

Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War

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Editors' Introduction: Self-Defence in Times of Transition

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I. The International Legal Order at Large

The international legal order, including the regime on the use of military force, is currently in transition. Our times are characterised by a high tension between interdependence and globalisation (economic, technical, and cultural) on the one hand, and stark cleavages and fencing (ideational, economic, territorial, and even military) among states, on the other hand. In such a period of tension, international law, with its broad principles, offers little guidance. This makes legal scholarship which tries to work with these principles particularly vulnerable.

Self-defence against non-state armed groups is of course not a new topic of international law. The “new threats”¹ to peace and security emanating from “new actors” are iconised in the terrorist attacks of 9/11/2001, although numerous large-scale terrorist transnational crimes had been committed before, and are continuing. The Security Council’s resolutions 1368 and 1373 of September 2001 are interpreted by many observers as an endorsement of the lawfulness of self-defence against a large scale terrorist armed attack,² while others insist that these resolutions only mentioned the right to self-defence without passing judgment on its lawful use in the concrete case. Whatever they mean, these resolutions still constitute the most

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¹ See Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change: “A More Secure World: Our Shared Responsibility”, 2.12.2004, UN Doc. A/59/565, 15.

² SC Res. 1368 of 12.9.2001, in its preamble, does not say more but that the Security Council is “*Determined* to combat by all means threats to international peace and security caused by terrorist acts, *Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter, (...)” In UN SC Res. 1373 of 28.9.2001 the Security Council was reaffirming that the attacks of 9/11 “constitute a threat to international peace and security, *Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), *Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, (...)”

important reference point for those “expansionists” who believe that self-defence can in principle be lawfully exercised against non-state attacks.

In the ensuing 15 years, the international landscape has changed. While we have become accustomed to powerful armed groups committing transnational crimes and terror acts, the “new actors” occupying international legal scholarship are big business and “new” states rising to power. China and Russia are attempting to shed their role as mere norm-takers, and to participate as norm-shapers – also in the field of peace and security. In the Chinese-Russian declaration on the Promotion of International Law of 2016, the two states “condemn terrorism (...) as a global threat that undermines the international order based on international law”.³ However, the two signatories do not mention self-defence as a response but – to the contrary – ask for “collective action in full accordance with international law, including the United Nations Charter” to “counter this threat”.⁴

The mentioned declaration underscores that different “threats” to the international legal order come both from within that order and from the outside, and that both are linked. The international legal order’s legitimacy flaws are perceived and articulated afresh, exactly because “power shifts”⁵ have occurred which allow new actors to raise their voice and which lend these voices more salience. Moreover, some observers expect a domino effect for multilateral institutions, a rejection of certain liberal values on a global scale, and the emergence of a new power concert.⁶

Can international law at all provide for a helpful “counter-reality” to the forces of the military, ideology, and crime – to mention the drivers of transnational non-state armed force? We do not believe that international law can best be described, in Marxist terms, as a “superstructure”, as a mere epiphenomenon of a given power constellation. However, we must admit that the international legal order “feeds on preconditions which itself cannot guarantee”.⁷ Sure, these pre-conditions and side-conditions are not only material

³ Chinese-Russian letter to the UN Secretary General of 8.7.2016 contained the *Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law*, signed in Beijing on 25.6.2016 by the two states’ Ministers of Foreign Affairs (UN Doc. S/2016/600), para. 7.

⁴ UN Doc. S/2016/600 (note 3), para. 7.

⁵ W. W. *Burke-White*, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, Harv. Int’l L. J. 56 (2015), 1 et seq.

⁶ H. *Krieger*, *Trumping International Law? Implications of the 2016 US Presidential Election for the International Legal Order*, EJIL talk!, 3.1.2017.

⁷ See, with regard to states (the most powerful entities in the international legal order) E. W. *Böckenförde*: “Der Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann.” (E. W. *Böckenförde*, *Die Entstehung des Staates als Vorgang der Säkularisation*, in: *Säkularisa-*

and economic, but also intellectual and moral. If the international order is currently changing, then it is not only due to the military power of – say – the Islamic State and Russia, but *also* due to the power of ideas and emotions, such as resentment against Western interference, the perception of being left behind, lack of prospects for a decent life, opposition against materialism and consumerism, or the like. And if the international legal order feeds on preconditions which itself cannot guarantee, this also means that international scholarship, too, must come to grips with pre-conditions and side-conditions over which itself has no control.

II. Black Letter Law Parameters on Self-Defence

The question whether and under what conditions self-defence is lawful against (certain types of) non-state attacks has reemerged since 2014 by the interventions in the armed conflict in Syria. In this context, a number of states, notably the United States of America, the United Kingdom, Turkey, and France, claimed individual self-defence against the Islamic State (IS) and/or Khorasan.⁸ Other states, and some of the mentioned ones, alternatively or additionally relied on collective self-defence of Iraq (which presupposes that Iraq was suffering an armed attack in the sense of Art. 51 of the Charter of the United Nations [UN Charter]) and/or on underlying customary law which would justify self-defence.⁹

The UN Charter circumscribes a right of self-defence, but – to quote the International Court of Justice (ICJ) – “does not go on to regulate directly all aspects of its content”.¹⁰ The source of self-defence against non-state actors might lie outside Art. 51 of the Charter, and the scope of that norm might differ from treaty law.

The ICJ case-law has not settled the question whether self-defence is available against attacks by non-state forces either.¹¹ In *Congo v. Uganda*

tion und Utopie: Erbacher Studien, Ernst Forsthoff zum 65. Geburtstag (1967), 75 et seq. (93).

⁸ USA (23.9.2014), UN Doc. S/2014/695; UK (25.11.2015), UN Doc. S/2014/851 and (7.9.2015) UN Doc. S/2015/688; Turkey (24.7.2015), UN Doc. S/2015/563; France (8.9.2015) UN Doc. S/2015/745.

⁹ USA (23.9.2014), UN Doc. S/2014/695; UK (25.11.2015), UN Doc. S/2014/851; Australia (9.9.2015) UN Doc. S/2015/693; France (8.9.2015) UN Doc. S/2015/745; Germany (10.12.2015) UN Doc. S/2105/946.

¹⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14, para. 176.

¹¹ See ICJ, *Oil Platforms*, ICJ Reports 2003, 161, paras. 51 and 61. The ICJ's *Wall Opinion* was initially read as leaning towards a state-centred view of “armed attack” (See *Legal Conse-*

the ICJ explicitly refrained from deciding this very question. At the same time, the Court implied that – if at all – self-defence was available only against “large scale attacks” of a non-state armed group.¹²

In 2004, the mentioned High-level Panel of experts commissioned by the United Nations (UN) Secretary General, had pronounced itself in favour of a “restrictive” reading of Art. 51.¹³ It had chiefly relied on the – then new – response capacity of the UN Security Council:

“It may be that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. *But however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed* and expectations about legal compliance are very much higher.”¹⁴

A decade after this High-level Panel report, the world has changed again. We are (again) in a cold-war like situation in which the Security Council is blocked by mutual vetoing so that states feel that they have to act to protect their citizens, without having to engage in a Security Council process which they expect to be futile anyway.

quences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, para. 139). In his declaration to the *Wall opinion*, Judge *Buergethal* had called that a “legally dubious conclusion”, based on a “formalistic approach” of the Court (*Buergethal* declaration, ICJ Reports 2004, 240, paras. 5 and 6). In hindsight, most observers read the Advisory Opinion as having left open the question whether self-defence against a non-state actor can be lawful.

¹² “[T]he 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.*” (ICJ Reports 2005, 168, para. 147, emphasis added). See in this sense also Judge *Simma* in his separate opinion in *Congo v. Uganda*, ICJ Reports 2005, 334, para. 11: “Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. (...) Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that *large-scale attacks* by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51.” (emphasis added).

¹³ UN Doc. 56 A/59/565 (note 1), paras. 188 and 192.

¹⁴ UN Doc. 56 A/59/565 (note 1), para. 196 (emphasis added).

III. The Need for Principles and for a Common Understanding

Specifically due to the quality of world peace as a global public good, the mentioned High-level Panel's call for a *shared* position on the lawfulness of the use of force can hardly be dismissed as irrelevant or dispensable. The expert report rightly pointed out: "The maintenance of world peace and security depends importantly on there being *a common global understanding, and acceptance*, of when the application of force is both legal and legitimate."¹⁵ That call for forging out a common understanding has been answered with scholarly attempts to formulate "principles" on self-defence against non-state armed attacks. The sets of principles which are currently on the table (the Chatham House Principles,¹⁶ the Leiden Policy Recommendations,¹⁷ and the Bethlehem principles¹⁸) are not uniform but they coalesce around important points of agreement.

A related scholarly enterprise is the "Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism", initiated in 2016 by *Olivier Corten*,¹⁹ signed by more than 240 international lawyers and professors from a wide range of countries.²⁰ The workshop convened by the Max Planck Institute in November 2016 did not seek to add yet another set of principles. It also seeks to avoid reduplication of, and builds on, the two focus sections organised by the Leiden Journal of International Law in 2016, on the lawfulness of the use of force mainly against non-state actors, one issue on "practice"²¹ and one on "theory".²² The Leiden focus section on "practice" sought to assess the lawfulness of military interventions

¹⁵ UN Doc. 56 A/59/565 (note 1), para. 184 (emphasis added).

¹⁶ The Chatham House Principles of International Law on the Use of Force in Self-Defence, ICLQ 55 (2006), 963 et seq.

¹⁷ Leiden Policy Recommendations on Counter-Terrorism, NILR 57 (2010), 531 et seq.

¹⁸ *D. Bethlehem*, Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors, AJIL 106 (2012), 770 et seq. (with "Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors" at p. 775). See the response by: *E. Wilmshurst/M. Wood*, Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles", AJIL 107 (2013), 390 et seq.; see also *D. Bethlehem*, Principles of Self-Defense: A Brief Response, AJIL 107 (2013), 579 et seq.

¹⁹ *O. Corten*, A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism, EJIL Talk!, 14.7.2016, <<http://www.ejiltalk.org>>.

²⁰ <<http://cdi.ulb.ac.be>>.

²¹ International Law and Practice, Symposium on the Fight against ISIL and International Law, LJIL 29 (2016), 737 et seq. (convened by *Theodore Christakis*, with contributions by *Karine Bannelier-Christakis*, *Olivier Corten*, *Nicholas Tsagourias* and *Vaios Koutroulis*).

²² International Legal Theory: The Future of Restrictivist Scholarship on the Use of Force, LJIL 29 (2016), 13 et seq. (convened by *Jörg Kammerhofer*, with contributions by *André de Hoogh*, *Raphael van Steenberghe*, *William C. Banks/Evan J. Criddle*, and *Anne-Charlotte Martineau*).

against the Islamic State of Iraq and the Levant (ISIL) and other terrorist groups against the benchmark of “positive international law” and also aimed “to evaluate whether these interventions and the counter-terrorism discourse surrounding them could lead to an evolution of the current legal system regulating the use of force”.²³ The other Leiden symposium on “theory” sought to engage in “second-order analysis”, and to identify “the structure of arguments employed and their change over time, the responses and counters: argumentative strategies of international lawyers at a critical juncture of this sub-field”, in the style of a “meta-analysis” of the dialogue (or non-dialogue) among “expansionists” and “restrictivists”.²⁴

Five years have passed since the publication of the latest principles in 2012.²⁵ The events in Syria have added a new layer of relevant practice. Moreover, the letters to the Security Council can reasonably be seen as explicitly formulating the states’ *opinio iuris*, a phenomenon which is rare in international relations. It is therefore unsurprising that our debate focussed on the legal significance of those events and statements.

Positions are currently so divided that the “common global understanding” called for in 2005 may be unattainable. As *Ian Hurd* has pointed out, “the question of whether US bombing against ISIL in Syria in 2016 really is self-defence or not under the UN Charter is not likely to be resolved – the issue rests on controversies over what the law allows and forbids, as well as over how these US actions fit into the law, and on these points it is probably unrealistic to expect convergence on any settled consensus.”²⁶ On top of all, the ongoing events suggest that the law on self-defence against non-state actors may be in a flux. It has even been claimed that the war against ISIL triggered a “Grotian Moment” of change in international law.²⁷ Even those who do not share the belief in a turning point must concede that the dynamism makes it even more difficult than usually in international law to pinpoint what the law actually “says”.

²³ *T. Christakis*, Editor’s Introduction, LJIL 29 (2016), 737 et seq., 737.

²⁴ *J. Kammerhofer*, Introduction: The Future of Restrictivist Scholarship on the Use of Force, LJIL 29 (2016), 13 et seq., 14.

²⁵ *D. Bethlehem*, Self-Defense (note 18).

²⁶ *I. Hurd*, The Permissive Power of the Ban on War, European Journal of International Security 2 (2017), 1 et seq., 14.

²⁷ *M. Scharf*, How the War Against ISIS Changed International Law, Case W. Res. J. Int’l L. 48 (2016), 15 et seq., 15.

IV. The Need for Plurality and Pluralism

Despite the importance of finding common ground and developing globally shared principles, we deem it advisable to approach the question of self-defence against non-state actors in a pluralist fashion. The fuzzy term “pluralism” has been overused in the recent scholarly discourse on international law, and we therefore need to clarify which type of pluralism we mean. We primarily have in mind a pluralism of scholarly approaches, of techniques for dealing with international law, and of background assumptions.

The welcome plurality of approaches first of all flows from the wide gamut of research questions that can be asked in the context of international law. They range from doctrinal over empirical, theoretical, and juridico-ethical approaches.²⁸ With regard to self-defence against non-state actors, for example, a scholar might ask – in doctrinal terms – whether a link of attribution is needed between the attack and the territorial state or not. A scholar might also investigate and contextualise the historical incidences of self-defence against irregular bands, she might analyse the structure of the justificatory discourse, she might analyse the political function of the rule on self-defence in international relations,²⁹ or she might ask questions of fairness in balancing the burden between the attacked state and the territorial state. Plurality also results from the variety of paradigms or frameworks in which scholarly reasoning is conducted, ranging from neo-naturalism and legal positivism over critical studies and post-colonialism to law and economics and rational choice.

Plurality further stems from different national backgrounds of the discourse participants. The pluralism of national perspectives satisfies the demand for “comparative international law” and for comparative international legal scholarship. The comparative approach, analysing national practice, will allow better to identify a truly international legal corpus of rules on a particular international problem at hand based on an overlapping consensus and imbued with local legitimacy. It allows to assess the chances of internalisation and proper national implementation of international rules, taking note of the domestic legal framework needed for this.³⁰

²⁸ See A. Peters, International Legal Scholarship under Challenge, in: J. d’Aspremont/T. Gazzini/A. Nollkaemper/W. Werner (eds.), *International Law as a Profession*, 2017, 117 et seq., at 153 et seq.

²⁹ See, for example, I. Hurd (note 26) with the argument that the lawfulness of military action (covered by claims of self-defence) is an important resource of legitimacy for states, *independently* of whether a clear yardstick of legality can be fixed or not.

³⁰ A. Peters (note 28), at 122 et seq. See also M. Delmas-Marty, *Comparative Law and International Law: Methods for Ordering Pluralism*, University of Tokyo Journal of Law and

The professional background of lawyers also plays a crucial role for the plurality of approaches taken towards international law and for determining the scope of the constraints imposed by the law. Practitioners concerned with concrete issues of national security and with advising their governments typically highlight the interpretive freedom which the rather general rules of international law allow. Doctrinal rigour in narrowing potential gaps of the law, on the other hand, is more frequently found in academic approaches to international law.

Finally plurality stems from different types of engaging with law as a normative framework. *Orna Ben-Naftali* reminds us that legal problems can be tackled with various genuinely “lawyerly” approaches.³¹ She relies on *Patricia Ewick* and *Susan S. Silbey* who distinguish three modes of legal thought: Thinking “before the law”, thinking “against the law”, and thinking “with the law”.³² Thinking “before the law” treats (international) legal norms as “distinctive, yet authoritative and predictable”, as “a formally ordered, rational, and hierarchical system of known rules and procedures”.³³ Legality and illegality here appear “as something relatively fixed”, if not in practice then in principle. The law is imbued with “its own awesome grandeur” and appears “[o]bjective rather than subjective”, and the norms are characterised if not “defined by [their] ... impartiality”.³⁴ This mode of thought is in continental Europe often called “doctrinal”. It dominates legal practice in which the actors need clear-cut and binary answers about the lawfulness or unlawfulness of a given or projected course of conduct.

The second line of thought, “against the law”, includes “exploit[ing] the interstices of conventional social practices to forge moments of respite (...) from the power of law. ... [P]art of the resistance inheres in ... passing the message that legality can be opposed, if just a little.”³⁵ The third mode, as summarised by *Ben Naftali*, is thinking “with the law”, involves “playing” law “as a game, ... in which pre-existing rules can be deployed and new

Politics 3 (2006), 43 et seq.; *E. Jouannet*, French and American Perspectives on International Law: Legal Cultures and International Law, *Me. L. Rev.* 58 (2006), 291 et seq.; *A. Roberts*, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, *ICLQ* 60 (2011), 57 et seq.; *W. E. Butler*, Some Reflections on Comparative International Law, *Journal of Comparative Law* 11 (2016), 52 et seq.; *O. O. Merezhko*, The Idea of Comparative International Law, *Journal of Comparative Law* 11 (2016), 92 et seq.

