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Striking Back, Striking Now: Navigating the Legality of Extra-Territorial Armed Responses to Terrorist Attacks Originating from Abroad

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ABSTRACT *The use of force against terrorism remains a widely debated matter among scholars. This article aims to show that taking forcible measures in response to terrorist attacks is consistent with the rules of jus ad bellum, even in non-consensual extra-territorial settings. Post-9/11 State practice and opinio juris support the view that terrorist attacks may amount to fully-fledged armed attacks. Yet, it is still unclear if and when a State victim of terrorism may intervene against terrorists located outside its territory. While the question would be irrelevant where the host State intervened against the terrorists present on its territory, it would not be so if it were unwilling or unable to act. In such a scenario, the victim State would have to choose between compromising its territorial integrity or that of its counterpart. It is against this background that the "Unwilling or Unable" doctrine will be evaluated in this article.*

KEYWORDS Self-defence; non-state actors; international law; armed attack; unwilling or unable; terrorism.

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1 Introduction

The threat posed by international terrorism is one which has very old roots. As early as the 1910s, States were confronted with politically motivated acts of violence orchestrated by private individuals and targeted against their civilian population.[1] The frequency and intensity of such conduct steadily increased over time, peaking during the 1970s and 1980s.[2] Even when producing massive harm, terrorist acts were largely regarded to be criminal, addressed through the tools offered by national and, where applicable, international criminal law.

However, the events of 9/11 radically changed this original understanding of terrorism. The terrorist attacks launched by Al-Qaeda shocked the international community, being absolutely unprecedented in terms of their destructive potential. It became apparent that terrorism could no longer be treated simply as a criminal phenomenon. As such, the Security Council unanimously affirmed the inherent right of self-defence in response to the 9/11 terrorist attacks and, in so doing, implicitly recognised that such attacks constituted fully-fledged acts of armed force within the meaning of article 51 UN Charter (hereinafter article 51).[3]

This drastic shift in the qualification of terrorist violence did not mean that States were no longer limited in their choice of means and methods when fighting terrorism. Rather, it meant that a State victim of terrorist violence was now entitled to take forcible measures against the terrorist actors targeting it when absolutely necessary to suppress them. Inter-State cooperation did not exit the scene, but kept playing a central role in this context. This is because terrorists operate increasingly in a cross-border fashion, planning and launching their attacks from territories located outside of the State(s) they target.

As such, even when acting in self-defence, a State would have in principle to coordinate its actions with the State where the terrorist threat is found – the territorial State – in order to address it without infringing on the latter's territorial integrity. However, what would happen if the territorial State showed unwillingness to cooperate, refusing to acknowledge – let alone solve – the security concerns of the victim State? This question has long been a point of great controversy among scholars as well as States.[4] While there exists strong support

[1] See for an overview J. Bew et al., 'The Long Twentieth century' in E. Chenoweth et al. (eds), *The Oxford Handbook of Terrorism* (Oxford University Press 2019).
[2] ibid.
[3] Charter of the United Nations (adopted 26 June 1945) 1 UNTS XVI, article 51.
[4] See M.E. O'Connell et al, *Self-Defence against Non-State Actors* (Cambridge University Press 2019) 2 et seq.; S.D. Murphy, 'Self-Defense and the Israeli Wall Opinion – An Ipse Dixit from the Court?' (2005) 99 AJIL 62; and A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993.

for the "Unwilling or Unable" doctrine, whereby a State's right of self-defence could trump another's territorial integrity whenever imperative to forestall future, imminent terrorist attacks, some condemn a similar theory as absolutely inconsistent with the rules of *jus ad bellum*.

Against this background, this article explores if and when a State victim of cross-border terrorism may intervene extra-territorially within the territory of another State – in the absence of that State's consent – to suppress the terrorist actors operating therein. To that end, the following section will provide a brief overview on the evolution of terrorism and outline its present-day understanding, before analysing when an act of terrorism may be lawfully framed as a fully-fledged armed attack. Subsequently, an assessment as to whether the scope of article 51 is sufficiently broad to cover terrorist attacks launched by autonomous non-State terrorist actors will be conducted, relying extensively on the case law of the International Court of Justice (ICJ).

On the basis of this determination, two different scenarios of self-defence against terrorism will be scrutinised, namely: intervention *against* the host State, and non-consensual intervention *in the territory of* that State (so-called "extra-territorial law enforcement"). In relation to the latter, emphasis will be put on the above-mentioned Unwilling or Unable doctrine, the rationale behind it, and its merits and shortcomings in furthering the fight against terrorism.

2 Redefining Terrorism in the Post-9/11 Era

2.1 Acts of Terrorism: Just Serious Crimes or Something More?

Up until the early 1970s, little to no doubt existed in respect of the nature of terrorist acts. These were generally understood as heinous criminal conducts which had to be prosecuted and punished under the national law of the victim State or, where applicable, under that of the State(s) hosting the perpetrators.[5] It was therefore the task of national police forces to locate, apprehend and bring terrorists to justice, using the least amount of force possible in the process.[6] The functioning of such a law-enforcement approach to terrorism was contingent on the situation on the ground as well as on the parties involved. This is because, even when addressed against a certain State or its people, a terrorist act may involve more than just one jurisdiction.

For example, the bombing of a State's embassy by dissidents of the embassy State, would substantially affect not just that State, but also the State where the

[5] See M.C. Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 HILJ 83.
[6] See for more detail T.D. Gill and D. Fleck, *The Handbook of the International Law of Military Operations* (Oxford University Press 2015) 352.

embassy resides, due to the act having taken place on its territory. A third jurisdiction could also be involved if, for instance, in the aftermath of the act, the perpetrators fled and attempted to seek refuge into the territory of a third State. In this situation, various States would share a common interest in seeing the responsible terrorist actors duly prosecuted, albeit on different grounds. The question would then arise as to which among them would be best suited or entitled to actually carry through with the overall investigative and prosecutorial process. The general answer provided by the thematic anti-terrorism Conventions is that cross-border acts of terrorism need to be dealt with under the *aut dedere aut judicare* principle.[7]

This means the custodial State must either apprehend and submit the terrorist offenders to the scrutiny of its own criminal courts, or surrender them to any other foreign jurisdiction adversely affected by their conduct which expresses an interest to prosecute. While arguably aimed at avoiding impunity for terrorist crimes, such a system is prone to criticism. The main one being that it works only for as long as the States involved show observance of the obligations they assumed under the thematic Conventions. Indeed, if a State found itself unable to locate and capture the terrorist actors hiding in its territory, or lacked the socio-political willingness to do so, the *aut dedere aut judicare* principle would *ipso facto* become unworkable. Terrorist actors would therefore escape criminal sanction altogether as a result of a failure of law-enforcement.

The persistent risk of impunity resulting from the existing legal framework criminalising terrorism, along with the increasing destructive potential of transnational terrorism, drove numerous States to consider alternative ways to respond to this phenomenon.[8] Most notably, specially affected States – such as the US and Israel – repeatedly submitted that terrorist acts producing serious harm to a State and/or its nationals could qualify as fully-fledged armed attacks.[9] Prior to 9/11, this position was largely criticised by the international community.[10] Indeed, traditionally, the use of force in international

[7] See in particular International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1995) UNTS 2149, article 8; and International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999) UNTS 2178, article 10.

[8] See G. Travalio and J. Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 CJIL 97; and N.C. Livingstone, 'Proactive Responses to Terrorism: Reprisals, Preemption, and Retribution' in C.W. Kegley jr. (ed.), *International Terrorism: characteristics, causes, controls* (Macmillan 1990).

[9] See US Secretary of State George Shultz, 'Terrorism and the modern world' (New York, 25 October 1984) reprinted in Department of State Bulletin (December 1984); and Letter dated 12 August 1969 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc S/9387 (12 August 1969).

[10] See for an overview, A. Garwood-Gowers, 'Self-defence against Terrorism in the Post-9/11 World" (2004) 4(2) QUTLJJW 167.

relations was conceived to be an attribute of statehood.[11] As such, only forcible actions taken in an inter-State setting could qualify as an "armed attack".[12] This is not to say armed violence by non-State actors was never categorised as an attack within the meaning of article 51.

