Leiden Journal of International Law (2016), 29, pp. 801–825
 doi:10.1017/S0922156516000327

Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule

NICHOLAS TSAGOURIAS*

Abstract
This article examines the law of self-defence as applied to non-state attacks in light of the coalition air strikes against ISIL in Syria. It critiques the two current interpretations of the law of self-defence – one based on attribution and the other on the 'unable or unwilling' test – for failing to address adequately the security threat posed by non-state actors or for not addressing convincingly the legal issues arising from the fact that the self-defence action unfolds on the territory of another state. For this reason, it proposes an alternative framework which combines the primary rule of self-defence to justify the use of defensive force against non-state actors, with the secondary rule of self-defence to excuse the incidental breach of the territorial state's sovereignty.

Key words
attribution; circumstances precluding wrongfulness; ISIL; non-state actors; substantial involvement; 'unable or unwilling'

1. Introduction

In recent years, ISIL has emerged as the most powerful and brutal jihadist group posing 'a global and unprecedented threat to international peace and security'.[1] In contrast to al-Qaeda or other terrorist groups, ISIL has a territorial basis, having seized large swathes of Iraqi and Syrian territory, from where it can plan and organize its nefarious activities and attack states, including Syria and Iraq. In response to such attacks, Iraq requested external assistance[2] and a US-led coalition of states launched air strikes against ISIL in both Iraq and Syria. Although the strikes against ISIL in Iraq were conducted with the consent of the Iraqi government,[3] Syria did not consent to the US-led strikes; but the majority of states involved in the air campaign against ISIL

* Professor of International Law, University of Sheffield [nicholas.tsagourias@sheffield.ac.uk].
1 UN Doc. SC Res 2249 (2015).
2 *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council*, UN Doc. S/2014/691 (2014), Annex.
3 *Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2014/851 (2014). For consent as justification for the use of force in another state see *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*), Merits, Judgment of 19 December 2005, [2005] ICJ Rep at 168, para. 47.

in Syria invoked their right of individual and/or collective self-defence. According to the US:[4]

> ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the US and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the US has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq.

Similarly, Turkey invoked its inherent right of individual and collective self-defence since 'the regime in Syria is neither capable of nor willing to prevent these [ISIL] threats emanating from its territory which clearly imperil the security of Turkey and safety of its nationals'.[5] In the same vein, Australia stated that its action is 'in support of the collective self-defence of Iraq' and that 'States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory.'[6]

The UK Parliament initially authorized strikes only in Iraq in response to the request by the Iraqi government but refused to authorize strikes within Syria.[7] However, the Government's view was that the collective self-defence of Iraq can justify action inside Syria and that the UK can exercise its 'inherent right of self-defence' against specific threats emanating from Syria as when it targeted two British citizens in Syria.[8] In November 2015, the UK Parliament authorized strikes against ISIL in Syria ruling out at the same time any deployment of troops.[9]

France justified its action by invoking its right to self-defence 'in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic', whereas after the Paris attacks of 13 November 2015, it labelled its previous action as collective

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

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

6 *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 (2015).

7 United Kingdom Prime Minister's Office, 'Policy paper, Summary of the government legal position on military action in Iraq against ISIL', 25 September 2014, available at www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil.

8 HC Deb 7 September 2015, vol 559, col 25–7-27. Also *Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland*, UN Doc. S/2015/688 (2015); House of Commons Foreign Affairs Committee, The extension of offensive British operations to Syria, Second Report of Session 2015-16 HC 457, 3 November 2015, 12; 'Memorandum to the Foreign Affairs Select Committee, Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria', November 2015, available at www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf; A. Lang, 'UK drone attack in Syria: legal issues' (HC Briefing paper, number 7332, 20 October 2015); A. Lang, 'Legal basis for UK military action in Syria' (HC Briefing paper, number 7404, 1 December 2015).

9 HC Deb 2 December 2015 c323; C. Mills, B. Smith and L. Brooke-Holland, 'ISIL/Daesh: the military response in Iraq and Syria' (HC Briefing paper, number 06995), 15 December 2015, 27–32.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

self-defence and its subsequent action against ISIL inside Syria as individual self-defence.[10]

The international reaction to the strikes was rather muted with only a handful of critical voices. Russia condemned the strikes because, in her view, they were carried out without Security Council authorization or approval by the Syrian government.[11] Yet it should be recalled that self-defence does not require Security Council authorization or host state consent. Russia was later involved in military action inside Syria apparently with the consent of the Syrian government.[12]

Syria complained to the UN Secretary-General about the French, British and Australian strikes. Syria claimed that the self-defence justification 'distorted … the intention of Article 51 of the Charter of the United Nations [and] is blatantly inconsistent with the Charter and the resolutions of the Security Council'.[13] Yet it did not explain why and how the acting states' interpretation of Article 51 is distorted. The Syrian government also declared that:

> [i]f any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, whether on the country's land or in its airspace or territorial waters, its actions shall be considered a violation of Syrian sovereignty

and that 'States must respect the unity, sovereignty and territorial integrity of the Syrian Arab Republic.'[14] It transpires that Syria did not denounce the coalition action as violating Article 2(4) of the Charter prohibiting the use of force but as violating its sovereignty.

From the preceding overview of state justifications, self-defence (individual or collective) emerges as the main justification for the air strikes against ISIL in Syria. Yet this justification is not without its problems, mainly because ISIL is a non-state actor and because the strikes unfold on the territory of Syria, a sovereign state, not itself implicated in the attacks.

In this article, I will first present the two most prominent approaches to the use of defensive force against non-state attacks and analyse their reasoning. The first relies on attribution that is, the attribution of the non-state attack to a state that subsequently becomes the target of the self-defence action, whereas the second relies on the inability or unwillingness of the host state to suppress the non-state attack. In the author's view these approaches fail to address the full gamut of legal and security issues that non-state attacks give rise to. I will therefore put forward an

10 *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/745 (2015). Conseil de sécurité - Résolution 2249 contre le terrorisme - Intervention de M. François Delattre, représentant permanent de la France auprès des Nations Unies - 20 November 2015, available at www.franceonu.org/Face-a-Daech-nous-avons-l-humanite-en-commun.

11 'Self-defence? Moscow questions France's Anti-ISIL strikes' *Sputnik International*, 27 September 2015, available at sputniknews.com/politics/20150927/1027618121/airstrikes-france-isil.html#ixzz3nIfyFro8.

12 'Lawmakers authorize use of Russian military force for anti-IS airstrikes in Syria' *TASS*, 30 September 2015, available at tass.ru/en/politics/824795.

13 *Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/719, 21 September 2015.

14 Ibid.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

alternative framework based on the interaction between self-defence as a primary rule and self-defence as a secondary rule.[15] To explain, whereas primary rules contain substantive rights and obligations or, to put it slightly differently, prescribe or proscribe certain conduct, secondary rules establish the conditions under which a primary rule is breached and the consequences that flow from such a breach. The law of state responsibility is, for instance, a regime of secondary rules which apply generally and uniformly to all breaches of primary rules. Self-defence as a primary rule is contained in Article 51 of the UN Charter and in customary law according to which the defensive use of force in response to an armed attack is lawful *per se*; there is no wrongfulness and no question of responsibility arises provided that the self-defence action adheres to the conditions set by law. Self-defence as a secondary rule is contained in Article 21 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ASR) according to which self-defence can exonerate breaches of certain international obligations.[16] Consequently, whereas the primary rule of self-defence can justify the use of force against non-state attacks, the secondary rule of self-defence can exonerate incidental breaches of obligations owned to the state on whose territory the action takes place provided that they are committed in the course of self-defence. This framework, it is hoped, provides a more systematic conceptual and legal treatment of the use of defensive force against non-state attacks.

2. Self-defence on the basis of attribution

The first approach to self-defence against non-state attacks relies heavily on the law of state responsibility in order to identify the state responsible for the armed attack.[17] Self-defence according to this approach is an inter-state affair involving the state that suffers an armed attack and the state responsible for the attack. The 'responsibilization' of self-defence is performed through the device of attribution as formulated in the law of state responsibility. This approach is most evident in the ICJ's *Wall in the Occupied Palestinian Territory Advisory Opinion* where the Court opined that the inherent right of self-defence exists 'in the case of armed attack *by one State against another State*' but since the attacks against Israel were not 'imputable to a foreign State', self-defence was not relevant.[18] Conversely, if an attack is not attributed to a state, the victim state cannot use defensive force against another state

15 On the distinction between primary and secondary rules see J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), 14–16; J. Crawford, 'The ILC Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 AJIL 874, at 876–9. YBILC (vol II, part II) 1980, 27A.

