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UNIVERSITY OF AMSTERDAM



TWELVE KEY QUESTIONS ON SELF-DEFENSE AGAINST NON-STATE ACTORS – AND SOME ANSWERS

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Terry D. Gill & Kinga Tibori-Szabó

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A. Introduction

Since the events of 9/11, States have increasingly relied on the right of self-defense in response to attacks by (quasi) independent, non-State armed groups (NSAGs) that are not under the direction or control of other States, nor which are supported to any substantial extent by any State. This evolving State practice has generated an ongoing debate as to the legality of self-defense in response to attacks by such NSAGs, and, assuming that its legality is accepted, regarding the conditions under which self-defense may be exercised in such circumstances.

The debate pertains to a number of principal questions that can be divided into two groups: legality and modality questions. As their common denominator implies, legality questions deal with the applicability *per se* of self-defense against NSAGs and they revolve around the concept of authorship, i.e. can a non-State actor be the author of an armed attack without its

acts being attributed to a State? This question is thus distinct from an “indirect armed attack” whereby a State exercises effective control over an armed group and uses it as a proxy for carrying out an attack against another State. That situation will not receive attention in this article beyond what is necessary to address the questions raised herein. The NSAGs referred to in this contribution are those (quasi) independent non-State armed groups, which have a degree of organization, share a common purpose and are capable of mounting armed attacks on their own. The four main legality questions addressed below consider the pre- and post-Charter history of the concept of authorship of an armed attack within the context of self-defense and are as follows. Did Article 51 of the UN Charter break with the pre-Charter concept of authorship? Did State practice and *opinio juris* between 1945 and 2001 narrow the understanding of such authorship to exclude NSAGs? Was the international reaction to 9/11 a passing expression of sympathy or a “Grotian Moment” of law creation? Has State practice and *opinio juris* since 9/11 broadened the understanding of authorship to include NSAGs?

The second group of questions departs from the presumption that a positive answer is found to the question as to whether self-defense can apply to an armed attack mounted by an NSAG and addresses the modalities, i.e. the conditions and limitations under which self-defense may be exercised against such NSAGs. These questions are closely linked to the elements of self-defense: the requirement of an armed attack (one question), necessity (four questions), proportionality (two questions) and immediacy (one question). The controversies surrounding these elements are thus discussed through eight main modalities questions that take into consideration both the perspective of the State defending itself from the NSAGs (targeted or defending State) and the State on the territory of which the NSAG operates (the territorial State). The questions pertaining to the principles of necessity and proportionality also address the so-called unwilling and unable test that has recently gained ground among some States and commentators. The eight main modalities questions addressed by this contribution are as follows: What degree of use of force by NSAGs qualifies as an armed attack? Is failure to prevent one’s territory from being used by NSAGs enough to trigger the right of self-defense? When does self-defense become necessary on the territory of “unable” States? When does self-defense become necessary on the territory of “unwilling” States? Can self-defense be exercised without the consent of the territorial State? How does proportionality affect the exercise of self-defense on the territory of an “unable” State? How does proportionality affect the exercise of self-defense on the territory of an “unwilling” State? Within what time-frame must self-defense be exercised and for how long does it remain operative?

The purpose of this contribution is to delve into the controversies surrounding these questions and to propose answers thereto applying the general criteria for the exercise of self-defense. Our main argument is related to the central role that the criterion of necessity plays in determining when self-defense is applicable and which limitations it poses when self-defense is exercised.

B. The legality questions

As stated above, the four legality questions formulated in this contribution ask whether NSAGs can qualify as authors of an armed attack. In order to reach an answer, the four questions follow the development of the concept of authorship from the time before the adoption of the UN Charter until the present.

1. Did Article 51 break with the pre-Charter concept of authorship?

Self-defense is generally recognized as having a dual legal basis in both the Charter and customary law and those principles governing the use of force in self-defense have long been recognized in customary law.¹ Nonetheless, for the past seven decades or so, opinions have persistently differed as to the fate of the pre-Charter customary right of self-defense. Some authors contend that the Charter preserved to a certain extent the customary content of self-defense,² while others aver that the drafters abandoned the prior scope of the right in favor of a narrower right of self-defense, set in and limited by the Charter's main purpose to ban the inter-State use of force.³ One of the controversies regarding the effect of the Charter on the pre-1945 right of self-defense concerns NSAGs and whether they can qualify as authors of an armed attack.⁴

Nineteenth century state practice was dominated by the concept of the sovereign's unrestricted right to wage war.⁵ That does not mean, however, that States did not try to avoid going to war. Declarations of war had to be preceded by ample military, diplomatic and financial preparations, so resorting to small-scale coercive measures proved to be less costly

¹ The dual legal basis of self-defense was acknowledged by the International Court of Justice (ICJ) in the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) Judgment, 1986 I.C.J. Rep 94, para. 176 (Jun. 27) (hereafter: *Nicaragua case*). The recognition of these principles dates back at least to the *Caroline* incident of 1837. See Robert Y Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 92 (1938). On necessity, proportionality and immediacy, see e.g.: YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENCE at 249-252 (6th ed. 2017); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE at 157-160 (4th ed. 2018); Terry D. Gill, *The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy* in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, at 113, 123-125 (Michael Schmitt and Jelena Pejic eds. 2007); KINGA TIBORI-SZABÓ, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW, at 192-196, 256-258, 263-264, 291-309 (2011).

² Dinstein, *supra* note 1, at 199; Christopher Greenwood, *Self-Defence*, in Max Planck Encyclopedia of Public International Law, para. 3, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL> (last visited 27 June 2019); Daniel Bethlehem, *Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 771 (2012); Tibori-Szabó, *supra* note 1,

³ See, e.g.: Gray, *supra* note 1, at 124-125; Dire Tladi, *An Assessment of Bethlehem's principles on the use of force against non-state actors*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 572-575 (2013).

⁴ See, e.g.: Gray, *supra* note 1, at 124-125; Alexander Orakhelashvili, *Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, at 171-173 (Marc Weller ed., 2015). *Per a contrario*: Thomas M. Frank, *Terrorism and the Right of Self-Defence*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 839 (2001); Ruth Wedgwood, *Responding to Terrorism: The Strikes against bin Laden*, 24 YALE JOURNAL OF INTERNATIONAL LAW, at 559 (1999).

⁵ STEPHEN C NEFF, WAR AND THE LAW OF NATIONS, at 93 (2009).

and more time-efficient.⁶ Absent a declaration of war or a factual state of war resulting from the exercise of belligerent rights without a preceding declaration, an armed intervention by a State on another sovereign's territory required a justification. Such small-scale armed interventions came in two, relatively separate categories. One category was that of "measures short of war", justified on the basis of the principle of self-preservation, which was seen as an exception to territorial inviolability allowing armed interference for the purposes of self-defense, hot pursuit, protection of nationals and for certain other reasons.⁷ A second category included retortions, retaliations and reprisals, which were seen as methods of dispute settlement not amounting to war.⁸

Within this context, self-defense was seen as "a primary right of Nations"⁹ to be exercised in a situation of "clear and absolute necessity"¹⁰. It was the presence of such a state of necessity that triggered and at the same time limited self-defense. The correspondence following the *Caroline* incident is instructive in this regard.¹¹ The US Secretary of State Daniel Webster writing to the British Minister at Washington Henry Fox characterized self-defense the following way:

A just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground for justification.¹²

It is interesting to note that the *Caroline* incident involved the exercise of self-defense against individuals who assisted insurgents, but the ensuing correspondence did not dwell on the significance of this aspect. The controversial issue was instead the alleged excessiveness of

⁶ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, at 45-47 (1963).

⁷ ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW*, at 225-231, 434 (Vol. 1, 1854); HENRY W. HALLECK, *INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR*, at 83 (1861); WILLIAM E. HALL, *INTERNATIONAL LAW*, at 242-250 (1880); LASSA F.L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, at 181-183 (Vol. 1, 1905); TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES*, at 143-145 (Vol. I, 1860). The demarcation line between some of these measures was not always clear. For example, the notions of self-defense and self-preservation were often used interchangeably. Jennings, *supra* note 1, at 82.

⁸ ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW*, at 10-13 (Vol. 3, 1857); Halleck, *supra* note 7, at 297; Hall, *supra* note 7, at 306; TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES*, at 18-20 (Vol. 2, 1863); LASSA F.L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, at 34-35 (Vol. 2, 1906).

⁹ Twiss, *supra* note 7, at 11.

¹⁰ Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington, 24 April 1841, in *BRITISH AND FOREIGN STATE PAPERS, 1840-1841*, at 1132-1133 (Vol. 29, 1857).

¹¹ During the insurrection in Canada in 1837, small disturbances, undertaken by sympathizers of the insurrection, occurred at various places in the United States, especially along the Canadian border. The US government took measures for enforcing neutrality laws, but insurgents, when defeated, kept seeking refuge on US territory, where they resumed recruiting their forces. The *Caroline* was a steam vessel owned by American sympathizers of the insurgents and was used for transporting aid and supplies for the rebel forces. To put an end to this practice, in December 1837, British forces crossed into US territory without the consent of the American government, took possession of the *Caroline* and sent it over the Niagara Falls, with some loss of life in the process. The case was settled in 1842 between the two countries and friendly relations were never interrupted. Jennings, *supra* note 1, at 82-84; Tibori-Szabó, *supra* note 1, at 72-73.

¹² Letter from Daniel Webster, *supra* note 10, at 1132-1133.

the response of the British forces. The fact that the acts that triggered the exercise of self-defense were undertaken by pro- insurgents was not considered a contentious matter. Nor was there any discussion on the attributability of the acts to a particular State.

By the beginning of the 20th century and in the context of the movement for the limitation of recourse to war,¹³ self-defense was increasingly viewed as the only legitimate remnant of the principle of self-preservation and the only legal exception to the nascent prohibition of war.¹⁴ The Locarno Treaties explicitly recognized self-defense as one of the exceptions to the mutual guarantee between its members.¹⁵ While the Kellogg-Briand Pact did not explicitly recognize self-defense as an exception to the renunciation of war, its significance was discussed in the correspondence between the US Secretary of State Frank Kellogg and the French Foreign Minister Aristide Briand prior to the adoption of the Pact. Kellogg maintained that there was nothing in the draft Pact that restricted or impaired in any way the right of self-defense and emphasized:

That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all time and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.¹⁶

The British and French reservations and the Japanese interpretive statement appended to the Pact echoed this understanding.¹⁷

In this regard, the example the German jurist Oppenheim offered when delimiting self-defense from other forms of self-preservation is telling: if a State was informed that on a neighboring territory “a body of armed men” was being organized for the purpose of a raid into its own territory and the danger could be removed through an appeal to the authorities of that country, there was no need to act in self-defense. However, if such an appeal proved to be fruitless or impossible, or if there was even more danger in delaying defense, the threatened State was justified to resort to self-defense.¹⁸ Oppenheim did not offer this

¹³ The movement saw the adoption of seminal treaties aimed at limiting the recourse to war, such as the Covenant of the League of Nations (*see* Articles 10-14) and the Locarno Pact. In relation to the Covenant and the League, *see* Eduard Benes, *The League of Nations: Successes and Failures*, FOREIGN AFFAIRS, at 68 (Vol. 11, 1932). The Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy (The Locarno Pact) was one of seven agreements negotiated at Locarno (Switzerland) in October 1925, between European States and defeated Germany (the Weimar Republic); Kellogg-Briand Pact. Signed at Paris, 1928. Signatory States: United States of America, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, Union of South Africa. Later adhered: Poland, Belgium, France, and Japan. It was later acceded to by an additional 48 States.

