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Self-Defence against Non-State Actors: Making Sense of the 'Armed Attack' Requirement

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I. INTRODUCTION

A major debate: Whether States can act in self-defence against armed attacks carried out by non-State actors is one of the major debates of contemporary international law. It has *relevance*: the issues are significant and implicate a 'cornerstone rule' of the discipline, the prohibition against the use of force.[1] It has *drama*: 'two main camps'[2] are said to face each other in what is now frequently (if simplistically) portrayed as an epic argument opposing 'restrictivists' and 'expansionists'.[3] It has *focus*: positions are clearly articulated; academics take sides – where do you stand on the 'unwilling or unable' test;[4] what's your view on the 'Bethlehem Principles';[5] have you signed the 'Plea against the Abusive Invocation of Self-Defence'?[6] – and do

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1 See ICJ, *Armed Activities in the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005, 168, para. 148.

2 Raphaël van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side', *Leiden Journal of International Law* 29 (2016), 43–65 (43).

3 This binary optique has become dominant: see e.g. contributions to two recent symposia in the *Leiden Journal of International Law* 29 (2016), one convened by Jörg Kammerhofer (13 *et seq.*), the other by Théodore Christakis (737 *et seq.*).

4 For detailed assessments, see e.g. Ashley Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense', *Virginia Journal of International Law* 52 (2012), 483–500; Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor: Birth of the "Unable or Unwilling" Standard?', *Heidelberg Journal of International Law* 75 (2015), 455–501.

5 Daniel Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors', *American Journal of International Law* 106 (2012), 770–7.

6 See 'A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism', 29 June 2016, available at http://cdi.ulb.ac.be/wp-content/uploads/2016/06/A-plea-against-the-abusive-invocation-of-self-defence.pdf.

not mince words.[7] And it has *topicality* and *momentum* – which most observers think is with the 'expansionists', as States assert a right to use force against non-State actors in Syria and elsewhere.[8]

A narrow debate: The major debate about self-defence against armed attacks by non-State actors is also (and this can get lost amidst the drama) rather narrow, or at least has a narrow kernel. Of course, disputes about particular uses of force turn on a range of issues: the lawfulness of a State's military response depends on questions of evidence and proof, the character and qualification of the attack, the timing, extent and locale of the response, etc. Yet to the extent that debates about particular incidents draw on these factors, they presuppose that self-defence can at all be invoked against armed attacks carried out by non-State actors – that it is not restricted to responses against armed attacks by States. This question is of a preliminary character; it is a *threshold question*. This threshold question is *narrow*. It depends on the proper construction of one rule of international law, and one element of that rule more particularly. The rule enshrines the right of self-defence, and the crucial element is the notion of 'armed attack'. That notion – 'armed attack' – certainly covers attacks by another State, and some commentators want to leave it at that. According to others, the notion covers all armed attacks, irrespective of their source; still others put forward a range of intermediary positions. Perhaps inevitably, the debate about this relatively narrow issue is replete with repetition and duplication: so much has been said before, and by so many.

A long-standing debate: In fact, so much has been said before by so many, *for so long*: self-defence against non-State actors has been discussed for centuries, and at least the practice of the Charter era remains significant. Since the beginning of the twenty-first century, the focus has firmly been on military responses against Islamic terrorism. But international terrorism did not begin on 9/11; and in the family of non-State actors, terrorists are but one tribe.[9] For decades, States have asserted a right to use force against insurgents, mercenaries and national liberation movements, and for decades, their claims have been

[7] *Pars pro toto*, see the exchange between Corten and d'Argent about the 'Plea' (n. 6), 14 July 2016, available at www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism.

[8] See van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side' 2016 (n. 2), 43; Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' 2012 (n. 5), 775; Jörg Kammerhofer, 'Introduction: The Future of Restrictivist Scholarship on the Use of Force', *Leiden Journal of International Law* 29 (2016), 13–18 (15).

[9] In fact, the prominence of the label masks the fact that the family of non-State actors is incredibly heterogeneous: see further *infra*, II.A.2.

assessed within international fora. Greece's letter to the United Nations sent in 1946 – qualifying support to insurgents as a 'breach of the peace' – contains much that sounds familiar.[10] Much that sounds familiar can also be found in debates about French raids against FLN units operating from Tunisia during the late 1950s,[11] about Israeli strikes against Palestinians of the Cold War era[12] and in the discussions preceding the adoption of the 1974 General Assembly's Definition of Aggression.[13] The threshold question, in short, has long been on the agenda; attempts to find answers to it ought to reflect that fact. This is not to exclude the possibility of normative change: even if the questions remain the same, answers over time may well differ, as the law adapts. But it suggests that change is likely to be gradual; and the popular terms suggesting decisive turn-arounds – from 'tidal waves'[14] to 'paradigm shifts'[15] to the (seemingly inevitable) 'Grotian moments'[16] – ought to be viewed with caution.

A confused debate: If, despite decades of discussion, the question remains on the agenda, it is because the issues are vexing, but also because much of the debate is confused. There remains a surprising degree of uncertainty as to how the question of self-defence against non-State actors should be approached. 'Method is undoubtedly a weak point of the scholarship on the use of force', notes Jörg Kammerhofer with refreshing frankness, and he may be right: there is just so much uncertainty.[17] Some commentators discuss customary international law, others the meaning of a treaty clause. While the 'threshold issue' remains central, many recent contributions 'blend' it with discussions about the modalities of self-defence, such as necessity.[18] As regards legal authorities, some authors emphasise the role of the International Court of Justice (ICJ), others that of major States; still others rely on UN resolutions. In the view of some, the law was shaped in 1945 (when the UN Charter was adopted); others point to clarifications in 1974 (GA

[10] See SCOR, 2nd year, 147th and 148th meeting, 1118–29.

[11] See *Annuaire Français de Droit International* 6 (1960), 1068–9, and 4 (1958), 809.

[12] See, notably, debates prompted by the 1985 Israeli raid on the PLO Headquarters in Tunis (which the Security Council condemned in SC Res. 573 of 4 October 1985).

[13] See GA Res. 3314 (XXIX) of 14 December 1974 ('Definition of Aggression').

[14] André de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World', *Leiden Journal of International Law* 29 (2016), 19–42 (20).

[15] James Green, *The International Court of Justice and Self-Defense in International Law* (Oxford: Hart Publishing, 2009), 157.

[16] Michael P. Scharf, 'How the War against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016), 15–67 (19).

[17] Kammerhofer, 'The Future of Restrictivist Scholarship on the Use of Force' 2016 (n. 8), 15, and (less trenchant) de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 23–5.

[18] Notably in discussions of the unable and unwilling test; see Nicholas Tsagourias, 'Self-Defense against Non-State Actors', *Leiden Journal of International Law* 29 (2016), 801–25 (810).

Res. 3314), 1986 (*Nicaragua*) or 2001 (9/11). Still others refer back to legal views articulated in the aftermath of the 1837 *Caroline* affair, to which subsequent developments seem but a coda.[19] As a result, similar pieces of evidence are assessed within different argumentative frameworks. That 'agree[ment] on method could cure much of the current divergence of views'[20] (as has been suggested) may be overly optimistic: methods do not necessarily predetermine answers; they help explain how they are reached. But the surprising methodological confusion that besets the debate makes genuine engagement more difficult, to the point where much of it becomes a 'dialogue of the deaf'.[21]

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All this forms the background to the present study, which is in the nature of a 'further take' on issues well-covered.[22] As a further take, it is unlikely to break radically new ground. And yet, the following analysis offers more than a rehash of well-worn arguments. Seeking to avoid the (often myopic) focus on recent crises, it engages with practice preceding the alleged 'paradigm shift' of 9/11 – which is diverse rather than uniform. Looking beyond the high-profile conflicts, it emphasises the breadth of self-defence practice – which includes well-covered military responses against ISIS and Al-Qaeda, but also uses of force outside the spotlight, by countries such as Tajikistan and Morocco. Whereas much of the literature dithers on the question of sources, the present study clarifies that the 'armed attack' requirement is a requirement of treaty law – whose meaning is ascertained in line with the accepted canons of treaty interpretation.

The fuller analysis thus offered does not necessarily lead to one obvious, 'natural' outcome: as with other vexing legal problems, responses have but 'varying degrees of legal merit',[23] and the subsequent analysis reflects as

[19] Vaughan Lowe notes the 'near theological reverence for the formulation of the right [of self-defence] in the context of the 1837 *Caroline* episode': Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007), 275.

[20] Andrea Bianchi, 'The International Regulation of the Use of Force', *Leiden Journal of International Law* 22 (2009), 651–76 (652).

[21] Olivier Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate', *European Journal of International Law* 16 (2005), 803–22 (822).

[22] For the author's earlier 'takes', see Christian J. Tams, 'The Use of Force against Terrorists', *European Journal of International Law* 20 (2009), 359–97; Christian J. Tams, 'Swimming with the Tide, or Seeking to Stem It?', *Revue Québécoise de Droit International* 18 (2007), 275–90; Christian J. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', European Journal of International Law 16 (2005), 963–78; Christian J. Tams and James G. Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defense', *Israel Law Review* 45 (2012), 91–106; Christian J. Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence', in Larissa van den Herik and Nico Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge: Cambridge University Press, 2013), 373–422.

[23] Cf. Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), 398.

much – hopefully without too much sitting on fences. Given the firm opinions held on self-defence, it would be naïve to expect the views set out in the following to meet with general approval; the analysis is a 'best efforts' attempt to offer a 'legally meritorious'[24] construction. It identifies blind spots in the reasoning of expansionists, restrictivists and commentators resisting such labels. And it will hopefully be perceived, even by those who disagree with the proposed reading of self-defence, as a methodologically sound contribution that allows the debate to move beyond a dialogue of the deaf.

In order to rise to the methodological challenge, Section II of the subsequent analysis goes to some length to situate military responses against non-State actors within the framework of the contemporary *ius ad bellum*. Sections III, IV and V then set out the contemporary regime governing self-defence against armed attacks by non-State actors. Their focus is firmly on the notion of 'armed attack'. The meaning of this notion is ascertained through a doctrinal analysis that uses the 'tools' and arguments recognised in the sources regime of international law and that accepts the distinction between the law in force and the law as it should be.

This doctrinal approach shapes the subsequent analysis. It means that responses to the threshold question are sought through a relatively dense and technical argument. It also makes for a narrow analysis that, focused on the threshold question, leaves to one side important issues – among them the conditions governing the exercise of self-defence, but also considerations *de lege ferenda* about the desirability of the law[25] – and that, focused on one narrow problem, can yield but 'in principle' views on the availability of self-defence. Yet these limitations seem a price worth paying: they permit a focused engagement with a crucial question – a question that is specific to the major debate about self-defence against armed attacks by non-State actors and that continues to divide and confuse commentators.

II. SETTING THE STAGE

In important ways, the Introduction has presupposed too much. Asking whether military action against non-State armed attacks could be justified as self-defence, it has assumed that such action requires justification and that self-defence offers the most plausible basis. Neither of these assumptions is

[24] *Ibid.*

[25] This approach is narrower than that adopted by Mary Ellen O'Connell in her contribution: see in this volume e.g. 179–81 (offering details on the ban on force) and 228–44 (exploring the historical foundations of the ban on force and the influence of natural law thinking). Dire Tladi's contribution is situated mid-way in between: his focus (like here) is doctrinal and on self-defence, but (like Mary Ellen O'Connell) he offers detail on the ban on force and Chapter VII, at 22–36.

entirely accurate: not all military responses against armed attacks by non-State actors require justification, and self-defence is not always the most plausible basis. Yet a significant number of them do, and it typically is. In clarifying why this is so, sections II.A and II.B demarcate the scope of the inquiry and situate self-defence within its proper normative context. Following these preliminary clarifications, section II.C spells out methodological premises that guide the inquiry. It notably does so by emphasising that self-defence is *a rule of treaty law* and by outlining principles that structure its interpretation.

A. *A Problem of Force in International Relations*

1. The State-Centric Ban on Force

Justifications offer reasons for conduct; they clarify that conduct that *prima facie* violates a rule is lawful. Most discussions of self-defence against non-State actors are discussions about the scope of a justification. They assume that the conduct in question is *prima facie*, ostensibly, unlawful. More specifically, a State's self-defence against a non-State actor ostensibly seems to fall foul of the prohibition against the use of force in international relations, enshrined in Article 2(4) of the UN Charter and customary international law. This prohibition is the lynchpin of the contemporary *ius ad bellum*. It binds all States and is said to extend to State-like entities such as stabilised *de facto* regimes.[26] According to the dominant reading, it precludes the use of military force in a general and comprehensive manner, irrespective of its intensity or the motives underlying it,[27] and it does so as *ius cogens*, with peremptory force.[28]

[26] See e.g. Christian Henderson, 'Contested States and the Rights and Obligations of the Jus Ad Bellum', *Cardozo Journal of International and Comparative Law* 21 (2013), 367–408; Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010), 126.

[27] There have been regular attempts to identify loopholes in the text, notably with respect to uses of force that were said not to threaten another State's territorial integrity or political independence. Amongst other things, these attempts ignore the fact that force is prohibited if 'in any other manner inconsistent with the Purposes of the United Nations' and that the references to 'territorial integrity' and 'political independence' were included to strengthen the prohibition: see Thomas M. Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2002), 12; Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 3rd edn., 2012), vol. I, 200–34 (para. 37); Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 3rd edn., 2008), 31–3; Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge: Cambridge University Press, 5th edn., 2012), 89–91.

[28] As a matter of principle, this is widely agreed – though there is debate about the reach of *ius cogens*, which according to some extends only to acts of aggression, while others are prepared

While general and comprehensive, the ban on force is purposefully limited: it prohibits the use of force by States 'in their international relations'. This was traditionally read to refer to 'the international relations *between States*',[29] notably the non-consented use of force on the territory (or within other recognised spheres of influence) of another State – as opposed to action 'within its own boundaries'.[30] It is today commonly extended to uses of force across internationally accepted armistice lines or against stabilised *de facto* regimes.[31] That is a modest extension, though, and the cornerstone rule against force has rightly been described as 'state-centric'.[32] This in turn affects the subsequent analysis in two crucial respects.

2. Wheat and Chaff

To begin with, the focus on the prohibition against force helps separate the wheat from the chaff, viz. distinguish military responses that require justification from those that do not. The starting point is straightforward: military responses require justification if – and only if – they ostensibly violate the prohibition against force. This is the case for uses of force that affect 'the international relations' in the State-centric sense described above. Military strikes targeting non-State actors based in another State are the obvious example in point. By contrast, other military responses do not need to be justified under the *ius ad bellum*. The most significant exclusion concerns military responses 'at home': in civil wars, against domestic terrorists, etc. Perhaps surprisingly (but indisputably), the prohibition against force, that 'cornerstone of the human effort to promote peace in a world torn by strife',[33] ignores the most significant forms of contemporary conflict.[34]

to treat Article 2(4) in its entirety as peremptory. For comment see O'Connell in this volume, 229–32; James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', *Michigan Journal of International Law* 32 (2011), 215–57. See also the views recorded in ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, para. 190. Implications of *ius cogens* are taken up *infra*, II.B.2 and II.B.3.

[29] Dörr and Randelzhofer, 'Article 2(4)' 2012 (n. 27), para. 32.

[30] See the ICJ's statement in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 6 January 1996, ICJ Reports 1996, 226, para. 50.

[31] See GA Res. 2625 (XXV) of 24 October 1970, Principle I, para. 5.

[32] Claus Kress, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law* 1 (2014), 11–54 (40); Kimberley N. Trapp, 'Actor-Pluralism and the "Turn to Responsibility"', *Journal on the Use of Force and International Law* 2 (2015), 199–222 (201).

[33] ICJ, *Military and Paramilitary Activities* (n. 28), Separate Opinion of Judge Singh, 153.

[34] According to the International Committee of the Red Cross, 'about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts': see 'Introduction to AP II', available at www.icrc.org/ihl/InTRO/475.

The other exclusion is more discrete; it illustrates that different non-State actors cannot always be treated alike. True enough, in a world carved up by States, a prohibition that precludes the use of force on the territory of another State covers most military strikes against non-State actors operating from outside the responding State's own boundaries. Much of the scholarship, especially on counter-terrorist responses, takes this for granted and seems to treat exceptions as oddities.[35] However, it is worth noting that one group of non-State actors has traditionally operated from outside State jurisdiction: namely pirates, who operate on the high seas or in a place outside the jurisdiction of any State.[36] Military action against pirates on the high seas is anything but an oddity. However, it is subject to a special set of rules: these impose restrictions,[37] but do not implicate general *ius contra bellum* provisions.[38] For reasons of convenience, they are left to a side here – but the brief reference suggests that the *ius ad bellum* does not necessarily treat different categories of non-State actors alike.

3. Asymmetry

Other than helping separate wheat from chaff, the focus on the ban on force draws attention to a complicating factor – in fact *the* major complicating factor that muddies discussions of self-defence against non-State actors and that can be described as a problem of 'asymmetry'.

Asymmetry is a consequence of the particular focus of the prohibition against force. State-centric as it is,[39] that prohibition addresses non-State actors only in an indirect manner. It requires a sequence of events involving one (attacking) non-State actor and one (responding) State to be appreciated on the basis of rules devised to apply between States. In that inter-State perspective, non-State actors hardly feature.[40] They do not feature as attackers, as their

[35] Natalino Ronzitti, 'The Expanding Law of Self-Defence', *Journal of Conflict and Security Law* 11 (2006), 343–59 (349); Marko Milanovic, 'Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum', *EJIL Talk!*, 21 February 2010, available at www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum.

[36] See United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (UNCLOS), Article 101.

[37] See notably Articles 100–7 UNCLOS.

[38] For details see Alexander Proelss, 'Piracy and the Use of Force', in Panos Koutrakos and Achilles Skordas (eds.), *The Law and Practice of Piracy at Sea* (Oxford: Hart, 2014), 53–63 (53).

[39] The subsequent passage, for reasons of simplicity, does not address 'state-like entities' and *de facto* regimes.

[40] In her contribution to this volume, Mary Ellen O'Connell emphasises the link between the right to be free from unlawful force and the right to life (e.g., 178–9 and 203–4). There is no

initial attacks as such do not implicate the *ius ad bellum*.[41] And they do not feature as targets in their own right either: the responding State's military reaction violates the ban on force only if it is directed against targets on the territory (or in other spheres of influence) of another State.[42] If it does, it needs to be justified. And while this typically will be the case, the obligation remains State-centred: what needs to be justified is a breach of international law *vis-à-vis* another State. Military responses against non-State actors therefore cannot meaningfully be thought of as a bilateral relationship between responding State and targeted non-State actors.

Surprisingly often, this straightforward point is not made. Kimberley Trapp makes it when noting that any 'true exception to the prohibition on the use of force ... must in some way excuse the violation of the host state's territorial integrity'.[43] In fact, as part of the State-centric *ius ad bellum*, this is all a 'true exception' needs to do.

On balance, State-centrism probably increases the scope for force to be used lawfully against non-State actors: host State consent in particular has become a convenient remedy, relied upon to ensure the legality of crossborder strikes. Yet absent such consent, responding States are 'caught' by the problem of asymmetry. What is motivated as a response against a non-State attack has to be justified within a set of rules operating between States. Between the logic of the response (State/non-State) and the rationale of the applicable legal rules (State/State), there is no equivalence: the two are asymmetrical. Much of what follows is an attempt to come to terms with this asymmetry.

B. A Question of Self-Defence

1. Self-Defence as the Justification of Choice

The analysis so far establishes that military responses against armed attacks by non-State actors usually require justification. So why should they be justified

doubt a common impetus to both. However, this impetus has been translated into different legal rules, with different rationales and limitations. The right to life does not assist in assessing whether the prohibition on the use of force has been violated in the first place – and it is on this question that the subsequent inquiry centres.

[41] See Dörr and Randelzhofer, 'Article 2(4)' 2012 (n. 27), para. 29.

[42] See Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defense against Non-State Terrorist Actors', *International and Comparative Law Quarterly* 56 (2007), 141–56 (145–6); Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Abingdon: Routledge, 2010), 38.

[43] Kimberley N. Trapp, 'The Use of Force against Terrorists: A Reply to Christian J. Tams', *European Journal of International Law* 20 (2010), 1049–55 (1049–50).

as self-defence? The short answer to this question is 'because States choose to rely on self-defence rather than on alternative justifications (other than host State consent and a Security Council authorisation)'.[44]

Self-defence emerged as the justification of choice for perfectly plausible reasons, but not over night. Nineteenth- and twentieth-century debates were characterised by much greater diversity. In the pre-Charter era, depending on type of attack and the timing and locus of the response, doctrines such as necessity,[45] armed reprisals and hot pursuit[46] were popular – at times in conjunction with self-defence. The adoption of the Charter, with its stricter system of prohibition and exceptions, initially did not affect this. The different explanations, recast as justifications for *prima facie* breaches of the ban on force, continued to be relied on; in fact, some doctrines such as 'hot pursuit on land' were only fully developed in the Charter era.[47]

Over time, though, the consolidation of the Charter regime led to a more streamlined discourse, in which self-defence became central.[48] This it became largely by default, as alternative justifications fell out of favour. The fate of necessity illustrates the process. During the twentieth century, necessity has come to be recognised as a circumstance precluding wrongfulness[49] and is now very much *en vogue* in other areas of international law.[50] Within the *ius ad bellum*, while significant as a limit on self-defence, it is no longer pleaded as a self-standing entitlement justifying recourse to force.[51]

[44] As will be shown *infra*, IV.E.2, in some instances the lines between these claims are fine.

[45] As famously, in the *Caroline* case: see Article 25 and commentary of the ILC's Articles on State Responsibility (ASR), *Yearbook of the International Law Commission* 2001, vol. II/2, 81 (para. 5).

[46] See Ian Brownlie, 'International Law and the Activities of Armed Bands', *International and Comparative Law Quarterly* 7 (1958), 712–35 (733–4).

[47] See e.g. Derek Bowett, 'Reprisals Involving Recourse to Armed Force', *American Journal of International Law* 66 (1972), 1–36 (17–21); Shane Darcy, 'Retaliation and Reprisals', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 879–96.

[48] For more on this see Tams, 'The Use of Force against Terrorists' 2009 (n. 22), 362–73.

[49] Article 25 ASR completed the process: see *Yearbook of the International Law Commission* 2001, vol. II/2, 80.

[50] For details, see the contributions to the *Netherlands Yearbook of International Law* 41 (2010) ('Necessity Across International Law').

[51] Olivier Corten, 'Necessity', in Weller, *The Oxford Handbook of the Use of Force* 2015 (n. 47), 861–78 (863–7); Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), 71–2.

Gazzini and Dinstein, for different reasons, reach a different conclusion: Dinstein, *War, Aggression and Self-Defense* 2012 (n. 27), 271–2, considers necessity to be part of a flexible concept of 'extraterritorial law enforcement' that describes 'the phenomenon of recourse in self-defence to cross-border counter-force against terrorists and armed bands' (at 272) – but this

Claims based on hot pursuit have suffered a similar fate. Primarily espoused by South Africa and Southern Rhodesia during the 1970s and 1980s, they were always received coolly.[52] After the independence of Zimbabwe, and the end of South Africa's incursions into 'frontline States', they are no longer advanced.[53] Armed reprisals do not fare much better: declared illegal in prominent legal texts,[54] the concept has effectively been abandoned as a justification for the use of force.[55]

With alternative justifications losing ground, self-defence today seems to be the 'last claim standing'. Since the 1990s, it has become absolutely dominant: as Lubell notes, it is indeed the 'sole avenue for legitimizing unilateral forcible action by states against non-state actors in the territory of other states'.[56]

2. Reasons and Implications

Why self-defence should have become the justification of choice is not difficult to see. Unlike necessity, hot pursuit, and armed reprisals, the right to self-defence is expressly recognised as an exception to the ban on force, which is strong enough to justify conduct that ostensibly violates a peremptory norm.[57] Pursuant to Article 51 of the Charter and customary international law, the ban on force does not 'impair the inherent right of . . . self-defence if an armed attack occurs'. A State invoking self-defence can be criticised for overstretching an exception; but it acts from within the accepted system. States

blurs the lines between separate legal concepts. Gazzini argues that measures directed against non-State actors ought to be treated as necessity. However, that ignores the conscious decision of States to rely on self-defence: see Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press, 2005), 204–10.

