
INTERNATIONAL LAW STUDIES

PUBLISHED SINCE 1895

U.S. NAVAL WAR COLLEGE



The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm

Louise Arimatsu

89 INT'L L. STUD. 21 (2013)

Volume 89

2013

The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm

*Louise Arimatsu**

I. INTRODUCTION

This article revisits the law of State responsibility to ask whether, rather than invoking self-defense, there is a better way to conceptualize a State's violent engagement with a non-State actor¹ located in the territory of another State when the latter does not consent to foreign intervention and is itself unable or unwilling to stop the non-State actor from directing further attacks. In posing this question my intention should not be misinterpreted as one that seeks to identify a broader exception to the general prohibition on the use of force; in fact, it is quite the reverse. This article proposes a more legally coherent account of State practice that preserves an inter-State reading of self-defense. In that process, it offers *an* explanation for the recent statements by the International Court of Justice (ICJ) that seem to rule out the option of invoking self-defense under Article 51 of the UN Charter

* Associate Fellow with the International Law Programme, Chatham House (UK). Thanks to Hemi Mistry for research support on this project. The views expressed in this article are the sole responsibility of the author and do not reflect the view of the author's affiliations.

1. The term "non-State actor" denotes any entity with the capacity to launch an armed attack, be they organized armed groups, terrorist groups or rebels.

against non-State actors.² Although this stance by the ICJ has been criticized for not corresponding with the recent practice of States, if Article 51 cannot be invoked to justify the use of force against a non-State actor in the scenario described above, are there any existing laws which *would* permit States to cross an international border lawfully?

In Part II, I argue that there are good reasons for preserving the traditional reading of Article 51, which was designed exclusively to regulate relations among States. To support this position, I identify the inherent weaknesses (as well as the attendant risks) embedded in the views that have emerged in recent years to justify the use of force against non-State actors based in the territory of a State that is unable to prevent further attacks but is also unwilling to consent to the armed intervention by the State under attack.

In Part III, I explore further the argument that favors extending Article 51 to non-State actors to ask why the non-State actor's geographical location determines the applicability of the *jus ad bellum*. If the answer to this question is simply that the crossing of the border is game-changing, an explanation of why this is so is warranted. If, on the other hand, there is no compelling reason why this should be so, it raises an important question as to whether self-defense is the most coherent legal framework within which to conceptualize the use of force against non-State actors. And if this indeed *is* the case, how might a border be lawfully crossed?

In Part IV, I tentatively suggest that existing international law has the potential to provide a satisfactory legal framework within which to address these questions. In addition to the two codified exceptions to the prohibition on the use of force, there is a long tradition, demonstrated by consistent State practice, that the wrongfulness of a use of force can be precluded in one, and possibly two, other exceptional circumstances found in customary international law. International law has long recognized the right of a State to consent to the intervention of foreign armed forces to assist it in maintaining its internal security. Where the intervention is consensual,

2. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) [hereinafter Wall Advisory Opinion]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19) [hereinafter Armed Activities Judgment]. But see also Judge Kooijmans' Separate Opinion, ¶¶ 31–35, and Judge Simma's Separate Opinion, ¶¶ 7–13, in the *Armed Activities* judgment.

there is no violation of Article 2(4).³ A second principle of international law that precludes the wrongfulness of an act that would otherwise be considered a violation of the law is the plea of necessity. I suggest that it is this customary international law principle that provides a far more coherent basis upon which to justify the use of force against the non-State actor located in the territory of another State that is unwilling to prevent further attacks.

I conclude by arguing that the conditions attached to necessity function to severely restrict its availability, more so than self-defense. Thus, the critics of current State targeting policy with respect to the members of organized armed groups (OAGs) in foreign territories are no more likely to be convinced on the facts that a robust case of necessity has been made out. However, by contrast to self-defense, invoking necessity to justify the use of force against an OAG in the territory of another State enables that State to cross a border lawfully if the requisite conditions are satisfied. For the State claiming the right to use force in such circumstances, there are further legal hurdles thrown up by *jus in bello* that must be overcome before its conduct is considered lawful.

II. SEVERING THE LINK BETWEEN STATE ATTRIBUTION FOR AN ARMED ATTACK

Constituted in the aftermath of the Second World War, the primary ambition of the United Nations Charter system, as exemplified by Article 2(4), was to prevent future war between States.⁴ The contemporary law on the use of force is founded on the now customary international law prohibition⁵ set forth in the Article, which states: “All members shall refrain in their international relations from the threat or use of force against the territorial integri-

3. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 114 (1991). Consent functions to negate what is otherwise a wrongdoing.

4. The Preamble of the Charter opens with the declaration,

We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, . . . and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, . . . have resolved to combine our efforts to accomplish these aims.

5. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27) [hereinafter Nicaragua Judgment].

ty or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.”⁶

The negotiating history of the Charter reveals that Article 2(4) was “intended to be a comprehensive prohibition on the use of force by one State against the other”⁷ and, as the text makes clear, the provision was only concerned with inter-State uses of force. The Charter recognizes two exceptions to this prohibition: enforcement actions as provided under Articles 39, 41 and 42; and the right of individual and collective self-defense, codified in Article 51. A decision by the Security Council to authorize the use of armed force under Article 42 is conditioned on a prior determination by the Council as to the existence of a “threat to the peace, breach of the peace, or act of aggression” (Article 39).⁸ While an act of aggression by definition can *only* be committed by States,⁹ there is nothing to preclude the former two situations arising as a consequence of violence by non-State actors.¹⁰ In fact there is considerable State practice to show that civil war situations, particularly where there are trans-boundary effects, have often been determined as amounting to “a threat to the peace.”¹¹

Article 51, on the other hand, has traditionally been regarded as an inter-State right that could be invoked only in the event of “an armed attack” by another State. More specifically, the article provides, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” Although this provision was not intended to preclude armed attacks by non-State actors that were acting on behalf of a State, what the Charter regime did not foresee was the prospect of an “armed attack” by a non-

6. U.N. Charter art.2, para. 4.

7. Sean Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARVARD INTERNATIONAL LAW JOURNAL 41 (2002).

8. Article 41 is concerned with measures not involving the use of armed force that may be used to enforce a Security Council decision.

9. Declaration on the Definition of Aggression, G.A. Res. 3314, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

10. As the commentary to Rule 18 of the *Tallinn Manual on the International Law Applicable to Cyber Warfare* notes, the Security Council has also “labelled two significant phenomena as threats to the peace”—international terrorism and the proliferation of weapons of mass destruction. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., forthcoming 2013) [hereinafter TALLINN MANUAL].

11. S.C. Res. 1973, pmbl., U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1527, pmbl., U.N. Doc. S/RES/1527 (Feb. 4, 2004); S.C. Res. 1484, pmbl., U.N. Doc. S/RES/1484 (May 30, 2003); S.C. Res. 924, pmbl., U.N. Doc. S/RES/924 (June 1, 1994).

State actor acting without (or with minimal) State involvement. This was most probably because there was an assumption that armed attacks by such actors on the scale and gravity envisaged by Article 51 would *necessarily* involve a State. The attacks on 9/11 challenged that assumption, prompting a fundamental rethinking of the law on the use of force.

Three views now dominate the discourse on the applicability of Article 51 to armed attacks by non-State actors. The first insists on the preservation of a strong link between the non-State actor that launches an armed attack and a State (typically the territorial State from which such an attack is launched). In other words, Article 51 may only be invoked in situations where there is “substantial involvement” by a State in the armed attack carried out by the non-State actor. The second view attempts to extend to victim States a remedy in situations where there is little or no evidence of the territorial State’s involvement in the armed attack although it has allowed its territory to be used a base from which the non-State actor is able to mount such an attack. Advocates of this view maintain that under such circumstances a victim State should be entitled to use force pursuant to Article 51 against the State that harbors or gives sanctuary to the non-State actor. Proponents of the third view simply claim that Article 51 applies to armed attacks by non-State actors. According to this view, the State from which the attack has been facilitated cannot claim that its territorial integrity or sovereignty has been violated if the victim State uses force in self-defense as long as the principle of necessity is strictly adhered to. Each of these views warrants further comment since there are inherent problems associated with all three.