¹⁴ Oppenheim, *supra* note 7, at 178; Eduard Benes and Nikolaos Politis, *Report on the Protocol, submitted to the Fifth Assembly*, LEAGUE OF NATIONS OFFICIAL JOURNAL, at 483 (Special Supplement No. 23, 1924).

¹⁵ Article 2(1) Locarno Pact, *supra* note 13.

¹⁶ DAVID H. MILLER, *THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY*, at 213-214 (1928).

¹⁷ *See Further Correspondence with Government of the United States Respecting the United States Proposal for the Renunciation of War, No. 2*, Sir Austen Chamberlain to Mr. Atherton, Foreign Office, July 18, 1928 https://avalon.law.yale.edu/20th_century/kbbr.asp#no2 (last visited 28 June 2019); Randall Lesaffer, *The Kellogg-Briand Pact (1928)*, in Max Planck Encyclopedia of Public International Law, para. 11, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e320?prd=EPIL> (last visited 27 June 2019).

¹⁸ Oppenheim *supra* note 7, at 178-179.

scenario as an illustration of a controversial issue. On the contrary, he considered it a self-explanatory example of legitimate self-defense.

To sum up, prior to the outbreak of the Second World War, self-defense was viewed as the inherent right of the sovereign State and the only exception to the emerging prohibition to wage war. Neither the adopted treaties nor the legal literature of the time indicated that States could only defend themselves against other States and not against a “body of armed men”.

The Charter confirms the inherent nature of self-defense and sets it out as one of the two exceptions to the prohibition to use or threaten force provided for in Article 2(4) of the Charter. According to Article 51, “nothing in the Charter impairs the inherent right to individual and collective self-defense if an armed attack occurs against a UN Member, until the Security Council (UNSC) has taken measures necessary to maintain international peace and security”. The article does not indicate who or what the author of the armed attack ought to be. It only refers to the inherent nature of self-defense, its two types (individual and collective) and the condition of an armed attack occurring. No other details as to the contents and limits of the right of self-defense are provided.

The wording of Article 51 has generated controversy in relation to the authors of an armed attack. According to one group of opinion, since the prohibition of the use of force in Article 2(4) of the Charter is set in an inter-State context (“All *Members* shall refrain [...] from the threat or use of force against [...] any *State*” – emphasis added), Article 51 also has to be interpreted in that context, hence the right of self-defense that it recognizes can only be an inter-State entitlement.¹⁹ Another group of authors and commentators contend that the word “inherent” in Article 51 signals the preservation of the right’s customary content and that, notwithstanding the inter-State context in Article 2(4), the overall wording of Article 51 clearly does not limit the exercise of self-defense exclusively to attacks by States.²⁰

The State-centric approach of the Charter can be easily explained. In the aftermath of the Second World War, the concern of the drafters was to control State behavior rather than delve into the dangers posed by NSAGs. Accordingly, during the drafting process of the Charter, the main discussions as regards Article 51 revolved around the concerns of certain Latin-American States that their regional arrangements (entailing a collective self-defense system) would be superseded by the Charter and the powers of the UNSC.²¹ Given this context, many other aspects of self-defense, including the authorship of an armed attack, were not discussed. Admittedly, an earlier version of Article 51 referred to an attack “by any State against any

¹⁹ Mary Ellen O’Connell, *Dangerous Departures*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 382 (2013); Gabor Rona and Raha Wala, *No Thank You to a Radical Rewrite of the Jus ad Bellum*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 386-389 (2013); Jörg Kammerhofer, *The resilience of the restrictive rules on self-defence*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, at 641-643 (Marc Weller ed., 2015).

²⁰ Dinstein, *supra* note 1, at 241-242; Christopher Greenwood, *International Law and the “War Against Terrorism”*, 78 INTERNATIONAL AFFAIRS, at 301, 307 (2002); Kimberley N. Trapp, *Can Non-State Actors Mount an Armed Attack?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, at 684-685 (Marc Weller ed., 2015).

²¹ Tibori-Szabó, *supra* note 1, at 104-109.

member State”²², but this phrase was later dropped without reasons for such a change having been recorded.

Against this background, it cannot be maintained that the adoption of Article 51 outlawed self-defense against NSAGs. At least, the conclusion is that the legality of self-defense against NSAGs was not clarified by the Charter and was left to subsequent State practice to settle. At best, the inference is that the right of self-defense continued to be available against NSAGs, as it was prior to the adoption of the Charter.

2. Did State practice and *opinio juris* between 1945 and 2001 narrow the concept of authorship, excluding NSAGs?

Whichever conclusion is entertained as regards the impact of Article 51 on the exercise of pre-Charter self-defense on NSAGs, an analysis of post-Charter State practice and *opinio juris* is essential in order to see whether either of these conclusions changed. Here as well, opinions differ. One body of opinion maintains that post-Charter State practice has unequivocally shown that self-defense can only be exercised against a State for armed attacks carried out either by a State, or by NSAGs sent, directed or controlled by a State.²³ The opposing view is that nothing in post-1945 State practice shows the emergence of a prohibition of using self-defense against (quasi-)independent NSAGs.²⁴

Assuredly, the State-centric approach of the Charter continued to influence the mid-twentieth century State practice in relation to the use of force for a number of reasons, not least of which was the fact that they were the only relevant actors at that time. Nonetheless, the subsequent waves of decolonization and the conflicts in the Middle East following the creation of the State of Israel brought NSAGs more and more to the fore, including in relation to claims of self-defense.

Up until the late 1990s, claims of self-defense in response to armed attacks carried out by NSAGs could be divided in two groups: claims that attributed the armed attack to a State based on the role allegedly played by that State in sending, controlling or supporting to an essential extent the armed group, and claims that did not necessarily attribute the armed attack to a State, but maintained that the NSAGs was being harbored or supported to a lesser extent by the territorial State. For our discussion, the second category of claims is of most interest.

²² FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1945, at 674 (Vol. I, General US Government Printing Office 1967).

²³ See, e.g.: Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 878 (1947); Carsten Stahn, *Terrorist Attacks as “Armed Attack”: The Right to Self-Defense, Article 51(1/2) of the UN Charter and International Terrorism*, 27 FLETCHER FORUM OF WORLD AFFAIRS, at 35 (2003); Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW, at 99-101 (2007); O’Connell, *supra* note 19, at 381-383; Orakhelashvili, *supra* note 4, at 171-173.

²⁴ See, e.g.: Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter*, 43 HARVARD JOURNAL OF INTERNATIONAL LAW, at 41 (2002); Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETHERLANDS INTERNATIONAL LAW REVIEW, at 159 (2008); Trapp, *supra* note 20, at 694-695.

Portugal invoked the right of self-defense to justify its military actions on the territory of Guinea, Senegal and Zambia between 1969 and 1971. Before the UNSC, Portugal claimed that Zambia opened its territory to elements hostile to Angola and Mozambique and authorized their training and supply.²⁵ Similar arguments were raised in relation to the other two countries.²⁶

South Africa relied on comparable arguments to justify its repeated armed incursions into Angola, Mozambique, Zambia, Lesotho and Botswana between the late 1970s and early 1980s.²⁷ The South African government claimed that these States harbored “terrorist elements”²⁸ on their territory that carried out repeated attacks on South African soil.²⁹ For this reason, South Africa had no other choice than “take effective measures in self-defense”.³⁰

Similar arguments were raised by Israel throughout the 1970s and 1980s to justify the repeated incursions into Jordanian and Lebanese territory to disable alleged bases of Palestinian armed units.³¹ As regards Lebanon, Israel gradually adopted a broader argument, according to which even if Lebanon did not intentionally harbor or support the Palestinian armed groups, Israel could still exercise self-defense as long as Lebanon was unwilling or unable to prevent these groups carrying out attacks from its territory.³² For instance, in July 1981, the Israeli representative argued before the UNSC that “under international law, if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defense”.³³

While not expressly invoking Article 51, Turkey seemed to rely on arguments similar to that invoked by Israel to justify its repeated incursions on Iraqi territory against Kurdish bases in the 1980s and 1990s.³⁴ For instance, in a 1995 letter addressed to the President of the UNSC, the Turkish *chargé d'affaires* averred that

“[a]s Iraq has not been able to exercise its authority over the northern part of its country since 1991 for reasons well known, Turkey cannot ask the Government of Iraq to fulfil its obligation, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey. [...] Turkey’s resorting to legitimate

²⁵ UNSC Verbatim Record (18 July 1969) UN Doc S/PV1486, para 68.

²⁶ Tibori-Szabó, *supra* note 1, at 208; TOM RUY, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTION IN CUSTOMARY LAW AND PRACTICE, at 400 (2010).

²⁷ F. Michael Higginbotham, *International Law, the Use of Force in Self-Defence and the Southern African Conflict*, 25 COLUMBIA JOURNAL OF TRANSNATIONAL LAW at 529, 561-572 (1987).

²⁸ UNSC Verbatim Record (22 May 1986) UN Doc S/PV/2684, 22.

²⁹ *Ibid.* 22-23.

³⁰ *Ibid.* 26.

³¹ UNSC Verbatim Record (27 March 1969) UN Doc S/PV/1466, paras 30, 69; Letter from the Permanent Representative of Israel addressed to the President of the Security Council (1969) UN Doc S/9387; Tibori-Szabó, *supra* note 1, at 206-207.

³² Ruys, *supra* note 26, at 401.

³³ UNSC Verbatim Record (17 July 1981) UN Doc S/PV/2292, 54.

³⁴ While Turkish actions were initially condoned by Iraq, after Turkey sided with the US-led coalition in the 1990-1991 Gulf War, Iraq began condemning Turkish incursions on its territory. On a few occasions, Turkey expressly justified its actions before the Security Council as ‘legitimate measures’ in the face of Iraqi inability to exercise authority over the northern part of the country. *See for instance* the following letters from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the Secretary General: (24 July 1995) UN Doc S/1995/605; (27 June 1996) UN Doc. S/1996/479; (7 October 1996) UN Doc S/1996/836; (3 January 1997) UN Doc S/1997/7; Ruys, *supra* note 26, at 422-423.

measures which are imperative to its own security cannot be regarded as a violation of Iraq's sovereignty. No country would be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organisation based and operating from a neighbouring country, if that country is unable to put an end to such attacks."³⁵

While the international reaction to the incursions of Turkey was limited, the attitude of the UNSC to the arguments developed by Portugal, South Africa and Israel was negative.³⁶

The obvious political divide in the Council indisputably dictated many of the expressed opinions.³⁷ Apart from genuine concerns as to the necessity and proportionality of the defensive actions,³⁸ the claims that the targeted States supported or harbored armed groups was often challenged.³⁹ That being said, one cannot infer a genuine conviction on the part of the UNSC that NSAGs could not carry out armed attacks that would trigger the right of self-defense. This was understandable, because, between 1945 and the late 1990s, the phenomenon of (quasi) independent NSAGs that could, without the direction, control or substantial support of a State, conduct an armed attack was largely unknown. This does not mean that the exercise of self-defense against NSAGs was prohibited or came to be outlawed during that time, it simply means that the issue did not arise in State practice.