16 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part I), UN Doc. A/56/10.

17 Art. 51 UN Charter.

18 *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories* (Advisory Opinion), 9 July 2004, [2004] ICJ Rep. para 139; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 12 December 1996, [1996] ICJ Rep. at 803, para 51: '. . . the United States has to show that attacks had been made upon it for which Iran was responsible'. Also ibid., para. 61.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

or on its territory unless the use of force is authorized by the Security Council[19] or is requested by the territorial state.[20]

Attribution takes place on the basis of an institutional, a functional and an agency test.[21] The institutional test is contained in Article 4 ASR according to which an attack will be attributed to a state if it has been committed by a *de jure* or a *de facto* organ of that state.[22] Following the functional test, an attack will be attributed to a state if it has been committed by an entity that is empowered by that state to exercise governmental authority or is committed by an organ of another state that has been placed at the disposal of the first state.[23] According to the agency test as formulated in Article 8 ASR, there needs to be an *ad hoc* relationship between a state and the non-state actor that commits the attack which is established when the state instructs or directs the non-state actor to attack[24] or when the state exercises 'effective control' over the specific non-state attack. [25]

It becomes apparent then that the attribution criteria in the law of state responsibility require very close links between a state and a non-state actor in order to hold states responsible for non-state acts. Yet, non-state actors may collaborate with states in more subtle ways than the ones envisaged by the existing attribution tests or they may have the resources to act independently. Furthermore, non-state actors may operate from failed or failing states in which case the attribution criteria become almost redundant. This is the case for example with ISIL. Its attacks cannot be attributed to Syria or to any other state because ISIL is not a *de jure* or *de facto* organ of Syria or of any other state, it does not exercise governmental authority over parts of Syria on behalf of the Syrian Government and does not act under the instructions, direction or control of any state. Moreover, ISIL operates from areas that are not controlled by the Syrian Government.

It thus transpires that applying the attribution tests of the law of state responsibility to non-state attacks creates a void which non-state actors, either independently or in collusion with states, can exploit to attack with impunity other states, whereas victim states are left with no lawful means of defence. Such legal incapacitation

19 It should be noted that UN Doc. SC Res 2249 (2015) did not authorize strikes against ISIL in Syria but, instead, endorsed the legal justifications offered by states such as self-defence or consent. D. Akande and M. Milanovic, 'The Constructive Ambiguity of the Security Council's ISIL Resolution', *EJIL Talk!*, 21 November 2015, available at www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

20 M.E. O'Connell, 'Dangerous Departures' (2013) 107 AJIL 380, at 380, 383; D. Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle' (2013) 107 AJIL 570, at 572; C. Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', (2008) 55 *Neth. ILRev* 159, at 169–71.

21 K.E. Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 *Melbourne JIL* 1.

22 Art. 4 ASR; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, para. 109 (hereinafter refered to as *Nicaragua Case*); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) Judgment of 26 February 2007, [2007] ICJ Rep. 307, 385, 390–3 (hereinafter referred to as *Bosnia Genocide Case*). J. Crawford, *State Responsibility-The General Part* (2013) 124–6.

23 Arts. 5 and 6 ASR.

24 Art. 8 ASR; O. de Frouville, 'Attribution of Conduct to the State: private individuals', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010) 257, 267; Crawford, *supra* note 22, at 145. *Bosnia Genocide Case*, *supra* note 22, para. 400. *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*) [1980] ICJ Rep. 3, para. 58; *Nicaragua Case*, *supra* note 22, Separate Opinion of Judge Ago, para. 16.

25 *Nicaragua Case*, *supra* note 22, paras. 116–17; *Bosnia Genocide Case*, *supra* note 22, paras. 398, 402–6, 413–14.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

may delegitimize states to the extent that defence and security are a state's primary responsibility but may also delegitimize international law because it would permit non-state actors and colluding states to infringe interests and rights protected by international law.

For this reason, attempts have been made to either ease or expand the attribution criteria whilst maintaining at the same time the state-centred reading of self-defence.

First, it has been suggested that with regard to organized groups the requisite level of state control over non-state actors who commit armed attacks should be lowered from effective to overall control.[26] Overall control is about the general influence that a state may exert over an organized group, shaping its actions, but does not require proof of state involvement in specific acts as it is the case with effective control. As explained by the ICTY, a state 'wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity' and, added that 'it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law'.[27]

Secondly, state complicity in the activities of non-state actors has been promulgated as an additional attribution criterion.[28] State complicity includes active but also passive support in the form of harbouring or tolerating non-state actors and their activities. The US, for example, justified its self-defence action against Afghanistan following the '9/11' attacks because the attacks 'have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan it controls to be used by this organization as a base of operation' and 'despite every effort by the United States and the international community, the Taliban regime has refused to change its policy'.[29] The Security Council endorsed this argument in Resolutions 1368 (2001) and 1373 (2001) by affirming the US' inherent right to self-defence. In the same vein, the OAS condemned the '9/11' attacks and declared that 'those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of these acts are equally complicit in these acts'.[30]

The immediate question is what is the legal status of the 'overall control' and complicity standard? It may be contended that they constitute *lex specialis* that is,

---

26 C. Stahn, 'Terrorist Attacks as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism' (2003) 27(2) *Fletcher Forum of World Affairs* 35, at 47.

27 *Prosecutor v. Duško Tadić a/k/a "DULE"*, Appeal Judgement, ICTY-94-1-A, A. Ch., 15 July 1999, para. 131, 137 (*Tadić* Appeal). The ICJ rejected the 'overall control' criterion for the law of state responsibility. *Bosnia Genocide Case*, *supra* note 22, para. 404. See A. Cassese, 'The Nicaragua and the Tadić tests revisited in light of the ICJ judgment on genocide in Bosnia' (2007) 18 EJIL 649.

28 C. Tams, 'Use of Force against Terrorists' (2009) 20 EJIL 385; A. Nollkaemper, 'Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility', in N.M. Blokker and N.J. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality - A Need for Change?* (2005) 160–4 (only if there is knowledge, foreseeability, intent and causation).

29 *Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/946, 7 October 2001; *Letter from the Charge d'affaires ai of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/947, 7 October 2001.

30 Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, Twenty-third Meeting of Consultation OEA of Ministers of Foreign Affairs, /ser.f/ii.23 rc.23/res.1/01, 21 September 2001, available at www.oas.org/oaspage/crisis/RC.23e.htm.

special attribution criteria of the use of force regime.[31] It should be recalled that whereas the ICJ rejected in the *Bosnia Genocide* Case the 'overall control' test, it went on to say that 'logic does not require the same test to be adopted in resolving the two issues which are very different in nature'.[32] The Court's dictum implies that there is legal space for the development of special attribution rules, yet, whether the aforementioned standards have thus been established has been challenged by commentators.[33] That having been said, even if they were to apply to ISIL attacks, they could not be attributed to Syria or Iraq since neither state provides the required level of support.

It thus becomes apparent that the attribution approach to self-defence either in its narrow or in its more expansive formulation does not solve the security problems posed by non-state actors such as ISIL.

This is not the only flaw of this approach. Its most important flaw is conceptual because it conflates the law of state responsibility with the law on the use of force; two legal regimes with different rationales, content and exigencies.[34] The use of force regime is a regime of primary rules which set out the circumstances and conditions under which force can be lawfully used in international relations. For example, Article 51 of the UN Charter establishes a legal entitlement to use force when an armed attack occurs irrespective of its author or of issues of responsibility. The law of state responsibility instead sets out the conditions and methods for holding states responsible for violations of their international obligations. Attribution in the law of state responsibility is thus the mechanism according to which non-state acts are transformed into state acts or, to put it in different terms, non-state acts are 'subjectivised' for purposes of responsibility.[35] It is for this reason that the law of state responsibility requires compelling state input into non-state acts or non-state actors namely, in order to distinguish private from public (state) acts.[36]

Because of the different content and rationale of the two regimes, questions arise as to the function and propriety of such inter-systemic transfer. More specifically, questions arise as to why secondary rules of attribution should determine the content and scope of the primary rules on the use of force. With regard to the law of state responsibility, questions arise about the possible effects on the coherence of the law of state responsibility of the emergence of differentiated attribution standards. Such standards may metastasise to the law of state responsibility challenging the whole edifice of a unitary and common system of secondary rules which underpins

31 See Arts. 55 and 59 ASR.

32 *Bosnia Genocide Case*, *supra* note 22, paras. 402–5.

