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ARTICLES

# Self-Defence and Non-State Actors: An Inquiry into the Morphology of the Right of Self-Defence in International Law

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## Abstract

This article examines whether states may use force in self-defence against non-state actors operating from the territory of another state. It first maps the prevailing approaches to self-defence in response to non-state armed attacks, focusing on attribution, Article 3(g) of the United Nations General Assembly's Definition of Aggression, and the 'unable or unwilling' doctrine. It argues that these approaches give rise to normative, methodological and practical difficulties and often leave states without an effective right to defend themselves. The article then goes on to explain the morphology of the right of self-defence. It contends that self-defence is a primary rule of international law permitting the use of force in response to an armed attack as a factual occurrence, irrespective of its perpetrator. It further argues that self-defence is neither an exception to Article 2(4), nor a legal sanction. On this basis, the right of self-defence extends to armed attacks by non-state actors, even when they operate from within the territory of another state. In such cases, self-defence as a circumstance precluding wrongfulness excuses the responsibility of the defending state for incidental violations of the territorial state's sovereignty in the course of defensive action.

**Keywords:** self-defence; non-state actors; circumstances precluding wrongfulness; attribution; 'unable or unwilling'; 'substantial involvement'

## 1. Introduction

The attacks carried out by Hamas on 7 October 2023, followed by subsequent attacks by Hezbollah and the Houthis, against Israel have once again brought to the forefront the question of the legality of using defensive force against non-state actors (NSAs).[1]

[1] In relation to the 2023 Hamas attacks see Marko Milanovic, 'Does Israel Have a Right to Defend Itself?', *EJIL:Talk!*, 14 November 2023, https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself; Yuval Shany and Amichai Cohen, 'International Law "Made in Israel" v. International Law "Made for Israel"',

Although this debate is not new, the challenges posed by NSAs, however, have evolved considerably as a result of the increasing frequency, scale and sophistication of their attacks. Also, while some NSAs operate as proxies for states – advancing their political, military or strategic objectives – others act with a significant degree of independence from state sponsorship, even while conducting operations from within the territory of states.

Non-state armed attacks on states raise complex legal questions concerning the applicability of the right of self-defence as stipulated in Article 51 of the UN Charter[2] and customary international law, particularly when defensive action is carried out within the territory of the state from which the NSA operates.

In this article, I argue that a state may lawfully resort to force in self-defence on the territory of another state against a non-state actor that has carried out an armed attack. This argument rests on an analysis of the morphology of the right of self-defence in international law. By morphology, I refer to the structural composition, internal logic, features and relational dimensions of this right within the broader legal system to which it belongs. In my view, it is only through such understanding that the application of the right of self-defence to attacks by non-state actors can be properly assessed and normatively justified.

To support this argument, I first present existing approaches to self-defence as reflected in international jurisprudence and academic commentary. More specifically, I start with the traditional approach, which conceives of self-defence as an interstate affair, permitting the use of defensive force only against another state either when a non-state armed attack is attributable to that state (Section 2.1) or when a state is regarded as the constructive author of the non-state armed attack (Section 2.2). I will then turn to the 'unable or unwilling' doctrine, which permits the use of defensive force against non-state actors operating from the territory of another state, provided that the territorial state is either unable or unwilling to prevent or suppress their attacks (Section 3). I will argue that they suffer from normative and methodological weaknesses and, in most cases, they deny the victim state a lawful means of defending itself.

Lieber Institute, *Articles of War*, 22 November 2023, https://lieber.westpoint.edu/international-law-made-in-israel-international-law-made-for-israel; Nicholas Tsagourias, 'Israel's Right to Self-Defence against Hamas', Lieber Institute, *Articles of War*, 1 December 2023, https://lieber.westpoint.edu/israels-right-self-defence-against-hamas. More generally see Constantine Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence' (2008) 55 *Netherlands International Law Review* 159; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press 2010); Paulina Starski, 'Right to Self-Defence, Attribution and the Non-State Actor – Birth of the "Unable and Unwilling" Standard?' (2015) 75 *Heidelberg Journal of International Law* 445, 461; Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *International Law Studies* 1; Nicholas Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 *Leiden Journal of International Law* 801; Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 *European Journal of International Law* 563; Jutta Brunnée and Stephen S Toope, 'Self-Defence against Non-state Actors: Are Powerful States Willing but Unable to Change the International Law?' (2017) 67 *International and Comparative Law Quarterly* 263; Erika de Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution' (2019) 32 *Leiden Journal of International Law* 91.

[2] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

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To answer the challenges posed by NSAs and to present a normatively and methodologically coherent justification for the use of defensive force, I will proceed to explain the morphology of the right of self-defence (Section 4). As I will explain, self-defence operates both as a primary and as a secondary rule of international law. As a primary rule, enshrined in Article 51 of the UN Charter and customary international law, it establishes the entitlement of a state to use force in response to an armed attack regardless of whether that attack is carried out by another state or by a non-state actor. I will also argue that, as a primary rule, it is not normatively or methodologically dependent on the prohibition of the use of force.

As a secondary rule, self-defence functions as a circumstance precluding wrongfulness as stipulated in Article 21 of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). In this capacity, its role is distinct: it excuses the wrongfulness of incidental violations of international obligations that may occur in the lawful exercise of the primary right of self-defence.

Before proceeding, three caveats must be noted. First, this article does not address all aspects of the right of self-defence, such as the requirements of necessity and proportionality. Second, the analysis is confined to the *jus ad bellum* framework and does not examine *jus in bello* considerations arising from the exercise of self-defence. Third, the article does not provide a detailed examination of all state practice involving the use of defensive force against NSAs.

## 2. The interstate paradigm of self-defence and non-state armed attacks

As was noted, the traditional construction of the right of self-defence conceives it as operating exclusively within an interstate context.[3] This conception of self-defence aligns self-defence with Article 2(4) of the UN Charter, which confines the prohibition of the use of force to interstate relations, and with the understanding of self-defence either as an exception to that prohibition or as part of a broader normative ensemble with Article 2(4).

When it comes to non-state armed attacks, the interstate paradigm of self-defence is maintained in two principal ways: first, through the mechanism of attribution whereby a non-state armed attack is imputed to a state according to the secondary rules of attribution found in the law of state responsibility; and, secondly, through the notion of constructive state authorship of an armed attack on the basis of Article 3(g) of the UN General Assembly's Definition of Aggression.

Although these two approaches overlap in that they both treat the state concerned, rather than the non-state actor, as the author of the armed attack and the proper target of self-defence, and both require some degree of state involvement in the non-state armed attack, they differ in the degree of state involvement required, as well as in their normative and methodological premises as is explained below.

I will now discuss these two approaches in more detail.

[3] ICJ, *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories*, Advisory Opinion, [2004] ICJ Rep 136, [139]; ICJ, *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, Judgment, [1996] ICJ Rep 161, [51]; ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, Judgment, [2005] ICJ Rep 168, [146]–[147].

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### 2.1. Attribution of non-state attacks to a state

According to this approach, which is prevalent in scholarship, a state may exercise the right of self-defence only against the state to which a non-state armed attack has been attributed under the attribution criteria of the law of state responsibility. Attribution refers to the legal process of imputation under which conduct that is prima facie private – such as an armed attack carried out by a non-state actor – becomes state conduct. If a non-state armed attack cannot be attributed to a state, the right of self-defence is considered unavailable to the victim state.

Attribution as a mechanism of legally imputing armed attacks to a state is reflected in Articles 8, 9 and 11 ARSIWA. These provisions are distinct from Article 4 ARSIWA, which encompasses armed attacks by *de jure* or *de facto* state organs,[4] and Article 5 ARSIWA, which covers armed attacks by entities empowered by a state to exercise elements of governmental authority.[5] In the latter two cases, the armed attacks are authored *ipso jure* and directly by a state because they are carried out by its own organs or entities that are part of its institutional structure, and not because of legal imputation of armed attack in a secondary sense, which is what attribution is about. In what follows I will thus focus on how non-state armed attacks can be attributed to a state under Articles 8, 9 and 11 ARSIWA.

Article 8 ARSIWA attributes to a state armed attacks committed by NSAs acting under its instructions, direction or control. Instructions require specific state orders whereas direction requires state guidance short of orders. Regarding the criterion of control, the International Court of Justice (ICJ) requires 'effective' control.[6] Although the ICJ has not clarified precisely what this entails, its rejection of alternative standards such as 'overall control' suggests that effective control requires indispensable state input into the non-state armed attack, amounting in effect to its causation. Applying this attribution criterion to the October 7 attacks, attribution on the basis of Article 8 ARSIWA is not tenable because the available information does not indicate that Hamas acted under the instructions, direction or effective control of any state.[7]

Turning now to Article 9 ARSIWA, an armed attack by a non-state actor exercising elements of governmental authority in the absence or in default of state authorities will be attributed to that state. This provision addresses incidental and temporally limited exercise of governmental powers by NSAs in lieu of the government when the state apparatus fails to function.[8] Although Hamas acted as the *de facto* government

[4] International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, UN Doc A/56/10 (ARSIWA), art 4.

[5] ibid art 5.

[6] ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43, [402]–[406].

[7] See also Claus Kreß, 'At the Outer Limits of the Right of Self-Defence and Beyond: Israel's Use of Force in the Gaza Strip since 7 October 2023' (2025) 58 *Israel Law Review* 132.