This is also reflected in the ICJ judgment of the *Nicaragua* case. While the Court found that an armed attack could be understood as including "the sending by or on behalf of a State of armed bands"⁴⁰, it rejected the view that the provision of weapons or logistical or other forms of support to irregular bands would also amount to an armed attack.⁴¹ This position, along with other aspects of the Court's interpretation of self-defense was criticized by some of the dissenting Judges and subsequently by others.⁴² But because the issue of attack by a NSAG acting independently of State control did not play any role in the factual context and proceedings in the *Nicaragua* case, the Court did not devote any attention to the question and the absence of a pronouncement in this regard cannot be interpreted either as a rejection or acceptance of the applicability of self-defense to such attacks.

Starting with the 1990s, however, (quasi) independent armed groups began acquiring importance. These groups emerged in the post- Cold War less stratified and less State centric

³⁵ UN Doc S/1995/605, 1.

³⁶ See e.g. regarding Portugal: UNSC Res 273 (1969); 294 (1971). Regarding South Africa: UNSC Res 387 (1976); 447 (1979); 466 (1980); 527 (1982); 545 (1983); 546 (1984). Regarding Israel: UNSC Res 265 (1969); 279 (1970); 313 (1972); 332 (1973); 450 (1979); 467 (1980).

³⁷ Christian J. Tams, *Use of Force Against Terrorists*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 367-368 (2009).

³⁸ See e.g. UNSC Verbatim Record (28 March 1969) UN Doc S/PV/1468, paras 18-19, 34.

³⁹ See e.g. UN Yearbook (1972) 159.

⁴⁰ *Nicaragua case*, I.C.J Rep 102-103, para 195.

⁴¹ *Ibid.*

⁴² *Ibid.*, Dissenting Opinion of Judge Jennings, I.C.J. Rep 543; Dissenting Opinion of Judge Schwebel, I.C.J. Rep 346, para 171; Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, paras 118-120, 137, 145 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999). For establishing individual criminal responsibility, the ICTY Appeals Chamber found that a test of "overall control" (where a State had a role in either organizing, coordinating or planning the military action, or financing, training, equipping or providing operational support for the group) was better placed than the restrictive "effective control" test articulated by the ICJ. See also Dinstein, *supra* note 1, at 207.

situation and acted with varying degrees of State toleration and support, without being under any particular State's control. As a result, among other questions concerning transnational cooperation and law enforcement, the issue of using armed force (in self-defense or otherwise) was given increasing consideration. Therefore, when in 1998, the US justified its airstrikes against al-Qaida targets in Afghanistan and Sudan in response to terrorist attacks against its embassies in Kenya and Tanzania as self-defense,⁴³ reaction to the bombing was mixed with the UK, Germany, Israel and others expressing their support, and only a handful of States condemning the action.⁴⁴ The shift in reactions indicated a growing understanding on the part of governments that the Tanzania and Kenya attacks signaled "the emergence of terrorist coalitions that do not answer fully to any government, that operate across national borders, and have access to advanced technology."⁴⁵

3. Was the international reaction to 9/11 a passing expression of sympathy or a "Grotian Moment" of law creation?

When it comes to self-defense against NSAGs, the 9/11 attacks are seen by many as a game changer or a "Grotian Moment"⁴⁶: the international reaction in the aftermath of 9/11 showed overwhelming support for the US response against the perpetrators of the attack. For those States and commentators who deny the continued relevance of customary law, the 9/11 attack marks the beginning of overt acceptance of the applicability of self-defense to attacks by (quasi-)independent NSAGs.⁴⁷ However, a minority view has continued to maintain that the international response to the 9/11 attacks was a temporary expression of political sympathy and maintains that support for the notion of self-defense against NSAGs quickly dissipated once States understood the intervening complexities.⁴⁸

The attacks on the New York World Trade Center and the Pentagon on 11 September 2001 were not only devastating in term of the resulting loss of life, injury and material damage, but also sent a shock wave through the international community. Within a few weeks it had become clear that the perpetrators were members of the al-Qaida organization, which at the time was located in Afghanistan under the leadership of Osama bin Laden.⁴⁹

⁴³ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (20 August 1998) UN Doc S/1998/780. *See also* Tibori-Szabó, *supra* note 1, at 219.

⁴⁴ Tibori-Szabó, *supra* note 1, 219; Ruys, *supra* note 26, at 426-427.

⁴⁵ Madeleine Albright, *Address to the American Legion Convention* (9 September 1998) <https://1997-2001.state.gov/statements/1998/980909.html> (last visited 25 June 2019).

⁴⁶ Michael P. Scharf, *The Response to 9/11*, in *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE*, at 183 (2013).

⁴⁷ *See e.g.*: Jutta Brunnée and Stephen J. Toope, *Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 *INTERNATIONAL COMPARATIVE LAW QUARTERLY*, at 264, 267-269 (2018); CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW*, at 210-211 (2018).

⁴⁸ *See e.g.*: OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE*, at 747 (2014); Marja Lehto, *The Fight Against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-defence against Non-State Actors*, 87 *NORDIC JOURNAL OF INTERNATIONAL LAW*, at 5 (2018).

⁴⁹ LAWRENCE WRIGHT, *THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11*, at 362-367 (2006). *See also*: National Commission on Terrorist attacks on the United States (9-11 Commission) Report <https://govinfo.library.unt.edu/911/report/index.htm> (last visited 28 June 2019).

Within a day of the attacks, the UNSC adopted Resolution 1368 referring to the inherent right of self-defense in the opening paragraph of the resolution and went on to stress that any form of assistance or support to the perpetrators would be held fully to account.⁵⁰ Just over two weeks later, the UNSC adopted Resolution 1373, which once again referred to the inherent right of self-defense in accordance with the Charter in the context of a comprehensive response to international terrorism in general and the 9/11 attack in particular.⁵¹ Both resolutions were adopted unanimously and the negotiations leading to their adoption reveal no reservations on the part of any member of the Council regarding the reference to the right of self-defense in its text alongside the comprehensive array of other measures, which were adopted in the latter resolution and are still in force. While some authors have questioned whether these resolutions should be given a general bearing on the law beyond the particular situation they addressed at the time,⁵² it is a fact that the Security Council has consistently referred to and reaffirmed them in its subsequent resolutions dealing with counter-terrorism issues.

Alongside the action taken by the UNSC, other international reactions showed a strong stance regarding the potential relevance of the right of self-defense to the 9/11 attack. The North Atlantic Council unanimously adopted a statement on 12 September referring to the applicability of Article 5, the mutual defense clause in the NATO treaty, “if it is determined that this attack was directed from abroad against the United States”.⁵³ On 21 September, the Organization of American States unanimously adopted a resolution that directly referred to the right of self-defense in accordance with the Charter and affirmed its applicability in stating that the 9/11 attack was an attack on the Americas which triggered the right of collective self-defense under the Rio Treaty.⁵⁴ The reactions of most States, including some not usually seen as supportive of the US, was also broadly supportive of the applicability of the right of self-defense in response to the 9/11 attacks.⁵⁵

The responsibility of al-Qaida for the 9/11 attacks was also widely acknowledged early after the attacks took place. In that context, the US demanded the surrender of the leadership of al-Qaida and the termination of its presence on Afghan territory from the Taliban administration. This demand was not premised upon any clear evidence or allegation of direct control by the Taliban of al-Qaida or joint responsibility for the attack, but rather on the factual situation that al-Qaida openly operated on and from Afghan territory.⁵⁶

The UNSC had prior to the 9/11 attacks demanded that the Taliban regime hand over Osama bin Laden to the US and end the presence of al-Qaida in Afghanistan. Neither the US, nor the

⁵⁰ UNSC Res 1368 (12 September 2001).

⁵¹ UNSC Res 1373 (28 September 2001).

⁵² See e.g.: Lehto, *supra* note 47, at 7; Kammerhofer, *supra* note 23, at 99.

⁵³ Edgar Buckley, *Invoking Article 5 Five Years On*, NATO REVIEW (Summer 2006) <https://www.nato.int/docu/review/2006/issue2/english/art2.html> (last visited 17 May 2019).

⁵⁴ OAS Resolution “Attack on America: Terrorist Threat to the Americas”, YALE LAW SCHOOL, THE AVALON PROJECT, DOCUMENTS ON LAW, HISTORY AND DIPLOMACY (28 September 2001) http://avalon.law.yale.edu/sept11/oas_0921b.asp (last visited 17 May 2019).

⁵⁵ *Reaction From Around the World*, NEW YORK TIMES (12 September 2001) <http://www.nytimes.com/2001/09/12/us/reaction-from-around-the-world.html> (last visited 17 May 2019).

⁵⁶ See e.g. Michael Byers, *The Intervention in Afghanistan – 2001-*, in THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, at 625-627 (Tom Ruys et al. (ed.), 2018); Dinstein, *supra* note 1, at 243-244.

UNSC based this demand on a relationship of “effective control” or “overall control”⁵⁷ by a State over a NSAG, but on a factual situation in which the armed group openly operated and conducted attacks against the US and other States directed from Afghan territory.⁵⁸

The relationship between the Taliban government and al-Qaida at the time was one of close ideological affinity, mutual material support and cooperation, but not one of control.⁵⁹ The demand of the US on the Taliban to surrender the leadership of al-Qaida and end its presence and operations in Afghanistan indicates that the US government did not view the 9/11 attack as an attack *by* Afghanistan or that the Taliban exercised direct control over al-Qaida, but rather as an attack by al-Qaida directed by its leadership *from* Afghanistan. When the Taliban government rejected the US ultimatum and offered instead to have Osama bin Laden be tried by an “Islamic court”, the US saw this as a refusal to cooperate and initiated the military campaign to eradicate the presence of al-Qaida in Afghanistan and assisted the Northern Alliance in overthrowing the Taliban government.⁶⁰ This campaign codenamed “Operation *Enduring Freedom*” was based on Article 51 and received widespread support or in any case acceptance from the bulk of the international community. In that context, it is important to note that the UN-mandated international security force ISAF, which provided security for the new Afghan government, operated alongside the US-led Operation *Enduring Freedom* over a prolonged period and at no time was there any mention of any fundamental incompatibility between them. On the contrary, every resolution relating to ISAF starting with Resolution 1386 in December 2001 recalled all previous resolutions relating to Afghanistan, including those referring to the 9/11 attack as an “armed attack”, the relevance of self-defense and the responsibility of the Taliban regime to end the presence of al-Qaida on Afghan territory.⁶¹

While not necessarily amounting to a Grotian Moment, the international response to the 9/11 attacks clearly shows a significant degree of support for the applicability of self-defense to attacks by autonomous NSAGs, to an extent much greater than had been visible during the 1990s, when such NSAGs started to emerge.