Although the traditional view of Article 51 is founded on an inter-State conception of the right to use force, this stance has never absolutely precluded the applicability of the right of the victim State to use force in response to an armed attack by a non-State actor where there is “substantial involvement” by a State in that attack. This latter point was elaborated by the ICJ in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* judgment) when it was required to consider whether acts committed by the contras in the course of their military operations in Nicaragua could be attributed to the United States.¹² In that case the ICJ noted that “the sending by or on behalf of a State of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another State . . . or its substantial involvement therein” could amount to an

12. *Nicaragua* Judgment, *supra* note 5, ¶ 115.

armed attack within the meaning of Article 51 if the operation, because of its “scale and effects,” would have been classified as an armed attack had it been carried out by regular armed forces of the State.¹³ In other words, although force could be used pursuant to Article 51 in the event of an armed attack by non-State actors, the right to do so was preconditioned on the involvement of a State in that attack. The pivotal question turned on what *degree of involvement* by a State was necessary to enable a victim State to invoke self-defense.¹⁴ According to the ICJ, the standard was high. For the conduct of irregular forces to give rise to legal responsibility on the part of the State, the non-State actor must have been in a relationship of “complete dependence”¹⁵ or under the direction or “effective control” of a State.¹⁶ Insofar as the ICJ was concerned, “general control” by the State or even a “high degree of dependency,” including the financing, organizing, training, supplying or equipping of the non-State actor, did not suffice.¹⁷

The customary international law test for attributing the wrongful acts of non-State actors to a State is set forth in Article 8 of the International

13. *Id.*, ¶ 195.

14. According to Judge Schwebel, a State must at least exercise significant, perhaps determinative, influence over the non-State actor’s decision making, as well as play a meaningful role in the specific operations before an armed attack will be imputed to it. *Id.*, ¶ 6 (separate opinion of Judge Schwebel).

15. In the *Nicaragua* judgment, the ICJ concluded there was insufficient evidence to demonstrate the contras’ complete dependence on the United States and therefore it was unable to determine that the contra force could equated for legal purposes with the forces of the United States. *Id.*, ¶¶ 109–10. In the *Genocide* case, the ICJ upheld the “complete dependence” test and explained,

[I]t is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 108, ¶¶ 392–93 (Feb. 26) [hereinafter *Genocide Case*].

16. *Nicaragua Judgment*, *supra* note 5, ¶ 115. As elaborated by the ICJ in the *Genocide* case, the “complete dependence” test is fundamentally distinguishable on the basis that the non-State actor cannot be considered other than a *de facto* State organ and so “all [its] actions performed in such capacity would be attributable to the State for purposes of international responsibility.” *Genocide Case*, *supra* note 15, ¶ 397.

17. *Nicaragua Judgment*, *supra* note 5, ¶ 115.

Law Commission's (ILC's) Articles on State Responsibility.¹⁸ Partially relying on the *Nicaragua* judgment, Article 8 provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct."¹⁹ As the ILC notes, it is widely accepted in international jurisprudence that responsibility attaches to a State for the wrongful acts of non-State actors if the former has authorized the acts in question; thus, if, on the specific instructions of a State, a non-State actor launches an armed attack on another State, the State that issued the instructions will be held responsible for the wrongful conduct.²⁰ It follows that since the State which instructs the non-State actor to commit the wrongful act is legally responsible for the commission of that act, if the act amounts to an "armed attack," the victim State is entitled to respond in self-defense against the State despite the fact that the actual attack may have been carried out by the non-State actor. The more difficult cases are armed attacks that are ostensibly carried out "under the direction or control" of a State. But as the ILC suggests, "such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of [i.e., the armed attack] was an integral part of that operation."²¹ Accordingly, if a State has effective control over the non-State actor's military operation which is of such "scale and effects" that it cannot be classed as anything but an armed attack (as in the case of specific instructions) the victim State is entitled to resort to force in self-defense against that State although the attack itself may have been carried out by the non-State actor. In that the majority in the ICJ's 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* appeared to foreclose the possibility that an armed attack within the meaning of Article 51

18. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 110 (2002). The standard set forth in Article 8 relied on the test of attribution identified by the ICJ in the *Nicaragua* judgment. The conduct of non-State actors may also be attributed to a State under Article 11 if the State "acknowledges and adopts the conduct in question as its own."

19. See also *Genocide Case*, *supra* note 15, ¶¶ 398, 406.

20. See *Nicaragua Judgment*, *supra* note 5, ¶ 195; *Armed Activities Judgment*, *supra* note 2, ¶ 146. See also U.N. Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 6th Comm, 29th sess., 2319th plen. mtg., U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

21. CRAWFORD, *supra* note 18, at 110, ¶ 3.

can originate from a non-State actor, the judgment is problematic, not least since such a scenario was expressly recognized in the *Nicaragua* judgment.²² Nor can this stance be reconciled with State practice. Nevertheless, even the more fluid *Nicaragua* test has engendered its own set of problems because it insists on a direct correlation between the *jus ad bellum* and State responsibility legal regimes.²³

The consequence of this is that the traditional inter-State approach fails to adequately provide a meaningful remedy for States that are subject to armed attacks by non-State actors in situations where: (1) there is inadequate proof to show that there is substantial involvement of a State in the attack; and (2), there is little or no involvement by a State in the armed attack although the State from where the attack was conducted allowed its territory to be used by the non-State actor.²⁴ The ICJ's faithful application of the test of attribution elaborated in the *Nicaragua* judgment to the facts before it in the case concerning *Armed Activities on the Territory of the Congo* (*Armed Activities* judgment) meant the ICJ could not *but* reject Uganda's claim that it had acted in self-defense.²⁵ With "no satisfactory proof" of the involvement of the Democratic Republic of Congo in the "armed attacks" by the rebel forces, Uganda was precluded from invoking Article 51, leaving it with no satisfactory remedy apart from countermeasures—in other words, measures short of force.²⁶ Although the traditionalists recognize that the State that allows its territory to be used by such groups is in violation of its customary international law obligations,²⁷ the best answer they

22. Wall Advisory Opinion, *supra* note 2, ¶ 139.

23. For useful analysis, see Nicholas Tsagourias, *Necessity and the Use of Force: A Special Regime*, 41 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 11 (2010).

24. SCHACHTER, *supra* note 3, at 169.

25. *Armed Activities Case*, *supra* note 2, ¶¶ 146–47. *But see also* Separate Opinion of Judge Kooijmans, ¶¶ 29–30, and Separate Opinion of Judge Simma, ¶ 12.

26. In the *Oil Platforms* judgment, Judge Simma took the position that proportionate countermeasures could involve a limited degree of military force in response to circumstances below the Article 51 threshold of "armed attack." Separate Opinion of Judge Simma, *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 12–13 (Nov. 6). Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 795 (2006).

27. In the *Corfu Channel* case, the ICJ held that every State is obliged "not to allow knowingly its territory to be used for acts contrary to the rights of other states." *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 4, ¶ 22 (Apr. 9). See also paragraph 4 of the Declaration on Friendly Relations. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N.

can offer is to point to countermeasures and/or the law enforcement paradigm. But what they cannot do is to resolve the situation in which the territorial State that harbors the non-State actor is unwilling to prevent further attacks let alone detain, extradite or even prosecute such actors.²⁸

This legal lacuna has been widely debated in legal journals since the 1980s prompting some to argue for a far more expansive interpretation of Article 51 than that set out in the *Nicaragua* judgment.²⁹ Proponents of this second view suggest that the State that harbors or allows its territory to be used by the non-State actor which engages in an armed attack is equally responsible for that wrongful act.³⁰ While this view has garnered far more support in the post-9/11 period, State practice prior to that point indicates that a narrow inter-State reading of self-defense prevailed.³¹ Repeated attempts to extend the right of self-defense to encompass harboring (often equated to aiding and abetting)³² the non-State actor were generally treated as inadequate bases upon which to claim the lawful use of force in self-defense. For example, in spite of Israel's assertion that "a country cannot claim the protection of sovereignty when it knowingly offers a piece of its territory for terrorist activity against other nations," its 1985 attack on the

Doc. A/8082 (1970). In the *Armed Activities* judgment the ICJ held General Assembly Resolution 2625 declaratory of customary international law and that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State." *Armed Activities Judgment*, *supra* note 2, ¶ 162. *See also* S.C. Res. 1373, U.N. Doc S/RES/1373 (Sept. 28, 2001).

