990s.[304]

Significantly, during this period, a number of other States joined Israel in asserting a right to act in self-defence against non-State actor attacks following extraterritorial uses of force by those States. Iran made numerous such claims to justify its uses of force in Iraq between 1993 and 2001, and against the Taliban in Afghanistan in 1998.[305] In 1993, for example, Iran claimed that bands of armed and organised terrorist mercenaries had planned and initiated trans-border military attacks from their headquarters in Iraq against Iranian border provinces.[306] In response, Iran carried out an air raid against the military bases of the terrorist group, which it deemed to be a purely defensive measure within Article 51 of the Charter and without prejudice to Iran's policy of respecting the sovereignty and territorial integrity of Iraq and to its commitment to the ceasefire between the two countries.[307]

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[303] 1988 UNYB 219.

[304] Israel made such claims in 1992 (UN Doc S/24032), in 1993 (UN Doc S/26152) and in 1996 (UNSC 3653rd Meeting (15 April 1996), UN Doc S/PV.3653, 6) to justify an extensive operation against Hezbollah in Lebanon.

[305] Letter dated 8 October 1998 from the Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/1998/934.

[306] Letter dated 25 May 1993 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/25843.

[307] ibid. In a previous letter to the Secretary-General, Iran stated that it held the Government of Iraq solely responsible for the attacks carried out by the mercenaries – Letter dated 21 May 1993 from the Chargé d'affaires a.i. of Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/25813). This allegation was not, however, repeated in any subsequent communication to the UN, and appears to have been abandoned.

It is evident that Iran's use of force in Iraq in that instance was based on a claimed right of self-defence against non-State actors. The same is true of its subsequent uses of force in Iraq – while expressly reserving its inherent right of self-defence in accordance with Article 51 against anti-revolutionary elements operating from Iraqi territory, including the Moujahidi Khalq Organisation (MKO), Iran continuously reiterated its respect for the territorial integrity of Iraq, emphasising that its defensive operations were aimed solely at the mercenaries and their command and control, training and logistics bases located inside Iraqi territory, and were not directed against the Republic of Iraq.[308] Since its actions were grounded in the inherent right of self-defence, Iran asserted that its military operations on Iraqi territory 'should not be construed as infringing the territorial integrity of Iraq.'[309]

Tajikistan also made direct claims of self-defence against non-State actors present in Afghanistan. In its 1993 letter to the United Nations outlining attacks made on a village in Tajikistan by the Afghan mujahidin, Tajikistan asserted that responsibility for the attacks rest 'fully and entirely with the extremist groups in Afghanistan', and reserved the right, if the attacks continued, to take all necessary

[308] See Letter dated 29 July 1996 from Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1996/602; Letter dated 2 October 1997 from the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1997/768; Letter dated 10 May 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1999/536; Letter dated 12 July 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1999/781; Letter dated 18 April 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2001/381.

[309] Iran April 2001 Letter (n 308).

measures, in accordance with Article 51 of the Charter, to repel those attacks. [310] Russia also supported this claim, reserving the right to act in the collective self-defence of Tajikistan if Afghanistan failed to take urgent measures to prevent the continuation of attacks against Tajikistan.[311] Tajikistan also reserved the right to act in self-defence against attacks by anti-Government opposition forces operating from Afghan territory in 1994 and 1995, supported by Russia and Kazakhstan.[312] In these instances, no claims of Afghan responsibility for the attacks, or of a right to act in self-defence against Afghanistan itself, were made. Tajikistan's communications instead called upon the Government of Afghanistan to take the necessary measures to suppress hostile non-State actor activity and thereby exclude the need for self-defensive action. Tajikistan also seemed willing to engage Afghanistan in a process of peaceful resolution, a position it would be unlikely to take had it considered Afghanistan responsible for the attacks against it.[313]

Turkey's action against Kurdish rebels present in Iraq during the 1990s, while not accompanied by an express claim of self-defence pursuant to Article 51 of the Charter, followed this rising trend. In 1995, Turkey launched a major military offensive against Kurdish rebels in northern Iraq, which continued for several

[310] Letter dated 15 July 1993 from the Permanent Representative of Tajikistan to the United Nations addressed to the Secretary-General, UN Doc S/26092.

[311] Letter dated 15 July 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc S/26110.

[312] Letter dated 28 February 1994 from the Permanent Representative of Tajikistan to the United Nations addressed to the Secretary-General, UN Doc S/1994/235, 2-3; 1995 UNYB 497.

[313] See eg Letter dated 24 August 1994 from the Permanent Representative of Tajikistan to the United Nations addressed to the Secretary-General, UN Doc S/1994/992, 2.

months.[314] In response to Iraq's letter of complaint to the Security Council, Turkey maintained its respect for the preservation of the sovereignty and territorial integrity of Iraq, but considered it was necessary to resort to 'legitimate measures which are imperative to its own security' since it was unable to rely on the Government of Iraq to fulfil its obligation under international law to prevent the use of its territory for the staging of terrorist attacks against Turkey. The language used by Turkey suggests a claim of self-defence. The United States, in its early support of the Turkish action, took the position that, in the circumstances, Turkey had a right to defend itself against attacks emanating from a neighbouring country.[315]

Similarly, in the following year, when accounting for its uses of force against the Kurdistan Workers' Party (PKK) in Iraq, Turkey described its actions as 'necessary and appropriate force to protect itself from attacks from a neighbouring country.'[316] Turkey highlighted Iraq's failure to meet its obligations to prevent the use of its territory for the launching of attacks against Turkey, but did not claim that this failure enabled it to act in self-defence against Iraq. Turkey was careful to stress that its measures targeted only the elements and resources of the terrorist organisation.[317] In 1997, Turkey again carried out a major offensive against the PKK, which had used camps based in northern Iraq as staging ground for attacks against Turkey.[318] In response to Iraq's numerous complaints to the Security

[314] Keesing's (2005) vol 41(3) 40473; vol 41(4) 40522.

[315] ibid. This support was later withdrawn after the Turkish operation continued on for several days.

[316] Identical Letters dated 27 June 1996 from Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/1996/479, 2.

[317] ibid 3.

[318] Keesing's (1997) vol 43 (5) 41651.

Council, Turkey justified its military operation as measures taken to defend the sanctity of its borders and the security of its people from acts of terrorism.[319] In its communication, Turkey did not expressly rely on Article 51 of the Charter or its inherent right of self-defence. However, its representative before the General Assembly classified the Turkish action as 'measures of self-defence'.[320]

The US claim of self-defence following the 9/11 terrorist attacks was not a first for that State. In August 1998, the US carried out targeted military attacks in response to terrorist attacks against US embassies in Nairobi and Dar es Salaam. In its communiqué to the UN Security Council pursuant to Article 51 of the Charter justifying the attacks, the US indicated that it had 'exercised its right of self-defence in responding to a series of armed attacks against US embassies and US nationals.'[321] The letter further indicated that the US had targeted camps and installations used by the Bin Laden-led organisation in response to these terrorist attacks, and to prevent and deter their continuation.[322] The similarity of the accusations levelled against the Governments of Afghanistan and Sudan contained in this correspondence and those made by the US against the Taliban regime in its October 2001 letter to the UN Security Council following 9/11 are obvious. In both instances, the US highlighted the failure of Afghanistan and Sudan in 1998 and Afghanistan in 2001 to meet its repeated requests to take action

[319] Identical Letters dated 16 July 1997 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/1997/552, 2.

[320] UNGA 22nd Plenary Meeting (2 October 1997) UN Doc A/52/PV.22, 32.

[321] Letter dated 20 August 1998 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/1998/780.

[322] ibid.

against those responsible. Significantly, as in 2001, the US claim of self-defence was not made against the territorial States, but against non-State actors present in those States.[323] The US expressly claimed that intelligence pointed to the sole responsibility of the terrorist network financed by and affiliated with Osama bin Laden, and its campaign targeted alleged Al Qaida facilities only. President Clinton, in outlining the reasons for and objectives of the strikes, made clear that the 'target was terror', rather than the States from whose territory these terrorist elements operated.[324]

The survey of pre-9/11 practice shows a gradual increase in direct claims against non-State actors in the 1990s. Admittedly, State practice during this period was not perfectly uniform. There were instances in which States used force against non-State actors present in overseas territory without any express claim of self-defence being recorded. Turkey, while noting the need to protect its territory and people from terrorist attacks, did not rely explicitly on self-defence in its communications to the Security Council. Instead, it claimed that its action originated 'from the principle of self-preservation and necessities'.[325] Similarly, Senegal bombarded alleged bases of the Movement of Democratic Forces of

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[323] This claim must be contrasted with previous claims made by the US following terrorist attacks. Following terrorist attacks on US citizens abroad in April 1986, the US used military force against Libya. The US classified the terrorist attacks as a 'pattern of attacks by the Government of Libya'. While it exercised care in restricting its military response to terrorist-related targets, the US deemed the perpetrators 'Libyan agents' and considered the attacks to be a violation of Article 2(4) of the Charter by Libya itself. The US use of force was deemed an armed aggression by the vast majority of States in the Security Council who rejected that Libya was involved in the attacks (UN Doc S/17990; UN Doc S/PV.2677; UN Doc S/PV.2679; UN Doc S/PV.2680). The US also claimed Iraq was responsible for the alleged assassination attempt of ex-President Bush by Iraqi agents in 1993 (UN Doc S/26003). In neither of these instances did the US claim to be acting directly against non-State actor elements in Libya or Iraq.

[324] Sean D Murphy, 'Contemporary Practice of the United States Relating to International Law' (1999) 93 AJIL 161,162.

[325] Turkey June 1996 Letters (n 316) 2.

Casamance (MFDC) located in Guinea-Bissau in 1992 and 1995 without relying on the right of self-defence.[326] The Government of Senegal, however, persistently alleged that the MFDC launched attacks against its territory from their bases in Guinea-Bissau. These provocations were well documented.[327]

A similar pattern is observed with Burundi and Thailand. Burundi alleged that Burundian refugees concentrated along the Tanzanian border carried out persistent deadly attacks on the territory of Burundi from their positions in Tanzania[328] but did not expressly claim to be acting in self-defence against refugee attacks when it carried out cross-border incursions into Tanzania. However, its actions appeared to be based, at least in part,[329] on a need to respond those attacks. Thailand carried out a cross-border attack against a camp of Democratic Karen Buddhist Organisation (DKBO) guerrillas on Burmese territory in 1995. The attack was preceded by government warnings that Thai forces would pursue the guerrillas into Burma if cross-border raids continued.

Although Turkey, Senegal, Burundi and Thailand all failed to expressly rely on a right of self-defence, their actions have been construed as invocations of the right of self-defence.[330] No competing legal basis for action was offered by these

[326] Keesing's (1992) vol 38 (12) 39228; Keesing's (1995) vol 38 40396.

[327] Franck (n 59) 65.

[328] Letter dated 2 October 1997 from the Permanent Representative of Burundi to the United Nations addressed to the President of the Security Council, UN Doc S/1997/764. See also Keesing's (1997) vol 40 41851.

[329] Burundi also alleged that it was subject to attacks by the Tanzanian army – See Letter dated 28 October 1997 from the Permanent Representative of Burundi to the United Nations addressed to the President of the Security Council, UN Doc S/1997/822.

[330] Gray (n 1) 146.

States. These events do not, therefore, detract from the noticeable trend of practice basing extraterritorial use of force following non-State actor attacks on a right to act directly against those non-State actors in self-defence. Instead, they provide additional evidence of shifting claims in State practice during the immediate pre-9/11 period.

The vast majority of claims of self-defence following non-State actor attacks during the 1980s and 1990s were expressly made, and specifically based on Article 51 of the UN Charter. States, in using force extraterritorially against non-State actors, considered themselves to be acting consistently with the Charter framework, rather than forging a novel right outside it. This practice, therefore, forms the backdrop against which the events of 9/11 and subsequent State practice must be assessed; not as novel claims, but as the continuation and consolidation of decades of converging practice.

Shifting Responses

As the legal claims of States using force extra-territorially following non-State actor attacks shifted in the pre-9/11 era, so too did the response of the international community to those claims. The issue of self-defence was not always addressed head on in the Security Council's consideration of uses of force against non-State actor attacks, but where specific attention was given to claims of self-defence, a gradual shift in attitudes and responses can be seen.

Israel's earliest claims of self-defence following non-State actor attacks based on territorial State responsibility were totally rejected and its uses of force condemned by States in the Security Council.[331] Israel's reformulated claim of a right to act in self-defence directly against non-State actors located on foreign territory was first met with equal resistance. Its use of force against Palestinian camps in Lebanon in 1979 was based on its inherent right of self-defence as expressed in Article 51 of the UN Charter.[332] In the Security Council debates on the occurrence, Kuwait classified the Israeli position as a 'bold misinterpretation of the Charter'.[333] Other States did not comment specifically on Israel's novel claim of self-defence, but the general consensus was that Israel had acted unlawfully.

Israel's claim of a right to use force against Palestinian elements in Lebanon in 1981 was also rejected. While Security Council Resolution 490 included no express condemnation of Israel's action, the majority of States before the Council considered the Israeli action an act of aggression.[334] Egypt, in particular, considered Israel's invocation of self-defence in the circumstances as an abuse of the right. Its representative classified Israel's justification as 'flimsy argumentation copied from 19th century pre-Charter concepts.' Specifically, Egypt opined that an armed attack within the meaning of Article 51 of the Charter had not preceded the Israeli use of force, rendering that provision inapplicable.[335] Israel's alleged self-

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[331] See eg UNSC Resolution 262 (n 279); UNSC Resolution 270 (n 288); UNSC Resolution 280 (n 288); UNSC 1541st Meeting (n 289) 4 (per China); UNSC 1643rd Meeting (n 287) 9 (per Saudi Arabia), 12 (per France), 18 (per Somalia); UNSC Resolution 332 (n 288); UNSC Resolution 347 (n 288); 1975 UNYB 229.

[332] UNSC 2146th Meeting (n 293) 4.

[333] UNSC 2147th Meeting (12 June 1979), UN Doc S/PV.2147, 5 (per Kuwait).

[334] UNSC 2292nd Meeting (n 294) (per Jordan and USSR); UNSC 2293rd Meeting (21 July 1981), UN Doc S/PV.2293, 3 (per Tunisia), 9 (per German Democratic Republic),15 (per Syrian Arab Republic), 17 (per China and Yemen).

[335] UNSC 2293rd Meeting (n 334) 7.

defensive operation also appears to have been overwhelmingly condemned by the international community as a whole despite Israel's invocation of the right of self-defence against PLO terrorist attacks. A draft Resolution of the Security Council condemning Israel's use of force in Lebanon was vetoed by the US as being insufficiently balanced to accomplish the objectives of ending the violence and promoting long-term peace in Lebanon.[336] It did, however, receive the affirmative vote of all other members of the Council.[337] Acting in tandem, the UN General Assembly condemned Israel's 'act of aggression against the sovereignty of Lebanon'.[338]

Israel's armed strikes against PLO bases and headquarters in Tunisia in 1985 were similarly condemned. Kuwait, on behalf of the group of Arab States, rejected Israel's claim of self-defence, terming the raid instead an act of official State terrorism.[339] The Non-Aligned Countries also rejected the claim of self-defence, condemning Israel's use of force as a 'totally unjustified attack on Tunisia in flagrant violation of its sovereignty and territorial integrity'.[340] The majority of States before the Security Council also considered the Israeli action unjustified and

[336] UNSC 2377th Meeting (8 June 1982), UN Doc S/PV.2377, 3. In a previous meeting, Guyana expressly rejected Israel's justification of self-defence – UNSC 2375th Meeting (6 June 1982), UN Doc S/PV.2375,10. A similar result (US veto of a proposed Resolution condemning Israel) followed Israel's use of force against the PLO in Lebanon in 1985 – See UNSC 2573rd Meeting (12 March 1985), UN Doc S/PV.2573,18.

[337] UNSC 2377th Meeting (n 336) 2.

[338] UNGA Resolution ES-7/5 (1982) (24th plenary meeting, 26 June 1982), UN Doc A/RES/ES-7/5.

[339] UNSC 2610th Meeting (2 October 1985), UN Doc S/PV.2610, 4.

[340] Special Communiqué adopted by the Meeting of Minsters and Heads of Delegation of Non-Aligned Countries to the General Assembly (1 October 1985), UN Doc S/17518, annex.

an act of aggression.[341] A few States in the Security Council,[342] and the European Community, Spain and Portugal, [343] while condemning, or acknowledging, the terrorist attacks committed against Israel, concluded that those acts did not justify the Israeli use of force on Tunisian territory. UNSC Resolution 573 vigorously condemned Israel's act of armed aggression and determined Tunisia was entitled to appropriate reparations.[344]

The United States, however, advanced a position against this tide of condemnation, and abstained from voting on the Resolution. Although it failed to support previous Resolutions of the Council condemning Israel on the basis of the perceived imbalance of the drafts, for the first time the US explicitly recognised and endorsed the legal justification offered by Israel for its use of force on foreign territory following terrorist attacks. In explaining its abstention on the vote, the US stated that:

> …we recognise and strongly support the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognised in the Charter of the United Nations. *We support this principle regardless of attacker*, and regardless of victim.[345]

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[341] UNSC 2610th Meeting (n 339) 5 (per India), 6 (per Egypt); UNSC 2611th Meeting (n 300) 3 (per Peru), 4 (per Turkey and Thailand), 7 (Algeria), 10 (per USSR and Cuba), 11 (per Senegal), 13 (per Pakistan); UNSC 2615th Meeting (4 October 1985), UN Doc S/PV.2615, 2 (per Nigeria on behalf of the Group of African States), 3 (per Germany), 4 (per Yugoslavia), 6 (per Indonesia, which considered the Israeli justification as 'lame'), 7 (per Nicaragua), 10 (per Malta), 11 (per Mauritania), 12 (per Bangladesh),14 (per Afghanistan), 15 (per Vietnam).

[342] UNSC 2611th Meeting (n 300) 2 (per Denmark), 5 (per Australia), 9 (per UK).

[343] Letter dated 2 October 1985 from the Permanent Representative of Luxembourg to the United Nations addressed to the Secretary-General, UN Doc S/17520.

[344] UNSC Resolution 573 (4 October 1985), UN Doc S/RES/573.

[345] UNSC 2615th Meeting (n 341) 22 (emphasis mine).

The US pointedly endorsed Israel's claim of self-defence against non-State actor attacks absent territorial State responsibility and recognised this right as being consistent with Article 51 of the UN Charter. Again in 1988, the US voted against three separate Resolutions of the Council deploring Israeli actions against the PLO in Lebanon, lamenting the failure of the Resolutions to address the security threats Israel faced.[346] In the US' view, 'attack has generated attack', and the request for Israel to cease all attacks against Lebanese territory regardless of prior provocation amounted to a denial of Israel's inherent right to defend itself.[347] Other members of the Council did not share the US' position on Israel's claim of self-defence and voted instead to condemn Israel's actions on each of these occasions.[348]

It is possible to observe, however, a progressively more positive response of the international community to claims of self-defence against non-State actors in the 1990s. This coincides with the increase in numbers of States claiming a right to use force extra-territorially in self-defence against non-State actors during that period, as has been discussed. The international community was largely silent on Iran's claims as against non-State elements present in Iraq. Despite letters of protest from Iraq to the UN Security Council,[349] there appears to have been no

[346] UNSC 2784th Meeting (18 January 1988), UN Doc S/PV.2784, 51; UNSC 2814th Meeting (10 May 1998), UN Doc S/PV.2814, 59-60; UNSC 2832nd Meeting (14 December 1988), UN Doc S/PV.2832, 29.

[347] ibid.

[348] UNSC 2784th Meeting (n 346) 48-49 (The UK abstained on the vote in January 1988, sharing the US' concern for the imbalance of the draft. It did not, however, appear to endorse Israel's claim of self-defence against non-State actors); 1988 UNYB 219-220.

[349] See eg Letter dated 1 August 1996 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/1996/617; Letter dated 29 August 1996

condemnation of Iran's uses of force or other institutional response.[350] Similarly, no international censure flowed from Tajikistan's uses of force against non-State actors in Afghanistan during the 1990s. While the Security Council considered the tensions along the Tajik-Afghan border, it did not make a pronouncement on the claims of self-defence. Notably, it reaffirmed the necessity for the respect of Tajikistan's sovereignty and territorial integrity, without a similar call in relation to Afghanistan.[351] The Secretary-General also investigated and produced reports on the situation in Tajikistan without pronouncing on the legal claims or circumstances of self-defence as argued by Tajikistan.[352] The silence on the part of States, and the UN Security Council, in these instances is arguably indicative of a tacit acceptance of the legal justification articulated by Tajikistan and Iran for their uses of force.

The international legal response to US military action in Sudan and Afghanistan in 1998 is particularly instructive. It would be an overstatement to conclude that the international community of States as a whole accepted the justification offered by the US in 1998.[353] No official UN censure flowed from the US military action,[354] but it is noteworthy that no official UN endorsement was

from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/1996/707.

[350] Franck (n 59) 65; Tams (n 137) 380.

[351] See eg Note by the President of the Security Council (23 August 1993), UN Doc S/26341.

[352] Gray (n 1) 183.

[353] Corten, *Law against War* (n 60) 179.

[354] Franck (n 59) 66.

received either.[355] Most States remained silent on the issue, [356] though criticisms were levelled by the League of Arab States, and the Governments of Pakistan, Iran, Iraq, Libya, Yemen and Russia.[357] Some European allies and Japan expressed varying degrees of support and understanding.[358] Although more positive in comparison to State reaction to Israel's earlier 'novel' claims, this response stands in stark contrast to the near total support given to the United States' claim to self-defence following the attacks of 9/11.

Against this backdrop of past State practice, the overwhelming legal response of the international community of States to the events of 9/11 clearly signals that a shift in international legal thinking on the issue had occurred by that time. Earlier State claims to self-defence based on attacks emanating from non-State actors were premised on painstaking attempts to establish the responsibility of the territorial State. Even where ties to the territorial State were particularly tenuous, they were used to weave together a claim of self-defence against that State. Contemporary State practice reveals a difference in approach. States claim a direct right of self-defence against non-State actors. The response of other States to such claims, largely negative or unsupportive in earlier years, is now also more positive.

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[355] In its Resolution 1193 the Security Council made no reference to the US military action in Afghanistan and Sudan. It did, however, note its grave concern at the threat posed by the Taliban forces to regional and international peace and security and the continuing presence of terrorists in Afghanistan – UNSC Resolution 1193 (28 August 1998), UN Doc S/RES/1193 (1998) Preamble.

[356] Gray (n 1) 205.

[357] Murphy 1999 (n 324) 164.

[358] ibid 165.

III. ***Evolved State Practice and the Notion of 'Armed Attack': The Verdict***

It has been suggested that the events of 9/11 brought about a sudden change in the law of self-defence. A survey of State practice shows, however, that the change was evolutionary. Calls for development of the law to recognise a right of self-defence against armed attacks by non-State actors were made by States like the USA and Israel, even before the ICJ's judgment in *Nicaragua*, in the face of increasing terrorist threats. In explaining its vote on the resolution condemning Israel's airstrikes in Tunis in 1985 for example, the US stated that the principle that a State subjected to continuing terrorist attacks might respond with appropriate force to defend itself against further attacks was an aspect of the inherent right of self-defence recognised in the Charter.[359] Though not supported at that time, such a statement would be endorsed by almost all States in present-day practice. The events surrounding 9/11, and subsequent practice as discussed above, have confirmed a shift in the law, but can hardly be described as novel or a 'tidal change'.[360] Other such pre-2001 instances have long been identified. Though the events of 9/11 are pivotal, against the backdrop of previous relevant State practice, and as the prelude to later such practice, the evolution of the law of self-defence can be seen as complete.

Prior to the events of 9/11, the vast majority of States rejected claims to self-defence in response to attacks by non-State actors falling short of the standard laid down in the *Nicaragua* case[361] in stark contrast to the overwhelming approval

[359] [1985] UNYB 287.

[360] Tams (n 10) 159.

[361] Gray (n 1) 13.

of the US right of self-defence following the 9/11 attacks. Doubts have been raised about the strength of the international response to the US' 9/11 claim. It has been suggested that Security Council Resolutions 1368 and 1373 do not in fact support a right of self-defence against terrorist attacks and, more specifically, a redefining of the concept of armed attack.[362] Cassese, for instance, argues that Resolution 1368 is ambiguous and contradictory because it recognises the right of self-defence in the preamble while defining the terrorist acts of 9/11 as a 'threat to international peace and security' rather than an armed attack legitimising self-defence under Article 51 of the Charter.[363] The same language is used in the preamble to Resolution 1373. The UNSC's recognition of the inherent right of individual or collective self-defence 'in accordance with the Charter' in both Resolutions suggests that it recognised the existence of an armed attack within the meaning of Article 51. Further, Article 51 itself expressly recognises that the circumstances of self-defence may amount to a threat to international peace and security necessitating the intervention of the Security Council to maintain or restore same. The reference to self-defence in the preambles to the Resolutions is of greater significance than first meets the eye since the Security Council does not commonly make any express reference to the right of self-defence in its resolutions.[364] As Simma opined in the *Armed Activities* case, the resolutions

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[362] Myjer and White (n 50); Tladi (n 241) 69; Cassese (n 12) 993.

[363] Cassese (n 12) 996.

[364] Gray (n 1) 206.

cannot but be read as affirmations of the classification of non-State actor attacks as 'armed attacks' within the meaning of Article 51 of the Charter.[365]

Further, the invocations of Article 5 of the Washington Treaty and Article 3(1) of the Rio Treaty by NATO and the OAS respectively, both of which are expressly predicated on an armed attack against a Member State, indicate that States considered the terrorist attacks of 9/11 to amount to an armed attack within the meaning of Article 51 of the UN Charter and customary international law although the Al-Qaeda terrorists were not sent by or on behalf of the Taliban government of Afghanistan within the meaning of the *Nicaragua* case. Beyond 9/11, the overall assessment of State practice indicates that the attribution of a non-State actor's use of armed force to a State is not a requirement for finding that an armed attack, within the meaning of Article 51 of the Charter and customary international law, has occurred. Recent self-defensive operations by Israel in Lebanon, Russia in Georgia, Colombia in Ecuador, and the coalition of States in Syria all confirm that the use of armed force by non-State actors can be classified as armed attacks. Positive State response to such claims has not been predicated on the establishment of host State support.[366]

It has been suggested, however, that the State practice is not as uniform and widespread as argued in the present analysis and that there remains a considerable number of States that oppose a non-State actor reading of Article 51

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[365] *Armed Activities* Merits (n 47) Separate Opinion of Judge Simma para 11. See also Lindsay Moir, 'Action Against Host States of Terrorist Groups' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 720, 725 (arguing that Security Council Resolution 1368 'cannot sensibly be considered independently from the 9/11 paradigm.')

[366] Tams (n 10) 153

of the Charter.[367] Reference is often made to the principled position of the 120-Member States strong Non-Aligned Movement (NAM), articulated most recently at the conclusion of its 2019 Summit.[368] In its Final Document, the NAM 'stressed that the UN Charter contains sufficient provisions regarding the use of force to maintain and preserve international peace and security' and that, in accordance with the practice of the UN and the jurisprudence of the ICJ, 'Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted.'[369] The Community of Latin American and Caribbean States (CELAC), comprised of 33 States, has also expressed concern at the increase in the number of Article 51 letters submitted to the Security Council in the context of counter-terrorism use of force in Syria.[370] It further noted 'underlying concerns stemming from attempts to reinterpret the law on self-defence'.[371]

While these statements may be construed as resistance to a non-State actor reading of the right of self-defence recognised in Article 51 of the Charter,

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[367] See eg Olivier Corten, 'A Plea Against the Abusive Invocation of Self-defence as a Response to Terrorism', EJIL Talk! Blog (14 July 2016) <https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/>.

[368] Tladi (n 241) 88; Jutta Brunnée and Stephen J Toope, 'Self-defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law', (2018) 67 ICLQ 263, 275 (arguing that the NAM has long resisted any attempts to expand the right of self-defence, or any other unilateral use of force against sovereign States.)

[369] Final Document, Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Movement (20-21 July 2019), NAM 2019/CoB/Doc.1, para 39.2.

[370] Statement by the Permanent Mission of El Salvador to the United Nations on behalf of the Community of Latin American and Caribbean States (CELAC) during UN General Assembly Sixth Committee Consideration of Agenda Item Measures to Eliminate International Terrorism, New York (2 October 2017).

[371] Statement of the Permanent Mission of the Republic of El Salvador on behalf of the Community of Latin American and Caribbean States, CELAC during Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organisation, New York 20-28 February 2018, <https://celac.rree.gob.sv/wp-content/uploads/2018/02/Statement-CELAC-Charter-Committee-Feb-2018.pdf> accessed 31 August 2020.

regard must be had to the larger context in which they were made. For its part, the 2017 CELAC statement specifically laments that most Article 51 letters are sent 'ex post facto'. While noting that any use of force which does not comply with the Charter is illegal, unjustifiable and unacceptable, the statement gives no indication of the circumstances in which use of force in the anti-terrorism context might be so classified. In its 2018 statement, CELAC advocates 'clarification of the content and procedure that follows, so as to ensure that the obligations laid out in the Charter are being fulfilled.'[372] No express reference is made to the right of self-defence against non-State actors *per se.* It would be overstating, therefore, to say that the CELAC, as a group, has expressed opposition to the right of non-State actor self-defence. This is particularly so when the group's statement is contrasted with that made by one of its Member States. In its own statement, Brazil noted 'concerns stemming from attempts to reinterpret the law regarding the content and scope of self-defence, *especially its applicability in relation to non-State actors',*[373] a position arguably not shared by the remainder of the community, which omitted to make a similar reference.

The NAM statement should similarly not be overread. Although the NAM emphasised a restrictive reading of Article 51 of the Charter, it recorded a general statement of its principled position on the peaceful settlement of disputes and non-use or threat of use of force expressed verbatim in previous iterations of summit

[372] ibid.

[373] Statement of the Permanent Mission of Brazil during the United Nations Sixth Committee Consideration of Agenda Item Measures to Eliminate International Terrorism, 2-4 October 2017, UN Doc A/C.6/72/SR.4, para 32 (emphasis mine).

Final Documents[374] without referencing a specific legal doctrine or claim. The NAM statement need not be read as inconsistent with an acceptance of non-State actor self-defence. That the 'UN Charter contains sufficient provisions regarding the use of force', and that Article 51 is restrictive in scope, are principled positions with which proponents of the right of self-defence against non-State actors would also agree.[375]

While acknowledging that the NAM statement does not speak expressly to the question of non-State actor self-defence, Tladi argues that it nevertheless highlights 'the discomfort of a large number of States… with the extraterritorial use of force to combat terrorism.'[376] With respect to the *opinio juris* of the States comprising the Movement, the statement need not be read in isolation and speculated upon, but can be assessed in light of the practice of those States otherwise recorded. First, a significant number of NAM States supported the US claim to self-defence in the aftermath of 9/11 as members of the Organisation of American States. Similarly, a number of the Movement's Arab Member States supported the US in airstrikes against ISIS positions in Syria. Beyond this, several NAM States have themselves invoked the right of self-defence against non-State actors in foreign territory, including Burundi, Colombia, Ethiopia, Iraq, Kenya,

[374] Final Document, 16th Summit of Heads of State or Government of the Non-Aligned Movement (26-31 August 2012), NAM 2012/Doc.1/Rev.2, para 28.2; Final Document, 17th Summit of Heads of State and Government of the Non-Aligned Movement (17-18 September 2016), NAM 2016/CoB/DOC.1.Corr.1, para 25.2.

[375] See eg Schrijver and van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (Grotius Centre for International Legal Studies, 1 April 2010) para 28 (which, while recognising a right of self-defence against non-State actors, declares that there is no need for new rules and the framework laid down in Charter remains cornerstone of the international legal regime on the use of force) and Wood (n 242) 3, arguing that the existing Charter rules 'properly interpreted and applied, are adequate to address current threats.'

[376] Tladi (n 241) 78.

Saudi Arabia and Tanzania. It is argued, therefore, that the NAM statement should be read consistently with the contemporaneous practice of these States.

Further, it is particularly significant that the NAM does not address the issue of non-State actor self-defence in its declarations while expressly rejecting the doctrines of pre-emption and unilateral humanitarian intervention. In its 2016 statement, for example, the NAM unequivocally opposed the adoption of the doctrine of pre-emptive attack[377] and 'reiterated the rejection by the Movement of the so-called "right" of humanitarian intervention, which has no basis either in the UN Charter or in international law.'[378] By contrast, the NAM voiced no condemnation of, or opposition to, the right of self-defence against non-State actors. Given the increased and explicit reliance by States taking action in Syria on a right to use force in self-defence against a non-State actor in the months directly preceding the 2016 NAM statement, it would be expected that any opposition would be similarly noted.

It is not suggested, however, that there exists a universal acceptance of the right of self-defence against non-State actors. It is noted and accepted, for instance, that Brazil has in recent years consistently and expressly opposed such a right in international fora. In an open debate of the Security Council on international law and the maintenance of international peace and security, Brazil's representative noted the State's disagreement with an interpretation of Article 51 that would permit self-defence as a response to non-State actors. In Brazil's view,

[377] NAM 2016 Final Document (n 374) para 26.5. See also NAM 2019 Final Document (n 369) para 40.6.