4. Has State practice and *opinio juris* since 9/11 broadened the concept of authorship, to include NSAGs?

In the years following the 9/11 attack and the US and international reaction to it, a growing number of invocations of self-defense in reaction to attacks carried out by NSAGs operating from the territory of a third State have been made by a variety of States.

The US has continued to rely on self-defense in response to the 9/11 attack in conducting “drone” strikes against individuals suspected of being members of al-Qaida and other

⁵⁷ See *supra* note 41.

⁵⁸ UNSC Res 1267 (15 October 1999).

⁵⁹ See ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR*, at 58-60 (2002).

⁶⁰ See sources in *supra* notes 55 and 58.

⁶¹ See UNSC Res 1386 (20 December 2001), which was the first in a long series of resolutions by the UNSC relating to the mandate of ISAF and the continuing relevance of self-defense.

“affiliated” jihadist armed groups in Afghanistan, Pakistan, Yemen and Somalia.⁶² This practice has been criticized for a number of reasons, including most importantly for this contribution, the seemingly endless and borderless reliance on self-defense many years after the initial attack which triggered it, alongside other considerations not directly related to self-defense. Whatever the merits or lack thereof of these criticisms, they are not relevant to the question of whether self-defense is applicable to attacks conducted by NSAGs as a matter of law.

Aside from the US, a growing number of States have invoked self-defense in response to attacks by NSAGs. The 2006 Israel-Hezbollah war was not an unequivocal example of such an invocation, since Israel, at least initially, claimed that the Lebanese State was responsible for the rocket attacks and abduction of members of the IDF by Hezbollah, although it seemingly softened that position later and maintained that its actions were not directed against Lebanon, but against the “terrorist presence of Hezbollah inside it”.⁶³ But for the purposes of this discussion, the interesting point is that most of the criticism directed against Israel in its reaction to these attacks had to do with perceptions of lack of proportionality in its response, in particular, the large number of civilian casualties and the targeting of Lebanese State infrastructure such as Beirut Airport and the blockading of the Lebanese coast and not on the fact that Israel exercised self-defense in reaction to attacks by Hezbollah as such. Many States and other international organs voiced support for, or at least understanding of the Israeli resort to self-defense at least initially in response to the actions of Hezbollah and the subsequent critique of the scale of the Israeli response and the way it was conducted do not vitiate this.⁶⁴ In other words, Israel was criticized for a widely perceived disproportionate use of force against Lebanon and not for the exercise of self-defense against an armed group operating from its territory.

Israel again invoked self-defense in 2008-9 as a justification for its operations directed against Hamas in Gaza. While some States voiced support for Israel’s right to defend itself against rocket attacks, most legal attention was focused on perceived violations of humanitarian law by both parties to the conflict, or whether self-defense applied in a situation of ongoing *de facto* occupation and comparatively little attention was paid to the question of whether self-defense against an armed group applied. This may well be at least partly due to uncertainty over the status of Gaza under the law of occupation.⁶⁵ On the other hand, no significant criticism was voiced against the invocation of self-defense against an armed group

⁶² Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington D.C. (25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> (last visited 28 June 2019).

⁶³ UNSC Verbatim Record (31 July 2006) UN Doc S/PV/5503, 4.

⁶⁴ UNSC Verbatim Record (20 July 2006) UN Doc S/PV/5492, 2-5 (statement of UN Secretary General Kofi Annan); UNSC Verbatim Record (14 July 2006) S/PV/5489 (statements by UNSC members).

⁶⁵ The question revolves around whether Gaza constitutes occupied territory. In the *Wall Advisory Opinion*, the ICJ took the position that self-defense would not apply in relation to attacks conducted from occupied territory. See, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep 194, para. 139 (July 9) (hereafter: *Wall Advisory Opinion*).

as such.⁶⁶ In subsequent operations against Hamas in 2012 and in 2014, no claim of self-defense was made by Israel, hence there is nothing to comment on in that respect.⁶⁷

In March 2008, the Colombian armed forces carried out a cross border raid against a camp of the leftist insurgent movement FARC located several kilometers inside Ecuador. Colombia characterized the raid as an extraterritorial law enforcement measure, made no claim of self-defense and stated it had no intention of violating Ecuador's sovereignty. The raid was criticized by most countries in the region, but no official condemnation was issued by the OAS or UN. The US backed the Colombian position. Although tensions between Colombia and its neighbors flared up for several days, Colombia chose to deescalate the situation through diplomatic initiatives and mediation by members of the Rio Group, a sub-regional organization, and within a few days these efforts succeeded in bringing about a diplomatic resolution.⁶⁸

In October 2011, the Kenyan armed forces launched an incursion into southern Somalia in response to abductions of foreign nationals by the al-Shabaab armed group in the region close to the Somali border and other terrorist incidents believed to have been committed by al-Shabaab. This operation was initially justified on the basis of self-defense alongside at least some measure of consent from the Transitional Government of Somalia (TGF), but Kenya later incorporated its troops into the AMISOM force mandated by the UNSC and conducted by the African Union with the consent of the TGF.⁶⁹ There was no opposition to the Kenyan action voiced by the AU or among members of the UNSC.

In February 2015, the Egyptian Air Force conducted a series of air strikes against an armed group active in eastern Libya that had proclaimed allegiance to ISIS in response to the beheading of 21 Egyptian Coptic Christians by the armed group and other alleged terrorist acts directed against Egypt and Egyptian nationals in Libya. Egypt based its acts on self-defense and cooperation with one of the factions purporting to govern Libya.⁷⁰ The international reaction was largely supportive of the Egyptian action. France and Russia offered support and cooperation with Egypt in countering terrorism, while the Arab League and the Gulf Cooperation Council both voiced support for the Egyptian action.⁷¹ The US

⁶⁶ In the debates leading to the resolution calling for a cease fire, Israel was criticized by some States for alleged excessive use of force, but little to no attention was devoted to the question of self-defense against Hamas. *See inter alia*, Press Release by UNSC of 8 January 2009 6063rd meeting at <https://www.un.org/press/en/2009/sc9567.doc.htm>, and UNSC Res 1860 (8 January 2009).

⁶⁷ Gray, *supra* note 1, at 216-217.

⁶⁸ See e.g. Simon Romero, *Regional Bloc Criticizes Colombia Raid in Ecuador*, NEW YORK TIMES (6 March 2008) <https://www.nytimes.com/2008/03/06/world/americas/06venez.html> (last visited on 25 May 2019). For the position of the OAS see: Permanent Council of the OAS Res. 930 (1632/08) (5 March 2008).

⁶⁹ Gorm Rye Olsen, *The October 2011 Kenyan Invasion of Somalia: Fighting al-Shabaab or Defending Institutional Interests*, 36(1) JOURNAL OF CONTEMPORARY AFRICAN STUDIES, at 39, 43-44 (2018).

⁷⁰ See Ismail Akwei, *Air Strikes in Libya are in 'Self-Defence' Egypt Tells UN*, AFRICA NEWS (29 May 2017) <https://www.africanews.com/2017/05/29/air-strikes-in-libya-are-in-self-defence-egypt-tells-the-un/> (last visited 25 May 2019); UN Press Release, *Comprehensive Strategy to Combat Terrorism in Libya Critical, Special Representative Tells Security Council* (18 February 2015) SC/11788 <https://www.un.org/press/en/2015/sc11788.doc.htm> (last visited 25 May 2019).

⁷¹ *France, Egypt call for U.N. Security Council meeting on Libya*, REUTERS (16 February 2015) <https://uk.reuters.com/article/uk-france-hollande-egypt/france-egypt-call-for-u-n-security-council-meeting-on-libya-idUKKBNOLK00Q20150216> (last visited 28 June 2019); *Russia Ready to Cooperate With Egypt in Fight Against Terrorism*, SPUTNIK NEWS (16 February 2015)

stated that it recognized every State's right to self-defense without stating explicitly that it backed these airstrikes.⁷² A number of other States voiced understanding but called for a political solution to the Libyan internal crisis.⁷³

Egypt has repeated its airstrikes more recently in May 2017 in response to an ISIS attack on Coptic Christians inside Egypt and informed the UNSC of its invocation of self-defense.⁷⁴

Most recently, the anti-ISIS coalition consisting of some 12 Western and 6 regional States under the military leadership of the US has used force against ISIS in both Syria and Iraq from the summer of 2014 until the present with the non-military support and diplomatic backing of some 60 other States.⁷⁵ This operation under the name of *Inherent Resolve* has succeeded in driving ISIS from Iraqi territory and reducing its presence in Syria to a few remaining pockets which are under pressure from both coalition allies on the ground in Syria and the Syrian government as well as its Russian and Iranian allies. To the extent forces have been engaged in Iraq against ISIS, the legal justification was the clear consent and request for assistance issued by the Iraqi government in July-August 2014, when ISIS advanced deep into Iraq from its stronghold in eastern Syria where it had gained control of a large portion of territory in the context of the Syrian conflict.⁷⁶ However, no consent was forthcoming from the Syrian government, and most members of the coalition, which were active in conducting strikes against ISIS targets in Syria, based their actions on collective self-defense in support of Iraq. France and Turkey, both members of the coalition, (additionally) based their actions on individual self-defense in response to attacks claimed by and attributed to ISIS on their territory.⁷⁷ Although the UNSC has condemned ISIS as an "unprecedented threat to international peace and security" and called for eradication of its safe haven in Syria and Iraq in Resolution 2249 of 20 November 2015, this resolution contains no clear or even implied authorization to use force on the territory of a non-consenting State such as Syria.

<https://sputniknews.com/middleeast/201502161018345827/> (last visited 28 June 2019); *Arab League 'understands' Egypt airstrikes in Libya*, TURKISH WEEKLY (18 February 2015) <https://web.archive.org/web/20150220130838/http://www.turkishweekly.net/news/180447/arab-league-39-understands-39-egypt-airstrikes-in-libya.html> (last visited 25 May 2019).

⁷² Aswat Masriya, U.S. "Respects Egypt's Right To Self-Defence" After Libya Airstrikes, EGYPTIAN STREETS (18 February 2015) <https://egyptianstreets.com/2015/02/18/u-s-respects-egypts-right-to-self-defence-after-libya-airstrikes/> (last visited 25 May 2019).

⁷³ A group of Western States called on Egypt to not upset the UN efforts to mediate a solution to the Libyan crisis and rejected a call by Egypt to expand the anti-ISIS airstrikes to Libya: Tamer El-Ghobashy and Benoît Faucon, *West Rebuffs Egypt Proposals for Military Intervention in Libya*, WALL STREET JOURNAL (19 February 2015) <https://www.wsj.com/articles/west-rebuffs-egypt-proposals-for-military-intervention-in-libya-1424388828> (last visited 28 June 2019).

