Introduction

Dilution of Self-Defence and its Discontents

Christian Marxsen and Anne Peters

Self-defence against non-State actors, such as pirates and ships carrying letters of marque with deliberately ambiguous links to sovereign States, was the cardinal issue that framed and propelled the rise of modern international law. After the adoption of the UN Charter, the concept of self-defence has been sharpened to mean first of all the situation that one State defends itself against an ongoing armed attack by another State. However, the concept has remained controversial at the margins.

This book is about the major controversy related to the transnational activities of armed non-State groups.[1] Terrorist organisations have become a major security concern for States in all parts of the world. Terrorism has been qualified by the Security Council as 'one of the most serious threats to international peace and security'.[2] Recurring strikes by armed terror groups raise the questions of whether and when such resort to armed force by non-State actors triggers the right to self-defence under international law.[3]

The international lawfulness of military reactions against physical violence exercised by non-State actors but unequivocally imputable to another State is fairly easy to assess. In terms of the International Court of Justice's *Nicaragua* judgment, attacks by non-State armed groups are attributable to a State when that State has sent them or when the latter is 'substantially involved' (referring

[1] The other major uncertainty concerns the temporal dimension of self-defence, which has become more acute in the nuclear age with the dangers of total destruction. The question is whether self-defence is or should be admissible against imminent (as opposed to ongoing) attacks, or even against more remote, future threats such as those emanating from the proliferation of weapons of mass destruction.

[2] SC Res. 2178 of 24 September 2014.

[3] The question has become a standard textbook problem but remains unresolved (see Christian Henderson, *The Use of Force and International Law* (Cambridge: Cambridge University Press, 2018), chapter 8, 308–46, specifically devoted to the use of force against non-State actors).

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to Article 3 lit. g of the General Assembly Definition on Aggression (3314) of 1974).[4] An alternative criterion figuring prominently in the international legal debates lies in the standard of 'effective control', which is the general standard for attribution in the international rules on State responsibility.[5] Where imputation is possible under these standards, the attacked State may take necessary and proportionate action against the State from whose territory the non-State actors operate, because the acts of the non-State actors are – from a legal perspective – those of the State.

I. THE CONTROVERSY AROUND SELF-DEFENCE AGAINST NON-STATE ACTORS

The controversial constellation is defensive action taken against an – as Dire Tladi calls it in this volume – 'innocent State',[6] that is a State to which the military operation of an armed group is not imputable under the acknowledged principles. This scenario raises the questions of whether a lower degree of State involvement is or should be sufficient to allow for self-defence affecting that 'innocent' State, and whether imputation to the territorial State matters at all.

It is by no means a new phenomenon that States use military force against non-State actors which operate independently from or at least not under the actual control of another State. In this book, Christian Tams reminds us of various instances since the 1940s. He pleads for acknowledging the nuances in the law which was – so he claims – not as straightforwardly State-oriented as standard narratives would have us believe.[7] However, while States did defend themselves against non-State actors by military means, these hardly triggered any international legal debate. Legal writings in the early days of the Charter did not take up the issue at length, but largely presupposed a State-oriented reading of the rules on self-defence.[8] While in the following decades a few especially affected States such as Israel took a clear position on

[4] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, para. 195.

[5] *Ibid*., paras. 115 and 109; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, 43, paras. 398 *et seq*. In this sense, see also ILC Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 31 *et seq*., Article 8.

[6] Tladi in this volume, 20.

[7] Tams in this volume, 136.

[8] See Tladi, 43–8, and Tams, 129, in this volume.

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the issue,[9] the underlying general question was not made a direct subject of controversy.

This changed significantly with the terrorist attacks of 9/11 in 2001 and with the subsequent military interventions. These events are often seen as constituting a 'true turning point' in the debate on the international law of self-defence.[10] Since the military intervention of the United States and its allies in Afghanistan in 2001, self-defence – and especially against non-State actors – figures as a, if not the, controversial issue of international peace and security law.[11] The primary target of the United States was the terrorist organisation Al-Qaeda. The US army intervened in Afghanistan, which the US accused of allowing 'the parts of Afghanistan that it controls to be used by this organization as a base of operation'.[12] As Afghanistan did not have 'effective control' over Al-Qaeda, the traditional criteria of imputation would not have allowed defensive action against its territory. Many observers interpret the US intervention and the international reactions to that intervention as triggers of a sudden shift in the law, partly described as a case of 'instant custom'.[13]

Those assuming such a shift in the law mainly point to Security Council resolutions 1368 and 1373 of September 2001.[14] These resolutions mention the inherent right of self-defence in their preambles before condemning the terrorist attacks of 9/11. While self-defence does not need a licence by

[9] See Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), 401–2. See, for a discussion of State practice, Tams in this volume, 136–42.