28. Since the early days of the U.N. Charter, commentators have cautioned that any law "which prohibits resort to force without providing a legitimate claimant with adequate alternative means of obtaining redress, contains the seeds of trouble." C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS (Hague Academy of International Law) 455 (II-1952)

29. Abraham Sofaer, *Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law and the National Defense*, 126 MILITARY LAW REVIEW 89 (1989); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE JOURNAL OF INTERNATIONAL LAW 559 (1999).

30. A further problematic aspect of this view is that proponents sometimes refer to the State that harbors the non-State actor while others talk of the State from whose territory an attack is launched.

31. *See generally* Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 JOURNAL OF CONFLICT AND SECURITY LAW 289–320 (2005).

32. For a discussion on the flaws of equating "harboring" with the criminal law concept of "aiding and abetting," see Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE JOURNAL OF INTERNATIONAL LAW 537 (1999).

headquarters of the Palestinian Liberation Organization in Tunisia on the grounds that it was acting pursuant to Article 51 was rejected by the Security Council, with the United States abstaining.³³ What is more, none of the members of the Council appeared persuaded by the U.S. contention that “an aspect of the inherent right of self-defense recognized in the United Nations Charter [is that] a State subject to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks.”³⁴ Similarly, the U.S. strikes at sites in Afghanistan and Sudan in August 1998 following the Al Qaeda bombings of the American embassies in Kenya and Tanzania as justified exercises of self-defense received mixed reactions.³⁵ Caution is nevertheless required before reaching any conclusion as to the scope of the law since the reaction of States to many of these incidents during this period were clearly framed by political alignments. That said, State practice did not appear to deviate much from the interpretation of self-defense elaborated by the ICJ in the *Nicaragua* judgment.

Proponents of the second view nevertheless point to the conduct of States in the immediate aftermath of 9/11 as having fundamentally altered the traditional conception of Article 51. Security Council Resolutions 1368 (2001) and 1373 (2001) and subsequent State practice are cited as evidence for the emergence of an instant customary international law right favoring an expansive interpretation of self-defense.³⁶ Those who have long pressed for such an approach recall the widespread international support for Operation Enduring Freedom, which was launched in (and against) Afghanistan on the basis that the threat posed by Al Qaeda was “made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it con-

33. For the exchanges between States, see U.N. SCOR, 40th Sess., 2615th mtg., U.N. Doc. S/PV.2615 (Oct. 4, 1985).

34. *Id.*

35. 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 invoking Article 51. U.N. Doc. S/1998/780 (Aug. 20, 1998). Britain, Germany, Australia, New Zealand and Israel supported the military operations; France and Italy were equivocal, while Russia, China, Pakistan, several Arab States and the Non-Aligned Movement were critical.

36. On the question of whether the case of Afghanistan represented the formation of instant custom or whether it ought to be regarded as an exception, see Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 997 (2001); Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 604 (Malcolm Evans ed., 2003).

trols to be used by this organization as a base of operation.”³⁷ Nevertheless, even supporters of the military action have conceded that justifying the use of force against *Afghanistan* is “a difficult question.”³⁸

State practice in the decade since 9/11 is marked by a certain degree of ambiguity.³⁹ For example, although the international community criticized Israel’s use of force during its 2006 conflict with Hezbollah as being disproportionate, many supported its right to use force in self-defense.⁴⁰ Yet the issue over which there was palpable unease was whether such force could lawfully be used in *Lebanon* without violating its territorial sovereignty, not least because there was a belief that Iran and Syria, rather than Lebanon, were facilitating Hezbollah’s military operations.⁴¹ Although a majority of experts agree that mere harboring (or indeed the failure of a State to

37. Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council. U.N. Doc. S/2001/946 (Oct. 7, 2001). The UK also justified its military action in Afghanistan under Article 51 on the grounds that the Taliban regime was “supporting” Al Qaeda. U.N. Doc. S/2001/947 (Oct. 7, 2001).

38. CHRISTOPHER GREENWOOD, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq*, in *ESSAYS ON WAR IN INTERNATIONAL LAW* 684, 686 (2006). Greenwood dismisses the objections on the basis that “the criteria for determining the responsibility of a State for the acts of a private organisation are not altogether clear” and that since Afghanistan was in violation of international law in permitting Al Qaeda to operate from its territory, this “exposed its own forces to lawful attack in exercise of the right of self-defence.”

39. Article 1(c)(xi) of the African Union Non-Aggression and Common Defence Pact, 2005, defines aggression to include “the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent transnational organized crimes against a Member State.” See also Article 1(3)(k) of the 2006 Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region.

40. For example, the UN Secretary-General stated, “While Hizbollah’s actions are deplorable and, as I have said, Israel has a right to defend itself, the excessive use of force is to be condemned.” U.N. SCOR, 61st Sess., 5492nd mtg., U.N. Doc. S/PV.5492 (July 20, 2006).

41. See 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, which read, “Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.” U.N. Doc. A/60/937-S/2006/515 (July 12, 2006). Revealingly, in his briefing to the Security Council the UN Secretary-General emphasized that “any analogy with Afghanistan under the Taliban is wholly misleading.” U.N. SCOR, 61st Sess., 5492nd mtg., U.N. Doc. S/PV.5492 (July 20, 2006).

police its territory to prevent the launch of attacks) is insufficient to attribute the actions of non-State actors to the State for the purpose of finding a use of force by that State, many also share the view that the provision of sanctuary coupled with other acts, such as substantial support for the non-State group, could, in certain circumstances, be considered a use of force.⁴² Advocates of the second view are not insensitive to the inherent risks associated with their position, since lowering the threshold of attribution necessarily increases the possibility of armed conflict.⁴³ But the case of Lebanon also exposes a far more problematic aspect of the second view in that the reasoning upon which self-defense rests is implicitly being reconfigured.

As an exceptional measure of self-help, self-defense is traditionally understood to operate to negate an otherwise wrongful act (the use of force by the victim State) in response to a prior wrongdoing (an armed attack) for the purpose of preventing further wrongdoing (attacks) by the *perpetrator* of the original wrong. Structurally, the plea regulates the conduct between two parties: the aggressor and the victim of that aggression. Additionally, it implicitly introduces a temporal limitation on the use of force in that once the aggressor no longer has the ability to conduct armed attacks, there is no further need—and by implication, requirement—for the victim to use defensive force. In its revised form, self-defense is being stretched to breaking point on both counts. Insofar as the temporal limitation is concerned, it is difficult to identify at what point the victim State need no longer use defensive force since self-defense was invoked against the party that was not directly responsible for the original armed attack.⁴⁴ Second, on this reading, self-defense is required to negate an otherwise wrongful use of force against the State that *harbors* the non-State actor, rather than against the *perpetrator of the armed attack*. The only way to resolve this incongruity is to accept, as some claim, that no distinction should be drawn between the two.⁴⁵ There will of course be some cases when the State from whose terri-

42. See Definition of Use of Force, TALLINN MANUAL, *supra* note 10, commentary to Rule 11, ¶ 5.

43. See Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245, 247–251 (2010).

44. Does defensive force end when the non-State actor is no longer able to conduct attacks from the territory of that particular State or from any other, or when the State no longer harbors such actors?

45. See, for example, the United States' *National Security Strategy* (Sept. 2002) and the 9/11 COMMISSION REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 326 (2004). The UK Attorney-General in a statement to the

tory the attack has been launched has played an active role in facilitating the attack; however, that will not always be the case, as was aptly demonstrated by the Lebanon example. The unease associated with this bind often translates into public statements by those claiming self-defense to emphasize that the use of force is directed not at the territorial State but the offending non-State actor. This unsatisfactory situation has thus given rise to a third view that calls for Article 51 to be extended to armed attacks by non-State actors.

