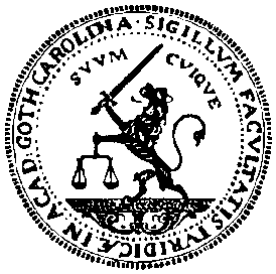

FACULTY OF LAW

LUND UNIVERSITY

Ludvig Nyhlén

A Dialogue Between the Deaf?

An Analysis of the Scholarly Debate Regarding Self-Defence Against Non-State Actors

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Supervisor: Markus Gunneflo

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Table of contents

Summary

With the rise of attacks stemming from hostile non-state actors, the question of whether states can respond in self-defence against attacks from such entities has become a pressing issue. This has led to a heated debate among legal scholars, with widespread disagreement on the legitimacy of using self-defence against non-state actors. The present thesis examines this scholarly debate, by analyzing the different argumentative approaches used by scholars to argue for or against the existence of a right to self-defence against non-state actors.

To examine this debate, the thesis consists of an analysis of academic writings on the right to self-defence. The writings analyzed are categorized into two main groups of scholars: the ‘expansionists’ which advocate for an expanded right to self-defence, and the ‘restrictivists’ who argue for a more restrictive interpretation, preserving an inter-state self-defence regime which does not encompass non-state actors. The arguments of each group are organized into argumentative frameworks, identifying the evidence scholars use to support their claims, derived from the different sources of international law. This approach allows for a systematic comparison, revealing commonalities, patterns, and differences in the argumentative frameworks, offering a comprehensive overview of the debate.

The thesis finds that expansionists advocate for a lowered state attribution threshold or direct self-defence against non-state actors, while restrictivists adhere closely to the UN Charter's provisions and the jurisprudence of the International Court of Justice. The analysis reveals the central importance of state practice for both approaches, although from different outsets. Expansionists prioritize state behavior as evidence of evolving the law on self-defence, while restrictivists emphasize a rigorous methodology in interpreting international law. Concerns over expansionist argumentation are raised, as it may lead to unilateralism and therefore the potential erosion of the international legal framework. This highlights the need for a balanced approach to address contemporary threats against international peace and security posed by non-state actors.

Sammanfattning

I takt med att antalet attacker mot stater härrörande från icke-statliga aktörer har ökat under de senaste decennierna har frågan om staters rätt till självförsvar mot sådana aktörer blivit en hett debatterad fråga. I kölvattnet av detta har en stor akademisk diskussion har uppstått, med en utbredd oenighet mellan forskare om frågan huruvida stater har en rätt till självförsvar mot icke-statliga aktörer. I detta examensarbete undersöks denna debatt genom att analysera de olika argumentationsmetoder som används av forskare för att diskutera existensen av rätten till självförsvar mot icke-statliga aktörer inom folkrätten.

Undersökningen genomförs genom en omfattande analys av akademiska texter som behandlar ämnet om staters rätt till självförsvar gentemot icke-statliga aktörer. Texterna kategoriseras i två huvudgrupper av forskare, varav den ena är "expansionisterna" som förespråkar en utvidgad rätt till självförsvar, och den andra, ”restriktivisterna", argumenterar för en mer restriktiv tolkning och bevarar det mellanstatliga ramverk som inte omfattar en rätt till självförsvar gentemot icke-statliga aktörer. De argumentationsmetoder som används av forskarna identifieras genom en kartläggning av hur rättskällorna inom folkrätten används för att stödja argumentationen. Detta tillvägagångssätt möjliggör en systematisk genomgång av de olika argumentationsmetoderna som visar på likheter, skillnader och mönster i de argumentativa ramverk som används, och möjliggör således en god översikt av debatten.

Av analysen framgår att expansionisterna antingen förespråkar en sänkt nivå gällande att hänföra väpnade angrepp utförda av icke-statliga aktörer till stater, eller att stater hade en direkt rätt till självförsvar gentemot icke-statliga aktörer. Restriktivisterna ligger däremot nära den traditionella tolkningen av FN-stadgans bestämmelser och Internationella domstolens rättspraxis, och förespråkar en högre nivå av hänförlighet till stater. Av analysen framkommer även att staters praxis är av central betydelse för båda dessa synsätt, även om utgångspunkterna för argumentationen kring dessa är olika. Expansionisterna framför att statspraxis bevisar att en utveckling av rätten till självförsvar har skett, medan restriktivister betonar en rigorös metodik och förhållningssätt gentemot folkrättsliga källor för att kunna dra acceptabla slutsatser. Slutligen yttras farhågor gentemot den expansionistiska argumentationen, eftersom den kan riskera att leda till unilateralism och därmed potentiellt urholka det folkrättsliga och multilaterala systemet. Detta understryker behovet av ett balanserat förhållningssätt från både stater och forskare gentemot rätten till

självförsvar för att på bästa sätt hantera det hot som icke-statliga aktörer utgör för internationell fred och säkerhet.

Preface

In writing this thesis two people have been essential and deserves my gratitude. Firstly, my supervisor Markus Gunneflo – thank you for insightful discussions and wise comments during the writing of this thesis. Secondly, my proofreader, and friend, John – thank you for reading through not just this thesis but also my other work throughout this program – your help has truly been indispensable.

-

I slutet av mitt examensarbete och mina fem år i Lund känner jag vemod. Sorg. Tiden här är förbi. Såklart kommer inte denna sorgsenhet från att studierna är klara – över det känner jag bara lättnad och lycka. Känslan kommer från tanken av att tiden tillsammans med alla fantastiska, fina, varma människor som varit med under tiden i Lund är över – på något sätt. Vissa stannar kvar, vissa hänger med, vissa åker åt andra håll. Oavsett var ni är jag skyldig er all tacksamhet för att ni velat vara en del av det som blev min studietid i Lund. Tack till

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…min fina familj. Mamma, pappa och Sigge. Tack för att ni alltid finns där, alltid tror på mig och alltid stöttar mig. Ni är bäst!

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Nu har jag ingen aning vart jag eventuellt kan svepas iväg…

Lund, juni 2024

Ludvig Nyhlén

Abbreviations

art.	Article
AU	African Union
DRC	Democratic Republic of the Congo
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISIL	Islamic State of Iraq and the Levant
NATO	North Atlantic Treaty Organization
PLO	Palestinian Liberation Organization
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

The prohibition on the use of force, and the exception of an inherent right of states to defend themselves against armed attacks, are both cornerstones of international law, providing a vital safeguard for state sovereignty and security. However, in light of the increasing complexity of contemporary conflicts, traditional notions of warfare are being challenged. The rise of non-state actors, spanning from terrorist organizations to insurgent groups and private militias, has blurred the boundaries between conventional and asymmetric threats. The devastating attacks perpetrated by Al-Qaeda on September 11, 2001, not only shook the foundations of global security, but also elevated the threat of terrorism to unprecedented levels, compelling the UNSC to recognize terrorism once again as a threat to international peace and security.[1]

The subsequent launch of Operation Enduring Freedom by the US in Afghanistan, alongside the international community's reaction, marked a pivotal moment for many concerning the evolution of international law of self-defence. Many esteemed legal scholars argue that these events either started an evolution of existing legal frameworks or reaffirmed the old customary right of states to defend themselves against non-state actors. However, on the other side of that argument, stand those scholars who oppose such a development of the law, meaning that the traditional inter-state self-defence paradigm, adopted with the inception of the UN Charter[2], remains unaltered.[3] The issue has since then been a contentious subject and has been hotly discussed for decades. This debate has strikingly been deemed a 'dialogue between the deaf'[4], and it is an understatement to say that it is not uncontroversial to take sides on the matter.

[1] See UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. [Hereinafter: UN Charter]

[3] See Raphaël Van Steenberghe, 'State Practice and the Evolution of the Law of Self-Defence: Clarifying the Methodological Debate' (2015) 2 Journal on the Use of Force and International Law 81; André De Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' (2016) 29 Leiden Journal of International Law 19.

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

The debate has often been broken down into two separate camps, divided into an extensive or a restrictive approach to the issue. Simplistically put, the extensive approach adheres to a use of force regime which allows extraterritorial self-defence directed against non-state actors. The restrictive approach favours a stricter interpretation where such self-defence is prohibited. Looking at the conclusions drawn on the issue by scholars belonging to the different camps, there is often a great discrepancy. This disparity does not stem from a difference of looking at the factual circumstances but from a difference in usage and view upon the sources of international law. It is rather a question of difference in methodology. Some scholars form their arguments around customary international law and recent state practice. Others downplay the meaning of custom and argue for a strict, UN Charter-conform, interpretation of self-defence and point to the precedence of the jurisprudence of the ICJ.

This difference in ways of argumentation and divergences regarding basic concepts of international law has brought the legal discourse to somewhat of a deadlock, where development is unsubstantial. Another contribution to this debate, construing and inferring conclusions where the legality of self-defence against non-state actors is justified or disregarded, would be rather futile, and would only dig the trenches deeper between the two sides. Another way forward is to not take sides on the matter, and instead map out the legal discourse as it is, as an outside observer, describing and structuring the different avenues which scholars have ventured when approaching the issue. This meta perspective of the debate will help in elucidating the fundamental assumptions which international lawyers and scholars have regarding the sources of international law on the use of force. This while also contributing to a deeper understanding of the complexities and nuances regarding the right of self-defence against non-state actors.

1.2 Purpose and Research Questions

The purpose of this thesis is to elucidate and structure the current and foregoing international legal debate regarding the right to self-defence against non-state actors. To accomplish this purpose, the different argumentative approaches utilized by scholars to reach conclusions on the subject are analysed and exhibited. The thesis therefore aims to highlight the different argumentative frameworks used by proponents of either the ‘restrictivist’ or ‘expansionist’ approach on the issue, and thereby purport to illuminate the differing perspectives on the sources of international law.

The main research question of this thesis is therefore: How do international legal scholars utilize the sources of international law when arguing for an either ‘restrictivist’ or ‘expansionist’ approach on the right to self-defence against non-state actors?

1.3 Method and Delimitations

The main method employed in this thesis is an analysis of scholarly argumentation. It involves organizing the arguments presented by different authors into structures or frameworks, where the main assertions made by each author are identified and analyzed, thereby pinpointing the evidence, reasoning, and examples each author present to substantiate their argumentation. Therefore, considering the aim of this thesis, it involves carefully identifying references to e.g. legal texts, treaties, customary international law, judicial decisions, and doctrine. This including an analysis and assessment of the importance, relevance, and interpretation given to these sources by the authors, and understanding the implications of their assessments. This enables a systematic comparison and analysis of the approaches taken, identifying the argumentative strategies of the authors, pointing out common themes, patterns, differences, and contentions, resulting in a comprehensive overview of the debate in review.

Because of the limited scope of this study, delimitations have been made. The contentious issue of self-defence against imminent armed attacks, closely connected to the issue of self-defence against non-state actors, is excluded from this thesis. Some of the publications analyzed also contain argumentation concerning the *rationae materiae* dimension of self-defence against non-state actors.[5] This aspect of self-defence against non-state actors is also excluded from the thesis.

1.4 Material

The central focus of this thesis, as stated above, involves mainly examining and analyzing scholars’ argumentation regarding the existence of a right of states to engage in defensive measures against non-state actors. Given the extensive body of literature on the topic, and the challenge of capturing a typical scholarly method of argumentation when proponing either the restrictivist or the expansionist approach, this thesis is based on a random sample of publications by 46 authors written in the English language. This

[5] Meaning whether the acts of a non-state actor is "of such gravity" that the acts would qualify as an armed attack if they had been carried out by regular armed forces.

random sample was carried out by conducting a search in Lund University's database LUBsearch (https//lubsearch.lub.lu.se) for papers using the search words "use of force, self-defence", selecting publications including substantial information on the issue of self-defence against non-state actors. This resulted in a sample of 50 scholarly articles, chapters, and books, all dealing with the subject of self-defence against non-state actors in different variations.[6]

What should be noted is that authors who publish on the topic of self-defence against non-state actors may be more inclined to support such a right, and, reciprocally, those who do not believe in such a right may be less likely to write about it. The sampling method employed may therefore impact the comprehensiveness and richness of the analysis. Furthermore, the inquiry is also limited by a language barrier, as the present author does not master any other languages than English and Swedish. Therefore, the analysis solely consists of an examination of material written in English, which may additionally affect the depth and breadth of the analysis.

1.5 Previous Research

Due to the complexities and uncertainties within international self-defence law, coupled with its inherently political nature, it is regarded as one of the most contentious areas of international law among legal scholars. While some research into the right of self-defence against non-state actors was conducted in the 20th century, the events of 9/11 served as a catalyst, leading to a significant increase in research on the subject.[7] Research focusing on an existence or non-existence of a right of self-defence against non-state actors is the most common researching method within this context. Although inquiries similar to this thesis which examines the methodological divide between the expansionists and restrictivists, are more infrequently found, it has been undertaken before, with some notable examples. Waxman, Farer, Corten, Kammerhofer, Hakimi and Cogan all discuss and analyze the methodological division between scholarship in the wider view on self-defence and the use of force, although under different names and within

[6] Kammerhofer has conducted a similar method of sampling material, see Jörg Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (First edition, Oxford University Press 2016) 633.

[7] Christine Gray, *International Law and the Use of Force* (Fourth edition, Oxford University Press 2018) 124–125.

slightly different perspectives.[8] Van Steenberghe conducts a similar inquiry, but specifically discusses and analyses how the arguments used by expansionists regarding self-defence have developed over time. While De Hoogh also research this division, he specifically dives into the development of restrictivist argumentation concerning the right of self-defence against non-state actors.[9]

Similarly, this thesis delves into the specific methodologies used by scholars to approach and analyze the issue of the right of self-defence. Discussing the methodological divide between the expansionists and restrictivists in the same study, specifically within the context of self-defence against non-state actors, offers new insights and perspectives that may not have been fully and as diversely explored in previous studies. This contributes to a deepened understanding of the nuances and complexities within the subject.

1.6 Structure of the Thesis

This thesis is organized into four distinct sections. Following the introductory section, *Section 2* provides a presentation and description of the prohibition of the use of force and the right to self-defence.

Section 3 comprises of a comprehensive examination of the arguments put forth by scholars proponing either the expansionist or restrictivist perspective on the right of self-defence against non-state actors. The expansionist arguments are delineated into two main categories: the 'Lowered State Attribution approach' and the 'Regardless approach', while the ‘Restrictivist approach’ is presented as a unified section. Each argumentative section is additionally divided into various subsections, focusing on the main points of scholarly argumentation.

Under the 'Lowered State Attribution Approach,' subsections include an analysis of scholarly debate surrounding the jurisprudence of the ICJ, examination of state practice, and exploration of alternative means of

[8] See Matthew C Waxman, ‘Regulating Resort to Force: Form and Substance of the UN Charter Regime’ (2013) 24 European Journal of International Law 151; Tom Farer, ‘Can the United States Violently Punish the Assad Regime? Competing Visions (Including That of Anthony D’Amato) of the Applicable International Law’ (2014) 108 American Journal of International Law 701; Kammerhofer (n 6); Monica Hakimi and Jacob Katz Cogan, ‘The Two Codes on the Use of Force’ (2016) 27 European Journal of International Law 257; Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Second edition, Hart Publishing, an imprint of Bloomsbury Publishing 2021) 3–60.

[9] See Van Steenberghe (n 3); De Hoogh (n 3).

attribution. Similarly, the 'Regardless Approach' is subdivided into sections, but analyzes the interpretation of art. 51 of the UN Charter, customary rights of self-defence, considerations regarding the jurisprudence of the ICJ, arguments regarding self-defence against non-state actors, state practice, and related lines of reasoning.

The ‘Restrictivist Approach’ is also broken down into subsections covering scholarly interpretations of art. 2(4) and 51 of the UN Charter, jurisprudence from the ICJ, of UNSC resolutions, and examination of state practice. This structure allows for a systematic examination and enables the reader to understand the argumentative framework of the different scholarly approaches.

Finally, in *Section 4*, the conclusions from the comprehensive analysis undertaken in Section 3 are presented. This includes a summary of the argumentative frameworks of the ‘Lowered state attribution approach, the Regardless approach, and the ‘Restrictivist Approach’. Additionally, some final observations on the scholarly debate are made. This is followed by a discussion on the differing perspectives scholars have regarding the sources of international law as revealed by the analysis, along with a discussion on the implications of these perspectives.

2 The Regime Governing the Use of Force

To understand the ensuing analysis of the debate concerning the right to self-defence against non-state actors, some of the fundamental concepts which underlie the scholarly debate are clarified. Considering that some of the aspects of the concepts dealt with below are the source of the debate, it is important to acknowledge that by defining the concepts in a certain way, it may be seen as taking sides on the issue. This is not the purpose of the exposé, but instead intended to be a pedagogical introduction, as to enable a fuller understanding of the ensuing analysis and mapping of the debate.

2.1 The prohibition on the use of force

The prohibition on the threat and use of force is held as a cornerstone obligation of international law, and as the most central provision in international law as a whole.[10] The provision is contained in its textual form within art. 2(4) of the UN Charter, and has since its inception in 1945 had the following wording:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The prohibition can also be found in customary international law[11], which has been reaffirmed by the ICJ in the *Nicaragua* case.[12] The prohibition has also been generally ascribed with a *jus cogens* character.[13] A definition of the force targeted by the prohibition is however omitted in the text of the provision. According to the *travaux préparatoires* of the UN Charter, economic and political force was excluded from the scope of art. 2(4), irrespective of how

[10] Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Edward Elgar Publishing 2018) 321.

[11] Belatchew Asrat, *Prohibition of Force under the UN Charter: A Study of Art. 2(4)* (Iustus ; Distributor outside Sweden, Almqvist & Wiksell International 1991) 50.

[12] "[…] on the question of the use of force…so far from having constituted a marked departure from customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law and that law has in the subsequent four decades developed under the influence of the Charter…", see *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, (Merits), ICJ Reports 1986, 14, 103, para. 181. [Hereinafter: *Nicaragua*]

[13] Asrat (n 11) 51.

severe the effects of such force are or who or what the target of the force is.[14] What comes under the prohibition is armed or physical force, comprising of acts taken as properly military and others akin to such acts. This includes usage of explosives, biological and chemical weapons but also encompasses other possible means of destruction or modes of damage and injury.[15] The meaning of the prohibition has been discussed extensively, but the prevailing interpretation upheld by the majority of UN member states is that the prohibition is absolute, which means that all uses of force are banned. The references to territorial integrity and political independence are not to be understood as qualifications of the general rule, but as elaborations of the rationale of an almost absolute prohibition of force. The absolute protection of the political independence and the territorial integrity of states is the *raison d'etre* of the prohibition, only limited by the purpose of the UN, which is the maintenance of international peace and security.[16]

This is reinforced by a textual interpretation, as art. 2(4) must be read in conjunction with art. 1(1) and 2(3) of the UN Charter, which stipulate that the purpose of the UN is to maintain international peace and security through collective action, and for UN members to resolve their disputes peacefully so as not to endanger international peace and security. Given this context, unilateral or collective use of force, not authorized by the UN, is always incompatible with the purposes of the UN, as per the language of art. 2(4), unless it constitutes legitimate self-defence under art. 51.[17] The inherent right to self-defence, in response to an armed attack in accordance with art. 51, is one of the two exceptions to the prohibition on the use of force in the UN Charter. The other exception consists of the right of the UNSC to authorize the use of force to maintain international peace and security, in accordance with relevant provisions in Chapter VII of the UN Charter.[18] Commentators have noted that as the exceptions are not expressly mentioned in art. 2(4) itself, it is possible that there exist other exceptions to the prohibition implied or located outside the UN Charter framework.[19]

[14] Christian Henderson, *The Use of Force and International Law* (Second edition, Cambridge University Press 2024) 93.