[10] Tom Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah', *Stanford Journal of International Law* 43 (2007), 265–94 (280). See, for a prominent analysis written at that time, Thomas M. Franck, 'Terrorism and the Right of Self-Defense', *American Journal of International Law* 95 (2001), 839–43. See also Michael Wood, 'International Law and the Use of Force: What Happens in Practice?', *Indian Journal of International Law* 53 (2013), 345–67 (356).

[11] In a recent book devoted to the political functions of international law, Ian Hurd specifically focuses on the expansion of self-defence for illustrating that international law has lost its constraining power; Ian Hurd, *How to do Things with Law* (Oxford: Oxford University Press, 2017), chapter 4 'The Permissive Power of the Ban on War', 58–81. The law of self-defence is a 'law that cannot be broken' or 'infrangible law' (*ibid.*, 79) – and that is, we might add, no law at all.

[12] UN Doc. S/2001/946, 7 October 2001 (USA).

[13] Christine Gray, 'The Use of Force and the International Legal Order', in Malcom D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2nd edn., 2006), 589–619 (602); Yutaka Arai-Takahashi, 'Shifting Boundaries of the Right of Self-Defence – Appraising the Impact of the September 11 Attacks on Jus Ad Bellum', *International Lawyer* 36 (2002), 1081–1102 (1094–1095); Benjamin Langille, 'It's Instant Custom: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', *Boston College International and Comparative Law Review* 26 (2003), 145–56.

[14] SC Res. 1368 of 12 September 2011; SC Res. 1373 of 28 September 2011.

the Security Council, and although the Council cannot unilaterally change the law of the Charter, its explicit classification of a terrorist threat as an armed attack would have contributed to the formation of a novel interpretation and *opinio iuris* in this direction.[15] Many observers interpret the resolutions' language as an endorsement by the Security Council of a right to self-defence against the non-State group Al-Qaeda.[16] Along the same line, the international support for the US, in combination with the absence of a condemnation of the military intervention in Afghanistan, is interpreted as acquiescence, or at least as a toleration, of a broader legal rule on self-defence.[17]

The question, however, has remained controversial. Critics of the extended notion of self-defence insist that the Security resolutions of 2001 only mention the right to self-defence without passing a judgment on its lawful use in the concrete case of the strikes against Al-Qaeda on Afghan territory.[18] Besides, the international reactions to the invasion in Afghanistan, especially the laconism or muteness of many States, have been interpreted in different ways. The opponents of the broader reading of self-defence explain the silence of many States as a politically motivated restraint that was not intended to have an influence on the law and thus does not express any *opinio iuris*.[19]

The case-law of the International Court of Justice has not settled the issue. While the *Advisory Opinion on the Israeli Wall* of 2004 is mostly read as

[15] Jost Delbrück, 'The Fight against Global Terrorism: Self-Defense or Collective Security as International Police Action: Some Comments on the International Legal Implications of the "War against Terrorism"', *German Yearbook of International Law* 44 (2001) 9–24 (14, fn. 16). See also Monica Hakimi, 'The *Jus ad Bellum*'s Regulatory Form', *American Journal of International Law* 112 (2018), 151–190, on the Security Council employing what she calls 'informal regulation' that does not authorise but 'condones' specific uses of military force and thereby confers legitimacy. Hakimi considers Resolutions 1368 and 2249 as examples for this novel type of regulation that might help preserve the *ius contra bellum*'s relevance (*ibid*., 165–6 and 187–9).

[16] Davis Brown, 'Use of Force against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses', *Cardozo Journal of International & Comparative Law* 11 (2003), 1–54 (29); Nicholas Tsagourias, 'Cyber-Attack, Self-Defence and the Problem of Attribution', *Journal of Conflict and Security Law* 17.2 (2012), 229–44 (243); Anders Henriksen, 'Jus Ad Bellum and American Targeted Use of Force to Fight Terrorism Around the World', *Journal of Conflict and Security Law* 19 (2014), 211–50 (225).

