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## Twelve Key Questions on Self- Defense against Non-State Actors

*Terry D. Gill & Kinga Tibori-Szabó*

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# Twelve Key Questions on Self-Defense against Non-State Actors

Terry D. Gill\* & Kinga Tibori-Szabó\*\*

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## I. INTRODUCTION

Since the 9/11 attacks against the United States, States have increasingly relied on the right of self-defense in response to attacks by non-State armed groups (NSAGs). These autonomous groups are not under the direction or control of other States, nor are they supported to any substantial extent by a State. This evolving State practice has generated an ongoing debate as to the legality of self-defense in response to attacks by NSAGs, and, assuming this legality exists, regarding the conditions for the exercise of self-defense.

The debate pertains to a series of principal questions divided into two groups: legality and modality. As their common denominator implies, legality refers to questions that deal with the applicability of self-defense against NSAGs and revolves around the concept of authorship, that is, can a non-State actor be the author of an armed attack without attribution of its acts to a State. This question is distinct from an “indirect armed attack” where a State exercises effective control over an armed group and uses it as a proxy for conducting an attack on another State.<sup>1</sup> The NSAGs referred to in this article are autonomous non-State armed groups that have a degree of organization, share a common purpose, and are capable of mounting armed attacks independent of State support.

The four legality questions consider the authorship of an armed attack within the context of self-defense before and after the U.N. Charter. They are: (1) Did Article 51 of the U.N. Charter break with the pre-Charter concept of authorship; (2) Did State practice and *opinio juris* between 1945 and 2001 narrow the understanding of authorship to exclude NSAGs; (3) Was the international reaction to 9/11 a passing expression of solidarity or a “Grotian Moment” of law creation; and (4) Has State practice and *opinio juris* since 9/11 broadened the understanding of authorship to include NSAGs.

The second group of questions addresses the modalities, that is, the conditions and limitations under which self-defense may be exercised against NSAGs. These questions are closely linked to the elements of self-defense: the requirement of an armed attack (one question), necessity (four questions), proportionality (two questions), and immediacy (one question).

The controversies surrounding these elements are discussed in eight questions that consider both the perspective of the State defending itself

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1. Armed groups as proxies are beyond the scope of this article, except as necessary to address the questions raised herein.

from the NSAGs (the targeted or defending State) and the State on the territory of which the NSAG operates (the territorial State). The questions concerning the principles of necessity and proportionality also address the “unwilling and unable” test that has recently gained acceptance by some States and commentators.

The eight modalities questions addressed are: (1) What degree of use of force by NSAGs qualifies as an armed attack; (2) Is failure to prevent one’s territory from being used by NSAGs enough to trigger the right of self-defense; (3) When does self-defense become necessary on the territory of “unable” States; (4) When does self-defense become necessary on the territory of “unwilling” States; (5) Can self-defense be exercised without the consent of the territorial State; (6) How does proportionality affect the exercise of self-defense on the territory of an “unable” State; (7) How does proportionality affect the exercise of self-defense on the territory of an “unwilling” State; and (8) Within what timeframe must self-defense be exercised and for how long does the right to engage in self-defense remain operative.

In this article, we delve into the controversies surrounding these questions and provide our proposed answers. In particular, we focus on the central role necessity plays in both determining when the right of self-defense arises and the limitations it imposes on the exercise of that right.

## II. THE LEGALITY QUESTIONS

The four legality questions focus on whether NSAGs can qualify as authors of an armed attack. These questions follow the development of authorship from the period preceding the adoption of the U.N. Charter to the present.

### A. *Did Article 51 Break with the Pre-Charter Concept of Authorship?*

Customary international law has long recognized the principles governing the use of force in self-defense.<sup>2</sup> Nonetheless, for the past seven decades,

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2. The International Court of Justice (ICJ) acknowledged the dual legal basis of self-defense in its Nicaragua judgement. *See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27). Recognition of these principles dates back at least to the *Caroline* incident of 1837. *See* Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 92 (1938). On necessity, proportionality, and immediacy, see, for example, YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 249–52 (6th ed. 2017); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 157–60 (4th ed. 2018); Terry D. Gill, *The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy*, in *INTERNATIONAL*

opinions have persistently differed as to the fate of the pre-Charter right of self-defense. Some authors contend that the Charter preserved the customary content of self-defense to a certain extent,<sup>3</sup> while others aver that the drafters abandoned the prior scope of the right in favor of a narrower interpretation, set forth and limited by the Charter's principal purpose, the prohibition on the inter-State use of force.<sup>4</sup> One of the controversies regarding the effect of the Charter on the pre-1945 right of self-defense concerns NSAGs and whether these groups can qualify as authors of an armed attack.<sup>5</sup>

The concept of the sovereign's unrestricted right to wage war dominated nineteenth-century State practice.<sup>6</sup> That does not mean, however, that States did not attempt to avoid war. Declarations of war were preceded by extensive military, diplomatic, and financial preparations, so resorting to small-scale coercive measures proved to be less costly and more efficient.<sup>7</sup>

These measures could include an armed intervention by a State on another sovereign's territory, but only when there was legal justification for intervention. Armed interventions came in two relatively separate categories. One category was "measures short of war." These measures were justified on the principle of self-preservation and viewed as exceptions to territorial inviolability. They permitted armed interference for self-defense, hot pursuit,

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LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 113, 123–25 (Michael Schmitt & Jelena Pejic eds., 2007); KINGA TIBORI-SZABÓ, ANTICIPATORY ACTION IN SELF-DEFENSE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW 192–96, 256–58, 263–64, 291–309 (2011).

3. See, e.g., DINSTEIN, *supra* note 2, at 199; Christopher Greenwood, *Self-Defence*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (last updated Apr. 2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401>; Daniel Bethlehem, *Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 770, 771 (2012); TIBORI-SZABÓ, *supra* note 2.

4. See, e.g., GRAY, *supra* note 2, at 124–25; Dire Tladi, *An Assessment of Bethlehem's Principles on the Use of Force against Non-State Actors*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 570, 572–75 (2013).

5. See, e.g., GRAY, *supra* note 2, at 124–25; Alexander Orakhelashvili, *Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 157, 171–73 (Marc Weller ed., 2015) [hereinafter OXFORD HANDBOOK OF THE USE OF FORCE]. *Contra* Thomas M. Franck, *Terrorism and the Right of Self-Defence*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 839 (2001); Ruth Wedgwood, *Responding to Terrorism: The Strikes against bin Laden*, 24 YALE JOURNAL OF INTERNATIONAL LAW 559 (1999).

6. STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 93 (2009).

7. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 45–47 (1963).

protection of nationals, and certain other purposes.<sup>8</sup> A second category included retorsions, retaliations, and reprisals, which were seen as methods of dispute settlement not amounting to war.<sup>9</sup>

In this context, self-defense was as “a primary right of Nations”<sup>10</sup> to be exercised in a situation of “clear and absolute necessity.”<sup>11</sup> Necessity triggered self-defense, while at the same time limiting it. The correspondence following the destruction of the *Caroline* is instructive in this regard.<sup>12</sup> U.S. Secretary of State Daniel Webster, writing to the British Minister in Washington Henry Fox, characterized self-defense as follows:

A just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground for justification.<sup>13</sup>

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8. See 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 225–31, 434 (1854); HENRY W. HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 83 (1861); WILLIAM E. HALL, INTERNATIONAL LAW 242–50 (1880); 1 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 181–83 (1905); 1 TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 143–45 (1860). The demarcation line between some of these measures was not always clear. For example, the notions of self-defense and self-preservation were often used interchangeably. See Jennings, *supra* note 2, at 82.