³¹ *O. Ben-Naftali*, Introduction, in: *O. Ben-Naftali/M. Sfar/H. Viterbo*, *The ABC of the OPT: A Legal Lexicon of the Occupation of the Palestinian Territory* (forthcoming, 2017).

³² *P. Ewick/S. S. Silbey*, *The Common Place of Law: Stories from Everyday Life*, 1998, 47 et seq.

³³ *P. Ewick/S. S. Silbey* (note 32), 47.

³⁴ *P. Ewick/S. S. Silbey* (note 32), 47.

³⁵ *P. Ewick/S. S. Silbey* (note 32), 48 et seq.

rules invented to serve the widest range of interests and values”. The concern is not primarily with protecting or respecting the power of the law (conceived as an independent entity). The research focus is rather on “the power ... to successfully deploy and engage with the law”.³⁶

The dialogue workshop is based on the premise that plurality of viewpoints and approaches, along the various dimensions just mentioned, is an intellectual asset. It therefore sought not only to make visible and to accommodate the legitimate pluralism of readings and interpretations of a complex legal problem in the international *jus contra bellum*, but also sought to try out the different types of thinking before, against, and with international law mentioned above.

Thinking “before” the law, we opine that legal scholarship in that mode has to give space to new claims which for the most part react to a changing environment in which the legal discourse takes place. We need to be prepared that a consensus or one “right” solution cannot be established. While our work is generally driven by the universalist aim to establish commonly shared understandings on the issues of international law it tackles, we recognise and acknowledge the existing pluralism and wish to provide room for disagreement.

Both scholars and political actors have in recent years become aware of the necessity to accommodate pluralism and to establish academic procedures in which this pluralism can find its expression. We think that this is especially needed in the law surrounding armed conflict. That area of the law is characterised by deep controversies. It touches the core principles of international law and relates to questions which are existential for states. The exact balance that is struck between, for example, sovereignty and human rights, or between the territorial integrity of one state and the security concerns of another, directly affect the material interests of states. Thus, these choices are deeply value loaded and connect to underlying political and theoretical preferences.³⁷

The diversity of opinions and assessments cannot be easily reconciled. Neither can “correct” solutions be found by means of doctrinally exact and rigid legal scholarship. Rather, the divergent legal assessments of situations surrounding armed conflict are, as a matter of fact, deeply rooted in the plurality of theoretical and practical approaches that exist in the reality of in-

³⁶ P. Ewick/S. S. Silbey (note 32), 48.

³⁷ As J. Kammerhofer (note 24), 18 points out with regard to self-defence against non-state actors: “Perhaps then, this is one area of the law where our capacity as scholars to keep a ‘clinical distance’ is most tested and where emotions, moral or political ideas and jingoist instincts surface most easily.”

ternational relations. Such plurality also governs (and should continue to govern) scholarly approaches.

Our praise of pluralism does not contradict or overtake our scholarly ideal of intersubjective comprehensibility. Academic works aim, or at least should aim, for universal intersubjective comprehensibility, allowing scholars with diverging geographical, educational, or theoretical background to understand an argument or a research finding. Given certain premises and a particular method, in principle anyone, regardless of sex, nationality or religion should arrive at the same results. Global intersubjectivity in turn requires a transnational academic legal discourse whose participants accept that arguments are sound only if they are fit for universal application. But of course the global inter-subjective comprehensibility and replicability depends on the premises and methods, which first of all have to be laid open and discussed. It is on that level (of research questions, premises, and methods) where pluralism should come into play.

V. The Contributions

The essays assembled in this focus section represent greatly differing views and approaches to the question of self-defence against non-state actors. They disagree profoundly on the state and the interpretation of the law. They identify different facts as constituting the relevant state practice, they cite different precedents as authoritative, and they make different proposals for the progressive development of the law. However, they mostly engage in what *Ewick* and *Silbey* have called “thinking before the law”. It looks as if the question of self-defence lends itself to such a doctrinal analysis “before the law” easily, because we have a treaty text, a relatively dense bulk of case-law, and much practice. Also, a range of traditional doctrinal questions can be asked, pertaining to canons of interpretation, to the relationship between primary norms and secondary norms of state responsibility, questions of attribution, the meaning of formal sources of law and their relationship among each others, and so on.

We have therefore arranged the contributions in four groups. The first part covers pieces that argue in favour of a restrictive interpretation on the law of self-defence, essentially upholding the state-centred paradigm. It includes statements by *Theodore Christakis*, *Olivier Corten*, *Letizia Lo Giacoco*, *Shin Kawagishi*, *Matthias Hartwig*, *Inger Österdahl*, *Britta Sjöstedt*, and *Priya Urs*.

The second part contains statements making the case for the legality of self-defence against non-state actors, including essays by *Irène Couzigou*, *Jochen Abr. Frowein*, *Guy Keinan*, *Karin Oellers-Frahm*, and *Christian J. Tams*. Part three offers reflections on conceptual alternatives to the traditional understanding of self-defence, presented by *Antonello Tancredi* and *Larissa van den Herik*. The fourth part presents some meta-reflections on the law by *Leena Grover*, *Christian Marxsen*, *Carl-Philipp Sassenrath*, *Paulina Starski*, and *Sir Michael Wood*.

The current symposium is a collection of short essays on the international law of self-defence against non-state actors. The collection results from the first workshop of the Max Planck Trialogues on the Law of Peace and War held in Heidelberg in November 2016. The Trialogues are books in which three authors (representing different theoretical, geographical, and practical backgrounds) tackle one and the same topic of the *ius contra bellum*, *ius in bello*, or *ius post bellum* from their distinct perspectives. They seek to positively acknowledge the diversity of perspectives, and to make constructive use of them for giving a multifaceted and problem-oriented account of the state of the law regarding pressing issues in the law surrounding armed conflict. The first volume of the Trialogues addresses the legality of self-defence against non-state actors.

We invite readers to pay attention not only to the essays' legal arguments in themselves, but also to the *Vorverständnis* of the writers, to the role they ascribe to international law in the realities of the present world and scholarship, and to the value of separating legality from illegality in order to enable international law to perform its functions.

Has Practice Led to an “Agreement Between the Parties” Regarding the Interpretation of Article 51 of the UN Charter?

Olivier Corten*

It is generally recognised that the *jus contra bellum* regime enshrined in the Charter of the United Nations (UN Charter) is composed of peremptory norms.¹ That does not mean that its meaning is frozen once and for all. On the contrary, it can evolve and be adapted to new circumstances, including by taking practice into account as it has been the case, for example, with the powers of the Security Council. In this case, however, a new interpretation of the rule has been “accepted and recognised by the international community of States as a whole” (Vienna Convention on the Law of Treaties [VCLT], Art. 53) or, if one prefers to use the classical means of interpretation set out in Art. 31.3 of the VCLT, been the object of an “agreement between/of the parties” to the Charter.

The current debate about the scope of self-defence is often framed as follows: Does the expression “armed attack” contained in Art. 51 of the Charter apply to a use of force by a non-State actor (NSA)? In fact, the question is biased, or rather largely irrelevant. Indeed, an affirmative answer has been evident for decades. In 1974, after decades of debates, all the UN Members adopted a definition of aggression in which the possibility to respond to some uses of force led by NSAs was specifically recognised (Art. 3 g)). This definition has been regularly reaffirmed by States, notably in 2010 when they adopted a definition of the crime of aggression in the context of the International Criminal Court (ICC) statute. Moreover, the definition is considered by the International Court of Justice (ICJ) as reflecting customary international law, without any objection on behalf of the judges of the Court.² The problem thus lies not in the invocation of self-defence in the case of an armed attack launched by an NSA, but rather in the possibility to invoke self-defence against a *State* which is not itself the direct author of the armed attack, and is therefore entitled to the protection of its sovereignty

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¹ O. Corten, *The Law against War*, 2010, 200 et seq.

² See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986 and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005.

and its political independence under Art. 2.4 of the UN Charter. In other words: How can an actor A (a State) invoke a use of force attributable to an actor B (an NSA) to justify using force against another actor C (a State whose territory is used by the NSA)? Different arguments have been advanced in this respect: Establishing that the territorial State has “sent” the NSA, or has been “substantially involved” in its activities (option A, corresponding to Art. 3 g) cited above); proving another form of complicity between this State and this NSA (option B); considering that the State would be “objectively responsible” for what the NSA did (option C, corresponding to a situation of “inability” or of a “Failed State”); invoking necessity as the only criterion justifying the intervention against the NSA, without even searching to establish a form of responsibility of the territorial State (option D).

Practice has been invoked in support of some of those options, and it is true that many States interpreted Art. 51 beyond the parameters laid down in Art. 3 g). However, the result is undoubtedly mixed. Actually, the only precedent having given rise to an implicit general endorsement of a broad interpretation of Art. 51 is the war against Afghanistan launched in 2001. This precedent could be interpreted as an illustration of options A (if we consider that the Taliban regime was “substantially involved” in the activities of Al Qaeda) or B (if we prefer to characterise it as a mere situation of complicity) presented above. However, this precedent was not followed by others, at least not of similar magnitude. The wars launched by Israel against Lebanon (2006) and in Gaza (in 2009 and 2014) were widely condemned, and not only because of the disproportional character of the responses. The Non-aligned Movement (NAM) adopted a statement in September 2006 denouncing a “relentless Israeli aggression”,³ without any reference to the criterion of proportionality, and similar statements were issued to denounce the military interventions in Palestine.⁴ Finally, the fight against Islamic State of Iraq and Syria (ISIS) in Iraq and Syria provides a topical example of the diversity of the position of States about the scope of self-defence, options A to D having been invoked by some, without any possibility to establish a common understanding of what international law could mean.⁵

³ NAM, Havana, 11.-16.9.2006, Final Document, 19.9.2006, A/61/472 – S/2006/780.

⁴ NAM, 16th Summit of Heads of State or Government, Final Document, August 2012, para. 28.2.

⁵ O. Corten, The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?, *LJIL* 29 (2016), 777 et seq.

Given this brief overview of the existing practice, we have to deal with two different conclusions.

- If we turn to formal and multilateral declarations made by States, the classical reading of the UN Charter, as reflected in the definition of aggression, still prevails. The NAM, composed by some 120 States (in other words, by the majority of the UN Members) regularly reaffirmed that “consistent with the practice of the UN and international law, as pronounced by the ICJ, Art. 51 of the UN Charter is restrictive and should not be re-written or re-interpreted”,⁶
- If we observe unilateral or regional practice, those statements are clearly not respected. Many large-scale or (more often) limited military operations have been conducted in the name of a broad conception of self-defence, beyond the criteria enshrined in Art. 3 g) and applied regularly by the ICJ in its jurisprudence.

However, if we chose to apply the general principles of interpretation laid down in the VCLT, it would be difficult to understand how a clear “agreement between the parties” (Art. 31.3 a)) could be challenged by an erratic and ambiguous practice, particularly as far as it has not led to any new “agreement of the parties” (Art. 31.3 b)). No principle of interpretation could be cited in favour of any disappearance of the law in those circumstances. In other words, and as in any other field of international law, every State is obliged to respect the treaty as long as it has not been changed, either formally (in an amendment or revision) or informally (by the way of an informal – but established – agreement between the parties).

At this stage, two possibilities are open, each of them reflecting a certain conception of international law. The first would be to consider that, even if formally in force, the rule doesn’t have any relevance any more, in view of its incapacities to address the current problems and challenges of the new “fight against terror”. This “realistic” view could offer an “option E”, consecrating the (provisional?) “death” of Art. 2.4. Another possibility, chosen by the ICJ in order to preserve the very existence of international law, is to refuse to consider that deeds are more important than words. In this perspective, practice, even in contradiction with the rule, cannot challenge the existence of this rule as such. The two positions are in theory equally respectable even if, as an international law scholar, it could be more logical to follow the second.

⁶ NAM, 17th Summit of Heads of State or Government, Final Document, September 2016, para. 25.2.

Challenging the “Unwilling or Unable” Test

Theodore Christakis*

The workshop on “Self-Defence Against Non-State Actors” organised by the Max Planck Institute in Heidelberg on 4.-5.11.2016 was marked by very interesting and heated debates among *jus ad bellum* experts about a great variety of issues. In this very brief op-ed I will focus on the famous “unwilling or unable” (UoU) test of self-defence. Proponents of this test claim that the case of Syria and adoption of United Nations Security Council (UNSC) resolution 2249 led to a “newly accepted change in the international law of self-defence” according to which “any State can now lawfully use force against non-State actors (NSA) (terrorists, rebels, pirates, drug cartels, etc.) that are present in the territory of another State if the territorial State is unable or unwilling to suppress the threat posed by those non-state actors”.¹ However, there are good reasons to argue that the UoU test was “unable” to make its entry in positive international law and that the international community of States could be “unwilling” to do so in the future.

I. Unable: The Positiveness of the UoU Test Is Doubtful for at Least Three Reasons

No acceptance by the UNSC: Contrary to what some scholars suggested, UNSC resolution 2249 provides no support for the UoU test. This resolution does not refer to self-defence, even less so to the UoU test. Several elements, including the context of adoption of this resolution, indicate on the contrary that there was a consensus among UNSC members not to refer to self-defence – which was in sharp contrast with other similar resolutions in the past.²

No agreement between coalition members themselves: While the members of the coalition claimed that they were entitled to act against the Islam-

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¹ M. P. Scharf, How the War Against ISIS Changed International Law, Case W. Res. J. Int'l L. 48 (2016), at 53.

² See K. Bannelier, The Joint Committee’s Drones Report: Far-Reaching Conclusions on Self-Defence Based on a Dubious Reading of Resolution 2249, Journal on the Use of Force and International Law 3 (2016), <<https://papers.ssrn.com>>.

ic State of Iraq and the Levant (ISIL) on the basis of individual or collective self-defence, the grounds for this claim seem to vary. Several states (Germany, Belgium, Norway or the Arab states) did not refer to the UoU test in their letters to the UNSC, despite its previous use by the USA.³ France, for instance, seemed to be reluctant to endorse this new theory.⁴

No endorsement by other UN members: The debates within the United Nations (UN) demonstrate that the UoU test was not shared by the vast majority of States. In February 2016, for instance, the Non-Aligned Movement reaffirmed its constant position that “consistent with the practice of the UN and international law, as pronounced by the International Court of Justice (ICJ), Art. 51 of the Charter of the United Nations (UN Charter) is restrictive and should not be rewritten or re-interpreted”.⁵

II. Unwilling: The International Community of States Could Hesitate to Accept the UoU Test In Positive Law for Several Reasons Including the Following

Blurring the distinction between obligations of conduct/result: By suggesting that a State will not be protected anymore by Art. 2 § 4 of the UN Charter and International Law if it is “unable” to defeat some NSA on its territory, the UoU test profoundly alters the nature of the due diligence principle. It is well established today that, under this principle, States have obligations of conduct, rather than result: If they know (or ought to have known) that their territory is used for acts contrary to the rights of other States, they need to deploy all their best efforts to put an end to this threat, even if the outcome cannot be ensured. Claiming that a State has an “obligation of result” to eliminate all terrorists threats on its territory in order to be protected against foreign intervention could be highly risky and even absurd: Western leaders themselves often make declarations about how “long and difficult” it is to eliminate terrorist threats in their territory. Does this mean that the UoU test could apply in such cases?

A risk for multilateralism: The UoU test could lead States to consider that self-defence always offers a sufficient legal basis for military intervention abroad and there is thus no need to search multilateral solutions (interna-

³ See O. Corten, The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?, LJIL 29 (2016), at 777 et seq.

⁴ Listen to the position of the head of the legal office of the French MFA *François Alabrune* here: <<https://colloquesfdi2016com.files.wordpress.com>>(1:07:00 - 1:09:00).

⁵ S/PV.7621, 15.2.2016, at 33 et seq.

tional cooperation, consent of the State concerned, use of force mandate by the UNSC ...) in the fight against hostile NSAs. While the initial scholarly proposals on the UoU test put emphasis on the “prioritisation of consent and cooperation”,⁶ these elements were set aside in the case of Syria (because of the United States (US)-led coalition’s hostility to the regime of Bashar-Al-Assad). It is more striking that the recent report of the Joint Committee on Human Rights of the United Kingdom (UK) Parliament on the UK Government’s drone policy completely neglects to discuss all these alternative solutions – considering that self-defence and the UoU test provide a sufficient legal basis for the use of lethal force for counter-terrorism purposes in foreign countries.⁷

A risk for the jus contra bellum system: The UoU test opens the gate to unbridled unilateralism in relation with the use of force. If this new theory becomes part of positive law, it could entirely unravel the shroud of collective security and seriously endanger the system of the prohibition of the use of force. To paraphrase the ICJ, this new theory could be regarded as “the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States ...”.⁸ Indeed, we could ask ourselves if the western proponents of this theory are ready to accept that, tomorrow, it could be used by States like China, Russia or other regional powers in order to undertake military interventions against “threatening” NSAs abroad. This could lead us back to the pre-Art. 2 § 4 universe of International Law where the doctrines of self-help, self-preservation and “vital interests” of States were dominant.