52 See Edward Kwakwa, 'South Africa's May 1986 Military Incursions into Neighboring African States', *Yale Journal of International Law* 12 (1987), 421–43.

53 See Dinstein, *War, Aggression and Self-Defense* 2012 (n. 27), 270–1; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), 401 (fn. 174).

54 See notably GA Res. 2625 (XXV) of 24 October 1970, Principle I, para. 6; Article 50(1)(a) ILC's Articles on State Responsibility (*Yearbook of the International Law Commission* 2001, vol. II/2, 31 *et seq.*); SC Res. 188 of 9 April 1964.

55 See Darcy, 'Retaliation and Reprisals' 2015 (n. 47), 892 ('futile case for revival').

56 Lubell, *Extraterritorial Use of Force against Non-State Actors* 2010 (n. 51), 74.

57 This is accepted in principle, but gives rise to some conceptual 'muddling through': some commentators claim that, since self-defence justifies a *prima facie* breach of a peremptory rule, it must itself be peremptory: see e.g. Paulina Starski, 'Silence within the Process of Normative Change and the Evolution of the Prohibition on the Use of Force', *Journal on the Use of Force and International Law* 4 (2017), 14–65 (24). The more convincing approach suggests that only *illegal* uses of force are prohibited as *ius cogens*.

relying on it of course need to argue that self-defence is available against non-State actors. However, unlike States invoking necessity or hot pursuit, they do not have to make the broader claim that the contemporary *ius ad bellum* recognised exceptions not explicitly mentioned in the Charter. Reliance on self-defence to justify military responses against non-State actors thus is the 'safer option'.

Safety comes at a price though. The conscious choice of States to treat military responses against non-State actors as a question of self-defence means that claims are to be presented within the parameters of that particular exception. This has one obvious implication and a further one that is not so obvious. The obvious implication is that military responses against non-State actors have to meet the conditions and modalities of self-defence. Four of them stand out:

- The *first* concerns the triggering event: justified as self-defence, military responses can only be directed against attacks that qualify as 'armed attacks': the dominant view restricts this to qualified uses of force, or even the 'most grave forms of the use of force'.[58]
- The *second* concerns the timing of the response: particular care must be taken if action in self-defence is meant to avert future attacks; the right, after all, is recognised only 'if an armed attack occurs'.[59]
- The *third* concerns the scope of the right: reliance on self-defence implies acceptance of the twin conditions of necessity and proportionality – each of them offering some flexibility, but both in principle 'well settled'.[60]
- The *fourth*, and final, condition goes to the purpose of the response: a military response presented as self-defence needs to serve a defensive purpose. This functional element is by no means easy to apply in practice, but it can help to exclude action that is retaliatory or punitive.[61]

All this, one might say, comes with the terrain. It is the price States have to pay for relying on the 'safer option' of self-defence. In reality, things are more complicated. The four limitations cannot be seamlessly applied to military responses against non-State actors. But that is a question of operationalising a set of conditions – which is beyond the scope of the present study.

[58] ICJ, *Military and Paramilitary Activities* (n. 28), para. 191.

[59] On anticipatory self-defence, see e.g. Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), chapter 4.

[60] ICJ, *Oil Platforms* (Islamic Republic of Iran v. United States), Judgment of 6 November 2003, ICJ Reports 2003, 161, para. 76.

[61] See Enzo Cannizzaro, 'Contextualizing Proportionality: Jus ad bellum and jus in bello in the Lebanese War', *International Review of the Red Cross* 88 (2006), 779–92.

3. More on Asymmetry

A) SELF-DEFENCE: BY DEFINITION SYMMETRICAL? Beyond the operational implications, the decision to rely on self-defence shapes the discourse in another manner. This second implication – hardly ever spelled out[62] – points back to the problem of asymmetry.[63] In essence, in opting to rely on self-defence to justify forcible acts against non-State actors, States have chosen to address the problem under a justification that is often intuitively understood to apply to symmetrical relationships only, in which the response targets the author of the initial attack. This understanding informs many domestic law concepts of self-defence as a response against an illegal attack *by the attacker*. On the international plane, the exceptional nature of self-defence as one of the few recognised exceptions to the ban on force has been said to support a symmetrical reading. Roberto Ago's apodictic statement reflects this approach: 'the only international wrong which, exceptionally, makes it permissible for the State to react … by recourse to force … is an offence which itself constitutes a violation of the ban'[64] – in other words, a use of military force by the State against which the response is directed.[65]

This 'symmetrical' view of self-defence can of course be contested. But the point at this stage is that it enjoys support: this sets self-defence apart from other justifications. Hot pursuit, for example, is by definition asymmetrical. It is formulated as a right to interfere with non-State actors; the interference with the territorial State's sovereignty and territorial integrity is incidental.[66] Hot pursuit would be 'tailor-made' to fit the asymmetrical relationship of State responses against a non-State actor. Necessity, too, offers significant room to deal with asymmetry. Unlike self-defence, it is not a response against conduct ('armed attack'), but a way of dealing with a state of affairs ('grave and imminent peril').[67] The response is not conditional upon the conduct of the

[62] But see Björn Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht* (Berlin: Duncker & Humblot, 2012), 82–8.

[63] See *supra*, II.A.3.

[64] Roberto Ago, 'Addendum to the 8th Report on State Responsibility', *Yearbook of the International Law Commission* 1980, vol. II/1, 54 (para. 89).

[65] For recent reprises see de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 22; Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?', *Leiden Journal of International Law* 29 (2016), 777–99 (796–7).

[66] A nineteenth-century US statement illustrates this rationale: 'If Mexican Indians whom Mexico is bound to restrain are permitted to cross its border and commit depredations in the United States, they may be chased across the border and then punished' (cited in Brownlie, 'International Law and the Activities of Armed Bands' 1958 (n. 46), 733).

[67] Article 25 ASR.

targeted State; hence, the law of necessity can accommodate asymmetrical responses.[68] Within the law of self-defence, by contrast, it is by no means obvious that a State should be able to respond against conduct by an entity other than the targeted State: when it comes to dealing with asymmetry, self-defence is an 'away game'.

b) ways of dealing with asymmetry While hardly spelled out, this problem is instinctively recognised. Over time, it has been addressed in two ways. One strategy has been to confront asymmetry head-on. The resulting argument is fairly straightforward. Self-defence, so the reasoning goes, is permissible against armed attacks irrespective of their source; the targeted State has to *tolerate* the response even though it has not committed an attack itself: the duty to endure is an implicit element of self-defence. The real task is to explain why and when targeted States are under a duty of toleration. Drawing on domestic debates about these matters, one might, for example, argue that it should derive from some form of involvement in the attack, or perhaps from a failure to suppress it.

The second strategy seeks to circumvent problems of asymmetry. This it does by postulating that a broad range of attacks can be treated as 'State attacks' – against which a response is permitted. More specifically, it claims that the circle of 'State attacks' is not restricted to attacks committed by the State's organs itself,[69] but extends to other acts for which the State has to answer. The task for this second approach is to explain why and when a State has to answer for acts that have not been committed by its organs. Again, one might query whether some form of participation in the attack, or a failure to prevent it, could offer arguments.

The existence of these two strategies is widely recognised, as is the fact that they are conceptually different: the latter approaches asymmetrical self-defence from within an inter-State framework; the former moves outside that framework to tackle asymmetry head on. Drawing on a popular (though controversial) trope of international legal discourse, Claus Kress pointedly distinguishes between 'Westphalian' and 'post-Westphalian avenues' towards recognising asymmetrical self-defence.[70]

[68] See Ian Johnstone, 'The Plea of Necessity in International Legal Discourse: Counter-Terrorism and Humanitarian Intervention', *Columbia Journal of Transnational Law* 43 (2005), 337–88 (368).

[69] Even this basic proposition – that the State has to answer for acts of its organs – is of course the result of a 'normative operation': see ILC, Introductory Commentary to Part One, Chapter II of the Articles on State Responsibility, *Yearbook of the International Law Commission* 2001, vol. II/2, 39.

[70] Kress, 'Major Post-Westphalian Shifts' 2014 (n. 32), 46.

This conceptual distinction is important – but more important still is another point. Insofar as the threshold question is concerned,[71] the Westphalian and post-Westphalian approaches raise essentially the same issue: they require the law to identify a sufficient link between the targeted State and the prior armed attack.[72] For want of a better term, this link is referred to in the following as the *State nexus*. Under the Westphalian approach, this State nexus determines which 'private attacks' can be treated as a 'State attack' for the purposes of self-defence. Under the post-Westphalian approach, the State nexus explains when the targeted State has to endure a military response. Crucially, both approaches have to address the very same set of questions. Does a State have to answer for (or tolerate a military response directed against) attacks whose commission it has facilitated? Does a State have to answer for (or tolerate a military response directed against) attacks that it has failed to suppress? Or, *in extremis*, does a State have to answer for (or tolerate a military response directed against) an attack simply because it emanates from its territory?

None of these questions needs to be addressed at this stage. They are raised to highlight that there is room for nuance in dealing with asymmetry – and to emphasise that the line between Westphalian and post-Westphalian approaches, at least for the purposes of the threshold question, is very fine indeed.[73] The choice for one over the other is a matter of predilection.

C. A Question of Treaty Law

1. The Continuing Appeal of Custom

Before pursuing arguments about asymmetrical self-defence, it is necessary to address a curious methodological problem that besets the debate. As indicated in the Introduction, there is considerable uncertainty about the proper source of self-defence, which is variably located in Article 51 of the UN Charter, custom or a blend of both.[74] Whether the different methodological choices

[71] When looking beyond the threshold question, there may well be differences between the Westphalian and post-Westphalian approaches, notably in defining against whom force in self-defence can be directed. These matters are beyond the scope of the present inquiry.

[72] Others see the two argumentative strategies as alternative: see e.g. Milanovic, 'Self-Defense and Non-State Actors' 2010 (n. 35) ; Trapp, 'Actor-Pluralism and the "Turn to Responsibility"' 2015 (n. 32), 201–3.

[73] As Claus Kress notes, once a tenuous State nexus is admitted, 'the Westphalian explanation . . . becomes indistinguishable, for all practical purposes, from its post-Westphalian competitor' (Kress, 'Major Post-Westphalian Shifts' 2014 (n. 32), 46).

[74] Separate considerations apply to States that remain outside the United Nations; this matter is left to one side.

actually affect outcomes is difficult to say with certainty;[75] but they make it more likely that debates turn into a dialogue of the deaf.

The source of the right of self-defence, to be sure, was a matter of dispute in the early days of the UN era. The wording of Article 51 of the Charter invited discussion: pursuant to its first sentence,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

As this is clearly a rather roundabout way of recognising an exception to the ban on force, it may not have been far-fetched to argue, in the early years of the United Nations, that a broad (customary) right of self-defence of the pre-Charter era would continue to exist ('un-impaired', as it were) alongside Article 51 – and that such a broader, customary right did not depend on a prior 'armed attack'.[76] But from early on, proponents of such a reading struggled to explain how their 'black hole' approach[77] could be squared with the Charter's desire to impose a strict set of rules regulating recourse to force.[78]

The debate about self-defence against non-State actors raises issues of a different character. It turns on the understanding of the term 'armed attack' (a term used in Article 51), not on the possibility of self-defence against other acts: in this sense, too, it is a debate that can be had 'within the system'.[79] And yet, uncertainties about the proper source of law persist; and if anything, the appeal of custom has increased over time. To illustrate by reference to prominent contributions: Daniel Bethlehem's widely discussed set of principles on self-defence is described by their author as an attempt 'to work with the grain of the UN Charter as well as *customary international law, in which resides the inherent right of self-defense*'.[80] Olivier Corten retraces 'Controversies Over the *Customary* Prohibition on the Use of Force'.[81] Others seek to have it both ways: hence Tom Ruys' book on *'Armed Attack' and Article 51 of the UN Charter* evaluates

[75] In his contribution to the volume, Dire Tladi suggests they do not: see Tladi in this volume, 48.

[76] See notably Derek Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), 187–8.

[77] See Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 7–11.

[78] *Ibid.*, 9.

[79] See *supra*, II.B.2.

[80] Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' 2012 (n. 5), 773 (emphasis added).

[81] Corten, 'The Controversies over the Customary Prohibition on the Use of Force' 2005 (n. 21), 803 (emphasis added).

'Evolutions in *Customary* International Law and Practice'.[82] According to André de Hoogh, 'most authors set forth their analysis or make arguments with a view to establishing the content of a rule of *customary* international law.'[83]

2. The Proper Focus: Treaty Law

The prominence of custom in discussion of self-defence against non-State actors is puzzling. To be sure, it would be perfectly understandable to locate the debate in custom if Article 51 of the UN Charter was merely a *renvoi* to extra-Charter law. But that view is not seriously maintained today. Self-defence is generally held to be 'regulated by both customary and conventional norms';[84] these two rules – even where 'they appear identical in content' – 'retain a separate existence'.[85] Of the two separate rules, the conventional one, Article 51, does not address all issues expressly; it needs to be applied in conjunction with concepts such as necessity and proportionality that it does not mention.[86] But its terms ('armed attack', 'occurs', etc.) do provide guidance on some issues, and they do so *as treaty law*.

The prominence of custom in debates about self-defence against non-State actors would also be understandable if the customary right of self-defence against armed attacks (however construed) could justify violations of the ban on force irrespective of their source. But such a view is difficult to square with general principles governing the interaction of treaty and custom. More specifically, it faces three significant objections. First, it presupposes a highly unusual view of co-existing rules of treaty and custom. Such co-existence, to be sure, is anything but exceptional. International law in many fields contains formally separate, but substantively similar, rules.[87] But such overlap is regularly dealt with by according primacy to treaty law rules. Custom (in the terms used by Dinstein and Thirlway, respectively) usually 'remains invisible': it 'is eclipsed' and 'reced[es] behind the treaty', waiting to 'reappear in its full vitality … whenever the treaty no longer blocks it from sight'[88] – e.g. when

[82] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53) (emphasis added).
[83] De Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 39.
[84] Raphaël van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?', *Leiden Journal of International Law* 23 (2010), 183–208 (185).
[85] ICJ, *Military and Paramilitary Activities* (n. 28), para. 178.
[86] See e.g ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 30), para. 41.
[87] Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014), 129.
[88] Yoram Dinstein, 'The Interaction between Customary International Law and Treaties', *Recueil des Cours* 322 (2007), 243–427 (396); Thirlway, *The Sources of International Law* 2014 (n. 87), 139.

a treaty, on grounds of jurisdiction, cannot be applied (as in the *Nicaragua* case). Yet as debates about self-defence against non-State actors are not so jurisdictionally limited, one should expect customary self-defence to 'recede' behind the Charter rule.

Second, on a more practical level, it is by no means sure how the customary rule on self-defence should preserve its autonomy from the Charter rule. With the United Nations nearing universal membership, international practice can no longer easily be allocated to one particular source. Again, this problem is not specific to self-defence: custom and multilateral treaty norms, while retaining their separate identity, are becoming increasingly amalgamated in many fields. The doctrine of sources does not preclude this, but increasingly accepts 'Entangled Treaty and Custom'.[89] Treaty law, as will be discussed in section IV, can evolve; and treaty interpretation is to take account, in various ways, of subsequent practice in the application of the respective treaty.[90] Where the treaty in question, like the UN Charter, is widely ratified, the lines between 'subsequent treaty practice' (for the purposes of treaty interpretation) and 'international practice' (for the purposes of ascertaining custom) become blurred.[91] The acceptance of State conduct within the UN, and of UN resolutions themselves, as factors relevant to the ascertainment of custom reinforce this trend. In short, a customary right of self-defence (assuming it were not eclipsed) could hardly be insulated from developments in treaty law.

Third, and most significantly, even if it existed autonomously from its UN Charter equivalent, it is very difficult to see how a customary right of self-defence could provide an effective justification for military responses on foreign State territory.[92] Whatever the position under customary international law, it bears reminding that States using force against non-State actors operating in another State *prima facie* violate international law's prohibition against force, which is recognised in treaty law and in custom. If customary self-defence is to be an effective justification for such conduct, it would need to justify both violations. The customary rule on self-defence would not only need to apply alongside its treaty law equivalent, but it would need to 'trump' the Charter system. It is one thing to argue customary rules should continue to

[89] See Oscar Schachter, 'Entangled Treaty and Custom', in Yoram Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Leiden: Nijhoff, 1989), 717–38 (717).

[90] For details see *infra*, IV.A.

[91] This point is often not made. But see van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors' 2010 (n. 84), 186.

[92] See Jörg Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence', in Weller, *The Oxford Handbook of the Use of Force in International Law* 2015 (n. 47), 627–48 (641).

exist, and to apply, alongside treaty-law rules governing the same ground. It is quite another to claim they should disapply the treaty law. This would turn the regular application of the *lex specialis* principle on its head.[93]

These three objections do not strictly rule out the possibility of an autonomous right of self-defence, recognised under customary international law, which would justify uses of force that are ostensibly illegal under custom and treaty. But they suggest it is a remote possibility, and one that – given the blurring of lines between customary law and treaty – would be very difficult to establish. Few contributors addressing questions of self-defence against non-State actors *as a question of customary international law* bother to engage with the three objections. Their preference for custom (as opposed to treaty law) may reflect a desire to focus on practice (undoubtedly a central element of custom, whose crucial role in treaty interpretation is not always appreciated) or an unwillingness to take the terms, context and *telos* of the Charter rules seriously. It may also simply show a *laissez faire* approach to the sources of international law, perhaps verifying Kammerhofer's charge of 'methodological weakness'.[94] Either way, it remains puzzling – and it ignores the main thrust of the preceding discussion: that self-defence, as regulated in Article 51, raises questions of treaty law. It is addressed as such in the following section.

3. Consequence: A Question of Treaty Interpretation

The focus on self-defence as a treaty-based right structures the inquiry. Whether States can invoke self-defence in response to armed attacks by non-State actors is a question of treaty interpretation, to be addressed on the basis of the principles codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), which reflect custom. In their customary guise, these apply to treaties predating the VCLT (such as the Charter).[95] They apply to a 'constituent instrument of an international organization', but are 'without prejudice to any relevant rules of the organization'.[96]

These considerations provide the framework for the subsequent analysis. This framework (unlike an inquiry based on custom) is capable of taking seriously the written treaty text, as read in light of its context and the Charter's

[93] Ago, 'Addendum to the 8th Report on State Responsibility' 1980 (n. 64), 63, considered it 'unconvincing . . . that two really divergent notions of self-defence . . . could co-exist'.

[94] Kammerhofer, 'The Future of Restrictivist Scholarship on the Use of Force' 2016 (n. 8), 15.

[95] Cf. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (VCLT), Article 4.

[96] Article 5 VCLT.

object and purpose.[97] At the same time, it is flexible enough to accommodate the subsequent conduct of States, which can influence the interpretation of Article 51, either as an authentic or supplementary means of interpretation, as '[w]ords are given meaning by deeds.'[98]

Before approaching Article 51 on the basis of this flexible framework, two preliminary points need to be addressed. The first concerns the normative environment of Article 51, which is part of a treaty establishing an international organisation with an institutional structure. It is widely accepted that the interpretation needs to reflect this fact. This is typically achieved by broadening the range of actors whose conduct affects the interpretative process. More specifically, the 'deeds' that matter for the purposes of treaty interpretation are not only those of States; the subsequent practice relevant for the construction of self-defence encompasses the conduct of UN organs alongside that of member States.[99] In fact, to the extent that secondary acts of the UN are designed to concretise the meaning of Charter provisions, they are 'privileged sites' of treaty interpretation.[100]

If UN practice can, in principle, be easily integrated into the regular framework of treaty interpretation, the impact of judicial decisions poses a greater challenge. International courts – notably the ICJ – have pronounced on different aspects of the *ius ad bellum*.[101] Read properly, these decisions have limited binding force, but can carry considerable persuasive power.[102] Binding precedents they are certainly not: this is contradicted by Article 59 of the ICJ Statute and equivalent provisions.[103] Nevertheless, a judicial decision will often carry significant authority as a 'means for the determination of rules of law' as per Article 38(1)(d) of the ICJ Statute. In this respect, decisions of the ICJ have been described as 'persuasive precedents'[104] and as 'beacons, guides and orientation points'.[105] Those descriptions seem apt, as they highlight the

97 Article 31(1) VCLT.

98 Richard K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2nd edn., 2015), 225.

99 See e.g. Stefan Kadelbach, 'The Interpretation of the Charter', in Simma, Khan, Nolte and Paulus (eds.), *The Charter of the United Nations* 2012 (n. 27), vol. I, 71–99 (para. 36).

100 Raphaël van Steenberghe, *La légitime défense en droit international public* (Bruxelles: Larcier, 2012), 171.

101 See further *infra*, IV.B.3.b and IV.D.3.b.

102 For details see Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013).

103 These indeed make it 'clear . . . that the Court cannot legislate': see ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 30), para. 18.

104 See e.g. ICJ, *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), Merits, Judgment of 3 June 1985, Dissenting Opinion of Judge Jennings, ICJ Reports 1984, 148, para. 27.

105 Franklin Berman, 'The International Court of Justice as an "Agent" of Legal Development?', in Tams and Sloan, *The Development of International Law by the International Court of Justice* 2013 (n. 102), 7–21 (21).

authority of a judicial decision, but also clarify that such authority is not a given: a decision needs to 'persuade', and whether it does so has to be assessed. The judicial voice, then, is an important one, but the Court 'does not have the last word'[106] in questions of treaty interpretation.

The second preliminary consideration concerns the peremptory status of the ban on force. This status, in the view of some commentators, affects the principles of interpretation.[107] Mary Ellen O'Connell makes the point emphatically; according to her, '[g]iven the nature of peremptory prohibitions, ... valid interpretation must not result in a weaker norm. Logically, peremptory norms may expand, not contract. ... [D]iluting and contracting the prohibition on the use of force through interpretation is impermissible.'[108] This approach is informed by a desire to construe the ban against force effectively. However, it fails to appreciate that such effective interpretation ought to proceed from the general regime of interpretation codified in Articles 31 to 33 of the VCLT. As a plea for a special regime of interpretation, the approach faces two obstacles. For one, it seems to assume that the 'true meaning' of peremptory norms were certain and timeless.[109] But that is difficult to sustain. To illustrate by reference to matters not at issue here, the meaning of 'force' in Article 2(4), or of the 'special intent' requirement of the prohibition against genocide, is not God-given; it needs to be established – and in this process, the means of interpretation mentioned in Articles 31 to 33 of the VCLT have their place.[110]

[106] Alain Pellet, in Andreas Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2nd edn., 2012), Article 38, para. 334.

[107] The following assessment focuses on the argument set out by Mary Ellen O'Connell in her contribution to the present volume. For related arguments, see notably Alexander Orakhelashvili, 'Changing Jus Cogens Through State Practice?', in Weller, *The Oxford Handbook of the Use of Force in International Law* 2015 (n. 47), 157–75.

[108] O'Connell in this volume, 248 and 251.

[109] See O'Connell in this volume, 249: 'As *ius cogens*, however, meaning is stable'; hence 'contrary state practice is of little relevance.' It is worth noting that while, according to this approach, 'diluting and contracting the prohibition on the use of force through interpretation is impermissible, discerning a broader prohibition is not'; this is because '[i]nterpreting the meaning of peremptory norms logically follows the principle of progression' (251). The source of this 'principle' is not disclosed.

[110] As Oliver Dörr rightly notes, 'Interpretation is always required ... Whenever a subject of international law invokes, applies or goes about implementing a treaty, it can only do so on the basis of a certain understanding of its terms, ergo on the basis of an interpretation', in Oliver Dörr and Kirsten Schmalenbach (eds.), *Commentary on the Vienna Convention on the Law of Treaties* (Heidelberg: Springer, 2012), Article 31, para. 15. James Green notes that 'such a stifling restriction on the development of the jus ad bellum would not concord with the reality of the law on the use of force' (James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' 2011 (n. 28), 237).