[17] Steven R. Ratner, 'Jus Ad Bellum and Jus in Bello after September 11', *American Journal of International Law* 96 (2002), 905–21 (910).

[18] Alain Pellet and Sarah Pellet, 'The Aftermath of September 11', *Tilburg Foreign Law Review* 10 (2002), 64–75 (71–3).

[19] Dire Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12', *American Journal of International Law* 107 (2013), 570–6 (574–5).

leaning towards a State-oriented reading of self-defence,[20] the ICJ judgment in *Congo v. Uganda* of 2005 gave room for much debate.[21] For many readers, this judgment signalled that the ICJ was open for accepting self-defence against non-State actors.[22]

International legal scholars and practitioners have developed a number of proposals for dealing with self-defence against non-State actors: the Chatham House Principles,[23] the Leiden Policy Recommendations,[24] and the Bethlehem Principles.[25] These sets of principles and recommendations purport to describe actual State practice and the current state of the law and (partly) make *de lege ferenda* proposals.[26] While they significantly diverge in their details, these proposals all assume that self-defence against non-State actors on the territory of a non-consenting State is lawful (or in the process of

[20] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 139. In his declaration to the *Wall* opinion, Judge Buergenthal had called the majority's focus on State attacks a 'legally dubious conclusion', based on a 'formalistic approach' of the Court (ICJ, *ibid.*, Declaration of Judge Buergenthal, ICJ Reports 2004, 240, paras. 5 and 6). Other observers read the Advisory Opinion as having *left open* the question of whether self-defence against a non-State actor can be lawful. See, for discussion and diverging interpretations of the *Wall* opinion, Tladi, 56–7, and Tams, 156–8, in this volume. The prior judgment ICJ, *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), ICJ Reports 2003, 161, paras. 51 and 61, is also relevant in this context. It implies that attacks must be imputed to a State (in this case to Iran).

[21] See ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, 168, paras. 146–7. Here the Court first stated in para. 146 that the acts of armed bands or irregulars against Uganda were not attributable to the DRC. In view of this, the ICJ then found in para. 147 that there is 'no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.

[22] See, for opposing interpretations of the decision, Tladi, 57–9, and Tams, 157–8, in this volume.

[23] 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly* 55 (2006), 963–72.

[24] 'Leiden Policy Recommendations on Counter-Terrorism and International Law', *Netherlands International Law Review* 57 (2010), 531–50.

[25] Daniel Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors', *American Journal of International Law* 106 (2012), 770–7 (the 'Bethlehem Principles'; with 'Principles Relevant to the Scope of a State's Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' at 775). See the response by Elizabeth Wilmshurst and Michael Wood, 'Self-Defense against Nonstate Actors: Reflections on the "Bethlehem Principles"', *American Journal of International Law* 107 (2013), 390–5; see also Daniel Bethlehem, 'Principles of Self-Defense: A Brief Response', *American Journal of International Law* 107 (2013), 579–85.

[26] The Chatham House Principles (n. 23) claim to be a statement of international law 'properly understood' (963), whereas the Leiden Policy Recommendations (n. 24) also aim to 'highlight areas in which greater consensus needs to be pursued at the international level' (540), and the Bethlehem Principles (n. 25) acknowledge that they not reflect 'a settled view of any state' (773). See, for discussion, Tladi in this volume, 38–42.

becoming the law, or should be allowed) in situations where the territorial State is either unwilling or unable to prevent attacks by non-State actors emanating from its territory.[27]

Many scholarly writings of the post-9/11 era, however, have remained more cautious. A general undertone of the debate has been an acknowledgement of a certain tendency towards a broader reading of self-defence, while formulations have often remained far from unequivocally postulating such an understanding. In that sense, commentators have stated, for example, that an extensive interpretation of self-defence 'appears to be gaining ground',[28] and that a 'trend ... clearly [points] towards the establishment of an even further-reaching responsibility of the host state based on the mere toleration or harbouring of terrorists.'[29] Christian Tams held in an earlier article that 'the international community today is much less likely to deny' a State's invocation of self-defence against attacks not imputable to a State.[30] Claus Kress found that an 'alleged right of self-defence in case of a non-State armed attack now occupies a place within the "light grey" area of the international law on the use of force'.[31] Thus, even positions generally agreeing that the solely State-centred reading of self-defence had come under immense pressure were hesitant to outrightly assume that a clear shift in the law had already taken place.