[378] NAM 2016 Final Document (n 374) para 777. See also NAM 2019 Final Document (n 369) para1000.

self-defence can only be a response to an armed attack either undertaken directly by a State or otherwise attributed to the State.[379] Similarly, in a General Assembly debate, Mexico expressed the position that Article 51 cannot be invoked to justify a military response to an attack perpetrated by a non-State actor that does not maintain a relationship with the territorial State, even in circumstances where that State may be unwilling or unable to act against the non-State actor.[380]

While these clear rejections of non-State actor self-defence are noted, it must be recalled that the requirement is for a general practice rather than a universal one. The concluded survey reveals a sufficient degree of uniformity and representativeness in State practice to support the classification of non-State attacks as armed attacks within the meaning of Article 51 of the Charter. The question, however, of the permissible response to such attacks is much less straightforward. Examination of the practice reveals general agreement on the classification of non-State actor attacks, but wide variation in the approaches taken to responding to them. It is important, therefore, to move beyond the debate on the existence of a right of self-defence against non-State actors to the topic of its scope.

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[379] UNSC 8262nd Meeting (17 May 2018), UN Doc S/PV.8262, 44. This position was also asserted by the Legal Advisor to the Permanent Mission of Brazil to the UN in laying out his country's legal position during the 2018 annual ASIL meeting – Remarks by Patrick Luna, (2018) 112 Proceedings of the Annual ASIL Meeting 50.

[380] Permanent Mission of Mexico to the United Nations, *Intervención de México en el debate sobre el Tema: Tema 85: "Informe del Comité Especial de la Carta de las Naciones Unidas",* Sixth Committee of the 73rd United Nations General Assembly (New York, 12 October 2018), <https://mision.sre.gob.mx/onu/index.php/eventos/800-intervencion-de-mexico-en-el-debate-de-la-sexta-comision-sobre-el-informe-del-comite-especial-de-la-carta-de-las-naciones-unidas-en-el-marco-de-sesiones-de-la-73a-asamblea-general-de-la-onu> accessed 31 August 2020, 2-3.

CHAPTER III

THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE ACTORS IN THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

A. INTRODUCTION

THE International Court of Justice (ICJ) has played a critical role in the elucidation and development of the rules governing the use of force in international law. The very first case before the Court, the *Corfu Channel* case,[1] raised issues of the use of force by States in the aftermath of World War II. The *Nicaragua* case of 1986,[2] however, gave the Court its first opportunity to extensively consider and apply international law on the use of force. While the factual matrix of the case included the use of force by the armed forces of the States involved, it primarily entailed forcible actions carried out by irregular forces, or non-State actors, with varying degrees of support or assistance from a State.

In parallel with the most recent trends in international warfare, where non-State actors play an increasing role in transborder attacks, the latest jurisprudence of the Court on the use of force has centred on the legal assessment of forcible actions perpetrated by non-State elements across international borders. While the Court has been called upon to clarify and declare the law as applicable to such uses of force, it has been guarded and equivocal in its pronouncements, particularly regarding the existence of a right of self-defence against attacks

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[1] *Corfu Channel Case (United Kingdom v Albania)* (Merits Judgment, 9 April 1949), [1949] ICJ Reports 4.

[2] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits Judgment, 27 June 1986) [1986] ICJ Rep 14.

perpetrated by non-State actors. Its engagement with developments in State practice has been meagre. This raises questions about the usefulness of the Court's jurisprudence for understanding and assessing the contemporary claims of self-defence by States in the face of non-State actor attacks and threats.

B. THE *NICARAGUA* CASE AND NON-STATE ACTOR ATTACKS

The Merits judgment of the ICJ in the *Nicaragua* case presents a useful starting point, not only because it represents the first consideration by the Court of the rules governing the use of force in international law, but also because the academic debate on the existence of a right of self-defence against non-State actors often centres on whether, and to what extent, contemporary State practice aligns or does not align with the pronouncements made by the Court in that case. Specifically, the Court found, relying on Article 3(g) of the General Assembly *Definition of Aggression*,[3] that an armed attack giving rise to the right of self-defence would have occurred where there was '"the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to"…an actual armed attack conducted by regular forces, "or its substantial involvement therein".'[4] Much of the controversy today, in the aftermath of the 9/11 terrorist attacks, revolves around

[3] UNGA Resolution 3314 (XXIX) (14 December 1974), UN Doc A/RES/3314 Annex, *Definition of Aggression,* Article 3(g).

[4] *Nicaragua* Merits (n 2) para 195.

this portion of the Court's judgment and whether a wider definition of armed attack should now be adopted.[5]

The *Nicaragua* case arose out of United States' actions in Nicaragua following the end of the Somoza presidency in 1979. US support for the new Sandinista regime soon shifted to overt support for the *contras,* an irregular military force opposed to the Sandinista regime primarily made up of ex-members of the National Guard and supporters of the former Somoza Government.[6] Nicaragua contended that the US was effectively in control of the *contras* who had caused considerable material damage and widespread loss of life. The Court was not satisfied that the US had directed and controlled the *contras* so that their actions were attributable to the US for the purposes of State responsibility,[7] but it did find that the US had provided funding, ammunition, military equipment, military training and intelligence towards the commission of military and paramilitary activities by the *contras*.[8]

While the US had withdrawn from the case before the Court's consideration of the merits,[9] its Counter-Memorial on jurisdiction and admissibility made clear that the US was relying on the inherent right of self-defence, specifically the

[5] Christine Gray, 'The International Court of Justice and the Use of Force' in Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* (OUP 2013) 252.

[6] *Nicaragua* Merits (n 2) 20-21.

[7] ibid para 106.

[8] ibid paras 95-100.

[9] See 'Text of U.S. Statement on Withdrawal from Case before the World Court', New York Times (19 January 1985) <https://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html> accessed 24 October 2020.

collective defence of El Salvador, Honduras and Costa Rica, as a justification for its actions.[10] The US claimed that Nicaragua had engaged in armed attacks on these States having 'provided guerrillas in neighboring countries – particularly in El Salvador – with arms, munitions, finance, logistics, training, safe havens, planning, and command and control support.'[11] The Court, then, had to consider whether Nicaragua had in fact given such support to the armed opposition in El Salvador,[12] and whether that support constituted an armed attack on El Salvador entitling the US to invoke self-defence.

It is the Court's legal assessment in answering these questions that has proved most controversial, and which has been most frequently referenced in the academic debate on a right of self-defence against non-State actors. In considering the notion of 'armed attack' in customary international law the Court concluded:

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General

[10] The US argued that all three States had sought its assistance in their self-defence against Nicaragua's aggression, to which the US responded in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance – see *ICJ Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Vol II (Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility)) para 202.

[11] US Counter-Memorial (n 10) paras 189-90.

[12] The Court focused its assessment on allegations of support to guerrillas in El Salvador only. For its reasoning see *Nicaragua* Merits (n 2) para 131.

> Assembly Resolution 3314 (XXIX), may be taken to reflect customary international law.[13]

In the Court's assessment, self-defence could arise in response to attacks perpetrated by a non-State actor if the non-State actor was sent by or on behalf of a State to perpetrate the attack, or the State was otherwise substantially involved therein. While the Court did not elaborate on the scope of the 'substantial involvement' criterion, it ruled out that the concept of 'armed attack' could include assistance to rebels in the form of provision of weapons or logistical or other support.[14] By implication, the Court took a very narrow approach to the concept of 'substantial involvement'.[15]

As with the *Nicaragua* case, the factual circumstances of claims of self-defence against non-State actors such as Hezbollah and ISIS in recent times do not align with the 'sending or substantial involvement' standard enunciated by the Court on the basis of Article 3(g) of the *Definition of Aggression.* In fact, modern claims of self-defence against non-State actors have been made despite there being little or no State involvement or support in very many of these instances. This discord with the *Nicaragua* standard, a standard which has been reiterated by

[13] *Nicaragua* Merits (n 2) para 195.

[14] *Nicaragua* Merits (n 2) para 195. The Court determined that such action could be regarded instead as a threat or use of force, or an intervention in the internal or external affairs of other States. In relation to Nicaragua's claim that the US assistance to the *contras* constituted a breach of the customary international law principle of the non-use of force, the Court found that the US had committed a *prima facie* violation of that principle by arming and training the *contras.* The Court concluded that the mere supply of funds to the opposition force did not, however, involve the threat or use of force (para 228).

[15] Tom Ruys and Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-defence' (2005) 10(3) JCSL 289, 303.

the Court in its subsequent jurisprudence,[16] is what gives some commentators pause about recognising a right of self-defence in those circumstances.[17]

C. Reconciling *Nicaragua*, Contemporary State Practice and Article 51 of the UN Charter

Does acceptance of a right of self-defence against non-State actors based on evolution in State practice in the past two decades necessitate a rejection of the continued value of the *Nicaragua* standard? This becomes an important consideration in light of the Court's reiteration of that standard in its most recent judgment on self-defence and the use of force.[18] Arguably it is extremely difficult, if not impossible, to reconcile the post-9/11 practice surveyed in the preceding Chapter with the dictum of the Court in *Nicaragua*. More accurately, it is extremely difficult to reconcile the post-9/11 practice with the *general construction* given to the dictum of the Court. As Gray notes, the test generally accepted as applicable to the concept of armed attack, and as arising from the judgment of the Court, is that the use of force by non-State actors constitutes an armed attack *only* when there has been a 'sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries'.[19] It is accepted that a right of self-defence against

[16] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v Uganda)* (Merits Judgment, 19 December 2005) [2005] ICJ Rep 108, 146.

[17] Gray (n 5) 258-60; Dire Tladi, The Use of Force in Self-Defence against Non-State Actors, Decline of Collective security and the Rise of Unilateralism: Whither International Law?' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War*, vol 1 (CUP 2019) 54-61.

[18] *Armed Activities* Merits (n 16) para 146.

[19] Christine Gray, *International Law and the Use of Force,* (4th edn OUP 2018) 207. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004) ICJ Rep135, Separate Opinion of Judge Higgins para 33; Christian Tams, 'The Use of Force against Terrorists', (2009) 20(2) EJIL 359, 369; Tladi (n 17) 55.

attacks by non-State actors was not widely endorsed by State practice at the time of the *Nicaragua* judgment.[20] While the Court was criticised on the standard it applied in assessing whether Nicaragua had engaged in an armed attack, there appears to have been no dissent voiced from the Court's implicit limitation of the right of self-defence to the inter-State context.[21] It is submitted, however, that the judgment of the Court is more nuanced than the common interpretation given to it.[22]

I. ***The*** **'Nicaragua'** ***Test as Circumstance-Specific***

The judgment of the ICJ in the *Nicaragua* case is undoubtedly significant, and relevant to the assessment of any claim of self-defence in response to attacks perpetrated by non-State actors. Its utility in legally classifying non-State actor attacks as armed attacks, however, must be appreciated in light of the specific legal question arising in that case. In this regard, the Court identified the scope of its investigation in relation to the US self-defence claim as entailing the following questions: whether Nicaragua had been giving support to the armed opposition in El Salvador, and whether *this support* constituted an armed attack on El

[20] See text to nn 269-358 in ch II for discussion of pre-9/11 State practice. See also Gray (n 19) 137.

[21] Oscar Schachter, 'The Lawful Use of Force by a State against Terrorists in Another Country' (1989) 19 IYHR 209, 217.

[22] For an illustration of the common interpretation given to the *Nicaragua* dictum see Schachter (n 21) 216:

> Article 51 does not qualify "armed attack". On its face it may apply to attacks from any source and therefore allow a State to respond with force to attacks by non-State bands… Although the International Court did not address this kind of question specifically in its *Nicaragua Case* decision, it is a fair inference that the Court considered that the requirement of armed attack for self-defence meant an attack by the State against which self-defence rights are asserted.

Salvador.[23] The first question is one of fact; the second is the legal question. The Court was expressly examining the actions of Nicaragua in relation to the alleged attack on El Salvador to determine whether Nicaragua's actions amounted to an armed attack, not the actions of the armed group itself.[24]

Contemporary State practice on self-defence against non-State actors raises an additional and distinct legal question: whether the actions of non-State actors themselves, regardless of State support, constitute an armed attack triggering the right of self-defence in international law. Consequently, where a claim of self-defence is made following an attack perpetrated by a non-State actor, or in the face of threat of such attack, it would be necessary to assess whether the non-State actor has received support from a State and whether that support amounts to an armed attack *by that State*. In the absence of such support, or if support given is found to be insufficient, it would still be necessary to determine whether the acts of the non-State actor nevertheless amount to an armed attack. While the standard propounded by the ICJ in the *Nicaragua* case would be relevant to the first stage of this assessment, it provides no assistance with the latter question. The Court's judgment, therefore, does not corroborate or negate the contention that non-State actors can otherwise perpetrate armed attacks within the meaning of Article 51 of the Charter;[25] neither can the judgment be read as ruling out that contention since the circumstances under which a State could legitimately

[23] *Nicaragua* Merits (n 2) para 127: 'In the Court's view… if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States…'

[24] Noam Lubell, Extraterritorial Use of Force against Non-state Actors (OUP 2010) 32.

[25] Lubell (n 24) 32.

use force against non-State actors in foreign territory was not in issue in the case. Instead, the US' claim, and actions, was directed against Nicaragua itself.[26]

It is equally important to note that the language used by the Court was taken from the *Definition of Aggression*, which expressly provides in Article 1 that aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.[27] Article 3(g) makes clear that it is the sending by or on behalf of a State of armed bands, which carry out acts of armed force against another State, that makes the former State guilty of an act of aggression. Both the ILC's work on a Code of Crimes and the debates preceding the establishment of the International Criminal Court (ICC) confirm that aggression ought only to be applied to the actions of States.[28] The test utilised by the Court in the *Nicaragua* case, as taken from the *Definition of Aggression*, is ill-suited for classifying the actions of independent non-State actors in contemporary practice. Further, in noting that an armed attack is understood as *including* those circumstances described in the *Definition of* Aggression, it is clear that the Court was not intending to be exhaustive in its identification of ways in which an armed attack could occur.[29]

[26] Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-defence against Non-State Terrorist Actors', (2007) 56 ICLQ 141, 143. See also Michael Scharf, 'How the War Against ISIS Changed International Law', (2016) 48 Case Western Reserve JIL 1, 26: '…the *Nicaragua* attribution requirement was not designed to answer the question of whether an attack by an independent non-state actor could trigger the right to use force in self-defence against the non-State actor.'

[27] *Definition of Aggression* (n 3) Article 1.

[28] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe tr, Hart 2012) 187-88.

[29] *Nicaragua* Merits (n 2) para 195.

Of significance also is that the Court's concern, in relation to the matter of self-defence, was not whether, and by what standard, the use of armed force by non-State actors could be attributed to a State. This would fall to be determined by the relevant secondary rules of international law on State responsibility.[30] On the contrary, the Court was seeking to determine what action by a State, in connection with non-State actor attacks, could amount to an armed attack, a matter for the applicable primary rules of international law governing use of force. The *Nicaragua* Merits judgment itself makes this distinction clear. For its part, Nicaragua claimed that the US had created and organised the *contra* force and directed and controlled its operations so that all the actions of the *contras* were to be considered as imputable to the United States itself for the purposes of finding violations of Article 2(4) of the Charter[31] and international human rights and humanitarian law.[32] The Court applied the relevant secondary rules of international law[33] and concluded that there was insufficient evidence of the US having actually exercised such a degree of control over the *contras* so as to attribute to the US the acts committed by the *contras* in the course of their military or paramilitary activities in

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[30] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, [2001] Yearbook Intl. L. Comm. Vol. II Part II, Art 8.

[31] *ICJ Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* vol IV (Memorial of Nicaragua (Merits)) paras 226-28. Nicaragua also submitted that the US had adopted and ratified the actions of the *contras* translating them 'into the acts of that State' (paras 270-74).

[32] *Nicaragua* Merits (n 2) para 113.

[33] The Court noted that what it had to determine was:

> whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras,* for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.
>
> – *Nicaragua* Merits (n 2) para 109

Nicaragua.[34] Instead, the US was responsible for its own conduct vis-à-vis Nicaragua.[35]

The Court's examination of Nicaragua's actions in connection with the Salvadoran opposition for the purposes of the US self-defence claim was quite different. Here, the Court was not concerned with attributing or imputing the conduct of the Salvadoran opposition to the Nicaraguan State; the Court's preoccupation was the actions carried out by Nicaragua *itself.* The Court did find that there was some support for the armed opposition in El Salvador from Nicaraguan territory, particularly the intermittent flow of arms. However, it could not establish on the evidence that the Government of Nicaragua had any responsibility for that arms flow.[36] In any event, the provision of arms to the Salvadoran opposition could not constitute an armed attack on that State since those actions were not sufficient to meet the *Definition of Aggression* standard.[37] Consequently, the US claim of self-defence on that basis failed.[38] Despite the distinction in approaches to these questions, the *Nicaragua* standard is often, and confusingly, referred to as an 'attribution' requirement.[39] This conflation of primary and secondary rules contributes to the difficulty of conceptualising self-defence

[34] *Nicaragua* Merits (n 2) paras 109-10, 115-16.

[35] ibid para 116.

[36] ibid paras 152-160.

[37] See n 14 above and accompanying text.

[38] *Nicaragua* Merits (n 2) para 230.

[39] See eg Kimberley N. Trapp, *State Responsibility for International Terrorism* (OUP 2011) 49 ('…Nicaragua's alleged assistance to the rebel groups (in the form of provision of weapons and logistical support) did not meet the threshold for attributing the conduct of those groups to Nicaragua…'). In note 142 Trapp refers to Article 3(g) as 'a standard of attribution for the purpose of defining an "armed attack".'

outside of the inter-State context. Since rules and standards of attribution relate to State responsibility in international law, defining the concept of armed attack, and therefore the right of self-defence, in terms of attribution presupposes State involvement.

In sum, the construction to be given to the dictum of the Court should, rather, be that a non-State actor attack gives rise to an armed attack *by a State* where the non-State actor is sent by or on behalf of a State and carries out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces of that State. Whether the use of armed force by a non-State actor independently amounts to an armed attack giving rise to the right of self-defence against that non-State actor is a separate question to be considered. If this approach is taken, it is possible to reconcile the judgment of the Court in *Nicaragua* with the contemporary practice on self-defence following non-State actor attacks.

II. ***A Lowered*** **Nicaragua** ***Standard?***

Though recent State practice on self-defence against non-State actor attacks tends to show that an armed attack may occur without any State involvement, the suggestion has been made that the practice has resulted in a lowered *Nicaragua* ‘attribution’ standard for finding an armed attack perpetrated by a State, rather than an independent right of self-defence against non-State actors. In other words, instead of the sending by or on behalf of a State of armed bands who carry out attacks against another State, or the State’s substantial involvement therein, lesser action by a State in connection with non-State actor attacks can amount to an armed attack by that State giving rise to self-defence. On this view, self-defence remains an inter-State concept, notwithstanding the developments in State practice.

Early support for a lower standard is to be found in the *Nicaragua* case itself. Judge Schwebel, in his dissenting opinion, posited that the Court's conclusion on aid to irregulars was inconsistent with accepted and desirable law.[40] He disagreed with the factual findings of the Court, concluding instead that Nicaragua had in fact provided large quantities of arms, munitions and supplies, and assisted in organising, training and otherwise equipping the Salvadoran rebels for their acts of insurgency.[41] In his view, the material support provided by Nicaragua was sufficient to amount to an armed attack by that State. Judge Schwebel considered that while Nicaragua had not 'sent' irregulars to fight in El Salvador, it had been 'substantially involved' in the sending of the Salvadoran insurgency, within the meaning of Article 3(g) of the *Definition of Aggression,* both by providing support to the leadership of the insurgency in its movement in and out of Nicaragua, and by providing arms, munitions, other supplies, training, command-and-control facilities, sanctuary and lesser forms of assistance to the Salvadoran insurgents.[42]

Judge Schwebel highlighted what he considered to be a deficiency in the majority's reasoning as it relates to the 'substantial involvement' aspect of the

[40] *Nicaragua* Merits (n 2) Dissenting Opinion of Judge Schwebel paras 155, 161. Judge Schwebel took the view that the Court's conclusion was inconsonant with generally accepted doctrine, law and practice. It is interesting to note, however, that the doctrine and practice to which Judge Schwebel extensively referred considered support to foreign armed irregulars as amounting to an indirect use of force in violation of Article 2(4) of the Charter, rather than an armed attack within the meaning of Article 51 specifically (paras 155-61). The Court did in fact hold that assistance to irregulars in the form of provision of weapons and logistical and other support could amount to lesser uses of force in violation of the Article 2(4) prohibition (see Merits Judgment para 195).

[41] *Nicaragua* Merits (n 2) Dissenting Opinion of Judge Schwebel para 6.

[42] ibid para 166.

Article 3(g) definition. The Court does appear to place greater emphasis on the sending requirement, noting that 'in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State' but does not include 'assistance to rebels in the form of the provision of weapons or logistical or other support.'[43] No further mention is made of the substantial involvement aspect of the Article 3(g) definition, nor is there any consideration of why this assistance to irregulars does not meet the threshold of substantial involvement. Judge Schwebel concluded:

> Article 3(g) does not confine its definition of acts that qualify as acts of aggression to the sending of armed bands; rather, it specifies as an act of aggression a State's 'substantial involvement' in the sending of armed bands. That provision is critical to the current case. …Nicaragua has been pervasively, not merely substantially, involved in many aspects of the sending of armed groups of insurgents to El Salvador… even if Nicaragua itself has not simply sent such armed bands from its territory to that of El Salvador. It is one thing to send; it is another to be 'substantially involved' in the sending.[44]

The Court's failure to examine the question of substantial involvement is particularly striking in light of Nicaragua's detailed written submissions on this aspect of the Article 3(g) definition[45] and the US expressly basing its claim to self-defence on Nicaragua's alleged provision of arms, munitions, finance, logistics, training, safe havens, planning and command and control support to guerrillas operating in El Salvador.[46]

[43] *Nicaragua* Merits (n 2) para 195.

[44] ibid Dissenting Opinion of Judge Schwebel para 170.

[45] Nicaragua Memorial on Merits (n 31) 72-73.

[46] US Counter-Memorial (n 10) 57.

Having provided no clear gauge for assessing 'substantial involvement' for the purposes of Article 3(g) of the *Definition of Aggression,* it is not surprising that the Court's wholesale exclusion of assistance to rebels in the form of provision of weapons or logistical or other support has been criticised as being overly broad and unrealistic. Judge Jennings, for example, in his dissenting opinion in the same case, considered that 'to say that the provision of arms, coupled with "logistical or other support" is not an armed attack is going much too far.'[47] In his assessment, given the range of activities potentially falling within the category of logistical and other support, it is difficult to see what action, short of direct attack by a State's own forces, would suffice to meet the standard of armed attack established by the Court.[48] Contrary to the Court's position, Judge Jennings found that the provision of arms could constitute a critical element in what might amount to an armed attack when taken together with other kinds of support or involvement by a State.[49]

In the ICJ's most recent case on use of force and self-defence, the Respondent State, Uganda, put forward for the Court's consideration this 'alternative view according to which the formulation of the majority of the Court in the *Nicaragua* case was excessively narrow in its approach to the interpretation of the phrase "armed attack".'[50] Uganda took the view that the provision of logistical support to armed bands with knowledge of their objectives may constitute an

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[47] *Nicaragua* Merits (n 2) Dissenting Opinion of Judge Jennings 543.

[48] ibid.

[49] ibid. Dinstein, writing shortly after the *Nicaragua* case, endorsed Jennings' position describing the judgment of the Court on this point as a 'sweeping statement that ought to be narrowed down.' - Yoram Dinstein, *War, Aggression and Self-defence,* (Grotius Publications 1988) 189-90.

[50] *ICJ Pleadings, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda),* Vol I (Counter-Memorial of Uganda (Merits)) para 350.

armed attack, a position it submitted was supported by doctrine and State practice.[51] According to Uganda, from the survey of legal sources, it could be concluded that, for the purposes of Article 51 of the UN Charter, the concept of 'armed attack' includes not only the sending by or on behalf of a State of armed bands to the territory of another State but also the sponsoring of armed bands through the provision of logistical support in the form of weapons, training or financial assistance, the operations of armed bands incorporated into the command structure of the armed forces of the State, and conspiracy between the State concerned and armed bands fighting against the State claiming self-defence.[52]

The Court did not respond to Uganda's contentions on this point since it was not necessary for the Court's determination of the case.[53] While it reiterated that an armed attack could result from the sending by or on behalf of a State of armed

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[51] Counter-Memorial of Uganda (n 50) paras 351-58.

[52] Ibid para 359:

> The results of this survey of the most authoritative legal sources can be formulated as follows. For the purposes of applying the provisions of Article 51 of the Charter, the concept of an 'armed attack' includes the following elements, taken both separately and cumulatively:
>
> (a) The sending by a State of armed bands to the territory of another State in conditions in which, had the operation been carried out by regular armed forces, it would have been classified as an armed attack (rather than as a mere frontier incident).
>
> (b) The sponsoring of armed bands by a State by the provision of logistical support in the form of weapons, training or financial assistance; in these circumstances, and in the presence of a shared purpose, the armed bands become agents, or "*de facto* organs", of the sponsoring State.
>
> (c) The operations of armed groups which form part of the command structure of the armed forces of the State concerned, whatever the nomenclature used to describe individual units.
>
> (d) In other circumstances in which there is evidence of a conspiracy between the State concerned and the armed bands fighting against the State taking action in self-defence."

[53] *Armed Activities* Merits (n 16) para 147.

bands to the territory of another State,[54] it passed no comment on whether its previous standard for 'substantial involvement' reflected contemporary international law. The Court itself has not advanced the discussion, but there have been arguments made in literature that the most recent State practice, outlined in the preceding Chapter, ought to be construed as a lowering of the *Nicaragua* standard without endorsing the right to use force extraterritorially against armed attacks not authored by a State.

Ratner, for instance, argues that the US claim following the 9/11 attacks was 'clearly staked' on the right to respond in self-defence against Afghanistan, as the State 'harbouring' such terrorists.[55] He premises this conclusion primarily on the political statements made by former President Bush in his addresses to the nation and before a Joint Session of Congress classifying any nation that harbours or supports terrorism as a hostile regime.[56] Tams also argues for this more lenient standard of attribution. He suggests that the most convincing way to accommodate the new State practice is to retain the traditional understanding of self-defence as a justification for the use of force between States while recognising special rules on attribution of terrorist activities. More specifically, Tams advances a special standard of imputability in relations between terrorist groups and host States akin to the international rules against 'aiding and abetting' illegal conduct.[57]

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[54] *Armed Activities* Merits (n 16) para 146.

[55] SR Ratner, '*Jus ad Bellum* and *Jus in Bello* After September 11', 96 AJIL (2002) 905, 907.

[56] President Bush's Address before a Joint Session of the Congress on the US Response to the Terrorist Attacks of September 11 (20 September 2001) 37 Weekly Comp.Pres.Doc.1347, 1349.

[57] Tams (n 19) 385. See also Ruys and Verhoeven (n 15) 315.

Even accepting that contemporary practice has resulted in a lowered standard of State involvement in defining an armed attack, it remains to be determined what that standard might be. For their part, both Judges Schwebel and Jennings appeared to accept that the Court correctly adopted Article 3(g) of the *Definition of Aggression* in defining 'armed attack' but did not agree with the Court's assessment of what actions could amount to substantial involvement. In their view, therefore, the criterion of 'substantial involvement' undoubtedly applied. Similarly, in the *Armed Activities* case, Uganda did not argue that the Article 3(g) requirements were to be done away with but submitted instead that those requirements were to be more broadly construed.

It is significant to note, that while advocating a more lenient standard, both Judges Schwebel and Jennings maintained that for an armed attack by a State to result from non-State actor attacks, that State would have had to offer *material* support to the activities of non-State actors. In finding that Nicaragua had in fact perpetrated an armed attack against El Salvador, Judge Schwebel classified Nicaragua's support as the 'major, perhaps the critical, factor in the transformation of what, before 1979, were largely sporadic acts of insurgent terrorism into an organised and effective army of guerrillas'.[58] In the same vein, Judge Jennings noted that 'it may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack' but the provision of arms, coupled with other material support, could be so classified.[59] Both these positions suggest that the 'substantial involvement' standard, even permitting a broader interpretation, is met by active

[58] *Nicaragua* Merits (n 2) Dissenting Opinion of Judge Schwebel para 171.

[59] *Nicaragua* Merits (n 2) Dissenting Opinion of Judge Jennings 543.

support that is material or fundamental to the activities of the non-State actor.[60] In other words, 'substantial involvement' demands support that materially contributes to the specific attack, given with knowledge of the willingness of the non-State actor to attack and of the potential for facilitation.[61]

Recent State practice, on the other hand, appears to endorse the right of self-defence even in circumstances where State support is less than material. In some instances, the extent of State 'support' was its mere passiveness in the face of non-State actor activity on its territory;[62] in others, non-State actors were able to perpetrate attacks across international borders because of mere inability on the part of the host State to take effective action against those elements.[63] Egypt's use of force on Libyan territory following terrorist attacks, for example, was prompted, not by Libya's support for terrorist organisations operating from its territory, but by

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[60] In its ordinary sense, 'substantial' means 'of solid worth or value; of real significance…important' - See 'substantial, adj.', *Oxford English Dictionary Online* (3rd end OUP 2012) <https://www.oed.com/view/Entry/193050?redirectedFrom=substantial&> accessed 24 October 2020.

[61] Nicholas Tsagourias, 'Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule', (2016) 29 LJIL 801, 816.

[62] In its letter to the UNSC following the 9/11 attacks, the US alleged that the Al Qaida organisation was 'supported by the Taliban regime in Afghanistan' which had 'allowed the parts of Afghanistan that it controls to be used by this organization as a base of operation' - Letter dated 7 October 2001 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/2001/946, 1. See also Letter dated 7 October 2001 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/2001/949, 2 (alleging that the Taliban regime had allowed Bin Laden and the Al Qaida organisation 'to operate with impunity in pursuing their terrorist activity').

[63] Justifying collective defensive action against ISIS safe havens in Syria, the US noted that the 'Syrian regime has shown that it cannot and will not confront these safe havens effectively itself' - Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695. Similarly, Israel justified its use of force against Hezbollah on Lebanese territory in light of 'Lebanon's failure to fulfil its international obligations' – Letter dated 24 October 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2001/1012.

Libya's complete loss of control in the areas from which these organisations operated. Egypt made clear that it was not acting against Libya; on the contrary, it was acting 'in coordination with the national army of Libya.'[64] In circumstances such as this, where a State applies genuine but ineffective efforts to counter non-State actor threats emanating from its territory, the ICJ has held that such failure is insufficient to find a breach of that State's duty of vigilance.[65] It is difficult to perceive how such a failure can be consistent with the duty of vigilance and simultaneously be elevated to an armed attack by the State, permitting the use of force in self-defence against it. Similarly, while inaction on the part of the host State undoubtedly contributes to the ability of non-State actors to carry out attacks against other States, its passivity cannot be classified as 'substantial involvement' or otherwise be deemed sufficient to find an armed attack perpetrated by the State itself.

Further, even in instances where allegations of more active support on the part of host States have been made in practice, those allegations did not prompt a direct claim of self-defence against those States. Israel, for example, used force in self-defence against Hezbollah on Lebanese territory while alleging that the Syrian

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[64] Letter dated 27 May 2017 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council, UN Doc S/2017/456.

[65] *Armed Activities* Merits (n 16) paras 300-01. The Court found that the DRC had not breached its duty of vigilance as reflected in the Declaration on Friendly Relations, which the Court considered to be declaratory of customary international law. The Declaration provides:

> Every State has the duty to refrain from… acquiescing in organized activities within its territory directed towards the commission of such acts (i.e. civil strife or terrorist acts), when the acts referred to… involve a threat or use of force.
>
> …no State shall… tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State."

UNGA Resolution 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' (24 October 1970), UN Doc A/RES/2625(XXV).

Arab Republic had provided financial, political and organisational assistance to Hezbollah which 'directly enhanced the capability of the organisation to launch attacks against Israel'.[66] Israel did not claim to have suffered an armed attack by the Syrian Arab Republic, neither did it target that State in its use of force. Instead, Israel used force on Lebanese territory where Hezbollah was present, and from which it operated. This pointedly illustrates that the determinative consideration is not whether the State on whose territory force is used has perpetrated an armed attack, but that the non-State actor which carries out the attack is present in, or operating from, that State's territory.

While rejecting a lowered 'attribution' standard, it is noted that the invocation of active or passive host State support, or its failure to prevent non-State actor attacks, has been a constant feature of claims of self-defence against non-State actors from as early as the Caroline Incident to the most recent claims in the post 9/11 era.[67] These invocations should not be treated as affirming a lower 'attribution' standard. Statements highlighting the failure of the territorial State to take decisive action against non-State actors present on its territory, particularly following a request from the victim State, are instead pinpointing factors contributing to the necessity to take defensive action in the circumstances of the particular case, and the proportionality of such action.[68] Russia's communication

[66] Israel October 2001 Letter (n 63).

[67] The US, for example, noted that the on-going threat posed by Al-Qaeda was made possible by the decision of the Taliban regime of Afghan to allow parts of its territory to be used by Al Q as a base of operation - US October 2001 Letter (n 62).

[68] Trapp, *State Responsibility* (n) 59 noting that the only role a State's complicity with, or acquiescence in, international terrorism plays in evaluating whether there is a right to use force in self-defence against non-State actors in foreign territory is that it responds to the requirement that the use of force be necessary. The requirements of necessity and proportionality in the context of non-State actor self-defence are further explored in Chapters IV and V.

to the UN Secretary-General on the subject of Chechen terrorists in Georgia makes this point particularly clear. In relation to Russia's inherent right of self-defence under Article 51 of the Charter, President Putin emphasised:

> None of this will be necessary, no measures or special operations will be needed if the Georgian leadership actually controls its own territory, carries out international obligations in combating international terrorism and prevents possible attacks by international terrorists from its territory against the territory of the Russian Federation.[69]

Closer examination of contemporary claims of self-defence reveals a shift in emphasis from State action as the essence of such claims to State action simply being a relevant consideration in determining the need to resort to force in self-defence following non-State actor attacks.