⁷⁴ *Egypt informs UN Security Council of airstrikes on Libyan terrorist hideouts, citing "self defence"*, AHAM ONLINE (28 May 2017) <http://english.ahram.org.eg/NewsContent/1/64/269677/Egypt/Politics-/Egypt-informs-UN-Security-Council-of-airstrikes-on.aspx> (last visited 25 May 2019).

⁷⁵ For an overview of States participating in and supporting *Inherent Resolve* see: *Operation Inherent Resolve*, Official website <http://www.inherentresolve.mil/About-Us/Coalition/> (last visited 28 June 2019). For States and international organizations backing it diplomatically see <https://theglobalcoalition.org/en/partners/>

⁷⁶ On the background to the ISIS offensive in North Iraq, see: *Islamic State and the crisis in Iraq and Syria in maps*, BBC NEWS (28 March 2018) <https://www.bbc.com/news/world-middle-east-27838034> (last visited 28 June 2019).

⁷⁷ France had initially cited collective self-defense as the legal justification for its actions, but following the attacks in Paris in November 2015 indicated it was also acting in individual self-defense. See UNSC Verbatim Record (20 November 2015) U.N. Doc. S/PV.7565, at 2. Turkey invoked self-defense against ISIS in a letter dated 24 July 2015, S/2015/563.

Consequently, any use of force against ISIS on Syrian territory would have to be justifiable under self-defense in order for it to have a legal basis. While Syria and its allies, Russia and Iran, have condemned the anti-ISIS coalition's airstrikes inside Syria as violations of Syria's sovereignty, there is nonetheless widespread, albeit not universal, support for the coalition's operations against ISIS.⁷⁸ While the positions of individual States and authors differ on a number of points, there seems to be a strong case for accepting that self-defense is applicable to the coalition air strikes against ISIS in Syria, although contours and limits to this right are less clear.⁷⁹

This cursory analysis of post-9/11 State practice shows a strong tendency towards the view that the concept of authorship is broad enough to include NSAGs and that self-defense can accordingly be exercised against armed attack carried out by such groups.⁸⁰ Whether this constitutes a new rule of customary law or an adaptation of the existing rule on self-defense to the relatively new phenomenon of autonomous NSAGs mounting attacks against States across international borders is secondary to the point that the right of self-defense can be applicable to such attacks. However, if one, for the sake of the argument, rejects the possibility that self-defense never excluded the possibility of taking action against attacks mounted by an autonomous armed group across an international border and takes the position that any such action requires satisfaction of the criteria for the formation of a new rule of customary law, then the abovementioned practice and widespread acceptance by States of multiple invocations of self-defense goes a long way towards indicating the acceptance of such a rule, or in any case a new interpretation of an existing rule.

There is, however, an enduring minority view, which relying mainly on the post-9/11 case-law of the ICJ, maintains that self-defense is an inter-State right and cannot be exercised against NSAGs as such.⁸¹ This view is based on the pronouncement made by the majority of the Court in the 2004 *Palestinian Wall Advisory Opinion*, inferring that Article 51 only applied to attacks by States and because the threat to Israeli security originated in areas under effective Israeli control, saw no relevance of the UNSC resolutions relating to the 9/11 attack mentioned above.⁸² This restrictive language which at least indirectly seemed to rule out, or in any case circumscribe, the applicability of self-defense in relation to attacks conducted independently of State control was criticized by some of the judges of the Court.⁸³ Subsequently, in the *Armed Activities* case of 2005, the Court found on the basis of the evidence and the contentions of the parties that there was no evidence to attribute armed actions by an armed group operating against Uganda to the Democratic Republic of the Congo (DRC) and that armed action by Uganda against the DRC could not be justified on the

⁷⁸ See *supra* note 75.

⁷⁹ See e.g.: Dinstein, *supra* note 1, at 244-249 and *Draft Report of the Use of Force Committee*, International Law Association, Sydney Conference (2018), at 14-16, http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf (last visited 28 June 2019).

⁸⁰ See, for instance: Trapp, *supra* note 20, at 690-694.

⁸¹ Olivier Corten, *Opération "liberté immuable": une extension abusive du concept de légitime défense*, 106 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC, at 51, 55 (2002); O'Connell, *supra* note 19, at 382-383; Tladi, *supra* note 3, at 571-572.

⁸² *Wall Advisory Opinion*, I.C.J. Rep 194, para 139.

⁸³ *Ibid.* Separate Opinions of Judge Higgins, I.C.J. Rep 215, para. 33; Separate Opinion of Judge Kooijmans, I.C.J. Rep 229-230, para. 35; Declaration of Judge Buergenthal, I.C.J. Rep 242, para. 6.

basis of self-defense against the DRC. Consequently, it saw no need to make any pronouncement on the legality of self-defense against “large scale attacks by armed groups”.⁸⁴ This failure to address the issue as to whether self-defense would apply to attacks mounted by armed groups not attributable to a State was criticized by several judges in their separate opinions.⁸⁵

The jurisprudence of the ICJ was somewhat counterbalanced by the work of other bodies. For instance, the 2005 Chatham House Principles, compiled on the basis of work undertaken by a small group of international law academics and practitioners and international relations scholars, acknowledged that “Article 51 is not confined to self-defence in response to attacks by States. The right of self-defence applies also to attacks by non-State actors.”⁸⁶ Furthermore, in 2007, the *Institut de droit international* (IDI) issued a resolution relating to self-defense, (2007 IDI Resolution), in which it asserted that in the event of an attack by NSAGs, Article 51 of the Charter complemented by the customary law of self-defense applied as a matter of principle. It held that in such cases, the right of self-defense in response to such attacks would allow for the use of force against the attacking NSAGs in the area of a State from which the attack originated. The 2007 IDI Resolution further held that in such situations the territorial State would be under an obligation to cooperate with the target State in exercising its right of self-defense.⁸⁷ A few years later, in 2013, the former Legal Adviser of the UK Foreign & Commonwealth Office, Daniel Bethlehem, set out a number of principles regarding self-defense against non-State actors, the first of which declares “[S]tates have a right of self-defense against an imminent or actual armed attack by non-State actors.”⁸⁸ The Bethlehem Principles have engendered both controversy⁸⁹ and endorsement.⁹⁰ Furthermore, the 2017 Leiden Policy Recommendations, prepared as a result of an expert consultation process supported by the Dutch Ministry of Foreign Affairs, declare that:

“The recognition in Article 51 of the inherent right of individual or collective self-defence in the event of an armed attack makes no reference to the source of the armed attack. It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state’s right of individual and collective (upon

⁸⁴ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) 2005 I.C.J Rep 222-223, paras 146-147 (Dec. 19).

⁸⁵ *Ibid.* Separate Opinion of Judge Kooijmans, I.C.J Rep 314, paras 27-30; Separate Opinion of Judge Simma, I.C.J. Rep 335-337, paras 4-11.

⁸⁶ Principle No. 6, *Principles of International Law on the Use of Force by States in Self-Defence* (hereafter: Chatham House Principles), Chatham House, (Elizabeth Wilmshurst, October 2005).

⁸⁷ *Tenth Commission Resolution on Present Problems of the Use of Armed Force in International Law - A. Self-defence* (hereafter: 2007 IDI Resolution), Institut de droit international, Santiago Session (2007) http://www.idi-ijl.org/app/uploads/2017/06/2007_san_02_en.pdf (last visited 27 June 2019). *See also*: Emmanuel Roucouнас (Rapporteur) *Report on Present Problems of the Use of Force in International Law - A. Sub-group on Self-defence*, at 144, <http://www.idi-ijl.org/app/uploads/2017/06/Roucouнас.pdf> (last visited 27 June 2019): if the territorial State “does not cooperate then the right of individual and collective self-defense could be exercised in that State under conditions obviously stricter than those in the traditional situation of State to State defense, since the requirement of cooperation requires a different *timing* and the aim will be the *neutralization* of the non-State entity” (emphasis in the original).

⁸⁸ Bethlehem, *supra* note 2, at 775.

⁸⁹ O’Connell, *supra* note 19; Gabor Rona and Raha Wala, *No Thank You to A Radical Rewrite of the Jus ad Bellum*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW (2013); Tladi, *supra* note 3.

⁹⁰ *See e.g.*: Elizabeth Wilmshurst and Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the “Bethlehem Principles”*, 107 American Journal of International Law (2013).

request of the victim state) self-defence. A state that is the victim of an armed attack by terrorists may thus take action against those non-state actors operating from another state, although the scope of that response will depend upon a variety of factors and requirements discussed below.”⁹¹

Notwithstanding these important instruments recognizing the applicability of self-defense to NSAGs, in 2016, more than 230 professors and international law researchers signed *A plea against the abusive invocation of self-defence as a response to terrorism*, in which they maintain that “[i]n accordance with article 51 of the Charter, the use of force in self-defense on the territory of another State is only lawful if that State bears responsibility for a violation of international law tantamount to an “armed attack”.”⁹²

The emerging view from the preceding analysis is that post-9/11 State practice has shown a strong tendency to accept the legality, in principle, of self-defense against NSAGs and that this position has been underscored by UNSC Resolutions and various international legal instruments supporting such an interpretation. However, a minority opinion, relying on ICJ jurisprudence and a restrictive interpretation of Article 51, continues to maintain that self-defense can only be exercised against armed attacks attributable to States.

C. The modality questions

Assuming that self-defense can be exercised against (quasi) independent NSAGs, the next questions pertain to the conditions and modalities under which such defensive action can unfold.

The very first such question is whether an armed attack carried out by such a group is subject to conditions other than the ones applicable to armed attacks carried out by or under the direction, control or support of States (section 5).

The next set of questions pertains to the application of the customary principle of necessity, which both drives and limits the right of self-defense. Typically, the principle of necessity in the general context of self-defense refers to the existence of an ongoing or manifestly imminent armed attack⁹³ and the ensuing lack of feasible alternatives that would preclude the necessity of defensive action. Such alternatives can entail, *inter alia*, a cease-fire, the negotiated withdrawal of forces, action by the UNSC that has the effect of ending the attack and other measures to ensure the termination of an ongoing attack and prevention of the recurrence of further attacks. Where such alternatives exist, the use of force in self-defense is unnecessary and hence unlawful.

⁹¹ Nico Schrijver and Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law* (1 April 2010) <https://openaccess.leidenuniv.nl/bitstream/handle/1887/42298/LeidenPolicyRecommendations1April2010.pdf?sequence=1> (last visited 28 June 2019).

⁹² *A plea against the abusive invocation of self-defence as a response to terrorism*, <http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme/> (last visited 27 June 2019).

⁹³ Necessity of self-defense does *not* include taking action where there is neither an ongoing nor a manifestly imminent armed attack. Preventive self-defense, triggered by a mere possibility that an attack might at some indeterminate point in time take place goes beyond the limits laid down in the *Caroline* criteria and is not recognized in international law. See Gill, *supra* note 1, at 113; Tibori-Szabó *supra* note 1, at 295-296.