But the plea for a special regime faces a more fundamental obstacle. It misconstrues the relationship between the ban on force, and the recognised exception of self-defence. '[B]uilt into the very nature of the UN system',[111] self-defence operates on the same hierarchical level as the ban on force.[112] Arguments about the peremptory status should reflect as much: what is peremptory is the rule against unlawful uses of force. Action in self-defence is simply not unlawful. Arguments about asymmetrical self-defence are advanced from 'within the system' of the UN Charter.[113] The rule is limited by the exception, which operates on the same level.

None of this is to criticise the quest for an effective construction of the ban against force. Nor should it be read as a plea for a *laissez-faire* approach to treaty interpretation. However, it suggests that if peremptory norms were subject to a special regime of interpretation, then this would have to apply to the ban on force *as limited by self-defence*. For the crucial question relevant here – is self-defence available against armed attack by non-State actors? – *ius cogens* offers fairly little.

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On the basis of these clarifications, the threshold question can be approached in its proper normative setting: it requires the interpretation of a treaty clause, Article 51, that enshrines the right of self-defence against armed attacks as an exception to a State-centric ban on force. According to the International Law Commission's (ILC) much-quoted formula, this interpretation is 'a single combined operation', whereby different means of interpretation are 'thrown into the crucible', to allow for their 'interaction',[114] which accords each means of interpretation 'appropriate emphasis'.[115] For reasons of convenience, the subsequent discussion presents arguments relevant to this 'single, combined' process in two steps. The bulk of the analysis (section IV) looks at the approach of States and UN organs. Treaty interpretation, however, is more than a tracing of practice. It proceeds from the text ('armed attack'), presumed to reflect the parties' understanding of the proper scope of self-defence. Put differently, words are not only given meaning *by deeds*; they also have meaning *as words*, an ordinary meaning, which context, object and purpose help

[111] James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' 2011 (n. 28), 229.

[112] See n. 28 for brief comment on the scope of the peremptory ban on force.

[113] *Supra*, II.B.2.

[114] See *Yearbook of the International Law Commission* 1966, vol. II, 219, para. 8.

[115] See Draft Conclusion 3(5), adopted as part of the ILC's work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, UN Doc. A/71/10 (2016), 120 *et seq*.

elucidate. A surprisingly large number of writers on self-defence fail to explore literal, contextual and teleological arguments, give short shrift to them, or use them uncritically.[116] Section III illustrates what they are missing: it takes Article 51 seriously as a rule of treaty law.

III. THE 'ARMED ATTACK' REQUIREMENT: MAKING SENSE OF THE TREATY TEXT

According to the general rule of interpretation reflected in Article 31(1) of the VCLT,

> [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This dense phrase offers a roadmap for the inquiry, which – in a process of 'progressive encirclement'[117] – moves from literal to contextual to purposive arguments before exploring the drafting history of Article 51.

A. '. . . *the ordinary meaning to be given to the terms of the treaty* . . .'

The notion of 'armed attack' is at the heart of Article 51. Its ordinary meaning, reflecting the common use of the terms, is not easy to define with precision, but four basic points can be made on the basis of the English language version:

(i) Self-defence is available against an '*attack*', i.e. an 'aggressive and violent act against a person or place'.[118]

[116] Of the detailed works, see e.g. Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 57–60 (brief discussion of the text of Article 51); Gray, *International Law and the Use of Force* 2008 (n. 27), 128 *et seq.* (approaching Article 51 via practice and jurisprudence); Gazzini, *The Changing Rules on the Use of Force in International Law* 2005 (n. 51), 132–3 (text and *travaux* 'scarcely . . . conclusive'). Others mention the text of Article 51, but treat it *en passant*: van Steenberghe, *La légitime défense en droit international public* 2012 (n. 100), 270; Lindsay Moir, *Reappraising Resort to Force: International Law, Jus ad Bellum and the War on Terror* (Oxford: Hart, 2010), 22; Lubell, *Extraterritorial Use of Force against Non-State Actors* 2010 (n. 51), 31; Gregor Wettberg, *The International Legality of Self-Defense against Non-State Actors* (Bern: Peter Lang, 2007). Corten, *The Law against War* 2010 (n. 26) mentions text and purpose of self-defence, but focuses on UN practice (162 *et seq.* and 445–55).

[117] See *Aguas del Tunari v. Bolivia* (ICSID ARB/02/03), Objections to Jurisdiction, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C210/DC629_En.pdf, para. 91.

[118] *Oxford Dictionary of English* (Oxford: Oxford University Press, 2nd edn., 2005): *s.v.* 'attack' (noun), at no. 1.

(ii) In order to trigger self-defence, such attacks must be '*armed*', i.e. involve the use of weaponry or firearms.[119]
(iii) Article 51 specifies the target of the attack, viz. 'a Member of the United Nations', i.e. a State.
(iv) Article 51 does not describe the identity of the attacker; the term 'armed attack' appears without qualifier. It is not expressly linked to conduct by 'a Member of the United Nations'.

The same four points apply to the (authentic) Spanish, Russian and Chinese versions.[120] Each of these mention a violent act, which is qualified by reference to weapons ('un ataque armado', 'вооруженное нападение' and 'gōngjí shi', respectively); and each qualifies the target of the required attack as a UN member State ('contra un Miembro de las Naciones Unidas'; 'против члена Организации Объединенных Наций'; etc.). By contrast, neither the Russian nor the Spanish or Chinese versions require the attack to be carried out *by* a State.

The French version differs, but not significantly. It, too, requires the violent act to be 'armed' (point (ii)) and clarifies that it must be directed against a State (point (iii)). As to point (i), the French text uses a different term, namely '*agression*', which suggests a qualified attack, viz. an '*attaque non provoquée, injustifiée et brutale*'.[121] However, it does not affect point (iv) made above: '*agression*' does not qualify the identity of the attacker any more than the term 'attack'; it notably does not imply any State nexus.[122]

From this first glance at Article 51, it is clear that what matters, for present purposes, is what is *not* said: nothing, in any of the five languages, suggests that self-defence would necessarily be symmetrical; the provision 'fails to specify from whom or which entity such an attack should originate'.[123] This silence is widely noted,[124] but quite what it means is disputed. A narrow claim is that it

[119] *Ibid.*, *s.v.* 'armed' (adjective), at 1.1.
[120] The following draws on Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht* 2012 (n. 62), 294–306.
[121] Larousse, *Dictionnaire monolingue* (online), *s.v.* 'agression', available at www.larousse.fr/dictionnaires/francais/agression/1766.
[122] Claus Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* (Berlin: Duncker & Humblot, 1995), 208.
[123] de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 21.
[124] See e.g. van Steenberghe, *La légitime défense en droit international public* 2012 (n. 100), 270; Oscar Schachter, 'The Extraterritorial Use of Force against Terrorist Bases', *Houston Journal of International Law* 11 (1989), 309–16 (311); Carsten Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism', *Fletcher Forum of World Affairs* 27 (2003), 35–53 (42).

does not preclude asymmetrical self-defence: in Judge Higgins' phrase, 'nothing in the text of Article 51 . . . stipulates that self-defence is available only when an armed attack is made by a State.'[125]

That may be too cautious, though. While interpreters have only 'the words "armed attack" to go on',[126] these have a positive meaning: they require an 'aggressive and violent act', which is expressly qualified in terms of its modality ('armed') and direction ('against a Member of the United Nations'). It is simply incorrect to state that '[the] silence [of Article 51] makes a determination of the ordinary meaning of its terms impossible.'[127] While the provision does not expressly *include* attacks by non-State actors, its terms are clear: they require no State nexus, and absent indications to the contrary, that should be taken to mean that no unwritten qualifier is required. On a textual analysis, self-defence is available against armed attacks by non-State actors simply because '[a]rmed attacks by non-state actors are still armed attacks.'[128]

B. '. . . *in their context* . . . '

Contextual arguments have more than the two 'words "armed attack" to go on';[129] they take into account the position of particular terms within the overall structure of the treaty, to ensure that an 'abstract ordinary meaning of a phrase [is not] divorced from the place which that phrase occupies in the [treaty as a whole]'.[130] To the extent that the terms of Article 51 are seriously interrogated, contextual arguments dominate. According to many commentators, they support a State-centric interpretation, which notably draws on the link between self-defence and the ban on force. The potential for contextual arguments is, however, rarely exhausted. The relationship between Articles 51 and 2(4) is relevant, but so is the immediate context of the term 'armed attack' and its relationship with provisions belonging to the same regulatory

[125] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, Separate Opinion of Judge Higgins, ICJ Reports 2004, 136, 215, para. 33.

[126] Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 43.

[127] de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 24.

[128] As noted by Dinstein in earlier editions of his textbook: see Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 3rd edn., 2001), 214.

[129] See Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 43.

[130] Oliver Dörr, in Dörr and Schmalenbach (eds.), *Commentary on the Vienna Convention on the Law of Treaties* 2012 (n. 110), Article 31, para. 44.

'scheme'.[131] The following four sub-sections explore well- and lesser-known contextual arguments.

1. The Immediate Context: The Terms of Article 51

A first contextual argument flows from the very phrase that contains the terms 'armed attack'.[132] As noted above (section III.A), Article 51 says nothing on the identity of the attacker, but specifies that it has to be directed against a 'Member of the United Nations', i.e. a State.[133] This is indicative; it makes it difficult to argue that Article 51, as a general matter, simply presupposes some form of State nexus. The argument can be put in the form of two questions. If such a nexus were assumed – why would the victim of an attack be expressly qualified as a UN member (State)? Conversely, if the provision expressly stipulates that only States can exercise self-defence under the Charter, does this not suggest that an armed attack, not so qualified, could emanate from a broader range of actors? This is not a necessary inference. But it is worth noting the contrast between the two sides of Article 51: the victim is expressly described as a State, the attacker not so, even though a qualifying term could easily have been added. This suggests that the silence in the text of Article 51 may have meaning.

2. Arguments Derived from Article 2(4) of the Charter: Conventional Wisdom

The most popular contextual argument suggesting that the silence should be ignored – and that self-defence is only available against a State attack – draws on the relationship between Articles 2(4) and 51.[134] Aspects of that relationship have been addressed already; the two most relevant ones for present purposes are that, first, Article 51 is an exception to the rule found in Article 2(4) and, second, that Article 2(4) in the main precludes the use of force directed against other States.[135] These starting points indeed favour a 'State-oriented' interpretation of the right of self-defence that construes the notion of 'armed

[131] Gardiner, *Treaty Interpretation* 2015 (n. 98), 205.

[132] This is, in Gardiner's phrase, the 'obvious initial contextual assessment that must be made' (*ibid.*, 197).

[133] See Articles 3 and 4 of the Charter, reserving membership to original members and 'peace-loving states'.

[134] This analysis largely draws on Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 37 *et seq*.

[135] *Supra*, sections II.A and II.B.

attack' like the ban on force.[136] As an exception justifying military conduct, self-defence can easily be construed as a 'responsive' right permitting symmetrical reactions against uses of force that violate Article 2(4). If it is the flip-side of the coin, then it should matter that the front side formulates a State-centric prohibition.[137]

Water-tight, or logically necessary, this conclusion is certainly not: perhaps self-defence is more than the flip-side of the ban. But it has considerable appeal, at least as long as the focus remains on unilateral uses of force.[138] Appeal, because prohibition and exception would follow the same (State-centric) rationale. Appeal, because it would reflect the close link between Articles 2(4) and 51, which are regularly presented as a 'package', the latter necessary to make the former palatable. Appeal, finally, because self-defence would operate in a straightforward manner: the exceptional response would only be available against States committing a qualified wrong.[139] The symmetric, State-centric construction of self-defence would, to put it bluntly, *make eminent sense* and *fit smoothly* within a Charter regime shaped by the State-centric ban on force.

3. Questioning the Conventional Wisdom

All of this, to be sure, is 'assailable',[140] and has been assailed. Three contextual counter-arguments could sever the link between prohibition and exception. Two of these can be dealt with relatively briefly; the third requires a fuller analysis.

The first counter-argument is an argument from the contrary. It, too, looks at the interplay of self-defence and the ban on force, but it emphasises differences. That Article 2(4) is State-centric only throws – so the argument runs – the openness of Article 51 into starker relief. The difference in wording, argues Andreas Zimmermann, 'seems to imply, by way of an *argumentum e contrario*, that Article 51 ... does not require any inter-state

[136] For firm views to this effect see e.g. Ago, 'Addendum to the 8th Report on State Responsibility' 1980 (n. 64), para. 89; Corten, *The Law against War* 2010 (n. 26), 162; Michal Kowalski, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard', *Polish Yearbook of International Law* 30 (2010), 101–30 (122).

[137] Ago, 'Addendum to the 8th Report on State Responsibility' 1980 (n. 64), para. 89.

[138] But see section III.B.4 that looks beyond unilateral responses.

[139] See de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 22–3; Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 38–9; Robert Kolb, *Ius Contra Bellum* (Basel: Helbing Lichtenhahn, 2nd edn., 2009), 293.

[140] Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 39.

situation'.[141] But this only goes so far. Every argument by analogy can in theory be turned into an *argumentum e contrario*. The question is whether the *ratio legis* warrants a 'contrarian' construction.[142] The close link between Articles 2(4) and 51 would rather seem to support a concordant reading.[143]

The second counter-argument questions the idea of symmetry between Articles 2(4) and 51. If these two provisions were truly symmetrical, every breach of Article 2(4) should trigger the right of self-defence. However, that is not the case: according to the dominant view, there is a 'gap' between the two, as self-defence is available only against qualified uses of force.[144] Perhaps, then, other forms of asymmetry should not be ruled out? But that, too, only goes so far. The accepted case of asymmetry between Articles 2(4) and 51 concerns the intensity of force, not the actors. As the two asymmetries are different, the move from the accepted (intensity) to the disputed one (actors) requires a leap of faith.

4. In Particular: Chapter VII of the Charter

More powerful is a third contextual counter-argument, which is rarely made.[145] It derives from a comparison between Article 51 on the one hand and Articles 39 and 42 on the other. Articles 39 and 42 – like Articles 2(4) and 51 – form part of the Charter's *ius ad bellum*. As read today, they permit the use of force by States with a Security Council mandate.[146] While that institutional setting is particular, from the perspective of the responding State, Articles 39 and 42 operate in much the same way as Article 51: they justify conduct that ostensibly violates the ban on force.[147] What is more, Article 51 reinforces the link between unilateral and institutionalised reactions by precluding self-

[141] Andreas Zimmermann, 'The Second Lebanon War', *Max Planck Yearbook of United Nations Law* 11 (2007), 99–141 (117); and further Christiane Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (Berlin: Duncker & Humblot, 2006), 134.

[142] See Karl Larenz, *Methodenlehre der Rechtswissenschaften* (Heidelberg: Springer, 2nd edn., 1991), 279.

[143] Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* 2006 (n. 141), 234–5.

[144] *Supra*, section II.B.2.

[145] The point is hinted at in Trapp, 'Actor-Pluralism and the "Turn to Responsibility"' 2015 (n. 32), 203–4, and Constantine Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', *Netherlands International Law Review* 55 (2008), 159–80 (163).

[146] See Franck, *Recourse to Force* 2002 (n. 27), 24 *et seq.*; Gazzini, *The Changing Rules on the Use of Force in International Law* 2005 (n. 51), 43 *et seq.*

[147] See Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' 2011 (n. 28), 229: 'In either case – self-defense or collective security – the *prima facie* unlawfulness of the use of force is precluded.'

defence when the UN's collective security mechanism is activated. All this suggests that Articles 39 and 42 can inform the contextual interpretation of the 'armed attack' requirement.

Article 39 clarifies that by adopting collective security measures. The Security Council can respond to acts of aggression, breaches of the peace or threats to the peace. Just as Article 51 is worded openly, so is Article 39: nothing in the text suggests that Security Council responses are dependent on some form of unlawful inter-State conduct, let alone the use of force.[148] Yet for some time, such an inter-State, symmetrical reading enjoyed considerable support. Article 39 was read to presuppose an unlawful use (or threat) of force in the international relations between States.[149] Lacking a foothold in the wording of Article 39, this interpretation was supported by contextual arguments, notably the close link with Article 2(4).[150]

Twenty-five years after *Desert Storm*, such readings are but a remote echo from a distant past. It is beyond doubt today that the Security Council may authorise military measures in situations *not* involving an inter-State force.[151] In fact, the Council has hardly ever responded to breaches of Article 2(4).[152] Perhaps more importantly, it has also authorised military measures against non-State actors.[153] On the face of it, States implementing such mandates would have violated the prohibition against the use of force. Yet covered by Articles 39 and 42, their conduct did not violate Article 2(4) and had to be endured by the host State.

This development is part of a new, robust construction of Chapter VII of the Charter that accommodates what Kimberley Trapp calls 'actor pluralism'.[154] And while some of the Council's other arrogations of competence are viewed sceptically, its decision to overcome an inter-State

[148] As noted by Nico Krisch, 'Article 39', in Simma, Khan, Nolte and Paulus, *The Charter of the United Nations* 2012 (n. 27), vol. I, 1273–96 (para. 7): 'The concept of "peace" . . . can take on many meanings.'

[149] See e.g. Wilhelm Wengler, *Das völkerrechtliche Gewaltverbot* (Berlin: de Gruyter, 1967), 23–4; Joachim Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen* (Berlin: Duncker & Humblot, 1975), 21 *et seq*. According to Kress ('Major Post-Westphalian Shifts' 2014 (n. 32), 14), '[t]he meaning originally given . . . to the term "international" [in Article 39] was "inter-state".'

[150] Arntz, *Der Begriff der Friedensbedrohung* 1975 (n. 149), 44.

[151] As Krisch notes, the Security Council, from early on, engaged with conflicts not involving a threat or use of force: see Krisch, 'Article 39' 2012 (n. 148), para. 19.

[152] *Ibid.*, paras. 16–29.

[153] For details see Pieter H. Koojimans, 'The Security Council and Non-State Entities', in Karel Wellens (ed.), *International Law: Theory And Practice – Essays in Honour of Eric Suy* (The Hague/Boston, MA/London: Martinus Nijhoff, 1998), 333–46.

[154] Trapp, 'Actor-Pluralism and the "Turn to Responsibility"' 2015 (n. 32), 204–5.

construction of Chapter VII has met with general approval. For the debate on self-defence, this development is instructive in two respects. First, it shows that inter-State readings of another openly worded Charter provision (Article 39) at some point enjoyed support – and were abandoned subsequently. Perhaps the law of self-defence could have undergone a similar transformation. And, second, a quick glance at the development of Chapter VII undermines the claim that, under the Charter's *ius ad bellum* regime, military force could *only ever* be lawfully used in response to prior breaches of Article 2(4):[155] uses of force authorised under Chapter VII can clearly be asymmetrical.[156]

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Contextual arguments point in different directions. The immediate context of the term 'armed attack' supports a broad construction of Article 51: the provision qualifies the victim of an armed attack (which must be a State) but not the attacker. By contrast, the close relationship between Articles 51 and 2(4) seems to support a State-centric construction. However, the popular argument derived from Article 2(4) rests on a narrow comparison that ignores the Charter's other exception to the ban on force, viz. force authorised by the Security Council. Once Articles 39 and 42 are appreciated (which they hardly ever are), the argument derived from Article 2(4) loses much of its force. The Charter's *ius ad bellum* scheme, if looked at as a whole, is significantly more diverse than commentators exploring the relationship between Articles 2(4) and 51 recognise. This suggests that, contrary to a commonly held view, contextual arguments do not support a State-centric construction of self-defence. On balance, they would seem to offer support for a reading that accepts the possibility of asymmetrical self-defence.

[155] Even Kammerhofer in his otherwise excellent analysis ignores this: cf. *Uncertainty in International Law* 2010 (n. 42), at 43: 'the Charter in all other respects relevant to its *ius contra bellum* . . . is directed exclusively towards inter-state action.'

[156] Dire Tladi, in this volume, 64, disagrees: he notes that '[t]he expansive reading of Article 39 and 42 has been facilitated in part by the special powers of the Council and its primary mandate for the maintenance of international peace and security, powers and a mandate that States, acting unilaterally, simply do not have. To suggest, as this contextual interpretation [set out here, CJT] might imply, that the scope of the rights of an individual State under Article 51 is the same as or even comparable to the scope of the powers of the Security Council in Chapter VII is wrong and dangerous.' This is correct, but misses the narrower point advanced here: no equivalence between self-defence and collective security is asserted. What is argued is that a look at the evolution of Chapter VII weakens the claim that the Charter's *ius ad bellum* scheme was necessarily State-centric.

C. '. . . and in the light of its object and purpose'

This finding can be tested by taking into account the Charter's object and purpose, which, under the general principles of interpretation, can help elucidate the ordinary meaning of the terms of the treaty.[157] Conventional wisdom directs interpreters to the preamble and introductory clauses of a treaty. The Charter seems to facilitate such an approach, since it expressly sets out the UN's 'Purposes and Principles'.[158] However, as with many other treaties of broad substantive scope, these comprise 'a variety of different, and possibly conflicting, objects and purposes'.[159] This in turn affects the impact of a teleological interpretation, which yields relatively few weighty arguments.

1. Ensuring the Maintenance of Peace and Security

The main teleological argument supporting a State-centric construction proceeds from what has been referred to as the UN's 'purpose of all purposes',[160] the maintenance of international peace and security. Under the Charter scheme – so the argument runs – the UN is to maintain peace and security primarily through measures of collective security, while unilateral military action is strictly limited by Article 2(4). Reinforced by the preamble's emphatic statement against the 'scourge of war', this purposive reading is said to mandate a narrow reading of entitlements to use military force unilaterally: 'as a product of the horrors of the Second World War inspired by the desire to end the "scourge of war", the whole object of the Charter was precisely to limit the scope for unilateral use of force as much as possible and to subject it to the control of the Security Council.'[161] In the present context, unilateral force in self-defence is most effectively limited if the trigger event is narrowly construed; and this is best achieved by limiting it to (armed) State attacks.[162]

[157] Gardiner, *Treaty Interpretation* 2015 (n. 98), 211.

[158] Kadelbach, 'The Interpretation of the Charter' 2012 (n. 99), para. 31.

[159] WTO Appellate Body, *US Import of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), para. 17.

[160] Rüdiger Wolfrum, 'Article 1', in Simma, Khan, Nolte and Paulus, *The Charter of the United Nations* 2012 (n. 27), vol. I, 107–20 (para. 5).

[161] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 59–60.

[162] See e.g. Tladi in this volume, 64: 'The object and purpose of the Charter, simply put, are the prevention of wars and conflict. Interpreting Article 51 to permit the use of inter-State force in the territory of another State – thereby violating the third State's territorial integrity – is contrary to this purpose.' See also Kowalski, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard' 2010 (n. 136), 123; Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 59; Starski, 'Right to Self-Defense, Attribution and the Non-State Actor' 2015 (n. 4), 498.

If all of this sounds a bit too good to be true, then that is because it is. More specifically, the purposive argument just summarised suffers from two problems. First, it proceeds from a traditional understanding of the Charter's peace and security scheme, which emphasises the absence of military conflict between States. This traditional understanding remains prominent, but is no longer dominant.[163] A brief passage from the UN Secretary-General's Report *In Larger Freedom* outlines a twenty-first century view of the institution's 'purpose of purposes':

> The threats to peace and security in the twenty-first century include not just international war and conflict but civil violence, organized crime, terrorism and weapons of mass destruction. They also include poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences.[164]

The move from one (inter-State) to another (broader) understanding of peace and security is a gradual process. But that it is well under way seems difficult to dispute.[165] And this is sufficient to weaken arguments premised on an equation of peace and security on the one hand and 'international war and conflict' on the other: for in the new, 'multidimensional',[166] understanding, non-State actors are certainly capable of threatening international peace and security. Action against them could well be portrayed as an attempt to *maintain* peace.