Additionally, UNSC Resolutions 1368 and 1373, to the extent they called into question the responsibility of Afghanistan itself in relation to the attacks, served to highlight the separate obligations that States may violate in connection with terrorist attacks emanating from their territory rather than to affirm a lower standard for ascribing responsibility for armed attacks by non-State actors.[70] States have independent obligations in customary and treaty law which may be breached by active support for, or acquiescence in, non-State actor attacks. In this connection, the ICJ held that arming and training irregular forces operating in another State, or providing to them other logistical support, may be regarded as a threat or use of force contrary to the prohibition of the use of force contained in Article 2(4) of the

[69] Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc S/2002/1012.

[70] See eg *Friendly Relations Declaration* (n 65).

UN Charter and in customary international law.[71] Additionally, the Court considered that these actions, together with the supply of funds to the *contras,* amounted to an act of intervention by the US in the internal affairs of Nicaragua in breach of the principle of non-intervention.[72] States also have obligations to apply best efforts to prevent and punish acts of terrorism committed on their territory.[73] Elevating such breaches to the status of an armed attack committed by the State 'would render many of the primary rules in the terrorism context redundant.'[74]

The lack of support in practice notwithstanding, retaining the traditional understanding of self-defence as an inter-State concept while accommodating the most recent State practice within an expanded 'attribution' standard is understandably appealing as being easier to reconcile with the common understanding of the *Nicaragua* test, particularly since the judgment of the Court has been criticised as imposing too high a standard concerning State support.[75] However, several doctrinal and practical difficulties arise from this approach. First, the effect of this approach would be that the act of harbouring alone, or mere acquiescence in a non-State actor attack, is equivalent to an armed attack or act of aggression by a State as being 'substantial involvement' in the non-State actor

[71] The Court found that the US had committed a *prima facie* violation of the principle of the non-use of force by its assistance to the *contras* in Nicaragua – *Nicaragua* Merits (n 2) para 228.

[72] *Nicaragua* Merits (n 2) para 228. The Court found the principle of non-intervention reflected in the Friendly Relations Declaration to embody customary international law. The Resolution provides that 'no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.' – *Friendly Relations Declaration* (n 65).

[73] For a detailed consideration of these obligations see Trapp, *State Responsibility* (n 39) ch 3. See also discussion on the 'duty of vigilance' in the *Armed Activities* case above text to n 65.

[74] Trapp, *State Responsibility* (n 39) 61.

[75] See text to nn 40-54.

attack. This position sits uncomfortably with the secondary rules of State responsibility which otherwise require effective control for non-State actor actions to be imputed to a State.[76]

Secondly, no clear standard can be said to arise from the practice. Though 'harbouring' is generally the term of choice, the factual circumstances in each case have tended to differ. While the US alleged that Al-Qaeda was supported by the Taliban regime and its actions facilitated by a wilful omission of the regime to change its policy,[77] the same cannot be said of the roles of Georgia in relation to Chechen terrorists in 2002, Lebanon in relation to Hezbollah in 2006, Ecuador in relation to the FARC in 2008, Somalia in relation to Al Shabaab in 2011, and Syria in relation to ISIS. Despite this, self-defence was still said to arise in each of these instances based on the occurrence of an armed attack. Germany noted, for example, that ISIS had occupied a portion of Syrian territory over which the Government of the Syrian Arab Republic did not, at that time, exercise control so that States subject to armed attacks by ISIS originating in that part of Syrian territory were justified under Article 51 in taking necessary measures in self-defence.[78] If a lower 'attribution' standard were accepted as arising from the practice, it would appear that the standard ranges from wilful action (provision of financial, logistical or other support) or omission (toleration) enabling the activities of the non-State actor to mere inability to control portions of territory or to otherwise

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[76] See text to n 34 above. Trapp describes such an approach as a 'collapse [of] a primary rule into a secondary rule of state responsibility' – Trapp, *State Responsibility* (n 39) 61.

[77] US October 2001 Letter (n 62).

[78] Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946.

prevent the use of armed force by the non-State actor. The variations of State action potentially falling within this spectrum are endless. It would also be unclear from the survey of practice whether these acts or omissions must be accompanied by actual or constructive knowledge of the specific intentions and activities of the non-State actor.

Thirdly, the practical repercussions of expanding the definition of armed attack *by a State* in this way must be considered. Where the State itself is deemed to be the perpetrator of an armed attack resulting from non-State actor use of force, this will have implications for the scope of any defensive action taken in response. In such circumstances, justification would exist for the use of defensive force directly against the host State.[79] On the other hand, where a non-State actor is considered the author of an armed attack, the victim State may generally take action violating the host State's territorial integrity 'in a limited and targeted fashion using force against… the very source of the terrorist attack.'[80] In the latter circumstance, considerations of necessity and proportionality will operate to limit the scope of action in self-defence more strictly, taking into account the interests of the 'innocent' host State. Ascribing non-State actor use of force to the host State may have the effect, therefore, of escalating the conflict. Further, targeting the host State directly in such circumstances is likely to decrease its counter-terrorism

[79] On the right of self-defence against non-State actors and targets see text to nn 116-23 in ch V below.

[80] Text to nn 140-42 in ch V.

capacity, including its military capacity to effectively assert control over relevant parts of its territory, which in turn perpetuates the non-State actor threat.[81]

Recognising a right of self-defence against non-State actors regardless of host State involvement is, therefore, not only the more convincing way to accommodate the most recent State practice on self-defence and non-State actor attacks, it also has the effect of allowing the use of force against non-State actors where and to the extent necessary without needlessly eroding international peace and security through the creation of an inter-State conflict.

D. The Evolved State Practice and Stagnant ICJ Jurisprudence

As the *Nicaragua* case shows, the ICJ has played a crucial role in elucidating international law governing the right of self-defence. Since that time, the Court has continued to engage with legal aspects of the use of force and self-defence and, therefore, it becomes necessary to consider the more recent jurisprudence of the Court in this area. While contemporary State practice overwhelmingly supports States' inherent right of individual and collective self-defence against armed attacks by non-State actors, the ICJ has failed in its recent jurisprudence to grapple with this change.

In the *Israeli Wall* Opinion, the Court was called upon to determine whether relevant rules and principles of international law had been or were still being breached by Israel's construction of a security barrier in the Occupied Palestinian Territory, including in and around East Jerusalem. The Palestine Liberation

[81] Trapp, *State Responsibility* (n 39) 59-60

Organisation (PLO) contended that the wall amounted to *de facto* annexation of land contrary to the legal principle prohibiting the acquisition of territory by the use of force and an interference with the right of the Palestinian people to self-determination. In response, Israel argued that the wall's sole purpose was to enable it effectively to combat terrorist attacks launched against it from the West Bank, and that it was a temporary measure.[82] According to Israel, the construction of the barrier was consistent with the inherent right of self-defence recognised in Article 51 of the UN Charter and with Security Council Resolutions 1368 and 1373, which 'have clearly recognised the right of States to use force in self-defence against terrorist attacks, and therefore surely recognise the right to use non-forcible measures to that end.'[83]

The Court's response to this contention was abrupt and vague. After citing verbatim the terms of Article 51 of the Charter, the Court concluded that the provision 'thus recognises the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.'[84] The Court further noted that the territory from which the alleged threat against Israel emanated was territory over which Israel exercised control as occupying Power. Therefore, UNSC Resolutions 1368 and 1373 could be distinguished.[85]

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[82] *Wall* Advisory Opinion (n 19) para 116.

[83] UNGA Official Records, Emergency Special Session: 21st Plenary Meeting (20 October 2003), UN Doc. A/.ES-10/PV.21, 6 (per Representative of Israel).

[84] *Wall* Advisory Opinion (n 19) para 139.

[85] ibid.

In stating that Article 51 '*thus* recognises the existence of an inherent right of self-defence in the case of armed attack by one State against another State' the Court thereby suggests that Article 51, by its terms, is applicable only in the context of inter-State uses of force and that a non-State actor cannot author an armed attack within the meaning of the provision.[86] It has been suggested that the Court did not, by its language, actually exclude the possibility of a right of self-defence against non-State actors.[87] Gray argues that the Court's statement is 'simply a statement of the basic central right of self-defence'.[88] This interpretation is, however, implausible since Israel directly asserted a right of self-defence against non-State terrorist attacks and the Court recognised this assertion.[89] The Court's rejection of the applicability of Article 51 to the circumstances of the case primarily rested on its inter-State reading of Article 51, rather than Israel's occupation of the territory from which the threat emanated.[90] This pronouncement definitively indicates that the Court was rejecting that such a right existed.[91] This was also the interpretation of the majority decision taken by Judge Buergenthal in his

[86] James Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 46.

[87] Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-defence' (2006) 55 ICLQ 963, 969; Trapp, *State Responsibility* (n 39) 49.

[88] Gray (n 19) 142.

[89] Sean D. Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: an *Ipse Dixit* from the ICJ?' (2005) 99 AJIL 62, 63.

[90] In its consideration of UNSC Resolutions 1368 and 1373, the Court noted that 'Israel could not *in any event* invoke those resolutions in support of its claim to be exercising self-defence' since Israel exercised control in the Occupied Palestinian Territory (emphasis mine). This makes clear that the Court considered the claim of self-defence to have failed even before contemplating the issue of Israel's occupation and its effect on a claim of self-defence.

[91] Murphy (n 89) 63.

Declaration[92] and Judges Higgins and Kooijmans in their Separate Opinions[93] in the same case. For this reason, and because Israel exercised control in the Occupied Palestinian Territory from which the attack emanated, the Court concluded that Article 51 of the Charter had 'no relevance in this case.'[94]

A year later in the *Armed Activities* Case between the DRC and Uganda, the Court rejected Uganda's contention that its 'Operation Safe Haven' was conducted pursuant to its inherent right of self-defence against the DRC. Specifically, Uganda contended that it had been subject to 'devastating cross-border attacks on a regular basis from armed insurgents' whose activities had been 'coordinated by, and subject to the command and control of, the Congolese Government.'[95] Uganda also claimed that these groups were being reorganised and rearmed by the DRC Government, and brought within the command structure of the Congolese armed forces. These acts of assistance, singly and cumulatively, were sufficient to trigger Uganda's right of self-defence within the meaning of Article 51 of the UN Charter.[96]

In rejecting Uganda's claim to self-defence, the Court noted that while Uganda claimed to have acted pursuant to Article 51, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC, but rather by the ADF; neither were the ADF sent by the DRC or on behalf of the DRC within

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[92] *Wall* Advisory Opinion (n 19) Declaration of Judge Buergenthal para 6.

[93] *Wall* Advisory Opinion (n 19) Separate Opinion of Judge Higgins para 33 and Separate Opinion of Judge Kooijmans para 35.

[94] *Wall* Advisory Opinion (n 19) para 139.

[95] Uganda Counter-Memorial on Merits (n 50) para 3.

[96] ibid paras 331-32.

the sense of Article 3(g) of the *Definition of Aggression*.[97] In fact, the Court was unable to find any satisfactory proof of DRC involvement in any of the attacks, whether direct or indirect[98] and therefore found 'that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.'[99] Strangely, the Court continued: 'Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.' This statement is hard to decipher. The use of the conjunction 'accordingly' suggests that the Court considered it need not respond to the contentions of the Parties because it found that the attacks did not emanate from armed bands sent by or on behalf of the DRC, or in whose activities the DRC was substantially involved, within the sense of Article 3(g) of the *Definition of Aggression*, a reading which aligns with an inter-State approach to self-defence.

Both judgments of the Court have rightly come under severe attack, including by a few of its number. In relation to the Court's bald statement on self-defence in the *Wall* Advisory Opinion, Judge Kooijmans highlights that although the Court was correct in stating that Article 51 recognises a State's right of self-defence against an armed attack by another State, it was completely beside the point in relation to Israel's actual claim.[100] Central to the reservations expressed

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[97] *Armed Activities* Case (n 16) para 146.

[98] ibid paras 131-35.

[99] ibid para 147.

[100] *Wall* Advisory Opinion (n 19) Separate Opinion of Judge Kooijmans para 35.

by Judges Buergenthal, Higgins and Kooijmans is the fact that Article 51, by its terms, does not require that an armed attack emanate from a State.[101] The conclusion that Article 51 *thus* recognises a State's right of self-defence only in the event of an armed attack by another State is actually unsupported by the language of Article 51, which leaves the provision open to an interpretation that embraces attacks by non-Sate actors that have no State nexus.[102] This conclusion is supported by a proper reading of Article 51 of the Charter in its context. While Article 2(4) of the Charter speaks of the use of force by "Members" against "any State", this construct is not repeated in Article 51, which is, rather, silent on who or what might commit an armed attack justifying self-defence.[103]

What Article 51 does recognise is every State's inherent right of self-defence in the event of an armed attack against it as contained in customary international law and, therefore, as reflected in the actual practice and *opinio juris* of States. Though an inter-State reading of Article 51 may have been the generally accepted interpretation for more than 50 years, contemporary developments in State practice and *opinio juris* suggest otherwise, particularly UNSC Resolutions 1368 and 1373.[104] Judge Buergenthal points out that in neither of these resolutions does the Security Council expressly limit their application to attacks by State actors only, nor is this implicit in the language employed in the resolutions. On the contrary, the Security Council recognised that 'international

[101] *Wall* Advisory Opinion (n 19) Declaration of Judge Buergenthal para 6, Separate Opinion of Judge Kooijmans para 35, and Separate Opinion of Judge Higgins para 33.

[102] ILA, *Final Report on Aggression and the Use of Force* (Sydney Conference 2018) 14.

[103] Murphy (n 89) 64.

[104] *Wall* Advisory Opinion (n 19) Separate Opinion of Judge Kooijmans para 35; *Armed Activities* Merits (n 19) Separate Opinion of Judge Kooijmans para 28.

terrorism constitutes a threat to international peace and security' while 'reaffirming the inherent right of individual or collective self-defence as recognised by the Charter of the United Nations'.[105] In interpreting the terms of Article 51, the Court should have taken into account the practice of States evidencing customary international law, which gives content to the right of self-defence recognised in Article 51. If this approach were taken, it is submitted, the Court's statement on Article 51 would have been different.[106]

Similarly, in the *Armed Activities* case, the Court missed an opportunity to assess contemporary developments in State practice.[107] After finding that there was no satisfactory evidence of DRC involvement, directly or indirectly, in the attacks carried out by the ADF against Uganda, the Court determined that it was not necessary for it to respond to the contention of the parties on a right of self-defence against large-scale attacks by irregular forces in contemporary international law. It is crucial to note that the contentions of the parties which the Court avoided examining concerned whether the threshold previously laid down by it in the *Nicaragua* case for the characterisation of support of non-State actors

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[105] *Wall* Advisory Opinion (n 19) Declaration of Judge Buergenthal para 6.

[106] The Court's judgment in the *Wall* Advisory Opinion has been criticized in another respect. Both Judges Buergenthal and Higgins considered that it was irrelevant in assessing the validity of Israel's claim to self-defence that Israel was alleged to exercise control in the Occupied Palestinian Territory, or that the attacks did not originate from outside that territory (Declaration of Judge Buergenthal para 6 and Separate Opinion of Judge Higgins para 34). Israel has continued to claim a right of self-defence against attacks emanating from Occupied Palestinian Territory and has received the support of States in that claim (see text to nn 103-20 in ch II). The Middle East Quartet (the United Nations, Russian Federation, European Union and the United States), which has a mandate to assist in mediating the Middle East peace negotiations and to support Palestine in economic development and institution building, expressly recognised 'Israel's legitimate right to self-defence in the face of terrorist attacks against its citizens' in the context of the Israel-Palestine conflict – Letter dated 6 October 2003 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2003/951, Annex.

[107] Sten Verhoeven, 'A Missed Opportunity to Clarify the Modern Ius Ad Bellum: Case Concerning Armed Activities on the Territory of the Congo' (2006) 45 Mil L & L War Rev 355.

activities as an armed attack by the 'supporting' State remained unchanged by contemporary developments in international law. This was the particular issue on which the Parties exchanged arguments.[108] The Court's finding that Uganda adduced no sufficient evidence of any DRC involvement with the insurgents made it factually unnecessary, therefore, to examine these claims. Its assessment was limited to whether Uganda was entitled to act in self-defence in response to an attack by the DRC and, consequently, the Court did not answer the question as to action a victim State may take in the case of an armed attack by non-State actors where no, or insufficient, territorial State involvement can be proved.[109]

Admittedly, the reserve displayed by the Court in the *Armed Activities* case flows, at least in part, from Uganda's presentation of its claim. Uganda claimed to have a right of self-defence against the DRC and it did not articulate a parallel or alternative right of self-defence against attacks by the ADF in the absence of any or sufficient complicity on the part of the DRC. However, to the extent that the parties raised arguments on the effect of contemporary developments in State practice and *opinio juris* on the traditional test espoused in *Nicaragua*, the Court should have addressed these contentions, and the broader question of developments in customary practice, head on. Uganda's failure to raise the legal issue of self-defence against non-State actors was not a bar to the Court's examination of that question to the extent that it was relevant to the dispute at

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[108] As noted by Judge Kooijmans in his Separate Opinion (para 21). The DRC focussed its submissions on establishing that indirect aggression giving rise to self-defence requires substantial involvement to the standard prescribed in the *Nicaragua* case, and that there was no attack against Uganda by the DRC (DRC Memorial on Merits paras 5.14-5.17, 5.20-5.23). On the other hand, Uganda argued that the DRC's alleged involvement with, and support to, armed opposition forces present on its territory amounted to an armed attack by that State giving rise to self-defence (see text to nn 50-52 above).

[109] Chatham House Principles (n 87) 970.

hand. Arguably, the Court had a duty to consider the impact of customary international legal developments on the interpretation of 'armed attack' within the meaning of Article 51 of the Charter.[110]

The Court had, in fact, found that five attacks of a serious nature in which a considerable number of civilians were killed or abducted had taken place against Uganda.[111] The Court also appeared to be satisfied that the attacks were carried out by the ADF operating from DRC territory. The Court failed to consider, however, whether any legal consequences flowed from that factual determination. As Judge Kooijmans notes in his Separate Opinion, even if no armed attack by the DRC could be established on the evidence, it would not rule out that self-defence could still arise justifying Uganda's use of force on DRC territory. In his view, there was a separate question left to be determined as to the kind of action a victim State could take 'if the armed operation by irregulars, "because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" but no involvement of the "host Government" can be proved.' [112] Considering customary international law

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[110] The ICJ itself has consistently acknowledged its own role in ascertaining the legal rules relevant to a particular dispute. See *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits Judgment, 25 July 1974) [1974] ICJ Rep 3, para 17 (cited with approval in *Nicaragua* Merits (n 2) para 29):

> The Court… as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, *as in any other case*, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.' (emphasis mine)

While this pronouncement was made, and reiterated, by the Court in the context of cases involving non-appearing Respondent States, it is equally applicable to all disputes before the Court.

[111] *Armed Activities* Merits (n 16) Separate Opinion of Judge Kooijmans para 17.

[112] ibid para 26.

applicable to the resolution of this question, Judge Kooijmans concluded that there was an armed attack triggering Uganda's right of self-defence, but that its response was disproportionate, and therefore unlawful.[113]

Contrastingly, the Court chose, under the guise of judicial economy, to avoid pronouncing on this question. Whereas in the *Nicaragua* case the Court did not need to look beyond the inter-State context,[114] the developments in State practice since 9/11 required that the Court do so in the *Armed Activities* case. Although the DRC was not responsible for an armed attack giving rise to a right of self-defence against it, an armed attack within the meaning of Article 51 had still arguably occurred. The Court's reasoning was, therefore, incomplete. Both Judges Simma and Kooijmans note in their Separate Opinions, while accepting the ultimate conclusion of the Court, that the occurrence of an armed attack is sufficient to give rise to the right of self-defence contained in Article 51 of the Charter, whether or not that attack can be said to be carried out by a State.[115]

The Court's conservatism in the *Armed Activities* case can be contrasted with its more liberal approach in the *Oil Platforms case* just two years before. In that case, the Court elaborated extensively on the law governing the use of force notwithstanding the fact that, based on its judgment on preliminary objections, the central theme around which the dispute was framed was the alleged infringement

[113] *Armed Activities* Merits (n 16) Separate Opinion of Judge Kooijmans para 32.

[114] Gray (n 19) 130 (noting that the Court's description of the scope of 'armed attack' was consistent with State practice and the practice of the Security Council at that time).

[115] *Armed Activities* Merits (n 16) Separate Opinion of Judge Kooijmans paras 26-30 and Separate Opinion of Judge Simma paras 7-12.

by the US of Iran's freedom of commerce.[116] Judge Simma, in his Separate Opinion, justified the methodology of the Court on the basis of 'legal policy and political relevance.'[117] In his view, the Court rightly took the opportunity to expound on the legal limits on the use of force 'at a moment when these limits find themselves under the greatest stress.'[118] The majority approach in the *Oil Platforms* case has been widely criticised on the basis that the bulk of its discussion on the use of force was unnecessary for the disposition of the case.[119] While the propriety of the Court's approach in *Oil Platforms* is debatable, the circumstances presented themselves in the *Armed Activities* case for this kind of approach. Not only were the issues of self-defence arising in the *Armed Activities* case extremely apposite as a matter of legal policy and political relevance, they were pertinent to the outcome of the case on the facts presented.

It is important to note, however, that the judgment of the Court in the *Armed Activities* case is completely without prejudice to the question of the extraterritorial use of force in self-defence against non-State actors. While the Court's failure to deal with the right of self-defence against non-State actors in the circumstances of the case has allowed for the judgment to be interpreted as implicitly confirming a

[116] Dominic Raab, '"Armed Attack" and the *Oil Platforms* Case', (2004) 17 Leiden JIL 719, 722.

[117] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits Judgment, 6 November 2003) [2003] ICJ Rep 161 Separate Opinion of Judge Simma para 3.

[118] *Oil Platforms* Merits (n 117) Separate Opinion of Judge Simma, 2nd introductory para.

[119] Judge Kooijmans, for instance, in his Separate Opinion in the case considered that the Court had gone too far in making a finding that was not necessary for deciding the claim and brought into question the scope of a judgment of the Court (*Oil Platforms* Merits (n 117) Separate Opinion of Judge Kooijmans para 3). See also Raab (n 116) 721-23; William H. Taft, IV, 'Self-Defense and the *Oil Platforms* Decision', (2004) 29 YJIL 295; Sir Frank Berman, Q.C. 'Treaty "Interpretation" in a Judicial Context', (2004) 29 YJIL 315.

requirement for a State nexus,[120] it must be recalled that the case was specifically argued on the basis of the inter-State aspects of self-defence. The Court did not at all address its consideration to the question of self-defence against non-State actors. Consequently, the judgment ought not to be read as precluding the existence of that right in contemporary international law.

[120] See eg Tladi (n 17) 57; Verhoeven (n 107) 358.

PART II: POSTLUDE

Establishing that an attack by a non-State actor may amount to an armed attack triggering a State's right of self-defence is the first step in a more complex assessment. It must next be considered whether forcible measures in self-defence may be taken by the victim State against such non-State actors on the territory of the State within which they are located and how such measures may affect the rights and interests of the latter State. Modern debates have shifted focus to this more vexed question. It has been argued that while the right of self-defence against armed attacks perpetrated by non-State actors may provide a justification for the counter-attack on them, it fails to explain the entitlement to violate the territorial integrity of the State in which they are based.[121] The justification for the use of force against the territorial integrity of the host State, particularly where it is not guilty of any wrongdoing associated with the armed attack carried out by the non-State actor from its territory, and even may have exerted its best efforts to repress such activity, is seen as elusive.

It is important to recall, however, that the right of self-defence is not predicated on the concept of 'fault' but rather on the imperative need to respond to an existing threat.[122] If the right of self-defence is conceptualised in this way, it becomes easier to accept the use of force against the territory of an 'innocent' State as a justified use of force in self-defence, wholly consistent with the

[121] Christian Tams, 'The Use of Force against Terrorists', (2009) 20 EJIL 359, 385; Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, (2001) 12(5) EJIL 993, 997.

[122] See text to n 248 in ch I.

foundational principles of international law governing the use of force. Admittedly, the imperative need of defence of the victim State must be balanced against the violation of the territorial integrity of the innocent territorial State. The right of self-defence against non-State actors makes allowance for the former concern, while imposing restrictions on its exercise to guard the latter. This balance is achieved through the operation of the principles of necessity and proportionality, which are next examined in this thesis.

THE PARAMETERS OF THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE ACTORS

THE determination that, conceptually, a State can invoke self-defence against an extraterritorial non-State actor, does not resolve the question of the availability of that right to a State in a given circumstance nor of the scope of action that may be permissible in exercise of that right. The requirement that action taken in self-defence be both necessary and proportionate is a prescription of customary international law.[1] The applicability of these core principles to the exercise of the right of self-defence in the inter-State context has been continually reiterated by the ICJ in several of its decisions[2] and by many commentators.[3] It is indubitable that these principles, described as 'requirements… inherent in the notion of self-defence',[4] should also apply to the regulation of the right of self-defence against non-State actors.

[1] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion [1996] ICJ Rep 65, para 41. See also Christine Gray, *International Law and the Use of Force* (4th edn OUP 2018) 159.

[2] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits Judgment 27 June 1986) [1986] ICJ Rep 14, para 176; *Nuclear Weapons* Advisory Opinion (n 1) para 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits Judgment, 6 November 2003) [2003] ICJ Rep 161, para 76; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v. Uganda)* (Merits Judgment, 19 December 2005) [2005] ICJ Reports 108, para 147.

[3] Christine Gray (n 1) 157; Christian J Tams and James D Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45(1) Is.LR 91, 92; Christian Henderson, *The Use of Force and International Law* (CUP 2018) 227; James Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 64.

[4] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, [2001] Yearbook Intl L Comm vol II Part II, Article 21 Commentary, para 6.

While the applicability of these principles is well settled, their conceptual form and application in practice raise appreciable problems. The enquiry as to whether a particular use of force in self-defence satisfies the requirements of necessity and proportionality is often handled as predominantly one of fact.[5] There are, however, issues of principle which require consideration. Primarily, much uncertainty remains about the precise content of each of these principles, and about their interrelation.[6] Once the right of self-defence has been triggered, it is the principles of necessity and proportionality which dictate what action, if any, can be taken. The right of self-defence cannot be properly delimited, therefore, without a determination of the meaning of these principles. Defined principles are particularly important where, in the actual practice of States, they are central to deciding on the legality of particular actions.[7]

Practice has shown that the application of these principles is circumstance-specific. Consequently, it is important not only to consider what these customary international law principles mean more generally in the context of self-defence, but also to probe their specific manifestation in the non-State actor context. Considering the particular position of the territorial State, its responsibility and conduct ought to be central to any discussion of the latitude of the victim State to

[5] Gray (n 1) 159.

[6] Christian J Tams, 'The Necessity and Proportionality of Anti-terrorist Self-defence' in Larissa van den Herik and Nico Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 374.

[7] Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War,* vol 1 (CUP 2019) 16.

act on its territory in the exercise of the latter's right of self-defence.[8] As will be shown, the extent of the territorial State's role 'may subtly change the necessity and proportionality calculi'.[9]

This Part of the thesis explores the principles of necessity and proportionality, first with a view to giving conceptual precision to each of these principles as they arise in the *jus ad bellum* more generally,[10] and secondly, applying the principles as defined to the extraterritorial use of force in self-defence against non-Sate actors. This two-fold assessment is carried out first in relation to necessity in Chapter IV, followed by a consideration of proportionality in Chapter V.

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[8] Daniel Bethlehem, 'Principles of Self-Defence – A Brief Response', (2013) 107 AJIL 579, 584.

[9] Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence' (2013) 107(3) AJIL 563.

[10] While these concepts also arise in the context of the *jus in bello* (law regulating armed conflicts), this thesis limits its enquiry to their application and meaning in the context of the *jus ad bellum,* which is where the law on the right of self-defence arises.

CHAPTER IV

THE REQUIREMENT OF NECESSITY

A. THE NECESSITY TEST

THOUGH scarcely analysed in scholarly works on self-defence, the principle of necessity has always played a part in the law of self-defence in international law[1] and its applicability is not disputed.[2] In reference to the *Caroline Incident* of 1837, to which the requirements of the principle are often traced,[3] then US Secretary of State Daniel Webster indicated that the Canadian authorities would have to display '*a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.*'[4] In sum, necessity determines whether, in the circumstances of a particular case, a State may exercise its right of self-defence through the use of armed force.[5] In other words, the principle of necessity requires that forceful defensive measures be the only avenue to achieve the legitimate end sought.[6] The legitimate end of self-defence, its 'raison d'être', as traditionally

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[1] For a detailed discussion on the principle of necessity in its historical context see Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 28-58.

[2] Robert Ago, Addendum to the Eighth Report on State Responsibility (Part I), Agenda Item 2, 32nd Session of the International Law Commission (1980), UN Doc. A/CN.4/318/Add.5-7, para 120; Christian J Tams, 'The Necessity and Proportionality of Anti-terrorist Self-defence' in Larissa van den Herik and Nico Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 378 (noting that its applicability follows from the comprehensive ban on the use of force which requires a narrow construction of exceptions).

[3] Gardam (n 1) 148; Christine Gray, *International Law and the Use of Force* (4th edn OUP 2018) 148.

[4] RY Jennings, 'The Caroline and McLeod Case', (1938) 32 AJIL 82, 92 (emphasis mine).

[5] Gardam (n 1) 2.

[6] ILA Committee on the Use of Force, *Final Report on Aggression and the Use of Force* (Sydney Conference 2018)

understood is 'that of repelling an attack and preventing it from succeeding'.[7] As has been established in Chapter I, there is considerable State and academic support for the extension of those aims to the thwarting of an imminent armed attack – the right of anticipatory self-defence.[8] Whether a particular use of force in self-defence complies with the requirement of necessity must be assessed, therefore, by reference to the legitimate goal of repelling or halting an ongoing attack or thwarting an imminent one.[9] While the principle of necessity is important for regulating self-defensive action following an actual armed attack, it is particularly critical in the context of preventative self-defence – the use of force in self-defence before an attack has occurred.[10]

<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6> accessed 28 September 2020, 11.

[7] Ago (n 2) para 119.

[8] See text to nn 158-183 in ch I. See further Jeremy Wright QC, Attorney-General of the United Kingdom, 'The Modern Law of Self-defence' (Speech delivered at the International Institute for Strategic Studies 11 January 2017) <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies> accessed 28 September 2020; George Brandis QC, Attorney-General of Australia, 'The Right of Self-defence against Imminent Armed Attack in International Law' (Lecture delivered at the TC Berne School of Law, University of Queensland 11 April 2017) 7 <https://law.uq.edu.au/files/25365/2017%2004%2011%20-%20Attorney-General%20-%20Speech%20-%20The%20Right%20of%20Self-Defence%20Against%20Imminent%20Armed%20Attack%20in%20International%20Law%20-%20for%20publication.pdf> accessed 28 September 2020; Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in self-Defence', (2006) 55 ICLQ 963, 964; Noam Lubell, 'The Problem of Imminence in an Uncertain World' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 701; Christian Henderson, *The Use of Force and International Law* (CUP 2018) 277.

[9] Christopher Greenwood, 'Self-Defence' in *Max Planck Encyclopaedia of Public International Law* (OUP 2015) para 27. The aim noted here is that generally accepted in the context of self-defence more broadly. The question whether that aim has been expanded in contemporary international legal practice, particularly in the context of non-State actor self-defence, is addressed in Chapter V of this thesis.

[10] Ago (n 2) para 120. James Green's taxonomy is adopted for the purposes of this thesis. As such, 'preventative self-defence' refers to any claim of self-defence made in relation to a threat as distinct from an actual armed attack. Preventative self-defence covers within its scope both 'anticipatory self-defence' and 'pre-emptive self-defence', the former referring to action taken to counter an imminent threat of attack and the latter denoting action taken in response to a perceived threat that is non imminent – See James A Green, *The International Court of Justice and Self-Defence in*

Embodied in Webster's statement are two separate requirements for a use of force in response to an actual or threatened armed attack to be considered 'necessary'. First, there must be no reasonably available alternative to action taken in self-defence, that is, use of force in self-defence must be by way of last resort – 'no choice of means'. Secondly, the situation must be such that the need to respond in self-defence is urgent and instant, requiring immediate action – 'no moment for deliberation'.

I. 'No Choice of Means'

Robert Ago, then ILC Special Rapporteur on State Responsibility, aptly describes the essence of the necessity principle:

> The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack…) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force.[11]

The resort to force in self-defence will not be considered necessary, therefore, where non-forceful alternative means for addressing the threat, which are available, have not been attempted by the victim State. Given the comprehensive nature of the prohibition of the use of force and, therefore, the exceptional nature of self-defence, this enquiry is a strict one, requiring that the use of force be the

International Law (Hart 2009) 28. For a consideration of the meaning of imminence in the context of anticipatory self-defence see text to nn 36-107 below.

[11] Ago (n 2) para 120.

only available and viable option.[12] Availability, in this sense, connotes not only that alternative means are accessible to the State, but also that they are available in time, that is, that they can be pursued timeously.[13] It is also generally accepted that necessity does not require the victim State to exhaust clearly impracticable or futile measures but only those likely to be effective to achieve the aim pursued.[14] Whether a particular measure is futile or unavailable, while a matter for the determination of the victim State in the first instance,[15] is subject to objective assessment. In this regard, the victim State must demonstrate, by the presentation of relevant facts, that there is a 'reasonable expectation' that recourse to alternative measures would be ineffective.[16] While regard must necessarily be had to the factual matrix of each case, at the heart of each necessity assessment is the question – when can it be concluded that all available non-forcible means capable of meeting the defensive aim of the State have been exhausted or would be to no avail?