[8] James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002) 114–15; Iran-U.S. Claims Tribunal, *Yeager v Islamic Republic of Iran*, Partial Award, Award No 324–10199–1, 2 November 1987, para 45. For the application of Article 9 to the relations between Hezbollah and Lebanon see Amichai Cohen and Yuval Shany, '"Well, It Depends": The Explosive Pagers Attack Revisited', Lieber Institute, *Articles of War*, 11 October 2024, https://lieber.westpoint.edu/well-it-depends-explosive-pagers-attack-revisited.

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of Gaza, it was not temporary and, more critically, it was not 'called for' in the sense of arising from necessity. On the contrary, Hamas fought and deliberately excluded the Palestinian Authority from Gaza. Consequently, the October 7 attacks cannot be attributed to Palestine.[9]

Finally, under Article 11 ARSIWA, an armed attack by a non-state actor will be attributed retroactively to a state if the state acknowledges and adopts it as its own.[10] These are cumulative conditions requiring the state to identify itself with the armed attack. Applying this criterion to the October 7 attacks, they cannot be attributed to any state. Although the Palestinian Authority remained silent and 'blatantly refuse[d] to condemn the barbaric Palestinian terror attacks against Israeli civilians',[11] silence alone does not amount to acknowledgement and adoption under Article 11, even if it may be politically meaningful. Similarly, reports that Iran's president congratulated the Hamas leader[12] would also not amount to attribution under Article 11 because the latter requires clear and unequivocal endorsement of the act rather than political or symbolic support.

It follows from the preceding discussion that if the right to self-defence is made contingent on attribution, states will be left in most cases legally paralysed in the face of non-state armed attacks.

This is because the attribution criteria in the law of state responsibility are narrow, reflecting the binary distinction between the public (state) and private (non-state) sphere, which derives from a classical, Westphalian understanding of the state as a centralised, hierarchical and bureaucratic entity.[13] According to this view, state responsibility for the acts of private actors attaches only when there is a demonstrable link between the NSA and the state apparatus, or their conduct is closely tied to the will and direction of the state. However, this restrictive approach is ill-suited for addressing the contemporary blurring of the public–private divide in the relations between states and NSAs, and the fact that NSAs can autonomously pursue their agendas while their action can affect states as well as the international order.

Methodologically, relying on attribution for applying the right of self-defence effectively subsumes the *jus ad bellum* under the framework of the law of state

[9] Jennifer Maddocks, 'Article 9 and the Attribution of Armed Groups' Attacks to the Territorial State', Lieber Institute, *Articles of War*, 15 November 2024, https://lieber.westpoint.edu/article-9-attribution-armed-groups-attacks-territorial-state.

[10] Crawford (n 8) 121–23; ICJ, *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, [1980] ICJ Rep 3, [74]. For the customary status of this provision see ECtHR, *Makuchyan and Minasyan v Azerbaijan and Hungary*, App No 17247/13, 26 May 2020, para 112; and International Tribunal for the Law of the Sea (ITLOS), *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, 1 February 2011, Case No 17, (2011) *ITLOS Reports* 10, paras 108–09.

[11] United Nations Security Council (UNSC), Identical letters dated 14 February 2023 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2023/104.

[12] Maayan Lubell and Nidal Al-Mughrabi, 'Israel Retaliates after Hamas Attacks, Deaths Pass 1,000', *Reuters*, 9 October 2023, https://www.reuters.com/world/middle-east/israeli-forces-clash-with-hamas-gunmen-after-hundreds-killed-2023-10-08.

[13] Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University of Virginia Press 1983) 320; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387.

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responsibility despite the fact that these two bodies of law serve fundamentally different purposes and operate according to different types of logic. Whereas the law of state responsibility is concerned primarily with the legal consequences that arise from internationally wrongful acts and is remedial in nature, the *jus ad bellum* concerns the threshold conditions – such as armed attack, necessity and proportionality – under which states may lawfully resort to force in the first place. It is prescriptive or proscriptive, not remedial in nature as is the law of state responsibility.

Consequently, determining the circumstances under which a state is responsible for the acts of NSAs is a different question from whether a state has engaged in an armed attack, or what state involvement in a non-state armed attack makes it a state armed attack for the *jus ad bellum* regime. Also, establishing state responsibility for the acts of NSAs does not in itself justify the use of force by way of self-defence.[14]

### 2.2. 'Substantial involvement' and constructive authorship of an armed attack

The other basis of the interstate paradigm draws on Article 3(g) of the UN General Assembly's Definition of Aggression.[15] This provision has been relied upon by the ICJ in interpreting the notion of armed attack and is widely regarded as reflecting customary international law.[16]

Article 3(g) first defines direct authorship of an armed attack when the non-state actor committing the armed attack operates as *de facto* organ of that state. This is the case where it is sent by that state to commit an armed attack or acts on its behalf.[17] The Article also defines constructive authorship of an armed attack when a state is substantially involved therein.[18]

It is therefore important to explain what amounts to 'substantial involvement'. Prima facie, it denotes assistance that enables the non-state armed attack, thereby making the assisting state an engaged participant in the armed attack though not its direct author, which would fall under the first prong of Article 3(g).

[14] James Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 50; *Armed Activities* (n 3) Declaration of Judge Koroma, para 9.

[15] UNGA Res 3314(XXIX), Definition of Aggression (14 December 1974) art 3(g) defines an act of aggression as 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein'. It is claimed that it defines 'indirect aggression' but this term is perhaps misleading and artificial because this provision in fact describes the direct commission by a state of an armed attack albeit through proxies. See also African Union Non-Aggression and Common Defence Pact (entered into force 18 December 2009) art 1(c)(viii): 'the sending by, or on behalf of a Member State or the provision of any support to armed groups, mercenaries, and other organized trans-national criminal groups which may carry out hostile acts against a Member State, of such gravity as to amount to the acts listed above, or its substantial involvement therein'.

[16] ICJ, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] ICJ Rep 14, [195]; *Armed Activities* (n 3) [146].

[17] See also Independent International Fact-Finding Mission on the Conflict in Georgia, 'Report', Vol 2, September 2009, 258–60; *Nicaragua* (n 16) [109].

[18] Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart 2006) 176–85. I prefer the term 'constructive authorship' to 'indirect aggression'.

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In the *Nicaragua* case, the United States argued that Nicaragua had committed an armed attack by being substantially involved in the guerilla armed attacks carried out in neighbouring states through the provision of arms, munitions, finance, logistics, training, safe havens, planning, command and control facilities.[19] The ICJ, however, excluded 'the provision of weapons, logistical support or other support'[20] from the concept of armed attack and consequently rejected the US claim. This led to criticisms by Judge Jennings and Judge Schwebel. In Judge Schwebel's opinion, Nicaragua's support for the El Salvadorian insurgents – which involved providing arms, munitions, other supplies, training, command and control facilities, sanctuary and lesser forms of assistance – constituted substantial involvement rendering Nicaragua the perpetrator of an armed attack.[21] For Judge Jennings:[22]

> Logistical support may itself be crucial. ... [It] covers the 'art of moving, lodging, and supplying troops and equipment' ... If there is added to all this 'other support', it becomes difficult to understand what it is, short of direct attack by a State's own forces, that may not be done apparently without a lawful response in the form of ... self-defence.

The Court did not clarify the type or degree of assistance that might amount to substantial involvement but its rejection of the US interpretation suggests that a state's involvement should reach such a degree as to render the NSA its *de facto* organ or amount to effective control.[23] Methodologically, the Court focused on what constitutes direct state authorship of an armed attack, rather than assessing whether the various forms of assistance, taken individually or cumulatively, could amount to *substantial involvement* sufficient to render that state the author of an armed attack.

As a result, the 'substantial involvement' standard was rendered redundant, having been assimilated into the '*de facto* organ' criterion, which also explains the ICJ's consistent reluctance to apply this standard in subsequent cases even when it referred to Article 3(g). In the *Armed Activities* (*DRC v Uganda*) case, for instance, the ICJ confined its analysis of state involvement to the 'sending' and 'on behalf' categories of this provision.[24]

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[19] ICJ, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Counter-Memorial of the United States of America, Vol II, 17 August 1984, [189]–[190].

[20] *Nicaragua* (n 16) [195], [226]–[231], [247]. According to Judge Ruda, 'even if there was such assistance and flow of arms, that is not a sufficient excuse for invoking self-defence because, juridically, the concept of "armed attack" does not include assistance to rebels': *Nicaragua* (n 16) Separate Opinion of Judge Ruda, [13].

[21] *Nicaragua* (n 16) Dissenting Opinion of Judge Schwebel, [166], [170]–[171].

[22] *Nicaragua* (n 16) Dissenting Opinion of Judge Jennings, 543–44. See also ICJ, *Case concerning Armed Activities on the Territory of the Congo*, Counter-Memorial of Uganda, Written Proceedings, [2001] ICJ Rep 2, [359].

[23] *Nicaragua* (n 16) [110], [115]. See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963) 370; ILC, Fourth Report on State Responsibility (30 June 1972), UN Doc A/CN.4/264 and Add.1, para 139; Luigi Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 233, 234, 245.