33 T. Ruys, '*Armed Attack' and Article 51 of the UN Charter* (2013), 490–2; A. Cassese, 'Terrorism Is also Disputing some Crucial Categories of International Law', (2001) 12 EJIL, 996; G. Guillame, 'Terrorism and International Law', (2004) 53 ICLQ, 537. For *lex specialis* see L. Condorelli and C. Kress, 'The Rules of Attribution: General Considerations' in J. Crawford et al. (eds), *The Law of International Responsibility* (2010), 221.

34 M. Hmoud, 'Are New Principles Really Needed? The Potential of the Established Distinction Between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense' (2013) 107 AJIL 576. Nollkaemper, *supra* note 28, at 133–71 (for whom there is connection between the law of state responsibility and the use of force). *Armed Activities on the Territory of the Congo*, *supra* note 3, Declaration of Judge Koroma, para. 9.

35 Art. 2 ASR; Frouville, *supra* note 24, at 270.

36 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 YILC, Vol. II (Part II), 38. *Bosnia Genocide Case*, *supra* note 22, para. 406

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

the institution of international responsibility. If that is to happen, the law of state responsibility may gradually and steadily extend beyond its current codification but as the ICJ warned with regard to the use of the 'overall control' standard, it would 'stretch too far, almost to a breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'.[37] By rejecting this standard, the ICJ contained the attempted expansion of the law of state responsibility and reassured states.

3. Self-defence on the basis of the 'unable or unwilling' test

Ever so often in recent years, states rely on the 'unable or unwilling'[38] test to justify the use of defensive force on the territory of a state against non-state attacks. Indeed, the US, Australia and Turkey among others relied on this test to justify their action against ISIL in Syria, whereas the UK and France relied on self-defence without mentioning the 'unable or unwilling' test, at least in official documents, although they alluded to that test. For example, the British Prime Minister justified the targeted killing of two British nationals in Syria under the rubric of self-defence:

> because there was no alternative. In this area, there is no Government we can work with; we have no military on the ground to detain those preparing plots; and there was nothing to suggest that Reyaad Khan would ever leave Syria or desist from his desire to murder us at home, so we had no way of preventing his planned attacks on our country without taking direct action [...] and given the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom.[39]

Interestingly, the UN Secretary-General said in relation to the strikes in Syria:

> I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government. I think it is undeniable – and the subject of broad international consensus – that these extremist groups pose an immediate threat to international peace and security.[40]

In contrast to the attribution approach discussed in the previous section, the 'unable or unwilling' test moves away from attribution and recognizes non-state actors as

37 *Bosnia Genocide Case*, *supra* note 22, para. 406.

38 E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963, Principle F, 969–70; A.S. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia J Intl L* 483; T. Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-defense Post-9/11' (2011) 105 AJIL 244–86; Ruys, *supra* note 33, at 502–7; N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (2010). See also C. Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/68/382 (2013) paras. 85–94; Promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/68/389 (2013), paras. 55–6. Also H.H. Koh, 'The Obama Administration and International Law' (Annual Meeting of the American Society of International Law, DC), 25 March 2010, available at www.state.gov/s/l/releases/remarks/139119.htm.

39 HC Deb 7 September 2015, c25–27.

40 Remarks at the Climate Summit press conference (including comments on Syria) Secretary-General Ban Ki-moon, UN Headquarters, 23 September 2014, available at www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#.VjN_J24UPnk.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

independent authors of armed attacks – and direct targets of self-defence – even if such action takes place on the territory of the host state. Its rationale is the following: states have the primary responsibility to prevent and suppress non-state attacks from within their territory but when they are unable or unwilling to fulfil that obligation, the victim state can take self-defence action against the non-state actor.

Although this approach to self-defence addresses the security concerns of states, it is not without its problems. The first question to ask concerns the meaning of inability and unwillingness; the second question is more fundamental and concerns the nature of the 'unable or unwilling' test; whereas the third question concerns the available justifications for infringing the territorial state's sovereignty.

With regard to the first question, Ashley Deeks identified a number of factors that should be taken into consideration when assessing whether a state is unable or unwilling. Such factors are: the territorial state's consent or co-operation in suppressing or preventing the non-state action; the nature of the threat posed by the non-state actor; prior requests to address the threat; reasonable assessment of the territorial state's control over its territory and of its capacity to act; proposed means to suppress the threat posed by the non-state actor; and prior interactions with the territorial state.[41]

These factors are not, however, without complications. First, with regard to consent, Deeks opines that 'if the territorial state gives the victim state consent, the latter need not perform an "unwilling or unable" analysis'.[42] Questions may be asked as to who should grant such consent and whether it should always be granted by the government in power irrespective of its legitimacy. For example, the Syrian government invited the US to coordinate their actions against ISIL[43] but, would the invitation of a government that is engaged in serious violations of international law be valid? Would cooperation with such a regime amount to aiding and abetting in the commission of crimes? What would happen if the host state grants consent to certain states but not to others? Moreover, from a legal perspective, the requirement of prior consent seems to make defensive force subsidiary to consensual intervention[44] but self-defence and consensual intervention[45] are independent bases for the use of force in international law.

Second, concerning requests to address the threat posed by non-state actors as one of the factors taken into consideration when assessing state inability or unwillingness, there is always a very thin line between permissible requests and unlawful intervention in that some requests may amount to coercion.[46]

41 Deeks, *supra* note 38, at 519–32.
42 Ibid, at 519.
43 'Syria's President Speaks: A Conversation With Bashar al-Assad', *Foreign Affairs*, March-April 2015, available at www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks.
44 C. Kress, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria', *Just Security*, 17 February 2015, available at www.justsecurity.org/20118/claus-kreb-force-isil-syria/.
45 G. Nolte, Intervention by Invitation, MPEPIL, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL.
46 Following the '9/11' attacks, President Bush in his address to Congress made the following demands to Afghanistan: 'Close immediately and permanently every terrorist training camp in Afghanistan, and

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

Third, it is not clear how a state's capacity and effectiveness to deal with non-state actors can be assessed. Would the fact that a state deals effectively with the threat non-state actors pose but at the expense of human rights or of other international law guarantees preclude the operation of this test? How would the debacle of one state claiming that it did all that was required and another state disputing such a claim be settled?

With regard to the second question concerning the nature of the 'unable or unwilling' test, it is not clear whether it complements the attribution approach or, instead, whether it is the only ground for using defensive force against non-state attacks. It appears that the 'unable or unwilling' test is often projected as if it were the only ground for using defensive force against non-state attacks.[47] Whether this is the case in law is very much debated[48] but, the most important obstacle is the fact that, according to the law, self-defence as a right becomes available when an armed attack occurs and not when a state is 'unable or unwilling'. Consequently, the 'unable or unwilling' test cannot determine the availability of the right to self-defence. It can perhaps condition the exercise of this right as part of the necessity calculus but this is a completely different thing.[49] In other words, it can answer the question of whether force is the only effective option available to the victim state when faced with a non-state attack launched from another state but in this case it is not an autonomous test, nor the only consideration in the necessity calculus. Still it is not clear what is inability and whether it makes self-defence automatically necessary. In sum, the nature of this test and its place in international law or in the self-defence matrix is not clear.

Related to the above is the third question, namely, how the violation of the territorial state's sovereignty can be justified under this test? This has not received adequate consideration in the literature or in official pronouncements, but one can

---

hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negation or discussion. The Taliban must act and act immediately. They will hand over the terrorists or they will share in their fate'. Presidential address to Joint Session of Congress and the American People, 20 September 2001, available at georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html. Georgia characterized Russia's demands in relation to Chechen fighters as a threat of force or aggression. *Letter dated 13 September 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-Genera*l, UN Doc. A/57/409–S/2002/1035 (2002).

47 M. Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *Intl L Studies* 1; Ashley Deeks relates the test to self-defence and indeed to the necessity condition of self-defence but the article often treats it as an independent test and more or less as a decision-making test removed from the legal conditions attendant to self-defence. Deeks, *supra* note 38.

48 Deeks, *supra* note 38, at 502; Reinold, *supra* note 38, at 29; K.J. Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test', *Opinio Juris*, available at opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/.