In the inter-State setting, though necessity is undoubtedly conceptually important, it 'only rarely excludes the exercise of self-defence'.[17] This is particularly so where force is employed to counter an on-going attack by another State. In this

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[12] Tams (n 2) 380.

[13] ILA Final Report (n 6) 12.

[14] Dinstein, *War, Aggression and Self-Defence* (6th edn CUP 2017) 250-51; Oscar Schachter, 'The Right of States to Use Armed Force', (1984) 82 Mich LR 1620, 1635.

[15] Tams and Devaney note that a victim State must make this assessment in good faith and on the basis of the facts available at the time – Christian J Tams and James D Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45(1) Is LR 91, 96.

[16] Henderson (n 8) 230.

[17] Tams and Devaney (n 15) 98.

case, it is presumed that there is nothing else that can be done to meet the attack – 'an almost irrebuttable presumption' in the view of Akande and Lieflӓnder.[18] Once the measure taken can be 'shown to be fully efficient in achieving its only legitimate aim: to put an end to an armed attack', in other words, that it has a defensive purpose, the condition of necessity will be fulfilled.[19]

Conversely, the necessity requirement cannot be considered a mere formality where there is no ongoing attack, 'either because no actual armed attack has yet occurred or because the armed attack appears to have ceased'[20] nor in the context of the extraterritorial use of force in self-defence against non-State actors.[21] While a State faced with an armed attack by another State has limited alternative avenues for recourse, the State faced with a non-State actor attack has at its disposal, at least in theory, the efforts and resources of the territorial State to neutralise the threat it is facing – 'an additional tool in the box of available options'.[22] This role of the territorial State gives rise to novel aspects of the necessity principle when assessing the extraterritorial use of force in self-defence

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[18] Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence' (2013) 107(3) AJIL 563, 564.

[19] Olivier Corten, 'Necessity' in Weller (n 8) 872.

[20] Akande and Liefländer (n 18) 564.

[21] Corten, 'Necessity' (n 19) 872. He suggests that the US military response and wide State support for that action following the 9/11 attacks illustrate that there is also no rigorous 'necessity' assessment in the context of non-State actor attacks and that a State will benefit from 'a certain leeway in how to react' once it is really the victim of an armed attack. It must be recalled, however, that before taking military action in Afghanistan, the US had conducted an extensive criminal investigation to identify the perpetrators, and had made demands of the governing Taliban regime to shut down Al-Qaida training camps, surrender up for prosecution the group's leaders, and allow US access for inspections. These demands were rejected – see Sean D Murphy (ed), 'Contemporary Practice of the United States Relating to International Law, (2002) 96(1) AJIL 237, 238, 243-4. The necessity of action in self-defence was, therefore, made out on the facts of that case.

[22] Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 16.

against non-State actors.[23] Primarily, the victim State can demand of the territorial State that it meet its obligation to repress the continuing threat of attack by non-State actors emanating from its territory. The functional import of the necessity requirement in this context is clear – where this avenue presents itself but is not explored, the resort to force in self-defence may be rendered unlawful as being unnecessary. The principle of necessity functions, therefore, as the substantive gatekeeper for the exercise of the right of self-defence against non-State actors.

II. ***'No Moment for Deliberation'***

It has been suggested that a separate criterion of immediacy or imminence arises from the *Caroline* correspondence,[24] but it is more useful to classify this notion as part of the requirement of necessity.[25] Not only does the principle of necessity require that the use of force in self-defence be the 'last resort' to effectively repel an attack, the principle also tests whether it is necessary to use force at the point in time at which it is used. This 'timing' component of the necessity principle is often referred to in two distinct contexts – first, where the victim State has suffered, or is suffering, an actual armed attack, reference is often made to a requirement for 'immediacy' of action in self-defence; secondly, where an armed attack has not yet occurred but is anticipated, there is a need for 'imminence' if defensive force is to be considered necessary. In essence, the imminence criterion tests, in the context of threats that have yet to materialise, whether the window of opportunity

[23] For a more detailed discussion of the impact of the territorial State's position on the necessity assessment see Part B below.

[24] See eg Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004), UN Doc A/59/565 para 188.

[25] Henderson (n 8) 227.

for using force has opened to the victim State, while the immediacy requirement tests whether that window has passed.

Immediacy

It has been suggested that to be necessary, any response in self-defence to an armed attack must also be instant. In the *Nicaragua* case, for example, the Court determined that, even accepting that assistance given by Nicaragua to the armed opposition in El Salvador amounted to an armed attack, the US actions in response were not necessary since they were taken several months after the major offensive of the opposition against the government of El Salvador had been completely repulsed and, therefore, no defensive purpose remained.[26] Similarly, Ago argues that the 'armed resistance to armed attack should take place *immediately*, i.e. while the attack is still going on, and not after it has ended.'[27]

Although the immediacy requirement may suggest that defensive action must follow immediately from an armed attack in a temporal sense, this is not what the requirement demands. Rather than an immediate response in time, the immediacy principle requires that defensive action in response to an actual armed attack be taken while there remains a need so to act either because the armed attack is ongoing, or the threat of continuation of the attack persists. The flexibility of the immediacy condition has long been observed in State practice involving the inter-State use of force in self-defence. In the case of the 1982 conflict between

[26] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits Judgment, 27 June 1986) [1986] ICJ Rep 14, para 237.

[27] Ago (n 2) para 122. See also Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (tr Christopher Sutcliffe, Hart 2010) 486.

the United Kingdom and Argentina concerning the Falkland Islands, the UK's resort to force in self-defence was considered lawful despite being initiated weeks after the invasion triggering the armed response.[28] In that case, the distance of the site of occupation from the UK centre of government and the effort necessary to prepare its military machinery for combat in this distant locale justified the delay.[29] This was a case of continuing invasion of the territory of the victim State so that the necessity to resort to self-defensive force remained evident despite the lapse of time. Where an armed attack is carried out by non-State actors from the territory of another State the continuing need to respond in self-defence becomes more and more doubtful as time elapses. State practice has shown, however, that even in the latter instance the 'immediacy' requirement ought to be flexibly interpreted. The US self-defensive response, for example, came almost a month after the 9/11 attacks, during which time negotiations were pursued with the Taliban regime, through the government of Pakistan.[30] If a victim State is to comply with the necessity requirement in its entirety, some delay is to be expected while it gathers intelligence, engages in diplomatic negotiations and seeks alternative recourse to action in self-defence primarily through the territorial State.[31] What is critical is that it be shown that there remains a need to act in self-defence despite the lapse in time.

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[28] Gardam (n 1) 151.

[29] Dinstein (n 14) 288.

[30] Murphy, 'Contemporary Practice of the US' (n 21) 243.

[31] Dinstein (n 14) 252; Henderson (n 8) 232.

Similarly, where the armed attack consists of a number of successive acts, the immediacy of the action in self-defence would need to be assessed in the context of the accumulation of those acts so that the threat may still be considered 'current' where a new attack is expected further to a number of others that have already passed.[32]

The essence of the immediacy condition is that there must be no undue delay between the armed attack and the use of defensive force in response, rather than a strict requirement that the exercise of self-defence follow immediately after the armed attack.[33] The further detached in time the defensive response from the attack that prompted it, the more difficult it will be to substantiate the necessity to use force in self-defence.[34] The immediacy requirement is central, therefore, to distinguishing legitimate action in self-defence from an unlawful reprisal.[35] This must be distinguished, of course, from forcible action taken after an attack or series of attacks has ended, but intended to counter a distinct anticipated armed attack from the same source, rather than to respond to the attack that has passed. In those circumstances, the requirement of imminence applies.

[32] Ago (n 2) para 122; Corten (n 27) 486-87.

[33] Dinstein (n 14) 252.

[34] Gardam (n 1) 150-51.

[35] See Corten (n 27) 486 (noting that forceful action taken once an attack has ended would no longer be 'a "necessary" measure of self-defence but an actual punitive expedition, which should rather be characterized as reprisals.')

Imminence

In the context of the use of force to counter an anticipated attack, 'imminence' has been endorsed as the relevant constraint by States in their practice[36] and by publicists who accept anticipatory self-defence.[37] As an element of the necessity principle, the criterion of imminence 'requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the [threatened] attack.'[38] In its traditional sense, the requirement of imminence was considered to be met where the threatened attack was temporally imminent, that is, about to happen.[39] Force would be properly employed in anticipatory self-defence 'at the point immediately preceding the launching of an armed attack.'[40] In this traditional understanding, imminence imports a strict temporal consideration allowing for little flexibility between cases.

It has been suggested, however, that the imminence requirement is to be applied in a context-specific manner. Lord Goldsmith, articulating the position of the UK Government on the matter of pre-emptive self-defence in 2004, noted that the determination of whether an attack is imminent falls to be assessed on the

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[36] Attorney-General Lord Goldsmith in the House of Lords, HL Deb 21 April 2004, vol 660, col 370; Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009) vol II <https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf> accessed 25 October 2020, paras 186, 222 (noting the positions of Georgia and Russia); *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (The White House 2016), 9.

[37] Lubell 'Imminence' (n 8) 697, 699 (noting that imminence is recognised as the applicable restraint even by those who oppose anticipatory self-defence); High-Level Panel Report (n 24) para 188; Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005), UN Doc A/59/2005, paras 124-25; Chatham House Principles (n 8) 967; Henderson (n 8) 277.

[38] Chatham House Principles (n 8) 966-67 (Principle C).

[39] Lubell 'Imminence' (n 8) 699.

[40] Henderson (n 8) 277.

particular facts of each case and that the concept 'will develop to meet new circumstances and new threats.'[41] More recently, there has been a notable call amongst some States for the concept of imminence to be adapted to 'terrorism, WMD, and modern threats more generally.'[42] In an address in 2016, the Legal Adviser to the US Department of State, providing clarity on 'the US international law approach' to its anti-ISIS operations, noted that in considering whether an armed attack is imminent, the US 'analyses a variety of factors, including those identified by Sir Daniel Bethlehem… in 2012'.[43] Similarly, the Attorney-General for Australia announced in 2017 that Australia 'agrees with and adopts [the Bethlehem] formulation' as its official government position on the question of imminence.[44] These statements reference Principle 8 of Sir Daniel Bethlehem's Principles on non-State actor self-defence, which proposes that:

> Whether an armed attack may be regarded as "imminent" will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of

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[41] Lord Goldsmith, HL Deb (n 36) col 370.

[42] Lubell 'Imminence' (n 8) 706.

[43] Brian Egan, Legal Adviser US Department of State, 'International Law, Legal Diplomacy and the Counter-ISIL Campaign' (Keynote Address at the Annual Meeting of the American Society of International Law, April 2016) <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf> accessed 1 October 2020.

[44] George Brandis QC Lecture (n 8) 7.

> self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.[45]

What is expressed in this principle is not a temporal conception of imminence as traditionally understood but rather a ‘contextual imminence’[46] where the timing of the attack is merely one factor to be considered. Bethlehem’s Principle 8 appears to draw heavily on the language of Lord Goldsmith articulating the UK position on anticipatory self-defence in 2004, that States are able to act in self-defence ‘where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.’[47]

The UK Government position on the meaning of ‘imminence’ was also set out in a 2017 speech by the Attorney-General, which expressed that the UK as a whole follows and endorses the approach proposed by Bethlehem on imminence. Going further, the Attorney-General acknowledged Bethlehem’s principle 8 as an encapsulation of ‘the modern law in this area’,[48] that is, not only a reflection of the UK’s position, but also of existing customary international law. He concluded that ‘the UK’s view that this is the correct interpretation of the law is long-standing.’[49] It is significant to note that the endorsements of Bethlehem’s formulation of the imminence principle by the UK, Australia and the US were all made in the context

[45] Daniel Bethlehem, ‘Self-Defense Against an Imminent or Actual Attack by Nonstate Actors’, (2012) 106(4) AJIL 769, 775-76.

[46] Henderson (n 8) 297.

[47] Lord Goldsmith, HL Deb (n 36), col 370.

[48] Jeremy Wright QC Speech (n 8).

[49] ibid.

of the use of force in self-defence against non-State actors, specifically against ISIS in Syria, in which all three States were actively engaged at the time.[50] This conception of imminence is also undoubtedly relevant to the policies on targeted killings adopted by the US and UK.[51] Henderson notes, in particular, that the contextual formulation of imminence would have been central to the UK's decision to launch a targeted RAF drone strike against the British national Reyaad Khan located in Syria on the basis of his alleged role in 'planning and directing armed attacks against the UK'.[52] As far as it concerns the use of force in self-defence against non-State actors, the UK, Australia and the US evidently recognise 'contextual imminence' as part of customary law.

Bethlehem's Principle 8 is not novel. The 2005 Chatham House Principles on self-defence provide that in assessing the imminence of an attack reference may be had to the gravity of the attack, the capability of the attacker, and the nature of the threat, since the criterion of imminence must be interpreted 'so as to take into account current kinds of threat and it must be applied having regard to the particular circumstances of each case.'[53] Similarly, the 2010 Leiden Policy

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[50] Brandis, for example, identified the relevant context for his statements:

> 'Australia, currently, has defence personnel engaged in conducting operations with our International partners against ISIL in Syria, as part of Operation OKRA. … That operation has led to much discussion… about the operation and extent of the principle of imminence as a ground for the defensive use of force.' – George Brandis QC Lecture (n 8).

[51] Although targeted killings by way of drone strikes are a common feature of the extraterritorial use of force in self-defence against non-State actors, this thesis does not consider the legality of targeted killings *per se,* a matter more suitably considered within the framework of the *jus in bello* and/or international human rights law.

[52] Henderson (n 8) 299 (citing then Prime Minister Dave Cameron in the House of Commons Debate, 7 September 2015).

[53] Chatham House Principles (n 8) 967.

Recommendations propose that imminence ought to be determined by reference to the immediacy, nature and gravity of the threatened attack.[54] The International Group of Experts on cyber-attacks also advocates a contextual approach to imminence in relation to anticipatory self-defence against cyber-attacks. In the process of drafting the Tallin Manual 2.0, the majority of those experts rejected a strict temporal approach to the question of imminence, favouring instead the 'last feasible window of opportunity' standard by which a State may act in anticipatory self-defence where delay in response will result in the State losing its opportunity to defend itself effectively. In their view, this window 'may present itself immediately before the attack in question, or, in some cases, long before it occurs.'[55] The Tallinn manual expressly recognises this standard as being equally applicable to cyber and kinetic attacks.[56]

Like the Tallinn Manual on cyber-attacks, both the Chatham House Principles and the Leiden Policy Recommendations were intended to state existing law rather than to offer proposals for how the law might be developed.[57] While the Leiden Recommendations were proposed in the context of counter-terrorism, the Chatham House Principles were drafted in the context of the use of force in self-defence more generally. In particular, the latter are neutral on the question of the source of 'current kinds of threat', that is whether State or non-State source, to

[54] Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (Leiden University, 1 April 2010) para 46.

[55] Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn CUP 2017) 351.

[56] ibid.

[57] Elizabeth Wilmshurst and Michael Wood, 'Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"' (2013) 107(2) AJIL 390, 395.

which the broadened conception of imminence applies. Similarly, the Tallin Manual 2.0 contemplates within its scope of application cyber-attacks from State and non-State sources.[58] While the contextual conception of imminence is most often debated as a feature of the right of self-defence against imminent attacks by non-State actors, it is evident that it is conceived of as applicable to threatened attacks by States also.

While there is significant doctrinal support for the contextual conception of imminence, it is open to question whether it has attained the status of customary international law. Glennon, for instance, expresses scepticism about the customary status of Bethlehem's principles suggesting instead that they 'substitute the *opinio juris* of the powerful for the practice of all'.[59] Similarly, O'Connell argues that, despite the assertions of State representatives, Bethlehem's proposals are 'far from the current rules'.[60] Admittedly, while there is ever-increasing support for a right of anticipatory self-defence in the practice of States, even the stricter 'temporal' conception of imminence remains controversial.[61] Notably, with specific reference to the unequivocal endorsement of a right of anticipatory self-defence in the 2005 Secretary-General's Report on security and human rights, a considerable number of Latin-American, North-African and Asian States voiced opposition in the General Assembly.[62] Pakistan, for example, noted its strong disagreement that

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[58] *Tallinn Manual 2.0* (n 55) 344-45.

[59] Michael Glennon, 'Law, Power and Principles', (2013) 107(2) AJIL 378.

[60] Mary Ellen O'Connell, 'Dangerous Departures' (2013) 107(2) AJIL 380, 384.

[61] Henderson (n 8) 306.

[62] For a useful summary of State responses see Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 339 – 41.

Article 51 of the Charter permits for any form of preventative self-defence. In its view, 'Article 51 is quite explicit and highly limitative. It provides for the use of force in self-defence only in case of an actual attack against a Member State'.[63] It is difficult to assert that 'contextual' imminence reflects customary international law in the absence of evidence of wider State endorsement.

A separate question is left to be considered *de lege ferenda* – is the contextual conception of imminence better suited to regulating anticipatory self-defence in the contemporary context? Proponents of a broader conception of imminence frequently point to the very real difficulty of applying the traditional temporal conception of imminence to current threats. In its response to the UK Human Rights Committee report on its policy on the use of drones for targeted killing, the UK Government noted that:

> Combating an enemy which may have covertly infiltrated our country, and can control attacks from abroad with sophisticated communications technology means that it will be a rare case in which the Government will know in advance with precision exactly where, when and how an attack will take place. An effective concept of imminence cannot therefore be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack...[64]

In very many of these cases, the evidence as to the precise timing of an anticipated attack necessary for a proper application of a strict temporal imminence requirement will simply be lacking. Concern has also been raised about the

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[63] Statement by Ambassador Munir Akram, Permanent Representative of Pakistan to the United Nations in the Informal Thematic Consultations on Cluster-II "Freedom from Fear" (21 April 2005) <https://pakun.org/statements/Plenary_of_General_Assembly/2005/04212005-01.php> accessed 24 September 2020.

[64] Joint Select Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015-16', <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74705.htm#_idTextAnchor032 > accessed 1 October 2020.

potentially catastrophic consequences of an unthwarted WMD attack or large-scale cyber-attack, which, because of advances in technology, may not allow for action to be taken immediately before it is launched.[65] If ‘imminence’ as a constraint on the use of force is to have effect in the actual practice of States, it is critical that it be capable of engaging with the ‘operational challenges with which… government legal advisers are having to grapple.’[66] There is, therefore, practical reason to embrace a contextual definition of imminence.

Nevertheless, conceptual difficulties have been identified with the notion of ‘contextual’ imminence. Henderson asserts, for instance, that it is incorrect, or perhaps disingenuous, to use the term ‘imminent’ to describe an anticipated attack in these circumstances.[67] The use of the term ‘imminent’ is less problematic, however, when considered more broadly in context. Rather than requiring that the anticipated attack be shown to be about to happen, the notion of imminence as a component of necessity instead describes a ‘certain pressing quality that a threat must have for anticipatory self-defence to be lawful.’[68] In other words, what necessity entails is a requirement that force be used as a last resort *and* that it be necessary for that force to be used *now.* This articulation is consistent with the

[65] Memorandum by Professor Christopher Greenwood, CMG, QC to the House of Commons Select Committee on Foreign Affairs, ‘The Legality of Using Force against Iraq’ (24 October 2002) <https://publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm> accessed 1 October 2020, para 25.

[66] Daniel Bethlehem, ‘Principles of Self-Defense – A Brief Response’ (2013) 107(3) AJIL 579,582.

[67] Henderson (n 8) 299-300.

[68] Akande and Liefländer (n 18) 564.

Caroline formula itself, which provides for 'a necessity of self-defence, instant, overwhelming, leaving… no moment for deliberation.'[69]

THE CONTEXTUAL IMMINENCE ASSESSMENT

Several factors, and varying combinations of those factors, have been suggested by publicists as contributing to the assessment of this 'pressing quality.'[70] Akande and Liefländer usefully distil the factors which characterise a threat and which, therefore, are potentially relevant considerations in assessing the imminent need to respond to it.[71] The essential components, they posit, are fourfold – the *type* of attack threatened, the *likelihood* that the attack will occur, the *gravity* of the threatened attack, and the *timing* of the attack. While these factors are identified as potentially relevant to the imminence assessment, Akande and Liefländer note that what is required of each of these elements and how they interact in the assessment remains unclear.[72]

Each of these factors raises specific considerations in the context of contemporary threats. With advances in technology, the available modes of delivery of armed attacks have expanded, and arguably have become more difficult to pre-empt. Cyber-attacks and terrorist attacks, for example, often involve some element of secretiveness and are likely to come without warning.[73] With

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[69] *Caroline and McCleod Case* (n 4) 92 (emphasis mine).

[70] See Bethlehem, 'Principles Related to Self-Defense' (n 45) 775; Chatham House Principles (n 5) 968; Leiden Policy Recommendations (n 55).

[71] Akande and Liefländer (n 18) 564.

[72] ibid 564-65.

[73] Henderson (n 8) 301; Chatham House Principles (n 5) 968.

regard to gravity, the question arises whether the magnitude of destruction that may result from the attack, for example where it involves the use of WMDs, should weigh heavily, or at all, in the assessment of its imminence. The likelihood of an anticipated attack can range from virtual certainty to low likelihood. Even where imminence is defined as a temporal concept, that is, in its strictest sense, it is likelihood that characterises the anticipated attack, rather than certainty.[74] As such, a temporally imminent attack is described as one that is 'objectively highly likely to occur in the immediate future unless action is taken to prevent it.'[75] Similarly, contextual imminence must be defined in terms of likelihood, rather than certainty. Finally, proponents of the contextual conception of imminence maintain the relevance of the timing of the attack, that is, when it is likely to occur.[76] Rather than being determinative, however, the timing of the attack is merely one factor to be weighed in the assessment. It remains to be considered, however, how these various factors ought to be balanced in the assessment of imminence. While the assessment is largely circumstance-specific, there must be guidelines which apply to this determination capable of general application.

Specificity of the Threat

As a preliminary matter, it must be noted that anticipatory self-defence may be lawfully employed only to meet a threat of a *specific* attack, that is, 'an identifiable actual attack… rather than the unformed potential of attack, or a threat which has

[74] Lubell, 'Imminence' (n 8) 713-14.

[75] Henderson (n 8) 282.

[76] See for example Akande and Liefländer (n 18) 565.

not yet materialised.'[77] While the requirement for a specific threat of attack may be self-evident, its primacy should not be understated. If there exists a threat of a specific and identifiable attack, it is to be expected that there will be some evidence of its preparation. While terrorism 'plays on the fear of the unknown',[78] a lack of knowledge as to all elements of the threat, that is, its type, likelihood (which calls into consideration its source), timing and gravity, would tend to suggest a lack of an imminent necessity. Such a threat would be 'as far from a specific impending attack as can be.'[79] The operational challenges associated with intelligence gathering, particularly in the context of non-State actor threats, are appreciated. However, the narrow allowance for anticipatory action within the already exceptional right of self-defence necessitates meaningful restraints. In sum, for the imminence criterion to be met, and by extension the requirement of necessity, there must be an actual threat of an attack from an identifiable source against the State rather than one that is 'potential or abstract'.[80]

Demanding specificity of the threat against which force may be used in anticipatory self-defence alleviates very many of the concerns with the contextual conception of imminence. There is understandable discomfort with a finding of imminence in the face of uncertainty, but if the degree of uncertainty is such that a concrete threat of a specific attack cannot be identified, then any existing threat, no matter how real, will fall outside the realm of self-defence. The specificity of the

[77] Lubell 'Imminence' (n 8) 704.

[78] ibid 707.

[79] ibid.

[80] Independent International Fact-Finding Mission on the Conflict in Georgia (n 36).

threat must be established by clear and convincing evidence.[81] Evidence of the mode of delivery, intended target, and timing of the attack will all contribute to establishing the specificity of the threat. However, the absence of clear evidence as to any or all of these elements is not an impediment to a finding of imminence so long as there is evidence otherwise pointing to a threat of a specific attack. By contrast, it is extremely difficult to envision a threat of a specific attack without evidence as to its source.

It follows from the requirement of the specificity of the threat that evidence of past attacks from the same source is not adequate. In the aftermath of the UK RAF drone strike on Reyaad Khan in Syria the UK Prime Minister, setting out the legal basis for the action taken, noted that there was clear evidence of Khan planning and directing armed attacks against the UK which were 'part of a series of actual and foiled attempts to attack the UK'.[82] This fact, in and of itself, would be insufficient to substantiate the imminent need to strike Khan at that moment without accompanying evidence of a further specific threatened attack in which he was involved. In this regard, the Prime Minister noted that Khan was 'actively… seeking to orchestrate specific and barbaric attacks against the west, including directing a number of planned terrorist attacks right here in Britain.'[83] The overriding consideration in assessing the necessity to use force in anticipatory self-defence,

[81] On the question of standard of proof, see text to n 214 below.

[82] Statement of Prime Minister David Cameron, HC Deb 7 September 2015, vol 599, col 26.

[83] ibid col 25.

therefore, is whether the use of force responds to the threat of a specific, identifiable attack.

TIMING OF THE ATTACK AS THE PRIMARY INDICATOR

The specificity of the threat aside, since the overarching enquiry of the imminence assessment is whether it is necessary to use force at a point in time, evidence as to the timing of the attack carries significant weight. Where the evidence indicates that time remains to pursue alternative avenues to address the threat or for the course of events to change, then it will not be necessary to use force in self-defence at that time. Akande and Liefländer support this view, arguing that where a military option is available for some time because the threat is temporally remote, alternatives to that option should first be tried.[84] Conversely, where evidence as to the timing of the attack signals that no time remains to pursue alternatives to self-defensive force, because the attack is about to materialise for example, then the imminence requirement will be satisfied. As distinct from its relevance in the strict temporal conception of imminence, the timing of the threatened attack, as a feature of contextual imminence, is not limited to establishing whether the threat is temporally imminent but relates to whether time allows for exploring other options. It is conceivable that an attack is not about to happen in a temporal sense, but there is nevertheless a need to act now if action is to be effective in meeting the threat. A strict temporal definition of imminence would deny use of force in those circumstances.[85] In that event, in addition to establishing that the threat is highly

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[84] Akande and Liefländer (n 18) 565.

[85] ibid.

likely to materialise,[86] there must also be evidence establishing that, notwithstanding the temporal remoteness of the attack, it will not be possible to take effective action at any future time. As a general principle, the more temporally remote the threatened attack, the more difficult it will be to establish that there is, nevertheless, a circumstance of imminence.

Where the assessment suggests that there will be future opportunity to use force in self-defence to meet the threat, there will be no need to use force at that time – no imminence – even where alternatives have already been exhausted or are currently unavailable. An attacker resolutely committed to the task in the present moment may change his mind in the intervening time, or a territorial State previously unwilling to take action to prevent the realisation of the attack may alter its policy. Indeed, there are ‘infinite possibilities for unforeseen developments’ where an attack is established on the evidence to be temporally distant.[87]

Importantly, where the evident timing of the attack allows for the pursuit of alternative action to the use of force in self-defence, the gravity and likelihood of the threat are not determinative. While evidence as to the precise timing of the attack may be often absent in the context of contemporary threats, it must not be overlooked that the timing of the attack is the primary indicator for consideration. Where the timing of the threatened attack is unclear however, the assessment depends more heavily on the other indicators of the imminence of the threat.

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[86] The likelihood of the threat materialising is examined in greater detail below.

[87] Lubell, ‘Imminence’ (n 8) 712.

Balancing the Indicators of Imminence

It is critical first to note that the type and gravity of the threatened attack cannot, by themselves, determine the imminence of the attack, even in circumstances where that attack may be potentially catastrophic.[88] In the absence of clear evidence as to timing of an anticipated attack, the likelihood of its materialisation must be considered to be the foremost indicator of its imminence. The type or mode of delivery of the attack is relevant only to the extent that it may substantiate the difficulty of ascertaining the precise timing of the attack and, therefore, the need to consider the attack's likelihood and gravity, rather than its timing, as determinative of its imminence.[89]

In considering the likelihood of the threat, the standard necessary to satisfy the imminence requirement must first be determined. Akande and Liefländer note the 'far-reaching consensus that a threat with a very low likelihood of materialisation does not allow anticipatory self-defence.'[90] But what degree of likelihood *does* suffice? Given that the use of force in anticipatory self-defence is reserved for the most exceptional of circumstances, it is arguable that nothing short of certainty will do. Lubell raises the legitimate unease aroused by a conception of imminence which does not demand certainty of materialisation of the threat. 'Losing our grip on this certainty', he argues, 'leads down a dangerous path of use of force based on nothing but speculation.'[91] It has already been acknowledged,

[88] Henderson (n 8) 302.

[89] Greenwood Memorandum (n 65) para 25.

[90] Akande and Liefländer (n 18) 565.

[91] Lubell, 'Imminence' (n 8) 713.

however, that in the realm of threats certainty is an illusion. Anticipatory self-defence necessarily entails a risk of defensive action being taken to forestall an event that may well never have happened. While certainty cannot be demanded, imminence must require more than a mere possibility. To be imminent, a threatened attack must be highly likely to occur.

It is submitted that a threat may be considered to be highly likely to materialise where the aggressor has both the capacity and the intention to carry out the threatened attack.[92] Capacity refers to possession of, or access to, the means necessary to carry out the threatened attack. The capacity of the aggressor may be indicated by its possession of relevant weaponry, such as WMDs.[93] Sands argues that capacity could include the acquisition of material or component parts to be used in the manufacture of WMDs, rather than possession of the finished product.[94] While the capacity of the aggressor may be established on such evidence, it is submitted that there must be accompanying evidence of the aggressor having the wherewithal to achieve completion.

The intention of the attacker is equally integral to establishing the likelihood of the attack. For the imminence requirement to be met, the attacker's intention must be specific; that is, the attacker's aim or purpose must be to carry out an

[92] This approach was advocated by Philippe Sands in his written evidence to the UK Foreign Affairs Committee in 2004 – Written Evidence Submitted by Professor Philippe Sands QC to the House of Commons Select Committee on Foreign Affairs, 'International Law and the Use of Force' (1 June 2004) <https://publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060805.htm> accessed 1 October 2020, para 15. Though raised in a different context, the Chatham House Principles also specify that force may only be used in self-defence where 'the attacker has the intention and the capability to attack' – Chatham House Principles (n 8) 965 Principle B.

[93] Chatham House Principles (n 8) 968.

[94] Sands Written Evidence (n 92) para 15.

actual armed attack against the target State. Evidence of a generally hostile disposition of the attacker toward the State claiming self-defence will be inadequate to establish a specific intention.[95] Intention is, therefore, inextricably linked to the idea of the specificity of the threat. The intention of the aggressor may be expressly conveyed or may be implied. In the absence of an expression of a specific intention to attack, a likely scenario in the context of contemporary threats, the motives of a State or non-State attacker may be difficult to ascertain. In those circumstances, the intention of the aggressor will best be substantiated by evidence of a plan of attack coupled with preparatory acts towards the execution of that plan. Evidence of a previous attack carried out by the aggressor may also be relevant to the determination of its capacity and intent.[96] This is particularly so where there has been a series of attacks indicating 'a concerted pattern of continuing armed activity.'[97] Evidence of a continuing series of attacks facilitates a more reliable prediction of the likelihood of a threat within this pattern of activity materialising at some time in the future.[98]

The gravity of the threatened attack has been given particular weight amongst proponents of the contextual conception of imminence. The Chatham House Principles, for example, state that although the possession of WMD without the intention to launch an attack does not, in itself, permit the use of force in anticipatory self-defence, 'the difficulty of determining intent and the catastrophic

[95] Lubell, 'Imminence' (n 8) 711; Henderson (n 8) 302.

[96] Henderson (n 8) 303.

[97] Bethlehem, 'Principles Related to Self-Defense' (n 45) 775.

[98] Akande and Liefländer (n 18) 565.

consequences of making an error will be relevant factors in any determination of imminence.'[99] It remains unclear, however, how the gravity of the attack alters the assessment. As a preliminary consideration, while the gravity of the threatened attack cannot, on its own, satisfy the imminence requirement, it remains an integral component of defining the threat. Specifically, the threat in response to which force in anticipatory self-defence is used must be a threat of an armed attack. If a gravity threshold is accepted as applying to the definition of an actual armed attack, it must equally apply to defining a threatened armed attack in response to which the right of anticipatory self-defence can properly be invoked.[100] As has been considered elsewhere in this thesis, while the relevance of a gravity threshold is debated in the inter-State context, it is generally agreed that self-defence arises in response to large-scale attacks by non-State actors.[101] Consequently, the right of anticipatory self-defence in response to a non-State actor threat requires that a large-scale attack be threatened.

Otherwise, the relevance of gravity to the imminence assessment has been raised with specific reference to threats the gravity of which is such that they are likely to produce catastrophic consequences. Two possible approaches are presented in academic discourse for accounting for the gravity of the threatened attack in the imminence assessment. First, it is possible for the requirements of likelihood and gravity to be aggregated so that a moderate threat must be complemented by a high standard of likelihood, while a threat that is extremely

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[99] Chatham House Principles (n 8) 968.

[100] Henderson (n 8) 302; Lubell, 'Imminence' (n 8) 708.

[101] Text to nn 224-27 in ch I.

severe need only be likely to a much lesser degree.[102] On the second approach, the gravity of the threatened attack may permit a more liberal determination of the likelihood of the threat on the available evidence.[103] In the latter case, while the requirement for a high standard of likelihood is maintained, the target State would be allowed a greater margin of appreciation in concluding that the threat is highly likely to materialise in its assessment of the evidence.