[24] *Armed Activities* (n 3) [146]; see also Dissenting Opinion of Judge ad hoc Kateka, ibid [13]–[15], [24]–[34]. States have occasionally mentioned this criterion. For example, Israel claimed that Syria provided financial, political and organisational assistance to Hezbollah, which 'directly enhanced the capability of the

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The Court's interpretation, however, is contrary to the wording and negotiating history of Article 3(g).[25] The 'substantial involvement' provision was conceived as an independent basis for determining a state armed attack designed to capture various forms of state complicity, encompassing not only material support but also moral support or omissions such as toleration.[26] Furthermore, the term 'substantial involvement' should be compared with the phrase 'open and active participation'[27] which it replaced and which was narrower in scope, excluding passive forms of support or omissions. The Court's narrow interpretation also stands in sharp contrast with its more expansive interpretation of state involvement that amounts to a prohibited use of force.[28]

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organisation to launch attacks against Israel'; however, it took self-defence action against Hezbollah and not Syria: UNSC, Letter dated 24 October 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc S/2001/1012. Yet, when Israel took action against Iran in 2025, it mentioned Iran's substantial involvement with terrorist organisations: UNSC, Identical Letters dated 17 June 2025 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2025/390.

[25] Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press 2016) 142, 170–71.

[26] See ILC, Second Report by Mr J. Spiropoulos, Special Rapporteur, 12 April 1951, UN Doc A/CN.4/44 and Add.1, para 153. See also Hans Kelsen, *Principles of International Law* (2nd edn, Rinehart and Winston 1966) 62–63 ('There are a number of ways in which force may be used indirectly by a state that may be interpreted as constituting an armed attack, for example, … the undertaking or encouragement by a state of terrorist activities in another state or the toleration by a state of organized activities calculated to result in terrorist acts in another state'). AVW Thomas and AJ Thomas, *The Concept of Aggression in International Law* (Southern Methodist University Press 1972) 65–68; Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017) 242–44, paras 636–40; Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 1415–18, paras 34, 38; Helmut Aust, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (4th edn, Oxford University Press 2024) para 40; *Nicaragua* (n 16) Dissenting Opinion of Judge Schwebel, [17]; *Armed Activities*, Ugandan Counter-Memorial (n 22) [359]: 'For the purposes of applying the provisions of Article 51 of the Charter, the concept of an 'armed attack' includes the following elements, taken both separately and cumulatively: … (d) In other circumstances in which there is evidence of a conspiracy between the State concerned and the armed bands fighting against the State taking action in self-defence'. The African Union Non-Aggression and Common Defence Pact (n 15) art 1(c)(xi) defines aggression as 'the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent transnational organized crimes against a Member State'. The term 'complicity' was revived following the 9/11 attacks. The UN General Assembly adopted a resolution according to which 'those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable': UNGA Res 56/1 (18 September 2001), UN Doc A/RES/56/1. In the same vein, the Organization of American States (OAS) condemned the attacks and declared that 'those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of these acts are equally complicit in these acts': OAS, 'Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, Twenty-third Meeting of Consultation OEA of Ministers of Foreign Affairs', 21 September 2001, http://www.oas.org/oaspage/crisis/RC.23e.htm.

[27] UN General Assembly, Report of the Special Committee on the Question of Defining Aggression, 30 May 1973, UN Doc A/9019(SUPP).

[28] *Nicaragua* (n 16) [195], [228]. UNGA Res 2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970), UN Doc A/RES/2625(XXV) (Friendly Relations Declaration), includes within the definition of the use of force the following conduct: organising or encouraging the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another state

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From a practical perspective, the ICJ interpretation of 'substantial involvement' effectively excludes all non-state armed attacks from the scope of self-defence, unless the NSA qualifies as a *de facto* organ of a state. This leads to the same gaps inherent in the attribution approach discussed earlier. For example, Israel would have no right to invoke self-defence in response to the October 7 attacks, as no state can be said to have been so substantially involved as to render Hamas a *de facto* organ of that state.

From a methodological standpoint, it seems that the ICJ has interpreted Article 3(g) through the lens of state responsibility, even though neither attribution nor the law of state responsibility played any role in the General Assembly's Definition of Aggression. In particular, earlier iterations of Article 8 attributed to a state 'the conduct of private persons in fact performing public functions, or in fact acting on behalf of the State as de facto officials', with such *de facto* organs including persons dispatched by a state to carry out specific missions, such as abduction or sabotage.[29] This has generated confusion over the nature of Article 3(g). For instance, some argue that the terms 'sending' and 'on behalf of' operate as standards of attribution, reflecting the criteria set out in Article 8 ARSIWA, while 'substantial involvement' resembles the 'overall control' test developed in international jurisprudence and scholarship.[30] Others regard these terms as special rules of attribution,[31] or even as primary rules of attribution embedded within Article 3(g) itself.[32] This, however, is not correct: Article 3(g) does not lay down criteria of attribution.[33] Rather, it constitutes a primary rule that defines what qualifies as a state armed attack for the purposes of the right of self-defence.

More recently, state assistance to non-state armed attacks has been addressed in the so-called Bethlehem 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors',[34] which seek to clarify the circumstances under which support for such actors may trigger

(para 8), and organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts (para 9).

[29] ILC, State Responsibility, *Yearbook of the International Law Commission* (1974) Vol I, UN Doc A/CN.4/246 and Add. 1–3; UN Doc A/CN.4/264 and Add.1; UN Doc A/9010/Rev.1, 32–6, and ibid, Draft Report of the Commission on the Work of its Twenty-Sixth Session (1974), UN Doc A/CN.4/L.216/Add.1; L.220/Add.1 and 2; L.223 and Add.1; L.224, 283–86. See also Pierluigi Lamberti Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986) 112.

[30] Claus Kreß, 'The State Conduct Element' in Kreß and Barriga (n 25) 412, 448–50; Kreß (n 7).

[31] ARSIWA (n 4) art 55; Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press 2011) 27; Olivier Corten, *The Law Against War* (Bloomsbury 2021) 468; Aust (n 26) 1794, para 39.

[32] Randelzhofer and Nolte (n 26) 1417, para 37; Trapp (n 31) 27; Corten (n 31) 468; Joe Verhoeven, 'Les "étirements" de la légitime défense' (2002) *Annuaire français de droit international* 48, 49, 56–57.

[33] For the different role of attribution see Marko Milanovic, 'Special Rules of Attribution' (2020) 96 *International Law Studies* 295.

[34] Daniel Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770; Elizabeth Wilmshurst and Michael Wood, 'Self-Defense against Nonstate Actors: Reflections on the "Bethlehem Principles"' (2013) 107 *American Journal of International Law* 390; Daniel Bethlehem, 'Principles of Self-Defense – A Brief Response' (2013) 107 *American Journal of International Law* 579.

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a lawful defensive response. Although their precise legal status remains unsettled,[35] these principles are described as being 'intended to work with the grain of the UN Charter as well as customary international law'.[36] It is therefore important to consider how these principles relate to the 'substantial involvement' standard in Article 3(g) of the 1974 UN Definition of Aggression, which, as was noted, reflects customary international law.

According to Principle 7:[37]

> [a]rmed action in self-defense ... may also be directed against those in respect of whom there is a strong, reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.

Principle 7 appears to suggest that only material assistance provided by a state to a non-state actor that is likely to directly cause the armed attack can justify self-defence action against that state. It thus requires a high degree of involvement akin to the '*de facto* organ' or 'effective control' approach adopted by the ICJ in contrast to the lower threshold envisaged by the 'substantial involvement' standard.

More critically, from a normative and methodological perspective, Principle 7 does not clarify whether an assisting state that participates directly in the non-state armed attack is to be regarded in legal terms as the author of the attack in place of the non-state actor or along with the non-state actor. Rather, it appears to justify self-defence action against the state and/or the non-state actor as a matter of policy, raising questions of legal justification.

## 3. The 'unable or unwilling' doctrine and non-state armed attacks

According to the 'unable or unwilling' doctrine,[38] a state that suffered an armed attack by a NSA may take direct self-defence action against that NSA, even when the NSA operates from within the territory of another state, provided that the territorial

[35] Certain states – notably the United States, the United Kingdom and Australia – have acknowledged the Bethlehem Principles: Brian Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations', 110th Annual Meeting of the American Society of International Law, 1 April 2016, 239, https://digital-commons.usnwc.edu/ils/vol92/iss1/7; Jeremy Wright, 'Attorney General's Speech at the International Institute for Strategic Studies', International Institute for Strategic Studies, 11 January 2017, https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies; George Brandis, 'The Right of Self-Defence Against Imminent Armed Attack in International Law', *EJIL:Talk!*, 25 May 2017, https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law. However, they have not received broader recognition and, even more critically, not all principles have been explicitly acknowledged. For criticisms see Michael J Glennon, 'Law, Power, and Principles' (2013) 107 *American Journal of International Law* 378; Mary Ellen O'Connell, 'Dangerous Departures' (2013) 107 *American Journal of International Law* 380.

[36] Bethlehem (2012) (n 34).

[37] It is not, however, clear whether this principle also applies to assistance provided by one NSA to another NSA.

[38] The terms 'doctrine', 'approach' and 'test' are used interchangeably.

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state is *unable* or *unwilling* to prevent or suppress these attacks.[39] This doctrine has been invoked, explicitly or implicitly, by many states to justify their use of defensive force against non-state actors, as in the case of Daesh (ISIS) in Syria.[40]

However, it faces normative and methodological challenges. To begin with, its legal status remains unsettled;[41] consequently, it cannot be regarded as a reliable basis of action. Furthermore, the fact that the meaning of 'unable' or 'unwilling' remains undefined, along with the absence of criteria and evidentiary standards for making such determinations and the uncertainty surrounding the relationship between the two, risks undermining the doctrine's normativity by making it personalised and open to instrumentalisation. This erodes its methodological integrity by compromising its coherence and consistency.