[15] Asrat (n 11) 134.

[16] Ove Bring and Said Mahmoudi, *Internationell våldsanvändning och folkrätt* (Norstedts Juridik 2006) 17.

[17] ibid 19.

[18] ibid 17–18.

[19] The examples given of such exceptions are consent, invitation by the authorities of another state to use force on its territory, or humanitarian intervention, see Henderson (n 14) 33.

2.2 The Right to Self-Defence

One of the exceptions to the prohibition on the use of force is the right to either collective or individual self-defence in art. 51 of the UN Charter. Art. 51 reads as follows:

> 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Self-defence is an interim right of unilateral use of force which states resort to at their own risk.[20] The right of collective and individual self-defence has also been deemed to constitute customary international law,[21] but the nature of this customary right is debated among scholars.[22] When drafting art. 51 during the San Francisco conference 1945, the right to unilateral or collective self-defence was not initially to be included within the provision. However, on the insistence of South American states, it was incorporated into art. 51 of the UN Charter, with the impetus of protecting the collective security system established in the region. With that, self-defence was constructed as an interim right, subsidiary to action taken by the UNSC. This way, the provision was construed in so that states, if subjected to an armed attack, would have the right to defend themselves collectively or unilaterally, report its measures in self-defence to the UNSC, and take action until the UNSC had deliberated and taken a decision on the matter.[23]

However, there are those who claim that despite the text indicating that the UNSC's authority can supersede a state's right to self-defence, the UNSC, in its practice, has recognized the right of states to defend themselves

[20] Asrat (n 11) 201.

[21] "[the Court] notes that in the language of Article 51 of the United Nations Charter, the inherent right (or 'droit naturel') which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law […]", see *Nicaragua* (Merits), ICJ Reports 1986, 14, 103, para. 193.

[22] For a summary of the debate, see Gray (n 7) 124–125.

[23] Kolb (n 10) 353.

individually and through coalitions even after the UNSC has acted.[24] Others, nonetheless, argue that the final determination of whether an armed attack has taken place under art. 51 rests with the UNSC. Therefore, the state claiming to have experienced such an attack must persuade the UNSC that this attack is indeed an armed attack. Failure to do so would render any self-defensive measures taken unlawful and unjustifiable under art. 51.[25]

There are differing views among scholars concerning the different aspects on the right to self-defence, and many questions of contention which do not have clear answers.[26] UNGA resolutions aimed at codifying laws on the use of force have been hindered due to wide disagreements between states. Therefore, there has not been any inclusions of significant provisions regarding the extent of self-defence. The 1970 Declaration on Friendly Relations[27] and the 1974 Definition of Aggression[28] did not include any provisions on self-defence. Similarly, in the 1987 Declaration on the Non-Use of Force[29], states could not progress beyond affirmations that "states have the inherent right of individual or collective self-defence if an armed attack occurs, as set forth in the Charter of the United Nations.".[30]

What could be the most contentious question, is the meaning and definition of “armed attack”. The provision omits what constitutes an armed attack, who may perpetrate such an attack, how and when a state may respond in self-defence, and whether a state can respond to an imminent armed attack that it is aware of. The omission of the *ratione personae* dimension of armed attacks in art. 51 of the UN Charter is inter alia what has given rise to the debate whether non-state actors may be the perpetrators of an armed attack, and therefore, the targets of self-defence.[31] The ICJ has dealt with the issue of non-state actors and self-defence on a number of times, although

[24] David A Sadoff, ‘A Question of Determinacy: The Legal Status of Anticipatory Self-Defense’ (2009) 40 Georgetown Journal of International Law, 523, 549–550.

[25] Stanimir A Alexandrov, *Self-Defense against the Use of Force in International Law* (Kluwer Law International 1996) 100–101.

[26] Asrat (n 11) 201–203.

[27] UNGA ‘Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations’, Res. 2625 (XXV), U.N. Doc. A/8082 (24 October 1970) [Hereinafter: Declaration on Friendly Relations]

[28] UNGA ’Definition of Aggression’ Res. 3314 (XXIX) (14 December 1974). [Hereinafter: Definition of Aggression]

[29] UNGA ’Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations’ Res. 42/22 (18 November 1987).

[30] Gray (n 7) 120–121.

[31] Henderson (n 14) 263–264.

commentators oppose the meaning and relevance of its rulings.[32] In the *Nicaragua* case the Court held that a state was responsible for an armed attack if it sent

"[…] armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.".[33]

The Court also stated that:

"[it] does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the interna1 or external affairs of other States.".[34]

A widely held interpretation of these statements, is that the Court excluded independent non-state actors from the notion of "armed attack" and simultaneously sets a high threshold for attribution of actions of non-state actors to a state. The acts could then only be attributable to a state if said state was substantially involved in the activities of the non-state actors, which the Court deemed a state was when it was in 'effective control' of the non-state actor. Therefore, in accordance with the reasoning of the Court, attribution is not possible when a state only supports or assists the non-state actor, e.g. by harboring a terrorist cell in a way which does not amount to the standard of 'effective control'.[35]

In the *Legal Consequences of the Construction of a Wall* the Court held that art. 51 of the UN Charter recognizes

"[…] the existence of an inherent right of self-defence in the case of an armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State." [36]

[32] See Section 3.1.1.1 and 3.1.2.3.

[33] *Nicaragua*, (Merits), ICJ Reports 1986, 14, 103, para. 195.

[34] ibid.

[35] For the requirement of 'effective control' see *Nicaragua*, (Merits), ICJ Reports 1986, 14, 103, para. 115. For a similar interpretation of the statements see e.g. Tom Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah' (2007) 43 Stanford Journal of International Law 265, 277.

[36] *Legal Consequences of the Construction of a Wall,* (Advisory Opinion), (9 July 2004) ICJ Reports 2004, 136, para. 139. [Hereinafter: *Israeli Wall*]

Scholars interpreted this statement as an expressive reaffirmation of its position in the *Nicaragua* case, as the Court once again restricted self-defence to solely encompass acts by states. This meaning an act where a state directly carries out an armed attack, or indirectly, in a situation where a state supports a group in committing an attack, where the support amounts to such a level that it can be attributable to the state.[37]

In the case of *Armed Activities on the Territory of the Congo (DRC v Uganda)* the Court refuted the Ugandan argument that it had a right to respond in self-defence against attacks perpetrated by rebels of the Allied Democratic Forces from the territory of the DRC. The Court held that

"[Uganda] did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The 'armed attacks' which reference was made came rather from the Allied Democratic Forces. The Court has found above […] that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC […] The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present." [38]

Commentators view this ruling as consistent with the Court's prior reasoning in both *Nicaragua* and *Israeli Wall,* since it once again reaffirmed that armed attacks giving rise to the right to self-defence must be imputable to a foreign state, which it deemed it could to the DRC. However, there is some ambiguity in this ruling since the Court stated that it

"[…] has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.".[39]

[37] Christian J Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16 European Journal of International Law 963, 976.

[38] *Armed Activities on the Territory of the Congo (DRC v Uganda)*, (Merits), ICJ Reports 2005, 168, paras. 146-147. [Hereinafter *Armed Activitites*]

[39] *Armed Activities*, (Merits), ICJ Reports 2005, 168, para. 147.

Some scholars view this omission of the Court to as regrettable, since the issue non-state actors had already given rise to much uncertainty in scholarly debate, as well as state practice.[40]

[40] See e.g. Phoebe N Okowa, 'Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)' (2006) 55 The International and Comparative Law Quarterly 742, 749.

3 Analysis

The analysis is structured into two parts: the first part consists of a determination and analysis of how expansionists argue when justifying the legality of self-defence against non-state actors. In the second part, the restrictivists argumentation is presented and analyzed, as they argue for the non-existence of a right of self-defence against non-state actors. Before delving into this analysis, it is important to recognize that while the arguments are framed around the two opposing ends of the spectrum, the landscape of the restrictive and expansionist perspectives is far more diverse, nuanced, and adjacent in ways than this division might imply. Nonetheless, the aim is to illustrate how scholars view and use the sources of international law in their argumentation, rather than pigeonholing any particular author into one category.

3.1 The Expansionists

When looking at the reasoning of international legal scholars who are proponents of the expansionist line of reasoning, there appears to be two ways to venture. The first line of reasoning accepts the notion of self-defence as an inter-state legal regime, but purports that this regime is not limited to actions carried out by the state organs alone, meaning that other acts for which the state is accountable is also attributable to a state, but only requiring some level of involvement in the attack or a failure to prevent it. The second line of reasoning asserts that self-defence is permitted as a response to an armed attack, irrespective of whether the attack emanates from a state or non-state actors. Authors of this approach instead argue why a state needs to, or is obliged to, tolerating self-defence from a state which has been the victim of an armed attack.

3.1.1 The Lowered State Attribution Approach

Scholars arguing from this approach have generally or in part accepted an inter-state reading of the prohibition on the use of force. What these scholars therefore must deal with is the issue, in their view, that the self-defence framework is too restrictive when it comes to attribution. This entails that these scholars need to explain as to how and when a state is responsible for supporting, acquiescing, or its inability to counter, non-state actors which has committed an armed attack, and therefore be the target of legitimate self-defence by a victim state.

3.1.1.1 The Jurisprudence of the ICJ

When arguing that a lowered threshold for attribution exists, it seems that scholars see the need of addressing the jurisprudence of the ICJ, which is either contradictory to their forthcoming legal argumentation, or too strict regarding what level of state involvement is needed for attribution. Therefore, arguments are centered on why the jurisprudence should be taken lightly or disregarded. To achieve this, scholars argue for its irrelevance, pointing to e.g., logical inconsistencies in the Court's legal reasoning or due to Declarations, Dissenting Opinions or Separate Opinions of Judges in different cases.

Ozubide for instance, agrees that the jurisprudence points to the contrary of his findings regarding the state of the law. However, he does not give weight to rulings by international tribunals nor ICJ decisions due to that decisions by the ICJ are only binding between the parties and particularly when such decisions are juxtaposed against customary international law. He asserts that subsequent practice of states is more likely to elucidate the provision of the charter than the decisions of the ICJ.[41] Looking at ICJ jurisprudence after 9/11, Ruys notes that the Court refers to Resolutions 1368[42] and 1373[43] in its dictum, but the precise contributions of the resolutions are left unanswered by the court. Ruys means that post 9/11 jurisprudence has offered little guidance as to what meaning recent state practice has for the scope of the right of self-defence. He also means that the authority of the Court's rulings in *Armed Activities* and *Israeli Wall* is undermined by the considerable Dissenting and Separate Opinions in which individual judges criticize the Court's stance.[44] De Wet highlights that dissenting judges and scholars respectively have criticized the restrictive requirement of state attribution, set up by the ICJ majority in *Nicaragua*, for not taking into account that states could incite forcible measures amounting to armed attacks against other states.[45] Similarly, Ruys and Verhoeven, analyzing the *Israeli Wall* case, raise Judges Kooijmans, Buergenthal and Higgins' disagreement in their Separate

[41] Alabo Ozubide, 'How the Use of Force against Non-State Actors Transformed the Law of Self-Defence after 9/11' (2016) 41 South African Yearbook of International Law 1, 23–24.

[42] UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

[43] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[44] Tom Ruys, 'Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' (2008) 9 Melbourne Journal of International Law 334, 356–357.

[45] Erika De Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution' (2019) 32 Leiden Journal of International Law 91, 93.

Opinions, as well as the findings of the Court in *Nicaragua*, and concludes that the findings in the *Israeli Wall* raise more questions than it solves. This due to its inconsistency with the Court's own findings in *Nicaragua* and due to the irreconcilable arguments in the Separate Opinions, why the ruling cannot be regarded as the new direction of international law.[46] Brent, referencing inter alia the Separate Opinions in the *Israeli Wall* case and *Armed Activities* case, concludes that there is no general agreement within the ICJ on the controversial issue of extraterritorial self-defence against non-state actors. Brent also contends that the Court's subsequent rulings do not impede the argument for a different or lower level of attribution in the self-defence context.[47] Travalio and Altenburg argues that the circumstances in *Nicaragua* and *Iran Hostages*[48] are far from factually analogous to states harboring and actively supporting terrorist groups.[49]

3.1.1.2 State Practice

When surveying state practice on the degree of attribution needed to impute armed attacks by non-state actors to states, authors tend to look at practice before and after 9/11 for the state of law and if any changes have occurred. The methodology used to interpret the self-defence framework is not always presented, but authors either approach it by determining an interpretation of art. 51 of the UN Charter or determine the content of a rule of customary international law. When looking at state practice before the 9/11 attacks, some authors have different claims regarding the state of international law on self-defence against non-state actors at that time. Some contend that customary international law did not allow such a right, unless it could be established that a high degree of control was exercised by a state over the non-state actors. Others are doubtful of a right of self-defence against non-state actors ever having existed, while others claim that it already existed.

Ozubide contends that not many states dared to expressly rely on art. 51 of the UN Charter to justify responses to armed attacks by terrorist non-state actors before 9/11, since the level of attribution was the one held by the ICJ in *Nicaragua.*[50] States which could not establish a nexus between non-state

[46] Tom Ruys and Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 Journal of Conflict and Security Law 289, 304–305.

[47] Michael Brent, 'Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence' (2009) 16 Australian International Law Journal 133, 137–145.

[48] *United States Diplomatic and Consular Staff in Tehran (Iran v US)*, (Judgement), ICJ Reports 1980, 3. [Hereinafter: *Iran Hostages*]

[49] Greg Travalio and John Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 Chicago Journal of International Law 97, 105–106.

[50] Ozubide (n 41) 18.

actors and a state when responding in self-defence against armed attacks were, pre 9/11, condemned by the UNSC and/or the international community. Authors exemplify this with the Israeli attacks against non-state actors in Lebanon 1968, Uganda 1975, Tunis 1985, US attacks in Libya 1986, US missiles against targets in Iraq 1993, US attacks in Sudan 1998, and South Africa's hot pursuit of non-state actors into Angola and Botswana in 1984 and in 1985.[51] Beard, reviewing international response to US extraterritorial attacks against non-state actors, is doubtful of the proof in customary international law of a right to self-defence against non-state actors. This due to the varying levels of support among states, and in particular, the wide condemnation against a US raid in Libya 1986, which many states expressed lacked a preceding 'armed attack'.[52] Travalio and Altenburg admit that the US bombings in Libya 1986 was widely condemned internationally. However, the reaction from the international community on a US launch of cruise missiles against Iraq in 1993, and US bombings of terrorists in Afghanistan in 1998, was unquestionably muted. They argue that the same goes for the bombing of a chemical weapons factory in Sudan in 1998, which was admittedly widely condemned. However, the bombings themselves was not condemned, but solely the fact that insufficient proof was presented that chemical weapons was being processed at the factory. If it had been clear that chemical weapons were processed at the factory, Travalio and Altenburg contend that the international community would have accepted the bombings.[53]

Authors are more aligned as to the meaning of state practice post 9/11. They tend to argue that a change of the law of self-defence took place after the attacks, building their argument upon the widespread support from the international community towards the military operations. This as well as emphasizing the meaning of the UNSC adopting Resolutions 1368 and 1373, and the US military operations in Afghanistan.

Ozubide upholds that the UNSC, for the first time, strayed away from the view that self-defence is only possible against states, and from there on also was possible against non-state actors. The resolve of the UNSC to hold states accountable for harboring terrorist non-state actors resonated in those resolutions, in par with the fact that the international community openly or

[51] Ibid 19; Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 The International and Comparative Law Quarterly 401, 406–407.

[52] Jack M Beard, 'America's New War on Terror: The Case for Self-Defence Under International Law.' (2002) 25 Harvard Journal of Law & Public Policy 559, 564.

[53] Travalio and Altenburg (n 49) 106–107.

silently tolerated the military operations in Afghanistan. Ozubide means that this gives reason to conclude that a change in the law of self-defence occurred.[54] Travalio and Altenburg assert that Resolution 1368 and 1373 were the culmination of a trend where the UNSC acknowledged an inherent right of self-defence in response to another state's support of terrorism, whether such support was active or passive.[55] Beard opines that these resolutions made it impossible for states hosting terrorist non-state actors to not be imposed of responsibility under art. 2(4) of the UN Charter, and to be subjected of forcible measures in response under art. 51, at least when an attack reaches the degree of devastation as the 9/11 attacks did.[56] Byers asserts that the resolutions were carefully worded to affirm, within the context of a broader response to terrorism, the existence of a right of self-defence in customary international law.[57] Heinze argues that the international reaction to the 9/11 attacks, including Resolutions 1368 and 1373, and the subsequent US invasion of Afghanistan, is indicative of two major developments. This being that acts by non-state actors could be regarded as an 'armed attack', and that the requirement of 'effective control' set by the ICJ in *Nicaragua* had been eased.[58] Hakimi sees Resolution 1368 and 1373, and the international response following these decisions, as reflecting a widespread view that the US could lawfully use defensive force in Afghanistan, which had harbored Al-Qaeda.[59]

Authors tend to delve into more recent state practice where states have exercised extraterritorial self-defence as response to purported armed attacks by non-state actors, as means to determine if a new interpretation of art. 51 of the UN Charter is possible, or a new rule of customary international law has been crystallized. Authors go into the nature of practice and review if the practice consists of a state imputing non-state actors' actions to a state, with a lowered attribution threshold. Studies surveying such incidents include the Russian raids against Chechen rebels into Georgian territory 2002[60], Israeli

[54] Ozubide (n 41) 14–17.

[55] Travalio and Altenburg (n 49) 107.

[56] Beard (n 52) 581–582.

[57] Byers (n 51) 409.

[58] Eric A Heinze, 'Nonstate Actors in the International Legal Order: The Israeli-Hezbollah Conflict and the Law of Self-Defense' (2009) 15 Global Governance: A Review of Multilateralism and International Organizations 87, 97.

[59] Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 International Law Studies Series. US Naval War College 1, 8–9.