49 *Nicaragua Case*, *supra* note 22, paras. 194, 237; *Case concerning Oil Platforms*, *supra* note 18, paras. 51, 73–7; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996) [1996] ICJ Rep. 226, para. 41. J. Gardam, *Necessity, proportionality and the use of force by States* (2004) 148–54; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (2005) 129; D. Bethlehem, 'Principles Relevant to the Scope of a State's Right to Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actor', (2012) 106 AJIL 1, Principles 11 and 12; Y. Dinstein, *War, Aggression and Self-defence* (2011) paras. 610–12, 729; C.J. Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence', in L.v.d. Herik and N. Schrijver (eds.) *Counter-Terrorism Strategies in a Fragmented International Legal Order* (2013) 373–422.

glean a number of assumptions. One assumption is that the violation is part of the 'unwilling or unable' test as an autonomous test or of the necessity calculus as explained above. In other words, the violation of the host state's sovereignty is necessary in order for the victim state to be able to exercise its right to self-defence.[50] Although this may be correct when the territorial state is the author of the attack, when the territorial state is not the author of the attack, a different justification is needed for trespassing its territory because in that case the necessity of self-defence justifies the action against the non-state actor and not against the territorial state which is a third party in the self-defence relationship. Put another way, the 'unable or unwilling' test as part of the necessity calculus of self-defence can explain why the use of force against a non-state actor is required but cannot justify the violation of the territorial state's sovereignty. That necessity is different from the state of necessity in Article 25 ASR.

Secondly, if the territorial state is 'unable' because it has lost control over parts of its territory, as is the case with Syria, there is the assumption that no violation has occurred because the territorial state's sovereignty has receded.[51] This is perhaps what the UN Secretary-General meant when he said that the US strikes 'took place in areas no longer under the effective control of the government'[52] and what SC Res 2249 (2015) perhaps alluded to when it called upon states to take all necessary measures on the territory under ISIL control.[53] The British Prime Minister also said with regard to the UK strikes against ISIL in Syria that ISIL operates from an ungoverned space and that the objective of the UK action is not to attack the Syrian regime.[54] Likewise, Israel claimed with regard to its 2006 action in Lebanon against Hizbollah that its action was not against Lebanon[55] since its Government had lost control of south Lebanon to Hizbollah, something that was recognized by most states and by the Security Council.[56] The Institut de Droit International also recognized the right of self-defence against non-state actors when the attack 'is launched from an area beyond the jurisdiction of any state'.[57]

The problem with such an assumption is that, in international law, actual or effective sovereignty is not conterminous with the legal institution of sovereignty, and thus a state's sovereignty is violated even if the action affects areas not controlled by that state.

50 K. Trapp, 'Can Non-state Actors Mount an Armed Attack?' in M. Weller, (ed.), *Handbook on the Use of Force in International Law*, (2015) 679–96.
51 Hmoud, *supra* note 34, at 577.
52 Remarks at the Climate Summit press conference (including comments on Syria) Secretary-General Ban Ki-moon, UN Headquarters, 23 September 2014. See also *Armed Activities on the Territory of the Congo*, *supra* note 3, Separate Opinion of Judge Simma, para. 12; Ibid., Separate Opinion of Judge Kooijmans, para. 30.
53 UN Doc. SC Res 2249 (2015), para. 5.
54 Memorandum to the Foreign Affairs Select Committee, *supra* note 8, at 9.
55 *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. S/2006/515 (2006).
56 UN Doc. SC Res 1701 (2006); Ruys, *supra* note 33, at 449–57.
57 Institut de Droit International, 'Present Problems of the Use of Armed Force in International Law, Resolution 10A' (27 October 2007) para 10(ii). See also *Armed Activities on the Territory of the Congo*, *supra* note 3, Declaration of Judge Tomka, para. 4.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

Thirdly, when a state is unwilling, there is the implicit assumption of fault, in that the territorial state allows knowingly 'its territory to be used for acts contrary to the rights of other states'[58] which can justify action on its territory. For example, Russia invoked Georgia's failure to live up to its sovereignty responsibilities in order to justify its self-defence action inside Georgia against Chechen fighters.[59] Yet even if the duty of due diligence is a corollary to sovereignty and to non-intervention, there is no rule in international law that permits forcible intervention or self-defence action when a state breaches its duty of due diligence.[60] Related to this is another argument that relies on the law of neutrality according to which a belligerent can take self-defence action on the territory of a neutral state if the latter allows its territory to be used by another belligerent in violation of its duties as a neutral state.[61] The immediate question is whether such a rule can be transposed to the use of force regime and, if that is possible, whether the use of force regime has recognized such a rule which is what is debated as far as this test is concerned.

Yoram Dinstein uses a different term to describe the cross-border force against non-state actors when the territorial state is 'unable or unwilling' to act. For him, it is 'extraterritorial law enforcement' in that the acting state enforces international law within the territory of the host state as a form of self-defence. [62]

What transpires from the preceding discussion is that the 'unable or unwilling' approach leaves much unexplained. That having been said, it is apparent that the 'unable or unwilling' approach to self-defence operates within a context of 'responsibilization'.[63] It is premised on the view that the territorial state is responsible for not preventing or suppressing non-state attacks and that self-defence is complementary to state action. To explain, not only does the unwilling state fail its primary obligation to prevent or suppress non-state attacks but is also complicit therein; it thus bears responsibility for its complicit acts or omissions although not for the actual armed attack.[64] Complicity in this case is not an attribution criterion as it is in the attribution approach discussed previously but still establishes some form of responsibility of the territorial state. The unable state on the other hand is a state that cannot fulfil its obligations and defaults on its responsibility. Self-defence then becomes a complementary means of enforcing international law. The 'unable or unwilling' test is in other words a jurisdictional test of who has primary and who

58 *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v. Albania*) [1949] ICJ Rep. 22, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 49, at 241–2. A.D. Sofaer, 'Terrorism, the Law, and the National Defense' (1989) 126 *Military Law Review 89*, at 106–7.

59 *Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*, UN Doc. S/2002/1012 (11 September 2002).

60 See in this regard the ICJ's distinction between use of force and due diligence. *Armed Activities on the Territory of the Congo*, *supra* note 3, para. 300. A. Cassese, 'The International Community's "Legal" Response to Terrorism', (1989) 38 ICLQ 589, at 597.

61 I. Brownlie, *International Law and the Use of Force by States* (1963) 312–14; D.W. Bowett, *Self-Defence in International Law* (1958) 167–74; *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (12 June 1994), Art. 22 and paras. 22.1–22.5.

62 Dinstein, *supra* note 49, paras. 711–33.

63 Wilmshurst, *supra* note 38, at 970.

64 Arts. 2 and 16 ASR. Crawford, *The International Law Commission's Articles on State Responsibility*, *supra* note 15, at 80, com 94.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

has secondary jurisdiction to enforce international law[65] and in essence it is similar to Dinstein's extraterritorial law enforcement theory. As Dinstein put it, a state is 'entitled to enforce international law extra-territorially' if another state is 'unable or unwilling' to prevent an armed attack.[66] Yet, as was said above and will be developed further in the sections that follow, self-defence as a primary right is not premised on a prior violation of international law but on an occurrence – an armed attack – and, moreover, treating self-defence as a means of enforcing international law is not only contrary to the nature of self-defence which is about defence and protection from attacks but also conflates self-defence with the law of state responsibility and in particular with the institution of countermeasures[67] which are decentralized means of enforcing international obligations when a state is unable or unwilling to address or redress wrongfulness.[68]

4. Self-defence against non-state actors: the interaction between self-defence as a primary rule and self-defence as a secondary rule

In view of the issues raised in the preceding sections, in this section, I will put forward an alternative framework of analysis of self-defence against non-state attacks which is based on the interaction between self-defence as a primary rule and self-defence as a secondary rule. For this reason, I will first explain the scope self-defence as primary rule before explaining the scope of its operation as a secondary rule.

4.1 Self-defence as a primary rule

As was said, self-defence is recognized as a primary rule in customary law and in Article 51 of the UN Charter which recognizes self-defence as an inherent right. As a right, it empowers states to use force and such force is lawful *per se*; it is not a *prima facie* violation of the prohibition of the use of force enshrined in Article 2(4) of the UN Charter which is subsequently exonerated.[69]

According to Article 51 of the Charter, the right to self-defence is activated by an armed attack. An armed attack is defined as such not because of its author but because of its physical attributes.[70] Article 51 for instance does not define the provenance or

65 See Kress, *supra* note 44.
66 Dinstein, *supra* note 49, para. 721.
67 Whether forcible countermeasures or reprisals are permitted is debated. See Art. 50 ASR but also Dissenting Opinion of Judge Simma in *Case Concerning Oil Platforms*, *supra* note 18, para. 15.
68 Art. 49 ASR. Crawford, *The International Law Commission's Articles on State Responsibility*, *supra* note 15, at 281. *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep. 7, para. 83.
69 It is interesting to note that the ICJ, in its self-defence jurisprudence, does not examine first the question of whether the defensive force is a violation of Art. 2(4) of the UN Charter. This supports the legal separateness of the self-defence norm from that on the use of force. See *Case Concerning Oil Platforms*, *supra* note 18, paras. 43–99 and *Armed Activities on the Territory of the Congo*, *supra* note 3, paras. 106–47 and 153–65; *Nuclear Weapons Advisory Opinion*, *supra* note 49, para. 38; George P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why* (2008), 30–62.
70 *Legal Consequences of the Construction of a Wall*, *supra* note 18, Separate Opinion of Judge Higgins, para. 33; ibid., Separate Opinion of Judge Kooijmans, para. 35; ibid., Declaration of Judge Buergenthal, para. 6. *Armed Activities on the Territory of the Congo*, *supra* note 3, Separate Opinion of Judge Simma, paras. 4–15; ibid., Separate Opinion of Judge Kooijmans, paras. 19-30; ibid., Declaration of Judge Koroma, para. 9.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

the author of the armed attack. Consequently, both states and non-state actors can commit an armed attack and activate a state's right to self-defence which will be directed against the attacking state or the attacking non-state actor.