Necessity in the context of attacks mounted by NSAGs entails all of the above, but also has a few special features. When an armed attack is (on the point of being) mounted by an NSAG against the territory of another State, feasible alternatives that may obviate defensive action by that State would include effective action by the territorial State to terminate the (threat of) attack conducted from its territory. Such action could consist of law enforcement measures, or where these are inadequate, military action by the territorial State, either on its own or acting in cooperation with the defending State. Another option is to seek and receive Security Council authorization where the political circumstances are favorable and the requisite majority is present within the UNSC. Where any such measures are effectively taken, the necessity of defensive action by the defending State is precluded. Where the territorial State cannot or will not take such measures, the defending State may still be in a position to take defensive action on its own territory which would effectively stop the attack and preclude further attack from the same source. Where this is feasible and would suffice to address the threat, including the threat of further attack in the immediate future, the necessity of extra-territorial defensive action by the defending State is avoided. It is only when none of these measures succeed in precluding an armed attack that the question of extra-territorial self-defense arises. In such a situation, given that the territorial State is not the author of the armed attack, the question arises whether the principle of necessity within the context of self-defense can justify extra-territorial defensive action in the territorial State to stop or thwart an armed attack emanating from an NSAG operating on that territory. It is in this context that the controversial “unwilling or unable” test, discussed below, has gained ground: can self-defense be lawfully exercised on the territory of a State that is unwilling or unable to prevent its territory from being used by NSAG mounting attacks against another State without it being the author of any armed attack carried out by that NSAG? This question has been addressed from a multitude of perspectives, four of which are of particular interest for this contribution and will be addressed below in the context of the principle of necessity: first, can self-defense be necessary merely because the territorial State failed in its duty to prevent its territory from being used by NSAG? (section 6); second, what makes self-defense necessary on the territory of so-called “unable” States? (section 7); third, what makes self-defense necessary on the territory of so-called “unwilling” States? (section 8) and, lastly, if resort to extra-territorial defensive action becomes necessary, does the defending State have a duty to request the consent of the territorial State for use of force against the NSAGs located on the territory of the latter? (section 9).

Questions also arise in relation to the principle of proportionality in the context of self-defense. Proportionality is generally understood to refer to two considerations; the scale of the defensive action must be roughly commensurate with the scale of the attack and, more importantly, the measures taken must not exceed what is required to halt the attack and where relevant, forestall continued attacks from the same source.⁹⁴ In the context of self-defense against NSAGs, the principle of proportionality has implications for how self-defense must be conducted in the territorial State, where that State is not the author of the armed attack (sections 10 and 11).

⁹⁴ See e.g.: Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE JOURNAL OF INTERNATIONAL LAW, at 293 (1985); Tibori-Szabó, *supra* note 1, at 308.

Finally, as self-defense is not a punitive measure and is not meant to provide an open ended justification for the use of extra territorial force, the question arises when it must be exercised and how long it remains operative (section 12).

5. What degree of the use of force by NSAGs qualifies as an armed attack?

Most authors agree that an armed attack requires a use of armed force that rises above a *de minimis* threshold which causes neither loss of life nor significant damage or disruption in the target State.⁹⁵ This implies that there may be a gap between Article 2(4) and Article 51 in the sense that not every use or threat of force may necessarily constitute an armed attack. A number of authors have disagreed with this approach and relatively recently the Chatham House Principles have also done away with such a threshold although in the case of attacks by non-State actors, they require that the attack rise above the level of a criminal act capable of being addressed by a law enforcement measures.⁹⁶ If no threshold separates a use of force rising above the level of an ordinary criminal act from an armed attack, then any use of armed force mounted or controlled from across an international border by an NSAG which rises above the level of an ordinary criminal act could trigger the exercise of self-defense. If one accepts, however, a *de minimis* threshold, the question arises what scale and effect renders armed force an armed attack, especially when committed by NSAGs. In the *Nicaragua* case, the ICJ held that it was necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms and that such differentiation was to be made on the basis of their gravity, measured in their scale and effect.⁹⁷ The problem with such an approach is that if only large scale armed attacks trigger the right of self-defense, there is no lawful response to smaller scale, but still insidious uses of force, which would be neither just, nor realistic as Judge Jennings pointed out in his dissent in the *Nicaragua* case.⁹⁸ Even the ICJ seemed to accept that a series of armed incidents related temporally and geographically and conducted by the same author can cumulatively amount to an armed attack.⁹⁹ Likewise, a small scale one-off armed attack on a discrete military unit or platform such as a warship can trigger a tactical level defensive measure to ward off such an attack which is referred to by different names.¹⁰⁰

Be that as it may, NSAGs are increasingly capable of mounting not only small-scale, localized or a series of small scale repeated attacks, but also large-scale ones, comparable to attacks mounted by or under the control of States. This is due to a number of factors, which

⁹⁵ See e.g.: Ruys, *supra* note 26, at 155; Monika Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INTERNATIONAL LAW STUDIES, at 16-17 (2015); Henderson, *supra* note 46, at 223.

⁹⁶ Chatham House Principles, at 6: “[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity.” See also: Kunz, *supra* note 23, at 878; John Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defence*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 139 (1987).

⁹⁷ *Nicaragua case*, I.C.J. Rep 101, 103-104, paras. 191 and 195.

⁹⁸ *Ibid.*, Dissenting Opinion of Judge Jennings, I.C.J. Rep 543.

⁹⁹ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) 2003 I.C.J. Rep 191-192, para 64 (Nov. 6) (hereafter: *Oil Platforms case*).

¹⁰⁰ Dinstein, *supra* note 1, at 262-263; Hans F.R. Boddens Hosang, *Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS (Terry D. Gill and Dieter Fleck eds., 2015).

include, in particular, changes in the global system whereby NSAGs have gained in relative influence and importance in comparison to the situation during and immediately following the Cold War. This phenomenon, combined with technological developments and other factors, has resulted in a relative proliferation of transnational uses of armed force by various armed groups acting with a large degree of autonomy and pursuing their own strategies and goals.

In conclusion, there is no persuasive reason why the scale of an armed attack would have to be different if it was conducted by a NSAG, as opposed to one carried out by a NSAG under the control of a State or by the State itself, other than that it rises above the level of a criminal act capable of being addressed by ordinary law enforcement measures. If one accepts that an armed attack requires a *de minimis* threshold, but does not necessarily entail only large-scale uses of force, any use of force beyond such threshold can amount to an armed attack including when committed by an NSAG. Simply put, the requirement of an armed attack does not change simply because the author in question is a NSAG operating independently from State control.

Furthermore, there is general agreement that an armed attack must originate or be controlled from outside the territory of the defending State for self-defense to be relevant.¹⁰¹ As long as the attack is not a domestic act of violence and meets the *de minimis* threshold of harm, it will qualify as an armed attack so long as it is directed against the territory, or military platforms or units of the defending State located abroad.¹⁰²

Finally, there must be credible and persuasive evidence as to the author of an attack before self-defense can be exercised against it. While it is clear that the burden of proving that an armed attack has occurred falls upon the defending State,¹⁰³ the applicable standard for such proof is somewhat ambiguous.¹⁰⁴ When it comes to armed attacks carried out by NSAGs, the burden of proving the author of the attack might be more difficult given that many such attacks may be carried out covertly or through unconventional methods. This does not mean, however, that the burden of proving the occurrence and the author of the armed attack must be different in the case of NSAGs. There is not a separate standard for identifying the author of an armed attack when it is conducted unconventionally or depending on whether the author is a State or a NSAG. In any case, the evidence of the author of (an imminent) attack would have to be convincing, even if that did not necessarily amount to the same standard used in a courtroom, for obvious reasons.

6. Is failure to prevent one's territory from being used by NSAG enough to trigger the right of self-defense?

¹⁰¹ *Wall Advisory Opinion*, I.C.J Rep 194, para. 139.

¹⁰² Terry D. Gill, *Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS*, at 213 (section 8.01) (Terry D. Gill and Dieter Fleck eds., 2015).

¹⁰³ *Oil Platforms case*, I.C.J Rep 189, para. 57.

¹⁰⁴ James Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 *INTERNATIONAL COMPARATIVE LAW QUARTERLY*, at 19 (2009).

In the context of responding to an (imminent) attack by a NSAG, the necessity of taking action brings to the fore an important question related to the duty of every State to prevent its territory from being used as a base of operations for an armed group against any other State. This is part of the duty of a territorial sovereign to exercise vigilance over its territory and safeguard the interests of other States to the best of its ability.

This duty has long been recognized in customary law and the decisions of international tribunals as in the well-known *Island of Palmas* arbitral award and the *Corfu Channel* decision of the International Court.¹⁰⁵ The duty to prevent the use by armed groups of a State's territory against any other State, has been explicitly recognized by UNGA Resolution 2625 and acknowledged as customary international law by the ICJ.¹⁰⁶

Certain authors have asserted that, first, the duty of due diligence contained in the duty of vigilance is not absolute and, second, failure to observe it does not give rise to the right to take forcible action.¹⁰⁷

Regarding the first point, the duty of vigilance is indeed not absolute. No State can possibly prevent any type of criminal act being perpetrated on or from its territory, which can cause harm to another State. This may involve terrorist cells or groups of insurgents belonging to or professing allegiance to an armed group being present on its territory and making preparations for acts directed *inter alia* against the citizens of one or more other States, and terrorist incidents of a greater or lesser gravity will occur despite the best efforts of any State. However, once the territorial State becomes aware of a threat of attack or of an actual attack against another State originating from its territory, it must undertake all feasible efforts to halt such activity and forestall future armed acts directed at any other State. It will hardly be possible for a NSAG to carry out armed attacks against another State from a base of operations in a territorial State against another State without either the territorial State or the targeted State being aware of such activity. In such a situation, the duty to take effective action is indisputable. As the 2007 IDI Resolution stated, the State from which the armed attack by NSAGs is launched has the obligation to cooperate with the targeted State.¹⁰⁸ Once an armed attack is underway or is imminent and no other means are available, the necessity of self-defense allows the targeted State to act within the limits posed by the same principle of necessity and the principle of proportionality to ward off the attack and forestall continued attacks from the same source, including on the territorial State's territory. Self-defense is an exception to the prohibition of non-intervention and serves as a lawful basis for the use of force, including on another State's territory. Consequently, the territorial State has no right to

¹⁰⁵ *Island of Palmas* (Netherlands, United States), at 839 (Permanent Court of Arbitration, 1928) http://legal.un.org/riaa/cases/vol_II/829-871.pdf (last visited 28 June 2019); *Corfu Channel* (UK v Albania), 1948 I.C.J. Rep. at 22-23.

¹⁰⁶ *Nicaragua case*, I.C.J. Rep 101, para. 191.

¹⁰⁷ See e.g.: Gray, *supra* note 1, at 248; Theodore Christakis, *Challenging the "Unwilling and Unable" Test*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, at 20 (2017); Marja Lehto, *The Fight against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-defence against Non-State Actors*, 87 NORDIC JOURNAL OF INTERNATIONAL LAW, at 12-13 (2018).

¹⁰⁸ 2007 IDI Resolution, Conclusion 10.

interfere forcibly with proportionate measures of self-defense directed against the NSAG by the targeted State, as there is no self-defense against self-defense.¹⁰⁹

Regarding the second point, it is not the failure of the territorial State to meet its due diligence duty to forestall acts directed against another State from its territory, but the occurrence or imminence of an armed attack emanating from its territory coupled with the lack of feasible alternatives which gives rise to the right of self-defense.