The first of these options presents considerable practical difficulties. While it appears to be a fair counterbalance on its face, it would be almost impossible to establish a standardised sliding scale capable of consistent implementation from case to case. To be consistently applied, there would need to be pre-set degrees of gravity corresponding to pre-set degrees of likelihood, a process more suited to variables that are quantitative in nature, rather than qualitative. More importantly, a sliding scale of gravity has the potential to eliminate altogether the relevance of the likelihood of the threat materialising. On a sliding scale, where the threatened attack is existential, there is a risk that a serious enquiry into the likelihood of the attack will be overlooked. Once hostile intent can be identified, the lowered threshold of likelihood is arguably easy to satisfy. This would be not only antagonistic to the general consensus that a low likelihood of materialisation will not suffice for the imminence requirement to be satisfied, it is also likely to escalate inter-State conflict since the risk of 'false positives', that is, the use of force on the

[102] Akande and Liefländer (n 18) 565. Lubell (n 8) 710 considers a similar 'sliding scale of gravity'.

[103] Lubell (n 8) 715.

basis of an imminent attack which in fact would not have happened, will be significantly increased.[104]

The second approach, while maintaining rigorous standards for the use of force in anticipatory self-defence, makes allowance for the legitimate security concerns of a victim State faced with a catastrophic threat in circumstances of uncertainty. Rather than permitting the use of force in anticipation of a threat with a low likelihood of materialising, the second approach would allow the target State to make more liberal inferences as to the intention of the aggressor in the particular case. To reduce the risk of false positives, it is suggested that this more liberal assessment of intention must be counterbalanced by a high standard of proof as to the capacity of the aggressor to accomplish the threatened attack. Since a recalibrated imminence requirement is dependent on the gravity of the threatened attack, it is reasonable to require a greater degree of certainty as to the capacity of the aggressor to carry out an attack of that gravity.

The Imminence Assessment: Final Thoughts

Rather than establishing whether a threatened attack is about to occur, the imminence requirement is aimed at determining the last window of opportunity for the target State to take effective action to counter the threatened attack.[105] While it is for the target State to make an assessment of the imminence of a particular threat in the first instance, the law of self-defence does not countenance a purely

[104] ibid 714.

[105] Chatham House Principles (n 8) 8 (Principle D); Akande and Liefländer (n 18) 565; Tallin Manual 2.0 (n 56) 64-5; Leiden Policy Recommendations (n 55).

subjective determination. The target State must have a ‘reasonable and objective basis’ for concluding that there exists a circumstance of imminence justifying the use of force in self-defence.[106] The contextual conception of imminence necessarily entails a degree of uncertainty. Particularly in the context of the extraterritorial use of force in self-defence against non-State actors, it is critical that a good faith assessment be demanded so as to protect the interests of the territorial State. Finally, it is important to recall that the imminence assessment is one element of the overarching necessity requirement. As such, the imminence of a threat does not remove the need to employ non-forcible alternatives where available.[107]

B. Necessity in the Context of Non-State Actor Self-Defence

As has been argued, the necessity principle plays an important gate-keeping function in the context of self-defence against non-State actors. Where the territorial State has not, by its own actions, made itself liable to defensive force then the burden to be overcome to justify the necessity of that force should be greater.[108] Where force is used to respond to non-State actor attacks, several context-specific questions are raised about how the necessity principle as previously detailed ought to apply. As will be shown, the role of the territorial State has significant implications for how the necessity requirement is applied and its

[106] Bethlehem, ‘Principles Related to Self-Defense’ (n 45) 776.

[107] Lubell (n 8) 700.

[108] Akande and Liefländer (n 18) 563.

conduct is key to indicating the entitlement of victim State to act on its territory without its consent.

I. *'No Choice of Means' – The Territorial State and Self-defence as a Last Resort*

The conduct of the territorial State is particularly relevant in considering whether the aggrieved State has no choice of means. In the traditional inter-State setting, it is evident that any response to a threatened or actual attack by another State must come from the victim State itself, acting alone or collectively with its allies. In the non-State actor context this is not necessarily so. This prompts a meaningful, rather than superficial, discussion about the application of the necessity principle in the non-State actor context. The presence of the territorial State in the factual matrix presents to the victim State additional options with potential to meet the non-State actor threat, namely territorial State action and consent. The territorial State may, by its conduct, alter the conditions of availability of those options and, accordingly, impact the determination of the necessity of self-defensive action.

Primacy of Territorial State Action

Where self-defensive force is to be used against a non-State actor on the territory of another State the principle of necessity requires that, where feasible, repressive measures by the latter State are sought before there is resort to extraterritorial use of force in self-defence.[109] Not only is the pursuit of territorial State action an alternative required by the relevant rules, for reasons of practicality, it is also a

[109] ILA Final Report (n 6) 16.

preferable one. The territorial State is likely to be better placed for intelligence-gathering and is able to act through domestic mechanisms, thereby minimising the likelihood of use of lethal force. Further, territorial State action will avoid the inevitable violation of sovereignty that comes with the extraterritorial use of force against non-State actors in self-defence, which has implications for international peace and security.

Wilmshurst and Wood observe that in considering defensive action against non-State actors, 'we are almost invariably in the counterterrorism context.'[110] Both State practice and international legal doctrine confirm that domestic law enforcement provides the primary paradigm for dealing with such threats.[111] Following the armed attacks of 9/11 the UNSC, while recognising and reaffirming the right of self-defence in that context, mandated Member States in the operative sections of its Resolution 1373 (2001) to take all necessary measures to prevent and suppress the funding and commission of terrorist activities within domestic jurisdictions through national criminal justice systems and border controls.[112] In its declaration on the global effort to combat terrorism, the UNSC further reiterated that this end is to be achieved through urgent steps towards the full implementation of the obligations imposed in Resolution 1373.[113]

Following terrorist bomb attacks in Bali, Kenya, Bogota, Istanbul, Madrid, and London between 2002 and 2005, responsibility for which was ascribed to, or

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[110] Wilmshurst and Wood (n 57) 393.

[111] Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', (2001) EJIL 12(5) 993, 994.

[112] UNSC Resolution 1373 (28 September 2001) S/RES/1373(2001) paras 1-2.

[113] UNSC Resolution 1377 (12 November 2001) S/RES/1377(2001) 2.

claimed by, various terrorist groups including Al Qaeda, the UNSC, while highlighting these instances as threats to international peace and security, reiterated the obligations of States pursuant to Resolution 1373 and stressed the need for cooperation between local authorities to bring the perpetrators to justice.[114] Implicit in the consistent emphasis on domestic measures throughout these Resolutions is an institutional position on the exceptional nature of self-defence in these circumstances and the primacy of territorial State action alongside international cooperation and support. The Security Council's approach is consistent with the various relevant international treaties which oblige States Parties to criminalise and prosecute terrorism and to cooperate through law enforcement and judicial measures to counter terrorist activities.[115] The Convention for the Suppression of Nuclear Terrorism, for example, classifies relevant terrorist activities as 'offences' within the domestic law of Member States[116] and obliges Parties to establish criminal laws to capture those offences with appropriate penalties reflecting their seriousness.[117]

This approach is also evident in the actions of victim States themselves in assessing the need to resort to force against non-State actors on foreign territory. As a precursor to justifying self-defensive action, States have tended to highlight

[114] UNSC Resolution 1438 (14 October 2002) S/RES/1438(2002) [Bali, Indonesia]; UNSC Resolution 1450 (13 December 2002) S/RES/1450(2002) [Kenya]; UNSC Resolution 1465 (13 February 2003) S/RES/1465(2003) [Bogota, Colombia]; UNSC Resolution 1516 (20 November 2003) S/RES/1516(2003) [Istanbul, Turkey]; UNSC Resolution 1530 (11 March 2004) S/RES/1530(2004) [Madrid, Spain]; UNSC Resolution 1611 (7 July 2005) S/RES/1611(2005) [London, UK].

[115] Cassese (n 111) 994.

[116] International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005) 2445 UNTS 89, Art 2.

[117] ibid Art 5.

failure of action on the part of the territorial State following reasonable request. The US was at pains to communicate to the UNSC the prior demands made of the Taliban government of Afghanistan to have those responsible apprehended and extradited for criminal prosecution.[118] Similarly Russia underscored its unsuccessful efforts to arrange cooperation with Georgia on issues relating to combating terrorism and its requests for the Georgian leadership to establish a security zone in the area of the Georgian-Russian border and to comply with its obligations under UNSC Resolution 1373.[119]

Two further points should be noted. First, the obligation of a victim State to first seek a resolution through territorial State action is not absolute. The prospect of success of such measures is relevant to the necessity calculation. The requirement of necessity in this context is not that such measures will definitely fail but rather that their success not be expected to prove timely enough to repel a continuation of the attacks.[120] This is consistent with the basic premise underlying the principle of necessity that the victim State is obliged to exhaust only those measures that would be effective.[121] Secondly, measures need not be undertaken by the territorial State alone. It may be possible for the victim State or third States to cooperate in assisting the territorial State with employing effective measures at

[118] Murphy, Contemporary Practice of the US (n 21) 243-44.

[119] Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, UN Doc. S/2002/1012.

[120] Michael Schmitt, 'Counter-terrorism and the Use of Force in International Law' (2002) 79 Intl L Stud 7, 36.

[121] See nn 13-14 above and accompanying text.

the domestic level.[122] The obligation of States to provide to each other the greatest measure of assistance and to cooperate in the prevention and suppression of terrorist activities has been affirmed by the UNSC time and again.[123] The victim State should, as a rule, seek to operate cooperatively with the territorial State where possible.[124] The desirability of a joint approach is also evident – not only will the territorial State's sovereignty be preserved, but both States will be able to benefit from shared intelligence in assessing the threat and crafting an effective response.[125] Coordination may also help to eliminate the possibility of the States working at cross-purposes.[126] Where the victim State acts in coordination with the territorial State, the consent of the territorial State to the victim State's participation in counterterrorism efforts removes any possible Article 2(4) violation and, consequently, the need to rely on self-defence.[127]

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[122] Schmitt (n 120) 28; Kimberley Trapp, *State Responsibility for International Terrorism* (OUP 2011) 59.

[123] See eg UNSC Resolution 1373 (n 112) paras 2-3; UNSC Resolution 1377 (n 113); UNSC Resolution 1438 (n 114) para 3; UNSC Resolution 1618 (4 August 2005) S/RES/1618(2005) para 7.

[124] Ashley Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', (2012) 52(3) VJIL 483, 520.

[125] ibid.

[126] In 2008, the Pakistani Foreign Minister alleged that US unilateral military raids against Taliban and Al Qaeda insurgents in Pakistan threatened to undo what the Government had already achieved in its counter-terrorism effort. See Reuters, 'U.S. raids hurt terrorism fight: Pakistan Minister' <https://www.reuters.com/article/us-pakistan-usa-raids/u-s-raids-hurt-terrorism-fight-pakistan-minister-idUSTRE4910AA20081002> accessed 1 October 2020.

[127] The ILA Report on the use of force makes clear that the extraterritorial use of force with the consent of the territorial State involves no breach of Article 2(4) *ab initio* - ILA Final Report (n 6) 3, 18. See also Oscar Schachter, 'The Lawful Use of Force by a State Against Terrorists in Another Country', (1989) 19 Is Ybk HR 209, 214. Consent operates, not as a circumstance precluding wrongfulness within the secondary rules of international law, but as an 'intrinsic element' of the primary rules on the use of force. For a consideration of consent as a circumstance precluding wrongfulness see Eighth Report on State Responsibility, by Mr Robert Ago, Agenda Item 2, 31st Session of the International Law Commission (1979) UN Doc. A/CN.4/318 and ADD.1-4, para 55.

Consent of the Territorial State

Consent arises as a natural supplement to territorial State action – where the territorial State is unable to act itself it can consent to the victim State taking unilateral or collective action with other States to address the non-State actor threat. In light of the international significance of the use of force against another State's territory, the victim State's preference should be to acquire the consent of the territorial State, an approach States tend to follow in their practice.[128] Seeking the territorial State's consent is not simply a matter of preference however; the necessity principle demands that consent is sought where it is available.[129] Colombia's use of force against FARC terrorists in March 2008 is illustrative. On that occasion, Colombia's failure to first seek Ecuador's consent to its military operation following a non-State actor attack resulted in the denunciation of its action by the OAS.[130] Its reliance on self-defence was rejected as unnecessary in the circumstances, since there was no evidence on which to conclude that the express consent of the government of Ecuador could not have been obtained.[131] On the contrary, the two countries had cooperated in the past in taking military

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[128] Brian Egan, former legal adviser to the US Department of State, noted that in practice, States tend to rely on the consent of the local government when conducting operations against non-State actors even when they may also have a self-defence basis to use force against those non-State actors – see Egan Keynote Address (n 43).

[129] The circumstances in which the territorial State's consent may be deemed to be unavailable are examined below.

[130] Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of Commission (5 March 2008) CP/RES/930 (1632/08).

[131] Deeks notes that Colombia unearthed evidence of Ecuador's security minister having met with the subject of the defensive attack, Reyes, the month prior. She argues that such evidence might substantiate a concern on Colombia's part that seeking Ecuador's consent might compromise the operation. However, this evidence was discovered after the attack and could not be relied upon by Colombia for its failure to seek Ecuador's prior consent – Deeks (n 124) 540-41.

action against the FARC[132] and Ecuador had publicly expressed a desire to eliminate FARC presence within its territory.[133] In opposing Colombia's raid on the FARC camp, Ecuador specifically lamented Colombia's failure to notify its intent.[134]

While consent frequently arises in the context of a request for foreign intervention, it is generally accepted that consent similarly operates where the intervening State is pursuing its own security interests rather than assisting the territorial State in quashing an insurgency or repelling foreign invasion.[135] The ICJ, in its *Armed Activities* Merits decision, explicitly recognised the lawfulness of Uganda's military operations against non-State actors in the DRC up until the time consent for such operations was withdrawn.[136] Writing in 1989, Schachter noted that it was not unprecedented for consent to be granted for a State to pursue non-State elements who had attacked its residents before fleeing to a haven outside that State.[137] In the contemporary context, the use of force by coalition forces against ISIS in Iraq is carried out with the consent of that State. Similarly, the US has relied on consent to justify drone strikes against individuals present in Pakistan, Somalia and Yemen.[138]

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[132] Deeks (n 124) 539-40.

[133] ibid 542.

[134] *Playing with Fire: Colombia, Ecuador, and Venezuela*, Report to Members of the Committee on Foreign Relations, United States Senate, 110th Congress, 2nd Session, 28 April 2008, 7 <http://www.hacer.org/pdf/Senate01.pdf> accessed 1 October 2020.

[135] Ago Report (n 2) para 55; Dinstein (n 14) 120; Corten (n 27) 249.

[136] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v. Uganda)* (Merits Judgment, 19 December 2005), [2005] ICJ Rep 108, paras 48-53.

[137] Schachter (n 127) 214.

[138] Max Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen', (2016) 3 JUFIL 97.

As with territorial State action, all reasonable good faith efforts must be made to obtain the consent of the territorial State for the use of force against a non-State actor on the territory of that State.[139]

II. ***Necessity of Self-defence against Non-State Actors and the 'Unwilling or Unable' Test***

The more pragmatic question to be answered, then, is when can it be concluded that the identified alternatives have failed or are unavailable so that the extraterritorial use of force in self-defence becomes necessary? While this question lies at the heart of the determination of the legality of claimed defensive uses of force, it is rarely directly commented on by States in their practice, particularly where a State is faced with a serious on-going attack by non-State actors.[140] States in the UNSC, for instance, when debating Israel's claim to self-defence against on-going attacks by Hezbollah from the south of Lebanon in 2006 all but overlooked the question whether the self-defensive use of force was in the first instance necessary, in favour of a more detailed assessment of its proportionality.[141] Only the representative from Ghana lamented that diplomacy was hardly given a chance in the circumstances.[142] While there are few instances of specific consideration of the necessity of defensive measures taken against non-

[139] Bethlehem 'Principles Relevant to Self-Defense' (n 45) 776 (Principle 10). It should be noted, that contrary to what Bethlehem suggests, armed action taken with the consent of the territorial State would not be 'armed action *in self-defence'* (emphasis mine).

[140] Tams (n 2) 418.

[141] UNSC 5489th Meeting (14 July 2006, New York), UN Doc S/PV.5489. This was despite Lebanon's express offer to negotiate with Israel toward an amicable solution (as noted on page 5 of the meeting record).

[142] ibid 8.

State actors, it is possible to distil guiding principles as arising from the practice of States.

It is submitted that self-defence may become necessary in two distinct circumstances – failure of alternative measures and unavailability of alternative measures. Failure is the less controversial of the two. In that event, there will be evidence of a request to the territorial State for its action or consent, followed by an unfavourable (or no) response. Where the territorial State expressly rejects a demand to take action or to give consent to a military response by the victim State within its territory in the face of an existing non-State actor threat, the necessity of self-defence as a last resort will be substantiated. Unavailability of alternative measures as a basis for establishing the necessity of self-defence requires closer scrutiny. The suggestion here is that territorial State action or consent need not be sought as they are patently unavailable in the circumstances. Such cases of necessity must be considered to be particularly exceptional.[143]

The ‘unwilling or unable’ test has been identified as the indicator of the unavailability of alternative measures.[144] In general terms, the unwilling or unable

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[143] Tams and Devaney (n 15) 98.

[144] See, for example, Bethlehem ‘Principles Relevant to Self-Defense’ (n 45) 776. His Principles 11 and 12 provide:

> 11.The requirement for consent *does not operate* in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the non-state actor or is otherwise *unwilling* to effectively restrain the armed activities of the non-state actor such as to leave the state… with no other reasonably available effective means to address an imminent or actual armed attack. …
>
> 12.The requirement for consent *does not operate* in circumstances in which there is a reasonable and objective basis for concluding that the third state is *unable* to effectively restrain the armed activities of the nonstate actor such as to leave the state… with no other reasonably available effective means to address an imminent or actual armed attack. (emphasis mine)

test, or standard, requires the victim State to determine whether the territorial State is unwilling or unable to address the threat posed by the non-State actor before using force in that State's territory without its consent or cooperation.[145] If the territorial State is found to be willing and able, territorial State action must be pursued and the victim State may not employ force in self-defence. The unwilling or unable test has been employed in the contemporary practice of States in this manner.[146] Most notably, the unwilling or unable test has been expressly invoked by States in justifying their uses of force against ISIS in Syrian territory without the consent of that State. The US, first to claim a right of collective self-defence to counter ISIS in Syria, specified in its communication to the UN that, in accordance with the inherent right of self-defence reflected in Article 51 of the Charter, States are able to defend themselves 'when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.'[147] Similar references have also been made by Turkey,[148] the UK,[149] Canada,[150] and Australia[151] as an element of their legal justifications for

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[145] Deeks (n 124) 487.

[146] For a very helpful survey of endorsements of the 'unwilling or unable' test in the practice of States see Elena Chachko and Ashley Deeks, 'Which States Support the 'Unwilling and Unable' Test?', Lawfare Blog (10 October 2016) <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> accessed 1 October 2020.

[147] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695.

[148] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2015/563.

[149] Statement of Prime Minister David Cameron, HC Deb 26 November 2015, vol 602, col 1491 – the then Prime Minister was outlining the legal basis for the use of force against ISIS in Syria in a bid to gain parliamentary support for the extension of British military operations to Syria.

[150] 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.

[151] 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.

use of force on Syrian territory.[152] Both the US[153] and the UK[154] have gone further, endorsing the unwilling or unable test as a matter of legal policy relevant to the right of self-defence against non-State actors in customary international law more generally.

The unwilling or unable test has also been adopted in the practice of States with reference to uses of force against non-State actors other than ISIS in Syria. Turkey, for example, expressly invoked the unwilling or unable standard in relation to its use of force in self-defence against the PKK in northern Iraq,[155] and Israel cited Lebanon's failure to take control of its territory in the south, permitting Hezbollah to launch attacks therefrom against Israel, as prompting its need to act forcefully on Lebanese territory in 2006.[156] In the latter case, the majority of States in the ensuing UNSC consideration of Israel's use of force spoke specifically to Lebanon's failure in its responsibility to exercise control in the south of its territory

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[152] While not invoking the unwilling or unable standard in those terms, both Germany and Belgium referenced the Assad regime's lack of effective territorial control in their Article 51 letters reporting their uses of force in Syria against ISIS – see Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946 and 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.

[153] Egan Keynote Address (n 43). See further John B. Bellinger, Legal Adviser, US Department of State, 'Legal Issues in the War on Terrorism (Address at the London School of Economic, 31 October 2006) in Miller and Zumbansen, *Comparative Law as Transnational Law: A Decade of the German Law Journal* (OUP 2012) ch 26 and Harold Hongju Koh, Legal Adviser US Department of State, 'The Obama Administration and International Law' (Remarks at the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> accessed 1 October 2020.

[154] Wright Speech (n 8) 10-11.

[155] Identical letters dated 27 June 1996 from Charge de Affairs a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/1996/479, 2.

[156] UNSC 5489th Meeting (n 141) 7 (per Representative of Israel).

and to take necessary measures to put an end to Hezbollah attacks against Israel.[157]

While there is significant usage of the unwilling or unable test in the practice of States, its customary international law status has been questioned in academic literature.[158] Admittedly there is no evidence of widespread express endorsement of the unwilling or unable standard in the practice of States that may be adduced to convincingly settle the question. Corten has suggested that even amongst those States using force in self-defence against ISIS in Syria there is no common *opinio juris* in favour of the unwilling or unable test.[159] In particular, he notes that a substantial number of States part of the coalition did not reference the unwilling or unable test in their Article 51 communications.[160] The UK and France (together with the EU), he argues, seemed instead to invoke a right of self-defence against a non-State actor threat or attack 'without requiring any additional condition in relation with the territorial state.'[161] In the same vein, Marxsen and Peters posit that

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157 See eg Statement of the Representative of Argentina UNSC 5489th Meeting (n 141) 9. Trapp argues that, cumulatively considered, the positions taken by these various States amount to a recognition that it may become necessary to use force extraterritorially in self-defence against non-State actors where the territorial State fails to prevent its territory being used as a base for terrorist operations - Trapp (n 122) 154-55.

158 See eg Kevin Jon Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test', Opinio Juris Blog (15 December 2011) <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> accessed 1 October 2020.

159 Olivier Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' (2016) 29 LJIL 777, 780.

160 ibid 782-83.

161 ibid 783.

Belgium and Germany relied on Syria's lack of territorial control rather than on the unwilling or unable standard.[162]

While the UK's letter to the UNSC, and those of France, Denmark and Norway, does not mention the unwillingness or inability of the Syrian State in those terms, it must be borne in mind that it is otherwise silent as to the *circumstances of exercise* of the right of self-defence in the particular case. Each of these States expressly relied upon the inherent right of self-defence recognised in Article 51 but provided no further details on the specific facts which made the exercise of self-defence necessary, a failure which, admittedly, makes the basis of those claims more difficult to assess. While there is no express invocation of the unwilling or unable test by those States, their communications need not be read as inconsistent with an *opinio juris* in support of the test. It can be argued that those States indirectly referenced the standard by classifying action taken in self-defence as 'necessary and proportionate measures'.[163] In any event, as has been noted with respect to the UK in particular, that State has expressly endorsed the unwilling or

[162] Christian Marxsen and Anne Peters, 'Dilution of Self-defence and its Discontents' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War,* vol 1 (CUP 2019) 8.

[163] See 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; Letter dated 7 September 2015 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/2015/688; Letter dated 3 December 2015 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/2015/928; Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, UN Doc S/2016/34; 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.

unable test with specific reference to the use of force against ISIS in Syria in other fora.[164]

The point should also be made that Belgium and Germany's emphasis on Syria's lack of territorial control speaks specifically to the factual circumstances satisfying the unwilling or unable test rather than a distinct legal standard. This conclusion is supported by the German Government's express invocation of the 'unwilling or unable' test in the Federal Constitutional Court of Germany with respect to its use of force against ISIS in Syria.[165]

Further, the unwilling or unable test is neither separate from nor additional to the right of self-defence against non-State actors. Rather, the unwilling or unable test is a component *of* the right of self-defence against non-State actors so that reliance on that right necessarily imports the applicability of the unwilling or unable standard. It follows from this that the unwilling or unable test is not a new and distinct justification for invoking the right of self-defence recognised in Article 51, though suggestions have been made to the contrary. Tsagourias argues, for instance, that the unwilling or unable test is often projected as an independent ground for the use of defensive force against non-State actors, 'removed from the legal conditions attendant to self-defence.'[166] Similarly, Corten classifies the

[164] HC Debate (n 151) col 1491 (per Prime Minister David Cameron); Wright Speech (n 8).

[165] Stefan Talmon, 'German Constitutional Court Considers Self-defence against Non-State Actors a Tenable Interpretation of Article 51 of the UN Charter', German Practice in International Law (10 October 2019) <https://gpil.jura.uni-bonn.de/2019/10/german-constitutional-court-considers-self-defence-against-non-state-actors-a-tenable-interpretation-of-article-51-of-the-un-charter/> accessed 24 September 2020.

[166] Nicholas Tsagourias, 'Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule', (2016) 29 LJIL 801, 810 (see text to n 47).

unwilling or unable test as a ‘lowering [of] the Article 51 threshold’ since, in his view, the unwilling or unable test is relied upon to invoke Article 51 in circumstances short of an ‘armed attack’ traditionally understood.[167] Both Tsagourias and Corten misconstrue the way in which the unwilling or unable test is relied upon in the practice of States. Rather than a freestanding justification for the use of force in self-defence, the unwilling or unable test serves to give content to the necessity requirement in the context of non-State actor self-defence.[168] Specifically, the test is used to establish that the right of self-defence, triggered by a non-State actor attack, actual or threatened, is *exercisable* in the circumstances.[169] The unwilling or unable standard does not, therefore, obviate the requirement to adhere to all other stipulations attached to the exercise of self-defence.[170]

This is precisely the manner in which the unwilling or unable test is employed in the practice of States. By way of illustration, Russia, in its communication to the UN signalling its intention to use force against Chechen terrorists present on Georgian territory, after citing the unwilling or unable test concluded:

> *None of this* [self-defensive force] *will be necessary, no measures or special operations will be needed if* the Georgian leadership actually controls its own territory, carries out international obligations in combating international terrorism and prevents possible attacks by

[167] Corten, ‘Unwilling or Unable’ (n 159) 795.

[168] ILA Final Report (n 6) 16.

[169] Corten, while recognising this framework for conceptualising the unwilling or unable test, nevertheless rejects it as defying legal logic. Corten starts from a position of rejecting non-State actors as authors of armed attacks within the meaning of Article 51, a position which, it is admitted, is impossible to reconcile with the unwilling or unable test – see Corten, ‘Unwilling or Unable’ (n 159) 795-97.

[170] ILA Final Report (n 6) 16.

> international terrorists from its territory against the territory of the Russian Federation.[171]

Clear from Russia's use of the unwilling or unable test is that it serves to establish the necessity of the use of force in self-defence. Similarly, Turkey noted that 'it becomes *inevitable* for a country to resort to necessary and appropriate force to protect itself from attacks from a neighbouring country, *if* the neighbouring State is unwilling or unable to prevent the use of its territory for such attacks.'[172] In other words, self-defensive force is not inevitable, not necessary, if the territorial State is, in fact, willing and able to act.[173]

The Unwilling or Unable Standard in Past Practice

Not only is the unwilling or unable test not a new justification for the use of force in self-defence, it is also not new in the practice of States. There is evidence of its historical use in the context of claims against non-State actors present in a third State. Israel expressly invoked the unwilling or unable standard in its claim of self-defence against the PLO in Lebanon in 1978,[174] and again in 1981. In the UNSC debate on the latter incident Israel asserted that 'under international law, if a State

[171] Russia September 2002 Letter (n 119) 4 (emphasis mine).

[172] Turkey June 1996 Letters (n 155) 2 (emphasis mine).

[173] Tsagourias (n 166) 810 recognises that the unwilling or unable test is well suited to this function – '…it can answer the question of whether force is the only effective option available to the victim state when faced with a non-state attack launched from another state…'

[174] UNSC 2071st Meeting (17 March 1978), UN Doc S/PV.2071, para 53 (per Representative of Israel). Israel cited in support of its claim Fawcett's 1961 Hague Academy Course on Intervention in International Law (Collected Courses of the Hague Academy of International Law, vol 103) in which he noted (at page 363):

> …where incursion of armed bands is a precursor to an armed attack, or itself constitutes an attack, and the authorities in the territory, from which the armed bands came, are either unable or unwilling to control and restrain them, then armed intervention, having as its sole object the removal or destruction of their bases, would – it is believed – be justifiable under Article 51.

is unwilling or unable to prevent the use of its territory to attack another State, the latter State is entitled to take all necessary measures in its own defence.'[175] Israel again invoked the unwilling or unable test as a part of its legal justification for the use of force against the PLO in Tunisia in 1985[176] and against Hezbollah in Lebanon in 1996.[177] As with contemporary usage, Israel's reliance on the unwilling or unable test in these cases was tethered to the necessity to use force in self-defence.

The US also based its right to use force in in Afghanistan and Sudan against terrorist targets on an inability to rely on the host States in counter-terrorism efforts.[178] Though the US did not invoke the unwilling or unable test in those terms, it noted that its forcible actions were 'carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organisation.' Being unable to rely on the governments of those States, the US concluded that it 'therefore, *had no choice but to use armed force* to prevent these attacks continuing.'[179] The 'unwilling or unable' standard was also invoked in substance in the *Caroline* Incident, Britain claiming that its action was prompted

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[175] UNSC 2292nd Meeting (17 July 1981), UN Doc S/PV.2292, para 54 (per Representative of Israel).

[176] UNSC 2611st Meeting (2 October 1985) UN Doc S/PV.2611, 6.

[177] UNSC 3653rd Meeting (15 April 1996) Un Doc S/PV.3653, 6.

[178] Trapp (n 122) 149-50.

[179] Letter dated 20 August 1998 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/1998/780, 1.

as a result of US failure to put an end to attacks against Canada by rebels within US territory.[180]

Conceptually, the use of force on the territory of a State to counter a threat not posed by that State itself is not foreign to international law. The unwilling or unable test can be said to have 'historical parentage in the law of neutrality.'[181] In that context, a neutral Sate is obligated to apply due diligence efforts to resist violations of its neutrality through the use of its territory for purposes of the conflict.[182] Where a neutral State is unwilling or unable to maintain the neutrality of its territory, the law of neutrality permits the offended belligerent to use force on the territory of the neutral State to prevent the use of the latter's territory by another belligerent.[183] The application of a similar test in the non-State actor context is reasonable where the equities of the affected States are comparable in each situation.[184]

While the customary status of the unwilling or unable test as an element of the necessity principle is arguable on the existing evidence of State practice, it has been increasingly endorsed as the applicable legal standard in academic literature. The test is endorsed as reflecting customary law in the Chatham House

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[180] Abraham D Sofaer, 'On Necessity of Pre-emption' (2003) 14 EJIL 209, 216-17.

[181] Deeks (n 124) 488. For a succinct description of the core rules of neutrality see Deeks (n 124) 497-98.

[182] ibid 498.

[183] ibid 499.

[184] ibid 503.

Principles,[185] Leiden Policy Recommendations,[186] and in the ILA Final Report on the use of force,[187] all of which have been contributed to by a cadre of highly qualified lawyers in this area.[188] It is also significant to note that there is no competing standard evident in the practice of States or in academic discourse for giving substance to the necessity principle in the context of non-State actors attacks. The unwilling or unable test effectively balances the competing interests of the territorial State and victim State in the necessity assessment. It is submitted that, subject to the discussion below on refining the test, the unwilling or unable standard represents the appropriate test for determining whether the use of force extraterritorially against non-State actors is by way of last resort.

What Does the 'Unwilling or Unable' Test Demand?

Despite growing reference to the unwilling or unable standard, there are few attempts at a clear articulation of what the test requires.[189] Where the concepts governing the use of force extraterritorially in self-defence against non-State actors are not adequately defined, subtle but important distinctions might be overlooked.[190] As a preliminary matter, though the unwilling or unable test is

[185] Chatham House Principles (n 8) 969 (Principle F).

[186] Leiden Policy Recommendations (n 54) para 42.

[187] ILA Final Report (n 6) 16.

[188] See further UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Study on Targeted Killings (28 May 2010), UN Doc A/HRC/14/24/Add.6, para 35; Carsten Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism', (2003) 27(2) Fletcher F World Aff 35, 44, 47; Lubell, *Extraterritorial Use of Force* (n 22) 42.

[189] Notably, Deeks has made significant strides in outlining the contours of the test.

[190] As such, Akande and Liefländer argue, 'If the host State that is merely unable or even entirely innocent is to receive the protection under international law that it deserves in comparison to the

accepted in principle as the appropriate tool for determining the necessity to resort to self-defence against non-State actors, there are considerable concerns about its use in practice. Most notably, the unwilling or unable formulation is often invoked as a ritual incantation without a clear indication of which arm of the test applies in the circumstances of the case. The 'unwilling or unable' formula admits of various permutations – a territorial State may be willing but unable, able but unwilling, or both unwilling and unable. The legitimacy of the test is undermined where it is recited in form without reference to the specific facts which meet its elements in a given case. In an attempt to establish the necessity to use force in self-defence against ISIS in Syria, for example, the UK Prime Minister highlighted that 'the Assad regime is *unwilling and/or unable* to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed on us.'[191] The use of the conjunction 'and/or' not only creates ambiguity as to the specific circumstances in which the UK considers the use of force on Syrian territory to be necessary, it also conveys a degree of uncertainty on the part of the State about whether the test is satisfied at all. When relying on the unwilling or unable test, States ought to make specific reference to the relevant facts which satisfy the demands of the test.