According to this view, a victim State should be entitled to resort to defensive force against a non-State actor as long as the *Nicaragua* “scale and effects” test is satisfied.⁴⁶ The fractious attribution question is thereby completely by-passed since there is no need to attribute the armed attack to any State, including the one from which the armed attack was launched.⁴⁷ In support of this view proponents point to State practice in the immediate wake of 9/11 which recognized the inherent right of States to use defensive force in response to attacks by non-State actors.⁴⁸ This view is further strengthened by the silence in the primary legal texts, which make no express reference to an armed attack having to originate from a State,⁴⁹ a con-

House of Lords on April 21, 2004 stated, “[F]orce might, in certain circumstances, be used in self-defence against those who plan and perpetrate [terrorist] acts and against those harbouring them, if that is necessary to avert further such terrorist acts.” 21 Apr. 2004, PARL. DEB., H.L. (2004) 356 (Lord Thomas of Gresford, statement opening the debate on international self-defence), <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm>.

46. It should be noted that there is a tendency among proponents of this view to conflate the *jus ad bellum* with the *jus in bello* rules; for example, the *jus ad bellum* “scale and effects” test is often equated to the *jus in bello* “intensity” threshold. Kress, *supra* note 43.

47. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 206–8 (4th ed. 2005); Murphy, *supra* note 7; Ken Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War”* 7 (WCL Research Paper No. 2011-16, 2011), available at <http://ssrn.com/abstract+1824783> (last visited Oct. 2, 2012).

48. As with the second view, evidence cited includes Security Council Resolutions 1368 and 1373 and NATO’s invocation of Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America “shall be considered an attack against them all.” North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm [hereinafter Washington Treaty].

49. This evidence is not as equivocal as advocates maintain. For example, Article 3(1) of the 1947 Inter-American Treaty of Reciprocal Assistance states that the High Contracting Parties

agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contract-

sideration that did not go unnoticed by some of the ICJ judges in the *Wall* advisory opinion and in the *Armed Activities* judgment.⁵⁰

The right to use defensive force against a non-State actor pursuant to Article 51 is tempered by the principles of necessity, proportionality, and imminence of the attack. The principle of necessity is required to play a far more prominent role in the context of defensive force against non-State actors than it does in the case of inter-State defensive force. This is so in two respects. First, embedded in the inter-State conception of defensive force is a fidelity to the territorial border, which functions to confine the force that may be deployed to specific geographical locations. This is achieved through the implicit recognition that when inter-State force is used, the territories of States *not* party to the conflict remain undisturbed, protected by the principle of territorial sovereignty. Extending self-defense to non-State actors severs the link with this geographical constraint (for the simple reason that the non-State actor is not defined by any territorial attributes), introducing the prospect of borderless wars. The principle of necessity performs a critical role by reintroducing a spatial limitation to self-defense, insisting that it is only if the State that harbors is unwilling or unable to respond in an appropriate manner to prevent further attacks that defensive force is lawful. Second, it would appear that the principle of necessity functions to preclude the territorial State from insisting that its territorial sovereignty be respected, possibly on the basis that it is in violation of its international obligation not to allow its territory to be used as a base from which attacks can be conducted.

To extend Article 51 to armed attacks by non-State actors seems to offer a simple solution insofar as the relationship between the non-State actor and the State that is the target of the armed attack is concerned. However, this view raises a number of derivative questions. Why does the geograph-

ing Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations.

Inter-American Treaty of Reciprocal Assistance Between the United States of America and Other American Republics, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77, available at <http://www.state.gov/p/wha/rls/70681.htm>. However, neither Article 51 of the UN Charter nor Article 5 of the Washington Treaty includes an express reference to States, with the latter merely providing that “an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.” Washington Treaty, *supra* note 48.

50. See, e.g., Wall Advisory Opinion, *supra* note 2, Declaration of Judge Buergenthal, ¶ 6; Separate Opinion of Judge Kooyijmans, ¶ 35; Separate Opinion of Judge Higgins, ¶ 33.

ical location of the non-State actor determine whether or not the State must justify its use of force? *Should* the location of the non-State actor determine the legal relationship between it and the State?

III. CROSSING THE BORDER

That States have willingly consented to limit their right to use force in accordance with the *jus ad bellum* does not impinge or alter in any manner the premise that the legitimate use of force rests exclusively with the State.⁵¹ Nor has the acceptance for greater international regulation of the violence between State and non-State actors had any bearing on the fact that it is *only* the State that is entitled to lawfully resort to force. The right to *use* force thus continues to be jealously guarded by States as a sovereign prerogative recognized by international law and enforced in accordance with domestic law. To the extent that non-State actors engage in unauthorized violence within a State (in other words, violence without the lawful authority of the State) they will be treated as criminals under domestic law regardless of whether the situation of violence amounts to an armed conflict.⁵² It is the fact that the non-State actor has taken up arms without lawful State authority that extends to the State the right to use force to suppress the violence. The degree of force that may be wielded by the State is context dependent and contingent on what legal regime applies in the circumstances. Experts may disagree on what *level* of force is appropriate in any given situation (whether the force is proportionate) but the issue over which there is no disagreement is that the territorial State is not required to justify its *use* of force whether as a law enforcement exercise in peacetime or a military operation in an armed conflict situation. In neither case is Article 51 relevant.⁵³

As already noted, self-defense is an exceptional right raised by a State to justify its *use* of force. It is therefore somewhat incongruous that a State should be required to justify its use of force against a *non-State actor* that has

51. Max Weber defined a State as “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.” Max Weber, *Politics as Vocation*, in *ESSAYS IN SOCIOLOGY* 78 (2001).

52. All States have legal frameworks which privilege their own police and armed forces over insurgents who oppose them. Dieter Fleck, *The Law of Non-international Armed Conflicts*, in *THE HANDBOOK OF INTERNATIONAL LAW OF MILITARY OPERATIONS* ¶ 1202.2 (Dieter Fleck & Terry D. Gill eds., 2008).

53. DINSTEIN, *supra* note 47, at 204.

engaged in violent activities directed against that State merely because the non-State actor is located on the territory of another State when no such justification would be expected were that same non-State actor to be located within the State's own territory. Dinstein's explanation for this is that "an armed attack against a State, in the meaning of Article 51, posits some element external to the victim State. Non-State actors must strike at a State from the outside."⁵⁴ Yet this still does not fully explain why the location of the non-State actor, or the crossing of a border, fundamentally alters a pre-existing relationship. This may account for the ambiguity that surrounds State practice, which is overshadowed by a deep-seated disquiet insofar as justifying the use of force against a non-State actor is concerned. The question that cannot be avoided is whether the geographical location of the non-State actor should, as a matter of law, alter the legal relationship between the State and non-State actor, let alone determine the applicability of the *jus ad bellum*. To answer in the affirmative is evocative of the claim held not long ago that the location of an armed conflict determines the classification of that conflict, revealing, if nothing else, the extent to which geography frames perceptions.

If there is no compelling reason why the non-State actor's location should be determinative, self-defense may not necessarily be the most coherent legal framework within which to conceptualize the use of force against such actors. If this is indeed the case, how might a border be lawfully crossed by a State without violating the territorial sovereignty of the State in which force is deployed? History is replete with examples of non-State actors attacking States from the territory of another State. The capacity of such actors to "wage war" against a State may have increased but the problem is not new. Did the Charter create a normative framework leaving States with no remedy? Is there a legal vacuum that must be filled?

The UN Charter may have introduced a legal regime which codified two exceptions to the prohibition on the use of force, but there is a long tradition, demonstrated by consistent State practice, that the wrongfulness of a use of force can be precluded in one, and possibly other exceptional circumstances found in customary international law. In the event that the territorial State is unable to prevent further attacks from its territory, international law does not prohibit it from inviting foreign forces onto its territory to stop the attacks,⁵⁵ as long as the consent is regarded as "valid" and

54. *Id.* at 204–5.