9. 3 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 10–13 (1857); HALLECK, *supra* note 8, at 297; HALL, *supra* note 8, at 306; 2 TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 18–20 (1863); 2 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 34–35 (1906).

10. TWISS, *supra* note 8, at 11.

11. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1840–1841, at 1129, 1132–33 (1857).

12. During the insurrection in Canada in 1837, small disturbances, undertaken by sympathizers of the insurrection, occurred at various places in the United States, especially along the Canadian border. The U.S. government took measures to enforce neutrality laws, but insurgents, when defeated, kept seeking refuge on U.S. territory where they resumed recruiting their forces. The *Caroline* was a steam vessel owned by U.S. sympathizers of the insurgents and was used for transporting aid and supplies to the rebel forces. To put an end to this practice, in December 1837, British forces crossed into U.S. territory without the consent of the U.S. government, took possession of the *Caroline*, and sent it over Niagara Falls, with the loss of life in the process. The case was settled in 1842 between the two countries and friendly relations were never interrupted. See Jennings, *supra* note 2, at 82–84; TIBORISZABÓ, *supra* note 2, at 72–73.

13. Letter from Mr. Webster to Mr. Fox, *supra* note 11, at 1132–33.

It is interesting to note that the *Caroline* incident involved the exercise of self-defense against individuals who assisted insurgents, but the ensuing correspondence did not address its significance. Instead, the controversial issue was the alleged excessiveness of the response by the British forces.

The beginning of the twentieth century saw the movement to limit recourse to war.<sup>14</sup> Self-defense was increasingly viewed as the only legitimate remnant of the principle of self-preservation and the only legal exception to the nascent prohibition of war.<sup>15</sup> The 1925 Locarno Pact explicitly recognized self-defense as one of the exceptions to the mutual non-aggression guarantee between its members.<sup>16</sup> While the 1928 Kellogg-Briand Pact<sup>17</sup> renouncing war did not contain a self-defense exception, its significance was discussed in correspondence between U.S. Secretary of State Frank Kellogg and French Foreign Minister Aristide Briand before the adoption of the Pact. Kellogg maintained that there was nothing in the draft Pact that restricted or impaired the right of self-defense, stating, “That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all time and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.”<sup>18</sup> The British and French reservations and the Japanese interpretive statement echoed this understanding.<sup>19</sup>

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14. The movement saw the adoption of seminal treaties aimed at limiting the recourse to war. See, e.g., League of Nations Covenant arts. 10–14; see also Eduard Benès, *The League of Nations: Successes and Failures*, 11 FOREIGN AFFAIRS 68 (1932).

15. OPPENHEIM, *supra* note 8, at 178; Eduard Bénès & Nikolaos Politis, *General Report Submitted to the Assembly on Behalf of the First and Third Committees of M. Politis (Greece), Rapporteur for the First Committee, and M. Bénès, Rapporteur for the Third Committee*, LEAGUE OF NATIONS OFFICIAL JOURNAL 479, 483 (Special Supp. No. 23, 1924).

16. Treaty of Mutual Guarantee, Final Protocol of Locarno Conference art. 2(1), Oct. 16, 1925, 54 L.N.T.S. 291. The Locarno Pact between Germany, Belgium, France, Great Britain, and Italy was one of seven agreements negotiated at Locarno, Switzerland in October 1925 between European States and defeated Germany (the Weimar Republic).

17. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. The signatory States were the United States, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, Union of South Africa, and Poland. Belgium, France, and Japan later adhered to the treaty.

18. DAVID H. MILLER, *THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY* 213–14 (1928).

19. See Letter from Sir Austen Chamberlain to Mr. Atherton, Foreign Office, Further Correspondence with Government of the United States Respecting the United States Proposal for the Renunciation of War, No. 2 (July 18, 1928), <https://avalon.law.yale.edu>.

In this regard, the example Oppenheim offered when distinguishing self-defense from other forms of self-preservation is telling. Oppenheim concluded that if a State learned that on a neighboring territory a “body of armed men” was being organized for a raid into its territory and the danger could be removed through an appeal to the authorities of that country, there was no need to act in self-defense.<sup>20</sup> However, if such an appeal proved to be fruitless or impossible, or if there was increased danger in delaying defensive action, the threatened State was justified in resorting to self-defense.<sup>21</sup> Oppenheim did not offer this scenario as an illustration of a controversial issue. To the contrary, he considered it a self-explanatory example of legitimate self-defense.

In sum, prior to the outbreak of the Second World War, self-defense was the inherent right of a sovereign State. The emerging prohibition on waging war excepted self-defense. Neither the treaties nor the legal literature indicated that States could only defend themselves against other States and not against a “body of armed men.”

The U.N. Charter prohibits the use or the threat of the use of force, but also confirms the inherent nature of self-defense, which allows for an exception to this prohibition.<sup>22</sup> That exception is found in Article 51, which states, “Nothing in the present Charter shall impair the inherent right to individual and collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>23</sup> Article 51 is silent as to the author of the armed attack, referring only to the inherent nature of self-defense, its two types—individual and collective—and the occurrence of an armed attack. It provides no other details on the contents and limits of self-defense.

Article 51’s wording has generated controversy as to the authors of an armed attack. In the opinion of some, since the prohibition of the use of force in Article 2(4) is set in an inter-State context (“All *Members* shall refrain . . . from the threat or use of force against . . . any *State*”),<sup>24</sup> Article 51 must be interpreted in an inter-State context. Hence, the right of self-defense can

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edu/20th\_century/kbbr.asp#no2; Randall Lesaffer, *The Kellogg-Briand Pact (1928)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 11 (last updated Oct. 2010), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e-320>.

20. OPPENHEIM, *supra* note 8, at 178.

21. *Id.* at 178–79.

22. U.N. Charter art. 2, ¶ 4.

23. *Id.* art. 51.

24. *Id.* art. 2, ¶ 4 (emphasis added).



only be an inter-State entitlement.<sup>25</sup> Another group of authors and commentators contend that the word “inherent” in Article 51 signals the preservation of the right’s customary content.<sup>26</sup> Further, notwithstanding the inter-State context in Article 2(4), Article 51’s wording does not limit the exercise of self-defense exclusively to attacks by States.<sup>27</sup>

The State-centric approach of the Charter is easily explained. In the aftermath of the Second World War, the drafter’s primary objective was to regulate State behavior rather than address the dangers posed by NSAGs. Accordingly, during the drafting process, the principal discussions regarding Article 51 centered on the concerns of Latin American States that the Charter and the powers of the Security Council did not supersede their regional arrangements for collective self-defense.<sup>28</sup> Other aspects of self-defense, including the authorship of an armed attack, were not discussed. During the Charter negotiations, an earlier version of Article 51 referred to an attack “by any State against any member State,”<sup>29</sup> but this phrase was later dropped without recording the reason for its deletion.

Based on the above discussion, it is clear that the adoption of Article 51 did not prohibit self-defense against NSAGs. One possible conclusion is that the Charter did not clarify the legality of exercising self-defense against NSAGs, leaving subsequent State practice to settle the question. A second conclusion is that the right of self-defense continued to be available against NSAGs, just as it was before the adoption of the Charter.