[60] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 464–466; Ozubide (n 41) 21; Hakimi (n 59) 14; De Wet (n 45) 99.

strikes against Hezbollah on Syrian territory 2003[61], US attacks against Al-Qaeda in different parts of the world including Yemen, Saudi Arabia, Syria and other gulf states since 2004[62], presence of Rwandan soldiers in eastern DRC in 2004[63], attacks on Uganda by the Lord's Resistance Army, emanating from DRC territory 2005[64], Israeli incursion into Lebanon targeting Hezbollah 2006[65], Ethiopian intervention in Somalia as to defend against threat posed by Islamic militia in 2006[66], Turkish raid against PKK bases in Iraq in 2007-08[67], Colombian invasion of terrorist bases in Ecuador in 2008[68], incursions by the US into Pakistan 2008-09[69], US attacks in Syria after terrorist non-state actors attacked US forces in Iraq 2008[70], Israeli bombings against a convoy purportedly carrying weapons intended for Hamas in Sudan 2009[71], the carrying out of air strikes against positions of ISIL in Syria 2014.[72]

After giving an account of recent state practice, authors come to different conclusions on the meaning of this state practice. Ozubide concludes that state practice post 9/11 has shown that the Bush Doctrine[73] was instantly crystallized into customary international law, and that the transformation of the law of self-defence has been accepted by the international community. This meaning that harboring of terrorist non-state actors could engage the responsibilities of a state and thereby expose said state to attacks in self-defence from victim states. For Brent, state practice is not entirely consistent, but still showcases a clear change of attitude. Drawing from the military response of the US after the 9/11 attacks, Brent means that neither the

[61] Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (n 60) 447–448; Ozubide (n 41) 20; De Wet (n 45) 99.

[62] Brent (n 47) 154.

[63] Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (n 60) 466–467.

[64] Ibid 468–470.

[65] ibid 449–450; Ozubide (n 41) 20; Hakimi (n 59) 9–10; De Wet (n 45) 99.

[66] Hakimi (n 59) 10.

[67] Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (n 60) 457–458; Ozubide (n 41) 21; Brent (n 47) 154; Hakimi (n 59) 13–14; De Wet (n 45) 99–100.

[68] Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (n 60) 462–463; Ozubide (n 41); Brent (n 47) 151–152.

[69] Brent (n 47) 152–153; Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (n 60) 471–472; Hakimi (n 59) 10–11.

[70] Brent (n 47) 153–154.

[71] Ibid 154; Hakimi (n 33) 15.

[72] Ozubide (n 41) 22; Hakimi (n 59) 19–21; De Wet (n 45) 100–101.

[73] After the 9/11 attacks, the Bush Doctrine described the policy that the US had the right to secure itself against countries that harbor or give aid to terrorist groups, which was used to justify the 2001 invasion of Afghanistan, see Steven R Weisman, 'Editorial Observer; President Bush and the Middle East Axis of Ambiguity' *The New York Times* (New York City, 13 April 2002) <https://www.nytimes.com/2002/04/13/opinion/editorial-observer-president-bush-and-the-middle-east-axis-of-ambiguity.html> accessed 25 March 2024.

traditional requirement of effective control, nor toleration is supported by contemporary international law. However, given the close relationship between the Al-Qaeda and the Taliban, and the international community's response to the US military operations, contemporary international law supports a lowered threshold for attribution, encompassing situations where the host state actively supports and gives sanctuary to non-state actors. Brent asserts that this is reinforced by subsequent state practice.[74]

Considering the number of interventions that falls below the *Nicaragua* requirement of attribution, as well as the numerous security doctrines and official statements that support a more permissive interpretation of art. 51, Ruys argues that both state practice and *opinio juris* have undergone important shifts since 1986, and especially since 2001. However, considering that state practice is less than coherent, and that states' security doctrines are ambiguous at times, Ruys contends that it is premature to conclude that a shift in practice has crystallized into an emergence of a lower attribution threshold of customary international law. Ruys thus opines that the state of the law, in cases of attribution of armed attacks by non-state actors to host states falling below the *Nicaragua* threshold of effective control, is at least 'not unambiguously illegal'.[75]

Heinze argues that the US was granted considerable flexibility in response to the terrorist threats of 9/11 and that this has encouraged the growth of a permissive normative order when it comes to the *jus ad bellum*. He means that if consistent patterns of state practice form, it would suggest an eased attribution of armed attacks non-state actors. After reviewing the Israeli use of force in Lebanon 2006, the explicit recognition of the UNSC members, the G8 and the UNSG, Heinze asserts that state practice has accumulated towards a customary legal norm that not only permits using defensive force in response to non-state actors, but also advances a relaxed standard for attribution.[76]

Hakimi deems state practice post 9/11 as ambiguous since states appear conflicted or uncertain about how the area of self-defence law, is or should be, developing. This since the position that best captures the operational practice seems not to be generally accepted as law, while whatever position which is most widely accepted as an authoritative statement of law, seems not

[74] Brent (n 47) 155–159.

[75] Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (n 60) 485–488.

[76] Heinze (n 58) 100.

to reflect the operational practice. Hakimi does however assert that some developments can be distilled from state practice; Most states have acquiescingly endorsed defensive operations against non-state actors in states that harbor or support those actors or, lack control over the areas from which they operate. Most states also tolerate defensive operations in a much broader range of circumstances, and these latter operations are unlikely to be legitimized or validated as lawful. However, she means, they are also unlikely to be condemned or treated as unlawful.[77]

De Wet considers recent state practice as supportive of the application of the right of self-defence outside the parameters of the *Nicaragua* decision and accommodates both a 'harboring' and an 'unwilling and unable' doctrine. However, De Wet contemplates whether recent state practice is consistent and clear enough with regards to the ambiguity or vagueness plaguing reactions of the international community to the different self-defence operations targeted at non-state actors. She does however come to terms with this when she considers that a great portion of the criticism pointed at the self-defence operations against non-state actors was more concerned with the application in a particular context, for example the proportionality of the defensive measures, than of the evidence about the author of the armed attack. De Wet therefore argues that state practice indicates a broader right of self-defence, wider than the one set out in *Nicaragua*.[78]

3.1.1.3 Other Means of Attribution

Another line of reasoning for a lowered attribution threshold are arguments based on the Definition of Aggression, which was adopted to define the concept of the act of aggression as stated in art. 6:

"Nothing in this Definition shall 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."

In *Nicaragua*, the Court stated that art. 3(g) of the Definition of Aggression reflects the customary restraint on the scope of the right of self-defence against acts of 'indirect armed aggression'[79], which many authors refer to when basing their argumentation on the Definition of Aggression. According

[77] Hakimi (n 59) 30–31.
[78] De Wet (n 45) 102–103.
[79] See *Nicaragua* [1986] ICJ Rep 14, para. 195.

to art. 3(g) of the Definition of Aggression, an act of aggression can be defined as:

> the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The Court did not wholly interpret the provision but did provide a clarification; assistance to rebels in the form of the provision of weapons, or logistical or other support, did not amount to an armed attack.[80] Authors reject this view and purport that the Court is erroneous in this regard, denying meaning of the wording 'substantial involvement'. Tsagourias contends that 'substantial involvement' has gradually lost its meaning in the Court's jurisprudence. To conclude this, he refers to Judge Jennings Dissenting Opinion[81], in junction with the Court's reasoning in *Armed activities*. In that case, the Court ignored the 'substantial involvement' criterion. He also refers to the reasoning in *Israeli Wall*, where the ICJ did not use its own definition from previous rulings when defining 'armed attack', as well as the fact that the International Fact Finding Mission on the Conflict in Georgia ignored the 'substantial involvement' criterion.[82]

Ruys and Verhoeven assert that the ICJ was too strict in *Nicaragua* when interpreting the customary restraint of 'substantial involvement' in art. 3(g) of the Definition of Aggression as not encompassing 'provision of weapons, logistical or other support' with regard to an 'armed attack'. Exemplifying recent state practice, consisting of the US interventions in Afghanistan post-9/11, Australian pledges of self-defence in 2002 and Russian attacks against Chechens in Georgia 2002, comparing with a similar evolution in legal

[80] *Nicaragua* [1986] ICJ Rep 14, para. 195.

[81] Tsagourias refers to the following in Judge Jenning's Dissenting Opinion: "It may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack… [but it] may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement…Logistical support may itself be crucial… [it] covers the 'art of moving, lodging, and supplying troops and equipment'… If there is added to al1 this 'other support', it becomes difficult to understand what it is, short of direct attack by a State's own forces, that may not be done apparently without a lawful response in the form of… self-defence." see *Nicaragua*, (Merits), ICJ Reports 1986, 14, 103, Dissenting Opinion of Judge Sir Robert Jennings, 543-544.

[82] Nicholas Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 Leiden Journal of International Law 801, 815–816.

literature, referencing works of Randelzhofer[83] and Gray[84], Ruys and Verhoeven opine that the concept of 'substantial involvement' has significantly broadened. Thus, they suggest, a reinterpretation of the concept of 'substantial involvement' is needed, and that the broader concept of 'aiding and abetting' is more adequate to reflect an evolution in state practice, legal literature, and international relations.[85]

Another line of reasoning is by reviewing the Articles on State Responsibility[86], and attributing an armed attack perpetrated by a non-state actor to a state through that set of rules. Wolfrum argues that the Articles on State Responsibility are relevant since both state responsibility and self-defence are mechanisms for the enforcement of international law. The rules on imputability are therefore applicable to both mechanisms. On that basis Wolfrum references art. 16 of the Articles on State Responsibility,[87] and contends that although art. 16 only deals with states, the provision reflects a general principle and is to be applied to other subjects of international law, including non-state actors. Wolfrum asserts that if the 9/11 attacks had been committed by a state with the assistance of another state, there would not have been any doubt that both states could have been targets of legitimate self-defence. Thus, Wolfrum means, that if a state supports an attack on another state it cannot be protected by the mere fact that the attack was launched by a non-state actor. Consequently, Wolfrum opines that an act committed by a non-state actor is attributable to a state if that state deliberately orchestrated a situation which was a contingent for a later event. This requiring that the occurrence of the event was not beyond reasonable probability and constituting a breach of international law.[88]

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[83] See Bruno Simma, Hermann Mosler and Albrecht Randelshofer (eds), *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press 2002) 801.

[84] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm Evans, *International Law* (Oxford University Press 2003) 604.

[85] Ruys and Verhoeven (n 46) 314–320.

[86] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', Supplement No. 10 (A/56/10), chp.IV.E.1 (November 2001). [Hereinafter: Articles on State Responsibility]

[87] Article 16 of the ILC Articles on State Responsibility reads "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.".

[88] Rüdiger Wolfrum, 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?' (2003) 7 Max Planck Yearbook of United Nations Law 1, 36–38.

Ruys also argues for attribution through the Articles on State Responsibility, but in contrast, argues for an application of art. 9 of the Articles on State Responsibility.[89] According to Ruys, an armed attack can be attributable to a state where the state apparatus has totally or partially collapsed. Ruys suggest that if art. 9 is interpreted broadly, attribution to a state is possible, in instances where a non-state actor has assumed governmental functions, in the absence of state authorities in a territory, which means that the territory is liable to a counterattack in self-defence. Ruys assert that in these cases, the armed attack is attributable to the state which has lost state authority in its own territory.[90]

3.1.2 The Regardless Approach

The Regardless approach is signified by authors arguing for a right to respond in self-defence directly against the non-state actor which perpetrated the armed attack. Common for these scholars, and what differs from the approach where state participation or attribution is a necessary constituent of self-defence, is that the state attribution aspect is irrelevant to the question of whether self-defence is legitimate or not. For these authors there exists a right of self-defence regardless of the source of an armed attack, whether it is a state or a non-state actor. These authors instead answer the question of why the territorial state needs to, or is obliged to, accept a forceful intervention in self-defence, even when the territorial state is not the perpetrator of the armed attack.

3.1.2.1 The meaning of Art. 51 of the UN Charter

Many belonging to this category of reasoning begins their argumentation by discussing how the UN Charter dimension of self-defence and the customary dimension of self-defence function in tandem. In art. 51 the UN Charter recognizes "the inherent right of individual or collective self-defence if an armed attack occurs". The silence on the *ratione personae* dimension of 'armed attack' in art. 51 of the UN Charter is often seen by expansionist scholars as a confirmation, or at least a possibility, that armed attacks can originate from non-state actors.[91] The wording 'inherent' is of equal importance for these scholars, because, from a textual interpretation, it is also

[89] Article 9 of the Articles on State Responsibility reads "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.".

[90] Ruys, 'STAN. J. INT'l L.' (n 35) 285–290.

[91] See e.g. J Jordan Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond' (2002) 35 Cornell International Law Journal 533, 534.

seen as a recognition of the existence of a customary dimension of self-defence, existing since before the inception of the UN Charter.

Greenwood, for instance, notes that that the word inherent signifies that art. 51 in the UN Charter did not create a right, but preserved an already existing right.[92] Similarly, Finucane asserts that the customary right of self-defence is preserved in the wording of art. 51 of the UN Charter, and this customary right supplement and complement the state-centric regime embodied in the UN Charter.[93] Ghanbari Amirhandeh argues that art. 51 does not contain all the consisting elements of self-defence since it lacks (1) a definition of an armed attack, (2) since the provision references the 'inherent' right of self-defence, and (3) since it also neglects to mention principles such as proportionality and necessity, which the victim state shall comply with in the course of its acts of self-defence. All this, according to Ghanbari Amrihandeh, suggests that the customary form of self-defence exceeds the UN Charter form of the rule in its scope and content, and calls for an inquiry into the customary form of self-defence.[94]

3.1.2.2 The Caroline

When presenting the argument for a customary right of self-defence against non-state actors, most authors refer to the *Caroline* incident as the origin of the rule.[95] Greenwood highlights that the threat in the *Caroline* case came from a non-state group comparable to contemporary terrorist groups. Although the fact that the US did not support the non-state group, nor could be regarded as responsible for its acts, it was never suggested in the correspondence nor the customary practice following the *Caroline* incident, that this made a difference. Greenwood therefore views the *Caroline* incident

[92] Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego International Law Journal 7, 11–12.

[93] Brian Finucane, 'Fictitious States, Effective Control, and the Use of Force Against Non-State Actors' (2010) 30 Berkeley Journal of International Law 35, 40–41.

[94] Amin Ghanbari Amirhandeh, 'An Examination of the Plea of Self-Defense Vis-a-Vis Non-State Actors' (2009) 15 Asian Yearbook of International Law 125, 132–133.

[95] The *Caroline* incident took place in 1837, when British forces in Canada took action against an American steamer boat named Caroline. The Caroline was used by insurrectionists of the Canadian Rebellion to convey men and material to the Canadian rebel forces harbored on Navy Island. The British engaged the Caroline, which was moored at the American side of the Niagara River, killing two American crewmembers in the process, set the vessel on fire and destroyed it. The ensuing diplomatic exchange between the US and the British governments, and specifically the correspondence of the US Secretary of State Daniel Webster and British minister to the United States Lord Ashburton, is used by many legal scholars to derive the customary right of the use of force in self defence, inter alia the use of force as self-defence against non-state actors, see Michael Wood, 'The Caroline Incident—1837' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: a case-based approach* (Oxford University Press 2018) 5–11.

as evidence of that an armed attack does not need to emanate from a state.[96] Greenwood underscores that this aspect of the right of self-defence has not changed, despite the undoubted changes in international law since the *Caroline* incident.[97] Finucane asserts, deriving from the *Caroline* case, that both Britain and the US in principle agreed to the existence of a right to self-defence against non-state actors and that such a right could justify the violation of another state's negative sovereignty.[98] Lubell[99], Ghanbari Amrihandeh[100], Lobo de Souza[101], Noorda[102], Deeks[103] Schmitt[104], Paust[105], and Dinstein[106] similarly rely on and point to customary principles traceable back to the *Caroline* incident regarding the right of self-defence against non-state actors.

3.1.2.3 The Meaning of the Jurisprudence of the ICJ

Many authors discussing the either existing, or emerging, customary right of self-defence against non-state actors also tend to address relevant ICJ jurisprudence. These authors often point to the Court's restrictiveness or the irrelevancy of its jurisprudence, highlighting e.g., inconsistencies between the different decisions or divisions within the court, such as Declarations, Separate Opinions and/or Dissenting Opinions. These writings are also often referred to as supportive of the idea of a customary right of self-defence against non-state actors.

Lobo de Souza, for instance, highlights that Judges Higgins, Buergenthal, and Kooijmans did not share the finding of the majority in *Israeli Wall*, namely that art. 51 of the UN Charter requires an armed attack either to be conducted

[96] Greenwood (n 92) 16–17.

[97] ibid 25.

[98] Finucane (n 93) 63–66.

[99] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (1st edn, Oxford University Press 2010) 35.

[100] Ghanbari Amirhandeh (n 94) 135–136.

[101] IM Lobo De Souza, 'Revisiting the Right of Self Defence Against Non-State Armed Entities' [2015] Canadian Yearbook of International Law 202, 226–227.

[102] Hadassa A Noorda, 'The Principle of Sovereign Equality with Respect to Wars with Non-State Actors' (2013) 41 Philosophia: Philosophical Quarterly of Israel 337, 345.

[103] Ashley Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 482, 502–503.

[104] Michael N Schmitt, 'Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework' in Michael N Schmitt, *Essays on Law and War at the Fault Lines* (T M C Asser Press 2011) 21–22.

[105] Paust (n 91) 535; J Jordan Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan' (2010) 19 Journal of Transnational Law & Policy 237, 241–244.

[106] Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) 274–275.

by a state, or to be imputable to a state. Moreover, he points to the Separate Opinions of Judge Kooijmans and Judge Simma in *Armed Activities*, where Judge Kooijman states that the UN Charter does not prescribe that the right of self-defence necessitates the existence of an attacker state, and Judge Simma adds that Resolutions 1368 and 1373 represent an endorsement of the view that non-state actors can commit armed attacks.[107]

Schmitt also highlights the Separate Opinions and Declarations in the *Israeli Wall*, and stresses that the *Israeli Wall* and *Nicaragua* cases are materially different. The *Israeli Wall* should therefore not be counted as a reiteration of the Court's position from *Nicaragua*. Schmitt means that in *Nicaragua*, the issue at hand was whether support of guerrillas could be imputed to a state and thereby entail legitimate self-defence directly against the supporter. While, in the *Israeli Wall*, the issue at hand was whether the actions of a non-state actor could justify the use of force directly against that actor in self-defence.[108]

In the same vein, Ghanbari Amirhandeh deems that the Court made two fundamental errors in its *Israeli Wall* judgment; firstly, by interpreting art. 51 of the UN Charter as state-centric, as put forward by the dissenting Judges Higgins, Buergenthal, and Kooijmans in the case, and secondly by neglecting its own previous judgements.[109]

Finucane analyses *Armed Activities* and broaches the Separate Opinions of Judge Kooijmans and Simma, which he sees as instances where the dissenting Judges criticised the majority's unwillingness to confront reality when the Judges pointed to the limitations of the Court's state-centric regime. Finucane contends that the Separate Opinions not only reflect an appreciation for the reality of violent non-state actors, the role of state practice and *opinio juris* in shaping international law, but also acknowledge the reality of a world of fictitious states and non-state actors. Finucane means that the dissenting Judges interpreted the UN Charter in accordance with this. He also asserts that they recognized the right of self-defence applied to action taken against both non-state and state actors.[110]

3.1.2.4 The Customary Right of Self-Defence Directly Against

[107] Lobo De Souza (n 101) 217–218, 242.
[108] Schmitt (n 104) 11–13.
[109] Ghanbari Amirhandeh (n 94) 127–129.
[110] Finucane (n 93) 59–61.