As a conclusion I could recall the “Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism”, initiated by O. Corten and six other scholars (including the author of these lines)⁹ and signed, in September 2016, by more than 240 international lawyers and professors from 36 countries.¹⁰ One of the main reasons for the adoption of this plea was, precisely, to challenge the UoU test. This is just another proof of the fact that

⁶ A Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, *VJIL* 52 (2012), at 519.

⁷ See K. Bannelier (note 2).

⁸ *Corfu Channel Case (UK v. Albania)*, Merits, Judgment, ICJ Reports 1949, at 35.

⁹ See O. Corten, A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism, *EJIL Talk!*, 14.7.2016, <<http://www.ejiltalk.org>>.

¹⁰ See <<http://cdi.ulb.ac.be>>.

this test is still far away from universal acceptance, both in international legal scholarship and State practice and *opinio juris*.

Scarcely Reconcilable with the UN Charter

*Inger Österdahl**

Considering among other things the fundamental goal of the United Nations (UN) of saving succeeding generations from the scourge of war, the most convincing view of the provisions on the use of force in the Charter of the United Nations (UN Charter) is the one claiming that the prohibition on the unilateral use of force is very broad and that the exception to the prohibition in the form of the right of self-defence against an armed attack is very narrow. Effective collective measures including military measures for the suppression for instance of acts of aggression or other breaches of the peace were supposed to be taken by the Security Council. For that purpose the UN Members conferred on the Security Council primary responsibility for the maintenance of international peace and security.

Today developments around the world suggest that states have a right not only to take measures in self-defence against armed attacks carried out by other states, in exceptional circumstances, but that states have a right to take measures in self-defence against armed attacks carried out by non-State actors. The crucial issue is to what extent if at all the provisions making up the collective security system under the UN Charter have been affected by the events we see unfolding on the ground. The conditions presumably qualifying the exercise of this potential right of states of self-defence against armed attacks by non-State actors are still highly unclear.

One argument in favour of an emerging right of self-defence against armed attacks by non-state actors is that the Security Council is not capable of responding adequately and that therefore the persuasive force of the collective security system under the UN Charter is weakened, both it would seem in terms of rules on competence and in terms of substantive content. If the Member States cannot rely on the Security Council they are entitled to take matters into their own hands and from the substantive point of view the right of self-defence can be interpreted a bit more freely and thus becomes a bit less exceptional. At the same time the fundamental prohibition of the unilateral use of force is necessarily narrowed. It would seem as if this argument presupposes that the original broad prohibition on the use of force together with the narrow right to self-defence are dependent on the UN collective security structure in its entirety and especially on a function-

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ing Security Council. There is some strength to this argument, and it also illustrates the potential fragility of the collective security system. Whether one wants it or not, the collective security system is dependent on all its parts in order to stay intact.

Another argument in favour of a right of self-defence against armed attacks by non-state actors is that it has always been there in the text of the relevant provision of the UN Charter: Member States have a right of individual or collective self-defence if an armed attack occurs, nothing more nothing less. The target of the armed attack is pointed out – the (Member) State –, but not the source of the armed attack, the text could or could not implicitly include attacks carried out by non-state actors. No support can be had from the *travaux préparatoires* in figuring out exactly what was on the mind of the drafters of the UN Charter in this respect. An answer to the question whether self-defence against an armed attack by a non-state actor was or can be, or for that matter should be, contained within the meaning of the text of the UN Charter is a matter of interpretation in different forms.

Judging from state practice and from reactions on the part of states who are not part of the actual practice, as well as from the acquiescence on the part of other states who could react, it would seem, either one wants it or not, as if there is a development taking place towards the recognition of a right of self-defence against an armed attack by a non-state actor. It is relatively easy for those in power in different states around the world to unite against those challenging the powers that be, at least and in particular if the challengers use violent means to pursue their cause and/or are labelled terrorists.

The potential consequences of this development legally and otherwise are incalculable. There are great risks inherent in such a development and whether they outweigh or not the potential benefits whatever they may be, is impossible to say. It would seem unlikely in any case that military self-defence measures would be an effective way of eradicating terrorism. It would also seem likely that the easing of the prohibition on the international use of force and the relaxing of the exceptional nature of the right of self-defence risk leading to more international use of force. That would be in complete contrast with the overarching goal of the UN Charter.

Perhaps the risks inherent in what seems to be today's developing practice could be limited by the normative obscurity pervading the next step, after a right of self-defence against an armed attack by a non-state actor has potentially been found. From the normative point of view, in this case of the *jus ad bellum*, the circumstances that should surround the exercise of a potential right of self-defence against an attack by a non-state actor remain

largely unclear, including the issue whether military measures can be used in third countries at all, presuming that the armed attack cannot be attributed to the third state in question. The stipulations of necessity and proportionality which are crucial to the lawfulness of self-defence in the inter-state context have yet to be translated to the non-state context, if an armed response is lawful at all in a third country. Consider also the territorial integrity and sovereign equality of states which are at stake.

If the criteria for legality of self-defence against an armed attack by a non-state actor are so difficult to fulfil that any exercise of such self-defence would break the law, then in practice this potential right on the part of states would become useless. A parallel could perhaps be drawn *mutatis mutandis* to the pronouncement of the International Court of Justice (ICJ) in the *Nuclear Weapons Case* on the legality of the use of nuclear weapons in the light of international humanitarian law: The use of such weapons in fact seems scarcely reconcilable with respect for the requirements of international humanitarian law, says the ICJ. Similarly, the exercise of a right of self-defence against an armed attack by a non-state actor, should such a right exist, seems hardly reconcilable with the remaining *jus ad bellum*, as it currently stands. Imagine if a dangerous development of the law could stop there.

Clearing Uncertainties of the Jurisprudence of the ICJ on Self-Defence Against Non-State Actors

*Shin Kawagishi**

The recent strikes by the United States against the Islamic State in Syria have again caused a fierce controversy about self-defence against non-state actors.¹ However, there is no indication of settlement of disagreement among scholars. A part of its reasons lies with the fact that they do not necessarily share common understanding of the position of the International Court of Justice (ICJ) on “armed attack *ratione personae*”. This article aims to contribute to some clarification of uncertainties about the ICJ’s jurisprudence on this matter.

The starting point for discussion is the following sentence in the *Wall* case: “Art. 51 of the Charter ... recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”² Some authors understand this as leaving room for self-defence against non-state actors.³ Actually, *C. Gray* emphasises that the ICJ “does not say there is a right of self-defence *only* in the case of an armed attack by one state against another state.”⁴ According to this, the ICJ merely indicates the typical case for self-defence, namely attacks by a State, and does not exclude acts by non-state actors from “armed attack”.

However, such a reading is problematic. First, by holding that “Art. 51 of the Charter has no relevance in this case”,⁵ the ICJ decides that the measures by Israel are not justified under Art. 51. It is important to note that to reach this conclusion, the ICJ mentions as follows: “Israel does not

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¹ The topic of self-defence dates back to the 19th century. See *C. Kreß*, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater*, 1995, 219 et seq.

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 194 (para. 139).

³ See e.g. *C. Gray*, *International Law and the Use of Force*, 3rd ed. 2008, 135; *K. Trapp*, *State Responsibility for International Terrorism*, 2011, 49.

⁴ *C. Gray* (note 3), 135 (italics in the original).

⁵ *Wall* case (note 2), 194 (para. 139).

claim that the attacks against it are imputable to a foreign State.”⁶ Considering this line of reasoning, the ICJ substantially limits the scope of self-defence under Art. 51 to the case that “armed attack” is conducted by a State.

Second, by criticising the ICJ’s decision, some judges advocate self-defence against non-state actors. Especially, Judge *R. Higgins* states that “I do not agree with all that the Court has to say on the question of the law of self-defence”, and insists that “nothing in the text of Art. 51 ... stipulates that self-defence is available only when an armed attack is made by a State.”⁷ In light of the objections by some judges, the ICJ appears based on the inter-state construction of “armed attack” under Art. 51.

In addition to this, one more ambiguous sentence appears in the *Wall* case: “The situation is ... different from that contemplated by Security Council resolution 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.”⁸ In this part, the ICJ distinguishes two circumstances at issue, and avoids deciding whether those resolutions recognised self-defence against non-state actors.

Indeed, *C. Gray* evaluates that this sentence “could be interpreted as leaving open the possibility of self-defence against non-state actors in situations like those contemplated in Security Council resolutions 1368 and 1373.”⁹ However, we have already demonstrated that as far as Art. 51 is concerned, the ICJ’s assumption lies in the state-centric approach to self-defence. Accordingly, in terms of logical coherence, those who defend the above interpretation need to prove that those resolutions recognised self-defence against non-state actors under *customary international law*.

Nevertheless, the ICJ doesn’t investigate legal weight of the fact that a right of self-defence was recognised by those resolutions. In this author’s view, there is a possibility that they recognised the legality of self-defence against non-state actors in relation to 9/11, but making reference only to them is not enough to show the existence of *usus* and *opinio juris* necessary for customary international law.

Besides the *Wall* case, another perplexing sentence emerges in the *Armed Activities* case: “Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contempo-

⁶ *Wall* case (note 2), 194 (para. 139).

⁷ Separate opinion of Judge *Higgins*, *Wall* case (note 2), 215 (para. 33).

⁸ *Wall* case (note 2), 194 (para. 139).

⁹ *C. Gray* (note 3), 136.

rary international law provides for a right of self-defence against large-scale attacks by irregular forces.”¹⁰ This passage was understood as not ruling out self-defence against non-state actors by some authors.¹¹

In keeping consistency with the *Wall* case, the following interpretation might be possible: Self-defence against non-state actors is in principle illegal, but in case of “large-scale attacks” by them, it is exceptionally permitted. However, in assessing the normative meaning of the above sentence, it is necessary to look at the fact that both Congo and Uganda disputed the legality of self-defence against territorial state, not that of self-defence against non-state actors.¹²

Considering such a factual situation surrounding the *Armed Activities* case, this author believes that the ICJ just thought it unnecessary to judge whether self-defence against non-state actors is lawful. From this view, the above sentence does not have any special meaning on self-defence against non-state actors. In fact, several authors evaluate that the ICJ’s state-centric approach to self-defence was unaffected.¹³

An indispensable question that the ICJ in this case must address is what degree of involvement is required between the territorial state and non-state actors. In this regard, the ICJ mentions “sending” or “substantial involvement” provided in Art. 3 (g) of the General Assembly (GA) resolution on the Definition of Aggression as an appropriate standard,¹⁴ which has been already presented in the *Nicaragua* case.¹⁵

These involvements are characterised as primary rules of international law by some authors.¹⁶ However, the ICJ’s qualification may be different. By holding that attacks “still remained *non-attributable* to the DRC”, the Court seems to treat these involvements as secondary rules of international law.¹⁷ This leads to the question of relationship between Art. 3 (g) of the

¹⁰ *Armed Activities on the Territory of the Congo*, ICJ Reports 2005, 223 (para. 147).

¹¹ See e.g. *K. Trapp*, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors, ICLQ 56 (2007), 144; *C. Tams*, The Use of Force against Terrorists, EJIL 20 (2009), 384.

¹² See Memorial of the Democratic Republic of the Congo, para. 5.17; Counter-Memorial of Uganda, para. 359.

¹³ See e.g. *J. Kammerhofer*, The Armed Activities Case and Non-State Actors in Self-Defence Law, LJIL 20 (2007), 96; *O. Corten*, *Le droit contre la guerre*, 1st ed. 2008, 702 et seq.

¹⁴ *Armed Activities* case (note 10), 223 (para. 146).

¹⁵ *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 103 (para. 195).

¹⁶ See e.g. *T. Becker*, Terrorism and the State, 2006, 176 et seq.

¹⁷ *Armed Activities* case (note 10), 223 (para. 146) (*italics added*).

GA resolution and the rules of attribution in the International Law Commission (ILC)'s Articles on State Responsibility.

As for this issue, Art. 55 of the ILC's Articles is relevant. It provides for *lex specialis derogat legi generali*. According to the Commentary, "there must be ... a discernible intention that one provision is to exclude the other" for this principle to apply.¹⁸ Therefore, in case of inconsistency between Art. 3 (g) of the GA resolution and the rules of attribution like Arts. 8 and 11 in the ILC's Articles, the former could prevail over the latter.

In conclusion, it is fair to say that although there are ambiguities in the advisory opinions and judgements of the ICJ, its jurisprudence consists of two propositions: (1) "armed attack" must be originated from a State; (2) "armed attack" requires close involvement between territorial state and non-state actors such as "sending" or "substantial involvement" provided in Art. 3 (g) of the GA resolution.

¹⁸ J. Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, 307.

Effective Territorial Control by Non-State Armed Groups and the Right of Self-Defence

Priya Urs*

It is now generally accepted that an armed attack carried out by a non-State armed group may activate the right of self-defence in Art. 51, Charter of the United Nations (UN Charter), but States relying on self-defence must nevertheless ensure that the conduct of the non-State armed group is attributable to the territorial State. The International Court of Justice in the *Nicaragua* case defined this threshold of attribution as one of effective control over the conduct of the non-State armed group.¹

As the Islamic State of Iraq and the Levant (ISIL) threat reveals, in some situations an armed attack by a non-State armed group is simply not attributable to the territorial State from which it emanates, and may even pose an existential threat to States like Iraq and Syria. Confronted with this difficulty, several States have advanced alternate justifications for the exercise of self-defence, offering weaker links of attribution between the activities of terrorist groups and the territorial States that “harbour” them,² or States that are unwilling or unable to effectively take action against non-State armed groups operating from their territories.³ These propositions enjoy only limited support in State practice.

In the ISIL context, a handful of States offer a new justification for the use of force in Syria while acting in the collective self-defence of Iraq and other States. The most elaborate articulation of this view was made by Germany in its letter to the Security Council in accordance with Art. 51, UN Charter on 10.12.2015, which states:

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¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14, para. 195.

² A. Nollkaemper, Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility, in: N. M. Blokker/N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality, A Need for Change?*, 2005, 133, 136 et seq.

³ A. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defence, *Va. J. Int’l L.* 52 (2012), 483.

“ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.”⁴

Earlier in 2015, Canada and Australia hinted at this argument, suggesting that their operations were not directed against Syria or its people.⁵ Norway and Belgium followed suit in 2016, each with a letter emphasising – as Germany did – that the measures taken in collective self-defence under Art. 51, UN Charter are directed against the ISIL and not against Syria.⁶ In contrast, the letters from Canada, Australia, Norway and Belgium do not expressly discard the need for Syria’s consent. Instead, they rely on Iraq’s letters to the Security Council requesting international support “with a view to denying terrorists staging areas and safe havens” in Syria.⁷

Notably, Germany, Norway and Belgium all refer to United Nations Security Council (UNSC) Resolution 2249 (2015), in which the Security Council found the ISIL to be an “unprecedented threat to international peace and security” based to some extent on “its control over significant parts and natural resources across Iraq and Syria”.⁸ The operative part of this Resolution calls upon Member States to:

“take all necessary measures, in compliance with international law ... on the territory under the control of ISIL ... to eradicate the safe haven they have established over significant parts of Iraq and Syria”.⁹

UN Secretary-General *Ban Ki-Moon* advanced the same line of reasoning in his response to United States airstrikes in Syria, stating that “the strikes took place in areas no longer under the effective control of that Government”.¹⁰ In a similar vein, the United Kingdom justified the use of force against “ISIL sites” and “military strongholds” in Syria to ensure that Iraq is able to regain control of its borders.¹¹ The United States has also affirmed

⁴ UNSC (10.12.2015) UN Doc S/2015/946.

⁵ UNSC (31.3.2015) UN Doc S/2015/221; UNSC (9.9.2015) UN Doc S/2015/693.

⁶ UNSC (3.6.2016) UN Doc S/2016/513; UNSC (7.6.2016) UN Doc S/2016/523.

⁷ UNSC (25.6.2014) UN Doc S/2014/440.

⁸ UNSC Res. 2249 (2015) UN Doc SC/RES/2249 (2015), preambulatory para. 5.

⁹ UNSC Res. 2249 (2015) (note 8), para 5.

¹⁰ *R. Goodman/S. Knuckey*, Remarkable Statement by UN Secretary-General on US Airstrikes in Syria, (23.9.2014), available at <<https://www.justsecurity.org>>.

¹¹ UNSC (25.11.2014), UN Doc S/2014/851.

Iraq's right to defend its borders in relying on Syria's unwillingness and inability to confront safe havens within its territory.¹²

Justifying the exercise of self-defence on the basis that a State has lost effective control over parts of its territory is problematic for several reasons. To begin with, as long as the State continues to exist, its loss of effective control of parts of its territory does not justify further compromising its sovereignty and territorial integrity by resorting to force without its consent. For as long as President *Bashar al-Assad's* Government represents Syria, and the ISIL has not established an internationally recognised *de facto* regime,¹³ measures "directed against" the ISIL constitute an unlawful use of force against Syria.