As Resolutions 405 and 419 clearly show,[13] the international community recognised in certain instances that hostile acts perpetrated by private actors – and specifically, by mercenaries – could amount to an 'act of armed aggression'.[14] Despite this recognition, the general idea remained that such acts had to be somehow connected, or attributable, to a State in order to properly qualify as an armed attack able to trigger a State's inherent right of self-defence.[15] The firm international condemnation of Israeli raids on Palestinian Liberation Organisation (PLO) bases in Lebanon and headquarters in Tunis,[16] as well as the critique of US airstrikes against Libya in response to the Berlin discotheque bombing,[17] are evident proof of that.[18]

The turning point in the "argumentative landscape" surrounding the qualification of acts of terrorism and the taking of forcible measures against them, came with the 9/11 attacks.[19] States were abruptly awoken to the new reality of international terrorism and rapidly came to terms with the idea that this phenomenon could not anymore be treated as a mere, albeit heinous, crime. The Resolutions adopted in the immediate aftermath of 9/11 demonstrate this transition away from the classical law-enforcement approach to terrorism. In both Resolutions 1368 and 1373,[20] the Security Council unanimously affirmed the inherent right of individual or collective self-defence in response to the terrorist attacks.

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[11] See Y. Dinstein, *War, Aggression and Self-Defence* (2nd edn, Cambridge Grotius 1994) 238.
[12] ibid.
[13] UNSC Res 405 (1977) S/RES/405; and UNSC Res 419 (1977) S/RES/419, 32 RDSC 18-19.
[14] Critically, it might be questioned whether the expression "act of aggression" could be equated to "armed attack" in every respect. As Brown notes, certain acts may fall within the scope of the former, but not of the latter because they fail to reach the necessary degree of intensity. See D. Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses' (2003) 11 Cardozo J Int'l & Comp L 1.
[15] See O. Schachter, 'The Lawful Use of Force by a state against Terrorists in Another Country' (1989) 19 IYHR 209; and T. Ruys and S. Verhoeven, 'Attacks by Private Actors and the Right of Self-defence' (2005) 10 JCSL 289.
[16] See UNSC Res 573 (1985) S/RES/573; and UNSC Res 316 (1972) S/RES/316.
[17] See in particular UN Doc. S/PV.2675, 15 April 1986, 18 (Syria), 24-5 (Oman); UN Doc. S/PV.2680 (18 April 1986) 32-4 (Ghana), 47 (Nicaragua); UN Doc. S/PV.2682 (21 April 1986) 16 (Uganda), 41 (Thailand); UN Doc. S/PV.2683(24 April 1986) 7 (India), 33 (Ghana). See also T. Ruys, *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 425.
[18] See W. O'Brien, 'Reprisals, Deterrence and Self-Defense in Counterterror Operations' (1990) 30 Va J Int'l L 421.
[19] R. van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' side' (2016) 29 LJIL 43.
[20] UNSC Res 1368 (2001) S/RES/1368; and UNSC Res 1373 (2001) S/RES/1373.

In so doing, the Security Council implicitly acknowledged that the events of 9/11 were not the result of a well-orchestrated criminal conduct but of a fully-fledged multi-pronged armed attack.[21] This was a necessary acknowledgement as the very exercise of the right of self-defence is by definition premised on the suffering of any such attack by a State. It would have thus been illogical for the Security Council to refer *verbatim* to the content of article 51 if it did not intend to frame the terrorist acts addressed in its Resolutions as actual "threats to international peace and security" to be answered by forcible measures. Such a view finds further confirmation in the almost identical position taken by the North Atlantic Treaty Organisation (NATO) and the Organisation of American States (OAS) in response to the attacks.[22]

The fall of the Twin Towers dispelled any lingering doubt concerning the possibility of framing high-intensity terrorist acts as expressions of armed force. Even those objecting to such a categorisation cannot but recognise that the clamour of 9/11 left a profound imprint on customary *jus ad bellum.*[23] The US intervention in Afghanistan, marking the start of the "War on Terror", pushed forward the narrative that the existing anti-terrorism legal regime had become insufficient to address modern manifestations of terrorism and that, as such, States were entitled to resort to military force to respond to intense armed terrorist violence.[24] This entitlement applied regardless of whether the terrorist acts originated from abroad,[25] or were launched by non-State actors operating in complete autonomy. It is important to note however that this new approach to terrorism – often referred to as the "conflict management" paradigm[26] – did not replace the classic law-enforcement paradigm but simply complemented it. The primary response to international terrorism still resides in transnational policing and judicial cooperation even after 9/11.[27] The use of military force against

[21] See Y. Dinstein, *War, Aggression and Self-defence* (6th edn, Cambridge University Press 2017) 246-7. See contra M. A. Drumbl, 'Victimhood in our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order' (2003) 81 NCLR 1.

[22] See North Atlantic Treaty Organization (NATO), 'Statement by the North Atlantic Council' (2001) 40 ILM 1267; and Organisation of American States (OAS), 'Resolution on Terrorist Threat to the Americas' (2001) 40 ILM 1273.

[23] E.P.J. Myjer and N.D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence' (2002) 7 JCSL 5.

[24] See C. Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (½) of the UN Charter, and International Terrorism' (2003) Fletcher F World Aff 35; and S. Neff, *War and the Law of Nations* (Cambridge University Press 2005) 386-7.

[25] That an armed attack must originate, or be controlled, from abroad constitutes a necessary pre-requisite for any action in self-defence to be admissible. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 194 (2004) [*Wall Advisory opinion*] para 139.

[26] J.N. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Ashgate Publishing 2005) 53-4.

[27] See Y. Dinstein, 'Terrorism and Afghanistan' in M.N. Schmitt, *The War in Afghanistan: A Legal Analysis* (2009) 44-5.

terrorist actors needs to be seen as an exception to this general rule, which may be relied on by a State solely when a terrorist act rises to the degree of an armed attack.

While the respective area of application of the two paradigms may seem clear at first glance, scholars and States alike tend to disagree on the qualification of terrorist attacks and on the parameters to be employed for such qualification. Bearing in mind that the proper categorisation of an act of terrorism plays a central role in determining the applicable paradigm, the next section shall evaluate in what instances terrorist violence may be lawfully understood as amounting to an expression of armed force.

2.2 Terrorist Acts as an "Armed Attack": A Matter of Threshold

Whether and when an act of terrorism rises to the level of an armed attack is a question intrinsically linked to the intensity of the act. Some scholars submit that the degree of force exercised must be such to cause substantive loss of life and/or significant destruction in the victim State for it to be qualified as "armed".[28] The Chatham House principles reflect this majority opinion but make the qualification contingent on the (in)ability of law-enforcement agencies to address it as a crime.[29]

Even if it is accepted that a *de minimis* threshold of violence going beyond the mere level of criminality must be crossed, that does not *per se* clarify what level of harm a terrorist act needs to produce to amount to an armed attack.[30] International jurisprudence has thus far failed to provide an entirely clear answer on this point. In the *Nicaragua Military and Paramilitary Activities* case (*Nicaragua*), the ICJ critically held that not all expressions of armed force fall within the scope of armed attack, just the "most grave forms" having certain "scale and effects".[31] In line with this pronouncement, the Institut de Droit International similarly acknowledged that an armed attack must be of a "certain degree of gravity" to trigger a State's right of self-defence.[32] While vaguely suggesting that an armed attack must produce, or at least have the potential to produce, some serious harm in order to trigger the application of article 51,[33] these

[28] See Ruys (n 17) 155; M. Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 9 Int. Law Stud. 1; and C. Henderson, *The Use of Force and International Law* (Cambridge University Press 2018) 210-11.
[29] E. Wilmshurst, 'Chatham House Principles of International Law on the Use of Force by States in Self-Defence' (2006) 55 ICLQ 963 [Chatham House Principles].
[30] T.D. Gill and K. Tibori-Szabó, 'Twelve Key Questions on Self-Defense against Non-State Actors' (2019) 95 Int'l Law Stud 467.
[31] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US), Judgment, ICJ Rep. 14 (1986) [*Nicaragua*] paras 191, 195.
[32] Institut de Droit International, Resolution *'*Self-Defence*'* (Santiago, 2007) 72 AIDI 233 [Self-Defence resolution] §5.
[33] Dinstein (n 21) 206.