Non-State Actors

Scholars argue for the customary right of self-defence directly against non-state actors because the non-state actors are the entity which have committed an armed attack. Hence, for these scholars, the self-defence against these actors is in no need of being attributed to the territorial state. However, many scholars still argue for as to why a territorial state needs to tolerate or accept forceful self-defence responses from a victim state in its territory. Scholars argue then that this toleration or acceptance emanates from the territorial state's violation of an obligation of the territorial state of due diligence, to stop a non-state actor operating on its territory, or some other obligation found in other sources of law, such as the laws of state neutrality or the principle of necessity. The due diligence obligations are found, for example, in the non-use of force principle in the Declaration on Friendly Relations[111] and the Definition of Aggression. Other obligations referenced by authors are derived from the law of neutrality or a territorial state's general obligation of holding sovereignty of its territory by policing and keeping it checked, or similar obligations.[112] From there, scholars argue that this violation of an obligation towards the victim state legitimizes self-defence, as necessity calls for the victim state to address the violation by the non-state actors with force. Some authors instead claim that necessity in itself legitimizes the actions of self-defence. In other words, the act of self-defence is justified by authors claiming the defensive measures to be necessary because the territorial state is unwilling or unable to counter the non-state actor operating in its territory, or for not upholding its legal obligation of due diligence. In the case of due diligence, the argument is that the victim state may legitimately take the place of the territorial state. This because of the necessity of upholding the obligation which the territorial state has violated by letting terrorists operate from its territory.

Dinstein utilizes this sort of argument and is often referred to by other scholars.[113] He argues that if a territorial state does not condone the operation of non-state actors emanating from within its territory, but is unable to

[111] Scholars refer to, in the Declaration, to the duty of "Every state […] to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." See Declaration on Friendly Relations (n 27).

[112] See e.g. Lobo De Souza (n 101) 206–208; Schmitt (n 104) 26–27; Lubell (n 99) 38–39; Deeks (n 103) 502–503; Ghanbari Amirhandeh (n 94) 142–143.

[113] See e.g. Finucane (n 93) 61; Waseem Ahmad Qureshi, 'Examining the Legitimacy and Reasonableness of the Use of Force: From Just War Doctrine to the Unwilling-or-Unable Test' (2017) 42 Oklahoma City University Law Review 221, 272.

politically, militarily, or otherwise prevent these operations, the victim state needs not to just endure such attacks just because the non-state actors are not directly attributable to the territorial state. In the same way, Dinstein stresses that a territorial state which permits its territory to be used to mount armed attacks against a victim state, a territorial state cannot expect its territory to be insulated against measures of self-defence. According to Dinstein, this is an extraordinary situation demanding an extraordinary solution in international law. Dinstein asserts that self-defence against the non-state actors in this situation is permitted in accordance with art. 51 of the UN Charter, because the victim state does what the territorial state should have done if it had the means to perform its duty. Dinstein deems this action by the victim state as 'necessity'. Dinstein underscores that the definition of this 'necessity' is not the same definition proclaimed by ILC in the Articles on State Responsibility where self-defence in art. 21 was separated from necessity in art. 25, which he sees as an erroneous and artificial distinction. 'Necessity' in this case, is where self-defence and necessity are linked, as US Secretary of State Webster deemed in connection to the *Caroline* incident. Dinstein names this formula as extraterritorial law enforcement, where a victim state, which is the target of an armed attack committed by non-state actors, is entitled to enforce international law extra-territorially when and if a territorial state is unable or unwilling to prevent repetition of said armed attack.[114]

A scholar also often referred to[115] and who employs a similar line of reasoning is Deeks. She argues that in a context where a state has attacked another state, the victim state deeming whether a forceful response is necessary or not, will be contemplating if the response of force on the territory of the state that originally attacked it is necessary. In the event of an attack by a non-state actor, the attack almost always emanates from the territory of a state with which the victim state is not in conflict with, which means that the victim state must consider if the forceful response is to be taken on another state's territory. Deeks asserts that, in consequence, in the case of non-state actors, the necessity inquiry instead has two dimensions. These two dimensions consist of (1) that the victim state must consider if the attack is a type which requires the victim state to respond with a use of force against the non-state actor, and concurrently, (2) to evaluate the conditions and abilities of the territorial state from where the non-state actors launched their attack. Deeks means that the latter evaluation is the so called 'unwilling or unable' test

[114] Dinstein (n 106) 268–272.
[115] See e.g. Qureshi (n 113) 272–273; Finucane (n 93) 86.

where the victim state assesses if the territorial state is prepared to suppress the threat of the non-state actors. If the territorial state is neither willing nor able, the victim state may, if it deems it necessary and if the force also is proportional and timely, lawfully deploy a forceful response in the territorial state. However, if the territorial state is both willing and able to suppress the threat, the requirement of necessity is not satisfied, and the victim state's force is unlawful.[116]

Lobo de Souza argues similarly, meaning that there is no reason for a victim state to await measures from a territorial state against non-state actors within its territory when the territorial state is unable or unwilling to take such measures. He asserts that the failure of the territorial state to fulfil its duty to prevent non-state actors from operating in its territory necessitates the right of the victim state to implement forceful measures in self-defence, even though the non-state actors are headquartered abroad.[117] Qureshi, in the same way, argues that a use of force in self-defence must follow the principle of necessity, which is decided by the unwilling or unable test.[118]

Finucane deploys his reasoning in a similar way, arguing that states, under customary international law, enjoy a right of self-defence against non-state actors, irrespective of the territorial state's consent. He asserts that the threshold inquiry regarding unilateral use of force in self-defence is decided by the principles of necessity. The lawfulness of a victim state's violation of an intervention into a territorial state is dependent on the reality of a threat and if the territorial state has or will take adequate measures to counter the threat. If the territorial state, due to unwillingness or inability, fails to neutralize or incapacitate the non-state actors on its territory, it loses its negative sovereignty, necessitating forceful response from the victim state, opening itself up to being part of the conflict between the victim state and the non-state actors operating within its borders.[119]

In the same way, Ghanbari Amirhandeh suggests that irrespective of whether an armed attack has been committed by a non-state actor or a state, the following military response, labelled as self-defence or a state of necessity, means the same in practice, since it shall adhere and remain within the borders of principles applicable in the course of defensive measures, i.e. proportionality and necessity. Applying these principles means that the victim

[116] Deeks (n 103) 494–495.
[117] Lobo De Souza (n 101) 233–236.
[118] Qureshi (n 113) 271–272.
[119] Finucane (n 93) 85–88.

state shall not override the whole territory of a territorial state, only certain part of a territory which the non-state actors *de facto* govern and which the territorial state has lost control over.[120]

Schmitt, in a similar fashion, asserts that assessing the lawfulness of an intervention on another state's territory to conduct anti-terrorism operations, involves more than a balancing of two conflicting international law rights. It also entails a breach, either intentional or due to an inability to comply, of a duty owed to other states by the territorial state when letting terrorism-related activities occur on its territory.[121] Lubell similarly argues that in order for a forcible response in self-defence to be lawful, the victim of the armed attack must attempt to have the territorial state take measures against the non-state actor. If it does not, the territorial state may be in violation of the UN Charter prohibition on the use of force or other international obligations. According to Lubell, in cases where the territorial state chooses not to take the demanded measures in which it may be in violation of other international obligations, or it might claim an inability to act, the victim state could claim to have no remaining option but to use force i.e., by necessity.[122]

In a similar fashion, Trapp asserts that a state acquiescence or constant failure to suppress terrorist activities, can make self-defence against this state necessary. If the measures are also appropriately targeted, the violation of the territorial state's sovereignty and territorial integrity falls within the scope of the art. 51 of the UN Charter exception.[123] Referencing Dinstein's reasoning, Noorda asserts that the right to use force in response to an attack committed by a non-state actor applies when there is a relationship between the territorial state and the victim state constituted by the territorial state's failure to control the non-state actor, or letting the non-state actor launch attacks on its territory. The victim state may then legitimately respond to the non-state actor in the manner the territorial state should have done.[124] Krajewski asserts that a temporary violation of a territorial state's sovereignty by a victim state can be justified if a territorial state not actively prevents and pursues activities of non-state actors on its territory. According to Krajewski, this justification stems from an analogy to the classical laws of state neutrality, where the territory of a state may be attacked if military activities emanate from the

[120] Ghanbari Amirhandeh (n 94) 142–143.
[121] Schmitt (n 104) 26–27.
[122] Lubell (n 99) 45–47.
[123] Kimberley N Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 International and Comparative Law Quarterly 141, 154–155.
[124] Noorda (n 102) 344–345.

neutral territory without attempts from the neutral state to curb the military activities. He means that a territorial state forfeits it right to territorial integrity by allowing non-state actors from carrying out armed attacks against other states from its territory.[125]

3.1.2.5 State Practice

This right of self-defence against non-state actors, either predicated on the coupling of self-defence and necessity or a direct right of self-defence, is contingent on a presentation of state practice, justifications from states which has been subjected to armed attacks, and the subsequent responses of the international community. This presentation undertaken by scholars, ultimately aims to show the continued precedence of the *Caroline* formula. By showing that the formula has been practiced by states both before and after the inception of the UN Charter, they mean to prove that the customary right of self-defence against non-state actors has always existed alongside the UN Charter form of self-defence, thereby showing that self-defence responses against both state and non-state targets are lawful within the use of force regime. This presentation of examples of state practice consists of a range of different incidents: US incursion into Mexico 1916 against non-state actors[126], Soviet Union interventions in Romania and Mongolia 1921[127], French intervention against Algerian rebels in Tunisia 1958[128], Israel incursion into Ugandan territory to rescue Israeli citizens from Palestinian

[125] Markus Krajewski, 'Preventive Use of Force and Military Actions against Non-State Actors: Revisiting the Right of Self-Defense in Insecure Times' (2005) 5 Baltic Yearbook of International Law 1, 24–25.

[126] Finucane and Dinstein see this as a notable incident because the US premised its legal claim on necessity of self-defence arising from Mexico's lack of control of its territory, which the US saw as an entitlement to fulfil the international legal obligation neglected by Mexico. US separated the acts of the non-state actor from the state of Mexico. See Finucane (n 93) 68–69; Dinstein (n 106) 273; Paust (n 105) 246–247.

[127] Finucane writes that the Soviet Union's recourse to force was necessary because Romania was incapable of dispersing the non-state actors on its territory. Against Mongolia, Finucane asserts that the Soviet Union resorted to force because Mongolia was unwilling or unable to control its own territory from non-state actors and Finucane defended its actions on the basis of self-defence, see Finucane (n 93) 69–70.

[128] Lobo de Souza means that the absence of effort in good faith to control and disband the Algerian rebels and to cooperate with France, was the reason for France's use of force in self-defence on Tunisian territory, see Lobo De Souza (n 101) 231.

hijackers 1976[129], Israel raids against PLO in Lebanon 1981 and 1982[130], Israeli attacks against PLO in Tunisia in 1985[131], Israeli airstrikes against PLO in Lebanon 1988[132], Russian intervention against Afghan Mujahidin in Afghanistan 1993[133], Israeli attacks against Hezbollah in Lebanon 1996[134], Turkish and Iranian interventions against PKK in Iraq 1995-96[135], US raids against Al-Qaeda in Afghanistan and Sudan 1998[136], US military response to 9/11 attacks in Afghanistan 2001[137], Russian intervention against Chechen

[129] According to Finucane, Israel argued that its intervention was lawful because Uganda did not exercise sovereignty over its territory and was not capable of handling the threat of half a dozen terrorists. International reactions was mixed, but efforts in the UNSC to condemn Israel failed and Uganda made no effort to convene the UNGA under the 'Uniting for Peace' procedure, see Finucane (n 93) 71–72; Ghanbari Amirhandeh (n 94) 137; Trapp (n 123) 147–148.

[130] Scholars sees this as an illustrative example of self-defence in necessity. Israel excused its incursion in consequence of Lebanon's inability to control the Palestinian military presence on its territory. According to Finucane, the 1982 raid was deemed unlawful by the UN. See Finucane (n 93) 72; Dinstein (n 106) 273; Ghanbari Amirhandeh (n 94) 135; Deeks (n 103) 549.

[131]Trapp writes that in this case, Israel argued that its use of force which violated Tunisian territory was necessary and proportionate, given Tunisia's failure to prevent its territory from being used as a base of operations for terrorists, see Trapp (n 123) 148–149; Ghanbari Amirhandeh (n 94) 135.

[132] According to Finucane, Israel argued that its intervention was necessary given Lebanon's lack of control over its territory. US vetoed a proposed UNSC resolution condemning Israel, see Finucane (n 93) 73.

[133] Finucane writes that Russia claimed self-defence valid, not against the Afghan state, but only against the non-state actors, see ibid 73–74.

[134] Finucane see the incident as an example of self-defence in necessity since Israel claimed the attacks as necessary in consequence of the Lebanese Government's inability and unwillingness to control Hezbollah's activities. Finucane writes that Russia and Germany criticised the attacks as disproportionate and Egypt explicitly invoked the *Caroline* formula, albeit that Israel had not complied with the requirements of the formula, see ibid 73; Deeks (n 103) 549.

[135] Ghanbari Amirhandeh and Finucane writes that Turkey and Iran similarly claimed its attacks against PKK targets as necessary in consequence of Iraq's inability to curb terrorist activities on its territory. Finucane (n 93) 76; Ghanbari Amirhandeh (n 94) 137; Deeks (n 103) 549.

[136] The US asserted its right of use of force in self-defence against Al-Qaeda. According to Ghanbari Amirhandeh the reactions suggests a measure of acceptance and Schmitt asserts there was implied acceptance to a state's right to react forcefully to terrorism, as long as the action is based on reliable information, see Ghanbari Amirhandeh (n 94) 138; Schmitt (n 104) 7–8; Paust (n 105) 247–248; Trapp (n 123) 149; Deeks (n 103) 549.

[137] Authors view this as a landmark case, where the right of self-defence against non-state actors was definitively recognized. Authors point to the UNSC's recognition of the US's inherent right of self-defence in Resolution 1368, as well as that the international community generally endorsed the validity of relying on self-defence as a response to the attacks, see Finucane (n 79) 77; Lubell (n 85) 29–30; Ghanbari Amirhandeh (n 80) 138–139; Lobo De Souza (n 87) 219–220; Greenwood (n 19) 24–25; Schmitt (n 89) 10–11; Deeks (n 88) 549; Trapp (n 108) 150–151; Paust (n 90) 248–249; Dinstein sees this not as a self-defence action against non-state actors, but as a "classical state versus state exercise of self-defence" because the Taliban, the *de facto* government at the time, were attributed the attacks and subsequently targeted in the military operation, see Dinstein (n 91) 261.

rebels in Georgia 2002[138], Israeli attacks against Islamic Jihad in Syria 2003[139], Israeli military response to Hezbollah in Lebanon 2006[140], Ethiopia's claim to use force against non-state actors in Somalia 2006[141], Colombian raid upon non-state actors in Ecuador 2008[142], Turkish incursion in Iraq against PKK 2007-08[143], US intervention in Pakistan to kill Al-Qaeda leader Osama Bin laden 2011[144], the coalition of states intervening against ISIL in Syria[145].

3.1.2.6 Related Lines of Reasoning

In a related line of reasoning, authors advance, as above, that a victim state's breach into another state's territory is justified if this is necessitated because non-state actors operate freely and commit armed attacks from that territory.

[138] According to Lobo de Souza, Russia claimed that the Chechen came from a territorial enclave outside of Georgia's control and, since Georgia was unwilling and unable to counteract the terrorist threat, the incursion was necessary. Finucane asserts that the US agreed to the legal principle applied by Russia, but not how it was applied to the facts, see Finucane (n 93) 78–79; Lobo De Souza (n 101) 231–232; Trapp (n 123) 153; Deeks (n 103) 549.

[139] Trapp asserts that Israel used similar arguments as it did in 1985, when in this case accusing Syria of being complicit to the terrorist attacks by the Islamic Jihad. Trapp therefore sees this as an argument where Israel justifies its incursion into Syrian territory based on Syrian complicity in terrorism, an inability to rely on Syria following its international obligations, and the targeted nature of the defensive measures directly against the terrorist base of operations. See Trapp (n 123) 152; Deeks (n 103) 549.

[140]Authors view this as a further recognition of the right of self-defence against non-state actors in cases where states has lost control of its own territory. Finucane claims that the UNSC, in the resolution it issued in response to the conflict, because it recognized Lebanon's loss of control over its territory and implicitly legitimized Israel's claim of self-defence. Lobo de Souza writes that Israel's action was the object of severe criticism by many countries, however, criticism was founded on the non-proportionality of the actions, not the self-defence against Hezbollah, see Finucane (n 93) 79–80; Lobo De Souza (n 101) 220–222; Dinstein (n 106) 273; Lubell (n 99) 30; Trapp (n 123) 153–154.

[141] According to Lubell, Ethiopia's claim was predicated upon a need to defend itself, as is it felt threatened by the Islamic militia operating there. The AU declared Ethiopia had a legitimate right to self-defence, see Lubell (n 99) 30.

[142] Finucane writes that Colombia justified its incursion into Ecuador in consequence of Ecuador's violation of international norms which prohibits states from harboring terrorists and demands a territorial state to inhibit the non-state actors operating in it. According to Finucane, Colombia's actions was condemned by Ecuador, Venezuela and the Organization of American States, however, neither the UNSC nor the UNGA took any action, see Finucane (n 93) 81–82; Dinstein (n 106) 273; Ghanbari Amirhandeh (n 94) 135.

[143] Dinstein deems the incident as an example of extraterritorial law enforcement as means of self-defence since Turkeys reason for the attack was attempting to deny PKK a sanctuary within Iraqi borders, see Dinstein (n 106) 273; Lubell (n 99) 30.

[144] According to Qureshi, the US justified the use of force by contending that Pakistan was unwilling or unable to fight the terrorists, see Qureshi (n 113) 269; Dinstein (n 106) 273.

[145] Lobo de Souza suggest that the EU-coalition characterized the terrorist attacks on France in 2015 as an armed aggression, however, the UNSC did not reference the right of self-defence in its issued Resolution 2249, but Lobo de Souza contends that the resolution contains an implicit endorsement inferred from a systematic interpretation of its provisions, i.a. since the resolution references Resolution 1368 and 1373, see Lobo De Souza (n 101) 222–223; Qureshi (n 113) 269.