The immediate question is when do states become the author of an armed attack? A state becomes the actual author of an armed attack if the attack is committed by its organs for example by its regular forces. A state may, however, use proxies to commit an armed attack. In relation to this, the ICJ relied on the General Assembly's Definition of Aggression[71] and in particular on Article 3(g) to say that state authorship of an armed attack also includes:

> the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein.[72]

The first alternative of 'sending' refers to situations where groups are part of the state apparatus as *de facto* organs.[73] In the same vein, the International Fact Finding Mission on the Conflict in Georgia equated 'sending' with *de facto* organs in order to determine whether Russia had committed an armed attack against Georgia by sending groups to Georgia.[74]

The second alternative, 'on behalf' may refer to *de facto* organs, as the ICJ opined in the *Nicaragua* case,[75] but can also encompass cases where non-state actors are prompted, discharged, instigated, instructed or controlled by a state.[76] This resembles the attribution standard found in Article 8 ASR, which in its previous iteration spoke of actions on behalf of a state.[77] In the same vein, the International Fact Finding Mission on the Conflict in Georgia equated effective control over non-state actors with the term 'on behalf'.[78]

What transpires is that there is substantive correlation with the attribution tests found in the law of state responsibility, in particular with the institutional and agency test. The rationale is however completely different. Here it is about state authorship of an attack[79] whereas in the attribution approach as discussed previously, it is about the 'subjectivisation' of the non-state attack through attribution.[80] It is for

71 'Definition of Aggression' UNGA Res 3314 (XXIX) (14 December 1974) Annex. For critiques of the Court's approach see J. Stone, *Conflict Through Consensus: United Nations Approaches to Aggression* (1977) 146. See also *Nicaragua Case*, *supra* note 22, Dissenting Opinion of Judge Schwebel, 168–70.

72 *Nicaragua Case*, *supra* note 22, para. 195; *Armed Activities on the Territory of the Congo*, *supra* note 3, para. 146; Ruys, *supra* note 33, at 479–85; S.A. Barbour and Z.A. Salzman, '"The Tangled Web": the right of self-defense against non-State actors in the Armed Activities case' (2007–8) 40 *NYU J Intl L and Policy* 53–106.

73 B. Simma, D.-E. Khan, G. Nolte and A. Paulus (eds.), *The Charter of the United Nations: A Commentary* (2012), at 1415; P. Lamberti-Zanardi, 'Indirect Military Aggression', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986) 112.

74 Independent International Fact-Finding Mission on the Conflict in Georgia (Vol. II September 2009) at 258–60.

75 *Nicaragua Case*, *supra* note 22, para. 109.

76 YBILC (vol II, Part One) 1974, 283.

77 YBILC 1974 (vol I) 152–53. See also First report on State responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/490 (1998) and Add. 1–7 paras. 193–215.

78 Independent International Fact-Finding Mission on the Conflict in Georgia (vol. II September 2009) 258–60.

79 It should also be recalled that the Definition of Aggression is about state authorship of aggression and not about responsibility.

80 de Frouville, *supra* note 24, at 270–1.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

this reason that certain authors speak of primary rules of attribution in contrast to the secondary rules of attribution contained in the law of state responsibility.[81] The difference between the two approaches (attribution vs authorship) becomes even more pronounced in the case of 'substantial involvement', which does not correspond to any of the attribution tests promulgated in the law of state responsibility and is neither an attribution nor a derivative standard but establishes direct, albeit constructive, authorship of an armed attack.[82] Put another way, it is about the state's involvement in the attack by virtue of which the state becomes its author.

The critical question is what constitutes 'substantial involvement'. International jurisprudence is not particularly helpful in this regard; it has not clarified the issue and often equates substantial involvement with attribution. In the *Nicaragua* case for example, the ICJ required high degree and specific – not general – involvement, effectively amounting to agency.[83] The Court excluded 'assistance ... in the form of the provision of weapons, logistical support or other support' from the definition.[84] Judge Jennings and Judge Schwebel were very critical in their dissenting opinions of the Court's interpretation of 'substantial involvement'. As Judge Jennings said:

> the mere provision of arms cannot be said to amount to an armed attack ... [but it] may nevertheless be an important element in what might be thought to amount to an armed attack where it is coupled with other kinds of involvement.

He went on to say that:

> Logistical support may itself be crucial. ... [It] covers the 'art of moving, lodging, and supplying troops and equipment' ... If there is added to all this 'other support', it becomes difficult to understand what it is, short of direct attack by a State's own forces, that may not be done apparently without a lawful response in the form of ... self defence.[85]

Moreover, 'substantial involvement' has gradually lost significance in the Court's jurisprudence. In the *Armed Activities* case, for example, the ICJ relied on the 'sending' and 'on behalf' criterion and completely ignored the substantial involvement standard; although it duly mentioned it as part of the definition of armed attack.[86] Similarly, in the *Wall in the Occupied Palestinian Territory Advisory Opinion* the Court spoke of imputation of armed attacks and did not even use its own definition of an armed attack developed in previous cases, such as in the *Nicaragua* case.[87] Likewise, the International Fact Finding Mission on the Conflict in Georgia ignored the 'substantial involvement' criterion.

---

81 Simma et al., *supra* note 73, at 1417.
82 T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, (2006) at 176–85.
83 *Nicaragua Case*, *supra* note 22, para. 115.
84 Ibid., paras. 195, 226–31. The ILC in a previous iteration seemed to adopt a lower threshold than the one advocated by the Court resembling the overall control criterion, YBILC (Vol II) 1975, at 80.
85 *Nicaragua Case*, *supra* note 22, Dissenting Opinion of Judge Sir Robert Jennings, 543–4; Ibid., Dissenting Opinion of Judge Schwebel, para. 154 et seq. See also *Armed Activities on the Territory of the Congo* (Counter-memorial of Uganda) 21 April 2001, para. 359.
86 *Armed Activities on the Territory of the Congo*, *supra* note 3, para. 146. See ibid., Dissenting Opinion of Judge ad hoc Kateka, paras. 13–15, 24–34.
87 *Legal Consequences of the Construction of a Wall*, *supra* note 18, para. 139.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

That said, if 'substantial involvement' is an autonomous criterion for constructing state authorship of an armed attack, it should be given full effect: and for this reason it should not only be distinguished from 'sending' and 'on behalf', but its content needs to be defined.

It is submitted that 'substantial involvement' includes any aid or assistance in the form of acts or omissions given by a state to a non-state actor that substantially contributes to the commission of the armed attack, provided that the state knows that the non-state actor is willing to commit attacks and that the aid or assistance facilitates them. Such assistance may include, for example: material support, planning and preparations; selection of targets; intelligence sharing for particular attacks; provision of technical advice for specific attacks; provision of 'safe havens' or sanctuary;[88] and training, but also more general support which, over time, may amount to substantial involvement.[89]

In sum, substantial involvement is about state input that contributes qualitatively and/or quantitatively in a non-incidental manner to the armed attack but, and this is the difference from 'sending' and 'on behalf', does not require direct effectuation of the attack, as the ICJ seemed to require in the *Nicaragua* case,[90] neither does it require any kind of effective control over the non-state actor.[91] Substantial involvement amounting to constructive authorship does not in other words envisage the state as the dominant power behind the non-state actor but as a facilitator.[92]

Even if 'substantial involvement' is quite broad as far as means and methods are concerned and takes a macro view of state actions and/or omissions,[93] it is narrowed down by the knowledge requirement. Knowledge does not include knowledge of the specific attack, because in that case it would transform knowledge into purpose, but requires knowledge of the non-state actor's willingness to commit attacks and of the contribution thereto of such assistance.