Where there is a failure of the territorial State to meet its due diligence duty, the so-called unable and unwilling test has emerged and is used by some States and commentators to determine when recourse to self-defense is justified.¹¹⁰ According to this test, while the armed attack is not to be attributed to the territorial State, its inability or unwillingness to prevent its territory from being used by NSAGs to carry out such armed attacks renders self-defense on its territory by the defending State lawful. While the territorial State would not be held responsible for the attack and the defensive action would not be directed against it, its inability or unwillingness to prevent or halt an attack originating from its territory would permit the defending State to exercise self-defense against the NSAG on the territory of the territorial State, with or without its consent.¹¹¹ The test has been endorsed by the Chatham House Principles,¹¹² the Bethlehem Principles¹¹³ and to a certain extent by the Leiden Policy

¹⁰⁹ *Ministries case* (US v. von Weizsaecker et al) at 314, 329 (US Military Tribunal, Nuremberg, 1949) cited in Dinstein, *supra* note 1, at 200.

¹¹⁰ Ashley Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW, at 483 (2011-2012). For the US position on the test, see: Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695 (23 September 2014): “States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq’s borders.” For the UK endorsement of the test, see: The Rt Hon Jeremy Wright QC MP, *The Modern Law of Self-Defence* (11 January 2017) <https://www.ejiltalk.org/the-modern-law-of-self-defence/> (last visited 26 June 2019). For the Australian endorsement of the test, see: Senator the Hon. George Brandis QC, Attorney-General of Australia, *The Right of Self-Defence Against Imminent Armed Attack In International Law* (11 April 2017) <https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/> (last visited 26 June 2019). See also: Elena Chachko and Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test?*, LAWFARE (10 October 2016) <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> (last visited 28 June 2019).

¹¹¹ Deeks, *supra* note 109, at 495; Lindsay Moir, *Action against Host States of Terrorist Groups*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, at 730 (Marc Weller ed., 2015).

¹¹² Chatham House Principles 2005, Principle No. 6, at 11: “If the right of self-defence [...] is to be exercised in the territory of another State, it must be evident that that State is unable or unwilling to deal with the non-State actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial State cannot be obtained”.

¹¹³ Bethlehem, *supra* note 2, at 776. Principle 11: “The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is [...] unwilling to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack.” Principle 12: “The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack.”

Recommendations.¹¹⁴ At the same time, critics of the test have characterized it incompatible with the international law on the use of force.¹¹⁵

While the inability or unwillingness of a State to prevent an NSAG from operating from its territory and the impact this has on the exercise of extraterritorial self-defense is discussed in the next two sections, it must be clarified at this point that the mere failure of a State to meet its due diligence obligation to prevent harm does not in itself give rise to a necessity of self-defense. Where inability or unwillingness is not synonymous with the lack of feasible alternatives, this will not translate into a right to take self-defense if other means of halting or forestalling an attack are available and would effectively remove the necessity to act. We will discuss when such inability or unwillingness, along with other considerations, will translate into a necessity of self-defense presently, but while a failure to exercise vigilance may well give rise to responsibility and a duty of reparation to the injured State, it does not in itself automatically equate with a necessity of self-defense.¹¹⁶ As such, it should not be seen as a stand-alone justification for the exercise of self-defense.

7. What makes self-defense necessary on the territory of “unable” States?

Determining the inability of a State to prevent its territory from being used by NSAG will depend on the circumstances at hand. A number of authors suggest that the territorial State’s inability to take effective measures against NSAGs operating from their territory is tantamount to the level of involvement necessary to render action against those armed groups lawful.¹¹⁷ Conversely, other authors have warned against conflating loss of territorial control with the absence of State jurisdiction and against treating unable States as failed States.¹¹⁸ The present authors agree that the degree to which a State is unable to control its territory can greatly differ and, in any case, it is only part of the assessment whether such inability renders self-defense permissible.¹¹⁹

There are roughly three scenarios that can result in a State being “unable” to prevent an armed group from conducting operations amounting to an ongoing or imminent armed attack from its territory.

¹¹⁴ *Leiden Policy Recommendations*, *supra* note 90, at para. 42: “Where a state is itself supporting or encouraging the actions of terrorists on its territory, it may well be unwilling to avert or repel the attack and action in self-defence may be necessary. Self-defence may also be necessary if the armed attack cannot be repelled or averted by the territorial state. States relying on self-defence therefore must show that the territorial state’s action is not effective in countering the terrorist threat.”

¹¹⁵ See e.g.: Olivier Corten, *The ‘Unwilling or Unable’ Test: Has it Been, and Could it Be, Accepted?* 29 LEIDEN JOURNAL OF INTERNATIONAL LAW, at 777 (2016); O’Connell, *supra* note 19, at 384; Lehto, *supra* note 47; Brunnée and Toope, *supra* note 46; Christakis, *supra* note 106; Craig Martin, *Challenging and Refining the ‘Unwilling and Unable’ Doctrine*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW (March 2019).

¹¹⁶ Kinga Tibori-Szabó, *The ‘Unwilling and Unable’ Test and the Law of Self-Defence*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW, at 90, 95-96 (Christophe Paulussen et al. eds., 2016).

¹¹⁷ See e.g.: Moir, *supra* note 110, at 735.

¹¹⁸ See e.g.: Priya Urs, *Effective Territorial Control by Non-State Armed Groups and the Right of Self-Defence* 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, at 33 (2017); Lehto, *supra* note 47, at 13.

¹¹⁹ See e.g.: Trapp, *supra* note 20, at 694-695; Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations against Armed Groups*, 93 INTERNATIONAL LAW STUDIES, at 219-220 (2017).

Firstly, a State may have imploded and ceased to function as an effective sovereign with a functioning government. This has applied to Somalia, for example, for a prolonged period extending over years and is (one of) the reason(s) for various foreign military interventions on its territory including the one by Kenya in 2011 referred to earlier.¹²⁰

A second possibility is that a State, while having a functioning government and a degree of control over its territory is too weak to take action against a more powerful armed group which is entrenched on its territory. An example of this was the situation in Lebanon in 2006 whereby the Lebanese government was (and is) in no position to confront Hezbollah and either attempt to disarm it, or prior to the Israeli intervention of 2006, to dislodge it from control over the southern part of the country. Israel, which is a very credible military power, had its hands full in its confrontation with Hezbollah, so it is hardly difficult to understand why a fragile State like Lebanon was “unable” to do so.¹²¹

A third possibility is the loss of control over part of the territory due to internal fragmentation, civil conflict or other factors which preclude the State from preventing an armed group operating from its territory. This was the situation in Syria from the outset of the civil conflict until very recently. The Syrian government continued to function and was engaged in clear efforts to regain control over its territory. Nevertheless, it was clearly incapable of preventing ISIS from taking over a sizable part of its territory, and from there taking control for several years of an equally sizable portion of Iraqi territory, including at one point in 2014 threatening to take the capital after conquering the second largest city in the country.¹²² The necessity of self-defense is, or in any event should be obvious in such a case. Fighting ISIS exclusively within Iraqi territory while its base of operations and oil resources lay across the border in Syria would have been like mopping the floor with the faucet open; an exercise in futility.

There are, of course, mixtures and variations of these scenarios (Libya is presently a combination of the first and third scenarios) and possible other candidates, but these are clear cases of situations where an armed group is capable of operating at will from a State’s territory and in that context conducting operations which by any reasonable standard constitute armed attacks giving rise to a necessity of self-defense, without there being any real complicity or support, much less control on the part of the territorial State. The term “unable” is based on the inability of the territorial State to prevent its territory from being used by an armed group as a base of operations for attacks on other States.

Regardless of which scenario is the most relevant in a given situation, the inability of the territorial State is not a violation of an obligation it owes the defending State if it is due to circumstances beyond its control. In any case, the exercise of self-defense by the targeted State on the territory of the territorial State will only become necessary if there are no feasible alternatives to halt or preclude further armed attack by the NSAG. For example, where an

¹²⁰ See *supra* note 68 and accompanying text.

¹²¹ See *supra* note 62 and accompanying text. See also: UN Doc. A/30/937 (2006); S/2005/515 (2006); UNSC Verbatim Record (14 July 2006) S/PV.5489.

¹²² See *supra* note 75 and accompanying text. See also: *Islamic State and the crisis in Iraq and Syria in maps*, BBC NEWS (28 March 2018) <https://www.bbc.com/news/world-middle-east-27838034> (last visited 28 June 2019).

attack has not yet been launched and is not yet imminent, it may be possible to obtain consent from the territorial State to conduct an extra-territorial law enforcement measure or, in some cases to forestall an attack by the employment of measures on its own territory, where these would suffice to thwart an attack and forestall future attacks originating or controlled from the territory of another State.

However, once an attack has been launched or is on the point of being launched and when no alternatives to the taking of self defense measures on the territory of the territorial State are available or would suffice to halt the attack, and preclude further attacks to the extent this was necessary, the targeted State may resort to self-defense against the NSAG in the territorial State. This is because in such a situation there is an indisputable necessity to resort to self-defense. When this necessity exists, there is no duty to make such action contingent upon permission from the territorial State or to subordinate the defensive response to conditions posed by the territorial State in general, and most particularly, if these would render the defensive action ineffective or would otherwise be unfeasible or unacceptable. The defending State is in short under a duty to respect and limit its intrusion into the sovereignty of the territorial State as far as this is possible and does not render its defense ineffectual. Who decides? As in any situation involving self-defense, it is the State exercising self-defense that makes the initial decision, which is subject to the subsequent approval, acquiescence or rejection by the UNSC and the international community at large.¹²³ Once the necessity of defense ceases, so too must any use of force on the territorial State's territory.

8. What makes self-defense necessary on the territory of “unwilling” States?

In situations where a greater or lesser degree of complicity exists between the territorial State and the NSAG operating from its territory, but such complicity falls short of exercising control over the armed group (hence the attack cannot be attributed to the territorial State), the situation is generally similar to that of “unable” States, but there are some important differences. In this case, the territorial State has effective control over its territory and is capable of taking action to halt the use of its territory by a NSAG as a base of operations against another State, but chooses not to do so. Another way of characterizing this posture is to deem the State “unwilling”.

A number of authors suggest that self-defense is lawful where the territorial State is unwilling to prevent the attacks, due to its tolerance of and support for the NSAG.¹²⁴ While the lack of feasible alternative to self-defense (in the form of law enforcement or cooperation with the targeted State) may indeed stem from the refusal of the territorial State to exercise its duty as a sovereign, the necessity of defensive action arises due to the combination of the ongoing or impending armed attack being mounted from the territorial State's territory and the lack of feasible alternatives in the form of an adequate response and not from the refusal of the territorial State as such.

¹²³ See Dinstein, *supra* note 1, at 253-258.