However, these authors do not derive this notion from custom, but from the Articles on State Responsibility. Authors of this line of reasoning argue that art. 51 of the UN Charter is the primary norm which upholds the right of the victim state to invoke the right of self-defence against the perpetrator of an armed attack, while the Articles on State Responsibility constitutes the secondary norm which precludes the wrongfulness of the intrusion in the territorial state's territory.

Tsagourias argues that in cases where the territory of a state is used by non-state actors to commit an armed attack, there are two relations. The first one is between the victim state and the attacking non-state actor, the second between the victim state and the territorial state. According to Tsagourias, this first relationship falls under the primary rule of self-defence, while the second relationship revolves around the obligations that the victim state violates during the recourse of self-defence owed to the territorial state, whereas the territorial state is a third state, in relationship to the non-state actor and the victim state. Tsagourias suggest that in such situations art. 21 of the Articles on State Responsibility is applicable.[146] Tsagourias argues that the employed force by the victim state does not fall within the terms of art. 2(4) of the UN Charter, because it falls below the qualifications contained therein in virtue of that the self-defence response is not intended to coerce the territorial state, but to defend against attacks emanating from the territory of the state. Instead, Tsagourias asserts, such a use of force violates the territorial state's sovereignty. It is such an incidental breach by the victim state to which art. 21 of the Articles on State Responsibility applies, exonerating the victim state, provided that the self-defence is otherwise lawfully exercised, i.e., in compliance with the principles of necessity and proportionality.[147] Tsagourias asserts that this application of self-defence is corroborated by state practice.[148] Paddeu similarly argues that art. 21 of the Articles on State Responsibility explains why force under art. 51 of the UN Charter does not constitute a

[146] Art. 21 of the Articles on State Responsibility reads: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.".

[147] Tsagourias (n 82) 819–823.

[148] Tsagourias references UK statements when acting against ISIL in Syria, stating that action "would not be against the Syrian regime; Israeli action against Hezbollah 2006 and PLO 1982, both in Lebanon, when claiming that Israel did not attack Lebanon but the non-state actors; Turkish incursions into Iraq against PKK in 2007-08 when Iraq condemned the incursion as a violation of Iraq's sovereignty but not as an use of force; Colombia's intervention against non-state actors in Ecuador in 2008 when Ecuador condemned the acts as violation of Ecuador's territorial integrity and sovereignty; US operations in Pakistan 2013 was condemned as violations of Pakistan's territorial integrity; US action in Sudan and Afghanistan 1998 was condemned by the Arab League as a violation of sovereignty. See ibid 822–823.

violation of the territorial state's rights, including territorial integrity. Paddeu asserts that while art. 21 of the Articles on State Responsibility assumes an inter-state use of force, it may be extended to the justification of the interference of third states, where there is a mismatch between the parties to the affected legal relations. She infers this from the fact that in the past, states have justified the inception of maritime exclusion zones, affecting third party rights of free navigation, on the basis of self-defence. However, Paddeu underscores that this solution would still require acceptance of states to become binding, through practice and *opinio juris*.[149]

De Wet instead suggest that the secondary norm could be art. 25(1)(a) of the Articles on State Responsibility.[150] De Wet argues for a more flexible relationship between primary and secondary norms, where the application of art. 51 of the UN Charter is informed by art. 25(1)(a) of the Articles on State Responsibility. De Wet Acknowledges that such a reading would be quite novel, considering that the necessity referred to in art. 25(1)(a) is a construction separate from the customary principle of necessity that governs the right of self-defence in art. 51 of the UN Charter, and that there is nothing in the work of the ILC which refers to a link between these different versions of necessity. However, de Wet contends, there is nothing in the work of the ILC nor in state practice which excludes such a link, and it would additionally infuse the imprecise customary principle of necessity with more exact benchmarks. De Wet asserts that the inability of a state to control its own territory where non-state actors operate and perpetrate attacks from, can pose a grave and imminent peril to the national security of other states, which is an essential interest for the security of other states. This makes an application of necessity as stated in art. 25(1)(a) in the Articles on State Responsibility possible. De Wet means that the application of this provision will require victim states to limit its defensive measures strictly to the source of the attack, meaning that, in the case of an unable state, only the non-state actors would be targeted, not the territorial state, which would consolidate the drastic consequences that self-defence measures have on a territorial state's sovereignty.[151]

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[149] Federica I Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 Leiden Journal of International Law 93, 113–115.

[150] Art. 25 (1)(a) of the Articles on State Responsibility read as follows "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act […] is the only way for the State to safeguard an essential interest against a grave and imminent peril.".

[151] De Wet (n 45) 107–110.

3.2 The Restrictivists

International legal scholars who propone a restrictivist line of reasoning argue for an interpretation of the legal regime which restricts self-defence to only encompass inter-state relations, and which qualify an act by a non-state actor as an armed attack according to art. 51 of the UN Charter, only if its authorship is attributable to a state, and where this threshold for attribution is set high. Restrictivists often dismiss or questions the meaning of recent state practice, assigning little weight to its meaning for the interpretation of the UN Charter, or for the development and crystallization of customary international law. However, before delving into that sort of argumentation, restrictivists discuss fundamental outsets for their interpretation of the self-defence regime to strengthen their legal argumentation.

3.2.1.1 Interpretation of Art. 2(4) and 51 of the UN Charter

A starting point for most restrictivists is to discuss the meaning and possible interpretations of art. 51 of the UN Charter. As presented above, expansionists interpret art. 51 of the UN Charter's silence regarding the *ratione personae* dimension of armed attack, that the Charter permits, or at least does not exclude, the possibility of non-state actors perpetrating an armed attack. Restrictivist authors tend to look at the text of the UN Charter, its purpose, drafting context and the logic within, to challenge the feasibility of such an interpretation.

Tladi, for instance, highlights that art. 51 of the UN Charter is situated in chapter VII of the UN Charter, where the powers of the UNSC are enshrined. Tladi means that the right to use unilateral force in self-defence is a temporary, exceptional right and should be seen as such in light of the collective security framework which the UN Charter intended to establish. Additionally, Tladi asserts that art. 51 is an exception to art. 2(4), and since art. 2(4) is concerned with inter-state use of force, it would be expected that art. 51, the exception, would cover the same subjects. Tladi further contends that the broad interpretation of 'armed attack', to include attacks from non-state actors with no state involvement, would significantly reduce the scope of the prohibition on the use of force in the UN Charter. Further, Tladi observes that if the exception to the prohibition to the use of force is interpreted broadly, the direct consequence is that the primary rule regulated in art. 2(4) is rendered meaningless. Moreover, Tladi argues that art. 51 does not exist in a vacuum, but in the context of other principles of international law, including principles of the respect for the territorial integrity and

sovereignty of other states. According to Tladi, the use of force in the territory of another state, even if minimal, is a violation of that third state's territorial integrity and sovereignty. Tladi concludes that an interpretation of art. 51 that permits the use of force in self-defence against the territory of a non-consenting third state would violate that state's sovereignty and territorial integrity and would impair these principles. Therefore, In Tladi's opinion, a contextual interpretation supports an inter-state reading of art. 51 of the UN Charter.[152]

Corten similarly provides that since art. 51 of the UN Charter is an exception to the general prohibition on the use of force of art. 2(4) of the UN Charter, art. 51 must be understood to only encompass resort to force in international relations, since art. 2(4) regulates that 'all members' are to refrain from the use of force. Corten contends that this corresponds with a reading of the UN Charter in its entirety, as well as an interpretation of its preparatory works.[153]

O'Connell opines that self-defence in art. 51 of the UN Charter is an inherent right but severely limited, drawing upon its relationship to art. 2(4), the role created for the UNSC in the UN Charter, and its requirement of an occurred armed attack.[154] In a similar fashion, Buckman concludes that given the significance of the general prohibition on the use of force, art. 51 of the UN Charter can only be seen as an extremely limited exception. Buckman further observes that the *travaux préparatoires* of the UN Charter and early litigation shows that art. 51 of the UN Charter was intended to refer only to armed attacks by other states.[155] Gray observes that the provisions in the UN Charter regulating the use of force was a response to World War II and accordingly are directed at inter-state conflict.[156]

3.2.1.2 The Jurisprudence of the ICJ

Another important source and starting point for restrictivist argumentation is the jurisprudence of the ICJ. Authors emphasize the Court's interpretation as

[152] Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?' in Mary Ellen O'Connell, Christian J Tams and Dire Tladi, *Self-Defence against Non-State Actors* (1st edn, Cambridge University Press 2019) 61–65.

[153] Corten (n 8) 162–164.

[154] Mary Ellen O'Connell, 'Self-Defence, Pernicious Doctrines, Peremptory Norms' in Mary Ellen O'Connell, Christian J Tams and Dire Tladi, *Self-Defence against Non-State Actors* (1st edn, Cambridge University Press 2019) 182.

[155] Rachel Buckman, 'Expansive Application of Self-Defence: Protecting Security at the Expense of Legality' (2019) 17 New Zealand Journal of Public and International Law 153, 155–156.

[156] Gray (n 7) 10.

seminal to ascertaining the meaning of the self-defence in the UN Charter, or at least how the law stood prior to 9/11. Tladi, for example, views judicial practice, especially from the ICJ, useful as a subsidiary means of determining the appropriate interpretation of art. 51 of the UN Charter. Tladi asserts that the many judgements, Advisory Opinions, and individual opinions of members of the Court have shed light on the proper interpretation of art. 51, and likewise, the corresponding rule of customary international law.[157] Enabulele also stresses the role of the Court's interpretation, asserting that the duty to define armed attack and clarify the ambit of art. 51 of the UN Charter naturally falls on the ICJ.[158] Martin asserts that, regarding scholars which challenge the authority of the ICJ interpretation of the state of the law, the judgments of the ICJ is not to be easily discounted, especially when making arguments about what the current state of the law is, and in the absence of convincing contrary evidence. Martin observes that in the course of legal argumentation, it is dangerous to the international rule of law to dismiss and disregard the judgments of the ICJ.[159] Similarly Buckman contends that as the ICJ is the UN's principial judicial organ and the guardian of legality for the international community, the decisions of ICJ is the place to look for authoritative statements of the law and if the law has changed, ICJ would rule accordingly.[160]

The Court's verdict in *Nicaragua* is often presented as fundamental for authors, often referenced, and held as decisive when it comes to deciding the scope of art. 51, or at least how the law stood prior to 9/11. Corten holds *Nicaragua* and *Legality of the Threat or Use of Nuclear Weapons*[161] as two classical precedents in the domain of the non-use of force. According to Corten, in *Nicaragua*, self-defence was envisaged by the Court in a strictly inter-state perspective. States could be held responsible for activities of irregular groups if providing support for their activities, but such support did not equate to an armed aggression. Corten writes that it was further significant since it brought up the Definition of Aggression and cited treaty instruments defining self-defence as an inter-state concept. Corten states that in *Nuclear Weapons*, the Court did not stray from this classical conception, referencing

[157] Tladi (n 152) 54–55.

[158] Amos O Enabulele, 'Use of Force by International/Regional Non- State Actors: No Armed Attack, No Self-Defence' (2010) 12 European Journal of Law Reform 209, 212.

[159] Craig Martin, 'Challenging and Refining the "Unwilling or Unable" Doctrine' (2019) 52 Vanderbilt Journal of Transnational law 387, 414–415.

[160] Buckman (n 155) 158.

[161] *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion) ICJ Reports 1996, 246. [Hereinafter: *Nuclear Weapons*]

that the Court held the prohibition on the use of force, and self-defence as its exception, only applicable to states.[162]

O'Connor asserts that the Court, in *Nicaragua*, held that an armed attack must be attributed to a state, and that this has been the prevailing interpretation on the state of the law for the past 50 years. She also highlights that the ICJ referenced art. 3(g) in the Definition of Aggression as a reflection of customary international law at the time.[163] Cenic similarly concludes that the state of the law before 9/11 dictated that state involvement was required for a state to be held responsible if shown that the state exercised effective control, as the ICJ held in *Nicaragua* when it referenced art. 3(g) in the Definition of Aggression, as reflective of customary international law.[164]

Buckman asserts that the test for attribution before 9/11 is to be found in *Nicaragua*, and that for an attack by non-state actors to qualify as an armed attack, which triggers art. 51 of the UN Charter, it needs to be attributable to a host state, whereas the host state must have had effective control over the non-state actors.[165] Martin holds that the standard presented by the ICJ in *Nicaragua*, consisting of that a territorial state must have been sufficiently involved if a victim state wants to justify a use of force in self-defence, continues to be the governing test for attribution.[166] Gray similarly asserts that prior to 9/11, the stance taken by the Court in *Nicaragua*, that is, the requirement in art. 3(g) in the Definition of Aggression i.e. the sending of non-state actors by or on behalf of a state or its substantial involvement therein, was applicable to the concept of armed attack and widely accepted by states.[167] Tladi highlights that the *Nicaragua* judgement is highly consistent with the idea that armed attack in art. 51 of the UN Charter is applicable in an inter-state context, and that the possibility of attribution is significantly reduced to only include cases where the state exercises effective control over the non-state actors.[168] Brunnee and Toope view *Nicaragua* as a landmark case built on the Definition of Aggression, where the ICJ underscored that only attacks by a state or attacks attributable to a state could

[162] Corten (n 8) 188–189.

[163] Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group' (2016) 3 Journal on the Use of Force and International Law 70, 83.

[164] Sonja Cenic, 'State Responsibility and Self-Defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter Been Widened as a Result of the US Response to 9/11?' (2007) 14 Australian International Law Journal 201, 205–207.

[165] Buckman (n 155) 157–158.

[166] Martin (n 159) 450.

[167] Gray (n 84) 207.

[168] Tladi (n 152) 55–56.

trigger the right to use force in self-defence, thereby reading the 'substantial involvement' criterium in the Definition of Aggression as narrow.[169]

From asserting the precedence of the *Nicaragua* judgment, authors present the remaining jurisprudence of the Court involving self-defence against non-state actors, concluding that the ICJ has held a consistent or mostly consistent position regarding self-defence against non-state actors. For restrictivists this further evidences the interpretation that armed attacks can solely emanate from a state or from non-state actors that are under the effective control of a state.

Corten states that the Court's holdings in *Nicaragua*, where the Court held that self-defence within the meaning of art. 51 of the UN Charter is confined to relations between states, is confirmed by two subsequent judgements by the Court: *Israeli Wall* and *Armed Activities*. Corten asserts that in *Israeli Wall* the Court rejected the idea that states can invoke self-defence against non-state actors, due to that the Court deemed art. 51 of the UN Charter to only recognize the existence of an inherent right of self-defence in the case of an armed attack by one state against another state. In relation to *Armed Activities*, Corten highlights that the Court saw the activities of the armed bands and irregulars in question as non-imputable to the DRC, in accordance with the requirements laid out in art. 3(g) of the Definition of Aggression. In Corten's view, this was a reaffirmation by the Court that its stance on art. 51 of the UN Charter, and the possibility of non-state actors committing an armed attack, is strictly limited to an inter-state perspective. Therefore, he means that self-defence in response to attacks by non-state actors are only permitted if support by another state to non-state actors rises to such a level that it meets the requirements set in art. 3(g) in the Definition of Aggression. Corten asserts the Court's case law as greatly consistent. The 'indirect aggression' mechanism allows acts of non-state actors, under limited circumstances, to be imputed to a state, entailing a right to exercise of self-defence. Situations which are not within these limited circumstances is unattributable, which makes art. 2(4) and 51 of the UN Charter not applicable.[170]

[169] Jutta Brunnee and Stephen J Toope, 'Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable to Change International Law' (2018) 67 International and Comparative Law Quarterly 263, 268.

[170] Corten (n 8) 189–196.

Tladi asserts that in *Oil Platforms*[171] the Court held that in order to successfully claim self-defence, the US had to show that Iran, as a state, was responsible for the attacks launched against the US. Moreover, Tladi states, that in *Israeli Wall* the Court answered the question whether Israel was entitled to use force in self-defence in reliance on art. 51 in response to attacks committed by non-state actors in the Occupied Palestinian Territories. According to Tladi, the Court confirmed their prior view that art. 51 of the UN Charter applies to cases where a state launches armed attacks against another state. Tladi further means that in *Armed Activities*, the Court confirmed the fundamental element in its reasoning comprising of that the use of force in self-defence was impermissible against non-state actors on the territory of a non-consenting third state. According to Tladi, the Court drew upon art. 3(g) in the Definition of Aggression to conclude that it found no evidence of state involvement in the attacks perpetrated by the non-state actors, either direct or indirect of the DRC, or that the attacks emanated from non-state actors sent on the behalf of the DRC. Tladi concludes that the approach of the Court in its jurisprudence subsequent to the *Nicaragua* case, namely in *Oil Platforms*, *Israeli Wall* and *Armed Activities*, in which the Court rejects that the use of force in self-defence can be used in the territory of a third-state in response to attacks by non-state actors, has been fairly consistent, and that the Court sticks to its restrictive threshold in regards to attribution.[172]

Enabulele similarly concludes that the Court in three cases, *Oil Platforms*, *Israeli Wall* and *Armed Activities* followed its view in *Nicaragua*, where it consistently declared that a state cannot use force in self-defence against attacks carried out by non-state actors.[173] Referencing the same cases, Brunnée and Toope conclude that the ICJ has reaffirmed its narrow construction of the right of self-defence as staked out in *Nicaragua*.[174] Similarly, Martin asserts, referencing *Nicaragua* and *Armed Activities*, that the ICJ has repeatedly held that self-defence against a state which hosts non-state actors responsible for an armed attack, requires the territorial state to be "substantially involved" in the operations of the non-state actor.[175]

[171] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, (Judgment), (6 November 2003), ICJ Reports 2003, 161. [Hereinafter: *Oil Platforms*]

[172] Tladi (n 152) 56–61.

[173] Enabulele (n 158) 213.

[174] Brunnee and Toope (n 169) 268.

[175] Martin (n 159) 431–432.

O'Connell similarly holds *Oil Platforms* and *Israeli Wall* as cases where the ICJ reemphasized its stance in *Nicaragua*, asserting that an armed attack needs to be significant and attributable to the state against which force in self-defence is exercised, for said self-defence to be lawful. According to O'Connell, in *Armed Activities*, the Court dealt with a situation of a loss of control of territory to non-state actors, which the Court did not consider triggered art. 51 of the UN Charter, in virtue of the DRC not controlling the non-state actors. O'Connell therefore believes that the ICJ has consistently made it clear in cases concerning non-state actors, and in most of its cases concerning the use of force, that self-defence is lawful only against another state proven to be responsible for an unlawful armed attack. A territorial state which has failed to exercise obligations of due diligence, with respect to controlling non-state actors, has not made itself liable when violating such an obligation. Therefore, such a violation does not in itself give a victim state the right to use force in self-defence.[176] Cenic opines that the threshold for attribution set up in *Nicaragua* has been confirmed by the ICJ in its subsequent decisions, as well as the ICTY, making this threshold applicable pre 9/11.[177]

Some restrictivist authors do not see a full consistency in the Court's jurisprudence and hold that the Court's reasoning is open for interpretation which would allow for a less restrictive self-defence regime than the one upheld in *Nicaragua*. These authors interpret ambiguousness in the Court's different decisions, why, for these authors, it is called for to review recent state practice to inquire whether the law on self-defence has changed.