Secondly, the reliance on UNSC Resolution 2249 (2015) to justify the use of force in Syria is misplaced. The Resolution neither authorises forcible measures under Chapter VII, UN Charter, nor endorses the exercise of self-defence against Syria. On the contrary, by addressing the ISIL as a unified threat to international peace and security across Iraq and Syria, the Security Council fails to acknowledge the distinct legal justifications for the use of force in Iraq, which requested international assistance, and Syria, which did not.

Finally, the suggestion that the loss of effective territorial control is a more objective formulation of the "unwilling or unable" test¹⁴ is unpersuasive. The attempt to sidestep Syria's consent by directing the use of force against a non-State armed group operating in areas no longer under its effective control is not an argument rooted in the attribution of responsibility, and would instead have the effect of conferring some degree of international personality upon the ISIL. In any event, without support in State practice, this proposition is unconvincing.

In conclusion, reliance on effective territorial control by a non-State armed group is at present no more than political rhetoric that takes advantage of the context-specific territorial dimension of the ISIL threat. As such, the legal justification for the use of force in Syria remains obscure. A more cautious approach to overcoming this difficulty could be the "substantial involvement" of the territorial State, which finds mention in the

¹² UNSC (23.9.2014) UN Doc S/2014/695.

¹³ C. Henderson, Editorial Comment: The Use of Force and the Islamic State, *Journal on the Use of Force and International Law* 1 (2014), 209, 215.

¹⁴ M. Lewis, What Does the "Unwilling or Unable" Standard Mean in the Context of Syria?, 12.9.2014, available at <<https://www.justsecurity.org>>.

Definition of Aggression,¹⁵ but has so far not been invoked by participating States.¹⁶

¹⁵ Art. 3 (g) UNGA Res. 3314 (XXIX), 14.12.1974, UN Doc A/RES/29/3314.

¹⁶ O. Corten, Self-Defence Against Terrorists: What Can be Learned from Recent Practice (2005-2010)?, KGZ (Journal of International Law and Diplomacy) 109 (2010), 129, 152.

Reconsidering the Legal Basis for Military Actions Against Non-State Actors

*Letizia Lo Giacco**

The question of whether or not States may lawfully resort to actions in self-defence against non-State actors (NSA) is prompted by two elements: i) the emerging practice of States¹ resorting to force in self-defence against terrorist groups including the Islamic State in Iraq and the Levant (ISIL); and ii) United Nations Security Council (UNSC) resolutions seemingly legitimising self-defence against NSA (i.e. UNSC Res. 1368 [2001]; UNSC Res. 2249 [2015]). From a scholarly viewpoint, such developments would entail interpreting Art. 51 of the Charter of the United Nations (UN Charter) in a manner such as to encompass armed attacks carried out by states and NSA alike.²

The UN Charter envisages two exceptions to the prohibition on the use of force codified in Art. 2 (4) UN Charter: self-defence against an armed attack; and enforcement measures implying the use of force decided by the UNSC pursuant to Art. 42. In considering the adoption of military measures in response to threats and breaches of international peace and security, one may observe that Art. 42 UN Charter may actually serve as an appropriate legal basis for the adoption of military measures against ISIL, and has in fact the merit of preserving the system of collective security as it has been envisaged by the drafters of the UN Charter. In contrast, broadening the scope of Art. 51 UN Charter to grant states the right to self-defence against NSA is premised upon somewhat slippery bases.

This contribution intends to shed light on the shortcomings of invoking Art. 51 as a legal basis for military measures against ISIL, and presents the advantages of invoking Art. 42 instead. This would lead to:

1. no Pindaric interpretation of Art. 51 (stretched to the point of applying the “unwilling or unable state” doctrine);

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¹ E.g. the US claimed that the Operation Enduring Freedom against Afghanistan was grounded on Art. 51 UN Charter.

² The present contribution focusses on Art. 51 UN Charter. The author is aware that self-defence under customary international law may not fully coincide in scope with Art. 51 UN Charter.

2. compliance of Art. 51 interpretation with Art. 2 (4), which speaks about inter-state relations (Art. 51 would as a consequence be understood as an exception to use of force in inter-state relations, hence against an armed attack of another state); and
3. safeguards against abusive powers of states in determining actions in self-defence when an armed attack occurs.

The discourse surrounding Art. 51 triggers questions of a revisionary nature. Self-defence, qua a circumstance precluding wrongfulness, entails the existence of a wrongful act in the first place. Hence, it would in principle compel construing NSA as subjects of international law and, as such, bearers of the obligation to refrain from using armed force under public international law.³ This conceptual hurdle has been questionably overcome by resorting to the “unwilling or unable state” doctrine, in order to satisfy the attributability-test of the NSA armed attack to the state where the NSA operates. Alternatively, the consent of the State hit by measures in self-defence has been considered determinant to exclude wrongfulness of such measures.

Although the term “armed attack” in Art. 51 does not specifically refer to a *state* armed attack, the joint reading of Arts. 51 and 2 (4) UN Charter is conducive to interpret self-defence within an inter-state dimension.⁴

Similarly, the temporal scope of self-defence, in particular in its anticipatory variant against ISIL’s threats to commit new attacks, poses questions of conformity with Art. 51 UN Charter insofar as it only concerns cases in which “*an armed attack occurs*”.

Remarkably, the UN collective security system is centred around the role of the UNSC in countering armed attacks. This is supported by the wording of Art. 51 which, while recognising the inherent right of states to self-defence, reaffirms the pivotal role of the UNSC in the resort to military force in the expression “*until the Security Council has taken the measures necessary to maintain international peace and security*”.

In the framework of Chapter VII, Art. 42 has been designed as a provision of last resort, in case of a failure of measures not implying the use of force pursuant to Arts. 40 and 41 UN Charter. This is consistent with the

³ In this respect, questions as to the capability of NSA (arguably, this umbrella-term encompasses a spectrum of actors with diverse capabilities) to actually launch an armed attack against a State for it to resort to self-defence incidentally arise.

⁴ Art. 2 (4) reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state (...).” (emphasis added)

purposes of the UN enumerated in Art. 1 UN Charter, in particular with maintaining international peace and security (Art. 1 (1) UN Charter).

Notoriously, the practice of the UNSC has already developed towards imposing Chapter VII-measures against NSA (including individuals, groups of individuals, and legal entities)⁵ and it would be no surprise if those actors were made the target of military actions agreed upon by the UNSC. Hence, the application *ratione personae* of Art. 42 would not raise the same controversies of Art. 51. Having an enforcement character, Art. 42-measures do not require the consent of the targeted state,⁶ unlike – as mentioned earlier – cases of self-defence against NSA would require. Most importantly, Art. 42-measures may be resorted to in case of *breaches* of the peace (armed attack or lower threshold violations of the non-use of force) and *threats* to the peace alike, thus encompassing a broader spectrum of situations than Art. 51. This is noteworthy as state military actions against ISIL are arguably resorted to against *threats* of future attacks. Further, if the use of force is authorised pursuant to Art. 42 UN Charter, the UNSC is to determine the scope of the mandate, including a temporal delimitation for the resort to such measures.

The claim of an emerging practice corroborating the existence of a right to self-defence against NSA may prove appealing and perilous insofar as it would allow defensive actions against ISIL's "attacks" but would decentralise the use of force to the extent that States qualifying themselves as victims of an NSA's armed attack may resort to military force.⁷

⁵ E.g. UNSC Res. 1267 (1999); 1373 (2001); 1618 (2005); 2083 (2012); 2170 (2014).

⁶ See B. Simma/H. Mosler/A. Randelzhofer/C. Tomuschat/R. Wolfrum/A. Paulus/E. Chaitobu (eds.), *The Charter of the United Nations – A Commentary*, Vol. 1, 2002, 754 et seq.

⁷ Israel sustained this position against NSA in the occupied Palestinian territories. UNSC Res. 2249 (2015) questionably expands States' powers to resort to military measures at discretion.

Applying the Unable/Unwilling State Doctrine – Can a State Be Unable to Take Action?

*Britta Sjöstedt**

The discussion regarding self-defence against non-state actors (NSAs) is a re-occurring topic on the international agenda. Various legal (and not so legal) arguments have been put forward to address dilemmas that may arise under the framework regulating the use of force in international relations. This paper focuses on whether a state can defend itself against a hostile NSA located in a third state not taking (sufficient) actions. More specifically, I will look closer into the application of the doctrine of the “unable or unwilling state” as a justification for self-defence in such a scenario.¹ The doctrine entails that NSAs can be lawfully attacked if they are harboured in a state that is unable or unwilling to control them. The doctrine sets one of the lowest standards on when NSAs can be lawfully attacked in third states on the basis of the right of self-defence. Whether the doctrine is reflecting the current status of the law is questionable.² Nonetheless, given that the doctrine applies, there are particular difficulties to invoke it as I will demonstrate by looking at the current situation in Syria. Can the unable/unwilling state doctrine legally justify the military operations of certain foreign states, i.e. the United States (US), United Kingdom (UK), France, etc. directed at the Islamic State (IS) in Syrian territory? I argue that even if one would accept this doctrine as a benchmark to determine acceptable use of force against an NSA in a third state, it sets an ambiguous and arbitrary standard that undermines the legal framework regulating use of force building on collective security.

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¹ The doctrine of unable or unwilling state was included in a set of principles put forward by a group of international lawyers to reflect current principles and rules of international law. See *Principles of International Law on the Use of Force by States in Self-defence*, 2005, available at the website of the Chatham House, the Royal Institute of International Affairs: <<https://www.chathamhouse.org>>.

² The Chatham House is an independent policy institute and the principles were put together as a clear statement of the rules by a group of eminent international lawyers. However, this document does not constitute a primary source of international law according to the ICJ Statute Art. 38.

International law on use of force is quite straightforward, although the arguments put forward by states when relying on it can at times be quite confusing. Art. 2 (4) of the Charter of the United Nations (UN Charter) prohibits military force between states in their relations. The article has two exceptions a) if acting in self-defence (Art. 51 UN Charter), or b) if the Security Council authorizes such force (Art. 42 UN Charter). Without entering into the larger discussion on the history of the right of self-defence, I will briefly note that at least since the adoption of the UN Charter self-defence against NSAs seems to be excluded according to the mainstream scholarly debate. However, a literal interpretation of Art. 51 UN Charter seems not to require that the attack is attributed to a state, but seen in the larger context of the Charter, such reading would not cohere with the rest of the provisions in the Charter, in particular in regard to Arts. 2 (4) and 42, as well with other rules in international law. In addition, the International Court of Justice (ICJ) has repetitively stated that self-defence cannot be applied against NSAs, unless they act on behalf or under control of another state.³ Nevertheless, the right of self-defence against NSAs may have been modified after the attack on the World Trade Center on 9.11.2001. To counter the 9/11 attack, the US together with the UK launched Operation Enduring Freedom (OEF) attacking al-Qaida targets in Afghanistan in October 2001. As a justification of the operation, the two states invoked their right of self-defence.⁴ The concern here is that the 9/11 attack had not been conducted by a state, but by al-Qaida. Although Afghanistan could not be held responsible for the 9/11 attack, OEF received large support within the international community.⁵ For instance, in the UN General Assembly debates held from 1.-5.10.2001, a large number of states with the exception of Cuba, expressed their support of the US invoking its right of self-defence.⁶ Scholars have tried to clarify the support from a legal standpoint. Among the justifications, one was grounded on the circumstance that Afghanistan was unable or unwilling to take action against al-Qaida despite the knowledge of the group's presence in the state and that the group already

³ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986 and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005.

⁴ Letters of 7.10.2001, UN Doc. S/2001/946 and UN Doc. S/2001/947.

⁵ Even though al-Qaida had been harboured by Afghanistan, this would not make the attack attributable to the state according to the general rules on state responsibility.

⁶ Ulf Linderfalk summarizes the debate, see U. Linderfalk, *The Post-9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline*, *GoJIL* 2 (2010), 900.

performed several harmful attacks against other states. Afghanistan refused to extradite *bin Laden* and showed no signs of willingness to deal with al-Qaida. Thus, Afghanistan must be considered as an unwilling state to deal with the NSA that would justify military force on the basis on self-defence, given that we accept the unable/unwilling state doctrine. However, the inability to deal with NSA does not seem to have been discussed in relation to OEF. I will now see how this doctrine can be applied in the case of Syria.

The fact that Syria has not consented to the military operations conducted by the US, UK and France in its territory would probably not make Syria an unwilling state as in the case of OEF. The doctrine on unable/unwilling state does not appear to dictate that a state must accept assistance from other states. Such a conclusion would challenge the territorial sovereignty of a state. Moreover, Syria has launched several military attacks at IS and is involved in a civil war against the group. Consequently, Syria cannot be considered as unwilling to take action against IS. Can Syria be considered as unable given how the situation has evolved? I will look at two circumstances that may support such a conclusion. First, in letters to the Security Council, Germany and Belgium endorse that they may exercise the right of self-defence against IS due to the fact that Syria lacks control over the territory where IS is located.⁷ Such reasoning may indicate, as suggested by *Dapo*, that Syria is unable to take action against IS. However, this may not be the correct interpretation of the letters because Belgium and Germany also focus on the interpretation of the necessity requirement.⁸ If it is meant to invoke the unable standard, it is unclear if lost effective control of territory would automatically establish inability of a state. Regarding effective control, it has not been a circumstance that the ICJ relied on in relation to the self-defence against NSAs. In the *Democratic Republic of the Congo (DRC) v. Uganda* case, the DRC cannot possibly have been exercising effective control over all parts of its territory. Yet, the Court did not consider that as providing Uganda with a right of self-defence. Looking at events post-9/11, Colombia did not have a right to attack Fuerzas Armadas Revolucionarias de Colombia (FARC) on Ecuadorian territory, although FARC was located in inaccessible parts of the Amazon over which Ecuador cannot possibly have been able to exercise effective control.

⁷ Letter of 10.12.2015 (Germany) and Letter of 7.6.2016 (Belgium), UN Doc. S/2015/946 and UN Doc. S/2016/523.

⁸ *Dapo Akande* claims that Germany and Belgium seem to be saying that is that because Syria does not have effective control of the territory then it is necessary for them to use force in self-defence. See comments by *D. Akande*, EJIL Talk, available at <<http://www.ejiltalk.org>>.

Second, Syria has invited Russia, which is a militarily powerful state, to combat IS. This clearly demonstrates that Syria indeed is not unwilling but perhaps also not unable. A state can always ask for military assistance. Thus, perhaps it is only in the cases where such requests are not granted that a state truly can be said to be unable to take action, but then it would probably not be unwilling. In any case, the doctrine of unable/unwilling state seems to have limited relevance to forward the argument that self-defence can be a legal basis to justify attacks against IS in Syrian territory without Syria's consent, at least as it seems impossible for a state to be truly unable if it is not unwilling. In any case, if Syria were considered as unable to fight IS, then also Iraq must be considered unable as well. Would then Russia have a right to intervene on Iraqi territory to fight IS on the behalf of Syria? In conclusion, the doctrine of unable/unwilling state lacks both a clear legal underpinning and a clear and set content at least as far as it involves an unable state. Its invocation may undermine the prohibition on use of force, risking the collective security.

Which State's Territory May Be Used for Self-Defence Against Non-State Actors?

*Matthias Hartwig**

One of the most neglected problems of self-defence against non-State actors is the question of how the infringement of the territorial integrity of another State while exercising this self-defence can be justified. This omission can be explained by the fact that by now these interventions affected States which were very weak, more or less excluded by the international community or could be qualified even as failed States. Therefore, they were unable to react or their reactions were steadily ignored.

The very simple idea is that measures against non-State actors may be taken on the territory of the State where the latter find themselves. The United Nations Security Council (UNSC) Resolution 1373 introduced the “harbouring” of terrorists as an action which constitutes a violation of international law. However, quite often the State does not consent to the presence of such persons on its territory, and therefore cannot be said to “harbour” them. Therefore, in recent times the justification of an intervention in these cases was extended by relying on the concept of “the unwilling or unable State”, meaning that self-defence may lawfully be exercised by a State on the territory of another State which does not want or is not able to eliminate the risk of terrorist activities originating in its sphere of sovereignty. The definition of unwillingness presupposes a shared concept of who is a terrorist which – as is well known – does not exist in current international law. Had the Russian Federation bombed the radio-station of the Chechens in Poland from where they were supporting the armed fight against the Russian army, we would have witnessed a general outrage for good reason. Apart from this specific aspect, one may question if this concept has already turned into a norm under international law.