55. The question of what legal regime applies to the foreign armed forces is a separate matter and must be determined on a case-by-case basis.

does not involve the violation of a peremptory norm. This principle is set forth in Article 20 of the Articles on State Responsibility.

As already noted, *primary* legal responsibility for prevention resides with the State from which such attacks have been conducted.⁵⁶ Nevertheless, in situations where the territorial State is unable to prevent further attacks yet is unwilling to consent to foreign intervention, the customary international law plea of necessity, I suggest, provides a far more coherent basis upon which to justify the use of force rather than self-defense. Such a suggestion is likely to court considerable criticism and resistance not least because necessity often arouses great angst. The unease is not without foundation since all exceptions threaten the rule.⁵⁷ Nevertheless, the concern that “in practice and over time the threshold for necessity will atrophy or ‘soften’”⁵⁸ is one that is perhaps overstated and should not serve as the basis for rejecting a more lucid approach to the law. That a normative gap in respect of non-State actors was created by the UN Charter regime is unsurprising since the objective of the drafters was to design a legal framework to regulate the relations between States. Attempts to remedy the gap in the law have to date focused on Article 51 but, as discussed above, there are intrinsic problems with each of the proposals suggested. Rather than stretching Article 51 beyond recognition, necessity, as set forth in Article 25 of the Articles on State Responsibility, may offer a better option in that it has the capacity to fill the void on a far more robust footing.

IV. THE PLEA OF NECESSITY

Despite the evidence supporting the customary international law plea of a “state of necessity” there has been little discussion as to its potential relevance and value in resolving the current legal quandaries facing States in their violent exchanges with non-State actors located in another State.

56. The nature of the attack may, however, alter this assumption. A more coherent view mandates that it is not the territory from which an attack is launched but the territory in which the non-State actor that is responsible for the attack is situated that matters.

57. As Crawford observes, “[T]he commentary admits that scholarly opinion on the plea of necessity is sharply divided, suggesting that a further reason for this was the earlier tendency to abuse the doctrine of necessity to cover cases of aggression, annexation or military occupation.” James Crawford, Special Rapporteur, Second Report on State Responsibility, ¶ 278, Int’l L. Comm’n, 51st Sess., U.N. Doc. A/CN.4/498/Add.2 (Apr. 30, 1999) [hereinafter Crawford Second Report].

58. Robert Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 447, 502 (2012).

Those who have entertained the possible relevance of the plea are quick to dismiss it as not applicable to situations that involve the use of force, although this view is not shared by all.⁵⁹ Simply put, necessity denotes a situation in which a State whose sole means of safeguarding an essential interest adopts conduct not in conformity with what is required of it by an international obligation to another State. But because the harm it faces is imminent and serious, along with the fact that any other course of conduct is likely to result in even more serious consequences, no State responsibility is incurred for the violation. Although not commonly invoked, the customary status of necessity was expressly recognized by the ICJ in the *Gabcikovo-Nagymaros Project* case when, after having carefully weighed the submissions by the parties and in light of the reports by the ILC, the ICJ held that “the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.”⁶⁰ Similarly, in the *Wall* advisory opinion, the ICJ considered “whether Israel could rely on a state of necessity, which would preclude the wrongfulness of the construction of the wall,” but dismissed its applicability on the facts as it was not convinced that “the construction of the wall along the route chosen was the only means to safeguard the interest of Israel against the peril which it has invoked as justification for that construction.”⁶¹

The plea of necessity is one among six circumstances identified by the ILC as precluding the wrongfulness of an otherwise unlawful act.⁶² The ILC’s decision to adopt a negative wording in defining the scope and content of necessity reveals its intention to underscore the exceptional nature of the plea. Article 25 of the Articles on State Responsibility states:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

59. While the majority of scholars have questioned the applicability of necessity as a plea involving uses of force, some have questioned the customary international law status of necessity as elaborated by the International Law Commission. *See, e.g., id.*

60. *Gabcikovo-Nagymaros Project* (Hung./Slov.), 1997 I.C.J. 7, ¶ 51 (Sept. 25).

61. *Wall Advisory Opinion*, *supra* note 2, ¶ 140.

62. *See* CRAWFORD, *supra* note 18, at 160–89. The five other circumstances are consent (Article 20), self-defense (Article 21), countermeasures (Article 22), *force majeure* (Article 23) and distress (Article 24).

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
- (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

The most compelling reason for preferring necessity over self-defense as a basis for justifying the use of force against a non-State actor is that, in contrast to self-defense, necessity is not dependent on a prior wrongdoing by the State acted against.⁶³ This aspect of the plea makes it particularly relevant in situations where there is little or no evidence to suggest that a State has been involved in an armed attack by a non-State actor. In contrast to Article 51, which leaves the victim State with no lawful option involving the use of defensive force, necessity would function to preclude responsibility for what would otherwise be a wrongful use of force by the victim State that is *totally independent* of the conduct adopted by the territorial State. In other words, necessity introduces the possibility of extending a lawful remedy to the victim State of an armed attack by a non-State actor without requiring it to attribute the wrongdoing to another State (including the ter-

63. The commentary to Article 33 on the State of Necessity to the ILC's 1980 report states, "[T]he wrongfulness of an act committed in a state of necessity is not precluded by the pre-existence . . . of a particular course of conduct by the State acted against." Rep of the Int'l Law Comm'n, 32nd sess, May 5–July 25, 1980, UN GAOR 35th Sess., Supp. No. 10, at 34, ¶ 2, U.N. Doc. A/35/10 (1980) [hereinafter 1980 Report of the ILC]. The commentary to the Draft Articles on State Responsibility likewise states, "Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), [necessity] is not dependent on the prior conduct of the injured State." Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l L. Comm'n, 53d Sess., U.N. GAOR 56th Sess., Supp. No. 10, at 178, ¶ 2, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 YEAR-BOOK OF THE INTERNATIONAL LAW COMMISSION 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

ritorial State from where the attack originates) in circumstances where there is clearly no such involvement on the part of a State in the attack. Since the victim State is likely to take the forcible measures it deems are necessary to defend its interests, it is simply a farce to leave it with no option but to present a case pursuant to Article 51 founded on contorted reasoning and dubious evidence linking the attack to the territorial State. By contrast, necessity would allow for a far more principled approach *governed by law* because a separation can be maintained between the wrongdoing perpetrated by the non-State actor and the relationship between the State deploying force and the territorial State in which such force is used.

For example, although Turkey did not expressly claim that its use of force in Iraq against the Kurdistan Workers' Party (PKK) in 1995 was justified by reason of necessity, its submissions to the Security Council justifying force were more redolent of necessity than self-defense in that Turkey made no effort to link its use of force to a prior wrongdoing on the part of Iraq. In fact the opposite was the case. During the course of its military operations against the PKK, which had established a number of bases within Iraq, Turkey emphasized that it had "always attributed utmost importance to the preservation of the sovereignty and territorial integrity of Iraq, a country with which it maintained close political and economic relations, emanating from a common historical background." Despite the mounting criticism and Libya's accusation that Turkey's incursion into Iraq was an act of aggression, it did not recall Article 51 as the United States had done on its behalf.⁶⁴ Instead, Turkey maintained that it could not "ask the Government of Iraq to fulfill its obligations, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey" since, due to the existing no-fly zone which had been imposed since 1991, Iraq was unable to exercise authority over the northern part of its country. Insofar as Turkey was concerned, it was "resorting to legitimate measures" against attacks by non-State actors to safeguard its own security which, in the particular circumstances, could not be regarded as a violation of Iraq's sovereignty.⁶⁵ Whether Turkey's military operations satisfied the requisite conditions of necessity is a wholly separate question that is discussed below.

64. Letter dated 12 July 1995 from the Charge d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/566 (July 12, 1995).

65. Letter dated 24 July 1995 from the Charge d'Affaires A.I. of the Permanent Mission of Turkey, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/605 (July 24, 1995).