Normative and methodological questions also arise because of the overlap between 'unwillingness' and 'substantial involvement'. Unwillingness may encompass various forms of support – such as toleration, funding, logistical support or training of NSAs – which coincide with the forms of conduct associated with the 'substantial involvement' standard discussed in Section 2.2. Questions thus arise as to which forms of assistance fall within the notion of unwillingness, which constitute substantial involvement, and where the threshold separating the two is located. Distinguishing between them is important as the legal implications differ: 'substantial involvement' renders the state itself the author of the armed attack whereas

[39] Ashley S Deeks, '"Unwilling or Unable": Towards a Normative Framework for Extraterritorial Self-Defence' (2012) 52 *Virginia Journal of International Law* 483; Said Mahmoudi, 'Self-defence and "Unwilling or Unable" States' (2021) 422 *Collected Courses of Hague Academy of International Law* 249–399; Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963, 969, Principle F. See also Adil Ahmad Haque, 'Self-Defense Against Non-State Actors: All Over the Map', *Just Security*, 31 March 2015, https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map.

[40] Indicatively, see UNSC, 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; UNSC, Letter dated 31 March 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221; UNSC, Letter dated 24 July 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2015/563; UNSC, Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693; UNSC, Letter dated 10 December 2015 from the Chargé d'Affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946; UNSC, Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc S/2016/523; UNSC, Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, UN Doc S/2016/513.

[41] See opinions of Brazil, China, Sri Lanka, Vietnam and Mexico in UNSC, Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General and the President of the Security Council (Arria-Formula Meeting), UN Doc A/75/993–S/2021/247, 20, 23, 50, 72, 85. According to Mexico, '[f]rom a substantive point of view, Mexico rejects the propositions of invoking self-defence on the premise of the so-called "unwilling and unable doctrine" or on the lack of effective control as being legally sound. These caveats are not found within Article 51 and go beyond the scope of this provision which, because of its nature and aim, was carefully and purposely drafted in a narrow way': ibid 2; Brunnée and Toope (n 1) 263; Oliver Corten, 'The "Unwilling or Unable" Test: Has It Been and Could It Be Accepted?' (2016) 29 *Leiden Journal of International Law* 777; Hakimi (n 1).

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under the 'unable or unwilling' doctrine, the non-state actor becomes the lawful target of self-defence.

For instance, Iran claimed that Iraq provided Kurdish groups operating from its territory with military training, financial and logistical support, intelligence services and sanctuary, and had been unable to control them despite repeated warnings against the use of its territory by these groups for launching attacks on Iran.[42] Iran subsequently undertook self-defence action against these groups rather than against Iraq even though this would have been permissible under the substantial involvement standard. Similarly, Iran relied on similar grounds to justify its 2018 strikes against the al-Ahvaziya group in Syria, which it held responsible for terrorist attacks, rather than against Saudi Arabia, which according to Iran supported this group.[43]

According to the formulation of this doctrine in the Bethlehem principles, both the non-state actor and the assisting state may become the target of self-defence action depending on the extent of the state's responsibility in aiding or assisting the non-state actor without clarifying the threshold at which such responsibility arises.[44] The difficulty, however, with the Bethlehem principles is that, as was noted, they seek to offer pragmatic solutions for the problem of non-state armed attacks but they do not always offer legal justifications.

A further challenge concerns the function of the 'unable or unwilling' doctrine. The 'unable' prong, for example, has been construed as part of the definition of a non-state armed attack in the context of cyber-attacks without, however, clarifying whether the self-defence action will be directed against the NSA or against the unable state.[45] The 'unwilling' prong, particularly in the form of harbouring or toleration, has instead been interpreted as a special attribution criterion notably in the context of the US self-defence action against Afghanistan following the '9/11' attacks.[46] Yet, whether such *lex specialis* rule of attribution has been established is

[42] UNSC, Letter dated 25 May 1993 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/25843; UNSC, Letter dated 9 November 1994 from the Chargé d'Affaires a.i. of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1994/1273; UNSC, Letter dated 12 July 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1999/781; UNSC, Letter dated 22 March 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/2001/271; UNSC, Letter dated 11 September 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2018/830.

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

[44] Bethlehem (2012) (n 34) Principle 11.

[45] 'Position Paper of the Republic of Austria: Cyber Activities and International Law', April 2024, 8, https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Austrian_Position_Paper_-_Cyber_Activities_and_International_Law_(Final_23.04.2024).pdf.

[46] UNSC, Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946; UNSC, Letter dated 7 October 2001 from the Chargé d'Affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2001/947.

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not settled[47] and, moreover, it is not clear whether the US relied instead on the 'substantial involvement' standard as discussed in Section 2.2. Certain commentators have also argued that 'unwilling' is an attribution criterion equating it with the 'substantial involvement' standard, which they also treat as an attribution criterion.[48] This brings to the fore the methodological problems discussed above – namely, how to determine what amounts to 'unwilling' and what amounts to 'substantial involvement'. Methodologically, it also conflates primary rules on the use of force with secondary rules of the law of state responsibility by transforming the notion of 'substantial involvement' into one of attribution. Such an interpretation would imply that it is the state rather than the non-state actor that is deemed the author of the armed attack and is therefore the lawful target of self-defence, a conclusion that is not supported by state practice. In most cases, states such as Iran in the cases discussed above[49] and the coalition that acted against Daesh in Syria[50] explicitly framed their actions as directed against the non-state actor rather than against the territorial state.

Another question concerning the normative status and methodological structure of the doctrine is whether it departs from the traditional interstate paradigm of self-defence by recognising in legal terms NSAs as the authors of armed attacks and thus as lawful objects of self-defence. The answer is in the negative. The doctrine addresses only the circumstances in which a state can act in self-defence when confronted with armed attacks by non-state actors. In other words, it concerns the practical conditions of necessity in the exercise of self-defence[51] rather than the

[47] Christian Henderson, *The Use of Force and International Law* (2nd edn, Cambridge University Press 2023) 406.

[48] Mahmoudi (n 39) 311.

[49] See nn 42, 43.

[50] See n 40. For other examples, Israel claimed, in relation to its 2006 action against Hezbollah in Lebanon, that it was not against Lebanon: UNSC, 'Immediate, Comprehensive Ceasefire Needed in Lebanon prior to Political Discussion, Acting Foreign Minister Tells Security Council', Press Release SC/8796, 31 July 2006, https://press.un.org/en/2006/sc8796.doc.htm. In relation to its 1995–96 action in Iraq, Turkey said that it targeted solely the PKK/KONGRA-GEL terrorist presence in the region and that it 'remains a staunch advocate of the territorial integrity and sovereignty of Iraq': UN Human Rights Council, Note Verbale dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva addressed to the Secretariat of the Human Rights Council, UN Doc A/HRC/7/G/15. Regarding its action in Iraq and Syria against Daesh and the Kurds, Turkey said: 'We recognize the importance of and support to the territorial integrity and political unity of Iraq': UNSC, Letter dated 16 November 2016 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2016/973; UNSC, Identical letters dated 25 April 2017 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2017/350; UNSC, Letter dated 24 August 2016 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2016/739.

[51] International Law Association (ILA), Final Report on Aggression and the Use of Force, Sydney Conference (2018), 16 ('the unable or unwilling test should be viewed as a component of the necessity criterion'). The US, for example, said in relation to strikes against Iran-affiliated militia in Syria that '[t]his military response was taken after non-military options proved inadequate to address the threat' and that 'States must be able to defend themselves, in accordance with the inherent right of self-defence 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 by non-State militia groups responsible for such attacks': UNSC, Letter dated 26 August 2022 from the Permanent

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normative question of whether non-state actors can, as a matter of law, be the authors of an armed attack.

Consequently, the doctrine preserves the state-to-state relational logic of self-defence by making self-defence dependent on whether the territorial state has fulfilled its international law obligations not to allow its territory to be used by non-state actors to commit armed attacks or not to assist non-state actors.[52] In doing so, it also implicitly transposes principles of the law of state responsibility in the law regulating the use of force.[53]

A major shortcoming of the doctrine is that it does not explain how the use of defensive force in the territory of another state that is not itself the author of the armed attack can be justified in the absence of that state's consent. Territorial states, as well as other states, have condemned such operations as violations of sovereignty. For example, Syria denounced actions on its territory against Daesh[54] or Hezbollah[55] as violations of its sovereignty. Similarly, Lebanon condemned Israel's strikes on its territory against Hezbollah or Hamas as a violation of its sovereignty,[56] whereas Iran

Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2022/647.

[52] ICJ, *Corfu Channel Case (United Kingdom v Albania)*, Merits, Judgment, [1949] ICJ Rep 4, [18]–[23]; Friendly Relations Declaration (n 28); Kimberley N Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 *International and Comparative Law Quarterly* 141, 147.

[53] For example, not every instance of inability constitutes a wrongful act, nor is it explained how a state's exercise of self-defence fits within the framework of state responsibility – in particular, whether it functions as a sanction, as is discussed later.

[54] UNSC, Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/719; UNSC, Identical letters dated 21 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/727; UNSC, Identical letters dated 22 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/1014; ILA (n 51) (opining that 'using force within the territory of another State – even if the forcible measures are limited to strikes against a non-state actor – must be considered as within the notion of force as it exists in Article 2(4) of the Charter. Distinguishing between forcible measures within but not against the State does not, therefore, provide a solution for the jus ad bellum concerns').