expressions do not offer suitable standards for distinguishing among the various uses of force. If anything, they only further complicate the notion of armed attack and its scope.[34]

To remedy this, some have tried to make sense of the gravity requirement introduced by the ICJ, attempting to redefine its importance. Taft has contended that the (harmful) effects of an unlawful use of force may well be relevant for appraising the extent and modalities of self-defence, but not for determining its application.[35] This is because article 51 does not, explicitly or implicitly, confine itself just to "especially large, direct, or important armed attacks".[36] Interpreting the provision otherwise would mean to preclude any lawful answer to "lesser, but still insidious uses of force"[37] – a category which may well include terrorist attacks. It would also contravene the text of Security Council Resolutions 1368 and 1373.[38] In line with these considerations, it seems more appropriate to say that whether a use of force qualifies as an armed attack should be assessed on a case-by-case basis, taking into account the amount of harm and destruction caused by the specific act against the victim State and/or its nationals.

In *Nicaragua*, the ICJ expressly suggested that an armed attack may result not just from a single incursion but also from a series of violent acts taken "collectively".[39] The ICJ reaffirmed this position in the *Oil Platforms* and *Armed Activities* judgements[40], although in more nuanced terms. It seems generally accepted in the ICJ's jurisprudence that, while individually unable to satisfy the required *de minimis* threshold, multiple low-level uses of force may cumulatively rise to the level of an armed attack.[41] This "accumulation of events" approach has evident consequences in the context of terrorism.[42] Terrorist attacks generally involve a concert of more or less coordinated violent acts, making a determination

[34] See *Nicaragua* (n 31), Dissenting opinions of Jennings j. and Schwebel j. Against this background, it is the US DoD has taken the position that the right of self-defence extends to "any illegal use of force" by a State or armed group. See US Office of General Counsel, Department of Defense, *Law of War Manual* (US Department of Defense 2015) 47.
[35] W.H. Taft IV, 'Self-Defense and the *Oil Platforms* Decision' (2004) 29 YJIL 295. The Chatham House principles support this position, noting that "An armed attack means any use of armed force, and does not need to cross some threshold of intensity". See Chatham House Principles (n 29) 6. See also Stahn (n 24) 42-43.
[36] J.L. Hargrove, 'The Nicaragua Judgement and the Future of the Law of Force and Self-Defense' (1987) 81 AJIL 135.
[37] Gill and Tibori-Szabó (n 30) 493.
[38] As Simma j. put it, "Resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-state actors can qualify as "armed attacks" within the meaning of article 51". See *Armed Activities on the Territory of the Congo* (DRC v. Uganda), Judgment, ICJ Rep 168 (2005) Separate opinion of Simma.
[39] *Nicaragua* (n 31) para 231.
[40] *Oil Platforms* (Iran v. US), Judgment, ICJ Rep 161 (2003) para 64; and *Armed Activities* (n 38) para 146.
[41] See Dinstein (n 21) 211.
[42] Ruys (n 17) 174.

on the existence of an armed attack based on the joint contribution of each act to the overall attack possible. To that end, all acts would of course have to share a reasonably close geographical and temporal proximity and be conducted by the same author.

3 The Inherent Right of Individual or Collective Self-Defence against Non-State Actors: Between Treaty Law and Customary Law

3.1 The Acceptance of a "Vertical" Understanding of Self-Defence

It is well established under international law that the right of self-defence constitutes, together with the authorisations by the UN Security Council under Chapter VII, the only lawful exception to the general prohibition on the use of force in international relations. This general consensus however, related more to the theoretical existence, rather than to the actual contents and limits of a right of self-preservation. While acknowledging the immanent nature of self-defence, States abstained from specifying against whom forcible responses may be lawfully taken.[43] As the Charter of the United Nations (UN Charter) did not provide an answer to the question either, the scope of self-defence rapidly became a central point in the jurisprudence of the ICJ.

In a number of cases, the ICJ was clear in submitting that a State may take forcible measures exclusively in response to armed attacks imputable to another State.[44] A State's action in self-defence would therefore be admissible either because a foreign State directly carried out acts of hostility against the victim State, or because it delegated the commission of these acts to "armed bands" which it directed or controlled.[45] By contrast, the possibility of countering purely non-State armed violence by military force was apparently excluded altogether.[46] Such a restrictive State-oriented reading of self-defence is prone to many criticisms, the main being that nothing in the language of article 51 suggests that the exercise of self-defence is strictly limited to inter-State armed force nor that an armed attack needs to be launched by a State.[47] The provision simply requires that an armed attack be perpetrated by and against a "Member of the United

[43] See S.A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (Martinus Nijhoff Publishers 1996) 182.
[44] See *Nicaragua* (n 31) para 195; *Wall Advisory opinion* (n 25) para 139; and *Armed Activities* (n 38) paras 146-7.
[45] *Nicaragua* (n 31) para 195.
[46] See for more detail O. Corten et al, "Opération liberté immuable: Une éxtension abusive du concept de légitime défence" (2002) 106 RGDIP 51. See also for a critical perspective K.N. Trapp, 'Can Non-State Actors Mount an Armed Attack?' in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015).
[47] See K. Zamenek, 'Armed Attack' (2013) 1 MPEPIL 595; and R. Kolb, *Ius Contra Bellum: Le Droit International Relatif au Maintien de la Paix* (2nd edn, Bruylant 2009) 266.

Nations" (i.e. a State).

This lack of specification as to the authorship of an attack notably stands in opposition with the phraseology of article 2(4) of the UN Charter, which instead explicitly addresses the prohibition of the use of force to a State-based audience.[48] The fact that the drafters of the UN Charter chose to maintain such a different terminology in the two complementary articles[49] cannot but reinforce the need to interpret them differently, rather than jointly.[50] Accordingly, some scholars have taken the view that, as long as they reach a *de minimis* threshold, attacks by non-State actors may well fall within the scope of application of article 51.[51] Concluding otherwise would equate to an acceptance of that a State may be precluded from exercising its inherent right of self-defence "merely because there is no attacker State".[52] This would not only be overtly unreasonable but would also be inconsistent with post-9/11 State practice and *opinio juris*.[53]

As the decade-long campaign against ISIS clearly shows, the posture taken by the international community in Resolutions 1368 and 1373 was not a case-specific response to international terrorism.[54] Rather, it intended to set a landmark precedent in furthering the suppression of terrorist violence and in the modalities for doing so. The shared position of Türkiye and France on the lawfulness of their airstrikes against ISIS elements in Syria,[55] which they framed

[48] See UN Charter (n 3) article 2(4).

[49] As a first draft of article 51 shows, express reference was originally made to that an attack had to be launched "by any state against any member state". However, this mention was later removed by the drafting commission without providing any justification for it. See 1 Foreign Relations of the United States, *Diplomatic Papers 1945* (Velma Hastings Cassidy et al. eds. 1967) 671.

[50] This position was most recently shared by a number of States during the 2021 Arria-Formula meeting on the use of force in international law. See UN Doc A/75/993-S/2021/247 (24 February 2021) 16 (Azerbaijan); 32 (Estonia); 38-40 (India); and 79-80 (Türkiye). In *Guantanamo Bay*, the Columbia District Court also argued against a restrictive interpretation of article 51 on the basis that UN Charter "recognises the inherent of states to use force in self-defense in response to any 'armed attack,' not just attacks that originate with states". See In re Guantanamo Bay Litigation, *Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay*, Misc. No. 08-442, 4 (D.D.C., Mar. 13, 2009).

[51] See in particular C. Greenwood, 'International Law and the "War against Terrorism"' (2002) 78 International Affairs 301; J.M. Beard, 'Military Action Against Terrorists Under International law, America's New War on Terror: The Case for Self-Defence under International Law' (2002) 25 Harv J L & Pub Pol 559; and Gill and Tibori-Szabó (n 30) 493.