State practice in which the plea of necessity involving a use of force has been invoked is admittedly sparse. The leading pre-Charter case is the *Caroline* incident of 1837. Although frequently cited as an example of self-defense, close scrutiny of the exchanges between the UK and United States indicate that the case centered on the plea of necessity in a pre-*ius ad bellum* environment. For its part, the UK was adamant that its use of armed force on U.S. territory directed at non-State actors who were assisting the Canadian insurgents was lawful. The destruction of the *Caroline*, a vessel owned by American citizens which was being used to aid the Canadian insurgents, was, according to the British government, “a justifiable employment of force, for the purpose of defending the British Territory from the unprovoked attack of a band of British rebels and American pirates, who, having been ‘permitted’ to arm and organize themselves within the territory of the United States, had actually invaded a portion of the territory of Her Majesty.”⁶⁶ From the exchanges that followed, it is clear that while the United States took offense with the inference that it had *allowed* the rebels to use its territory from which to launch such attacks, it was equally concerned to distance itself from the conduct of the rebels with the statement that it was the President’s “fixed resolution that all such disturbers of the national peace, and violators of the laws of their country, shall be brought to exemplary punishment.”⁶⁷

The ILC’s determination that the *Caroline* case turned on the principle of necessity rather than self-defense merits being cited in full:

In response to the protests by the United States, the British Minister in Washington, Fox, referred to the “necessity of self-defence and self-preservation”; the same point was made by counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution”. Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for

66. Extract from note of April 24, 1841 from U.S. Secretary of State Daniel Webster to the British Government following an exchange with the British Minister in Washington, Mr. Fox, *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Sept. 15, 2012).

67. *Id.*

deliberation". In his message to Congress of 7 December 1841, President Tyler reiterated that:

"This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's ad hoc envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."⁶⁸

Although the term "self-defence" appears in the exchanges between the parties, it is clear that each was referring to a state of necessity. What is more, the incident predated any limitation on the right of the use of force. Even though the *Caroline* case provides an exemplary example of necessity, the critical question is whether it is at all relevant in the post-Charter age.⁶⁹ Did the advent of the *jus ad bellum* regime with the express inclusion of Article 51 implicitly exclude necessity?

Before addressing these questions, the criticisms directed at the ILC for its apparent ambivalence as to whether necessity is a justification or excuse merits some comment.⁷⁰ To treat necessity as a justification is to suggest that the violation of the obligation owed by a State to another was, in the circumstances, not wrongful. If, on the other hand, necessity functions to excuse the State, no responsibility attaches for the violation although the act is recognized as wrongful. As commentators have observed, the difference between the two is of critical importance as legal consequences follow for victims (*Is compensation in order?*) and third parties (*Are they entitled to intervene?*). Although distinguishing between justifications and excuses within the context of domestic criminal law offers practical benefits and can inject

68. CRAWFORD, *supra* note 18, at 178, ¶ 5.

69. In his dissenting opinion in the *Corfu Channel* case, Judge Krylov concluded, "[T]he so-called right of self-help, also known as the law of necessity (Notrecht) which used to be upheld by a number of German authors, can no longer be invoked. [In the post-Charter age] it must be regarded as obsolete." *Corfu Channel*, *supra* note 27, at 77.

70. Sloane, *supra* note 58, at 483.

greater clarity into notions of culpability, whether the same reasoning applies at the international level is another matter.⁷¹ The ILC's decision to retain the phrase "circumstances precluding wrongfulness" and, in parallel, remain agnostic as to whether any of the listed circumstances functioned to justify or excuse, might be better regarded as a recognition of the particular way in which international law is constituted. Exculpation may indeed weaken the compliance pull exercised by a rule to a greater extent than an excuse,⁷² but there may be good reasons why on certain occasions a violation is regarded as justified. Since international law is an outcome of State practice, whether a circumstance serves to exculpate or excuse is a matter that is better treated on a case-by-case basis rather than through the imposition of "one blanket solution."⁷³ To transplant a legal methodology from the domestic to the international without due regard for the fundamentally distinguishable structural relations upon which each is founded is, as Robert Sloane observes, a "perilous" exercise.⁷⁴ Likewise, although the reasoning and conditions attached to the plea of necessity as it applies to States may be informed by the domestic experience, they should not be determined by it.

A. The Prohibition on the Use of Force in a Post-Charter System

To claim that the plea of necessity might be invoked to preclude responsibility for a use of force under contemporary international law is a controversial assertion. The predominant view is that the *jus ad bellum* regime introduced by the UN Charter prohibited all uses of force save for the two codified exceptions. What is more, even if the plea of necessity cannot preclude responsibility if the obligation violated is a peremptory norm. That the prohibition on the use of force as codified in Article 2(4) of the Charter is such a norm is widely accepted among international law experts.⁷⁵ Terry

71. Contrary to popular opinion, distinguishing between justifications and excuses within criminal law is often not easy. In particular, the difficulty associated with categorizing necessity and duress is such that they may better be approached as hybrid defenses.

72. Vaughan Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 405, 410 (1999).

73. *Id.* at 411.

74. Sloane, *supra* note 58, at 473.

75. See, e.g., CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 24 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 2–3 (1999) (stating "the prohibition enunciated in Article 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the in-

Gill's description of the prohibition as the "linchpin of the international legal system" is a commonly shared view, as is his observation that "although subjected to differing interpretations by scholars, and violated on numerous occasions, it nevertheless remains an almost universally accepted fundamental rule of international law and relations, one widely recognized as having a *jus cogens* character."⁷⁶ To question the *jus cogens* status of the prohibition comes close to undermining the entire edifice upon which contemporary international law is founded. That said, if the prohibition is indeed a peremptory norm, any views that hold otherwise should be easy to dismiss.

Overcoming these objections is admittedly difficult despite the rejection by the ILC and its Special Rapporteur, Robert Ago, of the suggestion that the express inclusion of the self-defense exception to the Article 2(4) prohibition in the Charter implicitly excluded the plea of necessity in all circumstances. Such a conclusion, it was maintained, did not "logically or necessarily" follow.⁷⁷ Whether such a finding is sustainable today is another matter. The record over the last sixty years is that States have consistently invoked self-defense to justify any and all uses of force even when the factual circumstances would have supported a strong claim of necessity, as in many cases involving the "rescuing" of nationals and others from civil war or hostage situations.

The objection—that the *jus cogens* status of the prohibition on the use of force that precludes the applicability of necessity—presents less of an impediment. Despite the consensus among a majority of commentators that the prohibition is *jus cogens*, on closer inspection there is surprisingly little evidence in the shape of explicit declarations on the part of States to

international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character"); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50 (2006) ("the prohibition of the use of force by States undoubtedly forms part of *jus cogens*"). See also Separate Opinions of Judges Simma (¶¶ 329–30), Koojman (¶ 260) and Elaraby (¶ 291) in *Oil Platforms*, *supra* note 28.

76. Terry D. Gill, *The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 363 (2006).

77. Addendum to Eighth Report on State Responsibility by Mr. Roberto Ago, [1980] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 59, U.N. Doc. A/CN.4/318/ADD.5-7 [hereinafter Addendum to Eighth Report]. This question arose in the context of the agreement on the part of both the ILC and the Special Rapporteur that necessity could not preclude the wrongfulness of a primary obligation which, by its definition, excluded the possibility of invoking necessity. See also CRAWFORD, *supra* note 18, at 185, ¶¶ 19, 21.

support this view.⁷⁸ Of course this does not mean that the prohibition is not part of customary international law and therefore not binding on all States. The State practice in support of its customary status is considerable. Nevertheless, whether the prohibition as codified in Article 2(4) stands up to scrutiny when assessed against the generally accepted criteria for identifying a *jus cogens* norm demands consideration. This is a question that has received little attention given the significance of the outcome.⁷⁹ Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a peremptory norm of general international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Since by definition, a *jus cogens* norm is generally accepted as one from which States may not derogate, the fact that the Article 2(4) prohibition is not an absolute rule but subject to a number of exceptions is problematic. The complexity of this issue is alluded to by former ICJ Judge Rosalyn Higgins, who comments:

In the *Oil Platforms* case, some judges viewed the application of norms relating to the use of force as having this special [*jus cogens*] character, and for this reason among others, displacing the more obvious applicable law. It seems to me self-evident that the use of force, when it is prohibited in the circumstances of Article 2(4) of the Charter, but permitted in the circumstances of Article 51 of the Charter, is not a *jus cogens* provision that without more sets aside a different specific, applicable law.⁸⁰

As Linderfalk reveals, the application of the definition of *jus cogens* to the prohibition appears to produce an absurd outcome: “[T]he relevant *jus cogens* norm cannot possibly be identical with the principle of non-use of force as such. If it were, this would imply that whenever a State exercises a right of self-defence, it would in fact be unlawfully derogating from a norm of *jus cogens*.”⁸¹ To surmount the critics’ doubt as to the *jus cogens* status of

78. James Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICHIGAN JOURNAL OF INTERNATIONAL LAW 242, 254 (2011).

79. Addendum to Eighth Report, *supra* note 77, ¶ 59. The two notable exceptions are Ulf Linderfalk, *infra* note 81, and James Green, *supra* note 78.