The inclusion of omissions within the scope of 'substantial involvement' may appear to contradict the ICJ's interpretation of aiding and assisting as requiring positive action.[94] It has also been claimed that toleration and harbouring falls below the threshold of 'substantial involvement'.[95] In the opinion of the author, there should be a case-by-case but also contextual assessment of whether a specific omission amounts to substantive involvement. If, for example, a state tolerates a non-state

88 Bethlehem, *supra* note 49, in particular principle 7.

89 J.J. Paust, 'Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?' (2014) 45 *Georgetown J of Intl L* 411, at 432–5; Simma et al., *supra* note 73, at 1418–19.

90 For a similar approach to the aiding and abetting modes of liability in international criminal law see *Prosecutor v. Tadić*, Appeal Judgement, ICTY-94-1-A, A. Ch., 15 July 1999, 229. Contra *Prosecutor v. Charles Ghankay Taylor*, Appeal Judgement, SCSL-2003-01-A, 23 September 2013, para. 478.

91 This is also the case in international criminal law. See *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Appeal Judgement, ICTY-02-60-A, A. Ch., 9 May 2007, para. 195; *Prosecutor v. Charles Ghankay Taylor*, *supra* note 90, para. 370.

92 *Bosnia Genocide Case*, *supra* note 22, Dissenting Opinion of Judge Mahiou, paras. 115–17.

93 Judge Schwebel spoke of cumulative actions constituting substantial involvement. *Nicaragua Case*, *supra* note 22, Dissenting Opinion of Judge Schwebel, para. 171.

94 *Bosnia Genocide Case*, *supra* note 22, para. 432.

95 Lamberti-Zanardi, *supra* note 73, at 115; Ruys, *supra* note 33, at 388–9. *Armed Activities on the Territory of the Congo*, *supra* note 3, Separate Opinion of Judge Kooijmans, para. 22.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

actor who uses its territory for training or recruiting purposes, for acquiring resources or as a base of their operations and such omissions enable that non-state actor to mount an armed attack on another state, this can amount to substantial involvement provided that the state was aware of the willingness of the non-state actor to commit attacks and that its omission contributed thereto.[96] Under different circumstances, toleration or harbouring may fall below the threshold of substantial involvement and constitute a violation of a state's general duty of due diligence or of a state's treaty or customary law obligations to prevent certain activities from its territory.

One may then ask when does an omission constitute constructive authorship and when does it constitute dereliction of a state's duty of due diligence?[97] The difference lies in the fact that due diligence is an obligation of conduct[98] and as such it is dependent on state capacity, whereas, for substantial involvement, capacity is irrelevant. What matters is the level of contribution the omission makes to the non-state attack. Secondly, substantial involvement translates into constructive authorship of the attack whereas according to the obligation of due diligence, a state is responsible for its own failure and not for its contribution to the acts of non-state actors. Third, whereas a state will evade responsibility if it meets its due diligence obligation even if the impugned act occurs, the occurrence of a non-state attack combined with a state's substantial involvement will make the latter the author of the attack and the target of the self-defence action. Finally, due diligence requires knowledge or constructive knowledge of wrongful activities, whereas substantial involvement requires knowledge of the willingness to commit attacks and of the contribution thereto.

The inclusion of omissions in the form of toleration and harbouring in the constructive authorship of armed attacks can also be supported by the General Assembly Declaration on the Inadmissibility of Intervention and the General Assembly Friendly Relations Declaration, which include a provision to the effect that:

> every State has the duty 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.[99]

These resolutions were relied upon by the ICJ in the *Nicaragua* case[100] and *Armed Activities* case[101] in order to determine and indeed expand the meaning of 'prohib-

96 See I. Brownlie in *Armed Activities on the Territory of the Congo*, Public sitting held on Monday 18 April 2005, CR 2005/7, para. 80.

97 O. Corten and P. Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case', in K. Bannelier et al. (eds.), *The ICJ and the Evolution of International Law* (2011), 331–2; V. Lanovoy, 'Complicity in an Internationally Wrongful Act', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of shared responsibility in international law: an appraisal of the state of the art* (2015), 145–8.

98 *Bosnia Genocide Case*, *supra* note 22, para. 221.

99 Declaration on Inadmissibility of intervention, UN Doc. A/RES/36/103 (1981), para. 2; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (1970).

100 *Nicaragua Case*, *supra* note 22, paras. 191, 195, 227–31.

101 *Armed Activities on the Territory of the Congo*, *supra* note 3, paras. 147 163–5.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

ited force', whereas the Definition of Aggression was used to determine and indeed expand the meaning of 'armed attack'. All these resolutions have a common denominator: they are concerned with the use of force and with forms of state involvement therein.[102] The Court then went on to distinguish between the different types of force on the basis of gravity with grave uses of force being categorized as armed attacks triggering self-defence action.[103] If the use of force 'topographies'[104] adumbrated in the aforementioned resolutions are to have any rational coherence, the types of force described in the Declaration on Non-Intervention and the Declaration on Friendly Relations can be used to interpret the 'involvement' criterion in Article 3(g) of the Definition of Aggression. Accordingly, state involvement in the form of organizing, instigating, assisting, participating or acquiescing in the use of force by non-state actors described in the Declaration on Friendly Relations will amount to an armed attack and to constructive authorship if the particular state involvement is substantial, the non-state actor commits an armed attack instead of a use of force and there is knowledge by the state. Otherwise there is no logical consistency in saying that a state becomes the author of a use of force when it instigates, organizes, assists, participates or acquiesces to the non-state use of force but does not become the author of an armed attack when it substantially acts in the same way vis-à-vis groups that go on to commit an armed attack.

The inclusion of such activities within the scope of self-defence is also corroborated by the *African Union's Non-Aggression and Common Defence Pact*, which expressly qualifies the harbouring of terrorists, as well as any provision of support for them, as an act of aggression[105] that leads to common defence;[106] and in Security Council Resolution 1378, which mentioned the Friendly Relations Resolution in the context of self-defence.

Equally important is Article 3(f) of the Definition of Aggression, according to which an act of aggression is committed if a state allows its territory to be used by another state to attack a third state. The essence of this provision is to transform an otherwise act of assistance into an act of aggression by the assisting state. The ICJ did not refer to this provision when defining an 'armed attack' but it should be noted that the ICJ did not engage in any comprehensive interpretation of the Definition of Aggression, neither does the resolution define an armed attack as such.[107] In other words, it is open to interpretation and there is nothing to preclude the use of this

102 The Court did not believe that there was a clear demarcation between these resolutions. For example, it said with regard to the Friendly Relations Declaration that '[a]longside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force.' *Nicaragua Case*, *supra* note 22, para. 191.

103 *Nicaragua Case*, *supra* note 22, para. 191.

104 D. Kritsiotis, 'Topographies of force', in M. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines* (2007), 45–73.

105 The African Union Non-Aggression and Common Defence Pact, adopted 1 January 2005, available at http://www.au.int/en/treaties/african-union-non-aggression-and-common-defence-pact. Art. 1(c)(xi): 'The following shall constitute acts of aggression: (. . .) the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State'.

106 Ibid., Art. 4.

107 Simma et al., *supra* note 73, at 1406–9.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

provision to establish state authorship of an armed attack.[108] Even if Article 3(f) refers to states, in view of the aims of the declaration and the fact that non-state actors mount attacks from state territories, it stands to reason to apply it by analogy to non-state actors.[109]

In summary, what constitutes state authorship of an armed attack is quite broad and includes actual as well as constructive authorship under the label of substantial involvement. In all these cases, the victim state can use force by way of self-defence against the perpetrator state. If, however, the assistance provided to non-state actors does not amount to substantial involvement, the assisting state does not become the author of the armed attack but it may be held responsible for violating assorted international law obligations arising from treaties, customary law, Security Council resolutions or from the duty of due diligence.

If a non-state actor commits an armed attack independently from states or when there is insubstantial state involvement, the non-state actor becomes the author of the attack and consequently the target of self-defence, according to self-defence as a primary rule. In this case, because the self-defence action is carried out on the territory of a state that is not the author of the armed attack, it violates obligations owned to that state. It is at this juncture that self-defence as a secondary rule becomes operative.