[55] UNSC, Identical letters dated 22 March 2023 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/77/813–S/2023/214; UNSC, Identical letters dated 4 April 2023 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/77/846–S/2023/245; UNSC, Identical letters dated 7 March 2023 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/77/795–S/2023/181.

[56] UNSC, Identical letters dated 1 March 2023 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/77/791–S/2023/176; UNSC, Identical letters dated 11 July 2023 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/77/966–S/2023/523; UNSC, Identical letters dated 13 August 2024 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/78/985–S/2024/612.

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condemned US and UK attacks on the Houthis in Yemen as a blatant violation of Yemen's sovereignty and territorial integrity.[57]

Responses to this question vary. For example, according to the Bethlehem principles, the requirement of consent does not operate when the territorial state is unable or unwilling without, however, offering a legal basis for such assertion; whereas if the territorial state refuses to agree on a reasonable and effective plan of action, it becomes unwilling, justifying self-defence action.[58] Others have invoked the law of neutrality, under which a belligerent may take self-defence measures on the territory of a neutral state that has failed to discharge its neutrality obligations.[59] However, extending this reasoning to an entirely different legal regime and to situations involving non-state actors represents a considerable conceptual and normative leap. One could also say that the self-defence action is corrective of the state's failure to prevent non-state armed attacks, thereby operating as a quasi-sanction by putting pressure on the territorial state to change its behaviour and signalling that such behaviour is intolerable. That having been said, no legally convincing justification has been offered.

## 4. The morphology of the right of self-defence and its application to non-state actors

In the light of the normative, methodological and practical challenges associated with these approaches, this section sets out to explain the morphology of the right of self-defence in order to demonstrate the legality of defensive action against non-state armed attacks, even when such action is carried out on the territory of another state.[60] It is only by understanding the history, nature, features and scope of the right of self-defence, its relationship with other norms and legal regimes, and the distinct legal relations and consequences it entails – matters not always consistently appreciated – that its application to non-state armed attacks can be properly explained and justified.

### *4.1. The origins of self-defence*

Recalling the history of the right of self-defence is important because it reveals key features of this right and its continuity within the modern *jus ad bellum* framework. Self-defence has deep roots in international law predating its codification in the UN Charter. It was part and parcel of the right of self-preservation, which gave rise to more specific rights and justified the use of force to protect a range of state interests from diverse dangers.[61] Among these interests, the human and physical existence of the state were regarded as paramount and attacks on them were considered to

[57] UNSC, Letter dated 15 January 2024 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2024/64.

[58] Bethlehem (2012) (n 34) Principles 11 and 12.

[59] Deeks (n 39) 498–503.

[60] Certain of these issues have been discussed in Tsagourias (2016) (n 1) 801; and Nicholas Tsagourias, 'The Use of Force Against Terrorist Attacks: The Two Facets of Self-Defence' (2024) 68 *St Louis University Law Journal* 327.

[61] Pasquale Fiore, *Nouveau droit international public* (tome premier, translated from Italian by Paul Pradier-Fodéré, Auguste Durand et Pedone-Lauriel 1868) 261 ('Le droit de conservation implique d'autres

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warrant recourse to force in 'legitimate' or 'necessary' defence even within the territory of another state.[62]

Self-defence thus historically addressed broader security concerns and predated the development of the prohibition of the use of force, which in legal terms began to emerge from the late 1920s.[63] Even in that context, self-defence was viewed as an inalienable right, an idea echoed in Article 51 of the UN Charter, which recognises the 'inherent right of self-defence'.[64] While this phrase is now understood to refer to the pre-existing customary law of self-defence to avoid the natural law connotations that the term 'inalienable' may invoke, it nonetheless acknowledges a pre-existing right and affirms the long historical pedigree of self-defence in contrast to Article 2(4) of the UN Charter on the prohibition of the use of force, which is a Charter-based creation. The deep-rooted historical foundation of self-defence also reveals another feature of this right, discussed below – namely, that it constitutes a primary norm of the *jus ad bellum* regime and is not an exception to Article 2(4) but rather a coexisting and complementary norm within the *jus ad bellum* framework.

### 4.2. *Self-defence is a primary norm of the* jus ad bellum *regime*

According to Ago's definition, primary rules establish rights and obligations whereas secondary rules set out the consequences of their breach.[65] Regarding self-defence, Article 51 of the UN Charter stipulates self-defence as a right and, indeed, in absolute terms, 'nothing in the Charter shall impair the inherent right of self-defence'. Article 51 and the corresponding customary rule of self-defence thus confer upon states an

droit secondaires; parmi ceux-ci, non-seulement est compris le droit de repousser toute attaque extérieure contre sa propre conservation, d'ou naît le droit de légitime défense, mais encore celui d'éloigner et de repousser toutes les conditions qui pourraient nuire a sa propre conservation et empêcher le propre perfectionnement'); Giuseppe Carnazza-Amari, *Traite de droit international public en temps de paix* (Lorose 1880), tome 1, ch III; Henry Wheaton, *Elements of International Law with a Sketch of the History of the Science* (Carey, Lea & Blanchard 1836) 81; Ellery Stowell, *Intervention in International Law* (Byrne & Co 1921) 392–414; John Westlake, *International Law*, Part I (Peace) (Cambridge University Press 1904) 296; William Howard Hall, *A Treatise on International Law* (2nd edn, Clarendon Press 1884) 244; Lassa Oppenheim, *International Law: A Treatise*, Vol 1 (Peace) (Longmans, Green & Co 1912) 184; Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, Vol II (Stevens 1968) 32; Karl Josef Partsch, 'Self-Preservation' in Rudolf Bernhard (director) (1982) *Max Planck Encyclopedia of Public International Law*, Vol IV, 217.

[62] John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press 1894) 115; According to the Earl of Birkenhead, 'self-preservation should mean self-defence': The Earl of Birkenhead, *International Law* (6th edn, Dent & Sons 1927) 82. The *Caroline* case, which is considered to be a source of the right to self-defence, is often placed within the right to self-preservation: Weaton (n 61) 115–17; The Earl of Birkenhead, ibid 80–81; Robert Yewdall Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82.

[63] Brownlie (n 23) 110.

[64] According to the ICJ, although the UN Charter recognises the pre-existing right of self-defence, it does not regulate all aspects of this right, and Article 51 does not subsume and supervene the customary law of self-defence: *Nicaragua* (n 16) [176]. See Randelzhofer and Nolte (n 26) 1427–28; Marco Roscini, 'On the Inherent Character of the Right of States to Self-defence' (2015) 4 *Cambridge Journal of International and Comparative Law* 634; Dinstein (n 26) 200–202; Corten (n 31) 399.

[65] Roberto Ago, Second Report on State Responsibility, *Yearbook of the International Law Commission* (1970) Vol II, UN Doc A/ CN.4/ 233, 178. Although Ago's distinction is not normatively absolute, it has significant explanatory value and for this reason it is employed here.

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entitlement to use force in the event of an armed attack. Such use of force is lawful *per se* and *ab initio*: it is not tainted by an initial presumption of wrongfulness – and does not give rise to consequent questions of responsibility provided it is exercised according to the conditions attached to self-defence.[66]

### 4.3. Self-defence is not an exception to Article 2(4)

Self-defence as a primary norm is not an exception to the prohibition of the use of force in Article 2(4) of the UN Charter but is an independent rule standing on equal footing with Article 2(4).[67] There is therefore no normative hierarchy or dependency of Article 51 on Article 2(4) which characterises a rule–exception relationship.[68] Rather, the two rules are normatively and structurally autonomous from one another, with asymmetrical application based on their distinct context-specific triggers. This means that the interstate character of Article 2(4) does not operate to limit the scope of the right to self-defence, particularly whether it applies in response to non-state armed attacks.

The view that self-defence cannot be regarded as an exception to Article 2(4) is further supported by the fact that, as noted earlier, it predates that provision, and the Charter acknowledged an already established right rather than creating a new right or carving out an exception to a new rule. During the drafting of the UN Charter, it was expressly recognised that the right to self-defence should not be impaired or diminished by the inclusion of Article 2(4).[69]

If self-defence were intended as an exception to Article 2(4), it would have been normatively and methodologically more consistent, and much simpler, to recognise a new treaty-based right of self-defence or integrate it directly into Article 2(4) to avoid any conflicts that may arise from the application of seemingly antithetical rules. This, however, is not how these rules were formulated in the UN Charter, each standing for a separate norm. That said, it has been argued that in the absence of such integration, conflicts between rules and their exceptions can be avoided by constructing 'derived rules' that merge the content of the two rules

[66] According to Crawford, a state that exercises 'its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2(4)': Crawford (n 8) 166, para 1.

[67] *Contra, Nicaragua* (n 16) [193]; Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law' in Anne Peters and Christian Marxsen (eds), *Self-Defence against Non-State Actors: Max Planck Trialogues on the Law of Peace and War*, Vol 1 (Cambridge University Press 2019) 37, 62; Terry D Gill, *The Use of Force and the International Legal System* (Cambridge University Press 2023) 100; Corten (n 31) 399; Iain Scobbie, 'Self-defence as an Exception to the Prohibition on the Use of Force' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford University Press 2020) 150.

[68] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2nd edn, Clarendon Press 1980) 227. The lack of normative and factual dependency is also evidenced by the fact that self-defence can also include non-forcible measures, whereas as an exception to Article 2(4) it would have been confined to forcible measures only: Russell Buchan, 'Non-forcible Measures and the Law of Self-Defence' (2023) 72 *International and Comparative Law Quarterly* 1. See also UN General Assembly, Emergency Special Session, Official Records of 21st Meeting (20 October 2003), UN Doc A/ES-10/PV.21, 7, statement by Israel.