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25. Mary Ellen O’Connell, *Dangerous Departures*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 380, 382 (2013); Gabor Rona & Raha Wala, *No Thank You to a Radical Rewrite of the Jus ad Bellum*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW, 386, 386–89 (2013); Jörg Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, in OXFORD HANDBOOK OF THE USE OF FORCE, *supra* note 5, at 627, 641–43.

26. DINSTEIN, *supra* note 2, at 241–42; Christopher Greenwood, *International Law and the “War against Terrorism,”* 78 INTERNATIONAL AFFAIRS 301, 307 (2002); Kimberley N. Trapp, *Can Non-State Actors Mount an Armed Attack?*, in OXFORD HANDBOOK OF THE USE OF FORCE, *supra* note 5, at 679, 684–85.

27. DINSTEIN, *supra* note 2, at 241–42; Greenwood, *supra* note 26, at 307; Trapp, *supra* note 26, at 684–85.

28. TIBORI-SZABÓ, *supra* note 2, at 104–09.

29. 1 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1945, at 674 (Velma Hastings Cassidy et al. eds., 1967).

B. *Did State Practice and Opinio Juris between 1945 and 2001 Narrow the Concept of Authorship to Exclude NSAGs?*

Whichever conclusion one accepts concerning the influence of Article 51 on the exercise of pre-Charter self-defense against NSAGs, an analysis of post-Charter State practice and *opinio juris* is essential in determining whether either of these conclusions changed. Here as well, opinions differ. One body of opinion maintains that post-Charter State practice has unequivocally shown that self-defense can be exercised only in response to armed attacks carried out either by a State, or by NSAGs sent, directed, or controlled by a State.<sup>30</sup> The opposing view is that nothing in post-1945 State practice shows the emergence of a prohibition of using self-defense against NSAGs.<sup>31</sup>

Assuredly, there are reasons the State-centric approach of the Charter continued to influence mid-twentieth century State practice on the use of force, not least of which was the fact that States were the only relevant actors at that time. Nonetheless, subsequent waves of decolonization and Middle East conflicts following the creation of the State of Israel brought NSAGs more and more to the fore, including concerning claims of self-defense.

Until the late 1990s, claims of self-defense in response to armed attacks carried out by NSAGs could be divided into two groups. First, there were claims that attributed the armed attack to a State based on the role allegedly played by that State in sending, controlling, or supporting to an essential degree the armed group. Second, there were claims that did not necessarily attribute the armed attack to a State but maintained that the NSAGs were harbored or supported to a lesser degree by the territorial State. For this discussion, the second category of claims is of the most interest, and it is those that we will examine.

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30. See, e.g., Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 872, 878 (1947); Carsten Stahn, *Terrorist Attacks as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter and International Terrorism*, 27 FLETCHER FORUM OF WORLD AFFAIRS 35 (2003); Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW 89, 99–101 (2007); O'Connell, *supra* note 25, at 381–83; Orakhelashvili, *supra* note 5, at 171–73.

31. See, e.g., Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARVARD JOURNAL OF INTERNATIONAL LAW 41 (2002); Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETHERLANDS INTERNATIONAL LAW REVIEW 159 (2008); Trapp, *supra* note 26, at 694–95.

Portugal invoked the right of self-defense to justify its military actions on the territory of Guinea, Senegal, and Zambia between 1969 and 1971. Before the Security Council, Portugal claimed Zambia opened its territory to elements hostile to Angola and Mozambique and authorized their training and supply.<sup>32</sup> It made similar arguments concerning actions taken by Guinea and Senegal.<sup>33</sup>

South Africa relied on comparable arguments to justify its repeated armed incursions into Angola, Mozambique, Zambia, Lesotho, and Botswana between the late 1970s and early 1980s.<sup>34</sup> The South African government claimed these States harbored “terrorist elements”<sup>35</sup> that carried out repeated attacks on South African soil.<sup>36</sup> For this reason, South Africa had no other choice than to “take effective measures in self-defense.”<sup>37</sup>

Throughout the 1970s and 1980s, Israel made similar arguments to justify its repeated incursions into Jordan and Lebanon to disable alleged bases of armed Palestinian groups.<sup>38</sup> In the case of Lebanon, Israel gradually adopted a broader argument. It argued that even if Lebanon did not intentionally harbor or support the armed groups, Israel could still exercise self-defense if Lebanon was unwilling or unable to prevent them from carrying out attacks from its territory.<sup>39</sup> For instance, in July 1981, the Israeli representative argued before the Security Council that “under international law, if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defense.”<sup>40</sup>

Although not expressly invoking Article 51, Turkey seemed to rely on similar arguments to justify its repeated incursions into Iraqi territory against

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32. U.N. SCOR, 24th Sess., 1486th mtg. at 7, U.N. Doc. S/PV1486 (July 18, 1969).

33. TIBORI-SZABÓ, *supra* note 2, at 208; TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTION IN CUSTOMARY LAW AND PRACTICE 400 (2010).

34. F. Michael Higginbotham, *International Law, the Use of Force in Self-Defence and the Southern African Conflict*, 25 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529, 561–72 (1987).

35. U.N. SCOR, 41st Sess., 2684th mtg. at 22, U.N. Doc. S/PV2684 (July 18, 1969).

36. *Id.* at 22–23.

37. *Id.* at 26.

38. U.N. SCOR, 24th Sess., 1466th mtg. at 3, 6–7, U.N. Doc. S/PV/1466 (Mar. 27, 1969); Permanent Rep. of Israel to the U.N., Letter dated August 12, 1969 from the Permanent Rep. of Israel to the United Nations addressed to the President of the Security Council, U.N. Doc. S/9387 (Aug. 12, 1969); TIBORI-SZABÓ, *supra* note 2, at 206–07.

39. RUYTS, *supra* note 33, at 401.

40. U.N. SCOR, 36th Sess., 2292th mtg. at 5, U.N. Doc. S/PV/2292 (July 17, 1981).

Kurdish bases in the 1980s and 1990s.<sup>41</sup> In a 1995 letter to the President of the Security Council, the Turkish *chargé d'affaires* averred:

As Iraq has not been able to exercise its authority over the northern part of its country since 1991 for reasons well known, Turkey cannot ask the Government of Iraq to fulfil its obligation, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey. Under these circumstances, Turkey's resorting to legitimate measures which are imperative to its own security cannot be regarded as a violation of Iraq's sovereignty. No country would be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organisation based and operating from a neighbouring country, if that country is unable to put an end to such attacks.<sup>42</sup>

The international reaction to the Turkish incursions was limited, as was that of the Security Council; however, the Council was not receptive to the arguments put forth by Portugal,<sup>43</sup> South Africa,<sup>44</sup> and Israel.<sup>45</sup>

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41. Turkish actions were initially condoned by Iraq; however, after Turkey sided with the U.S.-led coalition in the 1990–91 Gulf War, Iraq condemned the Turkish incursions. On several occasions, Turkey expressly justified its actions before the Security Council as “legitimate measures” in the face of Iraq’s inability to exercise authority over the northern part of its territory. *See, e.g.*, Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 1995 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, U.N. Doc. S/1995/605 (July 24, 1995) [hereinafter Turkish Letter of July 24, 1995]; Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Identical Letters dated June 27, 1996 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/1996/479 (July 2, 1996); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Identical Letters dated October 7, 1996 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/51/468, S/1996/836 (Oct. 8, 1996); Permanent Rep. of Turkey to the U.N., Identical Letters dated January 3, 1997 from the Permanent Rep. of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/1997/7 (Jan. 3, 1997).