80. Higgins, *supra* note 26, at 801.

81. Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 853, 860 (2007). Even those scholars who support the *jus cogens* status of the prohibition

the prohibition thus requires redefining the prohibition by incorporating the exceptions into the rule. What is more, a comprehensive remedy would also require the conditions imposed by customary international law to be similarly integrated into the definition.⁸² The complexity of the challenge, coupled with the perpetually contested aspects of the right to use defensive force, has prompted some to question whether a *jus cogens* norm can exist when its scope and parameters for its application are so debated.⁸³

A further factor that weakens the norm's *jus cogens* credentials is the uncertainty that surrounds the very notion of what constitutes a use of force. Although Article 2(4) prohibits the use of force, no further definition or criteria are provided under the Charter to determine when an act amounts to a use of force.⁸⁴ What is now widely accepted is that uses of force can be differentiated. This was expressly recognized by the ICJ in the *Nicaragua* judgment when it distinguished the uses of force that are “most grave”—those constituting an “armed attack”—from other, less grave forms of force.⁸⁵ Six years earlier, the ILC had raised this very question in the context of whether necessity could be invoked in situations involving uses of force that were not, by definition, in violation of a peremptory norm. Although there was unanimity that a use of force within the meaning of “aggression” would unambiguously violate a peremptory norm (thereby precluding the applicability of necessity) the more pertinent question was whether necessity could be invoked in situations that involved uses of force short of aggression if not all uses of force were peremptory in nature.⁸⁶

A survey of State practice, at least until 1980, proved ambiguous, leading the ILC and its then–Special Rapporteur, Roberto Ago, to conclude that no definitive conclusions could be drawn. It therefore remained unset-

have conceded that “the peremptory rule banning the use of force does not exactly coincide with the corresponding rule contained in Art. 2(4) of the U.N. Charter.” Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 147, 150 (Antonio Cassese ed., 1986).

82. Green, *supra* note 78, at 229–36.

83. *Id.* at 236.

84. TALLINN MANUAL, *supra* note 10, commentary to rule 11, ¶ 1.

85. *Nicaragua* Judgment, *supra* note 5, ¶ 191.

86. In the Addendum to the Eighth Report, Ago noted that “we were able to observe an outright rejection of the idea that a ‘plea of necessity’ could absolve a State of the wrongfulness attaching to an act of aggression committed by that State.” Addendum to Eighth Report, *supra* note 77, ¶ 79. Similarly, “In the opinion of the Commission . . . no invocation of a ‘state of necessity’ can have the effect of precluding the international wrongfulness of conduct not in conformity with an obligation of *jus cogens*.” 1980 Report of the ILC, *supra* note 63, at 43.

tioned as to whether States were barred from invoking necessity in respect of all uses of force because, by definition, all are *jus cogens* prohibitions. This impasse of sorts was “resolved” by distinguishing between primary and secondary rules, allowing Ago to reason that since the ILC had been tasked to identify the applicable secondary rules, it was up to other organs charged with interpreting the primary rules to determine whether a differentiation could be made.⁸⁷ Finding Ago’s reasoning persuasive, in its 1980 report the ILC also deferred judgment on the matter but nevertheless concurred with the Special Rapporteur’s assessment that the question might arise as to whether a state of necessity could be invoked to justify an infringement of the territorial sovereignty of a State in circumstances where the violation need not necessarily be considered as an act of aggression or breach of a *jus cogens* obligation.⁸⁸

According to the Commission, a distinction could be drawn for “certain actions by States in the territory of other States which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression.”⁸⁹ More specifically, this could include:

Some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier.⁹⁰

By 1999, the question of whether uses of force could be “differentiated” had become a particularly pressing matter in the context of the military action in Kosovo and the ensuing debates on humanitarian intervention. Endorsing his predecessor’s reasoning, the newly appointed Special Rap-

87. Addendum to Eighth Report, *supra* note 77, ¶ 66. The Special Rapporteur did, however, note that to claim that all uses of force are prohibited *jus cogens* “might be to expand beyond what is at present accepted by the legal conviction of States, either the concept of ‘aggression’ or the concept of a ‘peremptory norm’ as defined in article 53 of the Vienna Convention on the Law of Treaties.” *Id.*, ¶ 59.

88. 1980 Report of the ILC, *supra* note 63, at 43–44, ¶ 23.

89. *Id.* at 44.

90. *Id.*

porteur, James Crawford, concluded that the question of whether the use of force in certain circumstances was lawful was not a matter that fell within the scope of the secondary rules.⁹¹ But despite the Special Rapporteur's repeated emphasis that it was *not* the function of the Commission to interpret the Charter provisions on the use of force, in his discussions on peremptory norms and humanitarian intervention, Crawford is clearly of the view that "the rules relating to the use of force referred to in Articles 2(4) and 51 of the Charter" rank among the "peremptory norms of international law."⁹² The Special Rapporteur's insistence on maintaining a distinction between primary and secondary rules—thereby avoiding the fracas over humanitarian intervention—simply did not extend to the prohibition on the use of force as codified in Article 2(4) which was assumed to be a "peremptory norm."⁹³

The final draft of the ILC's Articles on State Responsibility avoids all reference to the contentious question as to whether all uses of force are *jus cogens*. Nevertheless, fears that the inclusion of a list of circumstances that functioned to preclude wrongfulness would create a loophole led the Commission to include Article 26 ("Compliance with peremptory norms"). In that article, the Commission reaffirms that none of the listed circumstances can preclude the wrongfulness of an act which is not in conformity with an obligation arising under a peremptory norm. Conceding that few peremptory norms have been recognized by the international community as meeting the criteria set forth in Article 53 of the 1969 Vienna Convention, the Commission concludes that those peremptory norms that are clearly accepted include "the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."⁹⁴ The absence of any reference to the prohibition on the use of force has left commentators to differ on what conclusions might be drawn.

While all uses of force are prohibited under treaty and customary international law, apart from the two codified exceptions, it is difficult to defini-

91. Crawford Second Report, *supra* note 57, ¶ 286. Over the years, the ILC continued to avoid the question on the grounds that it was not its function to interpret the Charter provisions on the use of force.

92. *Id.*, ¶¶ 279, 286.

93. *Id.*, ¶ 287.

94. CRAWFORD, *supra* note 18, at 188, ¶ 5. Article 26 states: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

tively conclude that all such prohibitions have acquired the status of a *jus cogens* prohibition.⁹⁵ However, even if a distinction in uses of force can be sustained, surmounting the argument that the plea of necessity involving a use of force did *not* survive the Charter regime remains hugely problematic. This raises the question as to whether necessity can or should be revived as an exception by virtue of a primary rule and, if so, what conditions might attach to best guard against abuse.