O'Connor believes that the Court offered little guidance in *Armed Activities* since it left open if and under what conditions international law provides for a right to self-defence against large-scale attacks by non-state actors.[178] Similarly, Murray claims that in *Armed Activities* the Court signaled a desire to adhere to the restrictive view on self-defence against non-state actors, without insisting on it as a dogma, which Murray means conveys the unsettled nature of the issue.[179] Flasch also sees the Court's findings ambiguous, suggesting that in both *Nicaragua* and in *Armed Activities* the Court dealt with measures in self-defence against the government of a state in response

[176] O'Connell (n 154) 196–201.

[177] Cenic (n 164) 205–206.

[178] O'Connor (n 163) 84.

[179] Donette Murray, 'Flawed and Unnecessary: The "Unwilling or Unable" Doctrine Pertaining to States' Use of Force in Self-Defence against Non-State Actors' in Jure Vidmar (ed), Ruth Bonnevalle-Kok, *Hague Yearbook of International Law / Annuaire de La Haye de droit international, Vol. 30 (2017)* (Brill | Nijhoff 2019) 68.

to an armed attack perpetrated by non-state actors, and that the Court refrained from dealing with the legality of using force in self-defence strictly against non-state actors, without involving the government. Flasch additionally points out that in *Israeli Wall*, the Court was unclear on the meaning of Resolutions 1368 and 1373 since it only pronounced that the resolutions were inapplicable due to the attacks emanated from a territory occupied by Israel, and not from foreign territory.[180] Gray notes that it is open to doubt whether the Court expressly ruled out self-defence against non-state actors in *Israeli Wall.* Gray asserts that, In *Armed Activities*, the Court deliberately and explicitly avoided the question of whether self-defence against non-state actors in the absence of state involvement in an armed attack, is allowed.[181]

Authors also point to the different Separate Opinions, Dissenting Opinions or Declarations by the members of the Court. Some of these authors dismiss the Judges arguments and their validity. Other authors highlight these and deem the stance of the ICJ as too restrictive, prompting these authors to later delve into state practice to inquire whether the law has changed. Tladi highlights Judge Schwebel's dissent in *Nicaragua*, where Schwebel asserted that the majority's decision, to not define a state's support of non-state actors in their attempt to overthrow the government of another state as an armed attack, was inconsistent with generally accepted doctrine, law, and practice. Tladi also highlights that Judge *ad hoc* Kateka in *Armed Activities* voiced a similar reasoning, as did Judge Koroma. Tladi contends that the Judges did not question attribution as such, but the standard required by the majority in *Nicaragua*, which they deemed was unreasonably high. Further, Tladi highlights Judge Koroma's declaration in *Armed Activities*, in which he argued that a state's powerlessness to hinder non-state actors from launching attacks from its territory could not constitute an armed attack. Tladi asserts that the Judge thereby excluded innocent states from the ambit of states in whose territory force in self-defence is not to be used.[182]

O'Connell discusses Judge Higgins' Separate Opinion in *Israeli Wall*, in which Higgins highlights that art. 51 of the UN Charter does not specify or mention whether an armed attack must come from a sovereign state. O'Connell opines that while the Judge is correct, Higgins clearly still agrees

[180] Olivia Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors' (2016) 3 Journal on the Use of Force and International Law 37, 49.

[181] Gray (n 7) 209.

[182] Tladi (n 152) 59–61.

with the majority's dictum, in where Israel is deemed the occupier in the territory of Occupied Palestinian Territory. O'Connell means that Judge Higgins thereby created an implicit contradiction, since an occupier controls the territory its occupying, akin to a government's control over its own territory, while for art. 51 to apply, Israel must have lost control of the territory, which Higgins acknowledged was not the case. O'Connell further points to the Separate Opinions of Judges Simma and Kooijmans, who argued that states acting in self-defence are allowed to carry out such self-defence on the territory of another state, regardless of the other state's responsibility for a non-state actor. O'Connell claims that in *Armed Activities* and *Oil Platforms* the ICJ majority clarified that self-defence is only lawful against a state proven responsible for an unlawful armed attack, meaning that, if a territorial state has failed its due diligence due to non-state actors operating in its territory, this failure alone does not justify another state's use of force in self-defence, which O'Connell means has been emphasized many times by the ICJ in cases on the use of force.[183]

Buckman means that Judges Kooijmans and Simma criticized the majority in their Separate Opinions in *Armed Activities* for taking a narrow approach. According to Buckman, Koojimans specifically argued that it's unreasonable to deny a state the right to self-defence just because there's no attacker state which an armed attack can be attributed to, which, according to Buckman, implies that the majority's decision in fact ruled out the right to self-defence against non-state actors.[184]

Corten notes that the Court's position in *Israeli Wall* was criticized by three judges in their opinions appended to the Advisory Opinion. Corten however contends that two of these Judges did not deny that the self-defence regime, which requires attributing attacks of non-state actors to a state, still represents existing law. Corten does note that these two judges however aired regret over the majority's decision to not make room for the new development concerning the law of self-defence, represented by Resolutions 1368 and 1373. In *Armed Activities*, from a reading of the submissions and the records of what was said in Court, Corten observes that the Court never concluded that a state can launch armed actions on the territory of another state, without having to prove that that state was itself responsible for a prior armed attack. Corten also highlights Judge Simma's Separate Opinion, where he asserts that Uganda could have acted in self-defence against the rebel groups in DRC

[183] O'Connell (n 154) 200–201.
[184] Buckman (n 155) 159.

territory. Corten is skeptical of this, as he contends that the Court clearly affirmed that Uganda had seriously infringed art. 2(4) of the UN Charter, which he means excludes any legal justification that may be raised against this conclusion and, at the same time, Uganda never argued that it directed its proponed self-defensive measures against the non-state actors within DRC's territory.[185]

Murray highlights that Judges Simma and Kooijmans in their Separate Opinions in *Armed Activities*, state that non-state actors can launch armed attacks, and that self-defence is allowed if it is in response to large-scale or continuous attacks not linked to a state. Murray claims this contrasts with the Court's stance, leaving it uncertain how non-state actors fits into the international legal system. Murray asserts that Judge Higgins's Separate Opinion, and Judges Buergenthal's and Kooijman's Declarations in *Israeli Wall* added to the ambiguousness of the Court's decisions, when they argued that armed attacks need not exclusively be committed by states.[186]

3.2.1.3 UNSC Resolution 1368 and 1373

An important point of restrictivist argumentation is to address Resolution 1368 and 1373 and discuss its importance for the progression of the law on self-defence. Restrictivist authors approach the resolutions differently by, for example, pointing out the location of the references to self-defence, the limited power of the UNSC to change the meaning of the Charter, the ambiguousness of the text used in the resolutions or the intention behind the resolutions. This leads to different conclusions, either deeming the resolutions meaningless or exaggerated regarding a progression of the self-defence regime.

Corten, before going into the interpretation of the resolutions, underscores that the UNSC does not have the power to revise the UN Charter by adopting resolutions. Thereafter, Corten assesses whether Resolution 1368 and 1373 acknowledges the possibility for a victim state to rely on the right of self-defence when justifying an attack on the territory of another state, without the victim state proving that the territorial state was directly or indirectly responsible for the attack. Corten asserts that firstly, the resolutions affirm that self-defence should be understood as in the UN charter, meaning that it cannot be argued for a change of the law with the adoption of the resolutions. Secondly, Corten contends, that the text of the resolutions only indicates that

[185] Corten (n 8) 198–202.
[186] Murray (n 179) 67–68.

an act of terrorism is a threat to international peace and security. Simultaneously, a state supporting terrorists within its territory can open itself up for a riposte in self-defence, if this riposte satisfies the remaining conditions of self-defence, i.e. holding another state responsible and defining it as an aggressor state. Corten means that there is nothing that points to the contrary, that the resolutions open up for a general right to self-defence to conduct attacks in the territory of any state, for the reason that terrorists hold the territory as a base of operations.[187]

Cenic contemplates whether the resolutions support self-defence against states that harbor terrorists, due to that the mention of an 'inherent right of self-defence' appears only in the resolutions' preambles and not in the operative parts. Cenic also stresses that neither resolution explicitly acknowledges the US's right to use of force in self-defence against another state. Further, Cenic discusses the wording 'accountable' in the resolutions. She whether it means that the use of force in self-defence would be a consequence, or whether less serious measures would be put in place, but she deems it unclear. Cenic also point out that both resolutions were adopted while it was still unclear who had committed the 9/11 attacks. Cenic therefore holds that neither resolution authorizes the use of force against the Taliban who harbored Al-Qaeda. With all this, Cenic concludes that it is unclear whether the resolutions really signify a shift in the law. Cenic means that this conclusion is accentuated by the UNSC's silence on the right of self-defence regarding post 9/11 terrorist attacks, even though many of the attacks were of sufficient gravity to amount to an armed attack. Cenic suggests that 9/11 was seen as an exceptional case which warranted some response from the UNSC, however not a response which was meant to clearly define the scope of the right of self-defence. Cenic also means that the resolutions indicate that the UNSC did not want to explicitly endorse the use of force in self-defence against states harboring terrorists.[188]

In a similar fashion, Tladi asserts that Resolutions 1368 and 1373 do not state, or imply, that self-defence in any way permits the use of force in the territory of a state to which attack could not be attributable. Tladi opines that in the context of self-defence against non-state actors, the resolutions solely contain a condemnation of the terrorist attacks and a reaffirmation of the right to self-defence, nothing more. According to Tladi, the resolutions never suggest that the inherent right of self-defence is exercisable against non-state actors, or

[187] Corten (n 8) 186–187.
[188] Cenic (n 164) 210.

mention non-state actors at all, certainly not in the context of the inherent right to self-defence. Therefore, Tladi concludes that there is nothing to learn about the permissibility of self-defence against non-state actors in an innocent third state, from the provisions of the resolutions.[189]

Similarly, O'Connell discusses Resolutions 1368 and 1373, and means that the UNSC cited the terms of art. 51, but not in the operative parts of the resolutions, nor did the UNSC authorise the use of force or make findings with respect to any of the other conditions of lawful self-defence. Additionally, the Council did not mention anything about attribution, necessity, or proportionality. O'Connell concludes that each UN organ has reflected an understanding of the UN Charter's principles on the use of force aligned with the plain terms of the text. O'Connell means that the only, often-cited exception, is Resolution 1368, which mentions art. 51 in the aftermath of a non-state actor attack. However, O'Connell contends such an example would not modify even legal principles subject to change through subsequent practice.[190]

Kajtar also highlights that the preamble of Resolution 1368 recognized the inherent right to self-defence in general, but that the binding text of the resolution only states that international terrorism is a threat to international peace and security. However, the resolution does not mention or classify the 9/11 events as an armed attack triggering the right to self-defence. Kajtar also points to the deliberations of the UNSC before adopting Resolution 1368, indicating that the UNSC members did not see the attacks as an armed attack, but a grave crime in the context of international criminal law and collective security measures. Kajtar additionally points out that the resolutions were adopted in an emotionally overheated atmosphere, as well as that the perpetrators were unknown, why it was unclear who the US could have exercised self-defence against. In light of this, Kajtar concludes that the meaning of Resolutions 1368 and 1373 is highly exaggerated.[191]

Murray contemplates the practice of the UNSC, pointing to it seemingly confirmed that non-state actors can mount armed attacks, evidenced by Resolutions 1368 and 1373, which labelled terrorists as threats to international peace and security. Yet, Murray asserts, even when the UNSC

[189] Tladi (n 152) 69–70.

[190] O'Connell (n 154) 211–212.

[191] Kajtar Gabor, 'Self-Defence Against Non-State Actors – Methodological Challenges' (2013) 54 Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominate: Sectio Iuridica 307, 318–324.

seemingly authorises action against private actors, the mandate is either significantly less norm-shaping than the headline might suggest or applies only to acts that demand attribution to a territorial state. This leads Murray to the conclusion that it is not established that attribution to a state is unnecessary for the triggering of a right to self-defence against non-state actors.[192]

Other restrictivists view the resolutions as important hallmarks, seeing them as additional reasons to why it is called for to review state practice, and the subsequent reactions of the international community, in order to conclude whether the law has changed. Martin, for example, views the adoption of Resolutions 1368 and 1373 as the UNSC characterizing the Taliban acquiescence of, and refusal to take action against, Al-Qaeda, as 'substantial involvement', and as a ground to attribute Al-Qaeda's actions to Afghanistan. Gray, in the same vein, highlights that it is stated in the preambles of Resolutions 1368 and 1373 that the UNSC is determined to combat the threat to international peace and security caused by terrorist acts, and that it concurrently recognizes the inherent right of individual and collective self-defence. Gray asserts that this reference to self-defence is of great significance because the UNSC does not commonly make express references to the right of self-defence in its resolutions. Drawing from this, Gray concludes that this response from the UNSC signifies that there could, under certain conditions, exist a right of self- defence against non-state actors responsible for acts of terrorism. However, Gray underscores the difficulty in establishing the scope of such a right.[193]

3.2.1.4 State Practice

Almost all restrictivist argumentation depends on an assessment of state practice, some with the purpose as to inquire whether a change of the law has occurred or as to reject its meaning for the progression of the law on self-defence. Some scholars reference the *Caroline* incident to dismiss its importance and its relevance, due to many expansionists relying on its meaning for the formation of customary international law. Others present it as an early example of self-defence against non-state actors.

Tladi is skeptical of whether the *Caroline* incident constitutes customary international law, contending that the reliance on the incident is based on flawed logic. Tladi asserts that for the exchange in the *Caroline* incident to

[192] Murray (n 179) 68–69.
[193] Gray (n 7) 206–207.

be formative, the use of force needed to be prohibited under international law at the time. In consequence of that, self-defence, as an exception under international law, is only logical if international law prohibits the resort to force. Yet, Tladi observes, at the time of the *Caroline* incident, international law did not prohibit the use of force, and the justifications advanced after the incident, therefore, appear to be political in purpose and not to shield against legal wrongfulness, which means that the *Caroline* incident cannot have been constitutive, or reflective, of customary international law. Also, Tladi asserts, it is not clear how the *Caroline* incident meets the requirements of a widespread or general practice, since those advancing it as constitutive of customary international law do not attempt to show acknowledgement by other states. Therefore, according to Tladi, the *Caroline* incident does not meet the generally accepted criteria for customary international law. Further, Tladi argues that world events since the incident have impacted customary international law on the use of force so much that a reference to the diplomatic exchange from 1842 is highly questionable. Therefore, Tladi concludes that the *Caroline* incident could reflect a rule of customary international law if it can be shown to meet the normal requirements for the formation of customary international law, why it must be assessed in the light of practice, especially more recent developments in the twentieth and twenty-first century.[194]

O'Connell argues similarly, rejecting the precedence of the *Caroline* exchange, as it contains no basis for a right of self-defence that survived the adoption of the UN Charter, this due to the the application of the UN regime refining and restraining norms originating from pre-UN Charter customary international law.[195]

Martin, on the other hand, discusses the incidents relevance for the unwilling or unable doctrine, since the exchange after the C*aroline* incident, according to Martin, suggests that a state has a right to use force in self-defence against non-state actors who are launching attacks from within the territory of another sovereign.[196] Murray similarly argues that the *Caroline* exchange and the formula extracted from it predates contemporary international law, with the formula consisting of the rule that threats of a certain magnitude could always be lawfully repelled, which was as an attempt to restrict the overly permissive use of force, at the time.[197]

[194] Tladi (n 152) 52–54.
[195] O'Connell (n 154) 217–218.
[196] Martin (n 159) 403–404.
[197] Murray (n 179) 83–84.

Before delving into examples of practice, some authors explain their methodology in assessing what elements are needed of state practice for it to not be deemed irrelevant for the formation of customary international law or treaty interpretation. The reaction of other states to actions in self-defence against non-state actors is considered crucial, as is that of legal justification to establish *opinio juris*. Tladi underscores that whether one assesses if a new rule of customary law has been formed or in regard to treaty interpretation, in accordance with art. 31(3)(b) or art. 31(3)(c) of the VCLT[198], it is important to assess the response of other states to conclude the meaning of the state practice.[199]

O'Connor asserts that for a new norm to be established in customary international law, two elements are necessary: (1) widespread practice, and (2) adherence based on a sense of legal obligation i.e., *opinio juris*. According to O'Connor, state practice must be nearly unanimous. Therefore, state actions are not only crucial, but equally significant is how states publicly justify their actions and the international community's response to these actions.[200] Brunnee and Toope similarly argues that new customary law is generated by a consistent, widespread, and representative practice, accompanied by *opinio juris* i.e., states' belief that they are legally obligated to behave in accordance with the norm. According to Brunnee and Toope these shifts therefore occur when a new standard is being embraced by consistent and widespread practice, with a clear *opinio juris.* And, according to Brunnee and Toope, as art. 51 of the UN Charter draws heavily from customary law, it is influenced by this ongoing process of evolution.[201]

Similarly, Murray claims that emerging custom requires a shared understanding and clarity about what is prohibited or permitted, meaning that the content of the rule must be foreseeable and specified. Moreover, Murray underscores that state practice, and the subsequent explanation of states' actions, must be sufficiently widespread, representative, and generally consistent.[202] O'Connell states that expansionists, in their argumentation, invoke state practice as evidence of a new rule of customary international law or as subsequent practice relevant to rule interpretation. On the other hand, O'Connell, opines that if art. 2(4) of the UN Charter was just a treaty principle

[198] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[199] Tladi (n 152) 50–52.
[200] O'Connor (n 163) 84–85.
[201] Brunnee and Toope (n 169) 279–280.
[202] Murray (n 179) 87–88.

or rule of customary international law, standard interpretation rules would include subsequent practice as a guide to meaning, even to some extent meaning that changes over time. But as it is *jus cogens*, the meaning is stable, and contrary state practice only has little relevance. Therefore, according to O'Connell, states that acknowledge the prohibition on the use of force as *jus cogens*, overlook this point about interpretation and the impact of state practice. O'Connell underscores that to avoid diluting art. 2(4), art. 51 must be interpreted to limit weakening the general prohibition, which means that only state practice indicating discernment toward a rule with wider reach is consistent with the *jus cogens* nature of the prohibition. Also, O'Connell opines, the general principles of necessity and proportionality that are part of the prohibition on the use of force must also be interpreted conservatively, as well as the principles of state responsibility. Therefore, according to O'Connell, the prohibition on the use of force and self-defence is a durable norm which will not fade under the pressure of illegal contrary practice. [203] In the same vein, Buckman asserts that subsequent practice can change the interpretation of treaties, including the UN Charter. However, Buckman points out, the norms regarding the use of force are *jus cogens* and can only be modified by a subsequent norm of the same status which is accepted and recognized by the international community of states, why any new rationale regarding the use of force needs firm legal footing.[204]

The examples of state practice, and the assessment of these are presented by scholars in a chronological order, often most by dividing the examples into pre 9/11 operations, the operations directly after 9/11 and the post 9/11 operations. The presentation of each example often starts with the justification by the state which has taken the defensive measures, thereafter discussing the subsequent reactions of the international community of the measures taken, and ending with a conclusion on what impact state practice has for the law on self-defence.