[52] See *Armed Activities* (n 38), Separate Opinion of Simma j., para 12; and Separate Opinion of Kooijmans j., para 30. See also *Wall Advisory opinion* (n 25), Declaration by Buergenthal j., para 6; Separate Opinion of Kooijmans j., para 35; and Separate Opinion of Higgins j., para 33.

[53] As Maogoto and Trapp observe, the question of attributability is irrelevant for assessing whether a terrorist attack falls within the scope of article 51. It is instead central for determining against whom defensive force may be exercised. See Maogoto (n 26) 169, and Trapp (n 46) 685-89.

[54] See M.P. Scharf, 'How the War against ISIS Changed International Law' (2016) 48 CWRJIL 15.

[55] See UN SCOR 70th Session, 7565th mtg. (France), UN Doc S/PV/7565 (20 November 2015); and Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Türkiye to the United Nations addressed to the President of the Security Council, UN Doc S/2015/563 (24 July 2015).

as legitimate expressions of individual self-defence, is quite telling in this respect. So is the international reaction to Egypt's military intervention in Libya.[56]

Alongside these relevant examples of State practice, numerous authoritative soft law instruments also support an extended notion of self-defence.[57] The Chatham House Principles, the Bethlehem principles and the more recent Leiden Policy Recommendations are all unequivocal in claiming that article 51 is not limited to horizontal self-defence but also extends to "attacks by non-State actors, even when not acting on behalf of a State".[58] While these instruments are *per se* non-binding, they clearly reflect the view that a State is "much less likely" today to be denied recourse to forcible measures against non-State actors.[59]

Simply accepting that self-defence is available in a vertical setting does not however clarify how, and under what conditions, defensive force may be exercised. In this respect, the main point of reference seems to be found in customary international law.[60] Indeed, the "essential components"[61] of self-defence (necessity, proportionality and immediacy) were first distilled by the US Secretary of State Daniel Webster in his correspondence with British Minister in Washington Henry Fox in relation to the Caroline affair. There, Webster took the view that for an exercise of self-defence to be lawful Britain had "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and that every measure taken involved "nothing

[56] See Turkish Weekly, 'Arab League "Understands" Egypt Airstrikes in Libya' (Turkish Weekly, 19 February 2015) <https://web.archive.org/web/20150220130838/http://www.turkishweekly.net/news/180447/arab-league-39-understands-39-egypt-air-strikes-in-libya.html> accessed 10 May 2024; and A. Masriya, 'U.S. "Respects Egypt's Right to Self-Defence" after Libya Airstrikes' (Egyptian Streets, 18 February 2015) <https://egyptianstreets.com/2015/02/18/u-s-respects-egypts-right-to-self-defence-after-libya-airstrikes/> accessed 10 May 2024.

[57] The examples of State practice provided are arguably the most relevant as to the notion of self-defence against non-State actors, but not the sole. A less recent example is the international reaction to the 2006 Hezbollah incursion into Northern Israel. While outspokenly critical of Israel's disproportionate military response, many States acknowledged that Israel had in principle the right to defend itself against Hezbollah. See UN Doc. S/PV.5489 (14 July 2006) 9 (Argentina); 12-3 (United Kingdom); 14-5 (Peru) and (Denmark); 15-6 (Slovakia); and 16-7 (Greece).

[58] D. Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 Am J Int'l L 770 [Bethlehem principles] principle 1; N. Schrijver and L. van den Herik, 'Leiden Policy Recommendations on Counter-Terrorism and International Law' (2010) [Leiden Policy Recommendations] §38; and Chatham House Principles (n 29) principle 6.

[59] See C.J. Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359. Yet, some States still insist that article 51 UN Charter applies exclusively to armed attacks launched by, or attributable to, States. See Peace and Security Council of the African Union, "Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace" (AU Addis Ababa 2024) PSC/PR/COMM.1196 (2024) §§39 and 41-3.

[60] This was acknowledged by the ICJ in its Nuclear Weapons Advisory opinion. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 3 (1996) para 41.

[61] Self-Defence resolution (n 32) §2.

unreasonable or excessive".[62] If this formula is accepted as good law, then any action in self-defence would have to be premised on the fulfilment of three key conditions.[63] Firstly, a State would have to show that the attack it suffered was launched by a State and/or an autonomous organised armed group,[64] and that more peaceful measures were insufficient for addressing it.[65] Secondly, proof would have to be adduced that all forcible measures taken were commensurate to the harm or threat posed by the armed attack, and thus strictly limited to what was necessary to forestall future attacks. Lastly, the exercise of self-defence must be such that no "undue time-lag" exists between the State response and the armed attack.[66]

Verifying the fulfilment of these conditions is not a matter of static assessment, but rather an active exercise that depends on the specific circumstances of the case. To highlight this need for adaptability, the analysis will now turn to focus on two distinct instances which may result in defensive action: intervention *against* the host State and *within* the State.

3.2 Intervention Against the Host State

Terrorist attacks may, and generally do, implicate a foreign State.[67] This is because, even when acting alone, terrorists must have a base of operations (on a nation's territory) for planning and organising their unlawful activities.[68] The mere presence of terrorists within its borders does not automatically make the territorial State responsible for their actions. As the ICJ clearly stressed in *Nicaragua* and *Bosnian Genocide*,[69] the test for attributability remains that of "effective control" even in the context of armed attacks perpetrated by private actors. As such, attribution requires proof of the territorial State's participation in

[62] Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841) 29 British and Foreign State Papers 1840-1841, 1129, 1132-33 (1857).
[63] Some scholars object to the idea that the Webster formula may influence the understanding of self-defence in the post-charter era. However, as Dinstein notes, "nothing in the Charter runs counter to the three conditions of necessity, proportionality and immediacy – distilled from Webster's original language". See J. Kammerhofer, 'The Armed Activities Case and Non-State Actors in Self-Defence Law' (2007) 20 LJIL 89; and Dinstein (n 21) 297.
[64] See *Oil Platforms* case (n 40) para 57. See also R. van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 LJIL 183.
[65] See R. Ago, 'Addendum to the Eighth Report on State Responsibility' (1980) II(1) ILC Ybk 13; and O. Schachter, 'The Right of States to Use Armed Force' (1984) 82 MLR 1620.
[66] Dinstein (n 21) 252. See also T.D. Gill, 'The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy' in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Brill 2007) 113.
[67] Dinstein (n 27) 45.
[68] ibid.
[69] *Nicaragua* (n 31) para 115; and *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Serbia and Montenegro), judgement, ICJ Rep 2 (2007) para 406.

planning, directing, or controlling the attacks. Non-involvement in terrorism does not, however, exempt a State from its duty to properly address internal non-State threats. This was expressly stressed in the *Island of Palmas* award[70] and later in *Corfu Channel*,[71] where the existence of a due diligence duty to prevent one's own territory from being "used for acts contrary to the rights of other States" was categorically upheld.[72] Every State must actively oppose the use of its territory for unlawful acts, but also abstain from passively tolerating or acquiescing in "organised activities… directed towards the commission of such acts" especially when involving "a threat or use of force".[73]

This multifaceted duty of vigilance is not absolute.[74] Indeed, it would be unreasonable to assume that a State is able, at all times, to predict and prevent all manifestations of armed violence originating from its territory and causing harm to another State. Instead, the more reasonable expectation is that the territorial State takes all necessary measures at its disposal to effectively suppress the terrorist presence within its territory as soon as it becomes aware of it.[75] Failure to do so would amount to an internationally wrongful act of omission,[76] and possibly to complicity in terrorist activities.[77] The compass in this latter regard seems to be the very stance of the territorial State vis-à-vis the terrorist actors found on its territory. If the national authorities openly endorse the terrorists' cause and the violent activities committed in its pursuance, they would *ipso facto* assume full responsibility for them.[78] Indeed, conferring any such "seal of approval" would effectively turn non-State actors into *de facto* agents of the territorial state,[79] translating their private acts into State acts.[80]