[69] UN Conference on International Organization (UNCIO), San Francisco, 1945, *Documents of the United Nations Conference on International Organization*, Vol VI, 459, 721.

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into a single normative framework.[70] Indeed, some commentators have advanced the view that Articles 2(4) and 51 form a normative ensemble.[71] Yet, this is a meta-construction to justify the assumption that self-defence forms an exception to Article 2(4), which, however, is not supported by the manner in which the two rules have been formulated in the UN Charter.

In fact, the UN Charter established a legal order composed of smaller rules that are, in Raz's words, 'self-contained (or self-explanatory)', guiding state behaviour by imposing duties or conferring rights.[72] Self-defence is one such 'self-contained and self-explanatory' rule, equal with and coexisting alongside Article 2(4). Whereas Article 51 confers a right to use force when its context-specific trigger – an armed attack – occurs, Article 2(4) imposes a duty not to use force. Both rules derive from values embedded in the Charter system, such as peace, non-aggression and sovereignty,[73] and neither rule renders the other redundant, as each addresses a distinct act-situation and creates distinct legal relations.[74]

The normative as well as structural separation between Articles 2(4) and 51 are also supported by their position within the UN legal order. Article 51 is not located in Chapter I of the UN Charter where Article 2(4) is found but in Chapter VII entitled 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. Chapter VII provides for both collective and unilateral action to maintain or restore international peace and security, while limiting unilateral action in the form of self-defence until the Security Council takes the necessary measures. This placement demonstrates the integration of self-defence into the UN collective security's legal framework. In fact, during the drafting of the Charter, the inclusion of self-defence within Chapter VII was intended to emphasise that the use of force in self-defence prior to Security Council action did not constitute a beach of the peace rather than a non-breach of Article 2(4).[75]

The ICJ jurisprudence clearly reflects the view that Articles 2(4) and 51 are normatively, methodologically and structurally autonomous. The Court has applied the rule on self-defence directly to the facts under consideration by examining whether its conditions – armed attack, necessity and proportionality – were satisfied without assessing whether the alleged use of force prima facie violated Article 2(4).[76] By contrast, if self-defence were an exception to Article 2(4), methodologically the Court would first have had to decide whether the conduct in question fell within the prohibition of Article 2(4), before assessing whether it fell within the exception. However,

[70] Jaap Hage, Antonio Waltermann and Gustavo Arosemena, 'Exceptions in International Law' in Bartels and Paddeu (n 67) 11, 29–31; Similarly Crawford (n 8) 166, para 1.

[71] ARSIWA (n 4) art 21, paras 1, 74; Kreß (n 7).

[72] Raz (n 68) 144–15.

[73] It is interesting to note that during the drafting of the Charter, the individual right of self-defence was assumed to exist, notwithstanding Article 2(4), as falling within the UN purpose of preventing aggression: Tadashi Mori, *Origins of the Right of Self-defence in International Law: From the Caroline Incident to the United Nations Charter* (Brill 2018) 228.

[74] Raz (n 68) 142–43. An 'armed attack' which is the act specific to self-defence is not equivalent to the threat or use of force in Article 2(4): Aust (n 26) paras 7–9; Derek W Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 186.

[75] UNCIO (n 69) Vol XII, 680–82; Mori (n 73) 212; Buchan (n 68) 12

[76] *Oil Platforms* (n 3) (2003) [43]–[51], [61], [73]–[74], [76]–[77], [99]; *Armed Activities* (n 3) [112], [118]–[120], [128], [130]–[132], [141]–[147], [1563]–[165].

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the ICJ does the reverse, as demonstrated in the *Nicaragua* and *Armed Activities* cases. It is only after rejecting a self-defence claim that it examines other related rules.[77] As asserted by Judge Tomka, 'a lawful exercise of the right to self-defence cannot constitute a breach of any relevant article of the United Nations Charter (*in concreto*, Article 2(4)), and there would be no point in analysing the latter. Only once the Court concludes that "the legal and factual circumstances for the exercise of a right of self-defence ... were not present" ..., is it incumbent upon it to consider, and to make findings on, the prohibition of the use of force'.[78]

A final point against construing self-defence as an exception to Article 2(4) is that, if it were an exception, it would be subject to restrictive interpretation;[79] this is not the case with self-defence, which is interpreted as a primary and autonomous rule according to its own purpose. Moreover, the current expansive interpretation of self-defence would risk entirely undermining the content of the prohibition of the use of force. In effect, self-defence would become the source of its content, contrary to the principle that exceptions should not undermine the general rule.[80]

### 4.4. Self-defence is not a legal sanction

Self-defence as a primary rule is not a legal sanction to a prior breach of an international legal obligation, namely the prohibition of the use of force.[81] By decoupling self-defence from Article 2(4) and not treating it as a sanction, self-defence overcomes the hurdle posed by the fact that NSAs are not recognised subjects of international law and therefore not bound by the prohibition of the use of force.[82] Consequently, self-defence may be exercised in response to armed attacks by non-state actors, even though such actors cannot themselves violate Article 2(4).

That having been said, there are approaches which conceived of self-defence as a sanction. For instance, Ago regarded self-defence as a sanction against wrongfulness and therefore as a secondary rule, although this view was not universally shared within the ILC.[83] As he explained, '[a]cting in self-defence means responding by force to forcible wrongful action carried out by another; and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful'.[84] Ago's conception rested on a vision of the international legal system as one

[77] *Armed Activities* (n 3) [147]–[166].

[78] ibid, Declaration of Judge Tomka, para 10.

[79] Per the interpretive principle *exceptio est strictissimae interpretationis*. For arguments supporting a restrictive interpretation of self-defence in the light of Article 2(4) see Corten (n 31) 399 and Brunnée and Toope (n 1) 278–79.

[80] *Exceptio probat regulam in casibus non exceptis*. If there is a broader definition of self-defence which includes anticipatory self-defence or self-defence against NSAs, the meaning of the use of force for Article 2(4) purposes will also change.

[81] Legal sanctions are defined as coercive reactions to illegality; see Hans Kelsen, *Principles of International Law* (Rinehart 1952) 20–22; Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1961) 328–30.

[82] For Ago, self-defence against NSAs falls within the principle of necessity. On this issue see Kreß (n 7).

[83] ILC, Report of the Commission to the General Assembly on the Work of its Thirty-second Session, 5 May–25 July 1980, UN Doc A/CN.4/SER.A/1980/Add.l (Part 2), 52, para 1, *Yearbook of the International Law Commission* (1980) Vol II Pt Two.

[84] ibid 53, para 3.

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of strict correspondence between obligations and responsibility, thereby giving primacy to the obligation not to use force. From this perspective, the use of force in self-defence could only be explained as a sanction for breach of that obligation. This approach also resonates with Bowett's view that self-defence constitutes a response to the delictual conduct of the perpetrator state.[85] Its understanding as a sanction, and indeed a forcible one, also calls to mind Kelsen's theory of war as a sanction for illegality, a theory that has long been rejected.[86]

Construing self-defence as a sanction is not supported by the history, codification, nature or aims of the right of self-defence. The UN Charter does not characterise self-defence as a sanction[87] or codify the law of state responsibility; rather, as noted, it sets out the primary rights and duties of states. Interpreting self-defence as a sanction will thus be inconsistent with its nature as a primary rule, as sanctions are secondary rules that address the legal consequences of violations of primary rules.

Furthermore, the purpose of self-defence reinforced by the requirements of necessity and proportionality is to enable states to repel and deter armed attacks,[88] not to punish the aggressor, enforce international law, or hold the author of the attack legally accountable – functions that belong to sanctions. Construing self-defence as a sanction would therefore distort its normative and methodological framework. More specifically, the requirement of necessity would be displaced, as a sanction functions as an automatic legal reaction to a wrongful act, whereas proportionality would assume a punitive dimension extending beyond the defensive purpose of self-defence.

Construing self-defence as a sanction will also normatively and methodologically collapse self-defence into countermeasures, which belong to secondary rules. As is well known, countermeasures are reactions to a prior wrongful act intended to induce compliance with international obligations and to secure cessation and reparation.[89] The similarities between the conception of self-defence as a sanction and countermeasures was acknowledged by the ILC itself but it sought to distinguish them by arguing that self-defence responds to a particular violation of international law – namely, the prohibition of the use of force – and aims to prevent the wrongful act from achieving its purpose, whereas countermeasures are *ex post* reactions to any breach of international law.[90] This distinction, however, is far from convincing.

If self-defence were to be seen as a special sanction in response to violations of the prohibition of the use of force while countermeasures were treated as reactions to other breaches of international law obligations, this would be inconsistent with the methodology of the law of state responsibility, which establishes general and uniform rules governing the legal consequences of all internationally wrongful acts.

[85] Bowett (n 74) 9, 20 ('The essence of self-defence is a wrong done, a breach of a legal duty owed to the state acting in self-defence').

[86] Kelsen (1966) (n 26) 61.

[87] The ICJ likewise has never treated self-defence as a sanction for breaches of Article 2(4).

[88] *Nicaragua* (n 16) [176]; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, [41]; *Oil Platforms* (n 3) [76].

[89] ARSIWA (n 4) arts 22, 49–54.

[90] ILC (n 83) 53, para 5.