¹²⁴ See e.g.: Moir, *supra* note 110, at 735; Guy Keinan, *Humanising the Right of Self-Defence*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, at 59 (2017)

As in the former scenarios, the territorial State will not, in principle, be itself responsible for the armed attack, so there is no question of a new standard of imputing the attack to it for failing to act or harboring the armed group. Nonetheless, a State that tolerates, encourages or supports an armed group operating against another State, is in violation of the non-intervention principle and certain forms of support will constitute violations of the prohibition of the use of force, even if they may fall short of constituting effective control resulting in the attack being an indirect armed attack by the State itself.¹²⁵

In sum, States have a duty to prevent their territory from being used by NSAGs to mount armed attacks on the territory of another State. Where a territorial State is in a position to and undertakes effective measures to neutralize the threat of an armed attack by a non-State armed group present on its territory, no necessity of self-defense will arise.¹²⁶ The targeted State may not take action in self-defense unless it is abundantly clear the territorial State will not do so and there are no other feasible alternatives to thwart the attack. However, there is no self-reliant “unable or unwilling” test to replace or supplement the principle of necessity in the exercise of self-defense. The inability or unwillingness of a State to prevent armed groups from operating on its territory may well be a factor in assessing the need to act in self-defense, i.e. whether there are any other feasible alternatives precluding the exercise of self-defense.

9. Can self-defense be exercised without the consent of the territorial State?

Exercising self-defense against an NSAG on the territory of a State not responsible for the armed attack raises another controversial question: whether such defensive action is conditional upon the consent of the territorial State. A number of authors and commentators require that the defending State asks for the consent of the territorial State before the exercise of self-defense. Such consent is variously described as an additional basis for using force or as a necessary step to permit the exercise of self-defense.¹²⁷

As regards the first characterization, valid consent is a *separate* (and in some cases additional) basis for the use of force against an NSAG on another State’s territory, but is not an exception to the prohibition of the use of force contained in Article 2(4) and the prohibition of intervention in customary law since it does not constitute a violation of either of those prohibitions.¹²⁸

As regards the second characterization, the consent of the territorial State cannot become a *conditio sine qua non* for the exercise of self-defense by the defending State, because that would render the right of self-defense nugatory. Certainly, whenever possible, the targeted State should indeed seek an effective response from the territorial State or consent to take

¹²⁵ UNGA Res 2625 (XXV) (24 October 1970) Part I.

¹²⁶ See also Trapp, *supra* note 20, at 694-695.

¹²⁷ See e.g.: Deeks, *supra* note 109, at 519; Christakis, *supra* note 106, at 21; Urs, *supra* note 116, at 33.

¹²⁸ For the work of the International Law Commission on consent, see JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY, at 163-165 (2002). For consent as a ground for using force on another State’s territory see Terry D. Gill, *Military Intervention with the Consent of or at the Invitation of a Government*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, at 252-255 (Terry D. Gill and Dieter Fleck eds., 2015).

action against an armed group operating with a significant degree of impunity on another State's territory when there is a clear danger of attack at some point in the future, depending on the factual situation, the relationship between the armed group and the territorial State and the nature and imminence of the threat. But once the necessity of resorting to self-defense in response to an ongoing or impending attack arises, the situation changes. There is no duty to seek consent when the necessity of self-defense is overriding or it is likely that doing so would significantly hamper the effectiveness of the defensive measures, or would otherwise be unacceptable for compelling reasons, such as becoming complicit in perpetration of serious violations of international law by the territorial State. There is *a fortiori* no need to seek consent where the territorial State is complicit in the attack or is otherwise colluding with the armed group without being directly responsible. As stated, self-defense is an exception to the prohibition of intervention and a lawful base for using force, including extra territorially and even in the absence of consent by the territorial State once the conditions for its exercise are extant.

To the extent the territorial State granted consent to the targeted State to conduct operations on its territory aimed at neutralizing the threat posed by the NSAG to the other State, this could constitute an additional or alternative legal basis for such action depending on what the conditions posed by the territorial State were in relation to the scale of the (imminent) attack and other relevant factual considerations.

Authors have also criticized the distinction between forcible action *against* a State and *within* a State.¹²⁹ In their view, even if the NSAG responsible for the armed attack is the sole target of the exercise of self-defense, the use of force violates the territorial integrity of the State in question. What these authors fail to consider is the very nature of self-defense as an exception to the prohibition to use force, which validates the use of force on the territory of another State. While the concern indeed remains that armed force is used on the territory of a State that is not responsible for the armed attack, the reverse question is seldom asked: why would the targeted State be condemned not to be able to resort to lawful self-defense against ongoing or imminent armed attacks that violate its own territorial integrity for fear of violating the territorial integrity of the State from which the attacks emanate.¹³⁰

10. How does proportionality affect the exercise of self-defense on the territory of an “unable” State?

The principle of proportionality in the context of self-defense requires that such defensive action be limited to neutralizing the threat. In the case of “unable” States that are not in a position to prevent an armed group operating from their territory, it is clear that self-defense must be directed solely at neutralizing the ability of the armed group to conduct or continue its attack and not at the territorial State. Proportionality would dictate that the force be restricted to what is strictly required for self-defense in response to the attack mounted by the NSAG and this will likely impact upon and restrict the geographical area of operations and

¹²⁹ See e.g.: Lehto, *supra* note 47, at 21; Tladi, *supra* note 3, at 574-575.

¹³⁰ See also: Keinan, *supra* note 122, at 58.

preclude the targeting of any national assets of the territorial State, except in the case the territorial State otherwise forcibly interferes with the lawful exercise of self-defense. The use of disproportionate force can change the equation if this results in or amounts to an attack on the territorial State, which obviously would no longer be lawful self-defense. The defending State should inform and cooperate with the territorial State as far as possible. However, this would not be required if such cooperation were likely to significantly impair the effective neutralization of the armed group's ability to carry on with an attack and continue to conduct attacks. Likewise, the defending State is responsible for providing compensation for any damage to the territorial State or its citizens resulting from human error, equipment malfunction, faulty or reckless targeting or disproportionate force. Moreover, as a matter of comity, the defending State may also compensate for damage incurred as a result of the use of lawful force when the territorial State incurs no blame for the attacks by the NSAG. Obviously, any action involving the use of force must always be carried out in conformity with applicable humanitarian and human rights law.

11. How does proportionality affect the exercise of self-defense on the territory of 'unwilling' States?

As regards "unwilling" States, the defensive action should likewise be restricted to what is strictly necessary to neutralize the threat posed by the armed group without engaging the territorial State unless forcibly opposed, but there will be no duty to cooperate with or compensate the territorial State for any damage once it is clear that the territorial State is both aware of operations by a NSAG originating from its territory directed against another State, but chooses not to act. This is because of the implicit or explicit complicity of the territorial State in a situation where it is aware of the harm originating from its territory, has the means to address this, but chooses not to. While this does not make the territorial State a co-author of the attack, it does make it responsible for its own failure to act.

How does this differ from the *Corfu Channel* situation in which the ICJ regarded the unilateral action by the UK as unlawful? It lies in the necessity to take action in self-defense if an armed attack is (on the point of) being launched from the territorial State's territory and the territorial State fails to act. In the *Corfu Channel* case there was no necessity of or invocation of self-defense; the UK was not under attack when it sent its warships into Albanian waters to sweep the mines. It justified its action (unsuccessfully) on the basis of gathering evidence of Albanian complicity and removing a hazard to navigation, not on any ongoing or impending attack.¹³¹ Hence, that case does not directly pertain to self-defense or preclude a State under attack from defending itself (or receiving assistance from another State in the context of collective self-defense).¹³² It does, however, clearly establish a duty of a sovereign to take all feasible measures to halt and in so far as possible, prevent harmful use of territory. Hence, any duty to compensate would ordinarily fall on the territorial State for its failure to act, as was the case in the *Corfu Channel* case.

¹³¹ *Corfu Channel* (UK v Albania), 1948 I.C.J. Rep, at 34-35.

¹³² See *supra* note 106 and accompanying text.

12. When does the defending State have to commence and end its action?

Self-defense is distinct from punitive action and has as its purpose the neutralization of an ongoing or imminent attack and differs from a reprisal in that it is not purely or primarily an act of retribution for an unlawful use of force. It becomes operative when the necessity of self-defense manifests itself through an (imminent) armed attack for which alternative means are either not available or would not be adequate to address the situation. Once a State is the victim of an armed attack or is the target of an impending attack and has exhausted feasible alternatives, it should take defensive action as soon as it is in a position to do so. This can depend on a number of factual considerations such as having the necessary evidence establishing the author of the attack when this is not readily apparent, mobilizing and deploying forces to the area of operations, taking diplomatic action, for example, with regard to the State where the attack originated, receiving assistance from friendly States when this is called for and so forth. This requirement can be seen either as an independent condition referred to by some as “immediacy”, or as part of the principle of necessity. Either way, it serves to distinguish self-defense from purely punitive action, even though self-defense can have an element of retribution in it in so far as it aims to dissuade and prevent the attacker from continuing with its attack.

Once the necessity of self-defense is no longer present, the defensive action must cease.¹³³ This will be the case when the original attack has been warded off and the threat of continuing attack from the same source has been neutralized and/or whenever alternative courses of action which would effectively remove the threat of continuing attack become available. Self-defense is not a license to carry on a borderless and perpetual war against a phenomenon or utilize self-defense as grounds to engage any armed group which poses a potential threat, irrespective of whether that threat is clear and present enough to justify armed measures on the territory of another State.

D. Conclusions

Without a doubt, the drafters of the UN Charter did not have NSAGs foremost in mind when they agreed upon a final version of Article 51. During the half century between the drafting of the Charter and the end of the Cold War, post-Charter and pre-9/11 State practice was not characterized by uses of force against NSAGs acting independently from States. While (quasi) independent non-State actors were certainly not unknown to the history of self-defense, during most of the twentieth century exercise of self-defense revolved around States and NSAGs dependent on State direction, control or support. This dearth of occurrence does not, however, translate into the emergence of a prohibition against using self-defense against (quasi) independent NSAGs. It would be unfounded to conclude that the law prohibited a phenomenon that did not actually occur. Since 9/11 there has been considerable State practice

¹³³ See Terry D. Gill, *When Does Self-Defence End?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, at 750-751 (Marc Weller ed., 2015).

indicating either the emergence of a new rule or the reaffirmation of the application of the existing conditions for the exercise of self-defense to attacks by autonomous armed groups.

While there is no stand-alone standard of “inability or unwillingness” which independently gives rise to the right to exercise self-defense, there is no convincing reason why the well-established conditions relating to the exercise of self-defense would not apply to situations where an autonomous armed group was conducting an armed attack instead of a State or a State-controlled armed group. With some adjustments these conditions apply to attacks by autonomous armed groups and considerations of inability or unwillingness may well be relevant in helping to assess when a necessity of self-defense arises and how it should be applied. We have shown how these conditions, in particular the principle of necessity within the context of self-defense, serve as both the driver and the essential limiter upon the exercise of self-defense. We hope this contribution will clarify some of the issues we have discussed relating to whether and how self-defense should be exercised in relation to the increasing capacity of armed groups acting independently of State-control to mount armed attacks.