42. Turkish Letter of July 24, 1995, *supra* note 41, at 1.

43. *See* S.C. Res. 273 (Dec. 9, 1969); S.C. Res. 294 (July 15, 1971).

44. *See* S.C. Res. 387 (Mar. 31, 1976); S.C. Res. 447 (Mar. 28, 1979); S.C. Res. 466 (Apr. 11, 1980); S.C. Res. 527 (Dec. 15, 1982); S.C. Res. 545 (Dec. 20, 1983); S.C. Res. 546 (Jan. 6, 1984).

45. *See* S.C. Res. 265 (Apr. 1, 1969); S.C. Res. 279 (May 12, 1970); S.C. Res. 313 (Feb. 28, 1972); S.C. Res. 332 (Apr. 21, 1973); S.C. Res. 450 (June 14, 1979); S.C. Res. 467 (Apr. 24, 1980).

The obvious political divide between the States on the Council dictated many of the opinions it expressed.<sup>46</sup> In addition, apart from genuine concerns as to the necessity and proportionality of the defensive actions,<sup>47</sup> targeted States often challenged claims that they supported or harbored armed groups.<sup>48</sup> That being said, one cannot infer a genuine conviction on the part of the Security Council that NSAGs could not carry out armed attacks triggering the right of self-defense. This was understandable because at the time the phenomenon of NSAGs that could conduct an armed attack without the direction, control, or substantial support of a State was quite limited and largely unknown. Thus, the issue of self-defense against such groups seldom arose.

In its *Nicaragua* judgment, the International Court of Justice (ICJ) found that in some circumstance, an armed attack could include “the sending by or on behalf of a State of armed bands.”<sup>49</sup> However, it rejected the view that the provision of weapons or logistical or other forms of support to irregular bands would also amount to an armed attack.<sup>50</sup> This position, along with other aspects of the Court’s interpretation of self-defense was criticized by two dissenting judges<sup>51</sup> and subsequently by the International Criminal Tribunal for the former Yugoslavia<sup>52</sup> and scholars.<sup>53</sup> But because the issue of attack by a NSAG acting independently of State control did not play a role in the factual context and proceedings, the Court devoted no attention to the question of self-defense against a NSAG.

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46. Christian J. Tams, *Use of Force against Terrorists*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 359, 367–68 (2009).

47. *See, e.g.*, U.N. SCOR, 24th Sess., 1468th mtg. at 2, 4, U.N. Doc. S/PV/1466 (Mar. 28, 1969).

48. *See, e.g.*, 26 YEARBOOK OF THE UNITED NATIONS 159 (1975).

49. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

50. *Id.*

51. *Id.* at 543 (dissenting opinion by Jennings, J.); *id.* at 346, ¶ 171 (dissenting opinion by Schwebel, J.).

52. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 118–20, 137, 145 (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999). For establishing individual criminal responsibility, the ICTY Appeals Chamber found that a test of “overall control” (where a State had a role in either organizing, coordinating or planning the military action, or financing, training, equipping, or providing operational support for the group) was better placed than the restrictive “effective control” test articulated by the ICJ.

53. *See, e.g.*, DINSTEIN, *supra* note 2, at 207.

Beginning in the 1990s, NSAGs became more important within international affairs. Uncontrolled by a State, these groups emerged in the less stratified and less State-centric post-Cold War era and acted with varying degrees of State toleration and support. As a result, among other questions concerning transnational cooperation and law enforcement, the issue of using armed force (in self-defense or otherwise) against NSAGs received greater attention. For example, in 1998, the United States justified its airstrikes against al-Qaida targets in Afghanistan and Sudan as self-defense measures taken in response to terrorist attacks against its embassies in Kenya and Tanzania.<sup>54</sup> The international community's reaction was mixed. The United Kingdom, Germany, Israel, and other States expressed support, but a handful of States condemned the action.<sup>55</sup> The shift in reactions indicated a growing understanding on the part of States that the Tanzania and Kenya attacks signaled "the emergence of terrorist coalitions that do not answer fully to any government, that operate across national borders, and have access to advanced technology."<sup>56</sup>

C. *Was the International Reaction to 9/11 a Passing Expression of Sympathy or a "Grotian Moment" of Law Creation?*

When it comes to self-defense against NSAGs many see the 9/11 attacks as a "Grotian Moment"<sup>57</sup> heralding the beginning of more open support for the applicability of self-defense to attacks by NSAGs.<sup>58</sup> However, a minority has continued to maintain that the international response to the 9/11 attacks was a temporary expression of political sympathy and that support for the

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54. Permanent Rep. of the United States of America to the U.N., Letter dated August 20, 1998 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998); see also TIBORI-SZABÓ, *supra* note 2, at 219.

55. TIBORI-SZABÓ, *supra* note 2, at 219; RUYS, *supra* note 33, at 426–27.

56. Madeleine Albright, U.S. Secretary of State, Address to the American Legion Convention (Sept. 9, 1998), <https://1997-2001.state.gov/statements/1998/980909.html>.

57. MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 183–210 (2013).

58. See, e.g., Jutta Brunnée & Stephen J. Toope, *Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INTERNATIONAL COMPARATIVE LAW QUARTERLY 264, 267–69 (2018); CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 210–11 (2018).

notion of self-defense against NSAGs quickly dissipated once States understood the complexities of the associated issues.<sup>59</sup> Regardless of whether the 9/11 attacks constituted a “Grotian Moment,” the international reaction was one of overwhelming support for the U.S. reaction against the perpetrators of the attack.

The attacks on the World Trade Center in New York and the Pentagon in northern Virginia were not only devastating in terms of the loss of life, injury, and material damage, but also because they sent a shock through the international community. Within a few weeks, it had become clear that the perpetrators were members of al-Qaida, based at the time in Afghanistan under the leadership of Osama bin Laden.<sup>60</sup>

Within a day of the attacks, the Security Council adopted Resolution 1368 referring to the inherent right of self-defense in the preamble and stressing that those providing assistance or support to the perpetrators would be held fully accountable.<sup>61</sup> Just over two weeks later, in Resolution 1373, the Council again cited the inherent right of self-defense as found in the Charter in the context of a comprehensive response to international terrorism in general and the 9/11 attacks in particular.<sup>62</sup> Both resolutions were adopted unanimously. During the negotiations leading to their adoption, there were no reservations expressed by any Council member to the reference to the right of self-defense nor to the comprehensive array of other measures required of States to combat terrorism. While some authors have questioned whether these resolutions are accorded a significance beyond the specific situation they addressed,<sup>63</sup> the Security Council has consistently referred to and reaffirmed them in its subsequent resolutions dealing with counterterrorism issues.<sup>64</sup>

In addition to the action taken by the Security Council, other international organizations accepted that the 9/11 attacks gave rise to the right of

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59. See, e.g., OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE* 747 (2014); Marja Lehto, *The Fight against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-Defence against Non-State Actors*, 87 *NORDIC JOURNAL OF INTERNATIONAL LAW* 5 (2018).

60. LAWRENCE WRIGHT, *THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11*, at 362–67 (2006); see also NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES, *THE (9-11 COMMISSION) REPORT* (2004), <https://govinfo.library.unt.edu/911/report/index.htm>.