The main objection against this approach is that it still sticks to the old ideas of war which normally is territorially linked to a State. In contrast, terrorists normally are very mobile, they cannot be “identified” with a given territory. Al Qaida stretches from Pakistan through the Arab States to Nigeria, Islamic State (IS) can be found from Afghanistan to Mali. The crimes committed by these organisations are planned in one country, they are fi-

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nanced from another country, citizens of a third country participate, they get the training in a fourth State and the attack takes place in a fifth country. One may take as an example the attacks of 11.9.2001 in the USA. According to the findings of the US-American secret services they were plotted in Afghanistan – and it has never been claimed that the Taliban government has been involved. The cell which implemented them was composed by Arab students who had lived in Germany for many years free of all surveillance by the State. The financing of this plot can be tracked back to sources in Saudi-Arabia. The chief perpetrators took flying lessons in the USA – unfettered by any State control. The group which finally executed the plot was composed mostly by citizens of Saudi-Arabia (which was recently brought into the focus of US legislation in the context of this attack). Each of the elements described above were necessary for the perpetration of the crime, if one had been eliminated the crime could not have been committed. Each of the States which are named can be blamed for some form of negligence. Who is entitled to decide that self-defence may be lawfully exercised in Afghanistan and not in Saudi-Arabia? Is self-defence in Afghanistan still justified if it can be proven that Germany – by stricter surveillance of the activities of certain Islamist groups on its territory – or the USA – by the introduction of stricter rules for the admission to flying lessons - could have prevented the attack? If we assume that such a terrorist group commits crimes in all those States – will it be lawful that each of these States takes armed measures against the group on the territory of each other State claiming that an act which was indispensable for the successful commission of the attack had occurred there? This is not only a theoretical question. On 13.11.2015, Islamist terrorists committed an attack in Paris. France – and Germany – referred to the right to (collective) self-defence against these non-State actors on Syrian territory. The members of the group claimed to be linked to IS which was by that time very active in Iraq and Syria, including against the government of Assad. They met representatives of IS in Syria before the attack. The group was composed of nine persons, seven of them European citizens who had lived in Europe for many years. They allegedly obtained the money for the funding of the crime by bank-robberies in Europe. If there are so strong “personal” and “material” links to one region – can it be justified to exercise self-defence on the territory of a State in which the underlying ideology has its cradle? Could Syria, the other way around, take armed measures in Europe claiming that many IS fighters and their material support come from Europe and that the European States do not take sufficiently effective measures against this flux of people and money to Syria?

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All these questions have not been addressed when self-defence was exercised in the cases mentioned above. It was within the discretion of the stronger States to make the choice between the countries where they wanted to exercise self-defence. The weaker States have to put up with it. However, the law should be equal for all. Therefore, if ever one wants to promote the concept of self-defence against non-State-actors one has to establish rules which regulate the exercise of self-defence in such situations. This must include proper criteria for the justification of military actions in the territory of another State. Otherwise the international rules will end where they came from: the law of the jungle.

Article 51 and the Realities of the Present Day World

Jochen Abr. Frowein*

1. Art. 51 contains only one condition for using self-defence. Self-defence is lawful where an armed attack occurs. Of course, in most cases this armed attack will be carried out by a state. However, already long time ago it was argued that also non recognised entities, so called *de facto* regimes, may cause an armed attack. This was discussed in United Nations Committees already in 1956. With the development of international terrorism the issue is much more relevant in 2016.

2. It has been shown that there is considerable state practice based on the understanding that where an armed attack is caused by a non-state actor self-defence is lawful. This practice is quite widespread as shown by *Christian Tams*. I consider the position taken by the Security Council after 9/11 as well as in the resolution no. 2249 of 20.11.2015 concerning the activities of the Islamic State (ISIS) in relation to Iraq and Syria to be quite relevant. This shows the Council's view that under those circumstances self-defence is lawful. I also believe that the express non-repetition by the International Court of Justice in the *Congo Case* of the dictum in the *Wall Opinion* is of great importance. After the criticism launched against the position that only states may cause an armed attack which can be countered by self-defence the Court did not repeat that dictum. It expressly left open the question under which circumstances self-defence against non-state actors is possible.

3. The most important question seems to be which groups can be seen as non-state actors in this sense and what sort of armed action is an armed attack. Isolated armed action in border areas are not armed attacks in this sense. However, where an invasion by armed forces takes place as by ISIS into Iraq from Syria the requirement of armed attack is fulfilled. The same is true where rockets with highly dangerous explosives are being fired from foreign territory. A coherent system of international law cannot operate a distinction between the following two scenarios. Where a submarine captured by non-state actors fires rockets from the high seas armed reaction is automatically possible without any rule of international law prohibiting that. As soon as rockets of a highly dangerous nature are being fired by

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non-state actors from foreign territory the same armed reaction must be possible. Art. 51 is the legal basis for this reaction.

4. I do not consider that any issue of attribution to the state from whose territory the armed attack is being launched is necessary. Where the territorial state immediately intervenes and stops the armed attack no issue arises because any action by the victim state would not be proportionate since the armed attack has been already ended. Where the armed attack continues Art. 51 is the basis for self-defence action. International law is a system under constant threat by unilateral action. However a proper interpretation of the legal rules must not contribute to unilateral illegal action by overlooking the realities of the present day world.

Article 51 – What Matters Is the Armed Attack, not the Attacker

*Karin Oellers-Frahm**

The problem of the exercise of self-defence according to Art. 51 of the Charter of the United Nations (UN Charter) against armed attacks of non-State actors raises mainly two interconnected problems. The first one concerns the question whether Art. 51 UN Charter does at all apply to armed attacks not originating from a state (a). If this question is answered positively the question arises of how to cope with Art. 2 (4) UN Charter which guarantees the right of territorial integrity and non-intervention into a foreign state (b). In a nutshell, my view on these questions (c) is the following.

a) The terminology of Art. 51 is not absolutely clear. As at the times of the elaboration of the Charter international law was clearly state-oriented it may be argued that self-defence was understood to be admissible only against an armed attack by a state. However, it may also be argued that the authors of the Charter were wise enough not to exclude situations in which an armed attack could also originate from a non-State actor and thus voluntarily did not refer to states with regard to the author of the attack, but only with regard to the victim of the attack.

In this context it has to be recalled that the Charter was the first international treaty providing for the prohibition of the use of force which until then was an undisputed right of sovereign states. The renunciation to use force had, however, to be counterbalanced by the concession that states have not to support attacks of a certain gravity and have not to keep inactive until the Security Council acts, but that in such situation they are empowered to react themselves, even by using force. Thus, the focus of Art. 51 refers to the definition of the term “armed attack”. If states suffer from an armed attack in the sense of Art. 51 they have the right to react by using force irrespective of who is the author of the attack, a state or a non-State actor.

b) If this reading is correct the question arises whether Art. 51 overrides Art. 2 (4), a question that characterizes the long-lasting discussions on humanitarian intervention and its justification. The traditional justification which is supported by international court decisions, in particular those of

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the International Court of Justice (ICJ) in the *Nicaragua* case, the *Wall* advisory opinion and the *Congo* and *Uganda* cases, refers to the law on state responsibility, namely the imputability of the acts of the non-State aggressors to the state from where they act. The harboring doctrine, the doctrine of unwillingness or incapability are referred to in order to justify humanitarian intervention as well as self-defence against non-State actors which usually implies a violation of the sovereignty and territorial integrity of the state from where the attacks originate. Such reading has some merit in particular with a view to Art. 21 Articles on State Responsibility (ASR) according to which measures taken in self-defence are justified and do not constitute a breach of international law, of course provided that the other prerequisites, in particular necessity and proportionality, are respected. But this reasoning which does, in fact, justify possible violations of Art. 2 (4) UN Charter, is based on the state-related interpretation of Art. 51 which seems too narrow to give Art. 51 the weight that it deserves. Self-defence is an “inherent right”, “droit naturel” in the French version, which is triggered whenever an armed attack occurs against a state irrespective from whom it originates and irrespective of questions of imputability to the third state. Its exercise is not dependent on any permission of the Security Council (SC) and until the SC takes measures to maintain international peace and security the individual state or several states collectively have the (primary) right to react. Consent is not necessary when the third state from where the attacks originate, is evidently unable to effectively restrain the armed activities of the non-State actors. What is at stake is the maintenance or restoration of international peace and security and whenever peace and security are endangered, even by a non-State actor, the remedies provided for in the UN Charter are applicable.

c) It is evident that this reading of Art. 51 may be criticized because it may lead to jeopardizing the prohibition of the use of force and thus one of the very basic principles of the United Nations Charter. This criticism is well founded in particular with a view to the fact that action of the SC is again very often prevented so that the use of force by a state in self-defence against an attack by a non-State actor may lead to overstretching the understanding of the term “armed attack” without being corrected by action of the SC. But possible abuse or misuse of rights cannot be a reason for preventing rights to be exercised and cannot have the effect that states have to suffer attacks from non-State actors without reacting merely because these actors are based on some states’ territory and not on the high seas or in the open space. In order to keep self-defence against non-State actors limited, which, and I want to stress this again, is a right flowing from Art. 51 UN

Charter, the most urgent task is to define what is an “armed attack” and to oppose armed attacks to “mere” terrorist attacks which do not *per se* constitute armed attacks in the sense of Art. 51. This is admittedly a difficult task but state practice, Security Council resolutions and court decisions in the aftermath of 9/11 can give some guidance. In addition, international criminal law can and should play a more active part in this context. In case of an armed attack by a state or a non-State actor the victim state is empowered under Art. 51 UN Charter to take the same measures as the SC would be competent to take under Chapter VII, Art. 39, 41 and 42 UN Charter. As the SC has already explicitly stated (in particular Res. 1368 [2001] and 1373 [2001]) that also attacks of non-State actors, not only those of states, may endanger international peace and security the measures provided for in Chapter VII including the right to self-defence may be taken also in case of an armed attack by a non-State actor.

The Right to Self-Defence Against Non-State Actors – Criteria of the “Unwilling or Unable” Test

*Irène Couzigou**

Some of the States involved in the fight against the Islamic State of Iraq and the Levant (ISIL) in Syria assert that they have a right to individual and/or collective self-defence for two reasons: because ISIL perpetrates armed attacks and because Syria is “unwilling or unable” to prevent the commission of those attacks.¹ The “unwilling or unable” test is not part of contemporary international law.² Indeed, State practice remains unclear as to the requirements for the implementation of this test, when it is applied to a State from which a non-State actor commits armed attacks, in the absence of any positive support of that State. This paper aims to present what those requirements should be.

A State has a customary obligation of due diligence to prevent the commission of unlawful activities from within its territory or any other area under its exclusive control against another State.³ Thus, a State must adopt all measures reasonably available to it aiming to prevent the continuation of armed attacks against another State, from any area under its exclusive control. In this author’s view, the territorial State or the victim State should assess if all possible means are resorted to in order to suppress armed attacks launched by a non-State actor from the territorial State’s confines.⁴ Indeed, to require that another entity determines whether a State applies its obligation of due diligence in preventing the misuse of its territory, would be too

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¹ Letter dated 23.9.2014 from the USA to the UNSC, UN Doc S/2014/695 (2014); Letter dated 31.3.2015 from Canada to the UNSC, UN Doc S/2015/221 (2015); Letter dated 9.9.2015 from Australia to the UNSC, UN Doc S/2015/693 (2015); Letter dated 24.7.2015 from Turkey to the UNSC, UN Doc S/2015/563 (2015); *D. Cameron*, Statement in the House of Commons on his response to the Foreign Affairs Select Committee (FAC) report on military operations in Syria, 2015 <<https://www.gov.uk>>.

² *O. Corten*, The Unwilling or Unable Test: Has it Been, and Could it Be, Accepted?, *Leiden Journal of International Law* 29 (2016), 780 et seq.

³ *The Corfu Channel Case*, ICJ Reports 1949, 22.

⁴ *A. S. Deeks*, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, *Va. J. Int’l L.* 52 (2012), 495.

time consuming and would thus undermine the rapidity of a response in self-defence by the victim State. In order to assess whether a State respects its obligation of conduct in addressing armed attacks from the area under its jurisdiction, the victim State should check: whether there has been a continuous pattern of armed attacks; whether the State criminalises the commission of armed attacks; whether the State conducts detailed investigations into those attacks; whether the State arrests, prosecutes, or extradites the authors of those attacks; whether the State complies with United Nations (UN) Security Council resolutions, if any, that sanction the authors of those attacks. A careful assessment of all these facts is needed before any determination can be made as to the “inability” of the territorial State.

If a State is “unable” to suppress, on its own, the perpetration of armed attacks by a non-State actor from within its territory or any other area under its exclusive control, in this author’s opinion, it must ask the victim State or other State(s) for assistance, or it must accept the assistance that may be offered to it.⁵ The request for assistance by the territorial State is viable as long as it is clear, free, and given by the government of the State. Such is the most effective authority in the State, able to represent it, nationally and internationally, independently from its legitimacy.⁶ If needed, the victim State must require from the territorial State to comply with its obligation to suppress armed attacks from its territory, when necessary in collaboration with it or other State(s). The territorial State has to agree with any international assistance that is, under the given circumstances, necessary and proportionate with the aim of preventing further armed attacks perpetrated from any area under its jurisdiction. This assistance could include the use of armed force.

If the “unable” territorial State fails to seek or accept assistance in the prevention of the perpetration of further armed attacks by a non-State actor from any area under its exclusive control, it is here argued that the State is “unwilling” to meet its obligation to prevent those attacks.⁷ If the territorial State no longer has a government able to control offensive non-State actors in its territory, it is *per se* “unable”. In those situations of an “unwilling” State or an “unable” failed State, the victim State should have a right to self-

⁵ In that sense: *K. N. Trapp*, Can Non-State Actors Mount to an Armed Attack?, in: M. Weller, *The Oxford Handbook of the Use of Force in International Law*, 2015, 695.

⁶ The USA could not ignore the explicit and free offer for collaboration made by the government of Syria in the fight against ISIL, for the reason that it did not want to be associated with the Al-Assad regime.

⁷ *K. N. Trapp*, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors, *ICLQ* 56 (2007), 147.

defence against the non-State actor. The action in self-defence must be necessary and proportional.⁸ Thus, it should target only the non-State actor, author of the armed attacks, and the level of force should be adapted to its objective, i.e. repelling the armed attacks.

If these *de lege ferenda* requirements in the implementation of the “unwilling or unable” standard are followed, a State could react in self-defence to armed attacks launched from a State that does not actively support them, in exceptional cases, when this seems reasonably necessary. An adequate balance would be struck between the territorial integrity of the State whose territory is used as a basis by a non-State actor for the commission of armed attacks, without any positive assistance of that State, on the one hand, and the security needs of the victim State, on the other hand.

⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 94, para. 176.

Humanising the Right of Self-Defence

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Non-state actors have occupied the landscape of *jus ad bellum* discourse for some time now, with the focus of the discussion occasionally shifting as a result of contemporary international events. Nowadays, the discussion focuses on whether self-defence against non-state actors may be exercised in the territory of another state without its consent. States and scholars have been increasingly resorting to the “unable or unwilling” test in this context, which allows self-defence to be invoked where a state (hereinafter: “the territorial state”) is either unwilling or unable to effectively repel an armed attack carried out from within its territory.

Although backed by decades-long practice, the “unable or unwilling” test has only recently attracted significant attention. Critics argue that it undermines the sovereignty of the territorial state as well as the prohibition on the use of force (enshrined in Art. 2 (4) of the Charter of the United Nations [UN Charter]), while proponents highlight the inherent right of any state to defend itself against armed attacks (acknowledged in Art. 51 of the UN Charter). Much of the debate tends to focus on the normative status of the test, and specifically on whether it is *lex lata* or *lex ferenda*. I would like to approach the issue from a different angle and focus instead on the assumptions underlying the various arguments, with the hope that doing so will reveal both their implications and where they fall short.

Critics of the test often emphasise that the territorial state is not responsible for the armed attack in question, and they consequently base their objection on two grounds. First, it is argued that self-defence can only be invoked vis-à-vis an actor if it had violated the prohibition on the use of force. As the territorial state has not violated this prohibition – because it is not “substantially involved” in the attack,¹ and because the attack cannot be attributed to it – the use of force in its territory is not covered by self-defence. I will call this *the symmetry argument*. Second, the critics claim that because the territorial state is not responsible for the attack it should not suffer the consequences attached to self-defence, namely infringement of sovereignty,

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¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 103 (June 27).

harm to persons and damage to infrastructure. I will call this *the unjustified effects argument*.

These two arguments merit serious consideration, and I shall address them one by one. As noted above, the symmetry argument assumes that self-defence may only be invoked vis-à-vis an actor which had violated the prohibition on the use of force. However, there is nothing in the Charter or in *jus ad bellum* generally that supports this assumption. While self-defence is indeed an exception to the prohibition to use force, the relationship between the two norms is not symmetrical; a violation of the prohibition to use force is not necessary for the right of self-defence to arise.² It is therefore unsurprising that Art. 51 refers only to the existence of an armed attack – regardless of the actor that had carried out the attack – and does not limit the application of the right of self-defence to actors of a certain type.³ Of course, this does not mean that the right is open-ended; its parameters are curtailed by requirements such as necessity and proportionality.

The unjustified effects argument is likewise problematic. By claiming that the territorial state is not responsible for the attack and should therefore not suffer the consequences of the response to an attack emanating from its territory, the argument essentially prefers the territorial state over the victim state. This preference seems arbitrary. If none of these states is responsible for the armed attack, why should the territorial state be preferred? After all, even if the territorial state is not to be blamed for the attack – and that is often not the case – the unjustified effects argument equally applies to both states.

Moreover, as the armed attacks carried out by non-state actors nowadays affect an increasing number of people, it is necessary to think of self-defence not only through a prism of abstract concepts such as sovereignty and territorial integrity but also by considering its effect on the lives and well-being of real individuals. Once we view self-defence this way, it becomes clear that any legal position we adopt effectively prefers the lives of certain individuals over those of others. Which lives should we prefer? I would like to consider three options and their humanitarian implications.