Acknowledging that a State may become an "accessory-after-the-fact" to the harm caused by terrorist actors for having approved of their actions bears

[70] *Island of Palmas* (Netherlands v. US), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); and *Corfu Channel* (UK v. Albania), Judgment, ICJ Rep 4 (1949).
[71] *Corfu Channel* (n 70) para 22.
[72] United Nations General Assembly (UNGA), 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', A/RES/2625 (XXV) (1970) 25 RGA 121.
[73] ibid. Such a twofold obligation was held to be declaratory of customary international law by the ICJ in the *Armed Activities* judgement. See *Armed Activities* (n 38) paras 162-3.
[74] See Gill and Tibori-Szabó (n 30) 494.
[75] ibid. See also S. Verhoeven, 'A Missed Opportunity to Clarify the Modern *Ius ad Bellum*: Case Concerning Armed Activities on the Territory of the Congo' (2006) 45 MLLWR 355.
[76] R. Ago, 'Fourth Report on State Responsibility' (1972) II ILC Ybk 71, 120. Some qualify responsibility for such an omission as "vicarious". See Brown (n 14) 13.
[77] See S. Sucharitkul, 'Terrorism as an International Crime: Questions of Responsibility and Complicity' (1989) 19 Isr YB Hum Rts 247.
[78] See Dinstein (n 21) 243.
[79] ibid.
[80] See *Case Concerning Diplomatic and Consular Staff in Tehran* (US v. Iran), judgement, ICJ Rep 3 (1980) para 74.

evident consequences in the context of self-defence.[81] Upon suffering a terrorist attack, the victim State could lawfully take forcible measures directly against the territorial State based on its overt support of the perpetrators.[82] The US military response to 9/11 offers a textbook example of such a scenario. Originally, there was no doubt within the international community that the attacks against the US had been authored by Al-Qaeda. Therefore, Afghanistan could not have been held responsible for them *ex post facto*, as it did not sponsor, support or collude with the terrorist group. However, everything changed when the Taliban government showed an unwillingness to act against Al-Qaeda, offering Bin Laden and his network a safe haven in Afghanistan instead.

The capability and willingness of Al-Qaeda to launch large-scale terrorist attacks against the US were such to make the terrorist group a "continuing threat" to US national security and integrity even after 9/11.[83] Afghanistan was therefore bound under international law to terminate the activities of Al-Qaeda on its territory and to comply with the numerous requests by the Security Council to surrender the group's leadership in order to bring them to justice.[84] However, the Taliban refused to comply with such demands, allowing Al-Qaeda to continue operating freely in the country. By so doing, Afghanistan effectively contributed to furthering the "continuing threat" to the US emanating from Al-Qaeda and as such, became responsible for it.[85] The US was therefore fully entitled to act in self-defence against Afghanistan, as it did during its 'Operation Enduring Freedom'.[86]

3.3 The Unwilling or Unable Doctrine and Non-Consensual Intervention

While a State's direct involvement in terrorism leaves little to no doubt as to the legitimacy of forcible measures and their addressees, the same cannot be as easily said in relation to armed attacks launched *from*, but not *by*, a State. This would pretty much be the case where terrorist actors located in the territorial State carry out incursions against the victim State in a hit-and-run fashion, using the territory of the former both as a base of operation and as a launchpad for their unlawful acts.[87] In this scenario, the territorial State would not be *per se* responsible for the harm suffered by the victim State, but it would be bound to promptly rectify the

[81] Dinstein (n 21) 243.
[82] See Maogoto (n 26) 73.
[83] Brown (n 14) 12.
[84] See in particular UNSC Res 1267 (1999) S/RES/1267; and UNSC Res 1333 (2000) S/RES/1333.
[85] Brown (n 14) 12. See also Dinstein (n 21) 243-4 and M. Bryers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 ICLQ 401.
[86] As Dinstein notes, "[…] The war against terrorism turned from a mere metaphor to a real (inter-State) war… not on 9/11 but on 7 October 2001". See Dinstein (n 21) 244.
[87] ibid.

situation.[88] All necessary measures would have to be taken by the territorial State to forestall future attacks against the victim State and/or its nationals.

However, the crux of the issue is that there is no guarantee that the territorial State will always be in the position to comply with its duty of vigilance. It is not unusual for a State plagued by terrorism to simply lack adequate manpower and resources to effectively act against it. This is especially the case where the terrorist actors are entrenched in remote and largely inaccessible areas of its territory,[89] impairing the feasibility of conducting counter-terrorist operations. According to certain scholars, the territorial State's inability to act inevitably leads to a corresponding duty to seek foreign aid.[90] An example of this kind of inter-State cooperation was witnessed in the West African coalition against Boko Haram. This cooperation was specifically created due to the inability of the States involved (Chad, Nigeria, Cameroon, and Niger) to individually oppose the Jihadist organisation striking from, or on, their territory.

Inter-State cooperation may also take the form of a one-sided consensual foreign intervention. To compensate for its operational shortcomings, the territorial State may invite the victim State to intervene against the terrorists present on its territory.[91] In these cases, the use of force by the victim State would be strictly subordinated to the consent of the territorial State both in terms of duration and scope,[92] so that any (hostile) action beyond the terms explicitly agreed on by the latter would amount to an act of illegal intervention by the former.[93]

However, what would occur if the territorial State were not only unable but also unwilling to act? While that State may actively oppose cross-border manifestations of terrorism originating from its territory, it may also refrain from doing so.[94] This would no doubt lead to a serious impasse. On the one hand, the victim State would be entitled to employ defensive force in response to the attacks launched against it and to destroy the terrorist bases from which they originated. On the other, to exercise its inherent right of self-defence, it would have to access the territorial State uninvited, and so to infringe on that State's territorial

[88] See Verhoeven (n 75) 361.
[89] *Armed Activities* (n 38) paras 300-1.
[90] See Self-Defence resolution (n 32) §10; Gill and Tibori-Szabó (n 30) 494; and K.N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56(1) ICLQ 141.
[91] See Dinstein (n 27) 46-7.
[92] ibid.
[93] See Trapp (n 90) 147.
[94] See Gill and Tibori-Szabó (n 30) 499-500.

integrity and sovereignty.[95] The victim State would end up being compressed between two equally relevant, but hardly reconcilable, obligations. Central in this context is that, even when unresponsive towards the terrorist actors on its territory, the territorial State could not be held accountable for their violent actions.[96]

At a minimum, this would constitute proof of passively tolerating the use of its territory for purposes contrary to international law, which by itself, is too weak a ground for attributability.[97] Any non-consensual intervention by the victim State inside the territorial State would not consequently be – at least nominally – in keeping with the general prohibition on the use of force. However, accepting that the territorial State's consent is always required for any foreign intervention on its territory problematically entails that a State victim of terrorism would have to passively endure cross-border terrorist attacks merely because these could not be linked to the territorial State from which they were launched.[98] It would also mean that the responsible terrorists could rely on the host State's territorial inviolability to easily escape accountability for and forcible responses against their heinous conducts. All this is no doubt hardly acceptable.[99] The territorial State should not be granted the privilege of insulating itself against any measure in self-defence when it allows terrorist operations to continue undisturbed on its territory despite having, or having been offered, all necessary means to halt them.[100] Arguing otherwise would unjustly reward that State for its wilful non-compliance with its duty of vigilance. Accordingly, it is generally understood that the territorial State's consent ought to be treated as being merely "desirable" rather than necessary.[101]

This means that if an attack were launched from the territorial State's

[95] See M. Lehto, 'The Fight against ISIL in Syria. Comments on the Recent Discussion of the Right of Self- Defence against Non-State Actors' (2018) 87 NJIL 5; and D. Tladi, 'An Assessment of Bethlehem's Principles on the Use of Force against Non-State Actors' (2013) 107 AJIL 570.
[96] See P.L. Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers 1986).
[97] See Dinstein (n 21) 290.
[98] B. Finucane, 'Fictitious States, Effective Control, and the Use of Force against Non-State Actors' (2012) 30 BJIL 35.
[99] As the Rwandan ambassador to the UN rightly observed, a State cannot reasonably be "expected to simply wait and fold its arms while its people are killed, its infrastructure is destroyed and destabilisation continues". See Letter dated 30 November 2004 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, UN Doc S/2004/933 (30 November 2004).
[100] See R. Wedgwood, 'Responsibility to Terrorism: The Strikes against Bin Laden' (1999) 24 YJIL 559. Trapp argues this option would instead be sacrosanct where the territorial State took all necessary measures to suppress the terrorist actors on its territory. On the other hand, Dinstein notes that it is not sufficient for a State to "try" to suppress the terrorist actors within its territory, but to actually take "satisfactory action" against them to achieve compliance with the duty. See Trapp (n 90) 147; and Dinstein (n 21) 298.
[101] Finucane (n 98) 83.