[27] The Leiden Policy Recommendations (n. 24) state: 'The territorial State's consent to military action is required, except where the territorial State is unable or unwilling itself to deal with the terrorist attacks' (540); the Chatham House Principles (n. 23) hold: 'If the right of self-defence in such a case is to be exercised in the territory of another State, it must be evident that that State is unable or unwilling to deal with the non-State actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial State cannot be obtained' (969); the Bethlehem Principles (n. 25) deal with the 'unwilling or unable' standard in principles 11 and 12. See critically on this body of literature Jutta Brunnée and Stephen Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?', *International and Comparative Law Quarterly* 67 (2018), 263–86 (275), diagnosing 'a curious interplay amongst State officials, former officials writing in their personal capacity and some academic commentators, whereby a small group tries to expand its influence by constantly cross-referencing each other'.

[28] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010), 296.

[29] 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), 35–54 (47).

[30] Christian J. Tams, 'The Use of Force against Terrorists', *European Journal of International Law* 20 (2009), 359–97 (381).

[31] 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 (53). His paper was published before self-defence was claimed against ISIS by the US and other States, which started in September 2014.

II. REVIVAL OF THE DEBATE SINCE 2014

The debate about whether and under what conditions self-defence is lawful against (certain types of) non-State attacks has received renewed attention since 2014 due to the interventions of numerous States in the armed conflict in Syria. In this context, a number of States – notably the United States, Turkey, the United Kingdom, and France – have claimed to act in individual self-defence against Islamist terrorist groups, above all against the group Islamic State of Iraq and Syria (ISIS).[32] Some States alternatively or additionally relied on the collective self-defence of Iraq,[33] and thus presupposed that Iraq was suffering an armed attack in the sense of Article 51 of the UN Charter.

The Security Council has assumed an equivocal position on interventions in Syria. In its Resolution 2249, it 'calls upon' member States to participate in the fight against ISIS, but did not itself authorise an intervention under Chapter VII of the UN Charter.[34] Furthermore, the Council did not even mention self-defence (not even in the preamble) – unlike in its Resolution 1368 after 9/11. It limited its 'call' to measures 'in compliance with international law'.[35] This reference to 'international law' can be read in various ways. It is at first sight a reminder that any reaction must be lawful. It might also be a veiled reference to the law of self-defence, avoiding an explicit mentioning, so as to escape a repetition of the post-9/11 controversy regarding whether the Security Council had endorsed the American claim of self-defence or not. The Security Council thereby left the controversial question of self-defence against non-State actors to the interpretation of the States. Unsurprisingly, the (probably deliberately) cryptic resolution has been interpreted both ways, as remaining within the boundaries of the established State-centred law, on the one hand,[36] and as embracing a broadened understanding of self-defence, on the other.[37]

[32] UN Doc. S/2014/695, 23 September 2014 (USA); UN Doc. S/2015/563, 24 July 2015 (Turkey); UN Doc. S/2015/688, 7 September 2015 (UK); UN Doc. S/2015/745, 8 September 2015 (France).

[33] See UN Doc. S/2014/695, 23 September 2014 (USA); UN Doc. S/2015/563, 24 July 2015 (Turkey); UN Doc. S/2014/851, 25 November 2015 (UK); UN Doc. S/2016/523, 9 June 2016 (Belgium); UN Doc. S/2015/693, 9 September 2015 (Australia); UN Doc. S/2016/132, 10 February 2016 (The Netherlands); UN Doc. S/2016/513, 3 June 2016 (Norway); UN Doc. S/2015/221, 31 March 2015 (Canada); UN Doc. S/2015/946, 10 December 2015 (Germany); UN Doc. S/2016/34, 13 January 2016 (Denmark).

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

[35] *Ibid.*

[36] See Tladi in this volume, 73–6; see also O'Connell in this volume, 211.