61. S.C. Res. 1368 (Sept. 12, 2001).

62. S.C. Res. 1373 (Sept. 28, 2001).

63. See, e.g., Lehto, *supra* note 59, at 7; Kammerhofer, *supra* note 30, at 99.

64. See *infra* note 75 and accompanying text; see also S.C. Res. 2322 (Dec. 12, 2016), S.C. Res. 2379 (Sept. 21, 2017), S.C. Res. 2396 (Dec. 21, 2017).

self-defense. The North Atlantic Council unanimously adopted a statement on September 12 referring to the applicability of Article 5, the mutual defense clause in the NATO treaty, “if it is determined that this attack was directed from abroad against the United States.”<sup>65</sup> On September 21, the Organization of American States (OAS) unanimously adopted a resolution recognizing the applicability of the right of self-defense under the U.N. and OAS Charters in stating that the 9/11 attacks were an attack on the Americas that triggered the right of collective self-defense under the Rio Treaty.<sup>66</sup> Most States, including some not usually seen as supportive of the United States, accepted the attacks gave rise to the right of self-defense.<sup>67</sup>

Al-Qaida’s responsibility for the 9/11 attacks was also widely acknowledged soon after the attacks. The United States demanded that the Taliban government surrender al-Qaida’s leadership and terminate the group’s presence in Afghanistan. Before the attacks, the Security Council made similar demands of the Taliban.<sup>68</sup> Neither the United States nor the Security Council alleged that the Taliban had “effective control” or “overall control” of al-Qaida.<sup>69</sup> Rather, these demands were premised on the fact that al-Qaida openly operated on and from Afghan territory.<sup>70</sup>

The relationship between the Taliban authorities and al-Qaida was one of close ideological affinity, mutual material support, and cooperation, but not one of control.<sup>71</sup> The U.S. demand that the Taliban surrender the leadership of al-Qaida and end its presence and operations in Afghanistan indicates the U.S. government did not view the 9/11 attacks as attacks *by* Afghanistan or that the Taliban exercised direct control over al-Qaida, but rather as an attack by al-Qaida directed by its leadership *from* Afghanistan.

When the Taliban rejected the U.S. ultimatum and offered instead to have Osama bin Laden tried by an Islamic court, the United States viewed

65. Edgar Buckley, *Invocation of Article 5: Five Years On*, NATO REVIEW (Summer 2006), <https://www.nato.int/docu/review/2006/issue2/english/art2.html>.

66. Organization of American States, Res. RC24, Terrorist Threat to the Americas (Sept. 21, 2001).

67. *Reaction from Around the World*, NEW YORK TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/us/reaction-from-around-the-world.html>.

68. S.C. Res. 1267, ¶¶ 1, 2 (Oct. 15, 1999).

69. *See supra* notes 49–52.

70. *See, e.g.*, Michael Byers, *The Intervention in Afghanistan—2001—*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 625, 625–27 (Tom Ruys et al eds., 2018); DINSTEN, *supra* note 2, at 243–44.

71. *See* ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 58–60 (2002).



this as a refusal to cooperate and initiated a military campaign to end the presence of al-Qaida in Afghanistan and assist the Northern Alliance in overthrowing the Taliban government.<sup>72</sup> The United States stated that this campaign, codenamed “Operation Enduring Freedom,” was conducted “in accordance with the inherent right of individual and collective self-defense.”<sup>73</sup> It received widespread support or, at a minimum, acceptance from most of the international community.

It is important to note that the U.N.-mandated International Security Assistance Force, which provided security for the new Afghan government, operated alongside the U.S.-led Operation Enduring Freedom for a prolonged period. Established by Resolution 1386 in December 2001,<sup>74</sup> that Resolution, and all those that followed, began by recalling all previous resolutions relating to Afghanistan, including those referring to the 9/11 attack as an “armed attack,” the relevance of self-defense, and the Taliban government’s responsibility to end the presence of al-Qaida on Afghan territory.<sup>75</sup>

While not necessarily a “Grotian Moment,” the international response in the period following the 9/11 attacks clearly shows much greater support for the applicability of self-defense to attacks by NSAGs than existed during the 1990s when such groups started to emerge.

*D. Has State Practice and Opinio Juris since 9/11 Broadened the Concept of Authorship to Include NSAGs?*

In the years following the 9/11 attacks and the U.S. and international response, several States have invoked self-defense against NSAGs conducting attacks while operating from the territory of another State.

The United States has continued to rely on self-defense in response to the 9/11 attacks in conducting drone strikes against individuals suspected of being members of al-Qaida and other “associated” groups in Afghanistan,

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72. *See supra* notes 67, 70.

73. Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. 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).

74. S.C. Res. 1386 (Dec. 20, 2001).

75. *Id.* pmb., ¶ 1; *see also* S.C. Res. 1401, pmb., ¶ 1 (Mar. 28, 2002); S.C. Res. 1413, pmb., ¶ 1 (May 23, 2002); S.C. Res. 1563, pmb., ¶ 1 (Sept. 17, 2004); S.C. Res. 1623, pmb., ¶ 1 (Sept. 13, 2005).

Pakistan, Yemen, and Somalia.<sup>76</sup> This practice has been criticized for a number of reasons, including, most importantly for this contribution, the seemingly endless reliance on self-defense many years after initial attack that triggered it and the lack of geographical connection with the territory where the attacks were initiated. Moreover, other considerations not directly related to self-defense have crept into the legal justification for this seemingly indefinite military action. Nonetheless, whatever the merits of these criticisms, they are not relevant to the question of whether self-defense applies to attacks conducted by NSAGs as a matter of law.

Israel provides another example. In 2006, the armed conflict between Israel and Hezbollah was not an unequivocal example of such an invocation, since Israel, at least initially, claimed that the Lebanese State was responsible for the rocket attacks and abduction of members of the Israel Defense Forces by Hezbollah. It seemingly softened that position later and maintained that it did not direct its actions against Lebanon, but against the “terrorist presence of Hezbollah inside it.”<sup>77</sup> Here, the relevant point is that most of the criticism directed against Israel in its reaction to these attacks concerned the perceived disproportionality of the Israeli response, in particular, the large number of civilian casualties, the targeting of Lebanese State infrastructure, and the blockading of the Lebanese coast. The criticism was not that Israel exercised self-defense against an armed group (Hezbollah), but in the manner it conducted these self-defense measures and especially their effect on the civilian population. At least initially, several States voiced support for, or at least understanding of the Israeli resort to self-defense in response to Hezbollah’s actions. The subsequent critique of the scale of the Israeli response and the manner in which it was conducted does not vitiate this support.<sup>78</sup> In other words, Israel was criticized for a widely perceived disproportionate use of force against Lebanon, not for the exercise of self-defense against an armed group operating from Lebanese territory.

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76. Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <https://2009-2017.state.gov/s/1/releases/remarks/139119.htm>.

77. U.N. SCOR, 61st Sess., 5503rd mtg. at 4, U.N. Doc. S/PV/5503 (undated).

78. U.N. SCOR, 61st Sess., 5492nd mtg. at 2–5, U.N. Doc. S/PV/5492 (undated) (statement of U.N. Secretary-General Kofi Annan); U.N. SCOR, 61st Sess., 5489th mtg., U.N. Doc. S/PV.5489 (undated) (statements by Security Council members).