territory against another State, and the former found itself unwilling or unable to take action against the responsible non-State actors, the latter could intervene directly against them in a non-consensual fashion.[102] The resulting cross-border operation would constitute a lawful exercise of self-defence, mounted in response to an armed attack,[103] provided it is limited to what the territorial State should have done in the first place, but failed to do.[104] Indeed, the victim State would exclusively target the terrorist operatives and their infrastructure found on the territorial State's territory in order to thwart the risk of future attacks being perpetrated against it. Since the sole object of the victim State's use of force would be to neutralise the terrorists on the territorial State's territory, no international armed conflict would in principle exist between the two States.[105] The territorial State may not therefore interfere with the targeted forcible measures taken by the victim State,[106] unless they resulted in incidental damage being suffered by that State.[107]

Recently, the legality of such a non-consensual form of intervention – often referred to as "extra- territorial law enforcement"[108] – has been questioned. While the States have largely expressed in its favour,[109] some scholars have

[102] See A. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extra-territorial Self-Defense' (2012) 52 VJIL 483; N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press 2011) 52 et seq; and Gill and Tibori-Szabó (n 30) 494-5.

[103] As Dinstein – citing Fenwick – argues, if the victim State is entitled to act in self-defence against an armed attack by the territorial State, it must be equally empowered to do so against "hostile organised armed groups" operating from within its territory. See Dinstein (n 21) 291. See also C.G. Fenwick, *International Law* (4th edn, 1965) 274; Chatham House Principles (n 29), principle 6; Leiden Policy Recommendations (n 58) §§ 51-2; and Bethlehem principles (n 58), principles 11 and 12.

[104] See C.C. Hyde, I International Law Chiefly as Interpreted and Applied by the United States (2nd edn, 1945) 240; and Dinstein (n 27) 49.

[105] See J.E.S. Fawcett, 'Intervention in International Law. A Study of Some Recent Cases' (1961) 103 RCADI 343. However, a military response by the territorial State against the victim State's targeted intervention could well trigger an international armed conflict. See Dinstein (n 21) 291.

[106] Indeed, there is no such thing as a "right of self-defence against self-defence". See Gill and Tibori-Szabó (n 30) 495.

[107] See W.K. Lietzau, 'Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism' (2004) 8 MPYUNL 383. It is implied that if the terrorist non-State actors used infrastructure belonging to the territorial State, the latter would be expected to bear the burden of their destruction by the (intervening) victim State. See Gill and Tibori-Szabó (n 30) 503.

[108] See S.A. Barbour and Z.A. Salzman, '"The Tangled Web": The Right of Self-Defense against Non-State Actors in the Armed Activities Case' (2008) 40 NYUJILP 53; and *Armed Activities* case (n 38), separate opinion of Kooijmans j. para 31.

[109] See Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695 (23 September 2014); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Türkiye (n 55); Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council , UN Doc S/2015/693 (9 September 2015); Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security

denounced extra-territorial law enforcement – particularly via the Unwilling or Unable doctrine – as being nothing more than an attempt to reintroduce a 19th century-like hierarchy of States in the operation of *jus ad bellum.*[110] In their view, allowing a State victim of terrorism to freely intervene in another State whenever that State is unwilling or unable to suppress the terrorist actors present on its territory would amount to a subordination of State sovereignty to the efficacy of counter-terrorism policies.[111] Thus, a State would be entitled to preserve its territorial integrity when capable of dealing with terrorism and would not be so when lacking appropriate means to control its territory or the political will for enforcing such control.

The most critical argument in this context is that, in practice, States from the Global South are far more likely to lose their "sovereignty privilege" than any other State. As they tend to be structurally and operationally weaker than their Western counterparts, these States may, and often do, face many more difficulties when opposing terrorist actors in and outside of their territory. As a consequence, they are more easily exposed to foreign military interventions and to the consequences flowing from them. This aspect has been taken as proof of that the Unwilling or Unable doctrine, while *prima facie* neutrally construed, systematically operates in a substantially "unequal international environment".[112] As Bernstorff puts it, the "semi-periphery" States which are "not powerful enough to resist the application of the regime" shall always be the sole targets of the doctrine.[113] Instead, the more military-capable Western States shall almost exclusively be those enforcing it.[114] Rather than a State's ability to fight terrorism, it seems to be the power disparity existing between the intervening victim State and the territorial State where the intervention occurs what truly drives the former's extraterritorial law enforcement.[115]

Council, UN Doc S/2015/946 (10 December 2015); Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937-S/2006/515 (12 July 2006). Support for the doctrine was also expressed by a number of States during the 2021 Arria-Formula meeting. See UN Doc A/75/993-S/2021/247 (n 50) 13 (Australia); 16 (Azerbaijan); 18-9 (Belgium); 25-6 (Denmark); 30-1 (United States); 32 (Estonia); 38-40 (India); 53-5 (Netherlands); 62-4 (United Kingdom); 79-80 (Türkiye); and, contra, 20 (Brazil); 22-24 (China); 49-50 (Mexico); and 72 (Sri Lanka).

[110] See in particular N. Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2017) 109 AJILU 266; and D.I. Ahmed, 'Defending Weak states against the Unwilling or Unable Doctrine of Self-Defense' (2013) 9 J Int'l L & Int'l Rel 1.

[111] Tzouvala (n 110) 267.

[112] Ahmed (n 110) 45.

[113] J. von Bernstorff, 'Drone Strikes, Terrorism and the Zombie: on the Construction of an Administrative Law of Transnational Executions' (2016) 5(7) ESIL Reflections 1.

[114] ibid.

[115] The so-called "Plea against the Abusive Invocation of Self-Defence" – an academic action started by Professor Corten – fully embraces this perspective, warning against the risk of the

While these criticisms do have some merit, it would be erroneous to conclude that the Unwilling or Unable doctrine purports an inherently discriminatory and dangerous expansion of the right of self-defence. There is no doubt that powerful Western States sworn to the War on Terror have frequently invoked it to justify "the unilateral launching of military operations around the world".[116] The airstrikes carried out by the US against Iranian-backed militias along the Syrian-Iraqi border,[117] and the targeted killing of Anwar al-Awlaki in Yemen,[118] are examples of that. Yet, these instances reflect the exception rather than the rule. They are evidence of the potential abuses to which the doctrine may be, and has been, subjected to, but by no means of the lawful use for which it was intended. As some scholars rightly note,[119] the doctrine was meant to function as a last resort instrument whereby a victim State could lawfully intervene in another State to forestall future terrorist attacks against it exclusively where no less intrusive means were available to achieve that end.[120]

The fulfilment of this latter requirement was deemed essential to strike a balance between the right of self-defence and the territorial sovereignty of the States involved, and to ensure that the intervening victim State would exercise armed force within the territorial State only when strictly necessary to safeguard its integrity.[121] As such, it is difficult to see how the Unwilling or Unable doctrine constitutes a more expansive and "qualitatively different" interpretation of article 51 UN Charter,[122] given its consistency with the basic tenets of self-defence.[123]

4 Conclusion

The analysis carried above shows that the events of 9/11 and the War on Terror ensuing from it, have irremediably changed the posture of the international

doctrine becoming "an alibi to justify the unilateral launching of military operations around the world". See O. Corten, 'A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism' (Centre de Droit International, 6 October 2016) <http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme/> accessed 10 May 2023.

[116] ibid. See also Tzouvala (n 110) 268.