On its face, the unwilling or unable standard simply requires that the victim State determine whether the territorial State is unable or unwilling to take effective

colluding State, imprecision with regard to [the requirement of] necessity… is hardly tolerable.' - Akande and Liefländer (n18) 563-64.

[191] HC Deb (n 149) col 1491 (per Prime Minister David Cameron). The Prime Minister repeated this precise formulation in his response to questions raised by the UK Foreign Affairs Select Committee concerning British military operations in Syria in 2015 – Memorandum to the Foreign Affairs Select Committee, *Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria*, (November 2015) <https://www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf> accessed 1 October 2020, 16.

action to neutralise the non-State actor threat before resorting to the use of force in self-defence on the territory of that State. It is not clear, however, how that determination ought to be made. The formula further suggests that where either of its elements is satisfied, that will be sufficient to establish the necessity to use force in self-defence; that is, the victim States need only establish *either* that the territorial State is unwilling to act *or* that is unable to do so. This raises concerns about whether a State which is applying its best efforts to countering a non-State actor threat, but which falls short of that target, should be subject to the use of force against its territory without its consent.

Trapp suggests that where a territorial State is 'doing all that can be done' to counter a non-State actor threat, a victim State's use of force against non-State actors in the territorial State 'is simply not a necessary use of force.'[192] This cannot be taken to mean that where the efforts of the territorial State, though its maximum effort, do not meet the security needs of the victim State, that the latter's right of self-defence is extinguished. The inability of the territorial State to take adequate measures renders territorial State action ineffective as an alternative to the use of force.

O'Connell legitimately raises concern about the scope granted to a victim State to 'decide something as amorphous as another State being "unable" to control violence on its territory.'[193] The most convincing method by which to establish the inability of the territorial State to meet the non-State actor threat is by the territorial State's own admission, whether in words or by its actions. Even

[192] Trapp (n 122) 147.

[193] O'Connell (n 60) 384.

where a victim State considers that a territorial State may be unable to address a specific threat, if time permits making a request for territorial State action, the victim State should do so and make an evaluation of the response.[194] This procedural step guarantees that the territorial State is aware of the threat, reducing the chance that its inaction is due to ignorance of the situation.[195] Following a request for action, the victim State should allow reasonable time for the territorial State to respond and for proposed measures to take effect before concluding that the territorial State is unable to take effective measures to counter the non-State actor threat. What is 'reasonable' time in the circumstances of a specific case must be determined taking into account the imminence and nature of the threat.[196]

Where the territorial State has not itself admitted to being unable to act effectively, its inability may be established by a reasonable assessment of its control over the area from which the threat emanates and its military or law-enforcement capacity to suppress the threat vis-à-vis the nature of the threat. This assessment should be based on publicly demonstrable evidence actually pointing to the inability of the territorial State and should not be merely speculative; for example, evidence of a State's failure to take action against non-State actors present in its territory over time is not necessarily indicative of its inability to counter the threat posed. Conversely, a State that is known to have ceded control in a relevant part of its territory is quite likely to be unable to effectively counter threats

[194] Deeks (n 124) 521.

[195] ibid 522.

[196] Deeks (n 124) 525.

emanating therefrom.[197] The lack of control over relevant territory may also be indicative of insufficient military or law enforcement capacity to effectively counter the non-State actor threat.[198] The territorial State's lack of capacity may also be demonstrated by previous failed attempts to engage the non-State actor operating from its territory.[199]

Reference may be had to the coalition use of force against ISIS in Syria. In its communication to the UNSC, the US highlighted that ISIS had established safe havens in Syrian territory from which the group launched attacks across Iraqi borders and against Iraqi people. Specifically, the US noted that '[t]he Syrian regime has shown that it cannot and will not confront these safe havens effectively itself.'[200] At the time of the US claim and the commencement of coalition action in 2014, Syria's inability to counter the threat posed by ISIS would have been substantiated by publicly available evidence. ISIS had, by that time, captured significant portions of territory in northern and eastern Syria including Raqqa, the northern provincial capital, which it established as a stronghold and *de facto* capital of its caliphate,[201] and held control over a sizeable population from which it levied taxes, oilfields and refineries, grain stores, and stockpiles of arms and

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[197] ibid 525-26 (noting Turkey's repeated claims against the PKK in Iraq on the basis of Iraq's infamous lack of control over its northern territory).

[198] ibid 527.

[199] See Deeks (n 124) 528 for a description of the circumstances necessitating the US use of force in Cambodia.

[200] US September 2014 Letter (n 147).

[201] Al Jazeera News, 'ISIS recaptures Raqqa from Syria's rebels' (14 January 2014) <https://www.aljazeera.com/news/2014/01/14/isil-recaptures-raqqa-from-syrias-rebels/> accessed 1 October 2020.

ammunition.[202] Further, the Syrian armed forces directly, and unsuccessfully, engaged with ISIS militants. On one occasion, ISIS overran a large military base manned by a division of the Syrian army and captured soldiers on the outskirts of Raqqa in an overnight siege.[203] A reasonable assessment of the facts reveals that Syria lacked control in the north-east of its territory from which the threats against Iraq emanated and its army was incapable of meeting the military challenge posed by ISIS.

The assessment of the capacity of the territorial State should be done with reference to a specific threat. It is not required that territorial State be able to remove the possibility for future threats developing by, for instance, completely eradicating the non-State group. Its inability to achieve that particular aim does not necessarily indicate an inability to counter the specific, existing threat with which the victim State is faced.[204] The assessment of the territorial State's ability should have in focus its capacity to meet the same aims as would be legitimate for a self-defensive use of force.

EITHER OR?

While the inability of the territorial State to take effective measures to neutralise the non-State threat is relevant to the question of necessity of self-defence, it is argued that this inability is not, of itself, sufficient to establish that necessity

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[202] The Guardian, 'Rise and fall of ISIS: its dream of a caliphate is over, so what now?' (21 October 2017) <https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist> accessed 1 October 2020.

[203] BBC World News, 'Syria conflict: ISIS "overruns" Raqqa military base' (25 July 2014) <https://www.bbc.co.uk/news/world-middle-east-28481283> accessed 1 October 2020.

[204] Deeks (n 126) 530.

notwithstanding the ‘either or’ formulation of the standard in the practice of States. As will be shown, relying on the mere inability of the territorial State to justify defensive force against non-State actors oversimplifies, and therefore misrepresents, the process for determining that there is a necessity to use force in self-defence. Tams and Devaney suggest that inability may be sufficient and offer two considerations in support of that position – first, they argue that ‘the line between situations of ‘unwillingness’ and ‘inability’ may be extremely thin, and not suited to distinguish illegal acts of force from instances of potentially necessary self-defence.’ Secondly, they note that States that lack the capacity to counter terrorist threats emanating from their territories remain under a duty to do so, just as unwilling States are, since inability to comply does not relieve those States of their obligations.[205]

The considerations raised by Tams and Devaney are less than persuasive. First, while it may indeed be difficult to discern whether a territorial State is genuinely unable to act against non-State actors or is rather unwilling to do so, alternatives to the use of force in self-defence are presented by the presence of the territorial State in the matrix. These alternatives cannot be lightly displaced on the basis of unclarity about the territorial State’s position. Arguably, it is in such circumstances that pursuit of alternatives through the territorial State are most important. A request made to the territorial State for its action or consent could bring clarity on its position based on its response to the request. Secondly, while the unable State may be equally in breach of its obligations to take reasonable steps to prevent use of its territory as a base for attacks, this fact is irrelevant to

[205] Tams and Devaney (n 15) 100.

the question of self-defence. The necessity of self-defence is assessed taking into consideration whether the victim State is left without alternative recourse in the circumstances, rather than whether the territorial State is, or is not, in breach of its connected obligations.

The decisive consideration is that an unable State may nevertheless be willing to give its consent to forcible action or to accept the assistance of the victim State to carry out law enforcement or other measures, particularly where the territorial State is already willingly taking such action itself, albeit unsuccessfully. Even where the territorial State may be in breach of its terrorism prevention obligations, this does not eliminate the possibility for joint counter-terrorism action and more importantly, has no obvious effect on the ability of the territorial State to consent to measures by the victim State. In other words, alternatives to the use of force in self-defence remain, in principle, available.

Where the territorial State is found to be unable to act, more is required to establish that the victim State has 'no choice of means.' It is particularly important to recall that the test's purpose is to determine when it is necessary to use force in self-defence *without* the consent of the territorial State. While a State may be deemed unable to suppress non-State actor threats emanating from its territory, it cannot be deemed unable to consent. The 'unwilling or unable' formulation appears, therefore, to dwarf the relevance of territorial State consent in favour of territorial State action. Where mere inability to counteract the non-State actor threat is established on the evidence, the necessity to use force in self-defence will rarely be satisfied without a request for consent or an offer for aid in law enforcement efforts.[206]

It is, therefore, a misnomer to speak of the ‘unwilling *or* unable’ test in the self-defence context. In actuality, it is the unwillingness of the territorial State that meets the demands of the necessity requirement without a prior request for action or consent. The use of force in self-defence is a last resort where the territorial State is either unwilling and unable or able but unwilling to take effective measures (solely or with assistance) *and* is unwilling to consent to victim State action on its territory. For emphasis, the territorial State’s unwillingness must extend, not only to taking unilateral action to counter the non-State actor threat, but also to cooperative action and to its consent.

In the absence of a clear refusal by the territorial State, its unwillingness must otherwise be established. In this regard, the extent of the relationship between the territorial State and the non-State actor may preclude territorial State action or consent as a reasonable, viable option of first resort. The unwillingness of the territorial State can be taken to be substantiated where it is providing active support to the non-State actor or is colluding with that entity in the commission of the attack against the victim State.[207] There is a very real concern that requiring the victim State to pursue territorial State action or consent in such circumstances might be detrimental to its cause where, for example, information might be leaked

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[206] A very narrow allowance is made for those circumstances in which time may not permit a request for consent or the coordination of efforts.

[207] Deeks (n 124) 504-05; Tams (n 2) 403.

to the non-State actor with the intention of compromising the defensive operation.[208]

A similar detriment might result where, although the territorial State is not colluding with or actively supporting the non-State actor, it is otherwise connected with the non-State actor in such a way that it can reasonably be concluded that soliciting the territorial State's involvement, through its action or consent, would imperil the security of the victim State. This is the basis on which, it is suggested, the US acted against Bin Laden on Pakistani territory without the territorial State's consent. Deeks notes that the US government seemed to have intelligence suggesting that certain officials within the Pakistani government had knowledge of Bin Laden's whereabouts and may have forewarned him of the planned US action if disclosed to government authorities.[209] Evidence of a State's security minister meeting with a non-State target, such as in the case of Ecuador and the FARC,[210] may also be indicative of a relationship which calls the territorial State's reliability into question.

Conversely, territorial State unwillingness cannot be presupposed where its actions can be described as merely tolerating or acquiescing in the activities of the non-State actor. Even a State that has ignored non-State actor attacks emanating from its territory or the repeated requests of the international community to take action over a considerable period of time may find the prospect of foreign use of force on its territory or a strong demand to comply with its relevant international

[208] Akande and Liefländer (n 18) 568. See also Deeks (n 124) 523.

[209] Deeks (n 124) 485.

[210] See text to n 131 above.

obligations sufficient impetus to take measures against the non-State actor operating from its territory in a concrete instance, or to give its consent to such use of force, allowing it some degree of oversight.[211] State practice suggests that a request in such circumstances may nevertheless be required. Despite Taliban failure to take action against Al Qaeda operatives on its territory in response to international demands from as early as 1999,[212] the United States self-defensive action post-9/11 was prefaced by yet another request relative to the particular threat. Not presuming unwillingness in these circumstances and requiring the victim State to seek territorial State action or consent ensures that the territorial State is aware of the security threat and provides an opportunity for the victim State to share relevant intelligence which may, in fact, prompt the territorial State to act.[213]

The 'Unwilling' Test: Final Thoughts

As is the case with the right of self-defence more generally, the victim State itself must decide in the first instance whether the conditions for the exercise of a right of self-defence against non-State actors are met. That determination is, however, subject to the objective scrutiny of the international community at large on the basis of the evident facts. Whether the conclusion that the territorial State is unwilling to act is presumed based on evidence of collusion or is otherwise established, this is

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[211] *Cf* Tams and Devaney (n 15) 100 arguing that where terrorists have operated over a considerable period of time, and where they have repeatedly mounted attacks, or where there have been repeated international appeals in the past, the territorial State's unwillingness to suppress their activities would be considered to be established.

[212] See eg UNSC Resolution 1267 (15 October 1999) UN Doc S/RES/1267(1999).

[213] Deeks (n 124) 522.

not a conclusion to be lightly reached. That conclusion must be based on credible evidence which inspires a 'high level of confidence.'[214]

The unwilling test is a specific manifestation of the necessity requirement in the context of non-State actor self-defence, which requires that the use of force be by way of last resort. The test must be aimed, therefore, at distilling those circumstances in which it can be properly said that the alternatives presented by the presence of the territorial State in the matrix are unavailable to the victim State. This demands that the position and actions of the territorial State be centrally considered.

[214] Deeks (n 124) 523; Bethlehem, 'Principles Relevant to Self-Defense' (n 45) 775.

CHAPTER V

THE REQUIREMENT OF PROPORTIONALITY

A. THE PROPORTIONALITY TEST

THE centrality of the proportionality requirement to assessing the legality of defensive use of force is evident not only in the demands of the international community of States who consistently emphasise that force used must remain proportionate, but also in the careful efforts of States using force in self-defence to establish the proportionality of their own actions. While reference is often made to it, defining the principle of proportionality in the *jus ad bellum,* in comparison to other areas of the law in which it arises, is notoriously fraught with difficulty. Despite the frequent invocation of proportionality as a basis for condemning particular uses of force, its legal limits are rarely referenced. This lack of clarity makes the principle difficult to apply in practice and potentially ineffective to properly regulate the conduct of States.[1] Proportionality serves the critical role of constraining the scale and effects of defensive action,[2] a function which is particularly significant in the context of non-State actor self-defence for the protection of the interests of the territorial State.

Like other aspects of the modern law of self-defence, *jus ad bellum* proportionality is considered to have its roots in the *Caroline* incident of 1837. The

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[1] Thomas M Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102(4) AJIL 715, 716.

[2] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010) 110.

extrapolated *Caroline* criteria do not, however, give clear content to the principle.[3] Equally, while the ICJ has applied the principle of proportionality in cases involving the alleged use of defensive force, it has not defined the principle in general terms.[4] Fundamentally, the principle of proportionality suggests a relating of two or more variables through comparison. The various contexts in which the term arises and the varying roles that it serves in each specific context mean the factors for comparison will vary from case to case. In the law governing self-defence, there is considerable disagreement on what these factors ought to be. The principle is fairly well defined in the *jus in bello* as a safeguard against unnecessary suffering in warfare, particularly in relation to collateral injury to the civilian population and civilian objects.[5] Such injury must not be excessive in relation to the concrete and direct military advantage anticipated.[6] Although *jus ad bellum* proportionality is similarly construed as a guard against excessiveness in the use of force,[7] commentators have noted that *jus ad bellum* proportionality bears a distinct

[3] Theodora Christodoulidou and Kalliopi Chainoglou, 'The Principle of Proportionality from a *Jus ad Bellum* Perspective' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1189.

[4] Franck (n 1) 720.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (8 June 1977) 1125 UNTS 3, Arts 51(5)(b) and 57(2)(b).

[6] ibid.

[7] Christian J Tams, 'The Necessity and Proportionality of Anti-terrorist Self-defence' in Larissa van den Herik and Nico Schrijver (eds) *Counter-terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 386.

meaning, as arising from a separate body of rules, so that transposing guidelines from one domain to the other is not necessarily helpful.[8]

I. *'Proportionality' in the* Jus ad Bellum

In the law of self-defence, the principle of proportionality is applied to determine the legality of the defensive operation as a whole.[9] Logically, therefore, that operation, and its outcomes, forms the first comparator of the *jus ad bellum* proportionality formula. Less evident is the factor, or factors, against which the operation is to be balanced, particularly in the non-State actor context where the territorial State's rights and interests are also at stake. Although the ICJ has not had to decide on the proportionality of self-defensive measures in its related judgments and, therefore, has not given detailed treatment to the principle's precise requirements, it has made statements suggesting what it conceives the *jus ad bellum* proportionality formula to be. In its *Nicaragua* Merits decision, the Court briefly noted that US mining of Nicaraguan ports and oil installations failed to satisfy the criterion since it could not be described as proportionate to the aid received by the Salvadorian armed opposition from Nicaragua, the action in response to which

[8] Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017) 251-52; Enzo Cannizzaro, 'Contextualizing Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War' (2006) 88 IRRC 779, 781; Michael N Schmitt, '"Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-defence', (2008) 29 Mich JIL 127, 154.

[9] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force by States in Self-defence' (2006) 55 ICLQ 963, 969 (citing the judgment of the ICJ in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits Judgment, 6 November 2003), [2003] ICJ Rep 161, para 77). See also Christian Henderson, *The Use of Force and International Law* (CUP 2018) 234; Noam Lubell, 'Comments on David Kretzmer's "The Inherent Right to Self-defence and Proportionality in *Jus ad Bellum*"', EJIL: Talk! Blog (17 April 2013) <https://www.ejiltalk.org/comments-on-david-kretzmers-the-inherent-right-to-self-defence-and-proportionality-in-jus-ad-bellum/> accessed 26 October 2020.

self-defensive measures were purportedly taken.[10] This approach appears to be a quantitative comparison between the injurious effects of the defensive action and those of the armed attack triggering the response,[11] what has been termed a 'tit for tat' approach.[12]

In her dissent to the ICJ's *Nuclear Weapons* Advisory Opinion, Judge Higgins suggests that the Court's *Nicaragua* judgment ought not to be so read. Instead, she argues that the terms used by the Court in *Nicaragua* make clear that proportionality 'limits a response to what is needed to reply to an attack' and does not require 'symmetry between the mode of the initial attack and the mode of response'.[13] In its *Oil Platforms* decision however, the Court reiterated its adherence to the tit for tat approach noting that the destruction of two Iranian frigates and a number of other naval vessels and aircraft could not be classified a proportionate use of force in self-defence 'as a response to the mining… of a single United States warship, which was severely damaged but not sunk, and without loss of life'.[14] Proportionality was assessed by the Court to involve striking a balance between the self-defensive action and the wrong provoking it.[15] Similarly, in the *Armed Activities* case, in passing, the Court observed 'that the taking of

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[10] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits Judgment, 27 June 1986) [1986] ICJ Rep 4, para 237.

[11] Tams (n 7) 387.

[12] David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum'* (2013) 24 EJIL 235, 237.

[13] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, [1996] ICJ Rep 65, Dissenting Opinion of Judge Higgins para 5. See also Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 158.

[14] *Oil Platforms* Merits (n 9) para 77.

[15] Christodoulidou and Chainoglou (n 3) 1191.

airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of trans-border attacks it claimed had given rise to the right of self-defence'.[16] These *obiter dicta* tend to suggest that what is required is a quantitative comparison between the force used in self-defence and the armed attack triggering it with a view to ascertaining a form of symmetry.

The most oft-cited alternative formulation in this context sees proportionality of self-defence being measured qualitatively against the legitimate end of self-defensive force or the threat posed by the armed attack.[17] This formulation of the proportionality requirement relates more closely to the *Caroline* criterion that there should be done 'nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'[18] In essence, the lawfulness of a defensive action is measured 'by its capacity for achieving the desired result.'[19] This alternative formulation can be termed a 'means-end' test since the defensive measure employed must be proportionate to, and therefore justified by, the end it is employed to achieve.

'Tit for Tat' or 'Means-End' Proportionality?

It is possible that the tit for tat and the means-end tests may yield the same result in a given factual situation. It is more likely, however, that this will not be the case,

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[16] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v. Uganda)* (Merits Judgment 19 December 2005), [2005] ICJ Reports 108 para 147.

[17] Cannizzaro (n 8) 783.

[18] RY Jennings, 'The Caroline and McLeod Cases', (1938) 32 AJIL 82, 89.

[19] Robert Ago, Addendum to the Eighth Report on State Responsibility (Part I), Agenda Item 2, 32nd Session of the International Law Commission (1980), UN Doc. A/CN.4/318/Add.5-7, para 121.

the application of both tests to the same facts leading to different results.[20] While the ICJ has apparently endorsed the tit for tat approach, States have tended towards a means-end standard of proportionality in their practice.[21] In the *Armed Activities* case, for example, in contesting the legality of Uganda's use of force, the DRC argued that Uganda failed to fulfil the proportionality requirement where its actions were incommensurate with its declared objectives.[22] Similarly, Uganda itself referenced the means-end formulation of proportionality in justifying its military response, asserting that the extent of its presence on DRC territory was 'functional' and 'directly related to the defensive objectives.'[23] The UK has also adopted the means-end formulation of proportionality. Articulating the UK government position on the right of self-defence in 2004, the Attorney General noted that 'force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.'[24] The means-end formulation of proportionality has also been overwhelmingly endorsed in legal scholarship.[25] The

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[20] For a vivid illustration in the context of the 2006 Israel-Lebanon war see Kretzmer (n 12) 236.

[21] James A Green, *The International Court of Justice and Self-defence in International Law* (Hart 2009) 94-55.

[22] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v. Uganda) (*Memorial of the Democratic Republic of Congo, Volume I, July 2000) para 5.31.

[23] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic Congo v. Uganda) (*Rejoinder Submitted by the Republic of Uganda, Volume I, 6 December 2002) paras 289-90.

[24] Attorney-General Lord Goldsmith in the House of Lords, HL Deb 21 April 2004, vol 660, col 370.

[25] See Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 64; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe tr, Hart 2012) 488; Dominic Raab, '"Armed Attack" after the *Oil Platforms* Case', (2004) 17 Leiden JIL 719, 734; Georg Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer' (2013) 24(1) EJIL 283, 284; Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', (2001) 12(5) EJIL 993, 995; Kimberley N Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-defence against Non-State Terrorist Actors' (2007) 56 ICLQ 141, 146; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994) 232; William H Taft, 'Self-Defence and the *Oil Platforms* Decision' (2004) 29(2) Yale JIL 295, 305; Schmitt (n 8)

2018 ILA Final Report on the Use of Force, for example, expressly rejects an 'equivalence of scale' approach to proportionality as incorrect.[26]

Of the tit for tat approach adopted by the ICJ, Tams further notes that the proportionality of each self-defensive operation was assessed by the Court retrospectively, as against the attacks that the responding States had suffered, and which prompted action in self-defence.[27] Self-defence is, however, fundamentally prospective in outlook; even where it is exercised in response to an attack already inflicted, it aims to neutralise the threat of further attack or to put an end to the attack that is on-going. It follows that the proportionality assessment relevant to self-defence should also be forward looking towards the intended objective of the use of force, rather than backward looking towards the attack that triggered the response and the harm already suffered.

The adoption of a tit for tat approach to proportionality in the context of self-defence may also prove practically problematic. Achieving quantitative equivalence between the response in self-defence and the armed attack triggering it may prove to be ineffective. As Ago argues:

> The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be

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153; Gardam (n 13) 160-61; *Armed Activities* Merits (n 16) Separate Opinion of Judge Kooijmans para 34.

[26] ILA Committee on the Use of Force, *Final Report on Aggression and the Use of Force* (Sydney Conference 2018) <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-074d-4d4b-851b-7a56871175d6> accessed 26 October 2020, 12.

[27] Tams (n 7) 387.

> sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain.[28]

It may also be necessary for a State to adopt a large-scale response to address effectively a series of smaller scale attacks,[29] a likely scenario when the perpetrator of such attacks is a non-State actor. Equally, a State may find that it can use minimal force to effectively respond to a larger-scale provocation.[30] This approach to proportionality can serve to significantly limit the use of force in self-defence where the armed attack results in widescale destruction and loss of life, but further attacks can be thwarted by a more contained defensive response. The varying factual circumstances in which the right of self-defence may arise necessitate that the proportionality requirement allow for flexibility, which cannot be achieved by a perfect equivalence approach.[31] This conclusion is particularly apt in the non-State actor context. It is quite difficult to perceive of equivalence between the initial attack carried out by non-State actors and the forcible response of the victim State, where the methods and forms of those actions are likely to be very different, and where the position of the territorial State in the matrix is not set. A tit for tat conception of proportionality also raises particular practical concerns when applied to anticipatory action in self-defence. Since successful anticipatory self-defensive action will forestall the manifestation of the attack, there will be no observable

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[28] Ago Addendum (n 19) para 121. See also Schmitt (n 8) 153 describing Israel's use of force in Lebanon in 2006 as 'paradigmatic' in this regard.

[29] Ago Addendum (n 19) para 121; Gardam (n 13) 161.

[30] Henderson (n 9) 236; Judith G. Gardam. 'A Role for Proportionality in the War on Terror' (2005) 74 Nordic JIL 3, 12.

[31] Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense', (2013) 107(3) AJIL 563, 568.

consequences against which to gauge the proportionality of the forceful response. The quantitative assessment would, therefore, be wholly speculative.

A tit for tat measure of proportionality has traditionally been employed in the *jus ad bellum* in relation to armed reprisals, which were accepted as lawful in the pre-Charter era in response to an unlawful act by another State in order to achieve cessation or redress and to deter repetition in the future.[32] An armed reprisal was considered unlawful where it was 'out of all proportion' to the act prompting it.[33] The suitability of this type of proportionality assessment for armed reprisals is evident where the intention is to achieve retaliation in kind.[34] Conversely, a tit for tat proportionality assessment is at odds with the concept of self-defence. Self-defence, as a protective right and not a sanction, serves a preventive role rather than a retributive one. Means-end proportionality – an appraisal of the forceful response relative to its intended end – is, conceptually, the more suitable fit.

A Dual Proportionality?

It has been suggested that in addition to the means-end test, *jus ad bellum* proportionality further requires 'that the physical and economic consequences of the force used must not be excessive in relation to the harm expected from the

[32] DW Bowett, *Self-Defence in International Law* (MUP 1958) 15; Kretzmer (n 12) 239.

[33] *Naulilaa Arbitration (Portugal v Germany)* (31 July 1928) 2 RIAA 1012, 1028 ('…on devrait certainement considérer, comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées.')

[34] Ago Addendum (n 19) para 121.

attack'.[35] The Chatham House Principles distinguish this approach from that adopted by the ICJ noting that proportionality should be assessed as against harm 'expected' in contradistinction to the harm 'already suffered'.[36] While this approach is consistent with the concept of self-defence as a right that is prospective in outlook, it is, in essence, another formulation of the tit for tat approach. Instead of measuring the proportionality of a defensive response quantitatively against the damage already inflicted, this approach appears to require quantitative equivalence between the consequences of the defensive use of force and the consequences expected as a result of the attack. Self-defensive action taken will have a direct impact on the consequences which do, in fact, result, if any at all. In those circumstances, the actual consequences of defensive force will be unhelpful in assessing the presumed consequences. The proportionality assessment will be, therefore, wholly speculative.

It is also unclear how the two elements of such a dual proportionality test would interact with one another. It is conceivable that a defensive measure could be proportionate when considered in light of its intended objective but at the same time out of proportion with the harm expected from the armed attack to which it is responding. In that event, a State may be limited to action that, while proportionate in the tit for tat sense, is unable to meet its defensive objective.[37] While there is evident appeal in a tit for tat formulation of proportionality, it presents considerable

[35] Chatham House Principles (n 9) 969. Tams (n 7) 389 also argues that 'proportionality is best formulated as a prohibition against measures that are excessive in relation to the injury expected from the attack.'

[36] Chatham House Principles (n 9) 969.

[37] The same difficulty arises with the 'double proportionality' approach advocated by Christodoulidou and Chainoglou (n) 1192 which combines the tit for tat approach advocated by the ICJ with the means-end test in a 'qualified scheme benefiting from two dimensions'.

practical difficulties whether assessed based on harm already suffered or harm expected. A pure means-end proportionality test is the most practicable of the suggested approaches and accords with the practice of States and the leaning of academic opinion. It is also worthy of note that a means-end test has been recognised by the ILA as applicable to determine the proportionality of forcible action taken pursuant to Security Council authorisation, the other existing justification for resort to force.[38] A uniform approach to the assessment of proportionality within the *jus ad bellum* is sensible.

Applying the Proportionality 'Means-End' Test

Having identified the means-end test as the appropriate standard for the determination of the proportionality of self-defence, it must next be considered by what measure this assessment ought to be done. Two principal questions arise: First, what is the legitimate end or aim of self-defence against which action taken must be measured? Secondly, how should the means and end of self-defence be balanced? It should be recalled that the legitimate end of self-defence as traditionally understood is that of repelling or thwarting an attack.[39] With regard to the second raised question, action taken in self-defence meets the proportionality standard only where it is *necessary* to achieve the legitimate end of self-defence.[40] Specifically, the action taken in self-defence must be necessary as having a

[38] ILA Final Report (n 26) 8. See further Dame Rosalyn Higgins DBE, QC et al, *Oppenheim's International Law: United Nations* (OUP 2017) 1007.

[39] See text to n 9 in ch IV. Whether this traditionally understood aim has been expanded in the light of contemporary threats is explored in Part B below.

[40] Ago Addendum (n 19) para 121; Schmitt (n 8) 28; Corten (n 25) 488; Kretzmer (n 12) 239.

rational connection with the end being pursued – 'functional' necessity,[41] but more importantly, that action must also be necessary in the sense of there being no less drastic measures available to achieve that end – 'comparative' necessity.[42] While the necessity requirement seeks to answer the question whether resort to force was unavoidable in the first instance, that is, whether non-forcible alternate measures were available by which the attack could be repelled or halted, the proportionality requirement questions whether no more force than was needed in the circumstances to achieve the aim of self-defence was used.[43]

Several factors have been identified as being relevant to the means-end assessment of proportionality in the context of self-defence including the defensive response's geographical scope, its effect on civilians, and the duration of the response.[44] While the tit for tat conception of proportionality has been rejected above, considerations of scale and consequences remain relevant to the assessment. Where a defensive response entails considerable physical and economic harm, the victim State will bear a significant evidential burden to justify the degree of force employed vis-à-vis the need to meet the threat of attack.[45]

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[41] Kretzmer (n 12) 277. See also *Armed Activities* Merits (n 16) para 147 where the ICJ observed that Uganda's taking of airports and towns many hundreds of kilometres from its border along which the attacks were said to be taking place, would not seem rationally connected to the goal of defending against such attacks and, therefore, were not 'necessary to that end'.

[42] Cassese (n 25) 355. See further Ago Addendum (n 19) para 121:

> Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale.

[43] See Schmitt (n 8) 28 and Chatham House Principles (n 9) 968-69, both of which endorse this function of the proportionality requirement.

[44] Henderson (n 9) 237; Tams (n 7) 391-92; Gardam, 'Role for Proportionality' (n 30) 13.

[45] Tams (n 7) 391.

Equally, the gravity of the actual or threatened attack itself is a relevant consideration. While equivalence between the attack and the defensive response is not required, it would generally be expected that a large-scale attack will require a more extensive response than a more limited attack, for example, one by a lone suicide bomber.[46] Where the defensive response far exceeds in scale the attack triggering that response, it is unlikely to be considered proportionate as being necessary to defend against that attack.[47]

II*. A Case for 'Narrow Proportionality'?*

It has been suggested that in addition to the forceful action being necessary for attaining the defensive aim,[48] the harm caused by that necessary measure should not outweigh the expected benefits – a 'narrow proportionality' assessment.[49] As Liefländer simply puts it 'the "good" effects of a measure should outweigh its "bad" effects.'[50] This test is argued to reflect the *jus ad bellum* proportionality requirement in its entirety by those who consider the means-end test to be an element of the

[46] Vaughan Lowe, '"Clear and Present Danger": Responses to Terrorism', (2005) 54 ICLQ 185, 193.

[47] Green (n 21) 95; Gardam, 'Role for Proportionality' (n 30) 13.

[48] It should be noted that the narrow proportionality test has not been put forward by its proponents as an alternative to the means-end test of proportionality but rather as a supplement to that requirement – Kretzmer (n 12) 232: '…the "narrow proportionality" test… can enter the picture only once a determination has been made that the means used were indeed necessary to achieve a legitimate war aim.'

[49] Kretzmer (n 12) 276-78; Cannizzaro (n 8) 784. Most recently, a narrow proportionality test has been endorsed by the ILA Committee on the Use of Force – see ILA Final Report (n 26) 12.

[50] Thomas Liefländer, 'Ius ad Bellum Proportionality is More Complicated Still: A Response to David Kretzmer', EJIL: Talk! Blog (22 April 2013) <https://www.ejiltalk.org/comment-on-david-kretzmer-the-inherent-right-to-self-defence-and-proportionality-in-jus-ad-bellum/> accessed 26 October 2020.

necessity requirement rather than of proportionality.[51] The narrow proportionality test is considered to be an expansion of the means-end test in that it seeks to further balance defensive measures in light of the aims of self-defence.[52]

Recent assessments of self-defensive operations against non-State actors by States have, in fact, centred on the damage caused to civilians and civilian objects without any express or specific enquiry into whether the measures taken were excessive in relation to the aim being pursued. In denouncing Israel's uses of force in Lebanon in 2006 and Gaza in 2014, for example, nearly all participating States in relevant Security Council debates decried those operations as disproportionate largely on the basis of extensive civilian deaths and casualties and the wide-scale destruction of civilian infrastructure such as schools, roads and bridges.[53] Emphasis on the harm resulting from action taken in self-defence could be taken to support a narrow proportionality assessment.[54]

It has also been argued that the ICJ's *Nuclear Weapons* Advisory Opinion supports a narrow proportionality test by suggesting the need to take into consideration in the *jus ad bellum* proportionality assessment 'an open set of interests and values' which might be affected by any action in self-defence.[55] In

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[51] See eg Mary Ellen O'Connell, 'Weighing the Cost of War: A Response to Kretzmer's "The Inherent Right to Self-defence and Proportionality in *Jus ad Bellum*"', EJIL: Talk! Blog (24 April 2013) <https://www.ejiltalk.org/weighing-the-cost-of-war-a-response-to-kretzmers-the-inherent-right-to-self-defence-and-proportionality-in-jus-ad-bellum/> accessed 11 September 2019. See also ILA Final Report (n 26) 12.