4.2 Self-defence as a secondary rule

It was James Crawford, the last Special Rapporteur on the topic of state responsibility, who made explicit the distinction between self-defence as a primary rule codified in Article 51 of the UN Charter and in customary law and self-defence as a secondary rule.[110] Roberto Ago, who is credited with that distinction, treated self-defence exclusively as a secondary rule. According to Ago, all violations of international law give rise to international responsibility unless they can be justified.[111] Thus, any use of force in principle violates the primary international law obligation prohibiting the use of force unless such use of force can be justified by the existence of a justificatory circumstance as it is self-defence. As Ago opined: 'Acting in self-defence means responding by force to forcible wrongful action carried out by another; and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful'.[112]

For this reason, he also confined self-defence to an armed attack by another state, and excluded an attack by private individuals, because only states are bound by the primary rule prohibiting the use of force.[113]

---

108 S.A. Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 114.

109 Simma et al., *supra* note 73, at 1418; Hmoud, *supra* note 34, at 578.

110 Crawford, *The International Law Commission's Articles on State Responsibility*, *supra* note 15, Art. 21 commentary, 166, para. 1 and 2. Also J. Crawford, Second Report on State responsibility, UN Doc. A/CN.4/498, 1999, para. 296.

111 YBILC (Vol. II, part I) 1971 214 ff; YBILC (Vol. II, part II) 1973 179 ff; YBILC (Vol. II, part II) 1980 at 52–61; YBILC (Vol. I, part I) 1980, at 13–70.

112 YBILC (Vol. II, part II), 1980, 54, para. 88. Contra A. Ushakov in YBILC (Vol. I) 1980, 190, paras. 16–17. See also *Nicaragua Case*, *supra* note 22, paras 74, 193, 195, 211.

113 YBILC (Vol. I), 1980, 184, para. 3. Contra Schwebel YBILC (Vol. 1), 1980, 192, para. 5.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

Following the last Rapporteur's approach to self-defence, Article 21 ASR codified self-defence as a circumstance precluding wrongfulness (CPW).[114] The role of CPW is to relieve states from responsibility in certain unusual circumstances in view of the fact that the law of state responsibility as codified by the ILC is not based on fault. CPW thus refer to an event or situation whose occurrence precludes the wrongfulness of the violation by the affected state of certain of its obligations, leading to non-responsibility.

Before identifying the specific obligations whose violation is exonerated by self-defence, it should be stressed that the scope of self-defence as a secondary norm is limited to the exigencies of the specific state of affairs created by self-defence. Article 21 ASR thus refers to violations of certain obligations committed in the course of self-defence which are strictly occasioned by it and are incidental to the exercise of self-defence.[115] As the last Special Rapporteur put it, 'in the course of self-defence, a State may violate other obligations towards the aggressor. For example, it may trespass on its territory, interfere in its internal affairs, disrupt its trade contrary to the provisions of a commercial treaty, etc'.[116]

If self-defence as a CPW were to apply to any violation of international law committed in the course of self-defence, then it would not only exceed its exigencies but its scope would become so broad that could potentially destabilize the international legal order. Consequently, any action by the defending state that is not related to the use of defensive force and is not strictly occasioned by it, for example, the suspension or termination of treaties or the adoption of other measures against the attacking state, needs to be justified by other rules of international law in order to be lawful. Such actions may, for example, be justified by the law of treaties and in particular by the rule on changing circumstances (*rebus sic stantibus*);[117] they may additionally be justified as countermeasures.[118]

Which are then those international law obligations whose incidental breach in the course of self-defence can be exonerated by the application of Article 21 ASR? As the aforementioned statement by the Special Rapporteur indicates, they refer to the obligation of respect of sovereignty and the obligation of non-intervention but, does Article 21 ASR also cover the obligation not to use force? It should be recalled that in international law they form a concentric circle of obligations protecting states and

114 J.M. Thouvenin, 'Self-defence', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 461; F.I. Paddeu, 'Self-defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) BYIL 1; T. Christakis and K. Bannelier, 'La legitime defense a-t-elle sa place dans un code sur la responsabilite´ internationale?', in A. Constantinides and N. Zaikos (eds.), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K Koufa* (2009) 519; T. Christakis and K. Bannelier, 'La légitime défense en tant que circonstance excluant l'illicéité', in R. Kherad (ed.), *Légitimes défenses* (2007), 233; T. Christakis, 'Les «circonstances excluant l'illicéité»: une illusion optique?' in O. Corten et al. (eds.), *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (2007) 223.

115 Art. 21 ASR commentary para 2. It does not, however, cover obligations of 'total restraint'. Art. 21 Commentary, para. 3.

116 J. Crawford, Second Report on State responsibility, UN Doc. A/CN.4/498, 1999, para. 297, 299.

117 Arts. 61 and 62, 1980 Vienna Convention on the Law of Treaties, 1155 UNTS 331. Contra Christakis and Bannelier, 'Légitime défense', *supra* note 114, at 253; Christakis and Bannelier, 'La légitime défense a-t-elle sa place', *supra* note 114, at 528.

118 Arts. 49–54 ASR

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

the ICJ has treated them as being separate. Moreover, the ICJ has consistently held that, even if a specific conduct does not breach the norm on the non-use of force, it can still violate the non-intervention norm or the norm of respect of sovereignty.[119]

Here, a distinction needs to be made between the state that is the author of the armed attack and the state that is not the author of the armed attack but on whose territory the self-defence action against the non-state author of the attack takes place.

With regard to the former, Article 21 ASR does not apply to the aforementioned obligations because the use of force is lawful *per se* according to the primary rule of self-defence[120] which also justifies the breach of the attacking state's sovereignty and intervention. In the same vein, the ICJ, if there is a claim of self-defence, only deals with the legality of the action according to the criteria contained in the primary rule and has never enquired whether the use of defensive force is a *prima facie* violation of the norm prohibiting the use of force or a violation of the target state's sovereignty or of the non-intervention norm. With regard to the state that authored the armed attack, Article 21 ASR can instead cover other obligations related to and incidentally breached by the use of defensive force, for example, a treaty obligation the breach of which was incidental to the defensive action as was the Treaty of Amity between the USA and Iran, which became a cause of contention in the *Oil Platforms* case.[121]

Article 21 ASR however acquires full meaning in cases where the self-defence action unfolds on the territory of a state that has not authored the armed attack. The self-defence action in that case gives rise to two sets of relations: the first set concerns the relation between the defending state and the attacking non-state actor, which falls under the primary rule of self-defence; whereas the second set concerns the relation between the defending state and the territorial state, where action on its territory is incidental to the self-defence action but may violate obligations owed to that state. In this case, the territorial state is a third party in the self-defence duel.

The ILC left the question of whether Article 21 ASR extends to third states open[122] but it is submitted here that self-defence as a secondary rule in the law of state responsibility is critical in such a situation because the primary rule of self-defence relates to the non-state author of the attack and cannot justify the trespassing of the territorial state's sovereignty as it does when the territorial state is the author of the attack. The application of Article 21 ASR to third states is also supported by a number of other considerations. One is historical and relates to the context from which this rule emerged which concerns the laws of war and the rights of third states.[123] The second concerns certain modern practices, namely the use of self-defence to justify

119 *Corfu Channel Case*, *supra* note 58, at 35; *Nicaragua Case*, *supra* note 22, para. 205.
120 Christakis and Bannelier, 'Legitime defense', *supra* note 114, at 253; also in Christakis and Bannelier, 'La legitime defense a-t-elle sa place', *supra* note 114, at 528.
121 *Oil Platforms*, *Preliminary Objections*, para. 21.
122 Thouvenin, *supra* note 114, 464.
123 ASR Commentary to Art. 21, para. 5.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

violations of obligations towards third states in the context of maritime exclusion zones[124] or, in the context of forcible interdiction at sea.[125]

With regard to the territorial state, Article 21 ASR does not apply to the obligation not to use force because the employed force does not fall within the terms of Article 2(4) of the UN Charter. To explain, it falls below the qualifications contained in Article 2(4) and is not intended to coerce the territorial state,[126] instead, it is limited and targeted and its aim is to defend against attacks emanating from the territory of that state. It does not also constitute unlawful intervention because it lacks a coercive element.[127] State practice corroborates this view. States taking self-defence action against non-state actors on the territory of another state go to great lengths to confirm that the action is not against the host state (or its government) but against the non-state actor.[128] For example, the British Prime Minister declared that the purpose of the action against ISIL in Syria 'would not be to attack the Syrian regime'.[129] With regard to the 2006 action in Lebanon, Israel claimed that its action was against Hizbollah and not against Lebanon[130] and made the same claim in relation to its 1982 action against PLO in Lebanon[131] and in relation to its bombardment of the PLO headquarters in Tunisia.[132]

Instead, such use of force can amount to a violation of the territorial state's sovereignty. This is corroborated by state practice. For example, Syria, as mentioned at the beginning of this article, claimed that the allied action violated its sovereignty and not the non-use of force norm. Iraq condemned the 2007–2008 Turkish incursions into its territory against the PKK as a violation of its sovereignty but not as a use of force[133] and used the same language with regard to previous Turkish incursions.[134] With regard to Colombia's operation in Ecuador against FARC, Ecuador condemned the action as a 'violation of Ecuador's territorial integrity' and reserved its right to self-defence only against the rebels.[135] Similarly, the OAS Foreign Ministers condemned the operation as 'a violation of the sovereignty and territorial integrity of Ecuador

124 Regarding the British exclusion zone around the Falklands see (1982) 53 BYIL 540. C. Michaelsen, 'Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved' (2003) 8 *Journal of Conflict and Security Law* 363, at 388. Remarks by Greenwood (1988) 82 *Am. Soc'y Int'l L. Proc.* 158, at 158–61.