[37] See e.g. Michael P. Scharf, 'How the War against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016), 15–67 (66): 'Despite its ambiguity,

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Among the intervening States, the conditions of lawful self-defence are far from agreed. Rather, the participating States have invoked diverse rationales for their interventions, ranging from the 'unwilling or unable' standard (proclaimed by the United States, Australia, Canada and Turkey)[38] to the criterion of effective territorial control (emphasised by Belgium and Germany).[39] In the course of the conflict in Syria, the extended understanding of self-defence has not only been invoked against ISIS. Turkey has also claimed to act in self-defence against the Kurdish militia YPG. In its operation 'Olive Branch', commenced in January 2018, Turkey claimed the right to defend itself against the 'threat from the Syria-based terrorist organizations, among which Deash and the PKK/KCK Syria affiliate, PYD/YPG, are at the top of the list'.[40]

Some observers have interpreted recent State activity in Syria as giving the 'final push' to a change in the law.[41] In view of significant State practice supporting a broader understanding of self-defence, and in view of widespread scholarly endorsement of this broad reading,[42] it partly seemed as if, in the words of van Steenberghe, 'the orthodoxy on the law on the use of force has

Resolution 2249 will likely be viewed as confirming that use of force in self-defense is now permissible against non-State actors where the territorial State is unable to suppress the threat that they pose.' Michael Wood, 'The Use of Force in 2015 with Particular Reference to Syria', Hebrew University of Jerusalem Legal Studies Research Paper Series 16-05 (2016), 8: '[I]t is difficult to read the resolution otherwise than as an endorsement . . . of the use of force in self-defence against an ongoing or imminent armed attack by Da'esh, a non-State actor.'

38 See UN Doc. S/2014/695, 23 September 2014 (USA); UN Doc. S/2015/563, 24 July 2015 (Turkey); UN Doc. S/2015/221, 31 March 2015 (Canada); UN Doc. S/2015/693, 9 September 2015 (Australia).

39 UN Doc. S/2016/523, 9 June 2016 (Belgium); UN Doc. S/2015/946, 10 December 2015 (Germany).

40 UN Doc. S/2018/53, 22 January 2018 (Turkey); see the critical analysis of Anne Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs', *EJIL Talk!*, 30 January 2018, available at www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs.

41 Scharf, 'How the War against ISIS Changed International Law' 2016 (n. 37), 66.

42 See e.g. Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors', *International and Comparative Law Quarterly* 56 (2007), 141–56 (147); Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), 42; Yoram Dinstein, *War Aggression and Self-Defence* (Cambridge: Cambridge University Press, 5th edn., 2012), 227–30; Ashley Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense', *Virginia Journal of International Law* 52 (2012), 483–550 (486); Wood, 'The Use of Force in 2015' 2016 (n. 37), 1, 8; see also the five contributions (Frowein, Oellers-Frahm, Kouzigou, Keinan, Tams) in the section 'expansionist positions' in Anne Peters and Christian Marxsen (guest eds.), 'Self-Defence against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War', *Heidelberg Journal of International Law* 77 (2017), 1–93 (15–45).

dramatically switched from a restrictivist to an expansionist perspective.'[43] However, pronounced scepticism towards the broader reading,[44] notably against the 'unwilling or unable' formula,[45] persists. An important academic action was the 'Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism', initiated by Olivier Corten in 2016, which found the support of more than 240 international lawyers and professors from a wide range of countries.[46] The plea explicitly rejects the 'unable' part of the 'unwilling or unable' doctrine[47] and perceives 'a serious risk of self-defence becoming an alibi, used systematically to justify the unilateral launching of military operations around the world'.[48] Further commentators criticise the 'unable or unwilling' standard from the perspective of weaker States, and in particular the Global South, as 'ignoring the unequal international environment in which the doctrine operates'.[49] This doctrine will not apply in powerful States, but it is a legal framework for what Jochen von Bernstorff has called the 'semi-periphery'-States 'that do not belong to the inner circle or are not powerful enough to resist the application of the regime'.[50] In this vein, the 'unwilling or unable' standard has been especially criticised from a post-colonial perspective as a vehicle for 'reintroduc[ing] a hierarchy of States in the operation of *jus ad bellum*' –

[43] Raphaël van Steenberghe, 'The Law of Self-Defense and the New Argumentative Landscape on the Expansionists' Side', *Leiden Journal of International Law* 29 (2016), 43–65 (43). The terms 'restrictivist' and 'expansionist' are meanwhile widely used, although they are controversial and might be criticised for their evaluative overtones.