[52] Kretzmer (n 12) 278, labelling it the 'very essence of the proportionality means-end test'. See further Cannizzaro (n 8) 784; ILA Final Report (n 26) 12.

[53] See UNSC 5489th Meeting (14 July 2006), UN Doc S/PV.5489 on Israel's use of force in Lebanon and UNSC 7222nd Meeting (22 July 2014), UN Doc S/PV.722 on Israel's use of force in Gaza.

[54] As Kretzmer does, in fact, argue – Kretzmer (n 12) 279.

[55] Cannizzaro (n 8) 784.

particular, the Court noted that while environmental protection obligations could not have been intended to deprive States of the inherent right of self-defence, in the exercise of that right 'States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.'[56] Further, the Court's finding that the use of nuclear weapons by a State may be legal 'in an extreme circumstance of self-defence, in which its very survival would be at stake'[57] may be read as importing a narrow proportionality test into the self-defence assessment. The Court may be taken to have suggested that 'the "bad" effects of nuclear weapons can only ever be justified when a particularly important "good" is at stake'.[58]

Despite these pronouncements, the applicability of the narrow proportionality test to the right of self-defence is far from certain. Although the discussions on Israeli use of force in Lebanon and Gaza took place in the context of claims by Israel of a right of self-defence, the discourse on proportionality appears to be largely informed by *jus in bello* rules.[59] Schmitt goes so far as to argue that while States expressly denounced Israel's use of force as disproportionate in the Security Council on the basis of the resultant harm, Israel's defensive operation as a whole remained compliant with *jus ad bellum*

[56] *Nuclear Weapons* Advisory Opinion (n 13) para 30.

[57] ibid para 97.

[58] Liefländer (n 50). See also Akande and Liefländer (n 31) 567.

[59] See eg UNSC 5489th Meeting (n 53) 9 (per Argentina), 14 (per Peru), 17 (per Greece) and UNSC 7222nd Meeting (n 53) 25 (per Chile), 26 (per Chad), all of which signalled the particular applicability of international humanitarian law.

proportionality rules.[60] Since a State exercising its right of self-defence is under an obligation to comply with the rules of both the *jus ad bellum* and *jus in bello*, including both requirements of proportionality,[61] it is not uncommon practice for both assessments to be melded together in a comprehensive analysis of the legality of a particular use of force, though they should properly be examined separately as relating to distinct legal rules.[62] It is difficult to deduce from the emphasis placed by States on the damage to humanitarian interests in these instances that they consider a narrow proportionality assessment to be required by the *jus ad bellum* as distinct from the *jus in bello*, particularly where reference was consistently made to harm to civilians and civilian objects, the interests identified as central to the *jus in bello* assessment. Further, in order to determine whether the level of force used was necessary to achieve the defensive purpose, the scale and consequences of force employed remain relevant. Emphasis on these factors does not, therefore, necessarily signal the applicability of anything other than the means-end test.

A similar view could be taken of the ICJ's reference to environmental consequences in the *Nuclear Weapons* Advisory Opinion. Where significant damage is caused to the natural environment as a result of defensive action, it will be particularly relevant to consider whether the level of force used resulting in such damage was necessary to achieve the legitimate end of self-defence. Further, the Court's suggestion that the 'bad' effects of nuclear weapons are likely to be justified

[60] Schmitt (n 8) 155.

[61] *Nuclear Weapons* Advisory Opinion (n 13) para 42; Kretzmer (n 12) 240.

[62] Cannizzaro (n 8) 781.

only in the event of a threat to the very survival of a State can equally be explained in terms of tit for tat proportionality, the approach that has been consistently referenced by the Court in its jurisprudence. In this sense, the Court could be taken to be suggesting that, in light of the catastrophic consequences likely to flow from the use of nuclear weapons in self-defence, such use would only be proportionate in the *jus ad bellum* sense where the harm anticipated from the attack would be equally severe. The Court's opinion does not, therefore, clearly point to the relevance of a narrow proportionality test.

While the applicability of a narrow proportionality test in the law of self-defence is doubtful as a matter of State practice and *opinio juris,* it is legitimate to consider whether it *should* have a place in regulating the right of self-defence in the *jus ad bellum.* The central concern is whether the right of self-defence is so absolute that it can justify the imposition of any cost, so long as that cost is inescapable in achieving the legitimate ends of self-defence.[63] In the non-State actor context, a narrow proportionality test would have the benefit of centralising the interests of the territorial State – its civilians, infrastructure, and economy – as core considerations in the determination of the degree of force to be employed in a particular case. Where force is to be used extraterritorially in self-defence against non-State actors, it is inevitable that harm will be caused to the interests of the 'innocent' territorial State. It is not unreasonable to suggest that action in self-defence must entail no more than 'acceptable side effects' for the territorial State.[64]

[63] Cannizzaro (n 8) 781.

[64] ibid 783-4.

While there is appeal in such an approach, the suitability of a narrow proportionality test for the *jus ad bellum* is questionable. First, a narrow proportionality test may operate to exclude otherwise necessary action in self-defence, leaving the victim State with no means to meet the danger it faces, a result which appears to be out of accord with the very rationale for the reservation of the right in customary law and the Charter. This result is particularly problematic in the non-State actor context where damage to legitimate targets must also be accounted for in the narrow proportionality assessment.[65] The legitimacy of a system of self-defence which would, in theory, admit damage to the aggressor to tip the balance against the legitimate interest of the attacked State in defending itself would be open to challenge. A proportionality assessment which would preclude a State suffering an armed attack from defending itself is 'a highly unlikely scenario'.[66] In the case of non-State actor self-defence, while the interests of the territorial State are deserving of particular consideration, it must be recalled that the right of self-defence arises only where that State has failed in its duty to adequately address non-State actor threats emanating from its territory and has proved unwilling to take, or to consent to, necessary countermeasures. In such circumstances, that the victim State's right of self-defence may be extinguished in favour of the interests of the territorial State is difficult to accept.

Further, it has been noted that the principle of proportionality serves varying roles in the diverse contexts in which it arises, which in turn influence the

[65] Kretzmer (n 12) 278.

[66] Tams (n 7) 386.

formulations of the respective proportionality equations.[67] The proportionality test applicable in the *jus ad bellum* must, therefore, be fit for purpose. Where a State is in a position of necessity, having suffered an armed attack and having exhausted reasonable alternatives, proportionality serves, in the context of the exceptional nature of self-defence, to guard against excessiveness in the forceful response. *Jus ad bellum* proportionality does not regulate the entitlement of a State to use defensive force per se, a function served by the precondition of an armed attack and the necessity requirement.[68] It would not be expected, therefore, that *jus ad bellum* proportionality would be formulated in such a way as to permit the exclusion of necessary force in self-defence. The means-end conception of proportionality, which seeks to limit the use of force in self-defence to the degree that is necessary, better accords with the role to be served by the principle in the law of self-defence.

The proposed narrow proportionality test also bears considerable likeness to the *jus in bello* proportionality principle which requires that injury to civilians and civilian objects not outweigh the concrete and direct military advantage anticipated. It is accepted that a narrow proportionality test would not directly duplicate the *jus in bello* proportionality requirement since they would operate on different planes – the latter applying to the employment of force in concrete military encounters and the former to the defensive operation as a whole.[69] It is submitted, however, that the relevant interests are adequately protected in the *jus in bello*, and arguably,

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[67] ibid.

[68] Christian J Tams and James G Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence', 45(1) Israel L.R. 91, 101, noting that proportionality serves to limit the scope and intensity of a response in self-defence rather than to regulate the availability of the right.

[69] Kretzmer (n 12) 278, noting that the questions in the two contexts are somewhat different.

more effectively so. The narrow proportionality test demands an assessment of the *actual* damage resulting from a defensive operation in relation to the benefits attained. It is difficult to see how such an assessment can be accurately undertaken by a victim State *prior* to taking action in self-defence. This is particularly so where an armed attack is ongoing and, therefore, the magnitude of the defensive operation as a whole is uncertain. While the *jus in bello* proportionality assessment involves some degree of speculation, its application to specific instances of targeting reduces the uncertainty.

While a narrow proportionality test is rejected in this thesis as conceptually inconsistent with the right of self-defence in international law, the harm resulting from a defensive operation, particularly collateral damage to the civilian population and civilian objects, remains highly relevant to the *jus ad bellum* proportionality assessment. In the non-State actor context, where there is considerable collateral damage to the interests of the territorial State, the defending State will be hard pressed to justify the proportionality of its use of force in the circumstances.[70]

[70] Tams (n 7) 393.

B. Proportionality in the Context of Self-defence Against Non-State Actors

While the previous section offers a framework for the operation of the proportionality principle in the *jus ad bellum* more generally, several questions remain about its specific manifestation in the context of self-defence against non-State actors. As with the principle of necessity, the position of the territorial State forms a part of the factual matrix for the assessment of the proportionality of force used in response to a non-State actor threat. Where the territorial State actively supports or is otherwise involved in the activities of a non-State actor operating from its territory, this may have the effect of automatically excluding many of the measures which might have been effective in meeting the objective of self-defence.[71]

In this context, three principal questions arise. First, when considering the means-end proportionality test, what are the legitimate aims which may be pursued in self-defence against non-State actors? Secondly, is the only permissible target of force the non-State actor itself or may force also be directed against the territorial State? Lastly, with specific reference to non-State groups operating transnationally, must self-defensive action be strictly limited in geographical scope to be proportionate?[72] Each of these questions will be considered in this Part.

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[71] Akande and Liefländer (n 31) 568.

[72] These three questions were highlighted as key concerns in the Chatham House International Law Discussion Group on Counterterrorism Strategies – Chatham House, 'Counterterrorism Strategies in a Fragmented International Legal Order', International Law Programme Meeting Summary (10 March 2014)<https://www.chathamhouse.org/sites/default/files/field/field_document/20140310CounterterrorismStrategies.pdf> accessed 24 September 2019, 6-7.

I. *The Legitimate End of Self-defence against Non-State Actors: New Aims for a New Threat?*

The application of the means-end proportionality standard presupposes that the end of self-defence is established.[73] However, it has been highlighted by commentators that there is some obscurity surrounding this matter, leading to much of the disarray on the governing principles.[74] Contemporary practice on the right of self-defence against non-State actors does not question that the legitimate ends of self-defence include repelling or halting an armed attack or series of attacks, but challenges that those ends are so limited. There is some evidence in recent practice of claims to more far-reaching objectives such as the extermination of a non-State group or the overthrow of a supportive regime, raising the question whether the right of self-defence against non-State actors can also serve to prevent or deter future attacks from an identified non-State source.[75]

Operation Enduring Freedom (OEF), for example, was launched on 7 October 2001 in response to the 9/11 attacks and 'in accordance with the inherent right of individual and collective self-defence' with the stated objective 'to prevent and deter further attacks on the United States'.[76] A notable feature of this operation is that it continued in excess of 13 years after it was initiated. Within the bounds of

[73] Gardam, 'Role for Proportionality' (n 30) 6.

[74] Christine Gray, *International Law and the Use of Force*, (4th edn OUP 2018) 150; Kretzmer (n 12) 282.

[75] These terms are defined for the purpose of this discussion as outlined by Kretzmer in his work on proportionality: *Prevention* entails force, the object of which is to weaken the military capacity of the enemy, thereby reducing the chances that it will be capable of mounting another attack. *Deterrence,* on the other hand, involves trying to influence the willingness or motivation of potential enemies to use force against the victim state. See Kretzmer (n 12) 268.

[76] Letter dated 7 October 2001 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/2001/946.

the more limited aim of halting or repelling an armed attack, this long temporal span would suggest a disconnect between the initial attacks and any anticipated further attack on one hand, and the protracted military campaign on the other.

Further, the scope of activities pursued over that period of time was quite extensive. What began as a campaign of aerial bombardment on Al Qaeda and Taliban targets culminated in the removal of the Taliban from the seat of power in Afghanistan by November 2001, a result that was achieved jointly with the Northern Alliance, a coalition of Afghan opposition forces.[77] Following that event, OEF forces continued to pursue Al Qaeda and Taliban forces to all ends of the country, and operations were expanded to include a maritime component. Undoubtedly, the removal of the Taliban regime crippled Al Qaeda's backing in Afghanistan, yet it is difficult to argue that these far-reaching actions were 'no more than necessary' to achieve the repelling or halting of the continuing threat of attack the US considered itself faced with after 9/11.

In its subsequent National Security Strategy, the US went further asserting, with respect to countering the threat posed by global terrorism and WMDs, that:

> …America will act against such emerging threats *before they are fully formed*. …we will not hesitate to… exercise our right of self-defense… to *prevent* them from doing harm against our people and our country; …We must be prepared to stop rogue states and their terrorist clients *before they are able to threaten or use weapons of mass destruction against the United States*…[78]

[77] For a more detailed description of Operation Enduring Freedom see Murphy (ed), 'Contemporary Practice of the United States Relating to International Law' (2002) 96(1) AJIL 237. See also Gray (n 74) 231-33.

[78] The White House, Washington, 'The National Security Strategy of the United States of America' (September 2002) <https://2009-2017.state.gov/documents/organization/63562.pdf> accessed 26 October 2020, v, 5-6, 14-5 (emphasis mine). See also Office of the Press Secretary, 'President

Rather than claiming a right to counter specific threats of attack, the US' stated goal was to enlarge the permissible aims of self-defence to include eliminating more vague and amorphous threats.[79]

Israel has also carried out extensive military operations against non-State actor attacks. Following the July 2006 cross-border attack on Israeli forces by Hezbollah militants in Southern Lebanon, Israel initiated a sweeping campaign of land, sea and air attacks against Lebanese territory that continued for a month and resulted in considerable devastation.[80] Thousands of private houses, commercial facilities, roads, bridges and fuel stations were destroyed as well as numerous airports, ports, water and sewage treatment facilities and electricity plants.[81] The displaced numbered close to one million.[82] Israel justified its extensive use of force not only on the basis of securing the return of the 8 soldiers abducted during the July 2006 attack and the cessation of continuing attacks, but also putting a definitive end to the operations of Hezbollah in the border area[83] and removing any possible future threat against its nationals by weakening the military capacity of the aggressor.[84] In addressing the proportionality of its actions, Israel justified its

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Bush Delivers Graduation Speech at West Point' (1 June 2002) <https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html> accessed 26 October 2020.

[79] Mariam Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defence' (2003) 97(3) AJIL 599. See also Tams (n 7) 379, noting that the claims raise issues going to the legitimate functions to be pursued by self-defence.

[80] Gray (n 74) 213-14.

[81] UN Department of Public Information, Press Release IHA/1215 (11 August 2006).

[82] UN Department of Public Information, Press Release IHA/1216 (14 August 2006).

[83] UNSC 5492nd Meeting (20 July 2006, New York) UN Doc S/PV.5492, Statement of the UN Secretary-General. See also Cannizzaro (n 8) 780, noting Israel's intention to set up a buffer zone on Lebanese territory.

[84] Yael Ronen, 'Israel, Hizbollah, and the Second Lebanon War' (2006) 9 Ybk IHL 362, 389-90.

targeting of bridges and roads and disabling the airways at the Beirut International Airport as part of a grander scheme to disrupt the general operations of terrorist groups in Lebanon, which were highly dependent on major transport arteries and the airport.[85] Most recently, in July 2014 Israel launched an extensive military campaign against Hamas in Gaza, which reportedly involved in excess of 5000 airstrikes and numerous ground offensives over a 50-day period of fighting.[86] In Security Council debates on the conflict, Israel made clear that, while exercising its inherent right of self-defence, the Israel Defense Forces (IDF) were fighting to rid Gaza of the Hamas military infrastructure to 'restore sustained quiet to the people of Israel'.[87]

The noted practice has, in fact, tended towards a more liberal understanding of the functions or aims of self-defence against non-State actors.[88] States such as the United States, Israel and Turkey[89] have claimed a right not only to repel or

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[85] Israel Ministry of Foreign Affairs, 'Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality' (25 July 2006) <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/responding%20to%20hizbullah%20attacks%20from%20lebanon-%20issues%20of%20proportionality%20july%202006.aspx> accessed 26 October 2020.

[86] BBC News, 'Gaza-Israel Conflict: Is the Fighting Over?' (26 August 2014) <http://www.bbc.co.uk/news/world-middle-east-28252155> accessed 26 October 2020.

[87] UNSC 7222nd Meeting (n 53) 7-8 (per representative of Israel). Of note are the comments of the Israeli Spokesman for the IDF. When asked whether Israel's offensive in Gaza would be tempered if Hamas was to stop firing rockets into Israel, he responded that the situation is 'beyond that point now', Israel's aim being to deplete Hamas' rocket capabilities and permanently paralyse the organisation - Lt. Col. Peter Lerner, Spokesman for the IDF in a live television interview on CNN - The Situation Room with Wolf Blitzer (7 August 2014).

[88] Tams (n 7) 400-01; Kretzmer (n 12) 269.

[89] In January 2018, Turkey commenced an extensive operation against Kurdish forces in the Afrin region of northern Syria aimed at extending Turkey's existing buffer zone inside Syrian territory and with the stated objective of 'ensuring [Turkey's] border security, neutralizing terrorists in Afrin and saving the brotherly Syrians.' – See Identical Letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the secretary-General and the President of the Security Council, UN Doc S/2018/53.

avert specific attacks, but also to prevent and deter future attacks from identified non-State sources. Commentators have, as a result, concluded that there appears to be growing support in practice for the legitimacy of such wider aims.[90]

Whether practice does in fact support this conclusion is open to question. Israel's military campaigns in 2006 and 2014 were both widely condemned, even by States that expressly recognised its right to act in self-defence in both instances. In the meeting of the Security Council discussing Israel's use of force in Lebanon, while all members condemned the terrorist attacks on Israel, all but the United States also condemned Israel for its disproportionate and excessive use of force.[91] Similarly, almost all States debating the Israel-Gaza conflict in the Security Council classified Israel's use of force as disproportionate.[92] It is not entirely clear from these debates whether States viewed Israel's far-reaching aims as illegitimate or whether they accepted such aims as legitimate but considered the damage caused in both instances to be excessive in relation to those aims.[93] Arguably, the tenor of statements made in these debates supports the former conclusion.[94]

US action in Afghanistan appears to offer stronger support for far-reaching aims legitimising measures such as the dismantling of a terrorist organisation or

[90] Gardam (n 13) 183; Kretzmer (n 12) 275; Tams (n 7) 412-13.

[91] UNSC 5489th Meeting (n 53) 7-17.

[92] UNSC 7222nd Meeting (n 53). See, for example, the statements of Luxembourg, Russia, Argentina, Chad, Egypt and Jamaica.

[93] Kretzmer (n 12) 266.

[94] See eg UNSC 5489th Meeting (n 53) 10 per Qatar: 'While we recognize the right of all States… to defend themselves, the waging of a wide-spread military campaign directly targeting civilians and their infrastructure… can in no way be consonant with that objective'; UNSC 7222nd Meeting (n 53) 11 per statement of Jordan: 'Jordan condemns the disproportionate and unjustified use of excessive force, which has in no measure, small or large, to do with the right of self-defence.'

the overthrow of a government actively supporting terrorist activity. Yet it does not provide unequivocal evidence of a widening of the legitimate aims of self-defence in practice. It is debatable how much of the US military operations in Afghanistan were based solely or actually on its inherent right of self-defence. Arguably, after the establishment of an interim power-sharing government in December 2001, the US acted with the consent of that new regime.[95] Further, in accordance with the Bonn Agreement[96] and UNSC Resolution 1368,[97] the International Security Assistance Force (ISAF) was established in December 2001 with the mandate of providing assistance to the newly formed Interim Authority in Afghanistan with the maintenance of security in and around Kabul, with express scope for progressive expansion. Member States participating in the ISAF were granted authority to 'take all necessary measures to fulfil its mandate'.[98] While OEF continued to operate in Afghanistan, it did so in close collaboration with the ISAF and 'in the implementation of the force mandate' as required by UNSC Resolution 1510 and 2096, a mandate that included expansive action to support the Afghan transitional authority in the maintenance of security in all areas of the country.[99] The US itself considered all three bases as applicable to its continuing action in Afghanistan.[100]

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[95] Gray (n 74) 207.

[96] Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn, 5 December 2001) annexed to Letter dated 5 December 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2001/1154, Annex I.

[97] UNSC Resolution 1386 (20 December 2001), UN Doc S/RES/1386(2001).

[98] ibid para 3. NATO assumed the lead of the ISAF in Afghanistan on 11 August 2003.

[99] UNSC Resolution 1510 (13 October 2003), UN Doc S/RES/1510(2003) paras 1-2; UNSC Resolution 2096 (19 March 2013), UN Doc S/RES/2096(2013) para 23.

[100] With specific reference to the legal bases for detentions, Harold Koh, then Legal Adviser, US Department of State, noted:

The US did take very extensive action, including the overthrow of the Taliban government, prior to the establishment of a transitional authority and the issuance of a Security Council mandate under Chapter VII and, therefore, solely pursuant to its right of self-defence. Although international support for its action during that time appears to have continued, several commentators have questioned whether toppling the Taliban regime in Afghanistan could be regarded as compatible with the notion of self-defence as embodied in Article 51 of the Charter.[101] The 'Bush doctrine', reflected in the 2002 National Security Strategy and put to the test by the US during its 2003 military campaign in Iraq,[102] was not seconded by US allies in the circumstances, neither did it receive the endorsement of States in the Security Council.[103] Further, later US policy on the use of military force has been interpreted as overruling the expansive interpretation of self-defence characteristic of the Bush era Security Strategy.[104] It is difficult to conclude

> First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting territorial government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of "all necessary measures" by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfil their mandate in Afghanistan.'

– Harold Hongju Koh, 'The Obama Administration and International Law', Address at the Annual Meeting of American Society of International Law, Washington DC (25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> accessed 26 October 2020.

[101] See e.g. Kretzmer (n 12) 273-74; Gardam (n 13) 167.

[102] The US asserted that military action was necessary 'to defend the United States and the international community from the threat posed by Iraq…' – Letter dated 20 March 2003 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/2003/351, 2.

[103] Henderson (n 9) 288-89.

[104] ILA Final Report (n 26) 13, noting the Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations (The White House, 2016) <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf> accessed 26 October 2020, 9.

that contemporary State practice bears out a definitive enlarging of the aims of self-defence beyond the repelling or halting of an armed attack. While States using force in self-defence against non-State actors have expressly and implicitly made such claims, they have yet to receive the endorsement of the international community as a whole.

The potential repercussions of the broader aims of prevention and deterrence are also obvious. While these aims bear likeness to the traditionally accepted halting or repelling theory of self-defence in that they also serve a protective role, within the broader aims of prevention and deterrence, it is not only highly likely that force will be used in self-defence, it is to be expected that the force used will be extensive.[105] Expanding the aims of self-defence will, therefore, have a direct impact on the means and duration of action taken in self-defence, which, in turn, have implications for the Charter scheme of international peace and security.[106] Under the UN Charter, self-defence is reserved to States as a 'limited emergency power' pending the Security Council taking measures necessary to maintain international peace and security.[107] Possible future attacks from a non-State source pose not only a threat to the security of the threatened State, but also to international peace and security as a whole. Primary responsibility for addressing such threats rests with the UNSC by Charter design.[108] Allowing for self-defence that pursues the aim of deterring possible future threats would seem

[105] Tams and Devaney (n 68) 103; Gardam (n 13) 10; Kretzmer (n 12) 266.

[106] Cassese (n 25) 998.

[107] Nolte (n 25) 288. See also Kretzmer (n 12) 259.

[108] Cannizzaro (n 8) 782, noting that 'the forcible removal of threatening situations and the creation of permanent conditions of security seems to have been reserved by the international community as tasks to be performed collectively.'

to run counter to this design. A similar view is expressed by the ICJ in the *Armed Activities* case. Having found that there was no armed attack by the DRC against which Uganda could be said to be defending itself, the Court concluded that:

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.[109]

This statement by the Court highlights another crucial point: the right of self-defence recognised in Article 51 of the Charter arises from an armed attack. This indicates that the aim of self-defensive action taken in view of an armed attack or a series of attacks must be related to, or limited by, that attack or series of attacks, whether actual or threatened. Action unconnected to countering the attack or threat of attack giving rise to the right of self-defence would be beyond the scope of conceivably legitimate aims.[110] Self-defence is a limited right allowing for an interim response to an urgent need rather than a permanent solution to the security concerns of States; it 'carries its purpose on its face'.[111] The principle of proportionality, as a guard against excessive force in relation to the aims pursued, would serve no real purpose as a constraint in the context of widely defined aims, particularly where the perceived threat is conveyed as existential.[112]

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[109] *Armed Activities* Merits (n 16) para 148.

[110] Antonio Cassese, *International Law* (2nd ed OUP 2005) 355; Corten (n 25) 489; Cannizzaro (n 8) 783-84; Gray (n 74) 159; Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (Leiden University, 1 April 2010) 14.

[111] Nolte (n 25) 289.

[112] Gray (n 74) 227; Tams (n 7) 413.

Though theoretically sound, it may be argued that the more conservative approach to proportionality fails to accord with reality. Reserving the removal of future threats and the creation of permanent conditions of security to a failing collective security system arguably makes it unreasonable to demand of States that they limit self-defensive operations to halting and repelling specific attacks where further attacks may take place in the future.[113] This deficiency creates a lacuna for international peace and security; however the solution to a failing collective security system is not to further undermine it by enlarging the ambit of authority for the unilateral use of force, even in self-defence. Where the aims of self-defence are broad and open-ended, increasing the scope for unilateral use of force, that is a result that is far more problematic from a systemic point of view. The potential for abuse will increase where States are given considerable latitude to take forcible measures to prevent and deter future attacks; in those circumstances, it is likely to be difficult to challenge that such a threat existed after action has already been taken in the pursuit of self-defence. Such an approach is at risk of being ‘reduced, in practice, to a self-serving rhetorical device.’[114] It is not surprising, therefore, that despite the more expansive claims of States such as Israel and Turkey, there remains significant State and academic support in favour of maintaining the narrower aims of self-defence.

[113] Kretzmer (n 12) 262.

[114] Nolte (n 25) 290.

II. ***The Territorial State as a Legitimate Target***

While considerations of legitimate targets in the course of armed conflict are generally reserved for the *jus in bello,* it has been suggested that the *jus ad bellum* proportionality principle imposes a distinct obligation not to target the territorial State itself in the exercise of self-defence against non-State actors. The ILA Final Report on the Use of Force makes the point that a distinction must be drawn between the use of force against a non-State actor on the territory of a State and the use of force directed against the State.[115] While it is generally accepted that a right of self-defence against non-State actors would operate to justify the use of force against non-State targets on the territory of another State, that is, it excuses the incidental violation of the host State's territorial integrity, it is more controversial whether the right can also justify a use of force directly targeting the territorial State. In other words, can injury to that State be the objective of defensive use of force in those circumstances, rather than merely collateral?

It is worth recalling that the presence of non-State groups on the territory of a State, or even some degree of support by that State for non-State actor activity emanating from its territory, does not, as a matter of course, make that State susceptible to defensive force directed against it. While host State complicity in, or support for, non-State actor activities may amount to violations of other relevant international law obligations, it does not amount to an armed attack by that State permitting the use of force in self-defence against it.[116] It is a distinct question,

[115] ILA Final Report (n 26) 15-16. As has been previously noted, however, both instances involve the use of force against the territorial integrity of the State within the meaning of Article 2(4) of the Charter.

[116] See text to nn 65-66 in ch III.

however, whether the interests of the territorial State can be directly targeted, within the framework of self-defence against non-State actors, to the extent such action may be considered necessary to halt or repel an armed attack, not committed or threatened by the State itself, but by a non-State element operating from its territory.

In the vast majority of cases of self-defence against non-State actors, victim States have made painstaking efforts to make clear that the sole target of defensive use of force was the non-State element, rather than the territorial State itself. Following its use of force against Bin Laden's Al Qaeda organisation in Afghanistan and Sudan, for example, the US claimed a right of self-defence while taking care to emphasise that its strikes were exclusively aimed at camps and installations used by the organisation to support its terrorist actions.[117] States taking action against ISIS in Syria also emphasised in their communications to the UNSC that military actions were 'not aimed at Syria or the Syrian people'.[118] A similar approach was adopted by Egypt with regard to its use of force in Libya,[119] by Ethiopia in justifying its defensive action on Somali territory,[120] and by Turkey

[117] Letter dated 20 August 1998 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/1998/780, 1.

[118] 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. See also 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; Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946; 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; 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.

[119] Letter dated 27 May 2017 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council, UN Doc S/2017/456.

[120] Keesing's (2006) v3ol 52(12) 47620.

with respect to its counter-terrorism operations in northern Iraq.[121] Even where its defensive action evidently went beyond the mere targeting of non-State actor elements, Israel claimed to be acting 'not against Lebanon, but against the forces and the monstrosity which Lebanon has allowed itself to be taken hostage by.'[122]

Against this grain of practice, the US and coalition use of force following the 9/11 attacks not only targeted both the Al Qaida organisation and the Taliban, it was also based on an express claim to use force targeting both the non-State organisation and the governing regime in Afghanistan. In its communication to the UNSC reporting action taken in self-defence, the US noted that its actions included measures against Al Qaida terrorist training camps *and* military installations of the Taliban regime in Afghanistan.[123] A claim to target the Taliban regime directly was made not only by the US, but also by partner States acting in collective self-defence. Canada, by way of example, noted that its actions were 'directed against Osama bin Laden's al-Qaida terrorist organization and the Taliban regime that is supporting it'.[124] While maintaining Al Qaida's sole responsibility for the attacks

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[121] Note Verbale dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office in Geneva addressed to the Secretariat of the Human Rights Council, UN Doc A/HRC/7/G/15.

[122] UNSC 5503rd Meeting (31 July 2006), UN Doc S/PV.5503 4 (per representative of Israel).

[123] US October 2001 Letter (n 76) 1.

[124] Letter dated 24 October 2001 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/2001/1005. For similar claims against the Taliban regime itself in the context of the 9/11 attacks see Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission 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/2001/947; Letter dated 29 November 2001 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1127; Letter dated 17 December 2001 from the Permanent Representative of New Zealand to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1193; Letter dated 8 October 2001 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General (15 October 2001), UN Doc S/2001/967, 2 (on behalf of the European Union).

and threats against it, the US and its coalition partners asserted a right to target the Taliban regime directly in light of its support to and harbouring of the Al Qaida organisation. The international community as a whole appeared to accept both Al Qaida and the Taliban as legitimate targets of defensive force.[125]

Despite the extent of the coalition use of force in Afghanistan following the 9/11 attacks, several commentators argue for a distinction between self-defence against non-State actors on one hand and self-defence against the territorial State on the other as it relates to permissible targets, relying on the more usual practice of States to identify non-State actors as the sole target of defensive force when claiming a right of self-defence against non-State actors. The US-led campaign in Afghanistan has been classified as 'highly problematic'[126] and has been dismissed as an anomaly in State practice which otherwise suggests that self-defence will be considered disproportionate where it is directed against the host State rather than the terrorists operating from its territory.[127] Trapp, for instance, argues that the right of self-defence against non-State actors would allow the victim State to violate the territorial integrity of the host State 'in a limited and targeted fashion' allowing force 'against (and only against) the very source of the terrorist attack.'[128] Where force targets the territorial State, either together with the non-State actor or alone, it can

[125] Trapp (n 25) 151.

[126] Jordan J Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond', (2002) 35 Cornell ILJ 533, 542.

[127] Tams and Devaney (n 68) 105. See further Paust (n 126) 540-41; Kretzmer (n 12) 281, noting that, given the view that Lebanon could not be held responsible for the Hezbollah attack on Israel in 2006, any action against Lebanon itself (as distinct from action targeting Hezbollah solely) would be unlawful, making any consideration of proportionality of that action irrelevant.

[128] Trapp (n 25) 147.

be justified only by a right of self-defence against the State itself.[129] This, she argues, explains the inter-State approach to self-defence taken by the ICJ in its *Nicaragua* and *Armed Activities* cases, both of which involved defensive force directed largely against the interests of the territorial States.[130] Trapp concludes that the use of force against the Taliban itself in the course of the US 2001 military campaign cannot be explained by the right of self-defence against non-State actors.[131]

The use of force against the Taliban regime of Afghanistan represents the only internationally accepted instance of a use of force directed against a State's apparatus in the circumstances of a non-State actor attack.[132] Regard must be had, however, to the factual circumstances of the case. States reporting the use of force against the Taliban regime to the Security Council all emphasised the support given by that regime to the Al Qaida organisation in the commission of its attacks. The government of the UK, in outlining its evidence on responsibility for the 9/11 attacks, highlighted that the attacks could not have been perpetrated by Al Qaida absent the alliance between that organisation and the Taliban regime in Afghanistan.[133] The implication is that the use of force directed against the military installations of the Taliban regime was considered necessary to avert further

[129] Trapp (n 25) 142.

[130] ibid 142-45. She argues that the *Nicaragua* and *Armed Activities* cases 'should be understood as requiring that armed attacks be attributable to a State if the State *itself* is to be the subject of defensive force.'