Regarding state practice before 9/11 several examples are analyzed. One of these are attacks by mercenaries in Benin in 1977 and the Seychelles in 1981, both discussed by Corten. Corten means that both examples show to be inter-state in character, and accusations were only made against other states, not non-state actors.[205]

[203] O'Connell (n 154) 248–250.
[204] Buckman (n 155) 165–166.
[205] Corten (n 8) 180–181.

Gray discusses the use of force by Israel in 1968 in Beirut against purported terrorists. Gray notes that Israel justified its actions with regards to that Lebanon had broken the ceasefire agreement and that Israel therefore had a right to self-defence. According to Gray, the UNSC unanimously condemned the Israeli actions. The US stated that the reason for self-defence was acceptable but that the measures were disproportionate. Gray also highlights the Israeli attacks in Tunis in 1985 where it justified its incursion by claiming that the measures were taken in self-defence against terrorist attacks by PLO. According to Gray, the resolution adopted on the matter by the UNSC condemned the Israeli action as a flagrant violation of the UN Charter, while only the US condoned Israel's argument. Gray also exemplifies US military action in Libya in 1986, where the US justified its air raids as measures in self-defence in accordance with art. 51 of the UN Charter in response to past terrorist attacks, that Libya was responsible for. Gray states that most states condemned the action, except for the UK and France, who joined the US in vetoing the UNSC resolution where the US was condemned for its actions. Another example raised is the US responsive measures against targets in Iraq in 1993. According to Gray, the US invoked art. 51 in its letter to the UNSC, where Russia and the UK offered express support of the US legal argument presented. China condemned the measures taken while other states generally said that they understood the actions. Gray deems this as that the international community was unsupportive concerning the legality of the actions.[206]

Another example of pre 9/11 state practice contemplated by authors is the US military action in Afghanistan and Sudan 1998. Corten highlights that the US itself, in its letter to the UNSC, made the connection between the terrorist groups and the states that allegedly harbored them. Corten highlights that the Non-Aligned Movement and the League of Arab States condemned the attacks against Sudan as a violation of sovereignty, territorial integrity, and international law, and that most states remained silent. He therefore views that the only thing this example shows, is that under certain circumstances, a state can be held responsible for an act of aggression because of the support it gives to a non-state actor committing an armed attack.[207] Gray claims that the US justified its attacks against the pharmaceutical plant and purported terrorist camp by claiming that Al-Qaeda used them to support its terrorist activities. Gray states that the reaction of the international community was generally muted, as well as that the UNSC never held a meeting. However, there were condemnations by the Non-Aligned Movement, Pakistan, and

[206] Gray (n 7) 202–204.
[207] Corten (n 8) 182–183.

Russia. States that did not expressly support or refrain from condemning the US were careful not to adopt this doctrine of self-defence.[208] Tladi means that the League of Arab States declared the US attack against the pharmaceutical plant as an attack on Sudanese sovereignty, why it cannot be seen as an example of state practice widening the law of self-defence.[209] Summarizing the pre 9/11 state practice, Gray asserts that states generally were not ready to formally condemn the US for its attacks in Baghdad, Afghanistan and Sudan. Only the UK and Russia openly supported the legality of the US actions in 1993, with Russia later abandoning its position for a more critical approach. Gray concludes that the failure of other states to condemn the US pre 9/11 be taken to indicate sympathy rather than acceptance of a legal doctrine.[210]

Concerning the meaning of practice by the US in Afghanistan post the 9/11 attacks, there are different views among authors. Some view the practice as that it may have changed the law, while others play down the importance of the practice, deeming it overstated.

Gray for instance opines, considering the almost universal support from other states for a US right to of self-defence in response to 9/11, that the question may be raised whether the law has changed.[211] Corten holds the justification by the US as vague as it invoked self-defence against 'other organizations and other states'. Corten highlights that some commentators view that this justification and the subsequent war in Afghanistan as a precedent for a new threshold for attribution consisting of mere 'toleration'. However, Corten assert it as unclear whether this can be deduced from the US operations post 9/11. He further argues that this example of practice does not have the meaning which would entail that self-defence must be envisaged outside of interstate relations to the level that a state may respond in self-defence without having shown that another state was guilty of a prior armed attack.[212] Cenic states that the global community's support for US actions in Afghanistan raises questions about a broader understanding of self-defence. However, Cenic means that the unprecedented nature of the 9/11 attacks made alternative responses unthinkable, particularly for EU and NATO members. This as well as that it being unclear whether attribution for the attacks to the Taliban regime is possible, and similarly, whether supporting the US actions

[208] Gray (n 7) 204–205.
[209] Tladi (n 152) 70–71.
[210] Gray (n 7) 205–206.
[211] ibid 206.
[212] Corten (n 8) 184.

implies acceptance of attributing non-state actor actions to harboring states.[213] Brunnee and Toope doubt the precedence of the US military operations in Afghanistan regarding self-defence against non-state actors, despite the massive support from the international community. Brunnee and Toope contend that neither the US nor the UK, in their reports of self-defence to the UNSC, invoked the unwilling or unable standard. The states rather highlighted the support of Al-Qaeda by the Taliban regime as the matter of importance, which Brunnee and Toope see as an effective reaffirmation of the criterium of 'substantial involvement'.[214] Tladi notes that the post 9/11 attacks were undertaken with virtually no condemnation by other states. Reviewing statements made by the US in connection to the subsequent military operation, he asserts it as clear that the US, at the time, deemed Afghanistan responsible for the 9/11 attacks to some extent, with some form of attribution referenced in their justifications of self-defence. Tladi suggests that the heftiness of the international response is debatable since it is possible that the lack of condemnations, and voicings of support, was more out of a sense of solidarity rather than a belief in the legality of the actions. From this, Tladi concludes that 9/11 related practice does not constitute appropriate evidence of an expanded right of self-defence.[215]

In respect of state practice post 9/11, authors analyze several examples, such as the Israeli attacks into Syria and Lebanon in 2001 to 2006. Gray highlights that Israel's justification consisted of an argument that accused Syria and Lebanon of harboring and actively supporting Hezbollah, why the two states were responsible for Hezbollah's actions and the attacks legitimate as use of force in self-defence. Therefore, Gray asserts, Israel did not expressly claim a right to attack non-state actors in the absence of territorial state involvement. However, some kind of state attribution was necessary, in light of Israel accusing Lebanon and Syria of colluding with Hezbollah. The subsequent reactions of the international community were generally of condemning nature, why Gray asserts that there was no general support for a wide right to use force against terrorist camps in a third state.[216] Corten contends that Israel, after the attacks, took a very clear inter-state stance, since the Israeli representative claimed that Syria was responsible since it made its territory available for terrorists. Corten claims that other states, declaring their views

[213] Cenic (n 164) 209–210.
[214] Brunnee and Toope (n 169) 269.
[215] Tladi (n 152) 67–69.
[216] Gray (n 7) 210–212.

on the matter in the UNSC meeting, were not convinced by Israel's arguments.[217]

Another example raised by authors is the Israeli responsive measures against Hezbollah in Lebanon in 2006. Gray writes that Israel's justification to the UNSC was short and affirmed the right of self-defence against an armed attack. Israel claimed that the government of Lebanon was responsible for the armed attack launched from its territory, while Iran and Syria were also claimed responsible since they embraced and supported the terrorists. Gray claims that many states accepted Israel's right to self-defence in general terms, but that it is not clear from the UNSC debate whether states accepted that Israel could use defensive force against Hezbollah in absence of the complicity of Lebanon.[218] Corten highlights that Israel justified its attack by referring to acts perpetrated by Hezbollah, but also expressly called into question the responsibility of the Lebanese government in its letter to the UNSC. Corten claims that most states denounced the Israeli attacks as an aggression against Lebanon's sovereignty and territorial integrity, why Corten deems that the precedent from this example of state practice is not wholly unambiguous, but remains contemplated from an inter-state perspective.[219] Tladi observes that the international community, exemplifying statements made by Russia, Argentina, Ghana and Qatar, deemed Israel's response in Lebanon as a use of force in violation of the UN Charter and an aggression. Tladi therefore concludes that the example cannot form the basis of subsequent practice for the purposes of interpretation of the UN Charter nor as practice reflective of customary international law.[220] Kajtar claims that, drawing from statements made by different officials representing the Israeli state in connection to the raids into Lebanon, the action along the border and within Israel was not a terrorist attack, but an attack that entailed responsibility from states, namely Lebanon, Syria and Iran.[221]

Gray and Corten highlight the conflicts in Gaza as another example of state practice. Israel justified its force as self-defence, as measures against terrorist attacks by Hamas, without any state being called into question. Both Corten and Gray asserts that the international community condemned the firing of rockets of Hamas into Israel, but the states who spoke of Israel's right to self-defence mentioned in it general and not in reference to art. 51 of the UN

[217] Corten (n 8) 187.
[218] Gray (n 7) 215–216.
[219] Corten (n 8) 187–188.
[220] Tladi (n 152) 71–72.
[221] Gabor (n 191) 325–326.

Charter. Many other states rejected Israel's claims, deeming Israel as the aggressor.[222]

Another example raised is Turkey's incursions into Iraq against PKK in 2008 and onwards. Tladi claims that most states and international actors questioned the legality of the Turkish use of force but expressed sympathy for its security concerns, why it is debatable whether the example can be advanced as state practice.[223] Both Gray and Kajtar highlight that Turkey did not officially invoke self-defence to justify its incursions against PKK in Iraq, why they view the example as lacking of any relevant *opinio juris* to regard it as having any substantial effect on the law.[224] Corten notes that the legal position of Turkey remained unclear since it did not invoke self-defence in its letter to the UNSC. Also, Corten observes, the reaction of third states was rather ambiguous in light of that some states recalled the necessity of respecting Iraq's territorial integrity, while others appealed to Turkey to exercise self-restraint, insisting on the necessity to use peaceful and diplomatic means, without condemning the military actions. This while other states remained silent. Corten therefore claims that it is difficult to deduce an evolution of the customary international law of self-defence from the precedent nor an established universal *opinio juris*, in favor of any new interpretation of the UN Charter.[225]

Other examples of state practice touched upon by scholars, are Russia's incursion into Georgia against Chechen rebels in 2002, Ethiopia's incursion into Somalia against purported terrorists in 2006, and Colombian raids into Ecuador against FARC in 2008. Concerning the incursion into Georgia, Gray is doubtful of the significance of the practice, but instead mainly highlights that the US did not acknowledge the right of another state to invoke self-defence against non-state actors in another territory, even if Russia was a neighboring state with a legitimately strong case. Gray contends that this makes it more difficult to claim that the events of 9/11 and its following response has established a new customary rule.[226] Corten asserts that Russia justified its incursion into Georgia from an inter-state perspective, and concurrently, the justification was not universally accepted, neither by Georgia nor by the US.[227]

[222] Corten (n 8) 190–191; Gray (n 7) 216–218.
[223] Tladi (n 152) 71.
[224] Gabor (n 191) 326–327; Gray (n 7) 223–225.
[225] Corten (n 8) 190.
[226] Gray (n 7) 225–226.
[227] Corten (n 8) 188.

Regarding the Colombian incursion into Ecuador, Gray notes that Colombia did not report its actions as self-defence under art. 51 of the UN Charter to the UNSC. Colombia also accused Ecuador of supporting the FARC, thereby arguing for the attribution of the rebels' actions to Ecuador. Gray also notes that the Organisation of American States condemned the incursion as a violation of Ecuador's territorial integrity, why Gray asserts that states were not willing to accept a wide right of self-defence against non-state actors.[228] Corten similarly highlights that Colombia claimed that Ecuador and Venezuela had supported the FARC in their justification, thereby attributing the attacks to states. Corten also notes that Colombia's legal position was far from accepted by the international community of states, which Corten reads as an obvious reluctance from states to accept any weakening of the prohibition of the use of force, even when a state conducts a very limited anti-terrorist action.[229]

Regarding Ethiopia's incursion into Somalia, Gray claims that there is some uncertainty as to the legal basis of the Ethiopian action, since Ethiopia first denied the presence of its forces and then later claimed self-defence towards Islamic terrorists. Gray observes that there was no report to the UNSC under art. 51 of the UN charter, nor did Ethiopia offer any reasoned legal case in defence of its use of force in the UN. Gray therefore concludes that the significance of the example is doubtful.[230] Corten states that, at first hand, the example may be interpreted as a precedent for the extension of self-defence beyond state-to-state relations. However, he argues that such a conclusion is exaggerated for two main reasons. Firstly, he points out the ambiguity in Ethiopia's line of argument, as they did not formally invoke self-defence to the UNSC and relied on vague political justifications. Secondly, Corten suggests that the intervention, supported by a transitional government lacking control, is more aligned with the issue of intervention with consent. Additionally, Corten notes that serious reservations from several third-party states were made concerning Ethiopia's justification. Therefore, overall, Corten deems the example as non-indicative for a change in *opinio juris*, and that the law remained within the inter-state context.[231] Tladi, reviewing the precedence of all three examples of state practice, observes that the examples may be seen as states using force on the territory of another in response to attacks by non-state actors. However, given the mixed and negative reactions from other states and the international community towards the practice, he

[228] Gray (n 7) 225.
[229] Corten (n 8) 189–190.
[230] Gray (n 84) 220–222.
[231] Corten (n 8) 188–189.

argues that the acts cannot form the basis of relevant practice This neither for the purposes of establishing a customary international law rule permitting such use, nor as subsequent practice for the interpretation of art. 51 of the UN Charter.[232]

Another recent example of state practice exemplified by authors, is the miliary operations against ISIL in 2014 and onwards. Tladi notes that Resolution 2249[233], adopted in connection to the military operations, has been hailed by other authors as indicative of allowing the use of defensive force in another state's territory. Tladi contends that international law, at the time of the resolution's adoption, did not permit the use of force against non-state actors on the territory of innocent third states. Therefore Resolution 2249 would have no impact, nor would it endorse the use of force without the consent of the territorial state, unless the conduct of ISIL was attributable to that state. Moreover, Tladi notes, states advanced different bases for their use of self-defence against ISIL, while also noting that states did not advance an interpretation of art. 51 of the UN Charter when justifying their operations, which he means suggests that their conduct is not based on an interpretation of art. 51. Further, Tladi observes that only a small number of states have questioned, explicitly or implicitly, the legality of the use of force in Syria without consent. Tladi therefore concludes that the operations of states against ISIL cannot form the basis of the expansive interpretation of art. 51 because they do not establish the agreement of the actors concerning the interpretation of art. 51.[234]

Gray launches similar objections towards the precedence of the military operations against ISIL in Syria. Gray, like Tladi, observes that states put forward different justifications for their respective incursions into Syrian territory. Some focused on Syria being unwilling or unable, while others referenced that the operations were solely aimed towards ISIL, and not the host state. Moreover, Gray notes, there were general objections towards the operations from the Non-Aligned movement, while some states implicitly objected by stressing its opposition in general terms. Many other states remained silent. Furthermore, Gray views Resolution 2249 as ambiguous, as it left open the question of its scope and application and made no mention of self-defence. Overall, Gray deems that the doctrines put forward in connection to the operations against ISIL are of so far-reaching nature, demanding a fundamental change of the self-defence framework, that it

[232] Tladi (n 152) 72–73.
[233] UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
[234] Tladi (n 152) 74–80.

would require overwhelming support to be accepted as international law. Regardless Gray considers it to be too early to assess whether the doctrine has gained that level of wide-spread support.[235]

Corten points to that the US, when justifying its incursion into Syria with the unwilling or unable doctrine, kept an inter-state perspective on the use of force in self-defence, compared to other states which referenced a notion self-defence directly towards ISIL, and not Syria. Moreover, Corten notes, a new interpretation of self-defence had not been accepted by the international community of states when the military operations against ISIL started. Corten references that the Non-Aligned Movement stated its opposition towards self-defence against non-state actors in general when it, in the context of the operations in Syria, declared that the practice of the UN and ICJ entails that the application of art. 51 of the UN Charter is to be restrictive and should not be re-written or re-interpreted.[236]

Flasch opines that ambiguity as to the real intention of states for supporting air strikes in Syria, as well as the decision by a number of states only to engage in air strikes in Iraq's territory, are evidence that neither the unwilling or unable test, launched by states when justifying their operations against ISIL, nor direct self-defence against non-state actors, has crystallized into a rule of customary international law. However, Flasch asserts, there are indications that it may eventually have, in virtue of increasing state support for the strikes.[237] Brunnee and Toope also discuss the impact of the operations in Syria and Iraq, asserting that no state from Africa, central or east Asia, or Latin America engaged in the debate, other than through support for the general statements on self-defence of the Non-Aligned Movement. According to Brunnee and Toope, the statements of the Non-Aligned Movement should, nonetheless be accorded considerable weight due to the sheer number of states endorsing them. Concurrently, they note, Germany and Belgium justified their operations upon a more restrictive standard which may be specific to ISIL's activities in Syria. Therefore, Brunnee and Toope conclude that state practice concerning the military operations against ISIL falls far short of the widespread and consistent practice required for the formation of customary international law. The efforts to articulate an *opinio juris* around the unwilling or unable standard are also limited to a few states and not entirely consistent.[238] Murray is of a similar opinion, drawing mainly from

[235] Gray (n 7) 242–248.
[236] Corten (n 8) 192–193.
[237] Flasch (n 180) 69.
[238] Brunnee and Toope (n 169) 277.

the statement of the Non-Aligned Movement, asserting that one may be able to discern state practice but only a hint of *opinio juris* regarding the military operations in Syria and Iraq against ISIL.[239]

After reviewing state practice, authors present their conclusions as to what the practice amounts to and the meaning it has for the progression of custom or interpretation of art. 51 of the UN Charter.