[117] See M. El Dahan and A. Ismail, 'Syria condemns 'cowardly' U.S. air strikes on Iran-backed militias' (Reuters, 26 February 2021) <https://www.reuters.com/article/us-usa-syria-strike-idUSKBN2AQ1L8> accessed 1 June 2023; and K. Daurgidas and J.D. Mortenson, 'Contemporary Practice of the United States Relating to International Law' (2015) 109 AJIL 174.

[118] See D. Leinwand Leger, 'Targeted killing of al-Awlaki raises legal questions' (ABC News, 1 October 2011) <https://abcnews.go.com/Politics/targeted-killing-al-awlaki-raises-legal-questions/story?id=14644479> accessed 1 June 2023.

[119] See Gill and Tibori-Szabó (n 30) 498; Dinstein (n 21) 293; and K. Chainoglou, 'Reconceptualising Self- Defence in International Law' (2007) 18 KCLJ 61.

[120] Arguably, it is to the victim State to prove that the territorial State was unwilling or unable to act, and that a non-consensual intervention was necessary. See I. Couzigou, 'The Right to Self-Defence against Non-State Actors: Criteria of the "Unwilling or Unable Test' (2017) 1 HJIL 47.

[121] See Trapp (n 90) 146.

[122] See Tzouvala (n 110) 267.

[123] See Gill and Tibori-Szabó (n 30) 501; and Trapp (n 90) 146-7.

community vis-à- vis terrorism. Although the ICJ has abstained from espousing a vertical understanding of self-defence, recent State practice and *opinio juris* show strong – though not unanimous – support for it. States actively engaged in the suppression of terrorism have indeed repeatedly taken military action against terrorist non-State actors, and have been fully endorsed by a majority of the international community for doing so.

It was shown, however, that undertaking any such defensive responses – even when lawful in theory – may not necessarily be feasible in practice. The fact that terrorists tend to act in a cross-border fashion inevitably implies that a State may not be able to forestall future attacks from being launched against it without having access to the area where the terrorists themselves are found. The victim State would therefore have seek and obtain consent from the territorial State to enter its territory, and to lawfully exercise its inherent right of self-defence, However, the main issue is that the territorial State may well object to such a request and refuse altogether to accept any form of foreign military aid. In the face of a, similar uncooperativeness, the victim State would seemingly be left with no other choice than that of passively enduring cross-border terrorist attacks for as long as the territorial State does not succeed in addressing them on its own. The very possibility of such a scenario coming into being is arguably absurd, and that is why the Unwilling or Unable doctrine has been tabled as a viable solution.

That said, this author agrees that the practice of extra-territorial law enforcement enabled by the doctrine must be exercised with great restraint, as a last resort measure, in strict observance of the rules of *jus ad bellum* as described above. When falling victim to cross-border terrorist violence, a State does not free itself from compliance with the customary elements of self-defence nor does it acquire a "carte blanche" to act in self-defence whenever and however it pleases.[124] Rather, in order for its response to considered lawful, that State must act in line with the principles of necessity, proportionality and immediacy. All in all, a victim State will be entitled to intervene in a non-consensual fashion on the territory of another State only when absolutely necessary to forestall future attacks perpetrated against it and absent alternative less intrusive measures, such as judicial or law enforcement cooperation, to achieve that objective.

[124] Trapp (n 90) 156.

5 REFERENCES

Primary sources

Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment, ICJ Rep 168 (2005).

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), judgement, ICJ Rep 2 (2007).

Case Concerning Diplomatic and Consular Staff in Tehran (US v. Iran), judgement, ICJ Rep 3 (1980).

Charter of the United Nations (adopted 26 June 1945) 1 UNTS XVI.

Foreign Relations of the United States, Diplomatic Papers 1945 (Velma Hastings Cassidy et al. eds., 1967).

Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937-S/2006/515 (12 July 2006).

In re: Guantanamo Bay Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Misc. No. 08-442, 4 (D.D.C., Mar. 13, 2009).

International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1995) UNTS 2149.

International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999) UNTS 2178.

Island of Palmas (Netherlands v. US), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); and Corfu Channel (UK v. Albania), Judgment, ICJ Rep 4 (1949).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep 194 (2004).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep 3 (1996).

Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946 (10 December 2015).

Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695 (23 September 2014).

Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Türkiye to the United Nations addressed to the President of the Security Council, UN Doc S/2015/563 (24 July 2015).

Letter dated 30 November 2004 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, UN Doc S/2004/933 (30 November 2004).

Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015).

Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693 (9 September 2015).

Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841) 29 British and Foreign State Papers 1840-1841, 1129, 1132-33 (1857).

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment, ICJ Rep. 14 (1986).

Oil Platforms (Iran v. US), Judgment, ICJ Rep 161 (2003).

Peace and Security Council of the African Union, "Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace" (AU Addis Ababa 2024) PSC/PR/COMM.1196 (2024).

UN Doc. A/75/993-S/2021/247 (24 February 2021).

UN Doc. S/PV.2675 (15 April 1986).

UN Doc. S/PV.2680 (18 April 1986).

UN Doc. S/PV.2682 (21 April 1986).

UN Doc. S/PV.5489 (14 July 2006).

UN SCOR 70th Session, 7565th mtg., UN Doc S/PV/7565 (20 November 2015).

United Nations General Assembly (UNGA), 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', A/RES/2625 (XXV) (1970) 25 RGA 121.

UNSC Res 1214 (1998) S/RES/1214.

UNSC Res 1267 (1999) S/RES/1267.

UNSC Res 1333 (2000) S/RES/1333.

UNSC Res 1368 (2001) S/RES/1368.

UNSC Res 1373 (2001) S/RES/1373.

UNSC Res 405 (1977) S/RES/405.

UNSC Res 419 (1977) S/RES/419.

UNSC Res 573 (1985) S/RES/573.

Secondary sources

Ago R., 'Addendum to the Eighth Report on State Responsibility' (1980) II(1) ILC Ybk 13.

Ago R., 'Fourth Report on State Responsibility' (1972) II ILC Ybk 71, 12.

Ahmed D.I., 'Defending Weak states against the Unwilling or Unable Doctrine of Self-Defense' (2013) 9 J Int'l L & Int'l Rel 1.

Alexandrov S.A., Self-Defense Against the Use of Force in International Law (Martinus Nijhoff Publishers 1996).

Barbour S.A. and Salzman Z.A., '"The Tangled Web": The Right of Self-Defense against Non-State Actors in the Armed Activities Case' (2008) 40 NYUJILP 53.

Bassiouni M.C., 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 HILJ 83.

Beard J.M., 'Military Action Against Terrorists Under International law, America's New War on Terror: The Case for Self-Defence under International Law' (2002) 25 Harv J L & Pub Pol 559.

Bethlehem D., 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 Am J Int'l L 770.

Bew J. et al., 'The Long Twentieth century' in E. Chenoweth et al. (eds), The Oxford Handbook of Terrorism (Oxford University Press 2019).

Brown D., 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses' (2003) 11 Cardozo J Int'l & Comp L 1.

Bryers M., 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 ICLQ 401.

Cassese A., 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993.

Chainoglou K., 'Reconceptualising Self- Defence in International Law' (2007) 18 KCLJ 61.

Corten O. et al, 'Opération liberté immuable: Une éxtension abusive du concept de légitime défence' (2002) 106 RGDIP 51.

Corten O., ‘A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism’ (Centre de Droit International, 6 October 2016) <http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme/> accessed 1 June 2023.

Couzigou I., ‘The Right to Self-Defence against Non-State Actors: Criteria of the "Unwilling or Unable Test’ (2017) 1 HJIL 47.

Daurgidas K. and Mortenson J.D., ‘Contemporary Practice of the United States Relating to International Law’ (2015) 109 AJIL 174.

De Hoogh A., ‘Restrictivist Reasoning on the Ratione Personae Dimension of Armed Attacks in the Post 9/11 World’ (2016) 29 LJIL 19.

Deeks A., ‘“Unwilling or Unable”: Toward a Normative Framework for Extra-territorial Self-Defense’ (2012) 52 VJIL 483.