First, it is possible to prefer those residing in the territorial state, as the critics do, and leave the victims helpless. Alternatively, it is possible to pre-

² Even scholars who argue that armed attacks by non-state actors do not violate the prohibition on the use of force nevertheless support the invocation of self-defence against these same actors. See, for example: O. Corten, *The Law Against War*, 2010, 128 et seq.

³ This argument is widely used to explain why self-defence may be invoked against non-state actors as well as against states. As used here, however, it indicates that self-defence may be invoked not only vis-à-vis the author of the attack but also vis-à-vis other relevant parties, including the territorial state.

fer, completely and unconditionally, the victims of the armed attack and allow the *immediate* exercise of self-defence. Finally, it is possible to strike a middle ground, as the “unable or unwilling” test does, and adopt a *varying* preference: The territorial state is accorded the opportunity to repel the armed attack by itself, but if it is unable or unwilling to do so, the victim state is allowed to act subject to the usual conditions for self-defence.

Each of these three options prefers the citizens of one state over the citizens of another, and each preference must be justified convincingly. Arguably, the “unable or unwilling” test justifies its own preference more persuasively than the other two options, and, by not rendering victims of armed attacks helpless, the balance it strikes better captures the underlying rationale of self-defence.

At the same time, the three options are hardly exhaustive. In a world where conflicts vary greatly, any proper interpretation of self-defence must pay attention to details. For example, it is difficult to see why states *unwilling* to repel attacks should be treated the same as states *unable* to do so. It is also unclear whether the law should be as restrictive in situations where the defensive response exclusively affects lawful targets with no humanitarian costs. Differences in facts should translate to differences in law, and while we do not yet have a sufficient level of nuance in the law, we should nevertheless strive to achieve it.

Embracing the Uncertainty of Old: Armed Attacks by Non-State Actors Prior to 9/11

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The Heidelberg workshop of early November 2016 focused on the proper understanding of the term “armed attack” (which some participants sought to limit to attacks attributable to another State, while others argued that self-defence could justify the use of force abroad in response to attacks by non-State actors). While reflecting the current division of opinion between so-called “restrictivist” and “expansionist” approaches, for the most part debates proceeded from an accepted starting point. Most participants, including the workshop’s organisers, took for granted that traditionally, self-defence only covered responses against armed attacks by another State – hence repeated encouragements to focus on recent practice (notably recent strikes against the Islamic State of Iraq and Syria [ISIS] in Syria), with a view to assessing whether the traditional understanding had already been expanded.

To put the question in those terms certainly simplifies the lines of argument. What is required is an assessment of the new developments, which may or may not be sustained enough to have led to a change in the law. The present, messy, situation is assessed against a clear background – the “old days” when the law was certain.

The problem is that it wasn’t. The workshop’s focus on recent practice, and the allegedly *new* uncertainty, obscures the fact that the scope of self-defence has been discussed throughout the Charter era. Whether States can use force in response to armed attacks by non-State actors operating from abroad is not a new issue that suddenly became relevant after 9/11. Views have no doubt changed over the past fifteen years, as more States have invoked, or endorsed the invocation of, self-defence against attacks by non-State actors. However, change is more gradual than is usually admitted.

Three examples can serve to illustrate this modest point.¹ All of them relate to incidents involving cross-border uses of force during the Cold War

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¹ The following draws on points made in my contribution to the Max Planck Trialogue book (*M. E. O’Connell/C. Tams/D. Tladi*, Max Planck Trialogues on the Law of Peace and War, Vol. I, Self-Defence Against Non-State Actors [A. Peters/C. Marxsen eds.] – forthcoming 2017), which in turn relies heavily on *C. Kress*, *Gewaltverbot und Selbstverteidigungs-*

era; and all of them suggest that the allegedly new uncertainty is not that new after all.

France's raids into Tunisia during the Algerian war of independence are cases in point. They were deemed necessary to "assurer [la] légitime défense" of French troops against Front de Libération Nationale (FLN) commandos operating from Tunisia: having harboured the FLN, Tunisia (said France) bore responsibility as an "accomplice" and had to accept armed responses on its territory.²

During the early stages of the Kashmir conflict, India had taken the same view. In its view, Pakistan's support for armed bands crossing into Jammu and Kashmir amounted to an "act of aggression against India"; in response, India claimed to be "entitled, under international law, to send [its] armed forces across Pakistan territory".³

During the late 1970s, Morocco relied on essentially the same argument in the West Sahara conflict. Following attacks by Polisario forces operating from within Algeria, Morocco claimed a right to "poursuiv[r] ses agresseurs sur *et hors son territoire*", i.e. into Algeria, which was accused of having armed, financed and sheltered Polisario fighters.⁴

These examples are reflective of a significant body of international practice of the Cold War era: Practice that saw States rely on self-defence to justify forcible responses against armed attacks that could not be attributed to another State, often with some level of (tacit) international approval.

Very little of this features in the contemporary textbooks. For the most part, the pre-9/11 practice is reduced to claims by a trio of States – South Africa, Portugal and Israel, at times with Rhodesia as an adjunct member: States that sought to justify the use of force in defence of highly unpopular goals (such as colonialism, apartheid and occupation) and whose claims, according to the mainstream narrative, were "quasi-systematically condemned".⁵ (The trio's actions indeed often were, but for a range of reasons, among which the broad construction of the "armed attack" criterion was by no means dominant.) And so, in a peculiar form of hindsight bias, the state-centric construction of self-defence, requiring an "armed attack ... from an-

recht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater, 1995.

² See the references in A.F.D.I. 6 (1960), 1068-69; and A.F.D.I. 4 (1958), 809.

³ SCOR, 3rd year, Nov. 1948 (Suppl.), at 139, 143.

⁴ See UN Doc. S/13394 (1979); and statements in SCOR, 34th year, 2151st meeting, at 3.

⁵ P. Klein, *Le droit international à l'épreuve du terrorisme*, RdC 321 (2006), 375 ("condamnations quasiment systématiques").

other State”, in retrospect is said to have been “*generally accepted* ... for more than 50 years”.⁶

The point in raising all this is not to argue that India’s, Morocco’s or France’s claims reflected a general view of the law. They did not. Nor is it to make a “post-truthian” point that all views on self-defence are necessarily of equal value. Broad readings of self-defence were not frequently advanced, and the debates leading up to General Assembly (GA) Res. 3314 (XXXI) showed that, at least in broad framework texts, the international community did indeed prefer to settle on a largely state-centric reading of self-defence.

And yet, the examples are indicative. They suggest that there was room for nuance, even in the Cold War era. Room for nuance in assessing claims of self-defence against “private”, un-attributable, attacks, when such claims were not employed in defence of dubious ends (colonialism, apartheid and the like). Room for nuance when, on the facts, the threat emanating seemed genuine, and the response proportionate. Room for nuance, in fact, even in GA Res. 3314 (XXXI), pursuant to whose famous, malleable, Art. 3(g), a State’s “substantial involvement” was sufficient to turn private attacks into acts of aggression. (No word on attribution in GA Res. 3314.)

While the uncertainty of old does not feature prominently in current debates, it should be embraced. It is submitted that to embrace it would affect the current debate in three relevant ways. First, it would undermine the charmingly simple, but simplistic, view that “expansionist” readings of self-defence are a recent phenomenon. They are not; they have been around since 1945. Second, it would affect how the question of self-defence against non-State actors is approached. Rather than asking whether an initially narrow concept is now being expanded, a fuller historical account (one that embraces nuance) would presumably proceed from an indeterminate notion of “armed attack”. And it would accept that that notion (like so many other Charter-based notions) has been shaped in the subsequent practice of treaty parties – which often favoured state-centric readings, but hardly saw them “generally accepted”.

And third, embracing the uncertainty of old could raise awareness for the dynamic nature of the *ius ad bellum*. The “quantum leap” of 1945, when “fifty States, [then] representing the vast majority of the members of the international community”,⁷ renounced their right to use military force in

⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136, Sep. Op. Kooijmans, at para. 35. (Judge Kooijmans himself interpreted the term “armed attack” differently.)

⁷ See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Reparations opinion, ICJ Reports 1951, 171, at 185.

their international relations, has been followed by decades of normative consolidation, adjustment and contestation. Debates about the scope of self-defence, and about the proper reading of the “armed attack” criterion, form part of that broader process. They have become particularly acute of recent – perhaps they are the current equivalent to the 1970s’ debates about wars of national liberation. But they were there from the start, and the contemporary debate would gain if it acknowledged as much.

“Proceduralising” Article 51

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The unilateral use of force by a State against a non-State actor in another State is nowadays routinely justified by invoking Art. 51 of the Charter of the United Nations (UN Charter).¹ The preference for a Charter-based exception has moved alternative legal bases to the background.² The reliance on Art. 51 in a non-State actor context has provoked intense debate whether self-defence is indeed available as a legal basis for such uses of force, and if so under what exact conditions and threshold criteria. In interpreting the applicable law, there are, as is well-known, two main camps, referred to as the “expansionists” and the “restrictivists”.³ Those two camps seem to become ever more entrenched in their positions without much appetite for compromise.

In light of this state of affairs, it may be useful to complement the substantive debate with some thoughts of a more procedural nature. It is suggested that there is merit in reflecting on processes that could, for instance, deepen the reporting obligation of Art. 51,⁴ thereby insisting that this requirement goes beyond mere notification also demanding that States make formal articulations on the scope of self-defence in concrete situations and that they make an effort to substantiate claims of self-defence, both legally and factually. Hence, and somewhat analogous to the sophisticated architecture that has been designed in the past decades in UN sanctions and coun-

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¹ N. Lubell, *The Extraterritorial Use of Force against Non-State Actors*, 2010, 74.

² C. Tams, *Self-Defence Against Non-State Actors*, in: A. Peters/C. Marxsen (eds.), *Max Planck Trialogue on the Law of Peace and War*, forthcoming.

³ As noted by *Christian Tams*, see note 2, with further references to two relevant LJIL symposia edited by *J. Kammerhofer*, *The Future of Restrictivist Scholarship on the Use of Force*, LJIL 29 (2016), 13 et seq. and *T. Christakis*, *International Law and the Fight Against ISIS*, LJIL 29 (2016), 737 et seq.

⁴ For an analysis on the status of the reporting obligation, see further *Y. Dinstein*, *War, Aggression and Self-Defence*, 5th ed. 2011, 239 et seq., with reference also to the ICJ’s statement in the *Nicaragua* Judgement that, “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”. ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), Judgement of 27.6.1986, para. 200. Also see, *J. A. Green*, *The Article 51 Reporting Requirement for Self-Defense Actions*, *Va. J. Int’l L.* 55 (2015), 563 et seq.

ter-terrorism context, some thinking should go into the creation of bodies or platforms, and ideally perhaps even panels of experts, at Security Council level that offer a more elaborate institutional environment to evaluate claims of self-defence. The underlying idea would be that the creation of a space for formal self-defence discourse encourages States, including third States, to be explicit in their position on the scope of self-defence. This will foster processes of internalisation and it may also assist in operationalising the principles of necessity and proportionality in a non-State actor setting.⁵ Over time, such processes can thus contribute to establishing or consolidating international consensus over the applicable rules on self-defence.⁶

In line with the exceptional nature of self-defence, it has repeatedly been emphasised that States invoking Art. 51 of the UN Charter should provide appropriate justification, especially also in a non-State actor context.⁷ Indeed, the *Leiden Policy Recommendations*, which offer expert perspectives aimed at clarifying the law and which highlight areas in which greater consensus needs to be pursued, underscore this obligation of States to justify their actions. As the excerpts below demonstrate, the Recommendations insist on several occasions on the burden of States using force in self-defence to make their case. They state:

“Self-defence may also be necessary if the armed attack cannot be repelled or averted by the territorial State. States relying on self-defence *must therefore show* that the territorial State’s action is not effective in countering the terrorist threat.”

“As the application of [the principle of necessity and proportionality] is heavily fact-dependent, States using force in self-defence should be prepared to make publicly available information and data that will support the necessity and proportionality of their conduct. International law does not prevent third States from scrutinizing the necessity and proportionality of self-defence operations from requesting further evidence.”

“Any use of force in anticipatory self-defence should be justified publicly by reference to the evidence available to the State concerned; the facts do not speak for themselves, and the State should explain, as fully as it is able to do, the nature of the threat and the necessity for anticipatory military action.”⁸

⁵ Effectively, this idea builds on *T. M. Franck*, On Proportionality of Countermeasures in International Law, *AJIL* 102 (2008), 715 et seq.

⁶ See *Leiden Policy Recommendations on Counterterrorism and International Law*, NILR 57 (2010), para. 28.

⁷ *Leiden Policy Recommendations* (note 7), para. 36.

⁸ *Leiden Policy Recommendations* (note 7), paras. 42, 44, 48 respectively (emphasis by author).

These excerpts principally focus on the requirement to factually substantiate a claim of self-defence. As a preliminary step though, States relying on self-defence should also be encouraged to construct their justifications in a legally plausible sense that adheres to the strictures of Art. 51, and if the situation so requires, to tailor those to the particularities of self-defence against non-State actors.⁹ Arguably, an enabling environment could entice States in this regard and it could similarly animate third States to challenge or scrutinise claims of self-defence. To be more concrete, proceduralising Art. 51 could include some of the following:

- Holding a routine debate once Art. 51 is invoked.
- The set-up of a database collecting Art. 51 letters.
- Developing best practices on when exactly and how often letters should be submitted.
- Developing best practices on what letters should contain.
- The creation of a subsidiary body that collects and monitors submission of Art. 51 letters.
- The creation of panels of experts to gather, examine and analyse relevant information from States, including from third States, and possibly to make *prima facie* evaluations.

Although some of these measures may be modest, while others too bold, it is still submitted that contemplating procedures and a more refined institutional structure that would facilitate formal self-defence discourse does constitute another avenue, of a more procedural nature, that should be explored and that could ultimately help to reach greater consensus on the law of self-defence, and particularly also the law of self-defence against non-State actors.

⁹ In their Article 51-letters, States have a tendency to focus on the nature of the initial armed attack, rather than explaining and justifying their own actions, see *A. Green* (note 4), 602 et seq.

Doctrinal Alternatives to Self-Defence Against Non-State Actors

Antonello Tancredi*

Since the obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States is a “best efforts” obligation,¹ what if the host State, despite all its efforts, proves to be simply unable to stop terrorist activities on its territory resulting in military attacks against other States?

A preliminary problem is that it is not always easy to draw a clear dividing line between lack of effort and inability. However, recent practice (concerning, for example, Lebanon in 2006, Somalia in 2008, and Mali in 2013) still shows that also a State that acknowledges its inability to guarantee internal and international security can, as a last resort, fulfil its *alienum non laedas* obligation by opening up to international cooperation. If, conversely, the host State refrains from any form of international cooperation, it may be questionable whether its authorities have made their “best efforts” to behave in accordance with the diligence which is due under general international law. On the other hand, their consent should always be sought, precisely in order to stimulate this cooperation.

Having said that, what if the host State makes every effort without result? In this case, some authors² have referred to a classic institute of Roman law, the *negotiorum gestio*, describing it as a general principle of law recognized by civilized nations. One possibility, then, could be to present *gestio* as a sort of fall-back argument to cover, at least, the constellation of cases of inability. The concept of *negotiorum gestio*, inspired by principles of solidarity and cooperation, must obviously be adapted to international law. Today, given the ongoing structural evolution of the international legal order from a prevalently individualistic configuration towards models of public management of its functions and interests, the rationale of the *negotiorum gestio* – which since the time of Justinian is to be found in reasons of “general convenience” and social protection – lends itself more easily to be trans-

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¹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, 221 and 225.

² See A. F. Panzera, *Attività terroristiche e diritto internazionale*, 1978, 107 et seq.

posed from domestic law into the international legal realm. Ideas of *gestio*, more specifically, can be useful to conceptualize a possible form of unauthorized intervention in the sovereign sphere of a State that is unable to discharge its responsibilities under international law. This constellation of cases, in fact – such as when the intervenor discharges a duty of the principal whose performance is in the public interest – is contemplated by both civil and common law legal orders, albeit under different names and legal categories.³

Indeed, being unable to discharge its duties under international law, the “principal” State fulfils the criterion of “*absentia domini*”, which must be interpreted not only as a physical lack, but more generally as the impossibility to fulfil the principal’s obligations. The test of spontaneity would also be met, since in our hypothesis the host State’s government has not invited foreign intervention. Relatively less problematic is also the fulfilment of the “*utiliter coeptum*” criterion, provided that this element of the initial usefulness of the unsolicited intervention is interpreted objectively, that is, in accordance with the “interests of society”⁴ rather than with the principal’s subjective interests or aspirations.