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Furthermore, one would expect that the situation triggering the sanction (in this case self-defence) would coincide with the situation constituting the violation. There is no normative, methodological or logical explanation thus for limiting self-defence as a sanction to only 'grave' uses of force rather than to any use of force, or for gradating violations of the same rule (the prohibition of the use of force) and attaching different sanctions. Contrary, however, to the ILC's muddled reasoning, the ICJ has consistently maintained a clear distinction between self-defence and countermeasures, holding that violations of the prohibition of the use of force give rise to peaceful countermeasures, not to self-defence.[91] The Court has also consistently affirmed that an armed attack triggers the right of self-defence, not countermeasures.

A further difficulty with treating self-defence as a sanction would be that collective self-defence would then be equated with countermeasures taken by third states for violations of *erga omnes* obligations, in this case the prohibition of the use of force.[92] That said, it remains unsettled whether third state countermeasures are available and, even if they are, forcible countermeasures are clearly precluded.[93] Moreover, collective self-defence concerns assistance rendered to the victim of an armed attack to enable it to defend itself, irrespective of whether the assisting state's own rights have been injured,[94] which is a critical condition of countermeasures. In addition, collective self-defence requires a request from the victim state,[95] whereas countermeasures by third states do not require such request.

Finally, if self-defence were conceived as a sanction for breach of the obligation not to use of force, it could not extend to imminent attacks, as in such cases no actual breach has yet occurred. Yet existing international law recognises the possibility of self-defence against imminent attacks, notwithstanding ongoing debates about the scope of imminence. The situation might have been different if self-defence were also regarded as a sanction for the threat of force under Article 2(4). However, even the proponents of the sanctions approach have not advanced this view, and Ago himself adopted a restrictive view on both the scope of the right of self-defence and the prohibition of the threat or use of force.[96]

### 4.5. Self-defence is a reaction to an armed attack as a factual occurrence

Self-defence is triggered by a factual occurrence, an armed attack. An armed attack is a use of force but in factual not legal terms. When the ICJ, for instance, characterised an armed attack as a 'grave' use of force with reference to its scale and effects, it was merely describing the factual attributes of an armed attack, but not

[91] *Nicaragua* (n 16) [249]; ARSIWA (n 4) art 50(1)(a).

[92] ARSIWA (n 4) arts 48, 54.

[93] ibid arts 50, 54; Russell Buchan, 'Collective and Third-Party Cyber Countermeasures' in Nicholas Tsagourias, Russell Buchan and Daniel Franchini (eds), *The Peaceful Settlement of Inter-state Cyber Disputes* (Bloomsbury 2024) 195.

[94] ILC (n 83) 53, paras 4–5.

[95] UNSC Res 661, The Situation between Iraq and Kuwait (6 August 1990), UN Doc S/RES/661.

[96] ILC (n 83) Addendum: Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1), UN Doc A/CN.4/318/Add.5-7, paras 113–14.

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defining an armed attack in legal terms within the framework of Article 2(4) of the UN Charter.[97] This reading of 'armed attack' is reinforced by the wording of Article 51, which is descriptive of its fact-based trigger and not attributive, as it does not qualify an armed attack by reference to its perpetrator. It also accords with the right of self-preservation, the historical source of the right of self-defence, which entitled states to use force to safeguard their existence and essential interests against any danger, regardless of whether the threat came from another state or from private actors.

It follows from this that, in factual terms, both states and NSAs are capable of committing an armed attack,[98] contrary to the ICJ view that only states can commit an armed attack for the purposes of Article 51.[99] As India observed during the Arria Formula debates, 'the source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right of self-defense',[100] and in the same vein the African Union's Non-Aggression and Common Defence Pact (2005) includes in its definition of acts of aggression armed force by non-state actors.[101]

This interpretation of 'armed attack' challenges the interstate construction of the right of self-defence and affirms the normative separation between Articles 2(4) and 51 of the UN Charter. At the same time, it maintains the separation between the *jus ad bellum* and state responsibility by decoupling the existence of an armed attack from attribution. It also supports the earlier point that self-defence is not a legal sanction triggered by a prior breach of international law.

[97] *Nicaragua* (n 16) [191]; ILA (n 51) 14 ('self-defence is a right triggered by an act, rather than the actor').

[98] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 490; Dinstein (n 26) 241; BVerfG (Federal Constitutional Court), Order of the Second Senate of 17 September 2019, 2 BvE 2/16, para 50, https://www.bverfg.de/e/es20190917_2bve000216en ('In principle, the wording of Art. 51 of the UN Charter does not preclude an interpretation that recognises non-state actors as possible aggressors for the purposes of this provision. Nor does its wording give rise to an absolute prohibition on self-defence measures adversely affecting third parties, for instance states from whose territory non-state actors operate. This broad interpretation of Article 51 of the UN Charter, as challenged by the applicant, does also not contravene the object and purpose of the provision. Ultimately, the provision aims to ensure that UN Member States, though bound to fully respect the prohibition on the use of force, remain capable of defending themselves against attacks, regardless of the aggressor. The finding that, in the past, such threats primarily originated from international conflicts between state actors merely describes historic realities; it does not, however, necessarily require that the right of self-defence be limited to attacks by state actors. In light of the object and purpose of the right of self-defence, which is to ensure that UN Member States can take effective defence measures until the Security Council takes action, it is at least tenable to consider attacks by non-state actors as permissible grounds for exercising this right'); OVG NRW (North Rhine-Westphalia Higher Administrative Court), Order of the Fourth Senate of 19 March 2019, 4 A 1361/15, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00, 67 ('In view of this broad practice in the community of states, it can be assumed that the right to self-defense is no longer limited to armed attacks by states, but can also be applied to non-state attackers'); ILA (n 51) 15 ('there is growing recognition – including through State practice – that there are certain circumstances in which a State may have a right of self-defence against non-state actors operating extraterritorially and whose attacks cannot be attributed to the host State').

[99] *Wall* Advisory Opinion (n 3) [139]; *Oil Platforms* (n 3) [51]. *Contra, Wall* Advisory Opinion (n 3) Separate Opinion of Judge Higgins, [33]; Separate Opinion of Judge Kooijmans, [35]; Declaration of Judge Buergenthal, [6]; *Armed Activities* (n 3) Separate Opinion of Judge Kooijmans, [26]–[32]; Separate Opinion of Judge Simma, [5]–[11]; Declaration of Judge Koroma, [9].

[100] Arria Formula Meeting (n 41) 38.

[101] African Union Non-Aggression and Common Defence Pact (n 15) art 1(c).

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### 4.6. Self-defence targets the author of the armed attack

It goes without saying that self-defence action must be directed against the author of the armed attack, whether that author is a state or a non-state actor. This prevents normative gaps by ensuring that states are not left without lawful protection from armed attack because they originate from non-state actors.

However, where the state in the territory of which the self-defence action occurs is not the author of the armed attack, the use of defensive force against non-state actors may nevertheless infringe that state's sovereignty. Indeed, as explained previously, territorial states, as well as third states, have condemned such actions as a violation of sovereignty.[102]

In such cases, self-defence as a circumstance precluding wrongfulness and a secondary rule comes to the fore. It is therefore important to clarify the relationship between self-defence as a primary rule and its operation within the framework of secondary rules, and to explain the distinct legal implications that arise.

### 4.7. Self-defence as circumstance precluding wrongfulness

Self-defence as a circumstance precluding wrongfulness operates within the framework of the law of state responsibility. According to Article 21 ARSIWA: 'The

[102] See references in nn 54–57. Also UNSC, Identical letters dated 9 November 2023 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2023/853; UNSC, Identical letters dated 19 November 2023 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2023/891; UNSC, Identical letters dated 13 January 2021 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2021/57; UNSC, Identical letters dated 16 June 2020 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2020/553; UNSC, Verbatim Record of the 9459th meeting, 30 October 2023, UN Doc S/PV.9459, 7 (statement by the representative of the Russian Federation concerning Israeli and US actions in Syria); UNSC, Letter dated 3 April 2023 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2023/242; UNSC, Letter dated 7 November 2023 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2023/845; UNSC, Letter dated 20 November 2023 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2023/892; UNSC, Letter dated 4 December 2023 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc S/2023/953.

Certain states protested by claiming that the self-defence action was disproportional, that no right of self-defence existed in the circumstances, that the invocation of self-defence was pretextual or that the action was not reported to the SC: UNSC, Verbatim Record of the 7222nd Meeting, 22 July 2014, UN Doc S/PV.7222, 11 (statement by the representative of Jordan); ibid 36 (statement by the representative of Malaysia); ibid 59 (statement by the representative of Salvador); ibid 68 (statement by the representative of Jamaica); UNSC, Identical letters dated 29 July 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/69/996–S/2015/574 (rejecting Turkey's claim that it was acting in self-defence); UNSC, Identical letters dated 4 March 2021 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2021/223 (Syria condemns the US action as pretextual self-defence and as a distortion of the right to self-defence); UNSC, Verbatim Record of the 9100th meeting, 26 July 2022, UN Doc S/PV.9100, 4 (statement by the representative of Iraq regarding the lack of reporting by Turkey).

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wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'. The function of self-defence as a circumstance precluding wrongfulness is thus different from self-defence as a primary rule, although it is dependent on the primary rule. More specifically, its function is to excuse the responsibility of the state acting in self-defence for collateral violations of international law obligations committed in the course of exercising its primary right of self-defence and occasioned by its exercise.[103] Applied now to the case at hand, it will preclude the wrongfulness of the violation of the territorial state's sovereignty committed in the course of exercising its right of self-defence against NSAs.[104]

There are, however, two issues that require further consideration. The first issue is whether the use of defensive force against non-state actors in another state's territory may also constitute a violation of the prohibition of the use of force vis-à-vis the territorial state and, if so, whether Article 21 can excuse its wrongfulness.