Dinstein Y., ‘Terrorism and Afghanistan’ in M.N. Schmitt, The War in Afghanistan: A Legal Analysis (2009).

Dinstein Y., War, Aggression and Self-Defence (2nd edn, Cambridge Grotius 1994).

Dinstein Y., War, Aggression and Self-defence (6th edn, Cambridge University Press 2017).

Drumbl M.A., ‘Victimhood in our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order’ (2003) 81 NCLR 1.

El Dahan M. and Ismail A., ‘Syria condemns 'cowardly' U.S. air strikes on Iran-backed militias’ (Reuters, 26 February 2021) <https://www.reuters.com/article/us-usa-syria-strike-idUSKBN2AQ1L8> accessed 1 June 2023.

Fawcett J.E.S., ‘Intervention in International Law. A Study of Some Recent Cases’ (1961) 103 RCADI 343.

Fenwick C.G., International Law (4th edn, 1965).

Finucane B., ‘Fictitious States, Effective Control, and the Use of Force against Non-State Actors’ (2012) 30 BJIL 35.

Garwood-Gowers A., ‘Self-defence against Terrorism in the Post-9/11 World” (2004) 4(2) QUTLJJW 167.

Gill T.D. and Fleck D., The Handbook of the International Law of Military Operations (Oxford University Press 2015).

Gill T.D. and Tibori-Szabó K., ‘Twelve Key Questions on Self-Defense against Non-State Actors’ (2019) 95 Int’l Law Stud 467.

Gill T.D., ‘The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy’ in M.N. Schmitt and J. Pejic (eds), International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein (Brill 2007).

Greenwood C., 'International Law and the "War against Terrorism"' (2002) 78 International Affairs 301.

Hakimi M., 'Defensive Force against Non-State Actors: The State of Play' (2015) 9 Int. Law Stud. 1.

Hargrove J.L., 'The Nicaragua Judgement and the Future of the Law of Force and Self-Defense' (1987) 81 AJIL 135.

Henderson C., The Use of Force and International Law (Cambridge University Press 2018).

Hyde C.C., I International Law Chiefly as Interpreted and Applied by the United States (2nd edn, 1945).

Institut de Droit International, Resolution 'Self-Defence' (Santiago, 2007) 72 AIDI 233.

Kammerhofer J., 'The Armed Activities Case and Non-State Actors in Self-Defence Law' (2007) 20 LJIL 89.

Kolb R., Ius Contra Bellum: Le Droit International Relatif au Maintien de la Paix (2nd edn, Bruylant 2009).

Lehto M., 'The Fight against ISIL in Syria. Comments on the Recent Discussion of the Right of Self- Defence against Non-State Actors' (2018) 87 NJIL 5.

Leinwand Leger D., 'Targeted killing of al-Awlaki raises legal questions' (ABC News, 1 October 2011) <https://abcnews.go.com/Politics/targeted-killing-al-awlaki-raises-legal-questions/story?id=14644479> accessed 1 June 2023.

Lietzau W.K., 'Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism' (2004) 8 MPYUNL 383.

Livingstone N.C., 'Proactive Responses to Terrorism: Reprisals, Preemption, and Retribution' in C.W. Kegley jr. (ed.), International Terrorism: characteristics, causes, controls (Macmillan 1990).

Lubell N., Extraterritorial Use of Force against Non-State Actors (Oxford University Press 2011).

Maogoto J.N., Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror (Ashgate Publishing 2005).

Masriya A., 'U.S. "Respects Egypt's Right to Self-Defence" after Libya Airstrikes' (Egyptian Streets, 18 February 2015) <https://egyptianstreets.com/2015/02/18/u-s-respects-egypts-right-to-self-defence-after-libya-airstrikes/> accessed 22 April 2023.

Moir L., 'Action against Host States of Terrorist Groups' in M. Weller (ed.), The Oxford Handbook of the Use of Force in International Law (Oxford University Press 2015).

Murphy S.D., 'Self-Defense and the Israeli Wall Opinion – An Ipse Dixit from the Court?' (2005) 99 AJIL 62.

Myjer E.P.J. and White N.D., 'The Twin Towers Attack: An Unlimited Right to Self-Defence' (2002) 7 JCSL 5.

Neff S., War and the Law of Nations (Cambridge University Press 2005).

O'Brien W., 'Reprisals, Deterrence and Self-Defense in Counterterror Operations' (1990) 30 Va J Int'l L 421.

O'Connell M.E. et al, Self-Defence against Non-State Actors (Cambridge University Press 2019).

Pellet A. and Pellet S., 'The Aftermath of September 11' (2002) 10 TFLR 64.

Rona G. and Wala R., 'No Thank You to a Radical Rewrite of the Jus ad Bellum' (2013) 107 AJIL 386.

Ruys T. and Verhoeven S., 'Attacks by Private Actors and the Right of Self-defence' (2005) 10 JCSL 289.

Ruys T., "Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press 2010).

Schabas W.A., An Introduction to the International Criminal Court (5th edn, Cambridge University Press 2017).

Schachter O., 'The Lawful Use of Force by a state against Terrorists in Another Country' (1989) 19 IYHR 209.

Schachter O., 'The Right of States to Use Armed Force' (1984) 82 MLR 1620.

Scharf M.P., 'How the War against ISIS Changed International Law' (2016) 48 CWRJIL 15.

Schrijver N. and van den Herik L., 'Leiden Policy Recommendations on Counter-Terrorism and International Law' (2010).

Stahn C., 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (½) of the UN Charter, and International Terrorism' (2003) Fletcher F World Aff 35.

Sucharitkul S., 'Terrorism as an International Crime: Questions of Responsibility and Complicity' (1989) 19 Isr YB Hum Rts 247.

Taft IV W.H., 'Self-Defense and the Oil Platforms Decision' (2004) 29 YJIL 295.

Tams C.J., 'Light Treatment of a Complex Problem' (2005) 16 EJIL 963.

Tams C.J., 'The Use of Force against Terrorists' (2009) 20 EJIL 359

Tladi D., 'An Assessment of Bethlehem's Principles on the Use of Force against Non-State Actors' (2013) 107 AJIL 570.

Trapp K.N., 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56(1) ICLQ 141.

Trapp K.N., 'Can Non-State Actors Mount an Armed Attack?' in Weller M. (ed.), The Oxford Handbook of the Use of Force in International Law (Oxford University Press 2015).

Travalio G. and Altenburg J., 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 CJIL 97.

Turkish Weekly, 'Arab League 'Understands' Egypt Airstrikes in Libya' (Turkish Weekly, 19 February 2015) <https://web.archive.org/web/20150220130838/http://www.turkishweekly.net/news/180447/arab-league- 39-understands-39-egypt-air-strikes-in-libya.html> accessed 22 April 2023.

Tzouvala N., 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2017) 109 AJILU 266.

US Office of General Counsel, Department of Defense, Law of War Manual (US Department of Defense 2015).

US Secretary of State George Shultz, 'Terrorism and the modern world' (New York, 25 October 1984) reprinted in Department of State Bulletin (December 1984).

Van Steenberghe R., 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 LJIL 183.

Van Steenberghe R., 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' side' (2016) 29 LJIL 43.

Verhoeven S., 'A Missed Opportunity to Clarify the Modern Ius ad Bellum: Case Concerning Armed Activities on the Territory of the Congo' (2006) 45 MLLWR 355.

Von Bernstorff J., 'Drone Strikes, Terrorism and the Zombie: on the Construction of an Administrative Law of Transnational Executions' (2016) 5(7) ESIL Reflections 1.

Wedgwood R., 'Responsibility to Terrorism: The Strikes against Bin Laden' (1999) 24 YJIL 559.

Wilmshurst E., 'Chatham House Principles of International Law on the Use of Force by States in Self-Defence' (2006) 55 ICLQ 963.

Zamenek K., 'Armed Attack' (2013) 1 MPEPIL 595.

Zanardi P.L., 'Indirect Military Aggression' in A. Cassese (ed), The Current Legal Regulation of the Use of Force (Martinus Nijhoff Publishers 1986).