Israel again invoked self-defense in 2008 and 2009 as justification for its operations directed against Hamas in Gaza. While some States voiced support for Israel's right to defend itself against rocket attacks, most legal attention focused on perceived violations of humanitarian law by both parties, and whether self-defense applied in a situation of ongoing de facto occupation. Comparatively, the question of whether self-defense applied to a NSAG received little attention. This lack of attention may be at least partially due to the uncertainty over the status of Gaza under the law of occupation.<sup>79</sup> On the other hand, there was no significant criticism of the invocation of self-defense against a NSAG.<sup>80</sup> In subsequent operations against Hamas in 2012 and 2014, Israel did not claim self-defense.<sup>81</sup>

This period also saw a growing number of States in different regions of the world invoke self-defense against NSAGs. In March 2008, the Colombian armed forces carried out a cross border raid against the Revolutionary Armed Forces of Colombia, better known as FARC, at a FARC camp located several kilometers inside Ecuador. Colombia characterized the raid as an extraterritorial law enforcement measure, made no claim of self-defense, and stated it did not intend to violate Ecuador's sovereignty. Most countries in the region criticized the raid, but neither the OAS nor UN issued an official condemnation. The United States backed the Colombian position. Although tensions between Colombia and its neighbors briefly flared, Colombia deescalated the situation through diplomatic initiatives and mediation by members of the Rio Group, a sub-regional organization, and, within a few days, these efforts succeeded in bringing about a diplomatic resolution.<sup>82</sup>

In October 2011, Kenyan armed forces launched an incursion into southern Somalia in response to abductions of foreign nationals and other

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79. The question is whether Gaza constitutes occupied territory. In the *Wall* advisory opinion, the ICJ took the position that self-defense would not apply to attacks conducted from occupied territory. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 194, ¶ 139 (July 9).

80. In the debates leading to the resolution calling for a ceasefire, numerous States criticized Israel for using excessive force; little to no attention was devoted to the question of self-defense against Hamas. *See, e.g.*, Press Release, Security Council, Security Council Calls for Immediate, Durable, Fully Respected Ceasefire in Gaza Leading to Withdrawal of Israeli Forces, U.N. Press Release SC/9567 (Jan. 8, 2009); S.C. Res. 1860 (Jan. 8, 2009).

81. GRAY, *supra* note 2, at 216–17.

82. *See, e.g.*, Simon Romero, *Regional Bloc Criticizes Colombia Raid in Ecuador*, NEW YORK TIMES (Mar. 6, 2008), <https://www.nytimes.com/2008/03/06/world/americas/06venez.html>. For the OAS position, see Organization of American States, CP/Res. 930 (1632/08) (Mar. 5, 2008).

terrorist incidents believed to have been carried out by al-Shabaab. This operation was initially justified based on self-defense and at least some measure of consent from the Transitional Government of Somalia.<sup>83</sup> There was no opposition to the Kenyan action voiced by the African Union or members of the Security Council.

In February 2015, the Egyptian Air Force conducted a series of airstrikes against an armed group active in eastern Libya that had proclaimed allegiance to ISIS in response to the beheading of twenty-one Egyptian Coptic Christians by ISIS and other alleged terrorist acts directed against Egypt and Egyptian nationals in Libya. Egypt based its acts on self-defense and cooperation with one of the factions purporting to govern Libya.<sup>84</sup> The international reaction was largely supportive of the Egyptian action. France and Russia offered support and cooperation with Egypt in countering terrorism, while the Arab League and the Gulf Cooperation Council both voiced support for the Egyptian action.<sup>85</sup> The United States stated that it recognized that every State has the right of self-defense without explicitly stating it backed the airstrikes.<sup>86</sup> Other States voiced their understanding but called for a political solution to the Libyan crisis.<sup>87</sup> Egypt used airstrikes to respond to a similar

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83. Gorm Rye Olsen, *The October 2011 Kenyan Invasion of Somalia: Fighting al-Shabaab or Defending Institutional Interests*, 36 JOURNAL OF CONTEMPORARY AFRICAN STUDIES 39, 43–44 (2018).

84. See Ismail Akwei, *Air Strikes in Libya are in ‘Self-Defence’ – Egypt Tells UN*, AFRICANEWS (May 29, 2017), <https://www.africanews.com/2017/05/29/air-strikes-in-libya-are-in-self-defence-egypt-tells-the-un/>; Press Release, Security Council, Comprehensive Strategy to Combat Terrorism in Libya Critical, Special Representative Tells Security Council, U.N. Press Release SC/11788 (Feb. 18, 2015).

85. *France, Egypt Call for U.N. Security Council Meeting on Libya*, REUTERS, Feb. 16, 2015, <https://uk.reuters.com/article/uk-france-hollande-egypt/france-egypt-call-for-u-n-security-council-meeting-on-libya-idUKKBN0LK00Q20150216>; *Russia Ready to Cooperate With Egypt in Fight against Terrorism*, SPUTNIKNEWS (Feb. 16, 2015), <https://sputniknews.com/middleeast/201502161018345827/>; *Arab League ‘Understands’ Egypt Airstrikes in Libya*, TURKISH WEEKLY (Feb. 19, 2015), <https://web.archive.org/web/20150220130838/http://www.turkishweekly.net/news/180447/arab-league-39-understands-39-egypt-air-strikes-in-libya.html>.

86. Aswat Masriya, U.S. “Respects Egypt’s Right to Self-Defence” after Libya Airstrikes, EGYPTIAN STREETS (Feb. 18, 2015), <https://egyptianstreets.com/2015/02/18/u-s-respects-egypts-right-to-self-defence-after-libya-airstrikes/>.

87. A group of Western States called on Egypt not to upset the U.N. efforts to mediate a solution to the Libyan crisis and rejected a call by Egypt to expand the anti-ISIS airstrikes to Libya. See Tamer El-Ghobashy & Benoît Faucon, *West Rebuffs Egypt Proposals for Military Intervention in Libya*, WALL STREET JOURNAL (Feb. 19, 2015), <https://www.wsj.com/articles/west-rebuffs-egypt-proposals-for-military-intervention-in-libya-1424388828>.

ISIS attack on Coptic Christians inside Egypt in May 2017, informing the Security Council of its invocation of self-defense after the airstrikes.<sup>88</sup>

Beginning in the summer of 2014 and continuing to the present, the anti-ISIS coalition, consisting of twelve Western and six regional States under the military leadership of the United States, has used force against ISIS in both Syria and Iraq. The coalition has the non-military support and diplomatic backing of sixty additional States.<sup>89</sup> This operation drove ISIS from Iraqi territory and reduced its presence in Syria to a few remaining pockets.

Different legal justifications have been advanced in support of the military operations in Iraq and Syria. In Iraq, the legal justification was the consent and request for assistance issued by the Iraqi government in July and August 2014, at a time when ISIS had advanced deep into Iraq from its stronghold in eastern Syria.<sup>90</sup> In Syria, the government did not consent to coalition military operations. Most coalition members conducting airstrikes against ISIS targets in Syrian territory based their actions on collective self-defense in support of Iraq. In addition to collective self-defense, coalition members France and Turkey based their actions on individual self-defense in response to attacks claimed by and attributed to ISIS on their territory.<sup>91</sup>

The Security Council condemned ISIS as an “unprecedented threat to international peace and security” and called for the eradication of its safe haven in Syria and Iraq in Resolution 2249.<sup>92</sup> However, the Resolution contains no clear—or even implied—authorization to use force on the territory of a non-consenting State such as Syria. Consequently, any use of force

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88. *Egypt Informs U.N. Security Council of Airstrikes on Libyan Terrorist Hideouts, Citing “Self Defence,”* AHRAM (May 28, 2017), <http://english.ahram.org/NewsContent/1/64/269677/Egypt/Politics-/Egypt-informs-UN-Security-Council-of-airstrikes-on.aspx>.