[44] Peter Hilpold, 'The Applicability of Article 51 UN Charter to Asymmetric Wars', in Hans-Joachim Heintze and Pierre Thielbörger (eds.), *From Cold War to Cyber War: The Evolution of the International Law of Peace and Armed Conflict over the Last 25 Years* (Cham: Springer, 2016), 127–35 (129); Jochen von Bernstorff, 'Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions', *ESIL Reflections*, 5(7) (2016), available at www.esil-sedi.eu/node/1368; see also the eight contributions (Corten, Christakis, Oesterdahl, Kawagishi, Urs, Giacco, Sjöstedt, and Hartwig) in the section 'restrictivist positions' in Peters and Marxsen, 'Self-Defence against Non-State Actors' 2017 (n. 42), 15–45.

[45] See, for a lucid critique from a Fullerian perspective, Brunnée and Toope, 'Self-Defence against Non-State Actors' 2018 (n. 27); Olivier Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?', *Leiden Journal of International Law* 29 (2016), 777–99; 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 (496–97).

[46] http://cdi.ulb.ac.be/wp-content/uploads/2016/06/Liste-prof-et-assistants-oct.pdf.

[47] 'A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism, 6 October 2016, available at http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme: '[T]he mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State's territory without its consent.'

[48] *Ibid*.

[49] Dawood I. Ahmed, 'Defending Weak States against the Unwilling or Unable Doctrine of Self-Defense', *Journal of International Law and International Relations* 9 (2013), 1–37 (36).

[50] von Bernstorff, 'Drone Strikes, Terrorism and the Zombie' 2016 (n. 44).

a hierarchy that echoes 'the infamous nineteenth-century distinction between civilized, semi-civilized and uncivilized states'.[51]

III. THREE PERSPECTIVES IN A TRIALOGUE

Against this background, this Trialogue raises a seemingly simple yet complex set of interrelated questions. Does international law as it stands allow for self-defence against non-State actors on the territory of a non-consenting State? Has an evolution of the law occurred in this regard, and, if yes, when and how? Assuming there has been legal evolution, what does this mean in terms of legal policy? What are the repercussions for the entire regime of the *ius contra bellum*, and for the international legal order at large?

The first two questions are primarily doctrinal, about the current state of law and the modes of legal change. Answering them requires an engagement with the doctrines on the sources of international law and hence with recent State practice. The aim is to identify whether and to what extent the numerous proposals and normative claims about self-defence that have been brought up in practice and theory have actually solidified into hard international rules and generally accepted interpretations.

As explained in the Introduction to the series, it is the characteristic feature of a Trialogue to approach the research questions from three perspectives which differ in terms of regional background, technical method, and world-view of the discussants.[52] Dire Tladi was invited to the Trialogue for his unique experience as a South African scholar and Professor of International Law at the University of Pretoria who has, at the same time, significant experience in the practice of international law. In addition to his academic appointments and scholarly work, he has served as the Principal State Law Adviser for International Law for the South African Department of International Relations and Cooperation and as legal adviser to the South African Permanent Mission to the United Nations. Moreover, he is a member of the International Law Commission and its Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*). With such a background, Tladi is in a position to clearly assess the consequences of an extended reading of self-defence for States that are potentially not powerful enough to resist outside intervention in the fight against terrorism.

[51] Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures', *AJIL Unbound* 109 (2015), 266–70 (267).

[52] See Anne Peters, 'Trialogical International Law – Introduction to the Series', in this volume.

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In his contribution to this Trialogue, Tladi espouses a 'positivist approach to the identification of the law',[53] aiming for the 'objectively correct interpretation' of the rules of international law on self-defence.[54] He offers an account of self-defence whose core is the embeddedness of this legal institution within a system of collective security. Tladi sets out the principles of the prohibition on the use of force and of collective security. Then, based on arguments of context and purpose, he advocates what has long been the largely uncontroversial interpretation, namely a State-centred reading of the rules on self-defence which requires attribution of the strikes by the non-State actors to a State. He accepts the possibility that State practice, whether as a constituent element of customary international law or as subsequent interpretation of article 51, can affect the State-centred interpretation of the law on self-defence. Having assessed the practice that is often put forward in support of a shift, including the interventions in Afghanistan and Syria, he concludes that the established notion of self-defence as requiring an armed attack from a State is still good law and has not been changed.