Having said that, we arrive at the main obstacle to configuring a *negotiorum gestio* in the cases at hand, that is, the altruistic nature of this institution. *Gestio*, at least in its pure form, implies that action must be taken “for” another, whereas in the cases under consideration the intervening State acts primarily to protect itself. Nonetheless, the obstacle might prove not to be insurmountable. Where *gestio* doctrines are applied to cases in which the obligation discharged by the *gestor* in substitution of the *dominus* is one in whose performance there is a public interest, the latter becomes predominant and overrides the principal’s preferences. This happens in different ways. Firstly, unlike other cases of *gestio*, several national legislations deem the possible prohibition to intervene established by a *dominus* irrelevant. Secondly, there is no discussion of the principal’s *own* interest, since it *must* be in its interest that its duties be discharged by an unauthorized intervenor. Thirdly, what really matters is the fulfilment of the collective interest that law be respected.

When it comes to transposing the elements described above into the international legal order, two solutions are possible. Either to identify the *dominus* with the unable host State replaced in the discharge of its sovereign

³ With reference to Anglo-American law, see *J. P. Dawson, Negotiorum Gestio: The Altruistic Intermeddler*, Harv. L. Rev. 74 (1961), 817, 1073; *P. B. H. Birks, Negotiorum Gestio and the Common Law*, Current Legal Probs. 24 (1971), 110.

⁴ *Rogers v. Price* (1829), The English Reports 148, 1080 et seq.

functions by the unauthorized intervenor, in which case it could be argued that the *gestor* acts simultaneously in its interest (as an “injured” State) but also, and perhaps most importantly, *uti universi*, on behalf of the whole international community, in order to protect shared interests such as peace, security, and fundamental human rights from the threat posed by terrorism. On the other hand, it is also possible to prospect an even more unorthodox solution, namely to consider that the real *dominus* at stake here is not the host State, but the whole international community (primarily the United Nations [UN]), of which the host State is a member, when and if unable to intervene promptly to stop a terrorist aggression.

Be that as it may, i.e., whatever use of *gestio* ideas can be admitted under international law, they seem to rest on a rationale which is not too dissimilar from justifications based on necessity (in fact, in US and English law, the same effects of *gestio* are sometimes reached by invoking the institute of the *agency of necessity* or the law of maritime salvage in order to preserve human life or health). *Gestio* and necessity have in common, for instance, the absence of any unlawful conduct attributable to the State undergoing the unauthorized intervention; the presence of a grave and imminent danger for the protection of interests deemed worthy of legal protection; a certain measure of urgency which makes immediate action imperative.

It is also rather evident that the remedy presented here responds to a “substitutive” logic, which is the same advocated by other authors⁵ as informing a kind of “self-help” rather than “self-defence”, that can be invoked in a varied constellation of cases, namely when a State *is* responsible for violating the *alienum non laedas* obligation.⁶ In this second situation,

⁵ A. Verdross, *Völkerrecht*, 5th ed. 1964, 429 et seq.; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. 1967, 352.

⁶ Substitutive self-help is most certainly not codified in the UN Charter. On the other hand, however, it might be argued that nor is it entirely excluded (at least when the threshold of gravity of an armed attack has been met). In fact Art. 51, which is the relevant *lex specialis* in this field (that is, the place to look for a *clear* intention to dispense with the pre-existing principles of customary international law to which the same provision refers), does not specify who the perpetrator of an armed attack must be. If this lacuna is not sufficient to prove the invocability of Art. 51 as a conventional norm against non-State actors (because the reference to inter-State relations must be deemed implicit in the whole system of the UN Charter), neither does it show a clear willingness to contract out from a previously existing – or, at least, so the argument runs – form of self-help regulated by general international law. One could simply think that, for obvious historical reasons, the problem of non-State actors was not of paramount importance in 1945. If this is true, then the only theoretical possibility available to support the continuing legality of substitutive intervention rests upon general international law, and, more precisely, on the possibility of tying together episodes from pre-1945 practice with (some) post 9/11 extra-territorial interventions against non-State actors. And also in this case – at least this is the present author’s opinion – we could at best speak of a trend that

the general idea is that a State cannot claim full respect for its sovereignty as a right if it does not fulfil the functions that come with that same sovereignty as a duty.⁷ If these functions of protection of other States' rights are not fulfilled, then, the international community, or, if this is not possible, the victim State directly, could take over from the negligent local authorities in performing their *law enforcement* functions. Certainly, in the case of *negotiorum gestio*, protection of the special interests of the host State should play a more prominent role. It can be imagined that this could have an impact on the need to seek its consent and cooperation more actively and at all times, or to apply the criteria of necessity and proportionality more strictly. Whether this makes a huge difference remains to be seen. A possible advantage of this "substitutive" logic, however, is that the triangular relationship existing between a territorial State, an irregular group operating from this State, and a victim State targeted by this group, rather than being forced into a legal category, such as "self-defence" under Art. 51 of the Charter of the United Nations (UN Charter), which is based on a binary logic, focused on attacker/target identity, and seemingly codified so as to apply to interstate relationships, would (also) become a more traditional bilateral relationship between the host and the targeted States, based on the concept of the substitution of functions. Within this legal context, the private actors' conduct would mostly be configurable as a fact.

Seen from the vantage point of State sovereignty, the adoption of a substitutive approach risks blurring any distinction between the consequences of both lawful and unlawful behaviour. Seen from a more communitarian perspective, however, the view may change. Effectiveness of power is a responsibility towards the entire international community, not only a fact or an exclusive right. A temporary inability to function as a sovereign, or a lasting absence of control over what used to be sovereign spaces are situations which can endanger legally protected interests, and, consequently, nurture a demand for appropriate remedies. Whether these remedies are provided for, as is desirable, through the functioning of the UN collective security system, or only through consenting intervention, or rather by way of unilateral intervention is often a matter of politics, urgency, and contingency. From a realist perspective, one cannot entirely exclude the existence of a twilight zone between legality and illegality. Radical as it may sound,

awaits further confirmation and generalization in practice. In this regard, however, one thing of importance from a methodological standpoint – but all too often overlooked – is that in para. 176 of the *Nicaragua* judgment, the ICJ seemed to admit the theoretical possibility of the existence of norms regulating intervention and use of force *outside* the UN Charter.

⁷ *Island of Palmas Case (Netherlands v. USA)*, RIAA 2 (1928), 839, and *Affaire des biens britanniques au Maroc espagnol (Espagne c. Royaume-Uni)*, RIAA 2 (1925), 641 et seq.

illegality itself can turn out to be a residual mechanism which enables the very legal order to perform its functions and to protect the collective interests of the community regulated by it. This can happen more easily if some fundamental limits (such as necessity, proportionality, human rights, *ius in bello*) are respected in such a way as to minimize the consequences of a doubtful legality/illegality and thus more easily induce tolerance, acquiescence, or even (more or less tacitly) cooperation on the part of the injured State.

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Self-Defence Against Non-State Actors – A Practitioner’s View

*Sir Michael Wood**

Lawyers advise on law, not policy. A lawful use of force is not necessarily wise; it may be disastrous. And, in the eyes of some, an unlawful use of force is not always bad. But these are not matters for the legal adviser, acting as such. Those giving legal advice need to distinguish between law and policy if their advice is to be respected. They may hold strong views, based on personal or moral beliefs, but that should not affect the legal advice. There is no room for lofty claims about the one true meaning of Art. 51.

A lawyer advising a Government whether or not force may lawfully be used in particular circumstances needs a clear view of the applicable international law on the use of force (the *jus ad bellum*). He or she cannot simply say that the law is unclear, or controversial, or merely a “process”. Clear advice has to be given, in light of such facts as are known at the time. Moreover, such advice may need to be given in light of the Government’s established position on the matter.

Art. 51 of the Charter of the United Nations (UN Charter) cannot be viewed in a vacuum. It needs to be interpreted in light of State practice, not least recent events such as the struggle against Da‘esh. The last couple of years have seen some interesting practice on familiar issues.¹

The present comments address some points that arose in our discussion about whether the inherent right of self-defence recognised in Art. 51 entitles a State to defend itself against attacks by non-State actors within the territory of a third State that does not bear responsibility for the attacks.

- Can an attack by a non-State actor be an “armed attack” within the meaning of Art. 51? There is no textual basis in Art. 51 for limiting self-defence to attacks by States. A “brief and opaque”² passage in the *Wall* Opinion has sometimes been invoked as authority for the proposition that to give

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¹ M. Wood, The Use of Force in 2015 with Particular Reference to Syria, Hebrew University, Jerusalem, 5.1.2016, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-05, <<http://papers.ssrn.com>>; M. Wood, The Use of Force Against Da‘esh and the *jus ad bellum*, Asian Yearbook of Human Rights and Humanitarian Law (forthcoming, 2017).

² C. Gray, The International Court of Justice and the Use of Force, in: C. Tams/J. Sloan (eds.), The Development of International Law by the International Court of Justice, 2013, 237, at 259.

rise to a right of self-defence an armed attack has to be launched by a State.³ The same goes for a “not altogether clear” passage in *Armed Activities*.⁴ Yet it seems improbable that the Court intended this; rather, it left the question open.

- Is it necessary to find that the armed attack is imputable to the territorial State, in accordance with the rules of international law on State responsibility? On the facts of *Nicaragua*, the Court applied the test in Art. 3 (g) of the 1974 Definition of Aggression, but that does not preclude other approaches. There is no reason to suppose that Art. 3 (g) was intended to establish the sole applicable test (see Art. 6, which is often overlooked).
- If one looks beyond Art. 3 (g), what is the test to be applied? There is considerable support in State practice and writings for the “unwilling or unable” test, which has a long and principled pedigree.⁵
- How strong the legal basis has to be before a State embarks upon a use of armed force – or assists another State to use force? This is ultimately a policy question. But lawyers can and should advise both on the strength of the legal arguments, as well as on the risks inherent in acting on the basis of a “reasonable”, or “arguable” or “reasonably arguable” case.⁶
- States acting in self-defence need to be ready to explain the legal and factual basis for their actions. In addition to the immediate reporting requirement under Art. 51 of the Charter, a State which has used armed force, or assisted another State to do so, may be required, at least after the event, to demonstrate that the facts as known to it prior to the use of force were such as to justify, as a matter of international law, the resort to force under

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at 194, para. 139.

⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, at 223, para. 147. The description come from Judge Kooimans’ Separate Opinion, *Democratic Republic of the Congo v. Uganda* (note 4), 311, para. 20.

⁵ See A. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, Va. J. Int’l L. 52 (2012), 483 et seq.; E. Wilmsburst, The Chatham House Principles of International Law on the Use of Force in Self-Defence, ICLQ 55 (2006), 963; Leiden Policy Recommendations on Counter-Terrorism and International Law, NILR 57 (2010), 531; also published, with background studies, in L. van den Herik/N. Schrijver, Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges, 2013, 706 et seq.; D. Bethlehem, Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors, AJIL 106 (2012), 770 et seq.

⁶ M. Wood, The International Law on the Use of Force. What Happens in Practice?, I.J.I.L. 53 (2013), 345, at 355 et seq.

the circumstances.⁷ This might happen in a court of law, at the United Nations, in parliament, or before an inquiry.

In short, Government lawyers advising on use of force issues need to take account of their Government’s practice and previously expressed views. The law indeed may be the least contentious aspect of the advice. The main problem is often to ascertain and assess the facts.

⁷ Leiden Policy Recommendations (note 5), paras. 44 and 48. See also *M. Wood* (note 6), 350; *F. Berman*, *The UN Charter and the Use of Force*, *Singapore Year Book of International Law* 10 (2006), 9, at 14.

Intertemporality and Self-Defence Against Non-State Actors

Leena Grover*

At the first Max Planck Trialogue, participants were shuttled back and forth between 1945 and the present day in a virtual TARDIS. Those arguing that international law prohibits States from using force in self-defence against non-State actors on the territory of another State pointed to the drafting history of Art. 51 of the Charter of the United Nations (Charter), the historic backdrop against which the Charter's drafters worked, and intellectual traditions that by 1945 had rejected the just war doctrine. Those taking a permissive view drew our attention to the subsequent interpretive practice of States and United Nations organs, considered new realities – of terrorism involving weapons of mass destruction, failed States and a collective security system that has not responded effectively to certain threats to peace – and emphasised legal concepts such as attribution, necessity and proportionality, which have gained traction in recent years. Despite so many arguments hinging on particular timeframes, a discussion of the concept of intertemporality was conspicuously absent. No one mentioned the TARDIS.

When interpreting Art. 51 of the Charter, Art. 31(3)(c) of the Vienna Convention on the Law of Treaties (Vienna Convention) provides that any relevant and applicable rules of international law must be taken into account. To determine applicability, Arts. 31-33 of the Vienna Convention must be applied to answer the following intertemporal question: Did the Charter's drafters intend Art. 51 to be interpreted in light of relevant international law in 1945¹ or at the time an alleged act of self-defence against a non-State actor occurs?² Of course, along with all other interpretive aids, subsequent practice may be used to determine this presumed intent.³

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¹ Intertemporality allows for a third temporal reference point, namely, the date of State accession to a treaty: *Aerial Incident Case (Israel v. Bulgaria)* [1959] ICJ Rep. 127, 142 et seq.

² For the ILC's latest commentary on the concept of intertemporality, see Report on the Work of the Sixty-Eighth Session (2016), UN Doc. A/71/10, at 180 and the subsequent commentary (ILC Commentary).

³ ILC Commentary (note 2). See also 180 et seq. for the concept of presumed intent.

If Art. 51 is to be interpreted against the backdrop of static or contemporaneous international law, meaning as it existed in 1945,⁴ this would preclude reliance on any relevant custom, treaties or general principles that developed at a later date (e.g. laws on aggression and State responsibility). If the applicable timeframe is when an alleged act of self-defence occurs, relevant international law up to the date of the incident must be taken into account in the evolutive interpretive process under Art. 31(3)(c).

For the many who rely on subsequent practice that does not evidence custom as an aid to interpreting Art. 51 of the Charter, what does the principle of intertemporality have to say about this? If subsequent practice in applying the Charter establishes States Parties' agreement on how to interpret Art. 51, this practice must be taken into account under Art. 31(3)(b) of the Vienna Convention as an authentic interpretive aid evidencing the objective intentions of States Parties.⁵ But what happens, as is possibly the case with self-defence against non-State actors, if the practice of States Parties falls short of establishing this agreement? Then Art. 31(3)(b) is not in play and subsequent practice falls to be considered under Art. 32 of the Vienna Convention as supplementary means of interpretation that may be taken into account. Art. 32 is invoked to confirm an interpretation resulting from an Art. 31 analysis or else, following this analysis, to resolve any lingering ambiguity, manifest absurdity or manifest unreasonableness.

In a recent report, the International Law Commission (ILC) stated that there are at least four factors to consider when weighing subsequent practice in the interpretive process – its clarity and specificity as well as whether and how it is repeated – but expressly refrained from commenting on “when and under which circumstances such practice can be considered” under Art. 32.⁶ Assuming subsequent practice may be considered under Art. 32 when interpreting Art. 51 of the Charter, what is the appropriate weight to give it and this provision's drafting history should the two supplementary aids conflict? It is here that the intertemporal analysis again seems relevant. If it supports a static interpretation of Art. 51, relying heavily on subsequent practice while ignoring contemporaneous supplementary aids such drafting history seems disingenuous. It seems equally inapposite to give little or no weight to subsequent practice if an evolutive interpretation of Art. 51 is the presumed intent of the Charter's drafters.

⁴ I am unable to take a position on this here.

⁵ ILC Commentary (note 2), at 132 and the subsequent commentary. The same is true of subsequent agreements under Art. 31(3)(a) Vienna Convention.

⁶ ILC Commentary (note 2), at 188 and 192.

Finally, it is important to recall what an intertemporal analysis cannot support in light of the many *jus cogens* assertions that were made at the Trialogue. If the *jus cogens* status of some part of the collective security system established by the Charter is proven,⁷ that which is *jus cogens* is a “norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.⁸ Thus, intertemporal analysis favouring an evolutive interpretation cannot support *jus dispositivum* under Art. 31(3)(c) or subsequent practice under Art. 32 of the Vienna Convention being invoked to derogate from or modify a *jus cogens* norm in the Charter.

While the Trialogue attendees are unlikely to agree on the applicable international legal timeframe for interpreting Art. 51,⁹ we can hopefully agree that it is important to expressly carry out an intertemporal analysis and accept the principled consequences that may follow.

⁷ I am unable to comment here on *jus cogens* claims regarding Arts. 2(4) and 51 of the Charter and their relationship to one another.

⁸ Art. 53 Vienna Convention.

⁹ For the view that the Charter is generally subject to an “evolutionary dynamic interpretation”, see for example S. Kadelbach, Interpretation of the Charter, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, Vol. I, 2 Vols., 3rd ed. 2012, 71 et seq., at 79. For support of the contemporaneous view, see I. Brownlie, *International Law and the Use of Force by States*, 1963, at 274: “It is possible that the terms in which the right of self-defence is defined in Article 51 are much closer to the customary law as it existed in 1945 than is commonly admitted” (original emphasis).

Diverging Interpretations of Individual State Practice on Self-Defence Against Non-State Actors – Considerations for a Methodological Approach

Carl-Philipp Sassenrath*

I. The Significance to Interpret Individual State Practice

Whilst the scholarly community agrees that much disagreement exists about the general methodology for concluding a change in the law on self-defence through either customary or a re-interpretation of United Nations (UN) Charter law, it is regularly overlooked that the controversy extends to even more fundamental stages in the legal process: The identification of individual instances of state practice and, more importantly, the interpretation with regard to the *opinio iuris* expressed in those individual instances.