89. For an overview of States participating in and supporting the operation, see *About CJTF-OIR, OPERATION INHERENT RESOLVE*, <https://www.inherentresolve.mil/About-CJTF-OIR/> (last visited Dec. 20, 2019).

90. On the background to the ISIS offensive in northern Iraq, see *Islamic State and the Crisis in Iraq and Syria in Maps*, BBC (Mar. 28, 2018), <https://www.bbc.com/news/world-middle-east-27838034>.

91. France had initially cited collective self-defense as the legal justification for its actions, but following the attacks in Paris in November 2015 indicated it was also acting in individual self-defense. See U.N. SCOR, 70th Sess., 7565th mtg. at 2, U.N. Doc. S/PV/7565 (undated). Turkey invoked self-defense against ISIS in July 2015. See Chargé d’affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 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, U.N. Doc. S/2015/563 (July 24, 2015).

92. S.C. Res. 2249, pmb., ¶¶ 5, 7 (Nov. 20, 2015).

against ISIS on Syrian territory would have to be justifiable under self-defense in order to have a legal basis.

While Syria and its allies, Russia and Iran, have condemned the anti-ISIS coalition's airstrikes inside Syria as violations of Syrian sovereignty, there is nonetheless widespread, albeit not universal, support for the coalition's operations.<sup>93</sup> Although the positions of individual States and authors differ on several points, there is a strong case for accepting that self-defense is applicable; however, the contours and limits to this right are much less clear.<sup>94</sup>

This cursory analysis of post-9/11 State practice reveals a general acceptance that the concept of authorship is broad enough to include NSAGs and that self-defense can be exercised against cross border-armed attacks carried out by such groups.<sup>95</sup> Whether this constitutes a new rule of customary law or an adaptation of the existing rule on self-defense is secondary to acknowledging that the right of self-defense can be applicable to such attacks. Even if a claim that self-defense always included the right to take action against attacks by these groups is rejected, requiring instead that such action satisfy the criteria for the formation of a new rule of customary law, the abovementioned practice and widespread acceptance by States of multiple invocations of self-defense goes far towards acceptance of such a rule.

There is, however, an enduring minority view, which, relying mainly on the post-9/11 case law of the ICJ, maintains that self-defense is an inter-State right that cannot be exercised against NSAGs.<sup>96</sup> This view is based on the conclusion of the Court's majority in the 2004 *Wall* advisory opinion inferring that Article 51 only applied to attacks by States.<sup>97</sup> The Court also held that because the threat to Israeli security originated in areas under effective Israeli control, the Security Council resolutions relating to the 9/11 attacks were irrelevant.<sup>98</sup>

Three of the Court's judges criticized this restrictive language, which seemed at least indirectly to rule out, or at least circumscribe, the applicability

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93. See *supra* note 89.

94. See, e.g., DINSTEIN, *supra* note 2, at 244–49; Use of Force Committee, International Law Association, Draft Report of the Use of Force Committee 14–16 (2018), [http://www.ila-hq.org/images/ILA/DraftReports/DraftReport\\_UseOfForce.pdf](http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf).

95. See, e.g., Trapp, *supra* note 26, at 690–94.

96. See, e.g., Olivier Corten, *Opération "Liberté Immutable": une Extension Abusive du Concept de Légitime Défense*, 106 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 51, 55 (2002); O'Connell, *supra* note 25, at 382–83; Tladi, *supra* note 4, at 571–72.

97. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9).

98. *Id.*

of self-defense to attacks conducted independently of State control.<sup>99</sup> Subsequently, in the 2005 *Armed Activities* judgement, the ICJ found no evidence to attribute the actions of an armed group operating against Uganda to the Democratic Republic of the Congo (DRC).<sup>100</sup> It then held that armed action by Uganda against the DRC could not be justified based on self-defense.<sup>101</sup> Consequently, it saw no need to decide on the legality of self-defense against “large scale attacks by armed groups.”<sup>102</sup> In separate opinions, two judges criticized the majority’s failure to address the issue of whether self-defense applied to attacks mounted by armed groups not attributable to a State.<sup>103</sup>

To a certain extent, the work of other bodies counterbalanced the jurisprudence of the ICJ. For example, in 2005, the Royal Institute of International Affairs assembled a small group of prominent international law and international relations scholars, as well as practitioners, to compile the Chatham House Principles, a set of legal principles “intended to reflect current international law.”<sup>104</sup> Principle 6 provides, “Article 51 is not confined to self-defence in response to attacks by States. The right of self-defence applies also to attacks by non-state actors.”<sup>105</sup>

In its 2007 Resolution on self-defense, the Institut de Droit International (IDI) asserted that in the event of an attack by NSAGs, Article 51, complemented by the customary law of self-defense, applied as a matter of principle.<sup>106</sup> It held that in such cases, the right of self-defense in response to such

99. *Id.* at 215, ¶ 33 (separate opinion by Higgins, J.); *id.* at 229–30, ¶ 35 (separate opinion by Kooijmans, J.); *id.* at 242, ¶ 6 (declaration by Buergenthal, J.).

100. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 146 (Dec. 19).

101. *Id.* ¶ 147.

102. *Id.*

103. *Id.* at 314, ¶¶ 27–30 (separate opinion by Kooijmans, J.); *id.* at 335–37, ¶¶ 4–11 (separate opinion of Simma, J.).

104. Elizabeth Wilmschurst, *Chatham House Principles of International Law on the Use of Force by States in Self-Defence*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 963, 963 (2006).

105. *Id.* at 969.

106. Institut de Droit International, Resolution, ¶ 1 (Oct. 27, 2007), [http://www.idi-iiil.org/app/uploads/2017/06/2007\\_san\\_02\\_en.pdf](http://www.idi-iiil.org/app/uploads/2017/06/2007_san_02_en.pdf) [hereinafter IDI Resolution]; *see also* SUB-GROUP ON SELF-DEFENCE, INSTITUT DE DROIT INTERNATIONAL, PRESENT PROBLEMS OF THE USE OF FORCE IN INTERNATIONAL LAW 144 (2007), <http://www.idi-iiil.org/app/uploads/2017/06/Roucounas.pdf>

[If the territorial State] does not cooperate then the right of individual and collective self-defense could be exercised in that State under conditions obviously stricter than those in the traditional situation of State to State defense, since the requirement of cooperation requires a different *timing* and the aim will be the *neutralization* of the non-State entity.

attacks would allow for the use of force against the attacking NSAGs in the area of a State from which the attack originated.<sup>107</sup> The Resolution further provided that the State from which the attack originated had an obligation to cooperate with the target State.<sup>108</sup>

In 2013, the former Legal Adviser of the U.K. Foreign & Commonwealth Office, Daniel Bethlehem, drafted a set of principles regarding self-defense against non-State actors. The first principle declares, “[S]tates have a right of self-defense against an imminent or actual armed attack by non-State actors.”<sup>109</sup> Now known as the “Bethlehem Principles,” these principles have engendered both criticism<sup>110</sup> and support.<sup>111</sup>

Finally, the 2017 Leiden Policy Recommendations, which followed an expert consultation process supported by the Dutch Ministry of Foreign Affairs, declared:

The recognition in Article 51 of the inherent right of individual or collective self-defence in the event of an armed attack makes no reference to the source of the armed attack. It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state’s right of individual and collective (upon request of the victim state) self-defence. A state that is the victim of an armed attack by terrorists may thus take action against those non-state actors operating from another state, although the scope of that response will depend upon a variety of factors and requirements discussed below.<sup>112</sup>

Notwithstanding these important instruments recognizing the applicability of self-defense to NSAGs, in 2016, more than 230 professors and international law researchers signed “A plea against the abusive invocation of

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107. IDI Resolution, *supra* note 106, ¶ 10(ii).