The second co-author of the Trialogue is Christian Tams, Professor of International Law at the University of Glasgow. Tams received his legal education in both Germany and the United Kingdom, and was invited to the Trialogue as someone who has been exposed to both the doctrinal rigour of the German legal system as well as to the case- and practice-oriented perspective commonly found in the Anglo-Saxon approach to international law.

Tams frames the issue of the legality of self-defence against non-State actors as a pure question of treaty interpretation, namely of the interpretation of the term 'armed attack' contained in Article 51 of the UN Charter. Tams essentially follows the structure of Articles 31 and 32 VCLT as a guideline to interpretation and provides a rich discussion of the wording, context, object and purpose as well as the preparatory work. His main focus rests on a discussion of practice since 1945. He embraces what he has described elsewhere as 'the uncertainty of old', arguing that self-defence against non-State actors has always been present in international practice since the foundation of the UN.[55] Tams rejects what he calls the 'popular narrative'. According to that narrative, the 'law of self-defence was "sufficiently clear"' until the 1990s or even until 2001, when (potentially)

[53] Tladi in this volume, 21.
[54] Tladi in this volume, 17.
[55] Christian Tams, 'Embracing the Uncertainty of Old: Armed Attacks by Non-State Actors prior to 9/11', *Heidelberg Journal of International Law* 77 (2017), 61–4.

a sudden shift in practice and law was triggered by the events of 9/11.[56] Tams thus departs from a different starting point than Tladi for his legal assessment. In Tams' view, we should not presume a basically unequivocal old State-centred law whose changes we ought to discuss in light of recent State practice based on new legal justifications. Rather, State practice, e.g. in Afghanistan and Syria, only carries on and has thereby intensified the legal justifications that were present before. The law was – so Tams argues – uncertain in the first place. Therefore, importantly, the standards for the operation of 'a change in the law' are significantly different from, if not actually lower than for, constellations in which an old rule was clear and strong. In discussing recent events as 'subsequent practice' (in the sense of Article 31(3)(b) VCLT) against the backdrop of 'the uncertainty of old', Tams arrives at the conclusion that international law in principle does allow for self-defence actions to be taken against non-State actors, independently of any attribution to a State.

The third co-author of the Trialogue is Mary Ellen O'Connell, Professor of International Law at the University of Notre Dame in the United States. She received her legal education in the United Kingdom and the US, and has specialised in the law of the use of force and has, *inter alia*, chaired the Use of Force Committee of the International Law Association and was a professional military educator for the US Department of Defense in Germany for several years. We invited her to the Trialogue for her normative approach to international law, at the core of which is a strong sceptical attitude toward the utility and morality of using military force.

Mary Ellen O'Connell's reading of the UN Charter is underpinned by natural law theory that she regards as the basis of the prohibition on the use of force. She generally shares Dire Tladi's argumentative direction by rejecting an extended reading of self-defence. She identifies and discusses three 'pernicious doctrines of expansive self-defence',[57] namely the assertion of a right to defend oneself against imminent attacks, the treatment of terrorist crimes as armed attacks, and the assertion of the 'unwilling or unable' doctrine to satisfy or substitute for the requirements of attribution or consent. With Dire Tladi, and in contrast to Christian Tams, she shares the assumption of a clear State-oriented character of the *ius contra bellum*. In contrast to Tladi, however, her main argument does not rest on an interpretation of recent State practice. Rather, central to O'Connell's argument is what she defines as the natural law/*ius cogens* character of

[56] Tams in this volume, 136.
[57] O'Connell in this volume, section III, 212–28.

the prohibition on the use of force and its exceptions. In her understanding, the *ius cogens* character restricts the possibility of derogation. This means that the prohibition may not be reduced or diluted by means of subsequent practice; and this guarantees that the law is not affected by contrary practice.

We hope that the readers of the three contributions will, not least through the numerous cross-references, be able to trace the trialogical exchange of arguments and considerations, and sense not only the tensions and undercurrents but also identify the concessions and winning arguments, and ultimately be empowered to form a better informed view on the legality, the politics, and the morality of self-defence against non-State actors.