The point need not be explored, as the purposive reading faces a second, more serious, problem:[167] it is premised on a selective view of the Charter's peace and security design. No doubt the two aspects mentioned by its proponents, viz. collective security and the ban on force, are central. However, so is the right of self-defence, which the purposive argument just sketched out conveniently ignores: an 'un-impaired' part of the Charter regime, self-defence operates as a limitation on the general ban on force, and is itself limited by collective security action. Read properly, the Charter's object is to maintain peace and security by banning military force, but only to the extent that force is *not used in self-defence*. In other words, the maintenance of peace and security as the Charter's primary

[163] For general accounts see Nadine Susani, 'United Nations, Purposes and Principles', in *Max Planck Encyclopedia of Public International Law* (online edn), March 2009; and Rüdiger Wolfrum's discussion of 'Article 1' 2012 (n. 160).

[164] In Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (21 March 2005), para. 78.

[165] See Susani, 'United Nations, Purposes and Principles' 2009 (n. 163), para. 25: '[T]he notion of "international peace and security" . . . has certainly become much more multidimensional.'

[166] *Ibid.*

[167] The following draws on Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht* 2012 (n. 62), 317–18.

purpose is operationalised through particular Charter provisions, of which Article 51 is one. These provisions concretise the Charter's object of maintaining peace and security; and a solution to problems of interpretation ought to be sought through them, not by reference to the abstract notion of peace and security.[168] Adapting the terms used by the ICJ in response to a broad, purposive construction of a jurisdictional treaty, one could say that '[a]lthough … States had expressed in general terms in the [Charter's Chapter I] their desire to [maintain peace and security], their consent thereto had only been given in the terms laid down in [the specific provisions operationalising that purpose].'[169] Once this is accepted, the purposive argument collapses: it depends on a selective analysis that simply bypasses Article 51.

2. Facilitating Effective Responses

Whereas purposive arguments favouring a State-centric construction may appear lofty, considerations in support of an asymmetrical understanding of self-defence seem a little prosaic. They are quite rare. Some commentators suggest that Article 51 sought to permit effective responses against real threats or real attacks – which is taken to favour a broad construction of the armed attack requirement.[170] Similarly, others claim that the Charter's peace and security design looked to substantive factors (such as the intensity of an attack) and should not depend on the status of the attacker.[171] But neither prong of the argument is really convincing. The purpose of self-defence (as opposed to that *of the Charter*) is not as such a relevant teleological consideration. Moreover, the Charter is incredibly 'status-conscious' in some fields (including in formulating a State-centric ban on force). And self-defence could still be effective if it applied only to State attacks.

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[168] Dire Tladi takes issue with this argument, noting that 'self-defence is a provision in the Charter' whose overall aim is to prevent war and conflict through collective action (Tladi in this volume, 65). This is correct; but it fails to appreciate that the preference for collective action is built into Article 51: self-defence becomes unavailable once collective security measures are taken. Precisely because 'self-defence is a provision in the Charter' (*ibid.*), attempts to construe treaty clauses by reference to the Charter's object and purpose should not ignore it.

[169] See ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Merits, Judgment of 12 November 1991, ICJ Reports 1991, 53, para. 56.

[170] See e.g. Zimmermann, 'The Second Lebanon War' 2007 (n. 141), 117; Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 214–15.

[171] Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* 2006 (n. 141), 134–5; Kolb, *Ius Contra Bellum* 2009 (n. 139), 276; Christopher Greenwood, 'International Law and the "War against Terrorism"', *International Affairs* 78(2) (2002), 301–17 (307).

All things considered, it may be understandable that commentators accord 'relatively little weight'[172] to teleological considerations. These simply do not offer compelling arguments either way. None of this should come as a real surprise. The Charter seeks to integrate competing goals into one overarching framework. While the UN's main purposes may 'have proved timeless and universal',[173] the Charter regime has been adapted and can no longer be reduced to 'one single, undiluted object and purpose'.[174] It is perhaps no wonder teleological considerations lack focus.

D. The Preparatory Work of the Treaty and the Circumstances of its Conclusion

Finally, a brief glance at the *travaux préparatoires* and the circumstances of the Charter's conclusion can help understand the meaning of the treaty text. Pursuant to the general principles of treaty interpretation, historical considerations are treated as 'supplementary means' with a more limited role than the 'primary means' of interpretation discussed so far.[175] That said, recourse to them is envisaged where (as here) the primary means 'leav[e] the meaning [of a treaty clause] ambiguous or obscure'.[176]

And yet, the *travaux* and the circumstances of the Charter's conclusion do not dispel lingering doubts.[177] In fact, they yield little. Article 51 was a late addition to the Charter text and discussed only briefly.[178] What is a major concern today then simply did not seem to merit debate. It is sometimes asserted that the Charter's drafters, perhaps intuitively, thought only of armed attacks by States, as the historical context was one of an inter-State war.[179] That may be true or not. (More likely, it is not: States after all did respond militarily to 'private' armed attacks prior to 1945.)[180] However, if it

[172] De Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 24.

[173] See GA Res. 55/2 of 18 September 2000, para. 3.

[174] See WTO Appellate Body, *US Import of Certain Shrimp and Shrimp Products* 1998 (n. 159), para. 17.

[175] Hence 'supplementary means' are referred to in a separate provision, Article 32 VCLT.

[176] Article 32(a) VCLT.

[177] The discussion draws on Kimberley N. Trapp, 'Can Non-State Actors Mount an Armed Attack?', in Weller, *The Oxford Handbook of the Use of Force in International Law* 2015 (n. 47), 679–96 (683–5).

[178] No reference to self-defence could be found in the Dumbarton Oaks proposals.

[179] Jochen A. Frowein, 'Der Terrorismus als Herausforderung für das Völkerrecht', *Heidelberg Journal of International Law* 62 (2002), 879–905 (887); van Steenberghe, *La légitime défense en droit international public* 2012 (n. 100), 270.

[180] See Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 217–31.

were true, the drafters left precious little written trace of their intuition. An early American proposal did refer to 'an attack by any State'.[181] However, as Kimberley Trapp notes, other proposed texts did not mention a State nexus: 'A UK proposal relied on "a breach of the peace" as the trigger for the right of self-defence . . ., while a French proposal had member states reserving a "right to act as they may consider necessary in the interest of peace, right and justice" in the event of Security Council deadlock.'[182]

The subsequent debates about what was to become Article 51 were based on two proposals, one jointly submitted by the United States and the United Kingdom, the other by the Soviet Union.[183] Both of these permitted self-defence (only) if the Security Council had not acted; both viewed it as a response against an 'armed attack' – but neither of them required a State attack. As the deliberations were not minuted, the drafters' motives are difficult to re-establish. One could speculate that the reference to another State (found in the early US proposal) had been dropped deliberately; alternatively, the requirement of a State nexus may have simply been taken for granted. Whatever the correct view, the *travaux* themselves are so obscure that they do not help much.

E. The Text of Article 51: Where Do We Stand?

The preceding considerations illustrate the benefit of taking the text of Article 51 seriously. The drafters did not discuss the term 'armed attack' in any detail. However, textual and contextual – as well as (to a lesser extent) teleological – considerations offer important pointers. The existing scholarship fails fully to reflect this, and often rehearses arguments that do not withstand scrutiny.

The preceding sections have analysed literal, contextual, purposive and historical arguments in deliberate detail. They suggest that the text of Article 51, on balance, supports a broad construction of self-defence that permits responses against armed attacks by non-State actors. The wording of Article 51 is the clearest indicator of such a broad understanding, which – contrary to conventional wisdom – is not contradicted by contextual arguments. Purposive and historical considerations, in turn, do not offer firm guidance either way. All things considered, the analysis nudges interpreters towards a broad understanding of Article 51.

[181] *Foreign Relations of the United States*, Diplomatic Papers (1945), vol. I, 659. See also *United Nations Conference on International Organization* (UNCIO) III, 483 (statement by Turkey); and *UNCIO* XII, 687 (Colombia).

[182] Trapp, 'Can Non-State Actors Mount an Armed Attack?' 2015 (n. 177), 685 (fn. 32).

[183] See *Foreign Relations of the United States*, Diplomatic Papers (1945), vol. I, at 705 and 813.

This finding seems to run counter to what has been described earlier as the intuitive symmetrical construction of self-defence as a response against illegal uses of force by another State. That the drafters simply presumed such an intuitive construction is often asserted – and cannot be ruled out. But an analysis of the text, context, purpose and *travaux* reveals little evidence supporting it. If anything, experience suggests that symmetrical readings can be overcome: the evolution of the UN's collective security system illustrates as much.

None of this, to reiterate, settles the threshold question. Perhaps UN members and organs (to adapt Gardiner's phrase again[184]), through their deeds, have given a State-centric meaning to the words 'armed attack'. The text itself, when interrogated, however, does not mandate, or encourage, such a construction. The subsequent practice of UN member States and organs is to be assessed against this background.

IV. 'MEANING THROUGH DEEDS': SUBSEQUENT PRACTICE IN APPLICATION OF THE 'ARMED ATTACK' REQUIREMENT

A. *Subsequent Practice in Treaty Interpretation*

Since 1945, the right of self-defence has been applied and discussed by States and UN organs. Their practice is rich and diverse. It comprises the conduct of States asserting self-defence, as well as international reactions to such claims. It also includes general statements from which the intended scope of self-defence can be inferred, and decisions of international courts. The following analysis cannot do justice to this rich practice. Instead of assessing developments comprehensively,[185] it offers a (long) synthesis that seeks to retrace key trends in the application of Article 51.

This synthesis provides a 'reality check'. Yet it also does more than that: under the general principles outlined above, it can be an element in the process of treaty interpretation if it reflects the understanding of Article 51. As a matter of principle, this much is undisputed; in fact, the drafters of the Vienna Convention considered '[t]he importance of [...] subsequent practice ... as an element of interpretation' to be 'obvious'.[186] Quite how subsequent practice should be operationalised is, however, not obvious.

[184] Gardiner, *Treaty Interpretation* 2015 (n. 98), 225 ('Words are given meaning by deeds').

[185] For fuller accounts see Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53); and Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122).

[186] *Yearbook of the International Law Commission* 1966, vol. II, 221.

The following synthesis takes its cue from the ILC's work on 'Subsequent agreements and subsequent practice in relation to interpretation of treaties'.[187] More specifically, it proceeds from the Commission's set of 'Draft Conclusions' adopted on second reading in 2018, which (building on the first reading text adopted in 2016) 'situate subsequent agreements and subsequent practice within the framework of the rules of the Vienna Convention on interpretation'.[188] For the purposes of the present study, three aspects of that framework, as construed by the ILC, are significant.

First, treaty interpretation can draw on a diverse range of subsequent practices.[189] The Vienna Convention in Article 31(3) mentions two instances expressly, viz. 'subsequent agreements' and 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. These two instances describe different modalities of establishing the meaning of a treaty provision, which can find expression 'in a common act or undertaking', or in 'separate acts that in combination demonstrate a common position'.[190] That said, Articles 31(3)(a) and Article 31(3)(b) both require an agreement of *all* treaty parties. Under multilateral treaties with near-universal membership, such all-party agreement will often be difficult to establish.[191] Against that background, it is significant to note that the subsequent practice of *some parties* can also affect the interpretation of a treaty.[192] In the ILC's work, this was initially referred as 'other subsequent practice'; in the Draft Conclusions as adopted in 2018, this shorthand term is dropped, but the key aspect maintained: subsequent practice by *some parties* can be relevant

[187] Details and documents (including four Reports by the Commission's Special Rapporteur, Georg Nolte) are reproduced on the ILC's website at http://legal.un.org/ilc/guide/1_11.shtml.

[188] See ILC, 'Subsequent Practice: Text of the Draft Conclusions and Commentaries Thereto', reproduced in UN Doc. A/73/10 (2018), 16 *et seq.*, para. 2 of the commentary to Draft Conclusion 1. For the 2016 version, see ILC, 'Subsequent Practice: Text of the Draft Conclusions and Commentaries Adopted on First Reading' in UN Doc. A/71/10 (2016), 120 *et seq*.

[189] Terminology on this point is not entirely satisfactory: in line with the jurisprudence of the International Court of Justice (see IJC, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, *Pulp Mills*, Provisional Measures, ICJ Reports 2006, 113, para. 53), the following discussion uses the term 'subsequent practice' to describe the manifold forms of subsequent conduct, including agreements.

[190] See ILC, 'Subsequent Practice' 2018 (n. 188), commentary to Draft Conclusion 4, at para. 10.

[191] With respect to the WTO, it has, e.g., been held that '[b]ecause of the large number of WTO Parties, there in fact appears to be only limited scope for evidence of "subsequent practice", since … the practice is intended to be the practice of … the Parties to the Agreement *as a whole*': Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements', *Journal of International Economic Law* 5 (2002), 17–89 (34).

[192] This was recognised in the ILC's earlier work on the law of treaties: see e.g. *Yearbook of the International Law Commission* 1964, vol. II, 203–4.

as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention.[193] This 'other practice' 'consists of conduct by one or more parties in the application of the treaty':[194] while not reflecting 'the agreement of [all] the parties', it 'can contribute to the clarification of the meaning of a treaty',[195] e.g. if that meaning is otherwise 'ambiguous or obscure'.[196] In light of the difficulties of establishing a common understanding of all UN members, this 'other subsequent practice' is significant. It means that the analysis needs to take into account the conduct of States and UN organs even where it does not reflect an 'agreement of *the parties* regarding [the Charter's] interpretation' in the sense of Article 31(3)(a) or (b).

Second, the general regime of treaty interpretation, as reflected in the ILC's work, helps determine the interpretative weight to be accorded to the different forms of subsequent practice. At the outset, it is worth emphasising that subsequent practice is but one element, which needs to be 'taken into account' alongside other (textual, contextual, purposive, etc.) considerations: not bindingness, but its relative weight, is at stake.[197] As regards their weight, a distinction is often drawn between the forms of 'authentic interpretation' reflecting the agreement of all treaty parties on the one hand, and the 'other subsequent practice' of some parties on the other. This distinction is no doubt relevant, as an authentic interpretation offers 'objective evidence' of the 'common will of the parties' and carries 'specific authority'.[198] Overall, though, interpretative weight is not a question of categorisation, but requires a case-by-case assessment. Common sense suggests (and the ILC's work confirms) that 'clarity' and 'specificity' should be relevant factors.[199] Where the understanding is not reached in a single act, it will be relevant also 'whether and how [a practice] is repeated',[200] while the interpretative weight of 'other subsequent practice' also depends on 'the number of affected states that engage in [it]'.[201] These are no doubt malleable criteria, but they contain helpful pointers.

[193] ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 4(3); and the earlier version in ILC, 'Subsequent Practice' 2016 (n. 188), Draft Conclusion 4(3).
[194] ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 4(3).
[195] *Ibid.*, Draft Conclusion 7(2).
[196] Article 32(a) VCLT.
[197] See ILC, 'Subsequent Practice' 2018 (n. 188), para. 4 of the commentary to Draft Conclusion 3.
[198] *Ibid.*, Draft Conclusion 3 and para. 3 of the Commentary thereto.
[199] *Ibid.*, Draft Conclusion 9(1).
[200] *Ibid.*, Draft Conclusion 9(2).
[201] *Ibid.*, Commentary to Draft Conclusion 9, para. 15. In Draft Conclusion 9(3), the ILC notes that '[t]he weight of subsequent practice as a supplementary means of interpretation . . . *may* depend on the criteria referred to in paragraphs 1 and 2.' It offers no alternative criteria, though.

Third, the general regime as reflected in the ILC's work provides guidance as to the possible effects of subsequent practice on the interpretation of a treaty. Subsequent practice in all its forms can 'contribute … to the clarification of the meaning of a treaty'.[202] Whether it can do more is disputed: there have been long-standing debates on whether subsequent practice could tacitly modify or amend a treaty,[203] and move (in Kelsen's terminology[204]) outside the 'normative frame' of plausible meanings. The Commission recognises the controversy,[205] but rightly notes that the question is typically avoided: 'States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way'[206] – and not as an amendment or modification. Hence subsequent practice is 'presumed … to interpret the treaty, not to amend or to modify it'.[207]

As is clear from the foregoing, the general regime as reflected in the ILC's work leaves room for finetuning. However, the Commission's Draft Conclusions offer a helpful framework within which subsequent practice in the application of Article 51 can be assessed. This framework is drawn upon in the following, which reflects the breadth of subsequent practice, evaluates its weight in light of factors such as 'clarity', 'specificity' and 'repetition', and accepts the preference for interpretation over treaty modification.

As noted above, the assessment is in the form of a (long) synthesis that identifies the main lines of development. More specifically, three main lines are retraced:

- *first*, the acceptance of an inter-State reading of self-defence, which would remain dominant during the Cold War era;
- *second*, the flexible application of these general rules to concrete instances of asymmetrical self-defence during the same period; and
- *third*, the gradual and palpable rise of asymmetrical self-defence over the past twenty-five years, i.e. broadly since the end of the Cold War.

[202] For authentic means of interpretation, the ILC specifies that such clarification 'may result in narrowing, widening, or otherwise determining the range of possible interpretations'; see ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 7(1).

[203] For a detailed analysis see ILC, 'Subsequent Practice' 2018 (n. 188), Commentary to Draft Conclusion 7, paras. 21–38.

[204] See Hans Kelsen, *Pure Theory of Law* (Berkeley, CA: University of California Press, 1967), 348 *et seq*.

[205] ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 7(3).

[206] *Ibid.*, Commentary to Draft Conclusion 7, at para. 38.

[207] *Ibid.*, Draft Conclusion 7(3).

B. The General Framework: An Inter-State Reading of Self-Defence

The first trend set in soon after the adoption of the UN Charter; it would provide a framework for the application of Article 51 for decades. As an exception to the State-centric ban on force, self-defence was construed as a defence between States, and viewed as a response against armed attacks for which another State was answerable. In practice, a State nexus – absent from the text of Article 51 – was read into the provision. This first trend is frequently noted. Missing from many accounts are the twists and turns that accompanied it: that the State nexus was never seriously debated; that it was construed very flexibly for a time and only gained contours from the late 1960s onwards; and that the more 'stratified' regime emerging then was not applied strictly to particular disputes. The subsequent sections outline the general trend and its twists and turns.

1. Sleepwalking into an Inter-State Reading

Looked at from a contemporary perspective, the most significant feature of the debates during the first decades of the UN era is that the inter-State framework was accepted without serious discussion. There was no equivalent, in the early years of the United Nations, to today's protracted debates between 'restrictivists' and 'expansionists'.[208] States (and UN organs) seemed simply to take for granted that an armed attack had to be one with some level of State involvement: they *sleepwalked* into an inter-State construction. As a result, straightforward statements explicitly rejecting the possibility of self-defence against non-State actors are rare.[209] The contemporary evidence supporting an inter-State construction is essentially indirect. It is a by-product of debates about the *level* of State involvement required to turn an attack into an 'armed attack'. As will

[208] See Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 37 (fn. 165): 'there is a marked absence of argument [in support of State-centric constructions].'

[209] For rare exceptions, see e.g. Josef L. Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter', *American Journal of International Law* 41 (1947), 872–9 (878); and a Report of the US Committee on Foreign Relations, quoted in Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon, 1963), 278 ('an attack by one State upon another'). Both statements recognise private attacks can be 'elevated' to the level of State attacks; eg 'if a revolution were aided and abetted by an outside power' (*ibid.*). The same seems true for a statement by Hans Kelsen referred to in Dire Tladi's contribution (Tladi in this volume, 37): Kelsen refers to an armed attack 'made by one state against another' ('Collective Security and Collective Self-Defence under the Charter of the United Nations', *American Journal of International Law* 42 (1948), 783–96 (791)) – but notes this could cover instances in which 'another state has interfered in a civil war taking place within another state by arming or otherwise assisting the revolutionary group' (792).

be discussed more fully below,[210] this level remained disputed for a while. Crucially, though, even States that took a broad view of self-defence argued on the basis of an inter-State framework.

Greece's complaint to the United Nations, one of the earliest invocations of self-defence in the Charter era, in many ways set the tone. The debates of 1946/7 were prompted by 'private attacks', but centred on the role of sponsoring States: Yugoslavia and Albania had allegedly supported armed bands or tolerated their activities – and thereby had 'breached the peace' and committed an 'aggression' against Greece.[211] From 1946 until around the late 1980s, in debates about attacks by non-State actors and possible responses thereto – from Burma/China (1953)[212] to the French raids on Tunisia in the late 1950s and the manifold Israeli strikes against Palestinian targets in Jordan, Lebanon and elsewhere[213] – the focus was squarely on the respective host States. The problem of armed attacks by non-State actors was treated, in Brownlie's words, as one of 'State complicity in, or toleration of, the activities of armed bands directed against other States'.[214] It was a problem of determining the required degree of State involvement: that there had to be some State nexus was generally assumed – asymmetrical self-defence was to be approached via the 'Westphalian avenue'.[215]

2. The State Nexus: Initial Flexibility

If the inter-State framework was taken for granted, it was anything but rigid, but initially understood flexibly. To some extent, this flexibility resulted from the fact that States did not proceed from any preconceived general regime of attribution defining for which acts a State would have to bear responsibility; quite to the contrary, the matter was treated as a question of the (primary) rules governing recourse to force.[216] Different views as to the required State nexus came to the fore during the long-standing debates about the proper legal

[210] See *infra*, IV.B.3 and IV.C.

[211] SCOR, 2nd year, 147th and 148th meeting, 1118–29.

[212] See GAOR, 7th session, 1st Committee, 605th meeting, at 665–6. For details see Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 48–9.

[213] On which *infra*, IV.C.1.

[214] Brownlie, 'International Law and the Activities of Armed Bands' 1958 (n. 46), 733, 784.

[215] See Kress, 'Major Post-Westphalian Shifts' 2014 (n. 32), 46.

[216] Partly, this was a question of timing: the debates about indirect aggression preceded the ILC's focused work on State responsibility, which would consolidate rules governing attribution: see *infra*, IV.B.3.c.

qualification of instances of 'indirect aggression', notably held within the UN General Assembly.

Indirect aggression was recognised as a pressing problem in the 1950s and 1960s. In a number of consensus resolutions, UN member States seemed ready to equate indirect and direct forms of force (and thereby to dilute the State-centric character of the prohibition).[217] The Friendly Relations Declaration, adopted in 1970, consolidated the process: it expressly qualified a broad range of ancillary acts as self-standing violations of the ban on force, among them a State's 'acquiesc[ence] in organized activities within its territory directed towards the commission of [acts of civil strife or terrorist acts]'.[218]

Quite how this should affect the understanding of the right of self-defence proved controversial. Should a State's 'participation in the use of force by unofficial bands',[219] or perhaps even its acquiescence, qualify as an armed attack? The practice of the 1950s and 1960s, reflected in the Friendly Relations Declaration, left the matter open. For a significant period of time, the inter-State framework was applied flexibly. In the words of Olivier Corten: 'In the first two decades after the Charter's entry into force, no decisive precedent can . . . be invoked [for or against the permissibility of self-defence against acts of indirect aggression].'[220]

3. GA Res. 3314 and Beyond: A Stratified General Framework

In the course of the 1970s and 1980s, the initially flexible framework came under pressure. While concrete disputes about self-defence continued to be handled pragmatically,[221] the general framework was stratified, and the required State nexus construed restrictively. This was a gradual development, but with the benefit of hindsight, one can identify three important catalysts: a) the General Assembly's Definition of Aggression; b) the interpretation given to that resolution in the ICJ's *Nicaragua* judgment; and c) the agreement, in the course of the ILC's work on State responsibility, on a set of narrow rules of attribution.

a) a definition of aggression The General Assembly's Definition of Aggression annexed to GA Res. 3314 marked the culmination of 'toilsome

[217] See e.g. GA Res. 380 (V)of 17 November 1950; GA Res. 2131 (XX) of 21 December 1965.
[218] GA Res. 2625 (XXV) of 24 October 1970, Principle I, paras. 8, 9.
[219] See Dörr and Randelzhofer, 'Article 2(4)' 2012 (n. 27), para. 23.
[220] Corten, *The Law against War* 2010 (n. 26), 456.
[221] See *infra*, IV.C.