Tladi notes that while there are many examples of states using force in territorial states in response to attacks from non-state actors, many of these are not able to form the basis of either interpretative state practice or form the basis of a rule of customary international law, due to the negative reactions from other states. According to Tladi, other cases advanced in support of a broad interpretation of self-defence, especially 9/11 related practice, are based on attribution and can therefore not form the basis of an independent right to use force in the territory of another state. Therefore, Tladi concludes, contemporary practice does not form the basis of an expansive interpretation of art. 51 of the UN Charter which would permit the use of force against non-state actors in a territorial state.[240]

Corten means that there is a variety of positions amongst states to be found, but none of these positions are a direct challenge to the inter-state nature of the self-defence framework. Corten acknowledges that there is widespread acceptance that certain actions by non-state actors can qualify as armed attacks under art. 51 of the UN Charter, but under specific circumstances. However, Corten asserts, when a state claims self-defence to justify military action in another state's territory, it often accuses the territorial state of indirectly supporting a terrorist group, meaning that this constitutes an armed attack. Therefore, Corten concludes that contemporary practice does not appear to be evidencing a shift in the *opinio juris* of states.[241] Brunnee and Toope assert that an expanded right to self-defence against non-state actors is pushed by a group of states, primarily led by the USA and the UK. They suggest that this groups attempt to alter customary international law has not been successful and may face significant obstacles. Brunnee and Toope underscore the importance of exercising caution before accepting the notion that changes in customary law can be driven solely by the practices of a few leading states, with presumed consent from a largely silent majority. Additionally, they assert that support for the unwilling or unable test is not as

[239] Murray (n 179) 89–90.
[240] Tladi (n 152) 80–81.
[241] Corten (n 8) 193.

widespread as often claimed, in light of only five states supporting the rule without caveats, namely the US, Australia, Israel, Turkey and the UK. Brunnee and Toope therefore conclude that the law has not shifted to support an expansive justification for self-defence against non-state actors.[242]

Cenic opines that the international community's reactions to the US defensive measures to 9/11, in comparison to the reactions to Israel's action against states harboring terrorists in 2001 and 2003, proves that harboring non-state actors is conclusively regarded as sufficient to impute the acts of terrorists to a harboring state. Cenic notes that the US in 2001 and Israel in 2001, 2003, and 2006, utilized harboring when justifying an expansive reading of the right of self-defence. However, Cenic concludes, the use of 'harboring' by Israel and the US should be approached with caution, despite the support shown for the US post 9/11. This since the support might signify sympathy and understanding rather than endorsement of a new legal doctrine.[243]

O'Connor concludes that there are increased numbers of invocations amongst states regarding the use of force in self-defence against non-state actors, indicating that customary international law is evolving. However, according to O'Connor, the practice does not have the uniformity nor the sufficient *opinio juris* for one to conclude it as crystallized into customary international law.[244] Enabulele similarly concludes that despite Resolutions 1368 and 1373, the premise of state practice lacks the necessary *opinio juris* to support a status equal of the UN Charter and the authoritative interpretations of the ICJ. Enabulele means that this is underscored by the large number of states that concur with the narrow interpretation of self-defence made by the ICJ.[245] Martin similarly contends that those who propone the precedence of custom excessively emphasize the practices of a few Western First-World states, while overlooking or downplaying inconsistent practices and explicit objections from the Global South. Martin therefore concludes that the purported new customary right to self-defence against non-state actors does not demonstrate the widespread state practice and *opinio juris* necessary to support claims regarding the establishment of new principles of customary international law.[246] In the same fashion, O'Connell notes that those who seek to establish a new customary rule do not inquire into general state practice. O'Connell means that only five states have attempted to justify a use of force

[242] Brunnee and Toope (n 169) 282–283.
[243] Cenic (n 164) 212.
[244] O'Connor (n 163) 96.
[245] Enabulele (n 158) 215.
[246] Martin (n 159) 414.

by invoking unable/unwilling, and those states have invoked justifications different from the unable/unwilling standard. Therefore, O'Connell concludes, the case for *opinio juris* is almost non-existent. Also, she asserts, even if there was sufficient *opinio juris*, a customary rule cannot derogate from a *jus cogens* norm, which such a standard would.[247]

[247] O'Connell (n 154) 227–228.

4 Summary and Concluding Observations

4.1 Summary of the Analysis

The present thesis has examined the divide between the two groups of scholars concerning the right to self-defence against non-state actors; those of the restrictivist approach and those belonging to the expansionist approach, as to elucidate how the two groups differ when arguing concerning the international sources of law.

The expansionists have been subdivided into two perspectives. The first approach argues for a lowered state attribution threshold for imputing the acts of non-state actors to a state. The other approach holds self-defensive measures targeted directly at non-state actors as legal, if the host state has violated, or omitted to fulfill, an international obligation. To begin with, these two approaches diverge, as one accepts the inter-state regime, meaning that for self-defence to be justified it needs to be attributed to a state, while the other propone an asymmetric reading of the right to self-defence, according to which a state may use force in self-defence towards a non-state entity. The asymmetric reading is argued for by referencing the ambiguousness of art. 51 of the UN Charter, as it fails to mention what kind of entity needs to be responsible for an armed attack, as well as referencing an 'inherent' right to self-defence. Both approaches address cases from the ICJ, whose jurisprudence clearly contradicts their respective argumentation. Consequently, the scholars either dismiss the jurisprudence of the Court or hold that the Court has been too restrictive in its assessment of the law. To strengthen these notions, expansionists point to the opposing views expressed by the members of the Court in different Separate Opinions, Dissenting Opinions or Declarations.

Authors of the state attribution approach seek to confirm a lowered threshold for state attribution by reviewing state practice, either trying to find a rule of customary international law corroborating this, or as means to interpret art. 51 of the UN Charter. Authors disagree on whether a lowered threshold could be confirmed by state practice before 9/11. However, many authors point to an evolution of the law taking place after the US operations in Afghanistan following the 9/11 attacks, emphasizing the subsequent wide support of the international community, including the support of the UNSC when adopting

Resolutions 1368 and 1373. Authors tend to thereafter inquire if this purported development of the law has crystallized into customary international law or if it has been confirmed by recent state practice post 9/11, examining a range of incidents and examples. From this, authors distill that the level fof attribution within the law of self-defence has been lowered, being lower than the level of 'effective control' to accommodate situations under a broader range of circumstances to activate the right of self-defence. Other arguments concerning attribution hold that the ICJ has been erroneous and too strict in its interpretation of the wording 'substantial involvement' in the Definition of Aggression, and that this definition had broadened since. Therefore, it needs to be reinterpreted to encompass a lower standard as to reflect progression in state practice, legal literature, and international relations. Another line of reasoning within this approach is argumentation purporting that a state can be attributed an attack by a non-state actor through art. 9 or art. 16 of the Articles on State Responsibility.

Scholars of the so-called Regardless approach diverge from the Lowered state attribution approach, by arguing that the *Caroline* is a precedent concerning the right to self-defence, and that the UN Charter has preserved this precedent with the wording 'inherent' in art. 51. This precedent is held as preserving the right of self-defence directly against non-state actors in situations when a territorial state cannot contain, or is unwilling to contain belligerent non-state actors, with the territorial state becoming a justified target of self-defence. This is argued for from somewhat different outsets. Some purport that self-defence against the non-state actors is legitimized in light of the host state violating a due-diligence obligation when omitting to stop the activities of non-state actors in its territory. Consequently, it is justified or, referencing necessity, necessitated, that the victim state 'steps into' the place of the territorial state to hinder the non-state actors. A similar outset is derived from the laws of state neutrality, where a state that does not uphold its duty as sovereign, consisting of being in control and policing its own territory. The state's right to sovereignty is then upheaved if it lets its territory be used by non-state actors to launch attacks onto a victim state, this entailing that any self-defensive measures adopted by the victim state towards the non-state actors within the host state's territory are legal. Another outset upheld by expansionists is that necessity in itself can justify self-defensive incursions targeting non-state actors in another state's territory. That is the case, if a host state is not in control of its territory and cannot, or will not, stop the non-state actors from mounting attacks, necessitating the victim state to defend itself, thus justifying the incursion. These notions, all derived from a customary

right preceding the right of self-defence in the UN Charter, is, according to proponents of this approach, reaffirmed by state practice and the subsequent reactions of the international community. According to these scholars, this type of practice is found both before and after the inception of the UN Charter. Various incidents and incursions are referenced, but most authors come to the same conclusion, that state practice and reactions of the international community is more or less consistent to the degree that the customary right of self-defence exists and allows states to legally act in self-defence directly against non-state actors. A related line of reasoning within the Regardless approach is an argument comprising of scholars referencing the Articles on State Responsibility to justify acts in self-defence against non-state actors. Authors of this line of reasoning argue that either art. 21 or 25(1)(a) of the Articles on State Responsibility, function as a secondary norm to art. 51 of the UN Charter, exonerating a victim state from violating a third state's sovereignty when pursuing self-defence against non-state actors in the third state's territory. However, there are doubts among authors whether this application of the Articles on State Responsibility has the sufficient *opinio juris* and state practice to corroborate this argument.

When it comes to the restrictivist approach, most scholars conduct a textual and/or contextual analysis of the UN Charter, to rule out the expansionist argument. This is based on the premise that the omission of an explicit mention in art. 51 of the UN Charter, regarding what entities may perpetrate an armed attack, implies that such actions are not exclusive to states. Scholars of this approach also highlight that the ICJ has held a consistent line of reasoning in *Nicaragua*, *Oil Platforms*, *Israeli Wall*, and *Armed Activities,* demanding an armed attack to be committed by non-state actors imputable to a state holding 'effective control' over the non-state actors, or that the armed attack originates directly from another state to be liable for self-defensive measures. At the same time, many scholars dismiss or argue against the arguments of the other members of the Court in their Declarations, Separate Opinions or Dissenting Opinions. Authors also debate the significance of Resolutions 1368 and 1373 in advancing the law of self-defence, with many suggesting that their importance has been overstated. Scholars point to factors such as the language used in the resolutions, as well as the exceptional circumstances under which the resolutions were adopted to support their argument. Others view the resolutions as important, and the adoption of the resolutions has been so significant that it entails a review of state practice to inquire whether the law had changed. Most authors discuss the meaning of state practice, controlling if the practice of states can show sufficient *opinio*

juris and a satisfactory amount of support from the international community towards the practice. Many of the authors do not accept such a change in practice and conclude that the practice suffers from insufficient support from the international community and/or a deficiency in *opinio juris*. Others also point out that state practice concerning self-defence against non-state actors often stems from a handful of states, and that expansionist approach overlook objections of several states when reviewing practice.

4.2 Final Observations

An obvious first observation regarding the debate on the right of self-defence against non-state actors is the centrality of state practice for both approaches. Expansionists, either reviewing state practice for the purpose of discerning whether there exists a lowered threshold within the law of self-defence, or whether it's for ascertaining the right of direct self-defence against non-state actors, do not rely on a formulaic analysis of the practice. The expansionist perspective prioritizes the mere existence of practice, placing more emphasis on the concrete actions and behaviors of states, rather than limiting themselves by adhering to predefined criteria. By doing this, departing from formalistic methodologies, the scholars allow themselves a more flexible interpretation of the purported examples of self-defence against non-state actors, thereby heightening the significance of individual state behavior in shaping international legal norms, rather than the international reactions to the practice. The fundament of expansionist argumentation is centralized around some pillars; the omission in art. 51 of the UN Charter of the entity which may commit an armed attack, the word 'inherent' in art. 51 preserving the customary right of self-defence against non-state actors and recent state practice corroborating either the evolution of the law or confirming the state of the law the way it stood before the inception of the UN Charter. Therefore, it is crucial for their argumentation that state practice can be 'formed' to fit their argumentative frameworks. It is therefore not surprising that expansionist often do not expand on the methodologies used for discerning the meaning of state practice, nor mention whether these inquiries into practice concerns subsequent practice, for the purpose of interpreting art. 51 of the UN Charter, or whether it serves to advance an existing rule of customary international law. This way, the practice does not need to meet any specific criteria necessary for interpreting a rule or establishing a new customary rule, giving more leeway when fitting the practice into the formula of self-defence that they are putting forth.

Restrictivists, on the other hand, see practice as something that needs to be approached with a consistent and rigorous methodology. Therefore, when restrictivists examine state practice to inquire whether there exists a customary rule straying from the conventional form of self-defence or reviewing state practice to see if any change of the interpretation of art. 51 of the UN Charter has occurred, a systematic, predefined approach is utilized. Examples of practice not only need to be reviewed as valid, but it also need to be concluded whether states have expressly provided an *opinio juris* in connection to the practice, and to what extent the practice was supported by the international community. This examination is done cautiously, and scholars avoid painting with a broad brush, rejecting speculative conclusions unless practice is clear and fulfills the requirements established beforehand. By utilizing this meticulous methodology, restrictivists want to ensure the integrity of the UN Charter, and that the meaning of the Charter provisions remains static and involatile to sudden change. This making it difficult for individual states to enforce legal constructs onto weaker states, constructs which have not been agreed upon by all states in a multilateral setting.

The decisions of the ICJ are also an important point in the debate, much like state practice. Restrictivists place emphasis on the decisions endorsed by the majority, attributing greater significance to the decisions of the Court, as these scholars hold the ICJ as highly authoritative when it comes to deciding the content and shaping of international law. The opinions of individual Court members are regarded as less authoritative and are afforded less weight, as they lack the same institutional backing and is more a representative of personal views than of the Court. In contrast, expansionist scholars view ICJ decisions as influential but not necessarily binding. They may regard them as just one factor among many when interpreting the right of self-defence. When it comes to self-defence in the context of non-state actors the views of the Court are not held as viable, as expansionist point out the inconsistencies exhibited by the Court and the internal disagreements between the majority and certain members of the Court. That there are members of the Court that agree with an expansionist interpretation, scholars take as a sign that the Court has been erroneous in its decisions, meaning that the state of the law is still questionable.

To summarize these observations, the expansionist argumentation entails that the content of the rules of the UN Charter on self-defence is open for interpretation and that this interpretation is most adequately done by reviewing state practice. The UN Charter rules are moldable by practice so that either the meaning of the rules can be reinterpreted, or a customary rule

exist which extends beyond the limitations of the UN Charter-based law. The validity of UN Charter rules is therefore determined by practice of states, rather than the rule holding a static meaning. Thus, if the UN Charter rule is not adequately fit for the contemporary landscape of conflicts, the customary rule will be superseding the conventional rule, adapting to the contemporary environment and the way states need it to be. In contrast, restrictivists adhere closely to the principles outlined in the UN Charter, viewing its textual provisions as static and resistant to change. They maintain a strict orientation around the language and intention of the UN Charter, emphasizing its role as the primary source of international law governing self-defence. For restrictivists, deviation from the conventional provisions would undermine its authority and the stability of the international legal framework. This comes with an institutional understanding of the treaty-based rules where institutional determinations of the law, such as judicial decisions by the ICJ, are highly regarded, and as authoritative, when it comes to defining the content of the law. Unilateral definitions of the law are dismissed, as the mutually agreed definitions established by the institutions of the UN, and its members, are in line with the text and purpose of the UN Charter.

What are then the implications of these differing perspectives on the sources of international law? When examining the three approaches, the Regardless approach, the Lowered state attribution approach, and the Restrictivist approach, it becomes evident that despite their argumentative differences, they all share a common idea, but to various degrees: the requirement of host states being liable for it to be justified to invoke self-defence. According to the restrictivist approach, in line with the decisions of the ICJ, a state must be in ‘effective control’ of non-state actors in order to be liable for the non-state actors’ actions. For the Lowered state attribution approach, the threshold for attribution is lowered, holding a state liable if it has supported, acquiesced or been unable to control non-state actors within its territory. Meanwhile, proponents of the Regardless approach assert that a state is liable for self-defensive action on its territory when it has omitted to fulfill an obligation to control its own territory from non-state actors operating in it, either by inability or unwillingness. Therefore, the three categories are closer in nature than at first glance, all sharing a fundamental commonality, the principle that state liability governs the legality of self-defensive measures. This is important, because it underscores that scholars and states of either approach still see the relevance and significance of establishing state agency before dispensing self-defensive measures.

Still, analyzing the different argumentative frameworks also illuminates issues and concerns regarding how international law may progress if utilized this way. From expansionist argumentation, an approach is discernable where these scholars prioritize the authority wielded by individual UN members in interpreting and shaping the content of international law, rather than adhering to the multilateral regime installed with the inception of the UN Charter. Tladi, from the restrictivist perspective, holds that a self-defensive regime which favors unilateralism may risk the rule of law and that such a regime will eventually lead to the law of the jungle rather than the rule of law, potentially regressing to the chaotic and insecure environment as was status quo before the establishment of the UN Charter and the multilateral security system.[248] Krajewski, on the other hand, holds that if the self-defence regime in the UN Charter cannot address contemporary threats to international peace and security, such as non-state actors, it will become irrelevant.[249]

Either way, according to these viewpoints, international law will lose its relevancy. This demands a critical question - should the power to shape international law be centralized within UN institutions, allowing members to collectively decide the path international law should take, or should individual members retain the autonomy to influence international law through their own decisions? The establishment of the UN marked a transition from colonialism to postcolonialism, shifting power away from powerful colonial states to multilateral organizations, towards a regime where every state is legally equal and sovereign over its territory. In this context, one state can never dictate the actions of another. The expansionist approach may challenge this order. By suggesting that one state has the authority to determine whether another is unable or unwilling to control non-state actors within its territory, expansionist thinking grants major powers the ability to unilaterally decide whether another state hold sovereignty over its territory or not. This potential for unilateral decision-making raises significant concerns about the balance of power and sovereignty in the international system, as powerful states are given the capacity to decide whether another state is sovereign over its own territory.

However, it is also apparent that the expansionist approach stems in part from a grave concern and frustration amongst states over the fact that contemporary international law does not have the tools to address both regional and international threats posed by non-state actors. This causes frustration and

[248] Tladi (n 152) 89.
[249] Krajewski (n 125) 21.

may cause states to illegally or extralegally address the threats of the non-state actors. The restrictive approach entails a slow approach to the formation of new international law, not so easily adapted to these new realities. While the approach aims to uphold the integrity and stability of international law, it could exacerbate the frustrations felt by states facing threats from non-state actors. This may undermine and reduce the confidence in the UN Charter system, as states reluctant to act contrary to its principles may feel compelled to do so with no other concrete and direct remedy in place.

In conclusion, the debate surrounding self-defence against non-state actors remains complex and multifaceted, and will remain so, as the contentions around the interpretation of the self-defence regime will not disappear any time soon. As the analysis of the debate sheds light on the different perspectives scholars have on the sources of international law, it also underscores the need of a balanced approach, one which safeguards both the protection of state sovereignty and state equality, as well as effectively ensuring international peace and security. The scholarly discourse concerning self-defence against non-state actors needs to continue, but in a direction where the differences are consolidated, or at least understood. This is inhibited by the current state of the debate. The 'dialogue between the deaf' needs to end. The effectiveness and integrity of the international legal regime governing self-defence is at risk when its interpretation remains endlessly contested and ambiguous. It leads to uncertainty and enables states to 'cherry pick' which rule to abide to when resorting to action. This undermines the foundations of international law and promotes unilateralism. Unilateralism without boundaries is what the UN Charter was created to prohibit, in order to prevent war and conflict. Scholars therefore have a responsibility to overcome the deadlock and recommit, seek common ground, engage in constructive dialogue, and acknowledge differences. This might result in a development of the law which encompasses both the protection of territorial integrity and sovereignty, as well as the maintenance of international peace and security.

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