B. The Conditions Attached to the Doctrine of Necessity

Insofar as the acting State is concerned, invoking necessity implies perfect awareness of having deliberately chosen to act in a manner *not* in conformity with an international obligation.⁹⁶ Since the decision to violate the obligation must have been the “only way” to avert the threat, there is no room for a State wishing to rely on the plea to claim that the conduct chosen was the preferred option among other available options that would not have entailed a breach of the obligation. It is likely that most pleas based on necessity will be rejected at this stage. This particular condition of the necessity plea parallels the necessity requirement that attaches to self-defense in that it would be impermissible for the acting State to resort to force if other options to effectively address the threat are available. Take, for example, the incursions by Turkey into northern Iraq. There is an arguable case that since Iraq was unable to prevent the PKK from launching attacks from its territory given the existence of the no-fly zone, the *only way* that Turkey could avert further attacks was to take matters into its own hands which necessarily involved the violation of Iraq’s territorial sovereignty. Whether Turkey’s military operations fulfilled the remaining conditions of necessity so as to conclude that its responsibility for violating the obligation it owed to Iraq was precluded is another matter.

The use of the word “essential” by the ILC to denote what interests might be protected by the violation of an obligation has been criticized for

95. Few scholars are willing to question the *jus cogens* status of the prohibition on the use of force. See, e.g., Ronzitti, *supra* note 82, at 153–54; Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 525 (2004).

96. See 1980 Report of the ILC, *supra* note 63, at 35 (“[T]he State organs which then have to decide on the conduct which the State will adopt are in no way in a situation that deprives them of their free will. It is certainly they who decide on the conduct to be adopted in the abnormal conditions of peril facing the State of which they are the organs, but their personal freedom of choice remains intact. The conduct adopted will therefore result from a considered, fully conscious and deliberate choice.”).

being too broad in scope. The Commission's decision in 1980 that "it would be pointless to try to spell out any more clearly and to lay down pre-established categories of interests"⁹⁷ on the ground that such matters were invariably context-dependent was a view from which the ILC did not depart in the final draft. By way of example, in both 1980 and 2001, the ILC suggested that such interests might include preserving the existence of the State itself, its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, and the ecological preservation of all or some of its territory.⁹⁸ Although these interests are admittedly broad in nature, it is only when the interest identified is threatened by a "grave and imminent" peril that the condition is satisfied. To return to the case of Turkey, unless compelling evidence of a grave and imminent attack by the PKK could have been demonstrated, it is unlikely that Turkey would have been able to rely on the plea. Other cases cannot be so easily dismissed, including Lebanon in 2006 and Afghanistan in 2001.

In addition to posing a serious threat to the interest identified, the peril must be "objectively established"; in other words, the *possibility* of a threat to the interest does not suffice. This does not mean that uncertainty as to the future disqualifies a State from invoking the plea but what *is* required is for the threat to be "clearly established on the basis of the evidence reasonably available at the time."⁹⁹ Moreover, the peril must be imminent in the sense of "proximate."¹⁰⁰ This raises an important question concerning temporality. As with self-defense, once the peril or threat no longer exists, there is no basis upon which the State can continue to rely on the plea. A State that resorts to force on the territory of another therefore cannot continue to invoke necessity once the threat no longer exists.

A further condition for invoking necessity is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole. This condition, as Sloane has observed, requires a balancing analysis that is akin to the choice-of-evils paradigm found in domestic criminal law. Sloane's concern that this assumes "values and interests can, in principle, be ranked ordinarily in a normative hierarchy"¹⁰¹ is not, as he infers, one that is limited

97. *Id.* at 49, ¶ 32.

98. *Id.* at 35, ¶ 3. See also CRAWFORD, *supra* note 18, at 183, ¶ 14.

99. See CRAWFORD, *supra* note 18, at 184, ¶ 16.

100. *Id.*, ¶ 15.

101. Sloane, *supra* note 58, at 476.

to the arena of international law. At the municipal level the lesser harm test has never satisfactorily explained how an objective comparison can be made of harms that are plainly not quantifiable or where the values being compared are manifestly incommensurable because qualitatively so different. The lesser harm test is sometimes equated to the proportionality test although the former sets a higher threshold. The ILC decision to opt for the lesser-harm test therefore corresponds with its overall ambition to limit the applicability of the plea.

The fact that the interest relied on must “outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective,” injects into the assessment a critical element of objectivity, including the requirement to consider obligations *erga omnes*.¹⁰² This particular condition will severely curtail a State’s ability to resort to force since the threat must be very substantial to outweigh all other considerations. The threat would certainly have to go beyond “acts of a sporadic character that cause occasional harm and inconvenience”¹⁰³ since the two rules being violated form the cornerstone of the international legal system—namely, the prohibition on the use of force and the principle of territorial sovereignty. For the threat to reach the required level of gravity, it is doubtful that a pattern of attacks will suffice. Although the ICJ has not entirely dismissed the “accumulation of events” theory in the context of self-defense, it is doubtful that the same reasoning can apply in the case of necessity.¹⁰⁴ This is because, as Andreas Laursen opines, to respond to a systemic threat with an exceptional ad hoc response is conceptually an “oxymoron.”¹⁰⁵

It is not uncommon in domestic criminal law for a defendant to be precluded from relying on the plea of necessity by what is sometimes referred to as the doctrine of prior fault. In other words a defendant cannot rely on necessity if he or she has contributed to the situation. At the municipal level, the doctrine serves two purposes: to restrict the availability of the plea and to reaffirm the centrality of moral choice above any expansive deterministic claims which would undermine the very substance of the criminal justice system. Article 25(2) of the Articles on State Responsibility precludes necessity if the State has “contributed to the situation of necessity.” The purpose of this condition may be simply to limit even further the

102. Laursen, *supra* note 95, at 506.

103. SCHACHTER, *supra* note 3, at 170.

104. Nicaragua Judgment, *supra* note 5, ¶ 231.

105. Laursen, *supra* note 96, at 526.

availability of the necessity plea. Nevertheless, this particular condition sits uneasily within the broader understanding of necessity as a circumstance that precludes wrongfulness on the part of States.

This cursory review of the conditions that attach to necessity indicates that it is a plea with limited application. The stringent cumulative conditions that will need to be met are likely to severely restrict its applicability. Why then should any efforts be made to “resurrect” the plea?

V. CONCLUSION

As a matter of legal reasoning, and in contrast to self-defense, necessity offers a far more coherent basis upon which to justify the extraterritorial use of force against members of organized armed groups where the consent of the territorial State is not forthcoming. Although the stringent cumulative conditions that apply to the plea of necessity mean that it is likely to be available only under “certain very limited conditions,”¹⁰⁶ the anxiety that the plea engenders nevertheless remains entrenched. A partial explanation for this is that necessity poses two particular problems for liberal theory. First, because it has the potential to “validate decisions according to conscience or prejudice rather than according to law,”¹⁰⁷ necessity threatens liberalism’s uncompromising fidelity to the rule of law. Second, by blurring the line between legislative, executive, and judicial responsibilities necessity seems to condone self-exemption which liberalism cannot tolerate. That said, the intuitive resistance to recognizing the plea in circumstances involving the use of force may be misplaced. Allowing for the plea in exceptional situations would extend to States an effective remedy which would be governed by, and judged according to, the legal criteria established by the plea. Critically, this would also provide an opportunity to reclaim the inter-State interpretation of Article 51 and make better sense of the ICJ’s insistence that an armed attack within the meaning of the article is limited to situations in which there has been substantial involvement of a State.

The plea of necessity may enable a State, in very exceptional circumstances, to cross a border lawfully but the State will also be required to comply with other relevant bodies of law before its conduct is regarded as lawful. In some situations this will entail having to respect relevant human rights obligations, while other situations will be governed by the *jus in bello*.

106. CRAWFORD, *supra* note 18, at 183, ¶ 14.

107. John Parry, *The Virtue of Necessity: Reshaping Culpability of the Rule of Law*, 36 HOUSTON LAW REVIEW 407 (1999).

Circumstances that give rise to a plea of necessity will be exceedingly rare. The use of force on the territory of Afghanistan in respect of Al Qaeda in 2001 is perhaps one such case. Paradoxically, international law scholars who attempted to make sense of the law in the immediate wake of 9/11 showcased the *Caroline* case as a precedent for invoking self-defense against non-State actors. The *Caroline* case *was* the relevant precedent, on the basis not of self-defense, but rather of necessity. Over a decade on, there seems little point in revising history but that does not mean that lessons cannot be learned from past mistakes.