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discussion[s]'[222] about indirect aggression. Belittled at the time,[223] the resolution's understanding of the term 'aggression' has become an important reference point.[224] Debate proceeded from two competing (irreconcilable) draft texts: one proposal, submitted by thirteen (mostly non-aligned) States, ruled out the possibility of self-defence against indirect aggression;[225] another, submitted by six (Western) powers, equated direct and indirect acts of aggression and expressly qualified three forms of active State involvement ('organizing, supporting or directing') as self-standing acts of aggression.[226]

GA Res. 3314 as eventually adopted reflected a compromise between these positions. It maintained an inter-State understanding of 'aggression', defined as the 'use of armed force by a State against . . . another State'.[227] In line with this approach, all but one of the 'acts of aggression' listed in the Declaration presupposed conduct by a State's 'armed forces'.[228] The one exception, Article 3(g), singled out two forms of 'indirect force', namely (i) '[t]he 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 the acts listed above [describing acts of aggression by regular armed forces]', and (ii) a State's 'substantial involvement therein'.[229] All this, to be sure, was not meant to be 'construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful',[230] but it gave meaning to an important Charter rule.

As is clear, GA Res. 3314 required both sides to make significant concessions. It did not rule out the possibility of self-defence against attacks by non-State actors; quite to the contrary, Article 3(g) expressly recognised certain exceptions, one of which (requiring no more than a State's 'substantial involvement') was of 'potentially broad scope'.[231] At the same time, Article 3, if read as a whole, reflected a gradual shift. Indirect and direct forms of aggression were clearly not placed on an equal footing: action by the armed forces

[222] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 389.
[223] See e.g. Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', *American Journal of International Law* 73 (1977), 224–46.
[224] That a text defining 'aggression' should affect the interpretation of 'armed attack' is not obvious but it has generally been accepted, as 'many States . . . thought of aggression as a constituent part of self-defence'; see Corten, *The Law against War* 2010 (n. 26), 404.
[225] UN Doc. A/AC.134/L.16 (and Corr. 1), 24 March 1969.
[226] UN Doc. A/AC.134/L.17 (and Corr. 1), 25 March 1969.
[227] GA Res. 3314 (n. 13), Article 1.
[228] *Ibid.*, Article 3(a)–(f).
[229] *Ibid.*, Article 3(g).
[230] *Ibid.*, Article 6.
[231] Corten, *The Law against War* 2010 (n. 26), 446.

remained the paradigm case; forms of proxy warfare were the exception. What is more, unlike in the Friendly Relations Declaration, a State's acquiescence in the activities of armed groups was clearly not sufficient to amount to an aggression: some *active* role ('sending', 'substantial involvement') seemed required.[232] GA Res. 3314 thus not only consolidated the inter-State framework, but pointed towards a more restrictive construction. Thirty years after the founding of the United Nations, that restrictive construction reflected a 'subsequent agreement' of the parties.

b) *NICARAGUA* AND THE TURN TO ATTRIBUTION In the aftermath of GA Res. 3314, the restrictive approach informing Article 3(g) soon came to be embraced and further tightened. Rather than making use of the flexibility preserved in Article 3(g), the dominant approach construed the provision to fit a State-centric understanding of the terms 'aggression' and, by implication, 'armed attack'. The ICJ's majority judgment in the *Nicaragua* case was of particular significance. The Court's reliance on Article 3(g) as a reflection of the customary international law on self-defence[233] ensured the provision's rise to prominence. What rose to prominence, though – via *Nicaragua* – was a narrowly construed version of Article 3(g).

In the circumstances of the case, the Court had to assess whether Nicaragua's supply of weapons to, and other support for, rebels amounted to an armed attack. The majority of the Court rejected this on the basis of a robust argument, holding that 'assistance to rebels in the form of the provision of weapons or logistical or other support' could not qualify as a 'substantial involvement' in the sense of Article 3(g).[234] This interpretation was not implausible. However, it was on the restrictive end of the plausibility spectrum and caused a 'deep rift between the … Hague judges'.[235] As Judge Jennings noted, the fact that the majority did not specify what level of involvement (beyond supplying weapons) would be 'substantial' made it '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'.[236] In essence, the restrictive approach of the *Nicaragua* judgment 'exorcised' the flexibility from the 'substantial involvement' test and thereby narrowed down the 'Westphalian avenue'[237]

[232] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 390.
[233] ICJ, *Military and Paramilitary Activities* (n. 28), para. 195.
[234] *Ibid.*
[235] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 415.
[236] ICJ, *Military and Paramilitary Activities* (n. 28), Separate Opinion of Judge Sir Robert Jennings, 543.
[237] Cf. *supra*, II.B.3.b.

towards asymmetrical self-defence. Under the *Nicaragua* logic, self-defence effectively became a right to respond to armed attacks that could be attributed to another State.

c) state responsibility: entrenching the public–private divide This narrow reading of a potentially flexible clause, Article 3(g), was facilitated by the clarification of the law of State responsibility. The late 1970s and early 1980s saw significant development of this area of law, which was consolidated as a body of *secondary rules* laying down 'general conditions under international law for the State to be considered responsible'.[238] These secondary rules drew a clear distinction between responsibility for conduct, and responsibility for complicity in the conduct of others. What is more, they included a small set of seemingly technical principles of attribution, stipulating conditions under which conduct is allocated to a State for the purposes of responsibility.[239]

Part of a general regime, these rules of attribution were residual: the law in special fields could of course opt for narrower or broader approaches.[240] However, the general regime shaped the discourse and set the standard. That standard entrenched the divide between public and private acts, which was to be drawn primarily by reference to the status of the actor within the State's structure. More specifically, a State had to answer 'at the international level [for] . . . the acts of its "organs" or "agents"'[241] but not for '[t]he conduct of a . . . group of persons not acting on behalf of the State'.[242] Exceptions to this principle were admitted only cautiously: they included provisions attributing to a State the conduct of 'completely dependent' *de facto* organs,[243] of private actors over whose specific acts the State exercised effective control,[244] and of acts carried out 'in the absence or default of the official authorities'.[245] But

[238] See para. 1 of the ILC's Introductory Commentary to the Articles on State Responsibility (*Yearbook of the International Law Commission* 2001, vol. II/2, 31–143).

[239] ILC, Commentary to Art. 2 ASR, para. 12 (*ibid.*, 36).

[240] Article 55 ASR (*ibid.*, 140).

[241] Para. 3 of the introductory commentary to Chapter II of the ILC's first reading text, *Yearbook of the International Law Commission* 1973, vol. II, 189.

[242] See Draft Article 11(1) of the ILC's first reading text, *Yearbook of the International Law Commission* 1975, vol. II, 70.

[243] See Article 5 ASR, as construed in ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, 43, para. 392.

[244] Enunciated in *Nicaragua* (in relation to the use of force), this proposition would later be formulated as a general rule and be reaffirmed in the *Genocide* judgment: see ICJ, *Military and Paramilitary Activities* (n. 28), para. 115; Article 8 ASR (*Yearbook of the International Law Commission* 2001, vol. II/2, 47); and ICJ, *Genocide Convention Case* (n. 243), paras. 398–406.

[245] Article 9 ASR.

these were narrow exceptions that 'offer[ed] little prospect in dealing with indirect aggression'.[246]

None of this, to reiterate, directly affected the regime of self-defence or the concept of 'armed attack'. But it resulted in a general regime that demarcated acts of the State from other forms of conduct, one that required far more than a mere (flexibly construed) 'substantial involvement'[247] for an act to qualify as an act of the State, and that treated responsibility for complicity as a conceptually separate category. As that general regime came to 'encode the way [international lawyers] think about responsibility',[248] alternative approaches to attribution looked increasingly unusual. A more tenuous State nexus had to be based (as the ICJ noted) on a 'clearly expressed *lex specialis*'.[249] Just as the Court's *Nicaragua* case, so the consolidation of the law of responsibility during the 1970s and 1980s pointed towards a more properly State-centric framework of international law. In Tal Becker's words, '[t]he pull of the public/private distinction was too strong.'[250]

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The preceding sections offer a broad-brush account of the development of legal thinking about the 'armed attack' requirement over the course of the first four decades of the UN's existence. They highlight that, from early on, self-defence was viewed as an inter-State defence permitting responses against armed attacks with some level of State involvement. The required level of involvement was initially understood flexibly, but over time States came to embrace a stricter approach that informed the General Assembly's Definition of Aggression. Self-defence against attacks by non-State actors was of course not entirely excluded, but preserved in Article 3(g). Yet the ICJ's construction of Article 3(g) in the *Nicaragua* case, and the gradual elaboration of the ILC's regime of responsibility, saw the room for flexible approaches shrinking. If GA Res. 3314 had reflected a shift towards a stratified general framework, the combined effect of the *Nicaragua* judgment and the ILC's work on State responsibility made that stratified framework look like a straightjacket.

[246] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 414.
[247] Cf. Article 3(g) GA Res. 3314 (n. 13).
[248] James Crawford, 'The International Court of Justice and the Law of State Responsibility', in Tams and Sloan, *The Development of International Law by the International Court of Justice* 2013 (n. 102), 71–86 (81).
[249] ICJ, *Genocide Convention Case* (n. 243), para. 401.
[250] Tal Becker, *Terrorism and the State* (Oxford: Hart, 2006), 361.

C. Particular Instances of Self-Defence (1946–Late 1980s): A Plea for Nuance

Developments described so far suggest a relatively clear picture, or at least a clear trend, towards a State-centric reading of self-defence. This trend dominates much of the discussion. According to a popular narrative, until the 1990s (or indeed until 2001), the law of self-defence was 'sufficiently clear' and only permitted action in self-defence against armed attacks that could be attributed to other States.[251] This popular narrative is charmingly straightforward, but lacks nuance. It fails to appreciate that the actual self-defence practice was diverse – and remained so notwithstanding the move towards a stratified *general* framework. A significant number of States, over time, claimed a right to respond militarily to armed attacks that were clearly not carried out by another State nor came within the scope of Article 3(g), as narrowly construed in *Nicaragua*. What is more, their claims met with mixed responses: they remained controversial, but were not rejected consistently. In other words, while embracing a more rigorous approach in general debates, States throughout the Cold War era preferred to retain flexibility when discussing particular disputes about asymmetrical self-defence.

Against that background, the subsequent analysis makes a case for nuance. That case is a modest one. It is not suggested that broad readings of self-defence were generally endorsed. However, such readings, even during the Cold War era, enjoyed support. Practice was significant, responses mixed; and a number of statements made outside the self-defence context reflected the continuing appeal of construing the terms of 'armed attack' and 'aggression' broadly.

1. Significant Practice

To begin with practice, a significant number of States – during the entire period of the Cold War – responded to 'private' armed attacks by using force on the territory of another State, or clearly asserted a right to do so.[252] They did so even though the other State concerned was neither responsible for sending the

[251] Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law* 12 (2001), 993–1001 (995); and further Tladi in this volume, 65; ICJ, *Construction of a Wall* (n. 125), Separate Opinion of Judge Kooijmans, para. 35 (arguing that 'it has been the generally accepted interpretation for more than 50 years' that an 'armed attack must come from another State'); Pierre Klein, 'Le droit international à l'épreuve du terrorisme', *Recueil des Cours* 321 (2006), 203–484 (375).

[252] The following analysis draws on Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 42–92.

irregular bands nor 'substantially involved' in their activities in the sense of Article 3(g), narrowly construed. In line with the dominant understanding, responding States regularly justified their conduct from within an inter-State framework, but construed this framework flexibly. In the typical setting, responding States asserted that host States had supported armed attacks, or at least offered armed groups a safe haven. In some instances, host States were also said to bear responsibility for attacks they had failed to suppress; in still others, 'support' and 'harbouring' rationales were combined. Whatever the details, a more tenuous State nexus was considered sufficient to trigger a right to respond.

France's raids into Tunisia during the Algerian War of Independence are illustrative.[253] They were considered necessary to 'assurer [France's] légitime défense'[254] against FLN attacks from Tunisia: Tunisia, argued France, had to endure them, as it had permitted the FLN to use its territory and failed to suppress its activities.[255] France's assessment echoed Greece's above-mentioned claims[256] as well as views expressed by India during the early stages of the Kashmir conflict.[257] In India's view, Pakistan's support for armed bands crossing into Jammu and Kashmir amounted to an 'act of aggression against India'; in response, India claimed to be 'entitled, under international law, to send [its] armed forces across Pakistan territory'.[258]

From the late 1950s onwards, variations of this broader understanding of self-defence would be embraced by a number of countries embroiled in national liberation conflicts. Portugal (in the 1960s and 1970s),[259] South Africa (during the 1970s and 1980s, once 'hot pursuit' claims had lost appeal)[260] and Rhodesia (during the 1970s)[261] invoked self-defence to justify military action against neighbouring States that provided support and sanctuary to armed groups.[262]

[253] See Jean Charpentier, 'Pratique française du droit international', *Annuaire Français de Droit International* 4 (1958), 791–826 (809) and 6 (1961), 1068–9.

[254] See *ibid.*, 1069.

[255] *Ibid.*

[256] *Supra*, III.B.1.

[257] See Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 44–5.

[258] SCOR, 3rd year, Nov. 1948 (Suppl.), 139, 143.

[259] See Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 63–4; Becker, *Terrorism and the State* 2006 (n. 250), 189.

[260] For details, see Kwakwa, 'South Africa's May 1986 Military Incursions into Neighboring African States' 1987 (n. 52); and *supra*, II.B.

[261] See the references in A. J. Luttig, 'The Legality of the Rhodesian Military Operation Inside Mozambique; The Problem of Hot Pursuit on Land', *South African Yearbook of International Law* 3 (1977), 136–49.

[262] For clear examples see e.g. SCOR, 24th year, 1520th meeting, 2 (Portugal); *United Nations Yearbook* 1979, 221 (South Africa); and further *South African Yearbook of International Law* 12 (1986/7), 221–7.

Lesser known is Morocco's reliance on essentially the same argument in the West Sahara conflict during the late 1970s.[263] Following repeated attacks by Polisario forces operating from within Algeria, Morocco claimed a right to 'poursuivr[e] ses agresseurs sur *et hors son territoire*', i.e. into Algeria, which was accused of having armed, trained, financed and sheltered Polisario fighters.[264] From the early 1980s, Turkey began to advance similar claims.[265] In 1983/4, foreshadowing subsequent operations on a much larger scale,[266] it mounted armed incursions against PKK bases in northern Iraq, which was accused of serving as a sanctuary.

While Turkey's justification remained elusive, other countries offered greater specificity. Israel did so frequently. From 1948, it regularly invoked self-defence to justify its military actions against Palestinian fedayeen based in Arab countries.[267] Having initially pointed to the close operational ties, or the willing cooperation, between Palestinian fighters and host States,[268] from 'the 1970s, Israel gradually adopted a broader version of the "harbouring" rationale' pursuant to which self-defence could be exercised against a host State that 'was either unwilling *or unable* to prevent cross-border attacks from taking place'.[269] In the 1980s, the United States moved towards the same position. The so-called 'Shultz doctrine' asserted a right to respond forcibly against armed attacks by terrorists and guerrillas, and to do so by using force against foreign countries that 'support, train, or harbour [them]'.[270]

All this suggests that decades before 9/11, the argument for asymmetrical self-defence had been clearly articulated by a considerable number of States, and acted upon with some regularity. In the debates of the day, the problem of asymmetry was typically not addressed 'head on', but from within an inter-State framework in which some State nexus was sufficient. As regards the

[263] Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 44–5, 65–6, provides further references.

[264] See UN Doc. S/13394, 13 June 1979, and statements in SCOR, 34th year, 2151st meeting, 3.

[265] See Charles Rousseau, 'Chronique des faits internationaux', *Revue Générale de Droit International Public* 87 (1983), 884–5 and 89 (1985), 455–6; and further Gray, *International Law and the Use of Force* 2008 (n. 27), 140–1.

[266] See *infra*, IV.D.1 and IV.D.2.

[267] For references see Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 82–8.

[268] See e.g. *United Nations Yearbook* 1968, 228–9.

[269] See e.g. *United Nations Yearbook* 1972, 158 ('as long as Lebanon was unwilling or unable to prevent armed attacks from its territory against Israel, it could not complain against actions taken in self-defence'), and references in Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 401. Emphasis added.

[270] See George Shultz, 'Low-Intensity Warfare: The Challenge of Ambiguity', *International Legal Materials* 25 (1986), 204–6.

character of this nexus, much of the practice – echoing views put during the preparation of GA Res. 3314 – concerned instances in which a host State had allegedly actively supported armed groups. However, the lines between support, the provision of safe havens, and mere toleration were blurred, and at least Israel began to claim that self-defence could be used against States *unable* to suppress armed groups.

2. Inconsistent Responses

Unsurprisingly, these assertions of a broadly construed right of self-defence prompted debate: express responses were rarely supportive, and often hostile. And yet, a careful analysis reveals a nuanced picture. Broad claims of self-defence were by no means consistently rejected, and when they were, disputes about the scope of Article 51 played a limited role.

To begin with the latter aspect, the conduct of South Africa, Rhodesia, Portugal and Israel met with widespread criticism, often expressed in strongly worded UN resolutions.[271] To give just two examples, the Security Council in 1985 'condemn[ed] vigorously' Israel's raid on the PLO Headquarters, which it qualified as an 'act of armed aggression . . . in flagrant violation of the Charter of the United Nations';[272] three years earlier, it had '[s]trongly condemn[ed] the apartheid regime of South Africa for its premeditated aggressive act against the Kingdom of Lesotho'.[273] Below the surface, things were not quite as clear. The debates about these and other incidents indicate that the conduct of States such as South Africa, Southern Rhodesia, Portugal and Israel 'was condemned on many different grounds'.[274] Facts and evidence often were crucial. (Had the responding States been able to make out their allegation of State support for armed bands? Had there been cross-border raids at all?)[275] As to the law, many military actions were considered to be disproportionate, or punitive and thus outside the scope of self-defence.[276] Most importantly, overarching perspectives were hardly conducive to a positive assessment.[277]

[271] The list of Security Council resolutions is lengthy. Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53) lists them comprehensively (at 402, in his note 178).

[272] SC Res. 573 of 4 October 1985.

[273] SC Res. 527 of 15 December 1982.

[274] Gray, *International Law and the Use of Force* 2008 (n. 27), 139.

[275] See e.g. the statements by Ireland and Sierra Leone in UN Doc. S/PV.2407, 15 December 1982, para. 89; UN Doc. S/PV.2408, 16 December 1982, para. 77.

[276] See e.g. UN Doc. S/PV.1650, 26 June 1972, paras. 9–11; *United Nations Yearbook* 1965, 135, *United Nations Yearbook* 1968, 193–8; *United Nations Yearbook* 1970, 231–3, 236.

[277] For clear statements to this effect see e.g. Becker, *Terrorism and the State* 2006 (n. 250), 189–90; Gray, *International Law and the Use of Force* 2008 (n. 27), 138.

During the 1960s and 1970s, broad understandings of self-defence were prominently espoused by States defending deeply unpopular causes (and losing ones at that), viz. colonialism, apartheid and military occupation. With friends like these, asymmetrical self-defence really needed no enemies. In fact, claims of South Africa, Southern Rhodesia, Portugal and also Israel were typically rejected *a limine*: as Christine Gray observes, they 'were undermined by the fact that the states invoking self-defence were regarded as being in illegal occupation of the territory they were purporting to defend'.[278] 'The right of self-defence could not be invoked to perpetuate colonialism and to flout the right of self-determination and independence'[279] – statements like these were common, and overshadowed finer normative arguments about the required degree of State involvement. In fact, so dominant were these 'different grounds'[280] that the minutes of Security Council debates yield 'virtually no statements directly dealing with the applicability of Article 51 to cross-border attacks by non-State actors'.[281] To reiterate: none of this suggests the broader view of self-defence adopted by Israel, South Africa and others was widely endorsed. But it was hardly ever rejected *specifically*.

The international response to claims of asymmetrical self-defence by States other than Israel, South Africa, Portugal and Southern Rhodesia points in the same direction. Outside the colonial or apartheid context, broad claims to self-defence attracted far less opprobrium. India's assertion of a right to 'send ... armed forces across Pakistan territory'[282] in response to that country's support of cross-border raids was not rejected.[283] When the Security Council engaged with Morocco's similar claim in 1979, a number of States mentioned Polisario's struggle for national liberation, but Morocco's view of self-defence went unchallenged.[284] The legality of Turkey's incursions into northern Iraq in the early 1980s was hardly discussed; and even France's cross-border

[278] Gray, *International Law and the Use of Force* 2008 (n. 27).
[279] See *United Nations Yearbook* 1969, 142.
[280] Gray, *International Law and the Use of Force* 2008 (n. 27), 139.
[281] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 404, and further Jean Combacau, 'The Exception of Self-Defence in UN Practice', in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht/Boston, MA: Nijhoff, 1986), 9–38 (23).
[282] SCOR, 3rd year, November 1948 (Suppl.), at 139, 143.
[283] See Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 44–5.
[284] See statements in UN Doc. S/PV.2151, 20 June 1979; UN Doc. S/PV.2152, 21 June 1979; UN Doc. S/PV.2153, 22 June 1979.

ripostes into Tunisia, which did target a national liberation movement, were not firmly censured.[285]

3. Circumstantial Evidence and Interim Assessment

A careful scrutiny of international practice thus suggests that the international community seemed prepared to live with the occasional instance of self-defence even where it did not meet the criteria of Article 3(g), narrowly construed. The international response often seems to have turned on questions of facts and evidence, or on overarching views of the rightfulness of a particular struggle. Some host State involvement in an armed attack seemed indispensable, but even during the 1970s and 1980s, well-founded claims of support (or even harbouring) could be sufficient to expose a host State to responses on its territory.

When looking beyond disputes in which a right to self-defence was exercised or clearly asserted, the picture becomes fuzzier still. Attacks by armed bands were often described as acts of aggression or armed attacks, irrespective of whether they could be traced back to a foreign State. The Security Council on occasion condemned as 'aggression' or 'armed attack' the conduct of mercenaries on foreign soil.[286] In his detailed analysis, Claus Kress identifies a significant number of further disputes, in which States considered private armed attacks within a framework of self-defence, or referred to them as 'aggression' in a legal sense. His analysis includes protests by Guatemala against cross-border attacks by rebel forces,[287] for which (according to Guatemala) Honduras and Nicaragua bore responsibility.[288] It also comprises a curious dispute, in which two States – Portugal and Zaire – agreed that support for mercenaries could amount to an armed attack.[289]

[285] See Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 90; Combacau, 'The Exception of Self-Defence in UN Practice' 1986 (n. 281), 21.

[286] See SC Res. 405 of 14 April 1977; SC Res. 419 of 24 November 1977; SC Res. 496 of 15 December 1981; SC Res. 507 of 18 May 1982.

[287] Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 50–1; and further J. E. S. Fawcett, 'Intervention in International Law: A Study of Some Recent Cases', *Recueil des Cours* 103 (1961), 343–421 (372 *et seq.*).

[288] SCOR, 9th year, 675th meeting, at 5.

[289] Zaire had accused Portugal of allowing mercenary attacks to be carried out from Angola. Portugal disputed this claim on the facts, but 'indicated it would welcome an official United Nations investigation of alleged mercenary bases in Angola, if the Congo would allow similar inspections of known anti-Portuguese bases in Congolese territory'; see Carl A. Anderson, 'Portuguese Africa: A Brief History of United Nations Involvement', *Denver Journal of International Law and Policy* 4 (1974), 133–51 (142).

The value of this evidence varies, and some of it may not amount to much.[290] States typically responded within their boundaries (so that the *ius ad bellum* was not implicated[291]), or stopped short of expressly claiming a right of self-defence. However, the statements form part of the broader normative discourse about the scope of the *ius ad bellum*. Perhaps they are best qualified as 'circumstantial evidence': of lesser weight, but a further indication that terms such as 'aggression' and 'armed attack' could be construed broadly.