The more diverse opinions on the meaning of general state practice are, the more important it is to offer an in-depth analysis of practice – starting at the individual level. In the face of more available practice and greater variation of views expressed, the response by scholars cannot be continued simplification of the analytical process. “Expansionists” and “Restrictivists” can be found equally guilty of bending the meaning of individual instances in their favour: The former prematurely categorise practice when it was in fact characterised by a great deal of ambivalence; the latter tend to over-interpret practice when it actually abstained from taking a distinctive view.

As an example, portrayals of German state practice relating to the “unable/unwilling” doctrine in the self-defence measures against the so-called Islamic State (IS; also known as *Da’esh*) show how individual state practice is interpreted differently (II.). This calls for a discussion of general principles for the interpretation of individual practice and the sources from which a framework for such principles might arise (III.).

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II. An Example: German State Practice on *unwilling/unable*

Drawing on one or more of the available sources, scholarly comments have interpreted the German practice on self-defence against IS as endorsing, implicitly supporting or as offering a more differentiated view. *Corten*, only pointing to a passage from the German letter to the UN¹ and offering no further interpretative comment, concludes that “Germany invoked it [the ‘unable and unwilling’ test] implicitly”.² *Ruys/Ferro*, referring to both the parliament mandate for the deployment of German forces to Syria³ and the German UN letter, state that the German position “can be read as endorsing the ‘unable and unwilling’ test”.⁴ *Starski* offers the most comprehensive investigation of the material available.⁵ She is thereby able to extract a much more differentiated picture, concluding that at different times different views have been presented that therefore do not allow for a clear-cut interpretation of the *opinio iuris* presented by Germany on the matter of “unwilling/unable”.⁶

For the purposes of this short contribution it is not relevant to initiate a broader discourse about the “right” interpretation of German practice but to notice that diverging interpretations exist on a matter as seemingly simple as an individual instance of practice by one state. This provokes questions about what can be done on a methodological level to contribute to consistency and sustainability in the interpretation of individual practice.

¹ UN Doc. S/2015/946, 10.12.2015.

² O. *Corten*, The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?, *LJIL* 29 (2016), 777 (780); with a similar conclusion of German practice (however before the release of the German UN letter): A. *Peters*, *EJIL Talk*, 8.12.2015, <<http://ejiltalk.org>>.

³ BT-Drs. 18/6866, 1.12.2015; also see its renewal BT-Drs. 17/9960, 13.10.2016.

⁴ T. *Ruys/L. Ferro*, Divergent Views on the Content and Relevance of the Jus ad Bellum in Europe and the United States? The Case of the U.S.-Led Military Coalition Against “Islamic State”, available at <<https://papers.ssrn.com>>, 14 et seq.

⁵ Drawing on the German UN letter, the parliament mandate, an opinion drafted by the Scientific service of the German parliament and a speech by the German foreign minister *Steinmeier* in the German parliament.

⁶ P. *Starski*, Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force – Normative Volatility and Legislative Responsibility, *MPIL Research Paper Series* 2016-20, 38.

III. Starting Points for a Methodology

First and foremost, any assessment of individual state practice should be based on a comprehensive compilation of that individual state's practice.⁷ Scholarship often evidences not only a selectivity in picking just some instances to assess the general practice of all states, but also when presenting practice by an individual state, only some of those state's materials are unearthed.

Secondly, with all available materials gathered, it will likely more often than not appear that the practice even of one single state shows considerable variation. According to the International Law Commission (ILC), the analysis of state practice consists of a significant step on the level of individual state practice: "Where the practice of a particular State varies, the weight to be given to that practice may be reduced."⁸

That thirdly leaves open questions of how to actually assess and weigh the practice of a particular state. Any assessment leads at its core to the determination of the *opinio iuris* held by a state. Even at the individual level, that involves a fair amount of interpretation because states, or at least their (political) representatives, are essentially "laymen" and what they "do and say, to become explicable, must always, therefore, be subjected to a certain amount of professional interpretation".⁹ It is here simply pointed to two possible starting points for a methodological framework guiding such endeavours of interpretation, which merit further consideration: While acts of state practice do not create a legally binding force by itself such as unilateral acts, state practice is in many ways of a similar nature to unilateral acts.¹⁰ Another set of interpretative rules could be gained from applying rules for the interpretation of either customary¹¹ or treaty law.

However, would such arduous work not unnecessarily complicate the ultimate international lawyer's task of combining and abstracting from all instances of state practice to identify the law itself? Can such efforts avoid (or would they even fuel) that eventually only (again) very few practices are being referred to? It is in the own interest of international legal scholarship

⁷ ILC, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, Draft conclusion 7[8], para. 1.

⁸ ILC, Identification of customary international law (note 7), Draft conclusion 7[8], para. 2.

⁹ C. Parry, *The Sources and Evidences of International Law*, 1965, 67.

¹⁰ See V. Rodríguez Cedeño, *Fourth Report on Unilateral Acts of States*, 2001, para. 77.

¹¹ See A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 2008, 496 et seq.

to show greater academic rigour or at least candour about the methods applied in the analysis of state practice – a task of essentially hermeneutical nature. This should start at the individual level, because even here room for substantially diverging interpretations exists. It is all the more significant in such cases where the law is in flux and scholarly contributions from all camps invoke individual instances in their favour – such as is the case in the law on self-defence.

A Call for a Turn to the *Meta-Level* of International Law: Silence, the “Interregnum”, and the Conundrum of *Ius Cogens*

Paulina Starski*

The debates during the first “Dialogues Workshop” on “Self-Defence Against Non-state Actors” have evidenced both the multidimensionality of the problem in question as well as the multiplicity of perspectives from which it can be viewed. “Expansionists” collided with “restrictionists”, “formalists” with “pragmatists” and “crits”, “realist” views were confronted with “idealist” or even “utopian” conceptions of international law. Most scholars assumed that we are presently witnessing a process of normative dynamics concerning the use of force regime and its corollary, the right to self-defence, whilst others stressed that a truly established reading of Art. 51 of the Charter of the United Nations (UN Charter) has never existed (and possibly never will). Diametrically opposed views surfaced particularly with regard to a relaxation of standards concerning the nexus between armed attacks of non-state actors and the states hosting them necessary for an invocation of Art. 51 UN Charter. It became apparent that all *prima facie* incompatible positions as to the normative substance of Art. 51 UN Charter *de lege lata* – the “micro-level of law” – find their roots (also) in considerable uncertainties and/or discord with respect to *meta*-questions of international law. The self-evidence of this assertion does by no means diminish its truth. Many aspects of the theory of sources, especially the secondary rules on law formation and mechanisms of normative change have remained undertheorised in international legal doctrine.¹ At this neuralgic point of a possible reconfiguration of one of the most fundamental norms of the international legal order – the prohibition on the use of force – a turn to these *meta*-questions is urgently needed. Obviously, some *caveats* are indicated here: It would be illusionary, if not naïve, to assume that ultimate answers to such “grand” questions could ever be given. Many conceptual issues will

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¹ See J. Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, EJIL 15 (2004), 523 et seq.

remain “essentially contested.”² Furthermore, a turn to the *meta*-level will not free legal discourse from “ideological” clashes. Its result might be a “doctrinalism” that distracts from finding pragmatic solutions to “real world problems”. Nevertheless, focusing on the theoretical underpinnings of the rules governing processes of law creation, evolution and change will be beneficial in three respects: Firstly, the efficiency of the discourse on micro-questions of law will be enhanced by tackling the nucleus of the problems at hand thereby preventing a mere talk at cross purposes. Secondly, a turn to the *meta*-level will potentially enhance the transparency of the academic debate. Scholars will be forced to disclose their presuppositions regarding the genesis of norms. Thirdly, such a turn might potentially facilitate a more “responsible” academic discourse. Whilst scholarship will always remain essentially normative to a certain extent, it is exactly the purpose of the theory of sources to discipline this normativity by separating valid from invalid arguments concerning the state of the law on the micro-level thereby reducing the risk of both delayed and premature proclamations of an altered normative content of Art. 51 UN Charter.³

In light of these findings: What are some of the “right” *meta*-questions to be asked?

Firstly, “silence” should rank prominently on the research agenda: Most “expansionist” lines of argument assuming changed legality standards for self-defence actions arrive at their conclusion by referring to the (contested) practice and explicit contentions of a limited number of states, the verbal support of these actions and claims by few others, and the fact that they are not opposed by the remaining majority of states. The crucial question is whether and, if so, under which conditions mere passivity of states in view of state actions that challenge the established reading of Art. 2 (4), 51 UN Charter might induce and consolidate a process of normative change.⁴ Taking a closer look at the doctrine of acquiescence will be only of limited avail since it has traditionally rather focused on bilateral relationships (e.g. in the context of “acquisitive prescription”) and not the setting of normative dynamics. In my view silence can only issue law-generative effects if a “legitimate” expectation exists that a state speaks up which depends on numerous

² See *W. B. Gallie*, Essentially Contested Concepts, *Proceedings of the Aristotelian Society* 56 (1956), 167 et seq.

³ Obviously, it is more than legitimate for scholars to argue how the law should be as long as they denote their assertions clearly as *de lege ferenda* statements.

⁴ See *P. Starski*, Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force – Normative Volatility and Legislative Responsibility, *Journal on the Use of Force and International Law* 4/1 (2017), 1 et seq. (online version).

factors. These might include the frequency and consistency of the contentious state practice itself, the determinacy of the claims made by the acting states, the “silent” states’ capacity to react, the circumstances in which the relevant claims were made, the reactions of non-involved actors to the state practice in question, the impact of the contentious practice on rights and interests of “passive” states but also on the rights and interests of the acting states, considerations of time and – possibly – the nature of the affected rules in question.

Secondly, the problem of – as *Tams*, inspired by *Gramsci*, called it – the “interregnum”, the phase in which “the old is dying and the new cannot be born”⁵ deserves a deeper analysis: Does the old rule apply in this phase of normative change by default or has the binary code of legal/illegal become dysfunctional? Since the essential purpose of norms is to constrain state behaviour and it lies in their very nature to stabilise counterfactual expectations even if they are disappointed⁶ the latter reading appears dangerous. Obviously, processes of normative evolution advance gradually. But until the new state practice has condensed into a norm – when this threshold is overstepped is undoubtedly one of the most controversial *meta*-questions – I submit that the normative command of the “old” remains the yardstick for determining the legality of the conduct in question. Undeniably this assertion appears problematic in light of one fundamental conundrum of international law: While norms are not invalidated by violations, each violation potentially carries the seed for the emergence of new law.⁷ States violating the “old rule” might hence be seen as “norm entrepreneurs” possibly not “truly” acting illegally. Nevertheless, it appears to me that this aspect should rather be taken into consideration on the secondary level of state responsibility *de lege ferenda* than on the primary normative level.

Thirdly, the question whether the *ius cogens* nature – a conceptual Pandora’s box in itself – of the prohibition on the use of force (or at least its substantial core)⁸ and possibly – due to their interrelatedness – also the right to self-defence influences processes of normative dynamics is in need of further reflection. Amendments to *ius cogens* require the emergence of contradictory norms of the same nature (Art. 53 Vienna Convention on the Law of Treaties [VCLT]). But what are the consequences of a norm’s *ius cogens*

⁵ A. *Gramsci*, Selections from the Prison Notebooks, 1971, 275.

⁶ N. *Luhmann*, Ausdifferenzierung des Rechts, 1999, 17.

⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14, para. 98.

⁸ *Nicaragua v. United States of America* (note 7), para. 100 et seq.

quality for its mere reinterpretation in light of subsequent state practice evidencing an “interpretative agreement” of the parties (Art. 31 (3) (b) VCLT)? Since the evolutionary potential of interpretation is far-reaching and distinguishing interpretation from amendment practically difficult and frequently arbitrary in the realm of international law I am inclined to argue that the *ius cogens* character of potentially affected norms is to be taken into account within both processes – albeit on a different doctrinal level and possibly to a different extent. The decisive point appears to be that *ius cogens* norms – even in their treaty emanation – are founded on the belief of the “international community as a whole” in their binding nature.⁹ Their “contractual embedding” within a treaty must not obscure the fact that it is eventually the “international community as a whole” that is the reference point for a possible “interpretative agreement” deviating from the established reading of the norms in question. This diminishes the significance of individual “re-interpretative” state practice.

⁹ A. Orakhelashvili, *Peremptory Norms in International Law*, 2006, 403.

A Note on Indeterminacy of the Law on Self-Defence Against Non-State Actors

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The international law on self-defence suffers from a high degree of indeterminacy. We face a “hard case” in which the secondary rules (in a Hartian sense) of international law – the doctrines on the sources of international law – do not provide an answer about whether self-defence actions taken against a non-state actor on the territory of another state are in accordance with international law or not, and – if in principle so – under which circumstances.¹ An indicator in that regard is not in the least the fact that the participants of the Trialogue workshop – many of them being among the leading experts on the *jus contra bellum* – drew opposing conclusions regarding the state of the law, often as the result of the review of the very same instances of state practice. This is not surprising, since the practice of states and international organs virtually is intended to be ambiguous, not ruling out one or the other interpretation of the rule on self-defence. The Security Council employs a clear strategy of ambiguity. In its post 9/11 resolutions² and later in its resolution on Syria,³ the Security Council acted in a way that gives ammunition to those supporting an extended right to self-defence, and those rejecting it. In resolution 2249, for example, the Council called on states to act against the Islamic State of Iraq and Syria (ISIS), but only within the constraints of international law – herewith leaving it open whether international law allowed states to take action in self-defence, but somehow implying that taking measures was justified under international law. The majority of states is silent about self-defence measures taken against non-state actors and make it a matter of appreciation on how to interpret their inaction. The International Court of Justice (ICJ) case law also receives contradictory interpretations.

How did this indeterminacy of the law reflect in the Max Planck Trialogue workshop? Interestingly we observed that a binary logic that aims

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¹ See generally the short essay by *M. Milanovic*, Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum, EJIL Talk!, 21.2.2010, <www.ejiltalk.org>.

² Security Council, S/RES/1368 (2001) of 12.9.2001, S/RES/1373 (2001) of 28.9.2001.

³ Security Council, S/RES/2249 (2015) of 20.11.2015.

to solve the problem with legal-doctrinal arguments prevailed. While the indeterminacy of the law was somehow largely conceded, the debate mostly focused on producing doctrinal arguments about why the wider or the narrower reading of self-defence was in fact correct. The problem with such arguments is that under conditions of indeterminacy of the law, doctrinal arguments are not able to solve the problem, as the indeterminacy is the result of the law itself, not of an insufficient analysis. The practice of states is a core element of the customary rule of self-defence and it is likewise decisive for the concrete shape and substance of the rule on self-defence under the Charter of the United Nations (UN Charter), because subsequent practice is an important element in interpreting the law. As long as the practice remains as unsettled and controversial as the one in regard to self-defence against non-state actors, doctrine will allow conclusions in either direction.

This does not of course devalue the role of doctrinal debates. Doctrinal analysis remains important in the attempt to structure the legal debate and to assess new developments, such as the recent events in Syria. At some point, practice and legal opinions of states might eventually lead to a clear change of the law and doctrinal analysis will help discover when this is the case. However, the issue will ultimately not be decided by academia, but by those engaged in state practice.

The consequence of such indeterminacy is that the scholarly positions taken are in fact motivated by political choices. Clearly, our background and our general convictions always inform the legal views we take, but in hard cases of indeterminacy the weight of doctrinal arguments for deciding a legal question in one or the other direction vanishes almost completely and extra-legal (in the sense of not-doctrine based) background assumptions determine our decisions. In regard to self-defence against non-state actors, those taking restrictive positions fear the abuse of an extended notion of self-defence by powerful states – this was evident in *Dire Tladi's* contribution to the Trialogue workshop who warned of an emerging unilateralism, replacing the cooperative structure of the UN Charter. The counter position, on the other hand, is often driven by the belief that states under threat of terrorism must have some effective tool to defend themselves. These assessments, of course with many nuances, are then cast as doctrinal arguments about whether there is, for example, a sufficiently dense subsequent practice or whether the positions articulated by states are in fact not clear enough to assume a change in the law.

In my opinion, participants in academic legal debates should be less hesitant to bring the political background assumptions into the open. Academics rarely admit that this background is decisive and make it an explicit sub-

ject of discussion. While this is obviously not possible for government lawyers representing specific interests, academics are free to do so. I believe that it would benefit the legal debate to openly admit the limits of the legal profession to provide an answer to the issue of legality of self-defence against non-state actors and to mark where the realm of policy choices begins. Something could be gained by exploring these background assumptions and making them an explicit subject of analysis, herewith allowing for a better understanding of the perspectives and concerns that are at issue and for which legal solutions are ultimately needed. By bringing the background to the forefront we would at least – in addition to the important doctrinal aspects – also discuss the true motivations for taking specific positions and not only indirectly tackle them, mediated through doctrinal arguments.

ZaöRV 77 (2017)