However, this question remains largely academic in that, as noted earlier, affected states have generally characterised such actions as infringements of their sovereignty rather than as violations of the prohibition of the use of force. This attitude seems to echo the US approach to the British incursions on its territory in the *Caroline* case, which were condemned as violations of its sovereignty.[105]

Another consideration which may explain states' reluctance to characterise such uses of force on their territory as breaches of Article 2(4) is the absence of hostile intent on the part of the defending state. As noted earlier, states often stress the fact that their actions are directed exclusively against NSAs and not against the territorial state.[106] Earlier writers also distinguished between war and self-defence in situations where a state used force against individuals or groups located within another state, arguing that in contrast to war, the self-defence action lacked hostile intention and was not directed against the state or its people and objects.[107]

Although there is no consensus currently as to whether an unlawful use of force under Article 2(4) requires hostile intent, support for such a requirement can be drawn from the text of Article 2(4), which prohibits the use of force 'against the

[103] As Crawford wrote: 'In the course of self-defence, a State may violate other obligations towards the aggressor. For example, it may trespass on its territory, interfere in its internal affairs, disrupt its trade contrary to the provisions of a commercial treaty, etc': James Crawford (Special Rapporteur), Second Report on State Responsibility (1999), UN Doc. A/CN.4/498, para 299. For an example, *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Rejoinder Submitted by the United States of America, 23 March 2001, 141 para 5.02, https://www.icj-cij.org/node/104293.

[104] Theodore Christakis and Karine Bannelier, 'La légitime défense en tant que circonstance excluant l'illicéité' in Rahim Kherad (ed), *Légitimes défenses* (2007) 27 *Collection de la Faculté de droit et des sciences sociales* 233; Theodore Christakis, 'Les "circonstances excluant l'illicéité": Une illusion optique?' in Olivier Corten and others (eds), *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (Bruylant 2007) 223; Federica I Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) 85(1) *British Yearbook of International Law* 90; Federica I Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge University Press 2018) Ch 5, 175.

[105] Mori (n 73) 52–53.

[106] See n 50, concerning Daesh and Syria.

[107] Hall (n 61) 245.

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territorial integrity or political independence' of a state.[108] On this view, if there is no intention to use force or no intention to coerce the other state's will when using force, such use of force would fall outside the scope of Article 2(4), though it may still form an unlawful breach of sovereignty.[109]

If the defensive action is nevertheless considered a use of force against the territorial state and a breach of Article 2(4), the legal question is whether Article 21 ARSIWA can excuse its wrongfulness. This raises the question of the exculpatory scope of self-defence as a circumstance precluding wrongfulness. Article 21 does not excuse breaches of obligations of 'total restraint'[110] but these obligations do not cover the prohibition of the use of force; they refer to 'intransgressible' humanitarian law principles or to non-derogable human rights norms.[111] What may be relevant in this case is Article 26 ARSIWA, according to which the wrongfulness of violations of *jus cogens* norms is not precluded. However, it is not established yet that the prohibition of the use of force possesses this status in contrast to the prohibition of aggression.[112]

A related issue is whether such a defensive action might be characterised as an armed attack against the territorial state, triggering its right of self-defence. There are very few examples where states made such a claim, but they concerned instances of long presence of foreign troops on their territory or the occupation of parts of their territory.[113] That said, these states have not taken any defensive action.

[108] *Nuclear Weapons* Advisory Opinion (n 88) [48]. In support see Corten (n 31) 85–90; Gill (n 67) 64. *Contra*, Russell Buchan and Nicholas Tsagourias, *Regulating the Use of Force in International Law* (Edward Elgar 2021) 31–33. For a non-committal passion see Tom Ruys, 'The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 *American Journal of International Law* 159, 188–91.

[109] Corten (n 31) 86.

[110] ARSIWA (n 4) Commentary to art 21, paras 3–4.

[111] *Nuclear Weapons* Advisory Opinion (n 88) [79].

[112] For example, the prohibition of the use of force does not feature in the ILC's list of *jus cogens* norms, although it should be noted that the list is non-exhaustive: ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries, *Yearbook of the International Law Commission* (2022) Vol II Pt Two; Buchan and Tsagourias (n 108) 36–38; James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215–57. *Contra*, Dinstein (n 26) 109–11; Corten (n 31) 206–17; Gill (n 67) 67–70. The view that the rule prohibiting the use of force is a *jus cogens* norm is premised on the assumption that self-defence is integrated therein, a view rejected here. It follows that if the two norms are independent, the question is whether self-defence is also a *jus cogens* norm because otherwise it will become void as a rule. Moreover, how a collision between *jus cogens* norms can be settled is not clear. Regarding the effects of the right of self-defence on the ICJ's competence to issue provisional measures when faced with claims of genocide (a *jus cogens* norm), according to Judge Robinson '[t]he right of self-defence recognized in Article 51 is inherent in every State and cannot be overridden by any pronouncement the Court may make as to the consistency of Russia's military operation with the Genocide Convention': *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Separate Opinion of Judge Robinson, Order of 16 March 2022, 253 [32].

[113] For instance, Syria condemned the US claim of self-defence as a pretext to commit acts of aggression and claimed that these 'acts of aggression' constitute a 'flagrant violation of international law, the principles of the Charter and the relevant Security Council resolutions, in all of which the Council reaffirms its strong commitment to the sovereignty, independence and territorial unity and integrity of the Syrian Arab Republic'. It mentioned Article 2(4) without claiming that it had been violated. However, the main

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A further consideration militating against such a construction is the absence of *animus aggressionis* on the part of the defending state, as illustrated by the *Oil Platforms* case in which the ICJ held that there was no armed attack in the absence of Iran's intent to attack the specific vessels.[114]

The second issue concerns the question of whether self-defence as a circumstance precluding wrongfulness has *erga omnes* application because Article 21 appears to regulate only the legal relationship between the attacking and defending state, whereas in the present case the territorial state is a third party to this relationship.

Although the ILC left open the question of the effects of self-defence as circumstance precluding wrongfulness on third states,[115] it may be argued that Article 21, as a secondary rule, is of general application, consistent with the ILC's overall approach to the law of state responsibility. It therefore applies to any incidental self-defence breach of obligations owed by the defending state to any other state. It should also be recalled that Article 21 is dependent on, and parasitic upon, the primary rule of self-defence. It does not substitute for, expand or narrow the substantive scope of the right of self-defence, which is determined exclusively at the level of the primary rule. Accordingly, it may be argued that Article 21 precludes the wrongfulness of incidental breaches of obligations owed to other states in so far as they are linked to the lawful exercise of the right of self-defence, however this right is defined by the primary rule.

## 5. Conclusion

This article has addressed the question of how states can justify the use of defensive force against non-state actors on the territory of other states. It first mapped out the current legal landscape and concluded that it leaves many normative, methodological and practical questions unsettled. It then explained the morphology of the

thrust of Syria's complaint was the presence of foreign troops on its territory (occupation, according to Syria) and consequently claimed that it has the right to self-defence: UNSC, Identical letters dated 4 March 2021 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2021/223. Likewise, Iraq condemned the presence without its consent of Turkish forces on its territory in the fight against Daesh and claimed that it may invoke Article 51: UNSC, Identical letters dated 17 October 2016 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2016/870. On another occasion Syria rejected Turkey's claim of self-defence in relation to its action in Syria and invoked its right to self-defence against Turkey but this was because Turkey, according to Syria, supported terrorist groups, including Daesh, by providing arms, munitions training and logistical support to terrorists and also trading with Daesh. According to Syria, 'L'Article 51 de la Charte des Nations Unies confère à la République arabe syrienne le droit de défendre son peuple et son territoire contre le terrorisme qui est fomenté à l'extérieur de ses frontières, avec le soutien de la Turquie et d'autres États de la région. La Turquie ne peut en aucun cas invoquer ce même article, puisque c'est elle qui incite à des actes de terrorisme sur le territoire syrien': UNSC, Identical letters dated 29 July 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/69/996–S/2015/574.

[114] *Oil Platforms* (n 3) [64]; Ruys (n 98) 162–65; Dinstein (n 26) 209. According to Gill (n 67) 129, 'there is no self-defence against self-defence'.

[115] ARSIWA (n 4) art 21, para 5. See also Jean-Marc Thouvenin, 'Circumstances Precluding Wrongfulness in the ILC "Articles on State Responsibility: Self-Defence"' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 464.

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right of self-defence. It argued that self-defence is a primary rule of international law permitting the use of force against an armed attack as a factual occurrence regardless of its perpetrator. It also argued that self-defence is not an exception to Article 2(4) or a legal sanction. This led to the conclusion that self-defence can be exercised against NSAs. If, however, the self-defence action takes place on the territory of another state that is not the author of the armed attack but is where the NSA is located, self-defence as a secondary rule and, more specifically, as a circumstance precluding wrongfulness as stipulated in Article 21 ARSIWA will excuse the responsibility of the defending state for the incidental breach of that state's sovereignty in the course of its self-defence action. The article thus offers a deeper understanding of the nature, features, role and place of self-defence within the *jus ad bellum* regime, which provides a more coherent legal justification for using defensive force against NSAs.

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