Viewed in this perspective, the circumstantial evidence supports the modest argument advanced here: that in its treatment of particular disputes, the international community could be prepared to accept a tenuous State nexus. In a relevant number of instances, States advanced broad constructions of self-defence. Their views never remotely reflected the views of 'all UN members' and hence could never 'establish the agreement of the parties regarding the interpretation of [Article 51]'.[292] But, of course, the practice of Israel, South Africa, Turkey, France etc. could be relevant as 'other subsequent practice' in the sense of the ILC's Draft Conclusions. As such, it could help clarify the meaning of the terms 'armed attack' and indicate that the trend towards a stratified general framework was not fully 'grounded' in treaty practice.[293] As regards the weight of this 'other practice', it is worth reiterating that instances of asymmetrical self-defence were not rare, and that the views of responding States often were set out clearly. The largely negative, or at best indifferent, response to such claims is of course significant; it reduces their probative value significantly. But contrary to common perceptions, claims of asymmetrical self-defence were not systematically rejected. Subsequent practice suggests that they could in principle (though exceptionally) be accepted; there was room for nuance in the Cold War era.

D. *Post-Cold War Practice: Gradual, Palpable Change*

Since the late 1980s, in statistical terms, the exception seems to have become the rule: over the past twenty-five years, self-defence has been invoked regularly against non-State attacks, most likely more often than in the traditional, inter-State setting. Many of the no-longer-exceptional claims have remained controversial, and the all-too-ready reliance on self-defence has prompted

[290] But cf. Dinstein, *War, Aggression and Self-Defense* 2012 (n. 27), 227.
[291] Cf. *supra*, II.A.2.
[292] Cf. Article 31(3)(b) VCLT.
[293] Cf. ILC, 'Subsequent Practice' 2018 (n. 188), para. 5 of the commentary to Draft Conclusion 6.

concerns about 'normative drift'.[294] But there has been a palpable change, and no more than a quick glance at the treatment of the issue in successive editions of standard works such as Charter commentaries and textbooks is required to reveal it.[295]

This change, it must be reiterated (since it is frequently ignored), has been gradual, not sudden. High-profile disputes have been catalysts, and dramatic crises particularly powerful agents of change. But not everything can be explained by reference to 9/11, or the more recent struggle against Daesh/ISIS. The gradual change that has taken place is both more profound and less drastic: more profound because it goes beyond high-profile campaigns; less drastic because it builds on claims that were espoused during the Cold War era.[296] In essence, minority positions articulated then enjoy widespread support today. At the same time, the new practice remains heterogeneous, and there has been a concern to avoid perceptions of rupture, especially in documents of a general nature and in court decisions. In the following, these developments are traced in three steps that summarise the rise and diversification of self-defence against non-State actors, the more positive reception of this new practice, and the relevance of documents and decisions emphasising normative continuity.

1. Regular, Heterogeneous Practice

The practice of States invoking self-defence against non-State actors is the most obvious indicator of change. Over the course of the past twenty-five years, self-defence claims have become significantly more common and more diverse.

a) a sharp increase in practice More specifically, broad self-defence claims that at some point might have been dismissed have been espoused by States on all continents, of different ideological leanings and different levels of

[294] The term is Daniel Bethlehem's: see 'International Law and the Use of Force' (Select Committee on Foreign Affairs, 8 June 2004), available at www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm, para. 21.

[295] In van Steenberghe's words, 'expansionists no longer struggle to demonstrate that a right to act in self-defence in response to armed attacks by non-state actors exists'; van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side' 2016 (n. 2), 46.

[296] Hence 9/11 has been described 'as a powerful crystallizing moment [rather] than … a dramatic departure from prior state practice': Kress, 'Major Post-Westphalian Shifts' 2014 (n. 32), 43.

development. The subsequent summary of instances (which is unlikely to be exhaustive) suggests that around twenty-five States[297] have themselves exercised, or firmly asserted, a right to react militarily against attacks by non-State actors even where these could not be attributed to another State under the traditional criteria. For reasons of convenience, four groups of supporters of such a right can be distinguished.

(i) **Traditional supporters of a broadly construed right**: Perhaps unsurprisingly, States that had put forward broad readings of self-defence during the Cold War era have clung to their view. Israel and Turkey are examples in point. The former has continued to invoke self-defence to justify repeated military strikes against Lebanon and Syria as a response to armed attacks by terrorist groups (notably Hezbollah).[298] Turkey has been less outspoken,[299] but if anything more active on the ground: from the 1990s, with Iraqi central authority waning, it has repeatedly attacked PKK bases in northern Iraq,[300] including, in 2008, in a large-scale ground operation ('Operation Sun') involving several thousand troops.[301]

(ii) **The United States in particular**: A relative latecomer among the States endorsing a broad understanding of self-defence against terrorists, the United States has emerged as its most vocal advocate. From the 1990s onwards, it has regularly employed force against terrorists operating from foreign States. The 1998 strikes against Sudan and Afghanistan, much discussed at the time,[302] in retrospect seem to have been no more than a prelude. Among twenty-first century practice, two large-scale events stand out: the armed invasion of Afghanistan begun in late 2001 and the current military campaign against Daesh in Syria, both justified on the basis of self-

[297] This figure does not include the conduct of States endorsing claims to self-defence *by other States*. The line between the two is fine, though.

[298] UN Doc. S/2006/51, 21 January 2006.

[299] Turkey has not invoked Article 51, but acted on the basis of a 'self-defence rationale'; see e.g. UN Doc. S/1996/605, 30 July 1996 (claiming to react against 'blatant cross-border attacks of a terrorist organization based and operating from a neighbouring country, if that country is unable to put an end to such attacks').

[300] According to Kress, Turkey also asserted a right to pursue Kurdish fighters into Iran and Syria: Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen* 1995 (n. 122), 90 (fn. 373).

[301] See Tom Ruys, '*Quo Vadit Jus Ad Bellum?* A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq', *Melbourne Journal of International Law* 9 (2008), 334–64.

[302] See Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', *Yale Journal of International Law* 24 (1999), 537–57.

defence.[303] In addition to letters to the Security Council, the US practice has been accompanied by a sequence of official documents setting out a broad understanding of that right.[304]

(iii) **States joining US-led campaigns on the basis of broad readings:** While Israel and Turkey have typically acted alone, the US-led campaigns in Afghanistan and Syria were joined by a significant number of other States. A considerable number of these States has invoked Article 51 to justify their own involvement, and expressly endorsed broad constructions of the right to collective or individual self-defence.[305] In 2001, the United Kingdom, Canada, France, Australia, Germany, the Netherlands, New Zealand and Poland sent letters to this effect to the Security Council.[306] Fifteen years later, most of these States,[307] as well as Norway,[308] Denmark[309] and Belgium,[310] would again expressly invoke Article 51 to justify their involvement in the fight against ISIS in Syria. A significant number of these States has clarified its view of the law (endorsing asymmetrical forms of self-defence) in general statements.[311]

(iv) **Other States – self-defence outside the limelight:** At least thirteen other States have exercised, or clearly asserted, a right of self-defence against non-State actors. They have often done so in conflicts that did not necessarily reach the headlines; perhaps as a result, their conduct has not always been scrutinised in depth. But their practice exists: it notably comprises cross-border raids in pursuit of rebels, at times

[303] See UN Doc. S/2001/946, 7 October 2001; UN Doc. S/2014/695, 23 September 2014.

[304] See e.g. Speech of Attorney General Eric Holder at Northwestern University School of Law, Chicago, IL, United States, Monday 5 March 2012, available at www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.

[305] The line between States that joined US-led efforts, and those that endorsed US self-defence, is fine. In both instances, the respective States' conduct remains relevant as subsequent practice.

[306] See UN Doc. S/2001/1005, 24 October 2001 (Canada); UN Doc. S/2001/1103, 23 November 2001 (France); UN Doc. S/2001/1104, 23 November 2001 (Australia); UN Doc. S/2001/1127, 29 November 2001 (Germany); UN Doc. S/2001/1171, 6 December 2001 (Netherlands); UN Doc. S/2001/1193, 17 December 2001 (New Zealand); UN Doc. S/2002/275, 15 March 2002 (Poland).

[307] See e.g. letters of the United Kingdom (UN Docs. S/2014/851, 25 November 2014, S/2015/688, 7 September 2015, and S/2015/928, 3 December 2015); Canada (UN Doc. S/2015/221, 31 March 2015); Australia (UN Doc. S/2015/693, 9 September 2015); France (UN Doc. S/2015/745, 8 September 2015); Germany (UN Doc. S/2015/946, 10 December 2015). The reasoning is not identical, but all letters refer to self-defence.

[308] UN Doc. S/2016/513, 3 June 2016.

[309] UN Doc. S/2016/34, 11 January 2016.

[310] UN Doc. S/2016/523, 9 June 2016.

[311] *Pars pro toto*, see the German government's statement to Parliament, *Bundestags-Drucksache* 18/6866, 1 December 2015, available at http://dipbt.bundestag.de/doc/btd/18/068/1806866.pdf.

conveniently labelled terrorists. Such raids (or airstrikes) have been undertaken by at least eight States, namely Iran (against Iraq),[312] Tajikistan (against Afghanistan),[313] Russia (against Georgia),[314] Rwanda (against the DRC),[315] Colombia (against Ecuador)[316] and Uganda (against the DRC),[317] as well as Senegal (against Guinea Bissau) and Thailand (against Myanmar).[318] Of these eight States, three – Iran, Tajikistan and Russia – expressly relied on Article 51 in their correspondence with the Security Council,[319] while Uganda described its self-defence action in the General Assembly.[320] The arguments of other States, such as Colombia or Rwanda, were not as clearly put, but upon analysis seem to have been based on a self-defence rationale.[321] The same is true for statements by India,[322]

[312] See e.g. UN Doc. S/25843, 26 May 1993; UN Doc. S/1994/1273, 10 November 1994; UN Doc. S/1996/602, 29 July 1996; UN Doc. S/1999/781, 12 July 1999; UN Doc. S/2000/216, 14 March 2000; UN Doc. S/2001/271, 26 March 2001; UN Doc. S/2001/381, 14 April 2001.

[313] See UN Doc. S/26091, 14 July 1993; UN Doc. S/26092, 15 July 1993; UN Doc. S/1994/992, 24 August 1994; and further van Steenberghe, *La légitime défense en droit international public* 2012 (n. 100), 301.

[314] See e.g. UN Doc. S/2002/1012, 12 September 2002; Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 464–5; Wettberg, *The International Legality of Self-Defense against Non-State Actors* 2007 (n. 116).

[315] During the Second Congo War, Rwandan troops repeatedly moved into Congolese territory to fight militias. Amongst other things, Rwanda accused the DRC of failing to disarm militias; this 'failure . . . may force Rwanda to take appropriate measures in self-defence'; see UN Doc. S/2004/652, 16 August 2004.

[316] In 2008, Colombia invoked self-defence to justify an attack on a FARC camp in Ecuador: see Comunicado No. 081 del Ministeria de Relaciones Exteriores de Colombia, Bogotá, 2 March 2008, available at http://historico.presidencia.gov.co/comunicados/2008/marzo/81.html; Tatiana Waisberg, 'Colombia's Use of Force in Ecuador', American Society of International Law Insights 12 (2008), available at https://www.asil.org/insights/volume/12/issue/17/colombias-use-force-ecuador-against-terrorist-organization-international.

[317] See UN Doc. A/53/PV.95 (23 March 1999), 14.

[318] During the 1990s, Thai and Senegalese forces crossed into neighbouring States (Myanmar and Guinea-Bissau respectively) in pursuit of armed rebels: see *Keesing's Record of World Events* 38 (1992), 39228; *Keesing's Record of World Events* 41 (1995), 40396; *Keesing's Record of World Events* 41 (1995), 40554; and further van Steenberghe, *La légitime défense en droit international public* 2012 (n. 100), 300 (fn. 1127).

[319] See e.g. UN Doc. S/1996/602, 29 July 1996, S/2001/381, 18 April 2001 (both Iran); UN Doc. S/2002/1012, 12 September 2002 (Russia); UN Doc. S/26091, 14 July 1993; UN Doc. S/26092, 15 July 1993 (Tajikistan).

[320] UN Doc. A/53/PV.95 (23 March 1999), 14.

[321] See UN Doc. S/2004/652, 16 August 2004 (Rwanda); Comunicado No. 081 del Ministeria de Relaciones Exteriores de Colombia, Bogotá, 2 March 2008, available at http://historico.presidencia.gov.co/comunicados/2008/marzo/81.html (Colombia).

[322] See statements in Louis Balmond, 'Chronique du faits internationaux', Revue Générale de Droit International Public 106 (2002), 389 and 107 (2003), 138.

Liberia,[323] Chad and Sudan,[324] all of which have asserted a right to respond in self-defence against armed attacks by terrorists. Finally, Ethiopia relied on self-defence to justify a significant military operation in support of the beleaguered government of Somalia: its conduct may have looked like an intervention upon invitation, but was presented as a 'self-defensive measure' aimed at 'counter-attacking the aggressive extremist forces of the Islamic Courts and foreign terrorist groups'.[325]

b) GREATER DIVERSITY Claims of asymmetrical self-defence have not just become more common, they have also become more diverse. Whereas the Cold War debate centred on problems of State support, more recent practice has embraced new rationales. While no case is exactly the same, the instances summarised in the preceding paragraphs can be broadly grouped into three categories.[326]

Active support: Active support (comprising e.g. forms of training, financing, arming and logistic support) is the first of these patterns; while no longer dominant, it has remained popular. In a number of the more recent instances, States have justified their forcible reactions by claiming that host States had actively supported non-State actors carrying out attacks – and thus had to answer for these acts and endure the use of responsive force on their territory. The claims of Senegal, Tajikistan, Chad and Sudan are illustrative of this pattern.[327] This body of practice remains within the boundaries of the Cold War era debates.

Harbouring: Whilst State complicity has remained relevant, the focus has clearly shifted towards a State nexus of a different sort. There are two aspects to this. For a start, variations of the 'harbouring doctrine' have

[323] UN Doc. S/2001/474, 11 May 2001.

[324] See UN Doc. S/2008/325, 14 May 2008 (Sudan), and I. M. Lobo de Souza, 'Revisiting the Right of Self-Defence', *Canadian Yearbook of International Law* 53 (2016), 202–43 (232).

[325] Statement by Prime Minister Zenawi, quoted in UN Doc. S/PV.5614, 26 December 2006, 3; and further Zeray W. Yihdego, 'Ethiopia's Military Actions against the Union of Islamic Courts and Others in Somalia: Some Legal Implications', *International and Comparative Law Quarterly* 56 (2007), 666–76; Olivier Corten, 'La licéité douteuse de l'action militaire de l'Ethiopie en Somalie', *Revue Générale de Droit International Public* 111 (2007), 513–37.

[326] The following distinction draws on Brownlie's categorisation (Brownlie, 'International Law and the Activities of Armed Bands' 1958 (n. 46)), but in the spirit of a synthesis, does not take up Brownlie's finer distinctions.

[327] See *supra*, references in notes 313, 318, 319, 324.

become much more popular: responding States have claimed a right to target safe havens of terrorist and irredentist groups abroad.[328] *Operation Enduring Freedom*, for the most part, was justified as a response against a regime accused of offering Al-Qaeda terrorists an operational base.[329] Harbouring also seems to have been the dominant theme in the self-defence claims of Colombia, Russia and Turkey,[330] and played a role in Tajikistan's argument.[331]

Loss of effective control: Significantly, in their more recent practice, reacting States have moved beyond the 'harbouring' doctrine. A number of the disputes just discussed involved the use of force against armed groups that had established areas of influence beyond the effective control of the host State. In this third setting, self-defence is exercised on the territory of the host State even though that host State is not accused of connivance with non-State actors; instead, it has to endure a response because it fails to control its territory. Barely hinted at in the Cold War era,[332] this 'idea of [self-defence within] an ungoverned space'[333] is now put more firmly, and regularly: by States relying on self-defence against ISIS in 'part of Syrian territory over which the Government of the Syrian Arab Republic does not, at this time, exercise effective control';[334] by Iran and Turkey justifying their respective incursions into northern Iraq;[335] and by Israel to support its strikes against Hezbollah targets in Lebanon.[336]

While the lines between the three categories can be blurred – where does 'harbouring' turn into 'support'?; when does a 'safe haven' become an 'ungoverned space'? – the overall trend seems clear: in addition to being more regular, the more recent practice has stretched the concept of asymmetrical self-defence and embraced arguments based on a more tenuous nexus – to the

[328] As noted *supra* (IV.D), this reasoning is not entirely novel, but it has gained considerable traction.

[329] See the US letter to the Security Council, UN Doc. S/2001/946, 7 October 2001 (9/11 had been 'made possible by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation'); and references in Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 439–43.

[330] See references in notes 299–300, 314, 316.

[331] See references in notes 313.

[332] See the brief reference to Israel's practice in section IV.D.1.

[333] Starski, 'Silence within the Process of Normative Change' 2017 (n. 57), 32.

[334] As noted in the Belgian letter to the Security Council: UN Doc. S/2016/523, 7 June 2016. For further examples, see the references in notes 307–11.

[335] See references in notes 299–301.

[336] See reference in note 298.

point where a State's failure to exercise effective control over its territory is said to have become sufficient. The newly popular formula of self-defence against 'unable or unwilling' States reflects the greater diversity of contemporary self-defence claims strands.[337]

Notwithstanding these changes, as in the Cold War era, reacting States have often gone to some lengths to justify why their response could not only target the attackers, but also violate the host State's territorial integrity. Responsibility has remained central in this respect: in nearly all instances self-defence claims have been accompanied by an assertion that the host State bore some form of responsibility, even though the armed attack itself could not be attributed to it under the general standards set out in the ILC's Articles on State Responsibility. What has changed is the character of responsibility incurred by the targeted State: in addition to claims based on responsibility for support (which dominated the Cold War practice), reacting States have frequently justified their conduct by claiming that host States bore responsibility for unlawfully shielding terrorists or failing to suppress their activities. The gradual recognition on positive duties to prevent and suppress terrorists has facilitated such arguments.[338]

2. A Greater Willingness to Accept Claims of Self-Defence

As was the case during the Cold War era, many of the more recent self-defence claims have been discussed internationally, including in the United Nations. As before, the international community's response has not been uniform. It has not always clearly focused on the proper construction of the armed attack criterion either: States have often preferred to address proportionality or been guided by overarching perspectives on the conflict.[339] Yet these caveats notwithstanding, international reactions confirm a changing attitude: gradual, no doubt, but palpable. The following four considerations illustrate this change.

[337] For detailed discussions see e.g. Deeks, 'Unwilling or Unable' 2012 (n. 4); Starski, 'Right to Self-Defense, Attribution and the Non-State Actor' 2015 (n. 4). Tsagourias' warning is worth reiterating: 'the "unable or unwilling" test [should not be] projected as if it were the only ground for using defensive force against non-state attacks': 'Self-Defense against Non-State Actors' 2016 (n. 18).

[338] For a telling example, see Israel's assertion (n. 298) that the Lebanese government bore responsibility because its 'ineptitude and inaction' had allowed Hezbollah to control parts of Lebanon.

[339] For similar trends in the Cold War practice see *supra*, IV.C.

a) outright condemnations have become rare *First*, outright condemnations have become rare. Action in self-defence has continued to prompt protests. However, States have only rarely been censured in the way South Africa, Portugal or Israel were during the 1970s and 1980s. In fact, in only two of the instances referred to above was the conduct of States firmly rejected in widely endorsed international resolutions: the OAS and the Rio Group denounced Colombia's 2008 raid on FARC camps in Ecuador and required Colombia to give an assurance of non-repetition;[340] the Security Council 'strongly condemn[ed]' Rwanda's military action in the DRC.[341] None of these resolutions specifically rejected broad constructions of self-defence.

b) some self-defence claims have met with explicit support: *Second*, certain instances of asymmetrical self-defence have met with broad approval. Unlike in the Cold War era, the international community has, in some recent instances, firmly supported the use of force in self-defence against non-State actors. In particular, UN organs have begun to endorse or encourage forcible responses against particular armed groups. In late 2001, the Security Council, recognised that the attacks of 9/11 implicated Article 51; hence its recognition and reaffirmation, in the preambles of Security Council Resolutions 1368 and 1373 (adopted when 'much [still] remained unknown as to the source of the attacks'[342]) of 'the inherent right of individual or collective self-defence in accordance with the Charter'.[343] In 2015, the Security Council called upon member States to 'eradicate the safe haven that [ISIS and others] have established over significant parts of Iraq and Syria'[344] (while stopping short of authorising military action under Chapter VII).[345] Both responses have been described as exercises in constructive ambiguity;[346] and no doubt they are: in neither case did the Council authorise forcible action.[347] But there is

[340] OAS Doc. OEA/Ser.G, CP.RES.930 (1632/08), 5 March 2008; OAS, Resolution of the Twenty-Fifth Meeting of Consultation of Ministers of Foreign Affairs, 17 March 2008, Doc. OEA/Ser.F/II.25, RC.25/RES.1/08 rev.1.

[341] See UN Doc. S/PRST/2004/45, 7 December 2004; UN Doc. S/2004/966, 13 December 2004; UN Doc. S/2004/385, 13 May 2004.

[342] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 434.

[343] SC Res. 1368 of 12 September 2001.

[344] See SC Res. 2249 of 20 November 2015, para. 5.

[345] For details see Starski, 'Silence within the Process of Normative Change' 2017 (n. 57), 35 *et seq*.

[346] See Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL Talk!*, 21 November 2015, available at www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution.

[347] In fact, in SC Res. 2249 of 20 November 2015, the Security Council encouraged only measures taken 'in compliance with international law, in particular with the United Nations Charter' (para. 5).

a risk of missing the forest amidst the trees: Security Council Resolutions 1368, 1373, 2249 and 2254 were passed in full awareness of the argument on self-defence; they lent international authority to forcible responses contemplated by States.[348] Importantly, they did so in scenarios that reflect the new diversity of self-defence claims: responses targeted host States accused of harbouring terrorists (Afghanistan) and lacking effective control over parts of their territory (Syria).

Outside the UN, forcible responses against Al-Qaeda and Daesh/ISIS have been significant, too. For the former instance, it is well documented. Michael Byers refers to supportive 'statements of more than 100 countries, and acquiescence on the part of all but two others';[349] others see practice after 9/11 as an 'implicit general endorsement of a broad interpretation of Art. 51'.[350] Responses to the use of force against ISIS in Syria are more difficult to evaluate, as the situation continues to evolve and as different explanations are put forward, including self-defence, intervention upon invitation (Russia, Iran) and an alleged right to defend peoples rising against authorities (Islamic Military Alliance). Specific support for a particular understanding of self-defence is not as widespread as in the wake of 9/11. However, the use of force against Daesh seems to meet with general (unspecific) approval. Reversing Christine Gray's assessment of the fate of South Africa's or Israel's claims during the Cold War era, one might perhaps say that it is endorsed 'on many different grounds'[351] – not specifically supporting the intervening States' self-defence claim, but accepting the outcome of their conduct.

c) A TREND TOWARDS ACCEPTANCE AMIDST CONTROVERSY *Third*, typically, forcible responses have met with a more equivocal response. Trends can nevertheless be made out, and they, too, suggest a changing attitude. It is, for example, reflected in a number of regional treaties that define core concepts in relatively broad terms. The 2005 African Union Non-Aggression and Common Defence Pact is illustrative: it considers certain uses of armed force to amount to aggression irrespective of whether they have been committed by

[348] Paulina Starski speaks of 'legitimized self-defence': '"Legitimized Self-Defense" – Quo Vadis Security Council?', *EJIL Talk!*, 10 December 2015, available at www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council.

[349] Michael Byers, 'The Intervention in Afghanistan (2001–)', in Olivier Corten and Tom Ruys (eds.), *The Use of Force in International Law – A Case-Based Approach* (Oxford: Oxford University Press, 2018), 625–38 (634).