125 D. Guilfoyle, 'The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?' (2006) 29 *Melbourne University Law Review* 733.

126 *Nicaragua Case*, *supra* note 22, para. 231. G. Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 *Wisconsin International Journal of Law* 166. For intent as component of Art. 2(4) see O. Corten, *The Law Against War* (2010), 76–92.

127 *Nicaragua Case*, *supra* note 22, para. 205.

128 For example, with regard to the 1998 US action against al-Queda in Sudan and Afghanistan see UN Doc. S/1998/780; with regard to the 2006 Israeli action in Lebanon see UN Doc. S/PV.5489, 6.

129 Memorandum to the Foreign Affairs Select Committee, *supra* note 8, at 9.

130 *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. S/2006/515 (2006).

131 See *Letter Dated 27 May 1982 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General*, UN Doc. S/15132.

132 UN Doc. S/PV.2611 (1985), paras. 65–7.

133 (2007) 53 *Keesing's* 48316, 48427.

134 *Letter Dated 16 October 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General*, UN Doc. S/23152 (1991).

135 *Letter dated 3 March 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Ecuador to the United Nations addressed to the President of the Security Council*, UN Doc. S/2008/146 (2008).

and of principles of international law'.[136] Pakistan condemned the US operations in its northern territory as violations of its territorial integrity.[137] Finally, in relation to the 1998 US action in Sudan and Afghanistan against al-Qaeda, the Arab League condemned the action against Sudan as 'a blatant violation of the sovereignty of a State member of the League of Arab States, and of its territorial integrity'.[138]

It is to such incidental violation of the territorial state's sovereignty that Article 21 ASR applies and exonerates the breach, provided that the self-defence action is otherwise lawful.[139] To explain, the action needs to be a reaction to an armed attack and should satisfy the conditions of necessity and proportionality.[140] The necessity condition requires, among others, that the action targets the non-state actor and that only incidentally affects assets or persons belonging to the territorial state if engaging them is necessary for the effective exercise of this right against the non-state actor.[141] If the self-defence action does not comply with these requirements or the state continues to use force against a non-state actor after the conditions of self-defence have elapsed, this would constitute a breach of the primary norm of self-defence whereas vis-à-vis the territorial state, it will constitute a breach of the prohibition of the use of force and of the obligation to respect sovereignty. Article 21 ASR would not apply in these cases.[142]

The immediate question is what legal consequences flow from the application of Article 21 ASR to such incidental breaches of state sovereignty? These depend on the legal meaning of 'circumstance precluding wrongfulness'.[143] The ILC is rather ambivalent in this regard and uses almost interchangeably the language of 'justification' and 'excuse'.[144] Justification alludes to a legally non-objectionable act, in other words, to a lawful act, whereas excuse alludes to an unlawful act that is

136 OAS, 'Convocation of the meeting of consultation of ministers of foreign affairs and appointment of a commission', 5 March 2008, Doc. OEA/Ser.G, CP.RES.930 (1632/08).

137 O. Bowcott, 'US drone strikes in Pakistan 'carried out without government's consent', *The Guardian*, 15 March 2013, available at www.theguardian.com/world/2013/mar/15/us-drone-strikes-pakistan. Ruys, *supra* note 33, at 472.

138 *Letter dated 21 august 1998 from the Charge d'affaires a.i. of the Permanent Mission of Kuwait to the United Nations addressed to the President of the Security Council*, UN Doc. S/1998/78921, (1998).

139 Art. 21 commentary, para 6.

140 For example, with regard to the US action in Sudan and Afghanistan, see *Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/1998/780 (1998).

141 Dinstein, *supra* note 49, at 275–7; paras. 728–33; Tams, *supra* note 49, at 373; R. Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden' (1999) 24 *Yale J Intl L* 359; Chatham Principles, Principle C and E.

142 It is interesting to note that with regard to certain coalition actions the government of Syria declared that they constitute 'blatant aggression'. *Identical letters dated 7 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/933 (2015). In subsequent communications it just listed the coalition actions without qualifying them. See *Identical letters dated 10 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/950 (2015)

143 H.L.A. Hart, 'Legal Responsibility and Excuses' in M.L. Corrado (ed.), *Justification and Excuse in Criminal Law* (1994), 31; V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 405; T. Christakis, 'Necessité n'a pas de loi? La necessité en droit international', *La nécessité en droit international*, Société Française de droit international**,** (2007), 11, at 45–63; N. Tsagourias, 'Necessity and the Use of Force: A Special Regime ' (2010) 41 *Netherlands YBIL* 11, at 39–42.

144 Crawford, *The International Law Commission's Articles on State Responsibility, supra note 15*, at 5–6, 160–2; J. Crawford, *Addendum to Second Report on State Responsibility, UN Doc. A.CN.4/498/Add.2*, (1999), paras. 214–29; J. Crawford, 'Revising the Draft Articles on State Responsibility', (1999), 10 EJIL 435, at 443–4.

excused because of certain special circumstances. Such an excuse may refer to the act itself or to the ensuing responsibility. If the excuse refers to the act, excusing its wrongfulness, it acts as justification. If the excuse refers to the responsibility of the author of the act, it means that the act is unlawful but responsibility is excused because of the intervening special circumstance. The latter approach is in line with the rationale of the law of state responsibility and its distinction between primary and secondary norms. Whereas justifications relate to substantive rules that is, to primary norms, excuses relate to secondary rules concerning the consequences arising from violations of primary rules. Self-defence as CPW is thus an excuse and as such it excuses the responsibility of the defending state for the incidental breach of obligations occasioned by the defensive use of force. Although it recognizes that the intrusion is in principle a breach of the host state's sovereignty, responsibility is mitigated because of the state of affairs created by the non-state armed attack. This approach is corroborated by state practice. Although territorial states such as Syria branded the actions as violation of their sovereignty, they did not take any measures to enforce their responsibility.

Moreover, the Security Council also seems to have exonerated states from responsibility in resolution 2249 (2015) by calling upon:

> Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter .... on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq.

To the extent that most states invoked self-defence to justify their actions and such actions incidentally breached Syria's sovereignty, the Security Council's approval may be interpreted as exonerating states, at least politically, from any responsibility. It is also interesting to note that the General Assembly has not criticized such actions. The reaction of these two bodies is important because they often play the role of world-wide 'juries' of the propriety of particular actions.[145]

Even if responsibility is excused by virtue of Article 21 ASR, the issue of compensation remains open.[146] The host state may thus request compensation for any damage caused in the course of the self-defence action.[147] This is fair and proper because otherwise the territorial state will be unnecessarily disadvantaged.

5. Conclusion

Because the attribution and the 'unwilling or unable' approaches to self-defence against non-state attacks suffer from practical and normative weaknesses, the

145 T.M. Franck, *Recourse to Force*, (2002) 190–1.

146 Art. 27 ASR.

147 For example, with regard to a previous incident, Iraq condemned the violation of its sovereignty following a Turkish self-defence operation against PKK and declared that it will demand compensation for the damage caused by these Turkish breaches and violations of Iraq's territory and airspace and for the human suffering inflicted on Iraqi citizens'. *Identical Letters Dated 14 June 1997 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General and to the President of the Security Council*, UN Doc. S/1997/461 (1997).

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press

author put forward an alternative framework to deal with non-state attacks based on self-defence as a primary rule that justifies the use of force against the non-state author of an armed attack; and self-defence as a secondary rule in the law of state responsibility which excuses responsibility for the incidental breach of the territorial state's sovereignty in the course of self-defence. This framework provides a conceptually coherent reading of self-defence as applied to non-state attacks.

https://doi.org/10.1017/S0922156516000327 Published online by Cambridge University Press