[131] ibid 155.

[132] ibid 156.

[133] The Wall Street Journal, 'Text of British Summary of Evidence Against Osama bin Laden' (5 October 2001) <https://www.wsj.com/articles/SB1002285854169481040> accessed 26 October 2020.

attacks by Al Qaida.[134] While the responsible non-State element is recognised as the sole target in the vast majority of cases, State endorsement of and participation in strikes against the Taliban regime suggest that directing force against the territorial State may be permitted as proportionate action in self-defence against non-State actors. It is to be expected that such instances would be particularly exceptional in the practice of States. [135]

The nexus between the territorial State and the non-State actor operating from its territory will influence the determination as to legitimate targets in cases of self-defence against non-State actors.[136] In this vein, Principle 7 of the Bethlehem Principles provides that armed action in self-defence may be directed not only against those actively threatening or perpetrating armed attacks, but against those providing material support essential to the attacks.[137] The Chatham House Principles and the Leiden Policy Recommendations also support the possibility for action in self-defence to be directed against the government of the territorial State.[138] The provision of material support by the territorial State does not, however, give free license for the victim State to direct armed force against the

[134] See, however, the US 9/11 Commission Report suggesting that President Bush intended, by directly striking the Taliban regime, to issue 'an appropriate ultimatum to the Taliban' to bring about compliance with the US' demands – National Commission on Terrorist Attacks Upon the United States, ' The 9/11 Commission Report' available at <http://govinfo.library.unt.edu/911/report/911Report_Ch10.pdf> accessed 24 October 2020, 331.

[135] Chatham House International Law Programme Meeting Summary, 'Counterterrorism Strategies in a Fragmented International Legal Order' (10 March 2014) <https://www.chathamhouse.org/sites/default/files/field/field_document/20140310CounterterrorismStrategies.pdf> 7.

[136] Gardam, 'Role for Proportionality' (n 30) 20-21.

[137] Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Attack by Nonstate Actors', (2012) 106(4) AJIL 769, 775.

[138] Chatham House Principles (n 9) 969, Principle F; Leiden Policy Recommendations (n 110) para 43.

former's forces and facilities, a latitude arguably given by the broadly phrased Bethlehem Principle. On the contrary, as the Leiden Recommendations and the Chatham House Principles make clear, defensive force may be so directed where it is 'necessary to avert or end the attack, but not otherwise.'[139] There must, therefore, be a demonstrable nexus between the State forces or facilities targeted with force and the armed attack occurring or threatened, evidencing a contribution to the non-State actor's activities.[140] Such a nexus is unlikely to be demonstrated where State support is passive, but may be established where the State is providing active support to the non-State actor by, for example, placing military facilities or personnel at the disposal of the non-State actor. As a practical matter, this will mean that in the vast majority of cases, proportionality will require that defensive measures be directed against the non-State actor responsible for the armed attack and its facilities only.[141]

III. *The Geographical Dimensions of Self-defence against Non-State Actors*

In its communication reporting its use of force against Al Qaida in Afghanistan, the US also noted that it 'may find that our self-defence requires further actions with respect to other organizations and other States.' This brings to mind the significant questions which arise concerning the permissible geographical scope of self-defence against non-State actors. The very concept of extraterritorial self-defence against non-State actors challenges the traditional approach to the geographical scope of self-defensive action by virtue of which forceful action in self-defence was

[139] Chatham House Principles (n 9) 969; Leiden Policy Recommendations (n 110) para 43.

[140] Gardam, 'Role for Proportionality' (n) 21.

[141] Leiden Policy Recommendations (n 110) para 43.

generally confined to the area of the attack to be repelled.[142] While such a restriction is arguably workable in the context of State-to-State confrontational combat, it is difficult to accommodate within a right of self-defence against non-State actor attacks which emanate from geographical spaces beyond the territorial boundaries of the attacked State. Even more controversial is the use of force on the territory of multiple States in response to a singular non-State actor attack or threat. A geographical limitation on defensive action as a feature of the proportionality criterion has been endorsed by several commentators as arising from the practice of States in the inter-State context. With specific reference to the 1982 Falklands conflict, for example, Higgins notes that while a significant degree of force was necessary to dislodge the Argentinians from the occupied islands, it was generally accepted that any forcible action on Argentinian territory or in port would have been disproportionate.[143] This supports the view that action in self-defence must be limited to 'the area of the threat which it is designed to meet'.[144]

There has, arguably, been indication of a similar geographical limitation in the non-State actor context. In reference to its 2008 military campaign in Northern Iraq, for instance, Turkey noted that its action was 'limited in scope, geography and duration' targeting only PKK/KONRA-GEL presence in the border region from which the militants operated. This limitation was recognised by Turkey as significant to the perceived legality of its military action. Similarly, although

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[142] Gardam, 'Role for Proportionality' (n 30) 14.

[143] Higgins (n 25) 232. See also Sina Etezazian, 'The Nature of the Self-defence Proportionality Requirement', (2016) 3(2) JUFIL 260, 277-79.

[144] Christopher Greenwood, 'Self-Defence and the Conduct of International Armed Conflict' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 277.

Uganda's claim of self-defence was against the DRC itself rather than anti-Ugandan rebels present on DRC territory, in the *Armed Activities* case, the ICJ noted that Uganda's taking of airports and towns many hundreds of kilometres away from the border region from which the anti-Ugandan rebels operated and from which transborder attacks against it were launched, would not seem to be proportionate action in self-defence.[145] The pronouncement of the Court appears to be 'an affirmation of the need for self-defence measures to take place in vicinity of the armed attack, in order to satisfy the proportionality requirement.'[146]

While the geographical scope of action taken in self-defence is undoubtedly relevant to the determination of its proportionality, there is no significant endorsement, neither in practice nor in academic debate, of a freestanding geographical criterion for the proportionality of self-defence. The circumstances of non-State actor self-defence are such that the armed attack will be directed and carried out or threatened from abroad, or the perpetrators will have fled beyond the territorial jurisdiction of the victim State in the aftermath of an attack. In those circumstances, the imposition of a strict geographical limitation to defensive action might have the effect of eliminating the possibility of an effective response. In fact, practice has consistently shown that States do not consider themselves to be confined in their responses to the geographical area of attack. Following the 9/11 attacks on the United States, for example, there was widescale acceptance of the US' defensive campaign on Afghan territory, where the Al Qaida organisation was primarily based. Similarly, there have been numerous claims of a right of self-

[145] *Armed Activities* Merits (n 16) para 147.

[146] Etezazian (n 143) 280.

defence against ISIS on Syrian territory in response to anticipated attacks on remote territories.[147]

To effectively meet the threat posed by non-State organisations that heed no territorial boundaries, States must have the right to operate in defence across borders.[148] The use of force on territory considerably remote from the area attacked is not necessarily unrelatable to a defensive objective.[149] Regard must be had to the totality of the circumstances of the particular case.[150] The overriding consideration for the assessment of the proportionality of self-defence against non-State actors is not whether the defensive response is geographically limited to the area of attack but whether the action taken, including its geographical reach, is necessary to achieve the defensive aim. This is not to suggest, however, that geography plays no part in the assessment of a proportionate response. While the use of force in self-defence outside of the geographical area of attack does not preclude a finding of proportionality, the geographical scope of action may impact that assessment as the ICJ's judgment in the *Armed Activities* case illustrates. Consequently, forcible action against non-State actors in foreign territory that is extended beyond the portion of that territory on which the non-State actor is

[147] *Cf* Etezazian (n 143) 282 arguing that the use of force by the US, UK and France on Syrian territory is to be considered as 'geared almost towards an overt breach of the geographical requirement contained in *jus ad bellum* self-defence.'

[148] Gardam, 'Role of Proportionality' (n 30) 16; Tams (n 7) 415.

[149] As such, Higgins argues that the extensive forcible action against military targets on Iraqi territory during the Persian Gulf Conflict was considered a proportionate measure to bring about the end to Iraqi occupation in Kuwait, although a distinct geographical arena from the place of attack – Higgins (n 25) 232. See also Gardam, 'Role of Proportionality' (n 30) 15.

[150] Gardam, 'Role of Proportionality' (n 30) 14. See also Tams (n 7) 392.

located, or from which it operates, is unlikely to be a proportionate measure in self-defence.

As a final consideration, self-defence against a non-State actor attack or threat may necessitate forcible defensive measures on the territory of multiple States. The ubiquitous nature of some modern terrorist organisations enables the direction of armed attacks from multiple bases in various countries.[151] In those circumstances, it may become necessary to use force in self-defence on the territory of each of those States, regardless of geographical considerations. However, an assessment of the necessity and proportionality of action must be made anew with respect to each State on whose territory force is to be used.[152] While one State may be unwilling to take the necessary action to eliminate the non-State actor threat, another State may be willing and able so to act, eliminating the need for defensive action by the victim State on the former's territory.

[151] Tams (n 7) 415.

[152] Counterterrorism Strategies (n 135) 7.

<u>CONCLUSION</u>

THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE ACTORS WITHIN THE CHARTER SYSTEM OF COLLECTIVE SECURITY

THE preceding Chapters substantiate the existence of the right of States to use force in self-defence against armed attacks by non-State actors and offer conclusions on the extent of its scope. Centrally, the discussion affirms that State practice has evolved over time to confirm States' right to use force extraterritorially against non-State actors in self-defence. This right is consistent with the terms of Article 51 of the UN Charter and with the international legal order ushered in by the UN Charter in the post-war era. Although the right of self-defence more generally is anchored in customary international law and expressly safeguarded by the Charter, it remains shrouded in controversy. Much of this controversy arises from the inherent difficulty of reconciling the right with the Charter scheme of collective security; a unilateral right of States to use force is, by its nature, antithetical to ideals of a centralised security underpinning the UN Charter. This raises questions about how far the unilateral right of self-defence should go and its desirability in modern international law. These questions reverberate more strongly in the non-State actor context.

The obvious tensions between a unilateral right of self-defence and the ideal of collective security are evident on the text of the Charter. While the right of self-defence is preserved, it is without prejudice to the authority and responsibility of the Council to take whatever action it deems necessary even in circumstances which may give rise to self-defence. As the keystone of the collective security system established by the Charter, the Security Council undoubtedly maintains a central role in the oversight of actions taken in self-defence. This provision for collective oversight, grounded in the reporting requirement stipulated in Article 51, ensures accountability in the exercise of the unilateral right of self-defence, in keeping with the collective ideals espoused in the Charter.

A. The Role of the Collective Security System in Countering Non-State Actor Threats

The first stated purpose of the United Nations is to maintain international peace and security by way of 'effective collective measures for the prevention and removal of threats to the peace'.[1] Collective security represents, therefore, the fundamental principle underpinning the legal order created by the UN Charter. Within this system of collective security, it is unassailable that collective action will be 'almost always better than individual action' in every respect.[2] To that end, the Security Council was created to assume the central role in the pursuit of collective security;[3] by Article 24 of the Charter, Member States agree to confer on the Security Council primary responsibility for the maintenance of international peace and security, a responsibility to be carried out on behalf of Member States.[4]

[1] Charter of the United Nations (San Francisco, 26 June 1945) 1 UNTS XVI, Art 1(1).

[2] Sir Michael Wood, 'The Role of the Security Council in Relation to the Use of Force against Terrorists' in Larissa van den Herik and Nico Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) Chapter 10, 317.

[3] Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VI Powers* (OUP 1999), 3.

[4] UN Charter (n 1) Article 24(1).

Further, Member States agree to accept and carry out the decisions taken by the Security Council in the pursuit of international peace and security.[5] In this way, the Security Council is set apart from the other principal organs of the UN.[6] The Charter system of collective security empowers the Security Council to carry out the organisation's objectives through the enforcement powers entailed in Chapter VII of the Charter. This represents a transfer to the Security Council of some of the prerogative of States to pursue their own ends by way of forcible measures.

Within this system of collective security, however, the unilateral right of States to individual and collective self-defence was expressly reserved in Article 51 of the Charter. The tension between this right reserved to States and the overarching purpose of the Chapter is evident on the text of Article 51. While States retain the right to resort to forcible measures in the event of an armed attack, such measures may be taken only 'until the Security Council has taken measures necessary to maintain international peace and security.'[7] Measures taken in self-defence are, therefore, contemplated as temporary measures.[8] Further, forcible measures taken in self-defence must be 'immediately reported to the Security Council' and 'shall not in any way affect the authority and responsibility of the Security Council… to take… such action as it deems necessary' for the maintenance or restoration of international peace and security.[9]

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[5] ibid Art 25, Art 48(1).

[6] Dame Rosalyn Higgins DBE, QC et al, *Oppenheim's International Law: United Nations* (OUP 2017) 63.

[7] UN Charter (n 1) Art 51.

[8] Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 131-32.

[9] UN Charter (n 1) Art 51.

From this construct, and given the Charter's aim to centralise the use of force, the evident intention of the Charter's drafters was that military force employed or authorised by the Security Council would function as the main exception to the prohibition of the use of force contained in Article 2(4). Action taken in self-defence would, therefore, be 'an exception to the exception' in circumstances where the main exception of collective use of force has failed or has not yet occurred.[10] Therefore, while the inherent right of self-defence is preserved by the Charter text, it is contemplated that in acting according to its prescribed powers, the Security Council will reduce the scope for States to act unilaterally.

In reality, there has been a significant number of claims by States of a right to act unilaterally to counter diverse threats in the post-Charter era of international law.[11] While the right of self-defence is contemplated as subsidiary to collective action within the UN Charter, in the immediate post-Charter era, the Security Council faced notable impediments in asserting its authority in this area. By Charter design, the Security Council was to have at its disposal a standing army to be made available by States, and on the Council's call, to effect collective security action.[12] The contribution of forces by Member States was to be governed by

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[10] Hans Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations', (1948) 42 AJIL 783, 785; Georg Nolte and Albrecht Randelzhofer, 'Article 51' in Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary,* 1424 (noting that 'the right of self-defence embodied in Article 51 is only meant to be of a subsidiary nature.'); Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War,* vol 1 (CUP 2019) 31.

[11] For a comprehensive catalogue of self-defence claims made to the UNSC see Dustin A. Lewis (ed), *HLS PILAC Catalogue of Communications to the Security Council,* annexed to *Quantum of Silence: Inaction and* Jus ad Bellum, (Harvard Law School Program on International Law and Armed Conflict 2019).

[12] UN Charter (n 1) Art 43(1).

agreements which were to be ‘negotiated as soon as possible on the initiative of the Security Council.’[13] These agreements did not, however, come to fruition. In Higgins’ assessment, Member States simply did not desire the Security Council to have a force, whether standing or on standby, which could be called into operation by Security Council decision.[14] The lack of Article 43 agreements undoubtedly impacts the capacity of the Council to take collective measures as contemplated by the Charter since, notwithstanding the provisions of Articles 25 and 48, the Council appears to have no authority to compel States to otherwise participate in military enforcement.[15] Additionally, the conclusion of the UN Charter was soon followed by the protracted Cold War. During this time, the geopolitical tensions amongst the permanent members of the Council and the frequent exercise of the veto crippled the Security Council’s decision making.[16] Consequently, the Security Council was unable to carry out its primary function of addressing threats to international peace and security. Despite the end of the Cold War, there appears to be a general recognition that the original design of Chapter VII is unworkable.[17]

In the more recent history of the Security Council, even where Council activity has significantly increased, the disproportionate influence of permanent members continues to hinder the optimal functioning of the Security Council. The

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[13] ibid Art 43(3).

[14] Rosalyn Higgins, ‘The United Nations’ Role in Maintaining International Peace: The Lessons of the First Fifty Years’ (1996) 16 New York Law School JICL 135, 139.

[15] Higgins, *Oppenheim* (n 6) 1002-03. The lack of Article 43 agreements was considered by a few earlier writers to render Article 42, which empowers the Security Council to take forcible enforcement measures, a ‘dead letter’ – see eg FL Kirgis, ‘The Security Council’s First Fifty Years’ (1995) 89 AJIL 506, 520.

[16] Higgins, *Oppenheim* (n 6) 63, 962.

[17] Gray (n 8) 342.

exercise or threat of veto has prevented the passing of important draft resolutions, or where political agreement is achieved, the resulting resolutions are often 'watered-down'.[18] In contemporary practice, this has meant a more widespread reliance on the right of self-defence to justify unilateral forcible action taken primarily against non-State actor targets. The use of force against ISIS in Syria is instructive in this regard. In its letter to the UN in June 2014, Iraq described the worsening situation of ISIS attacks against its territory perpetrated from eastern Syria. Noting that the assistance of the international community to date 'has not been enough', Iraq called on the UN and the international community at large to 'recognise the serious threat our country…[is] facing' and to provide additional support in defeating ISIS including the provision of military training, advanced technology and weapons necessary to counter the extant threat.[19] While States within the Council recognised the need for military assistance to be provided to Iraq, no decision was taken for collective measures under the purview of the Council. Political disagreement amongst permanent Members on the approach to be adopted in Syria posed an insurmountable hurdle to collective action. Consequently, States acted individually in coming to the collective self-defence of Iraq.[20]

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[18] Higgins, *Oppenheim* (n 6) 63.

[19] 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, 2-3.

[20] See eg the statement of the President of the Council made on behalf of the United States outlining the individual measures being taken by States in support of Iraq – UN Security Council 7271st Meeting (19 September 2014), UN Doc S/PV.7271, 7. *Cf* the statement of the representative for Rwanda who, after noting Rwanda's own 'experience of abandonment' by the Council in 1994, called on the international community to 'act fast and act *collectively*' in countering the ISIS threat – UNSC 7271st Meeting, 8 (emphasis mine).

The Security Council has been vested not only with authority to intervene in any situation posing a threat to international peace and security, including those created by non-State actor threats, but also a responsibility to do so. While the majority of claims of self-defence against non-State actors have been noted in communications to the Security Council, its oversight over these claims remains limited in practice.[21] Rarely has the Council intervened with measures necessary to restore international peace and security. The consideration or condemnation of specific threats or attacks will not be adequate in circumstances where military measures are called for. The failure of the Council to act decisively to counter non-State actor threats has left the way open for unilateral action by States.

This is not to suggest that the Security Council has played no role in this area. Despite its shortcomings, the Security Council remains 'a key instrument for multilateralism in a world where unilateralist pressures are all too great.'[22] The Council has shown itself willing to act in countering non-State actor threats, but this willingness has been in certain respects only. In its Resolution 2249, the Council recognised international terrorism not simply as a threat to international peace and security but as 'one of the most serious',[23] bringing such threats squarely within the scope of Chapter VII enforcement measures. While some threats may call for a forcible response, the Security Council may also decide upon, and call upon UN Members to apply, measures not involving the use of armed force geared at the maintenance or restoration of international peace and

[21] Christian J Tams, 'Self-defence against Non-State Actors: Making Sense of the 'Armed Attack' Requirement' in Peters and Marxsen (n 10), 170.

[22] Wood (n 2) 333.

[23] UNSC Resolution 2249 (2015) (20 November 2015), UN Doc S/RES/2249(2015), 1.

security.[24] To date, the Security Council has decided on relevant measures pursuant to Chapter VII of the Charter, which have included general directives to States to suppress the recruiting, organising, transporting and equipping of individuals for participation in terrorist acts and to ensure the establishment of serious criminal offences in their respective domestic laws and regulations to enable prosecution and penalisation of related activities.[25] The Council has also acted in specific cases – with respect to the Al-Qaida organisation operating in Afghanistan, for instance, the Security Council demanded, under threat of sanctions, that the Taliban regime of Afghanistan cease its support for international terrorism and turn over Osama bin Laden for prosecution.[26]

Further, the Security Council has authorised the use of 'all necessary measures' by multinational and regional forces to counter diverse threats to international peace and security.[27] In the aftermath of the US intervention in Afghanistan following the 9/11 attacks, for example, acting under Chapter VII, the Security Council established the International Security Assistance Force (ISAF), a coalition of willing States, and empowered participating Members States to 'take all necessary measures to fulfil [the force's] mandate'.[28] The force was initially charged to assist the Afghan Interim Authority in the maintenance of security in

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[24] UN Charter (n 1) Art 41

[25] UNSC Resolution 2178 (2014) (24 September 2014), UN Doc S/RES/2178(2014), paras 5-6. See also UNSC Resolution 1373 (28 September 2001), UN Doc S/RES/1373(2001).

[26] UNSC Resolution 1267 (1999) (15 October 1999), UN Doc S/RES/1267(1999) paras 2-4.

[27] For a comprehensive listing of such authorisations see 'Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' in the *Repertoire of Security Council Practice* <https://www.un.org/securitycouncil/content/repertoire/actions> accessed 2 September 2020.

[28] UNSC Resolution 1386 (2001) (20 December 2001), UN Doc S/RES/1386(2001), 2.

Kabul and its surrounding areas by providing assistance in counter-insurgency security operations and necessary resources to increase the capacity and capabilities of the Afghan forces. Critically, the Security Council maintained oversight of ISAF operations, requiring periodic reports on implementation,[29] which allowed the Council to reassess and expand the geographical reach of the mandate as it became necessary.[30] Undoubtedly, an integral component of the Security Council's authorisation was coordination with the Afghan Interim Authority.

The authorisation of military force to counter non-State actor threats requires political consensus amongst the members of the Security Council, particularly its permanent members. Such a consensus is not, however, easily achieved. Given the current landscape of non-State actor threats, it is possible that political alliances or the direct involvement of permanent members in the matter under consideration would stymie the collective security process through the threat or use of veto.[31]

Members of the Council have, on occasion, expressed a desire to realise a truly global coalition, under the aegis of the Security Council, to counter terrorist and other non-State actor threats.[32] It would appear that, at present, political

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[29] ibid para 9.

[30] ISAF's mandate was progressively expanded to cover the entire country by late 2006.

[31] Nigel D White, 'The United Nations and Counter-Terrorism' in Ana María Salinas de Frías, Katja Samuel and Nigel D White (eds), *Counter-terrorism: International Law and Practice* (OUP 2015) 74.

[32] See eg the representative of Bolivia calling for the Council 'to take *joint, coordinated and consensual actions* and to meet our responsibilities as members of the Security Council under the mandate conferred upon us in line with the provisions of the Charter of the United Nations…' – UN Security Council 7565th Meeting (20 November 2015), UN Doc S.PV.7565, 8.

consensus on that matter has not yet been achieved.[33] The Security Council has, to some extent, reimagined its role within the institutional limitations with which it operates. In its Resolutions 1368 and 1373, the Security Council expressly recognised the right of self-defence in the context of the 9/11 terrorist attacks against the United States.[34] Again, in Resolution 2249, the Security Council called upon Member States to take 'all necessary measures, in compliance with international law' to counter the terrorist threat posed by ISIL in Iraq and Syria.[35] As has been argued, Resolution 2249 represents the unanimous indication by the Security Council that action being undertaken by States in individual and collective self-defence against ISIL at that time was within the scope of measures States were called upon by the Security Council to take.[36] By unanimously adopting these Resolutions, the Security Council has assumed the role of 'legitimising' claims of self-defence made by States in the non-State actor context.[37] While this approach may have the effect of shifting attitudes away from collective measures towards unilateral solutions to non-State actor threats, given the present conditions of politicking in the Council and the persisting threats faced by States, self-defence

[33] White (n 31) 74.

[34] UNSC Resolution 1368 (12 September 2001) UN Doc S/RES/1368(2001); UNSC Resolution 1373 (28 September 2001) UN Doc S/RES/1373(2001).

[35] UNSC Resolution 2249 (n 23).

[36] Text to n 239 in ch II.

[37] Paulina Starski, '"Legitimized Self-Defense" – Quo Vadis Security Council?' (10 December 2015) EJIL Talk! Blog <https://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/> accessed 3 September 2020.

is more likely to be resorted to. In those circumstances, 'Self-defence endorsed by the Council is the next best thing.'[38]

The desirability of collective measures rather than unilateral action in self-defence is evident. This is even more so in the context of non-State actor attacks and threats where the rights and interests of the territorial State are implicated. While the principle of necessity applicable to the exercise of the right of self-defence against non-State actors requires consideration of the territorial State's position, demanding coordination with the territorial State or its consent as alternatives to self-defence where possible, collective action is more likely to have in view the long term security and other interests of the territorial State, particularly where it is unable to meet the non-State actor threats emanating from its territory. It is apparent, for example, that the security, political and other needs of the territorial State weighed heavily in the design of the mandate for the ISAF in Afghanistan in the aftermath of the 9/11 attacks. Further, through its decisions backed by sanctions, the Security Council is able to assert considerable collective pressure on an obstinate territorial State that has failed to address a known non-State actor threat emanating from its territory. In those circumstances, Security Council action can have the effect of eliminating the need for a forcible response, thereby securing the interests of the victim State without a rupture in international peace and security. While the Security Council has affirmed 'its determination to

[38] Michael Wood, 'The Use of Force in 2015 With Particular Reference to Syria', Keynote Speech at Conference on 'Israel and International Law: Developments and Patters in the Year 2015', International Law Forum, The Hebrew University (5 January 2016), Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-05, 6. See also Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (Leiden University, 1 April 2010) para 36 (describing Security Council endorsement for action taken in self-defence as 'politically desirable').

combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations', the political realities existing within the Council are such that those responsibilities are not lived up to[39] and collective action, similar to that taken in the aftermath of the 9/11 attacks, is unlikely to be frequently achieved.[40] In those circumstances, the Council's practice of endorsing legitimate claims of self-defence is a welcome development.

B. Ensuring Accountability in the Exercise of the Right of Self-Defence against Non-State Actors

Although the right of self-defence is a unilateral right reserved to States in Article 51 of the UN Charter, it functions within the overarching system of collective security created by the Charter. An important element of this collective system is the accountability to the international community as a whole demanded of States in their exercise of self-defence. Article 51 of the Charter provides that self-defensive measures taken by Member States 'shall be immediately reported to the Security Council'. While a State's failure to report does not serve to invalidate the claim of self-defence made, the ICJ has noted that such a failure may undermine the believability of the claim to self-defence.[41] The reporting requirement serves,

[39] By contrast, France expressed the views that, through unanimously adopting Resolution 2249, the members of the Security Council had 'acted… to live up to their responsibilities' – UNSC 7565th Meeting (n 32) 2.

[40] Statement by the President of the Security Council (20 December 2006), UN Doc S/PRST/2006/56 (2006), 1.

[41] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits Judgment, 27 June 1986) [1986] ICJ Rep 14, para 200. See further Larissa van den Herik, 'Article 51's Reporting Requirement as a Space for Legal Argument and Factfulness', Grotius Centre Working Paper Series No 2019/083-PIL (24 June 2019), 5.

therefore, as an integral procedural requirement and as a built-in trigger for an intended system of accountability by placing claims of self-defence in the public domain.[42] States asserting the right of self-defence have tended to comply with the requirement to report military action.[43]

That the Security Council is empowered to make determinations about the conformity with governing international law of the measures reported to it has been recognised by the ICJ.[44] The reporting requirement serves, therefore, not only to provide relevant details to inform Council decision-making on possible collective responses to any threat to the peace, it also allows for the Security Council to be kept fully informed of measures taken in self-defence with a view to ensuring oversight.[45] The Security Council has, in the past, evaluated claims of self-defence and has readily condemned assertions of a right to use force extraterritorially in self-defence against non-State actors, principally in cases involving Israel in the

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[42] It has been noted that the current practice of the Security Council appears to be that communications are circulated as a matter of course solely amongst its Members. To facilitate more robust debate on Article 51 claims, Mexico has called for the publication of all Article 51 reports and their circulation as official documents to the entire membership of the UN – *Intervención de México en el debate sobre el Tema: Tema 85: "Informe del Comité Especial de la Carta de las Naciones Unidas", Sexta Comisión de la 73º Asamblea General de la ONU* (Nueva York, 12 de Octubre de 2018), 3 <https://mision.sre.gob.mx/onu/index.php/eventos/800-intervencion-de-mexico-en-el-debate-de-la-sexta-comision-sobre-el-informe-del-comite-especial-de-la-carta-de-las-naciones-unidas-en-el-marco-de-sesiones-de-la-73a-asamblea-general-de-la-onu> accessed 3 September 2020. Similarly, in a meeting of the Security Council dedicated to its working methods, Brazil proposed a dedicated section of the Council's website for listing all Article 51 communications with a view to improving the flow of information to all UN Members – UN Security Council 8175th Meeting (6 February 2018), UN Doc S/PV.8175, 25 (per Brazil). Brazil reiterated this suggestion in its intervention in the Sixth Committee of the General Assembly – Statement of Mission of Brazil, UN General Assembly Sixth Committee Meeting on the Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (15 October 2018) <http://statements.unmeetings.org/media2/20303642/brazil-85.pdf> accessed 3 September 2020.

[43] Gray (n 8) 129.

[44] *Nicaragua* Merits (n 41) para 200.

[45] James A Green, 'The Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 Va J Int'l L 563, 603; van den Herik (n 41) 13.

1970s to 1980s.[46] In its more recent practice the Security Council has, it is noted, tended against making express pronouncements on the legality of claims to self-defence notified to it.[47] The Security Council remains, however, an important forum for the interrogation of specific claims of self-defence. Council members have, in particular, interrogated the proportionality of various defensive operations targeting non-State actors.[48] Deliberations in the Council can go further, however, to consider the necessity of self-defensive force, particularly in the context of the extraterritorial use of force against non-State actors given the position of the territorial State in the matrix.

Although the Security Council does not, as a matter of course, directly consider and pronounce upon all claims of self-defence reported to it, its relevant resolutions and statements which contemplate State action and which affirm or discredit claims of self-defence hold significant value for the development of international law in this area.[49] Further, the expressed position of individual States in Council debates provides evidence of *opinio juris* integral to the identification and determination of governing customary international law. As States critically assess self-defence claims, there will be greater contribution to the creation and consolidation of international consensus on the applicable rules.[50] Deliberations to date have provided useful signals of the positions adopted by States on the

[46] Text to nn 331-44 in ch II.

[47] Gray (n 8) 126. Gray argues that although Article 51 envisages a central role for the Security Council, it does not necessarily require that the Council make a pronouncement on the legality of any claim to self-defence.

[48] See eg text to n106 in ch II (concerning Israel's use of force in Gaza).

[49] Gray (n 8) 126.

[50] Leiden Policy Recommendations (n 38) 11.

question of self-defence against non-State actors. Given the potential impact, more routine engagement with self-defence claims should be promoted.[51]

It follows from the intended collective oversight prompted by the Article 51 reporting requirement that States claiming to exercise a right of self-defence must be called upon to outline for scrutiny the evidentiary assessments on which such claims are based – 'evidence is fundamental to accountability, and accountability to the rule of law'.[52] It will not be sufficient for an acting State to merely notify that action has been taken in self-defence without reference to the surrounding circumstances.[53] A proper evaluation of the requirements of necessity and proportionality in particular, both of which largely turn on the factual circumstances of a case, requires that all relevant information be made publicly available.[54]

The evidence depended upon must also be reliable.[55] The preceding chapters of this thesis have raised the relevance of evidence as a central element of a claim to self-defence against non-State actors in several respects. The determination of the imminence of an attack, for example, rests on evidence of the capability and intention of the would-be attacker. In that regard, a State claiming

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[51] Green (n 45) 606. In this vein, Brazil has proposed the institution of a routine follow-up procedure for the examination of Article 51 communications – Brazil UNGA Sixth Committee Statement (n 42). This proposal has been supported by Argentina and Mexico – UNSC 8262nd Meeting (17 May 2018) UN Doc S/PV.8282, 47 (per Mexico) and 65-66 (per Argentina). See also Larissa van den Herik, '"Proceduralising" Article 51', 2017 77 ZaöRv 65, 66, proposing the creation of a dedicated body or platform at the Council level to allow for the evaluation of self-defence claims within a more sophisticated and exacting process.

[52] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force by States in Self-defence' (2006) 55 ICLQ 963, 968.

[53] van den Herik (n 41) 11.

[54] Leiden Policy Recommendations (n 38) para 44.

[55] Michael Schmitt, 'Counter-terrorism and the Use of Force in International Law' (2002) 79 Intl L Stud 7, 70.

the right to use force in anticipation of an attack must show clear and convincing evidence substantiating those circumstances rather than mere intelligence.[56] In the non-State actor context, while the sensitivity of factual information or the nature of its source may militate against a full disclosure, meaningful accountability requires that a plausible legal argument, resting on factual substantiation, is offered.

The express reservation in the UN Charter of a unilateral right to use force in self-defence reflects the need to balance the imperative security interests of individual States against the pursuit of a centralised and collective security for the maintenance of international peace and security. Post-action accountability represents a key component of grounding this unilateral right in the collective security system created by the Charter. Collective oversight, generated by the Article 51 reporting requirement, provides an opportunity not only for the evaluation of action taken in self-defence and the legal and factual bases upon which is it based, but also for the elucidation of the applicable international rules and principles. In the non-State actor context, where considerable disagreement amongst commentators persists about the scope of the right of self-defence against non-State actors, the pronouncements of the Security Council and of its individual members have provided helpful benchmarks for evaluating the current State of the customary law on self-defence.

State practice undoubtedly evinces the existence of a right of self-defence against non-State actors. Its existence within the collective security framework of the Charter necessitates that States are held to account in their exercise of the

[56] On the standard of evidence applicable in use of force claims more generally see Mary Ellen O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era', (2006) 100 Proceedings of the Annual Meeting (ASIL) 44.

right. To date, the Security Council has not lived up to its role as the primary guardian of international peace and security. If the right of self-defence against non-State actors is to remain truly exceptional within the Charter scheme of collective security, the Security Council must overcome its political hindrances and assume the central role in scrutinising claims and assuming oversight in circumstances giving rise to self-defence.

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