[350] Olivier Corten, 'Has Practice Led to an "Agreement Between the Parties" Regarding the Interpretation of Article 51 of the UN Charter?', *Heidelberg Journal of International Law* 77 (2017), 15–17.

[351] Gray, *International Law and the Use of Force* 2008 (n. 27), 139.

'a State, a group of States, an organization of States or non-State actor(s)', and in this respect mentions 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'.[352] No provision of the Pact explicitly recognises a right to self-defence against aggression.[353] And while that is of course also true for other important definitions,[354] the safer reading might be to see the Pact, in the terminology used above, as a piece of circumstantial evidence. The fact that this circumstantial evidence is found in the definitional provisions of an important agreement is perhaps indicative.

The response to particular self-defence claims is a further indicator of change. Many recent instances of self-defence against non-State actors simply did not prompt significant debate. For operations of a limited scale (such as Senegal's and Thailand's incursions into neighbouring countries) this seems entirely understandable, especially if the countries involved did not raise the matter in international fora. More significant is the international community's willingness to accept larger-scale operations that were reported, such as Iran's incursions into Iraq or Tajikistan's significant operations in Afghanistan (expressly justified as an exercise of self-defence).[355] The silence with which these claims met need not amount to acquiescence.[356] However, the least that can be said is that the repeated reliance on a broad concept of self-defence did not seem problematic enough to warrant responses.

Where matters were taken up, the scales seem to have tipped in favour of States invoking self-defence. The US strikes against Afghanistan and Sudan in 1998,[357] Ethiopia's intervention in Somalia,[358] Turkey's incursions and

[352] See Article 1(c) chapeau and lit. xi. of the African Union Non-Aggression and Common Defence Pact (Abuja Pact), 31 January 2005, available at https://au.int/sites/default/files/treaties/7788-treaty-0031_-_african_union_non-aggression_and_common_defence_pact_e.pdf.

[353] A point emphasised by Corten, *The Law against War* 2010 (n. 26), 167–8. Unlike Corten, van Steenberghe views the Pact as 'une application du droit de légitime défense' (*La légitime défense en droit international public* 2012 (n. 100), 338).

[354] Notably GA Res. 3314 (n. 13), whose text explicitly safeguards the right of States under 'the Charter, including its provisions concerning cases in which the use of force is lawful' (Article 6).

[355] See e.g. UN Doc. S/1996/602, 27 July 1996, S/2001/381, 18 April 2001 (both Iran); UN Doc. S/26091, 14 July 1993; UN Doc. S/26092, 15 July 1993 (Tajikistan).

[356] For attempts to apply the rationale of acquiescence see Starski, 'Silence within the Process of Normative Change' 2017 (n. 57), 8 *et seq*.

[357] See the references in Sean D. Murphy, 'Contemporary Practice of the United States Relating to International Law', *American Journal of International Law* 93 (1999), 161–94 (164–5); Franck, *Recourse to Force* 2002 (n. 27), 94–6.

[358] The African Union endorsed Ethiopia's intervention, and the UN quickly authorised the deployment of a regional force to consolidate the situation following the withdrawal of Ethiopian troops. While these actions approved the outcome, they need not be construed as an

'Operation Sun' in Iraq[359] – all of these met with a mixed response, but criticism was 'decidedly muted'.[360] As in previous decades, engagement with the specifics of self-defence has remained rare; instead, reactions focused on questions of fact or the scope of the response. Where States could claim to make out a credible case (US–Afghanistan 1998), or were considered to have avoided excesses (Turkey–'Operation Sun'),[361] they could expect a significant level of understanding. As with operations against Al-Qaeda and ISIS, such understanding did not seem to depend on proof of host State *support* for non-State actors. It was also shown where self-defence was directed against States accused of harbouring terrorists, or targeted areas beyond the host State's effective control (as in the disputes involving Russia/Georgia, Iran/Iraq and Turkey/Iraq).[362]

D) AN ILLUSTRATION – ISRAEL'S USE OF FORCE IN LEBANON (2006) The gradual, yet palpable shift in opinion is illustrated by the international response to Israel's use of force in Lebanon during 2006.[363] Israel asserted a right of self-defence against Lebanon, whose government had responded to Hezbollah attacks with a mix of 'ineptitude and inaction' and 'not exercised jurisdiction over its own territory for many years'.[364] Israel's intervention raised many of the questions that had beset earlier strikes against targets in Arab countries.[365] The Security Council debates on the issue reflected entrenched views on the Israeli–Arab conflict. Many States preferred to discuss proportionality and warned against excessive force – warnings that Israel, in the view of most (including supportive) States, ignored.[366] And yet, unlike in previous debates,

acceptance of Ethiopia's self-defence claim: see Gray, *International Law and the Use of Force* 2008 (n. 27), 244.

359 For references see Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence' 2013 (n. 22), 395–6.

360 As noted by Murphy in relation to the 1998 strikes: see Murphy, 'Terrorism and the Concept of "Armed Attack"' 2002 (n. 90), 50.

361 See Franck, *Recourse to Force* 2002 (n. 27), 96; Ruys, '*Quo Vadit Jus Ad Bellum?*' 2008 (n. 301), 334; but contrast Tladi in this volume, 70–1.

362 See the references in notes 314, 312, and 299–301.

363 The following draws on Christian J. Tams and Wenke Brückner, 'The Israeli Intervention in Lebanon (July 2006)', in Corten and Ruys (eds.), *The Use of Force in International Law* 2018 (n. 349), 673–88. For a different assessment of the intervention see Tladi in this volume, at 71–2.

364 UN Doc. S/2006/515, 12 July 2006.

365 See *supra*, IV.D.1 and IV.D.2.

366 By way of illustration, having affirmed Hezbollah's attacks, France 'condemn[ed] the disproportionate response by Israel, whose military operations are holding the Lebanese people hostage, killing large numbers of civilians and causing substantial material damage in Lebanon': UN Doc. S/PV.5493, 21 (Resumption), 21 June 2006, 11.

Israel's claim was widely endorsed as a matter of principle. 'Being attacked, as Israel was, grants the right to self-defence', observed Denmark in the Security Council, without mentioning a State nexus.[367] According to Tom Ruys, in two debates in the Security Council, '[n]otwithstanding deep concern at or outright condemnation of the excessive use of force, a majority of participants agreed as a matter of principle that Israel had the right to defend itself against the attacks by Hezbollah':[368] alongside the 'usual suspects', this majority included Russia, Turkey, Argentina, Brazil, Ghana, Iceland, Japan, Ukraine, Guatemala and Peru, and their view was shared by the UN Secretary-General.[369]

Outside the Security Council, the picture was more mixed: the Non-Aligned Movement condemned Israel's 'relentless ... aggression', and while it singled out the 'indiscriminate and massive' nature of Israel's attacks (perhaps suggesting a focus on the conduct of operations), nothing in its statement implies any in-principle acceptance.[370] That said, as in the Cold War era, the criticism remained unspecific, and not one State claimed that self-defence could only be exercised against State attacks.

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These references illustrate the controversies prompted by self-defence claims in 2006. Still, stepping back from the details, the tone of the debate seemed to have changed. This was, to recall, Israel – whose reliance on self-defence had regularly been condemned in the Cold War era.[371] In 2006, a new voice had joined the chorus of opinion: the voice of States that in principle, explicitly, accepted Israel's reliance on self-defence. That voice was prominent even though Israel could not conceivably accuse Lebanon of having supported Hezbollah's attacks; and at least in the open Security Council debates, it was the voice of a majority. If viewed in this perspective, the international response to the 2006 conflict indeed 'is very remarkable'.[372]

[367] *Ibid.*, 7.

[368] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 452.

[369] See the statements in UN Docs. S/PV.5492, 20 July 2006, S/PV.5493 and S/PV.5493 (resumption), 21 July 2006, S/PV.5498, 30 July 2006; and the references in Tams and Brückner, 'The Israeli Intervention in Lebanon' 2018 (n. 363), 4–6, 8.

[370] See Final Document of the Fourteenth Conference of Heads of State or Government of Non-Aligned Movement (Havana, 11–16 September 2006), UN Doc. A/61/472, S/2006/780, 29 September 2006, at paras. 142–5.

[371] See the references *supra*, IV.D.2.

[372] But see van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors' 2010 (n. 84), 193.

3. The Appeal of Normative Continuity

Whilst the preceding discussion emphasises elements of change, this change has been accompanied by affirmations of continuity. As in many other disputes about the proper interpretation of the *ius ad bellum*, there has been a tendency to protect the normative *acquis* against rupture. This is particularly obvious from assessments removed from the 'heat' of a particular dispute.

a) framework documents affirming the sufficiency of the existing law Framework documents emanating from international organisations reflect the considerable appeal of normative continuity; many of them affirm the sufficiency of the existing law.

The Non-Aligned Movement has been particularly vocal. It has emphasised that 'consistent with the practice of the UN and international law, as pronounced by the ICJ, Article 51 . . . is restrictive and should not be rewritten or re-interpreted.'[373] This – now regular – formula has remained general and does not mention specific controversies about the scope of self-defence.[374] But its general message is clear.

As regards the UN, the world organisation has in recent years restated fundamental principles of friendly relations, including those governing recourse to force. In documents such as the World Summit Outcome Document of 2005,[375] the High Level Panel Report and Kofi Annan's *In Larger Freedom*,[376] the post-Cold War practice is not even hinted at. All documents affirm the primacy of the Charter regime, which the Outcome Document considers 'sufficient to address the full range of threats to international peace and security'.[377]

Six years after Kosovo and two years after Iraq, this statement probably mainly illustrated the UN's capacity to imagine order amidst chaos. But can it be taken as an affirmation of a State-centric construction of self-defence?[378] The argument seems rather strained, if only because it is circular: it

[373] See e.g. Iran's statement on behalf of the Non-Aligned Movement, UN Doc. S/PV.7621, 15 February 2016, 34.

[374] Contrast e.g. the G77's specific 'reject[ion] [of] the so-called right of humanitarian intervention' in the wake of the Kosovo crisis: Declaration of the South Summit, Havana, 10–14 April 2000, para. 54, available at www.g77.org/summit/Declaration_G77Summit.htm.

[375] GA Res. 60/1 of 24 October 2005.

[376] See UN Doc. A/59/565 (2 September 2004) and UN Doc. A/59/2005 (26 May 2005) respectively.

[377] GA Res. 60/1 of 24 October 2005, para. 79.

[378] For variations of this argument see Corten, *The Law against War* 2010 (n. 26), 164–5; Olivier Corten, 'Regulating Resort to Force: A Response to Matthew Waxman from a "Bright-Liner"', *European Journal of International Law* 24 (2013), 191–7 (195).

presupposes what it seeks to prove – viz. that the Charter regime excludes asymmetrical self-defence, and that the regime *thus interpreted* is sufficient. Yet four years after 9/11, State-centric readings were no longer unchallenged. Moreover, as is clear from the debates, States did not seriously discuss the question of non-State attacks.[379] Against that background, the more plausible view is that the Outcome Document sought to 'paper over' controversies concerning the scope of self-defence: an affirmation of the Charter's significance served that purpose, yet it did not settle long-standing debate about symmetrical or asymmetrical readings.

B) RECENT ICJ DECISIONS The more recent jurisprudence of the International Court of Justice equally reflects the appeal of normative continuity. Unlike the UN's general documents, this jurisprudence is relevant, but it lacks the certainty of the Court's earlier pronouncements.

To recall, the Court's *Nicaragua* judgment had approached self-defence firmly from within an inter-State framework and set a high threshold for attacks to qualify as State attacks.[380] Two more recent decisions – the *Israeli Wall* opinion (2004) and the *Armed Activities* judgment (2005) – provided the Court with an opportunity to assess the impact of recent practice. On the face of it, they send a message of continuity. Both majority decisions seem firmly based on an inter-State understanding of self-defence. In the *Wall* case, the Court explicitly rejected Israel's argument that the construction of a wall was in line with Article 51, which 'recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another'.[381] In *Armed Activities*, the Court was faced with arguments about the proper reading of Article 3(g) of the General Assembly's Definition of Aggression, which Uganda considered to encompass cases of aid and assistance. However, as in the *Wall* opinion, the Court rejected claims of self-defence: Uganda had not established a sufficient State nexus; cross-border attacks 'remained non-attributable to the DRC';[382] and 'the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.'[383] All this reads like a succinct restatement of the Cold War orthodoxy: it is difficult to avoid the impression that, in the view of the Court's

[379] By contrast, they did discuss questions of anticipatory self-defence, and decided not to include a passage recognising such a right: see Corten, 'Regulating Resort to Force' 2013 (n. 378), 195.

[380] *Supra*, IV.B.3.b.

[381] ICJ, *Construction of a Wall* (n. 125), para. 139.

[382] ICJ, *Armed Activities in the Territory of the Congo* (n. 1), para. 146.

[383] *Ibid.*, para. 147.

majority, more recent trends in practice (at least as of 2004/5) could be ignored.[384]

When probing further, the picture becomes rather more blurred. For one, other passages of the *Wall* and *Armed Activities* decisions raise doubts. In the former, the Court noted that Israel's situation was different from that 'contemplated by Security Council resolutions 1368 (2001) and 1373 (2001)', adopted after 9/11.[385] In *Armed Activities*, the Court felt it could leave open 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.[386] Both statements are curious. In the *Wall*, if self-defence required an 'armed attack by one State against another',[387] why did Security Council Resolutions 1368 and 1373 need to be distinguished? The majority's disclaimer in the *Armed Activities* case takes this confusion to a higher level. Benevolent commentators have suggested that Uganda had not expressly relied on a right of self-defence against non-State attacks.[388] But that ignores the fact that, according to Uganda, host States tolerating armed rebel bands on their territory 'were under a super-added standard of responsibility'.[389] The majority's decision not to respond to this contention is indeed 'not altogether clear'.[390] Problems of internal consistency notwithstanding, it is perhaps best taken at face value: as an express recognition that the question of non-State attacks is an open one.

A number of judges went further; they explicitly accepted that self-defence was available against armed attacks by non-State actors. The majority decisions just summarised were, in other words, reached over pronounced opposition. In the *Wall* case, Judges Higgins and Kooijmans expressed disappointment at the majority's apodictic approach, but stopped short of saying it was wrong as a matter of law.[391] Judge Buergenthal thought it was, and said so,[392] as did – one year later – Judges Kooijmans and Simma in the *Armed Activities* case. All three accepted that an attacked State could not be

[384] See, in this sense, Klein, 'Le droit international à l'épreuve du terrorisme' 2006 (n. 251), 407; Corten, *The Law against War* 2010 (n. 26), 467–70.

[385] ICJ, *Construction of a Wall* (n. 125), para. 139.

[386] ICJ, *Armed Activities in the Territory of the Congo* (n. 1), para. 147.

[387] ICJ, *Construction of a Wall* (n. 125), para. 139.

[388] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 483; Zimmermann, 'The Second Lebanon War' 2007 (n. 141), 116.

[389] *Armed Activities* case, Oral Hearings, CR 2005/7, 30, para. 80 (Brownlie).

[390] See ICJ, *Armed Activities in the Territory of the Congo* (n. 1), Separate Opinion of Judge Kooijmans, 306, para. 20.

[391] ICJ, *Construction of a Wall* (n. 125), Separate Opinion of Judge Higgins, 207, para. 33; Separate Opinion of Judge Kooijmans, 219, para. 35.

[392] ICJ, *Construction of a Wall* (n. 125), Declaration of Judge Buergenthal, 240, para. 6.

'den[ied] ... the right to self-defence merely because there is no attacker State'.[393] Judge Tomka, too, seemed to accept that where a territorial State no longer exercised governmental control in parts of its territory, a 'neighbouring State, victim of attack, [could] step in and put an end to the attacks'.[394]

The Court's recent jurisprudence, then, seems to reflect a considerable degree of uncertainty about the proper understanding of self-defence. The majority decisions have given short shrift to post-Cold War practice. Individual judges have gone further, but the fact that they felt the need to do so, especially in *Armed Activities*, suggests that despite the disclaimer, the majority may not have succeeded in leaving matters open.[395] However one looks at it, the recent ICJ jurisprudence is fairly difficult to make sense of. As in Michelangelo Antonioni's *Blow Up*, the closer one looks, the more blurred the picture appears. This is, to be sure, of the Court's own making: its recent jurisprudence 'combin[es] an ostensible reaffirmation of the *Nicaragua* threshold with a smoke screen of ambiguity'.[396] Perhaps, indeed, the central message is one of indecision.

E. Subsequent Practice: Where Do We Stand?

1. General Considerations

Since 1945, States and UN organs have sought to give meaning to the 'armed attack' requirement, in their assessment of particular self-defence claims, and in the course of attempts at clarifying the law in general terms. Their subsequent practice is rich and diverse. For the most part, it has been a debate about nuances – about exploring under what circumstances a State would have to answer for armed attacks carried out by non-State actors. The preceding synthesis of practice highlights that over time, States' views on this question have changed considerably. And yet, contrary to a popular narrative, this is not a story of radical breaks, let alone of one clear trajectory. If anything, there have been *two* main trends: *first*, the move towards a stratified framework in the course of debates about GA Res. 3314, amplified by the *Nicaragua* judgment

[393] ICJ, *Armed Activities in the Territory of the Congo* (n. 1), Separate Opinion of Judge Kooijmans, 306, para. 30; similarly Separate Opinion of Judge Simma, 334, para. 12.

[394] ICJ, *Armed Activities in the Territory of the Congo* (n. 1), Declaration of Judge Tomka, 351, para. 4.

[395] See ICJ, *Armed Activities in the Territory of the Congo* (n. 1), Separate Opinion of Judge Kooijmans, 306, para. 22.

[396] Ruys, *'Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 487.

and the ILC's work on State responsibility; and *second*, the rise of asymmetrical self-defence since the end of the Cold War. This analysis contradicts the popular assumption that practice had been State-centric for decades before the 'tidal changes'[397] of early twenty-first-century practice swept aside restrictive approaches: the pendulum has swung back and forth.

What is more, throughout these pendulum swings, the law has remained contested. Even during the heyday of a restrictive analysis, the international community could tolerate the odd instance of asymmetrical self-defence. Conversely, the broad reading of self-defence of the post-Cold War era is primarily 'driven' by claim and contestation in concrete disputes, but has not trickled down to the level of multilateral documents; these – just as the ICJ – emphasise continuity. This is, in short, not a simple story of 'things are different now. Practice, law and/or its interpretation were radically transformed by "9/11" and its aftermath.'[398] What has changed is the *relative* support for the different positions.

2. The Significance of the Two Main Trends

The significance of subsequent practice for the interpretation of Article 51 to some extent depends on these preliminary considerations. More importantly, though, it depends on a detailed assessment of the two main trends just identified. This assessment needs to reflect the general rules governing the role of subsequent practice in treaty interpretation, as reflected in the ILC's recent work.

Looked at from that perspective, the first of the two main trends – the stratification of the regime during the Cold War era – at the time undoubtedly was significant. GA Res. 3314 reflected a 'subsequent agreement' of UN members to view self-defence primarily as an inter-State defence. This agreement was recorded in an important document, through which the parties purported to clarify the meaning of aggression, and by extension, self-defence. The key provision of that agreement, Article 3(g), was debated at length; this suggests that it should have significant weight.

For the purposes of treaty interpretation, Article 3(g) offered three main messages: (i) there was *some* room for asymmetrical self-defence; (ii) such asymmetrical self-defence was to be exceptional – as a minimum, it

[397] De Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' 2016 (n. 14), 20.

[398] But contrast Kammerhofer, 'The Future of Restrictivist Scholarship on the Use of Force' 2016 (n. 8), 13.

presupposed a State's 'substantial involvement'; and (iii) this by implication seemed to exclude asymmetrical self-defence on the basis of the harbouring (and similar) doctrines. Beyond that, however, the precise contours of the 'substantial involvement' test remained unspecific – which, in line with the general regime, would affect its weight.[399]

The *Nicaragua* judgment and the ILC's work on State responsibility 'fine-tuned' these messages. *Nicaragua* suggested that State support would be insufficient – and was taken to suggest that attribution was required, which the ILC construed narrowly. Yet these subsequent 'specifications' had to be seen against the backdrop of an inconsistent practice, which could raise doubts about whether the very narrow construction of Article 3(g) was firmly established.[400]

The significance of the second pendulum swing – the move towards a broader understanding of self-defence in the post-Cold War era – is more difficult to assess. While the analysis has revealed a palpable change in practice, it needs to be asked whether this change could neutralise the earlier move towards State-centrism. The question is pertinent as the broader construction of self-defence in recent practice is not reflected in general documents of the calibre of GA Res. 3314; in the ILC's terminology, it is relevant only as 'other subsequent practice'.[401] Some commentators suggest that this 'lesser' practice could not modify the earlier position.[402]

At least for the purposes of treaty interpretation, such an approach seems too hierarchical and formal. Subsequent practice is only one factor to be 'taken into account' in processes of treaty interpretation; and its weight depends on material criteria (specificity, clarity, repetition). Commentators requiring something akin to an *actus contrarius* for changes to take effect fail to appreciate the character of interpretation as a 'single combined operation'.[403] They also ignore the terms of GA Res. 3314, which – far from purporting to 'freeze' the law – was not meant to 'diminish[] the scope … [of the] Charter … provisions concerning cases in which the use of force is lawful'.[404] All this

[399] ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 9(1).

[400] Cf. *ibid.*, para. 5 of the commentary to Draft Conclusion 6, noting that 'the way in which a treaty is applied' was indicative of 'the degree to which the interpretation that the States parties have assumed is "grounded" and thus more or less firmly established'.

[401] The near-unanimous response to the attacks of 9/11 is the exception that proves the rule: see Corten, 'Has Practice Led to an "Agreement Between the Parties"?' 2017 (n. 350), 15.

[402] See *ibid.*, 16 ('difficult to understand how a clear "agreement between the parties" (Art. 31.3 a) could be challenged by an erratic and ambiguous practice, particularly as far as it has not led to any new "agreement of the parties" (Art. 31.3 b)').

[403] *Yearbook of the International Law Commission* 1966, vol. II, 219, para. 8.

[404] GA Res. 3314 (n. 13), Article 6.

suggests that the impact of the more recent 'other subsequent practice' cannot be dismissed *a limine*, but needs to be carefully assessed.

3. In Particular: The Impact of the Post-Cold War Practice

A careful assessment needs to inquire whether developments since the end of the Cold War are significant enough to challenge the impact of the State-centric trend of the 1970s and 1980s. This question eschews a clear-cut answer. The preceding analysis suggests a nuanced response that distinguishes between the different 'messages' identified above and approaches the problem in engaging with three questions.

a) DOES SUBSEQUENT PRACTICE AT ALL LEAVE ROOM FOR ASYMMETRICAL SELF-DEFENCE AGAINST ATTACKS THAT CANNOT BE ATTRIBUTED TO ANOTHER STATE? It is convenient to begin by asking whether the recent practice affects the most restrictive aspect of the State-centric approach, viz. the highly restrictive reading of GA Res. 3314 brought about by the ICJ's *Nicaragua* judgment, which effectively viewed self-defence as a response against State attacks. This first inquiry is a modest one, no doubt: all that is assessed is whether the recent practice can be taken to have freed the 'substantial involvement' test from the '*Nicaragua* straightjacket'. The preceding analysis suggests that it has: this first, modest, proposition is supported by a body of widespread and sustained subsequent practice that is clear and specific.[405] Practice since the end of the Cold War is no doubt in many ways heterogeneous, reflecting different rationales ('support', 'harbouring', 'loss of effective control'); but these different rationales share a common denominator: they all assume that (contrary to what *Nicaragua* has been read to suggest) there is scope for self-defence outside the ILC's general categories of attribution. The practice in support of this view is common and long-standing: around twenty-five States from different regions of the world have asserted a right of self-defence outside the '*Nicaragua* setting'; many more have supported it. Adapting terms endorsed by the ILC,[406] one can certainly speak of 'a discernible pattern' of practice. This pattern extends over a significant period of time. Claims of asymmetrical self-defence have been on the rise for roughly twenty-five years. They are not a 'one-off',[407] but exceed the period between

[405] Cf. the criteria identified in ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 9 and commentary.

[406] *Ibid.*, para. 7 of the commentary to Draft Conclusion 9.

[407] Cf. *ibid.*, para. 11 of the commentary to Draft Conclusion 9.

GA Res. 3314 and the end of the Cold War, the heyday of a restrictive analysis of the *ius ad bellum*. Finally, while some States have preferred to muddle through, a greater number has been straightforward in setting out their view of the law, including in letters to the Security Council: the debate about asymmetrical self-defence, for the most part, is conducted openly, and arguments are clearly articulated.

Perhaps most importantly, the first, modest, proposition meets with relatively little resistance. It does not, to reiterate, leave the 'safe ground' of GA Res. 3314, but merely suggests that its State-centric yet flexible terms should be taken seriously. As such it can be reconciled with statements emphasising the need for normative continuity, such as the Non-Aligned Movement's insistence to construe self-defence 'consistent with UN practice'.[408] All this suggests that the subsequent practice bears out a first, modest proposition: there is room for self-defence beyond instances of attribution.

b) DOES SUBSEQUENT PRACTICE RECOGNISE THE POSSIBILITY OF ASYMMETRICAL SELF-DEFENCE AGAINST STATES SUPPORTING ARMED ATTACKS? Whether the subsequent practice of the post-Cold War era has consolidated sufficiently to go beyond this is more difficult to state with certainty. As in many other fields of law, it is easier to describe trends than to identify the contours of an emerging regime with precision. The fact that the lines between the different rationales of asymmetrical self-defence that have emerged – support, harbouring, loss of effective control – are not sharply delineated, adds to this.

Notwithstanding these caveats, differences of degree exist. Of the different rationales, the case for self-defence against States that had actively supported 'private' armed attacks is the strongest. 'Support' has not been a dominant feature of recent practice, but it has remained prominent. What is more, it seems reasonable to assume that the significant number of States that have come out in support of asymmetrical self-defence on the basis of broader doctrines (harbouring, loss of effective control, 'unable and unwilling') by implication endorsed self-defence against supporting States. Perhaps more importantly, of the different patterns of asymmetrical self-defence that have risen to prominence since the end of the Cold War, 'State support' presents the least risk of rupture. The practice of old may not have endorsed it, but the matter was debated: during the debates about indirect aggression, and in the assessment of particular self-defence claims, 'support' was the obvious

[408] See 17th Summit of Heads of State and Government of the Non-Aligned Movement, Island of Margarita, 17–18 September 2016, Doc. NAM2016/CoB/DOC.1, para. 25.2.

'candidate'. Finally, State support of a certain intensity seemed the obvious candidate, too, for inclusion in the category of 'substantial involvement' recognised in GA Res. 3314. These considerations would seem to point towards a second proposition: that the subsequent practice of States and UN organs in the application of Article 51 on balance accepts the possibility of self-defence against States complicit in the commission of armed attacks.

c) DOES SUBSEQUENT PRACTICE RECOGNISE THE POSSIBILITY OF ASYMMETRICAL SELF-DEFENCE ON THE BASIS OF BROADER DOCTRINES? Asymmetrical self-defence beyond complicity gives rise to greater problems. States have frequently invoked self-defence on the basis of broader doctrines (harbouring, loss of effective control), but these claims pose greater challenges than instances of 'State support' and prompt significant resistance. The possibility of self-defence in 'ungoverned spaces' was not seriously entertained in the Cold War era, while 'harbouring' (which has a longer pedigree) was generally considered to fall below the 'substantial involvement' test of GA Res. 3314. As regards the more recent practice, extensive self-defence claims seem the main cause for concern about 'normative drift'.[409]

A closer look at the treatment of particular instances of self-defence yields a different picture though. Since the end of the Cold War, the harbouring doctrine has become the most common basis for asymmetrical self-defence claims. In assessing self-defence claims, States seem not to draw any principled distinction between instances of complicity on the one hand and broader doctrines on the other: in fact, prominent conflicts illustrating the trend towards asymmetry have involved self-defence in 'ungoverned spaces'; by the same token, the United States' reliance on the harbouring doctrine to justify *Operation Enduring Freedom* met with near-universal support. In other words, judging from its assessment to individual cases, the international community certainly seems prepared to accept (and has in the aftermath of 9/11 near-unanimously accepted) self-defence on the basis of broader doctrines in exceptional cases. This suggests that a more tenuous State nexus (below the level of active support) is not in principle excluded.

The real question, then, is how such exceptional cases can be identified. Practice so far yields very few insights: as noted above, States seem to have been influenced by a broad range of contextual factors – from the credibility of the evidence to the magnitude of the threat – and the contours of the exception remain fuzzy. In light of these considerations, the current situation is perhaps best described as follows. In the recent practice of States, the

[409] See Bethlehem, 'International Law and the Use of Force' 2004 (n. 294).

possibility of self-defence on the basis of the 'harbouring' and 'loss of effective control' doctrines has not been generally admitted, but self-defence claims based on these doctrines have been tolerated or widely endorsed in a relevant number of individual instances.

V. ASSESSMENT AND CONCLUDING THOUGHTS

The preceding analysis illustrates how much is at stake in the major, narrow, long-standing and often confused debate about self-defence against non-State actors. Answers to the threshold question proceed from 'no more than the words "armed attack"',[410] but these two words are an integral part of the contemporary *ius ad bellum*, which is at the heart of the Charter and of the contemporary regime of international law. The analysis needs to reflect this; so it is perhaps no wonder that contributions to it (including this one) tend to be heavy and dense.

Long-standing, major debates rarely yield obvious answers. This one does not either. It takes more than a fair share of chuzpe to assert that one's preferred 'position [on the matter] cannot be seriously doubted'.[411] Of course it can, and of course it is: for decades, States, UN organs, courts and commentators have taken different views on whether (and under which conditions) self-defence could be invoked against attacks by non-State actors. Few of the answers given are obviously right or obviously wrong. There is room for disagreement; different views have no more than 'varying degrees of legal merit'.[412]

To admit as much should not be read as a 'post-truthian' suggestion that all things were equal: degrees of legal merit vary after all. The preceding analysis points towards a more convincing view. It suggests that under contemporary international law, self-defence is more than a right to respond to State attacks by another State. It can in principle be invoked against armed attacks by non-State actors, even though this possibility will often be subject to stringent conditions. The remainder of this concluding section summarises why this is so (A), and what it implies (B).

A. *The Case for Asymmetrical Self-Defence*

The 'case' for recognising asymmetrical self-defence against armed attacks by non-State actors draws on the preceding exercise in treaty interpretation.

[410] Kammerhofer, *Uncertainty in International Law* 2010 (n. 42), 43.
[411] Lowe, *International Law* 2007 (n. 19), 278.
[412] Cf. Lauterpacht, *The Development of International Law by the International Court* 1958 (n. 23), 398.

As noted above, according to the drafters of the Vienna Convention regime, the different means of interpretation are to be 'thrown into the crucible'[413] where each is accorded 'appropriate emphasis'.[414] In this process 'law-applying agents [no doubt enjoy] a certain scope of discretion',[415] but the regime of treaty interpretation does 'nudge treaty interpreters towards the 'correct' [approach]',[416] and it does so notably by focusing attention on 'the elucidation of the meaning of the text'.[417]

1. The Meaning of the Text: Reprise

Given ongoing uncertainties about the proper source of self-defence, section III of the present study has engaged with a range of textual, contextual, teleological and historical arguments. Contrary to a popular understanding, these arguments on balance point towards a broad understanding of the 'armed attack' requirement that leaves room for asymmetrical self-defence. The terms of Article 51 are particularly significant in this respect: the provision refers to 'armed attacks' without specifying the character of the attacker. This is to be taken at face value, not only because the text is 'presumed to be the authentic expression of the intentions of the parties',[418] but also because Article 51 explicitly qualifies the character of the victim (which must be a State): 'what matters' is indeed 'the armed attack, not the attacker'.[419]

Contextual arguments on balance reinforce this understanding. Notably, over time, the Charter's other recognised exception to the ban on force – the use of force with Security Council authorisation – has come to be read asymmetrically: under the Charter's collective security system, States can clearly be authorised to use force on the territory of another State even where that other State has not committed any wrong (let alone violated Article 2(4)); the State-centric approaches of the early Charter era have been

[413] See *Yearbook of the International Law Commission* 1966, vol. II, 219, para. 8.
[414] See ILC, 'Subsequent Practice' 2018 (n. 188), Draft Conclusion 2(5).
[415] Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science?', *European Journal of International Law* 26 (2015), 169–89 (189).
[416] Michael Waibel, 'Uniformity Versus Specialization', in Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds.), *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar, 2014), 375–411 (381).
[417] *Yearbook of the International Law Commission* 1966, vol. II, para. 11; and see further Gardiner, *Treaty Interpretation* 2015 (n. 98), 144; Waibel, 'Uniformity Versus Specialization' 2014 (n. 416), 380 ('qualified textualism').
[418] *Yearbook of the International Law Commission* 1966, vol. II, 220, para. 11.
[419] Karin Oellers-Frahm, 'What Matters is the Armed Attack, not the Attacker!', *Heidelberg Journal of International Law* 77 (2017), 44–51.

overcome. Self-defence could be construed in much the same way. Contrary to a prominent view, it need not be read as the 'flip-side' of the State-centric ban on force. All this suggests that, when construed in light of the general rule of treaty interpretation, Article 51 is open to, and actually encourages, a reading that permits self-defence against armed attacks by non-State actors.

2. Subsequent Practice: Reprise

This finding crucially affects the role of subsequent practice in the process of treaty interpretation. Embedded in a broader inquiry, subsequent practice is one among a range of elements of interpretation, which 'in [its] interaction with other means of interpretation, [contributes] to the clarification of the meaning of a treaty'.[420] The assessment of subsequent practice, in other words, does not take place in a legal vacuum, and nor does it start from scratch. Part of the 'single, combined operation', subsequent practice is assessed with a view to determining whether the parties' conduct in the application of a treaty 'confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation)'.[421] Applied to the present case, it is thus to be asked whether the subsequent practice of States and UN organs in the application of Article 51 'confirms or modifies [the potentially "open" construction of self-defence] arrived at by the initial interpretation'.[422]

Looked at from this vantage-point, the long synthesis of subsequent practice conducted in section IV can be distilled into five main points:

(i) During the UN's early practice, States and UN organs seemed prepared to make some use of Article 51's potential for openness: in debates about indirect aggression, the possibility of self-defence against 'private' armed attacks that another State had supported or allowed to be conducted from its territory was discussed.
(ii) The General Assembly's Definition of Aggression constrained options for such flexibility: in it, all States agreed on a more State-centric approach that permitted asymmetrical self-defence only in exceptional settings. The flexible formulation of the exception ('substantial involvement') seemed to leave some leeway, though.
(iii) In its *Nicaragua* judgment, the International Court of Justice interpreted the 'substantial involvement' test very narrowly and

[420] As noted by the ILC: see 'Subsequent Practice' (n. 188), Draft Conclusion 7(1).
[421] *Ibid.*, para. 3 of the commentary to Draft Conclusion 7.
[422] *Ibid.*

largely deprived it of meaning. The *Nicaragua* approach effectively construed self-defence as a right to respond against armed attacks by another State. This approach – corroborated by the agreement on a narrow concept of attribution in the ILC's work on State responsibility – excluded the possibility of asymmetrical self-defence and therefore, at the time, pointed towards a modification of the results of the 'initial interpretation' of Article 51. It was, however, not strictly followed in the actual practice of States, which tolerated the odd instance of asymmetrical self-defence.

(iv) In the post-Cold War practice, the potential for asymmetrical self-defence is being reclaimed. The palpable change in practice is not so far recorded in framework texts or international jurisprudence of the calibre of the Definition of Aggression or the *Nicaragua* judgment. However, it is reflected in a rich body of subsequent practice that gives expression to the views of a large number of States. Insofar as these States, as a basic proposition, claim that there must be *some* room for asymmetrical self-defence outside cases of attribution, their views meet with little resistance. The more specific claim that asymmetrical self-defence should be available against States that had actively supported private armed attacks also has relatively broad support. In both respects, the recent subsequent practice neutralises the earlier, more restrictive approaches – and returns to the result of the 'initial interpretation'.

(v) Insofar as the recent practice supports a right of self-defence on the basis of broader doctrines (harbouring, loss of effective control), it meets with greater resistance. This does not mean that self-defence has been categorically excluded. Quite to the contrary, self-defence claims based on these doctrines have been tolerated or widely endorsed in a relevant number of individual instances. However, there is as yet no clear pattern suggesting under which circumstances they would be tolerated or endorsed. In the absence of clear guidance, all that can be tentatively said is that States relying on self-defence have to be particularly careful to establish the necessity of their action and in particular set out why the armed attack cannot be repelled or averted by the host State.

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This summary suggests that over seven decades of subsequent practice under the Charter, States and UN organs have given meaning to the 'armed attack'

requirement. Notwithstanding its trends, twists and turns, the subsequent practice in a number of ways helps concretise the scope of Article 51. It does so by specifying the nexus required to make a State answerable for (or requiring it to tolerate responses directed against) armed attacks by private individuals.

In two respects, the subsequent practice confirms the findings of the initial interpretation of Article 51. It recognises that there is in principle room for self-defence against non-State actors: this has been the position during most of the Charter's history, overshadowed only during the dominance of the *Nicaragua* judgment; and it clarifies that States supporting 'private' armed attacks can be targets in self-defence.

Beyond instances of State support, matters are more complex. The subsequent practice provides conflicting guidance. While there is much resistance against explicitly recognising self-defence against States harbouring non-State actors, or against States that fail to exercise control over non-State actors operating on their territory, in practice such a right is gradually being accepted in individual instances. Practice certainly no longer excludes self-defence based on a more tenuous State nexus categorically; but it offers as yet neither strong support nor clear guidance.

There are different ways of describing the resulting uncertainty. With Tom Ruys, one can fall back on a trusted formula developed in British government parlance and describe self-defence on the basis of the 'harbouring' and 'loss of effective control' doctrines as 'not unambiguously illegal'.[423] A more cautious reading would require change to be consolidated before it produces legal effects: during the 'interregnum',[424] the old law would then govern by default.[425]

A more convincing approach ought to proceed from the result of the initial inquiry, which after all points towards an asymmetric reading. In that perspective, one might view in the handling of individual cases since the end of the Cold War a willingness to 'activate' an option that was there from the beginning. This shift of perspective results in a slightly different verdict: The 'harbouring' and 'loss of effective control' doctrines no longer appear merely 'not unambiguously unlawful' – but have been accepted in individual

[423] Ruys, '*Armed Attack' and Article 51 of the UN Charter* 2010 (n. 53), 531.

[424] In Antonio Gramsci's much-quoted phrase, an interregnum marks a period when 'the old is dying and the new cannot be born': see *Selections from the Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1971). (Gramsci continues with: 'in this interregnum a great variety of morbid symptoms appear').

[425] Corten is very clear in this respect: Corten, 'Has Practice Led to an "Agreement Between the Parties"?' 2017 (n. 350), 16.

cases and thus are no longer excluded in principle. And they have been so accepted, not as 'novel rights',[426] but on the basis of a treaty clause that has, since its entry into force, permitted, and indeed encouraged, asymmetrical readings of self-defence.

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This final consideration yields a broader lesson and permits us to return to a point made at the outset. As noted in the Introduction, the preceding analysis is a narrow one; its exclusive focus has been on the threshold question, viz. can self-defence be invoked against attacks by non-State actors? Responses to this question are always 'in principle' responses: they clarify against which types of attacks the right of self-defence can be invoked, but do not imply that in a particular instance all the conditions for the lawful exercise of self-defence had been met. Whether such exercise has been lawful not only depends on the intensity of the prior attacks (for they have to qualify as 'armed attacks', which according to the dominant reading presupposes a certain gravity[427]), it also depends on a host of contextual factors, among them the strength of the reacting State's factual case and the persuasiveness of its claim that military action is necessary as a measure of last resort and that it be exercised on the territory of the targeted State. These contextual factors have not been the focus of the present inquiry. Yet the preceding analysis of subsequent State practice suggests that they determine whether self-defence can exceptionally be invoked on the basis of doctrines beyond complicity. It indicates that the line between lawful and unlawful exercises of self-defence can not, or no longer, be drawn on the basis of a pre-defined State nexus ('harbouring', 'support' etc.), but requires a more comprehensive assessment of the situation. The State nexus certainly forms part of this overall assessment. However, it forms a part only.

B. *Implications*

The case for asymmetrical self-defence, as set out in the preceding section, is of course open to challenge. It is based, as has been stated in the Introduction, on a 'best efforts' attempt to deal with one particular ('threshold') question and to ascertain the meaning of the 'armed attack' requirement. This best efforts attempt reflects the author's 'discretion'[428] in evaluating arguments pointing in

[426] Cf. ICJ, *Military and Paramilitary Activities* (n. 28), para. 207.
[427] See II.B.2 for brief comment.
[428] Linderfalk, 'Is Treaty Interpretation an Art or a Science?' 2015 (n. 415), 189.

different directions as much as the methodological starting-points from which the threshold question is approached.

The response offered here – even if only an 'in principle' response, which requires many further factors to be considered – of course has implications. As options for asymmetrical self-defence are being activated, a universally accepted right can be exercised on the territory of a foreign State even though that State has not committed any armed attack itself. It is no wonder that this prompts concerns about risks of abuse.

In the case of self-defence, that risk is significant because other limiting factors, and the conditions governing the exercise of the right, do not seem fully effective. The gravity requirement distinguishing the 'most grave forms of the use of force' qualifying as armed attacks[429] from 'lesser' uses of force is not easy to apply. The twin limitations of necessity and proportionality are highly dependent on the characterisation of threats and on the ready availability of evidence. International control over self-defence claims in practice remains limited: once the genie of self-defence is out of the bottle, it is not easily put back in again. All of these, to be sure, are problems that arise is relation to all self-defence claims. But the 'in principle' recognition of asymmetrical self-defence means they are to be confronted more regularly. Though non-specific, the risk of abuse is very real.

To argue that this is a risk consciously taken – by States and UN organs that, over the past decades, have activated Article 51's asymmetrical potential, fully aware of its implications – is to state the obvious, but helps little. Of equally little use are counter-factual thought experiments: of course some of the alternative legal claims discussed until the 1970s (hot pursuit, necessity) might have offered a 'safer' path towards admitting certain military responses on foreign soil, and would have been less open to abuse. As in many other controversies, the international community's strong stance against unwritten exceptions to the use of force has preserved the Charter regime with its ban on force and two recognised exceptions relatively intact[430] – but it has had the effect that assertions of a right to use force unilaterally are almost inevitably presented as self-defence claims: the 'sole avenue for legitimizing unilateral forcible action' is widely used precisely because it is the only 'safe' argumentative option.[431]

[429] ICJ, *Military and Paramilitary Activities* (n. 28), para. 191; and cf. *supra*, II.B.2.

[430] See Tams, 'The Use of Force against Terrorists' 2009 (n. 22), 383.

[431] See Lubell, *Extraterritorial Use of Force against Non-State Actors* 2010 (n. 51), 74; and *supra*, II.B.

What, then, can be done to mitigate the risk of abuse? Multilateral approaches are the obvious cure. The time may not be conducive to 'grand designs', but there is no lack of options. A General Assembly-sponsored attempt to produce authoritative guidance in the form '*Definition of Armed Attack*', mooted in the literature,[432] could well end in polarised debates and acrimony – but then again, the same was said about GA Res. 3314, which seems to have outlived expectations. A Security Council resolution authorising future forcible reactions against terrorists (and defining general conditions governing their lawfulness) would meet with serious concerns about executive law-making – but might offer the most obvious 'way out' of the current debate.

Below the level of 'grand designs', a number of less ambitious but nevertheless useful initiatives would be worth exploring. A more active, and more robust, debate about the necessity and proportionality of self-defence could help define the limits of forcible responses more clearly.[433] Insistence on credible evidence supporting self-defence claims could force reacting States into a public dialogue.[434] Finally, drawing on experience with targeted sanctions, institutional options could be explored. '[A] space for formal self-defence discourse [could indeed] encourag[e] States, including third States, to be explicit in their position on the scope of self-defence.'[435] None of this promises quick returns – but all of this could help curb the risk of abuse. A more robust, and more rigorous discourse among States and other stakeholders offers the best chance of curbing abuse.

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Academic debate has been robust for decades, and frequently rigorous. As noted in the Introduction, self-defence against non-State actors is (and has been, and likely will be) one of the discipline's most prominent sites of contestation. The present study reflects that fact; significant parts of it have been in the form of an engagement with earlier writings. This engagement confirms many points made elsewhere, but it also identifies a number of blind spots and a worrying degree of methodological uncertainty. Quite apart from offering a ('best effort') response to the threshold question, the present inquiry has been an attempt to contribute to greater methodological clarity.

[432] Ruys, '*Armed Attack*' *and Article 51 of the UN Charter* 2010 (n. 53), 535 *et seq*.

[433] For proposals to this effect see Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence' 2013 (n. 22), 419 *et seq*.

[434] See in this respect the 'Leiden Policy Recommendations on Counter-Terrorism and International Law', *Netherlands International Law Review* 17 (2010), 531–50 (para. 44).

[435] Larissa van den Herik, '"Proceduralising" Article 51', *Heidelberg Journal of International Law* 77 (2017), 65–7 (58).

In concluding, its main findings in this respect can be summarised in six propositions:

(i) The problem of self-defence against non-State actors operating from a foreign (host) State must be addressed on the basis of the UN Charter regime governing recourse to force. As that regime is State-centric, the host State under regular circumstances cannot be ignored: self-defence against non-State actors is problematic because (and if and when) it ostensibly violates the Charter's ban against force in relation to the host State.

(ii) The challenge of appreciating armed attacks by non-State actors from within the State-centric *ius ad bellum* is essentially a problem of asymmetry. This problem can be addressed from different ('Westphalian' and 'post-Westphalian') perspectives: one assessing under which conditions a host State has to answer for private armed attacks emanating from its territory (and thus is exposed to self-defence); the other accepting that self-defence can be exercised against private attacks and inquiring under which conditions the host State would have to tolerate such exercise on self-defence on its territory. Both perspectives raise essentially the same question: they are debates about the required State nexus.

(iii) Answers to this question depend on an assessment of Article 51 of the Charter as a rule of treaty law, whose meaning is to be ascertained in a process of treaty interpretation, guided by the general principles of interpretation.

(iv) This interpretation is more than a tracing of practice. Textual, contextual, purposive and historical considerations offer a rich array of arguments that help establish the meaning of the 'armed attack' requirement. These arguments do not point in one direction and of course need to be evaluated – but they deserve careful scrutiny.

(v) Under the general principles of treaty interpretation, the subsequent practice of States and UN organs can help clarify the meaning of the 'armed attack' requirement, notably by confirming or modifying the results of the initial interpretation. Subsequent practice comprises conduct that reflects a 'common understanding' of all UN members, as well as (as a supplementary means) conduct reflecting the understanding of a more limited number of parties.

(vi) Subsequent practice over time has not followed one direction and has rarely been fully consistent. For most of the UN's history, debates about the required State nexus have explored nuances and degrees. Informed scholarship ought to reflect this; it needs to move beyond the

> binary logic that draws lines between the 'two main camps' of 'expansionists' and 'restrictivists', and that suggests sharp, sudden shifts from 'old' to 'new' understandings, such as 'pre-9/11' versus 'post 9/11'.

In a field as contentious as this, 'agree[ment] on method' may perhaps not really 'cure much of the current divergence of views'.[436] But it could at least render the major and long-standing debate about self-defence against non-State actors a little less confused – and perhaps make it a bit more likely for the law to affect and inform the shaping of policy. It is hoped that even those readers who disagree with the substantive findings of this study will see in it some contribution towards greater methodological clarity.

[436] Bianchi, 'The International Regulation of the Use of Force' 2009 (n. 20), 652.

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