108. *Id.* at ¶ 10.

109. Bethlehem, *supra* note 3, at 775.

110. *See, e.g.*, O’Connell, *supra* note 25; Rona & Wala, *supra* note 25; Tladi, *supra* note 4.

111. *See, e.g.*, Elizabeth Wilmshurst & Michael Wood, *Self-Defense against Nonstate Actors: Reflections on the “Bethlehem Principles”*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 390 (2013).

112. NICO SCHRIJVER & LARISSA VAN DEN HERIK, LEIDEN POLICY RECOMMENDATIONS ON COUNTER-TERRORISM AND INTERNATIONAL LAW ¶ 38 (2010), <https://openaccess.leidenuniv.nl/bitstream/handle/1887/42298/LeidenPolicyRecommendations1April2010.pdf> [hereinafter LEIDEN POLICY RECOMMENDATIONS].



self-defence as a response to terrorism.”<sup>113</sup> They maintain that “[i]n accordance with article 51 of the Charter, the use of force in self-defense on the territory of another State is only lawful if that State bears responsibility for a violation of international law tantamount to an “armed attack.”<sup>114</sup>

The view emerging from the preceding analysis is that post-9/11 State practice has shown a strong tendency to accept the legality, in principle, of self-defense against NSAGs. Security Council resolutions and various international legal instruments supporting such an interpretation underscore this point. However, a minority opinion, relying on ICJ jurisprudence and a narrow interpretation of Article 51, continues to maintain that the right of self-defense exists only against armed attacks attributable to States. Moreover, debates regarding the application of self-defense, and its potential for abuse, continue.

### III. THE MODALITY QUESTIONS

Assuming States can lawfully exercise self-defense against NSAGs, the next questions are the conditions and modalities under which such defensive action can unfold. The first such question is whether an armed attack carried out by a NSAG is subject to conditions other than the ones applicable to armed attacks carried out by or under the direction, control, or support of States. The next set of questions pertains to the application of the customary principle of necessity (forming part of the right of self-defense as distinct from other manifestations of necessity), which both drives and limits the right of self-defense. Typically, the principle of necessity refers to the existence of an ongoing or manifestly imminent armed attack<sup>115</sup> and a lack of feasible alternatives, thereby necessitating the defensive action. Such alternatives can entail, *inter alia*, a ceasefire, the negotiated withdrawal of forces, action by the Security Council, and other measures to terminate an ongoing attack and prevent recurrence of further attacks. Where such alternatives exist, the use of force in self-defense is unnecessary, and hence, unlawful.

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113. Contre une invocation abusive de la légitime défense pour faire face au défi du terrorisme, <http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme/> (last visited Dec. 20, 2019).

114. *Id.*

115. Necessity of self-defense does *not* include taking action where there is neither an ongoing nor a manifestly imminent armed attack. Preventive self-defense, triggered by a mere possibility that an attack might at some indeterminate point in time take place goes beyond the limits laid down in the *Caroline* criteria and is not recognized in international law. See Gill, *supra* note 2, at 113; TIBORI-SZABÓ, *supra* note 2, at 295–96.

Necessity in the context of armed attacks mounted by NSAGs entail these same considerations. However, they also feature additional challenges. When a NSAG is preparing an armed attack in one State against a second State, feasible alternatives may obviate defensive action. These would include effective action by the territorial State to terminate the threat of attack. Such action could consist of law enforcement measures. They could also consist of military action, either unilateral or in cooperation with the defending state, should law enforcement measures prove inadequate. Another potential option is Security Council action under Articles 41 or 42.<sup>116</sup>

When effective measures end the threat, the necessity of defensive action by the defending State also ends. If the territorial State cannot or will not act, the defending State may still have the ability to take defensive action on its territory to stop the attack and preclude further attacks. Where this is feasible, extraterritorial defensive action by the defending State becomes unnecessary. Only when none of these measures succeeds does the question of extraterritorial self-defense arise.

In that situation, since the territorial State is not the author of the armed attack, the question arises as to whether the principle of necessity can justify defensive action to thwart an armed attack emanating from a NSAG. It is in this context that the controversial “unwilling or unable” test, discussed below, has gained credence.<sup>117</sup> Here, the question is can self-defense be lawfully exercised in a State that is unwilling or unable to prevent its territory from being used by a NSAG to attack another State when that State is not the author of the attack.

This broad question raises several specific follow-on questions. Four of those, each concerned with one aspect of the principle of necessity, are of particular interest for this contribution. First, can self-defense be necessary merely because the territorial State failed in its duty to prevent its territory from being used? Second, what makes self-defense necessary on the territory of “unable” States? Third, what makes self-defense necessary on the territory of “unwilling” States? Finally, if resort to extraterritorial defensive action becomes necessary, does the defending State have a duty to request the consent of the territorial State?

Application of the principle of proportionality to self-defense also raises important questions. Proportionality *ad bellum* is generally understood to refer to two considerations. The first consideration is the scale of the defensive

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116. U.N. Charter arts. 41, 42.

117. See *infra* section III.B.

action, which must be roughly commensurate with the scale of the attack. Second, and more importantly, the measures taken must not exceed what is required to halt the attack and, where relevant, forestall continued attacks from the same source. For self-defense against NSAGs conducted in the territory of a State that is not the author of the attack, proportionality has specific implications beyond those found in the inter-State context.

Finally, as self-defense is not a punitive measure and is not meant to provide an open-ended justification for the use of extraterritorial force, when must it be exercised and for how long does the right remain operative?<sup>118</sup>

*A. What Degree of the Use of Force by NSAGs Qualifies as an Armed Attack?*

Most authors agree that an armed attack requires a use of armed force that rises above a *de minimis* threshold, with *de minimis* defined as one that causes neither loss of life nor significant damage or disruption in the target State.<sup>119</sup> This definition suggests there is a gap between Article 2(4) and Article 51 in the sense that not every use or threat of force may constitute an armed attack.

The Chatham House Principles have no threshold,<sup>120</sup> although for attacks carried out by non-State actors, they require that the attack rise above the level of a criminal act capable of being addressed by law enforcement measures.<sup>121</sup> If no threshold separates a use of force rising above the level of an armed attack, then any use of armed force beyond the capability of law enforcement authorities could trigger the exercise of self-defense. However, if one accepts a threshold above *de minimis*, the question arises as to what scale and effect render the use of force an armed attack, especially when committed by NSAGs.

In *Nicaragua*, the ICJ held that it was necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms and that such differentiation was to be based on their scale

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118. See *infra* sections III.C and III.D.

119. See, e.g., RUYS, *supra* note 33, at 155; Monika Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INTERNATIONAL LAW STUDIES 1, 16–17 (2015); HENDERSON, *supra* note 58, at 223.

120. Wilmshurst, *supra* note 104, at 966 (“An armed attack means any use of armed force, and does not need to cross some threshold of intensity.”); see also Kunz, *supra* note 30, at 878; John Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 135, 139 (1987).

121. Wilmshurst, *supra* note 104, at 971.

and effect.<sup>122</sup> The problem with such an approach is that if only large-scale armed attacks trigger the right of self-defense, there is no lawful response to lesser, but still insidious uses of force. That outcome would be neither just nor realistic as Judge Jennings pointed out in his dissent.<sup>123</sup> Even the ICJ seemed to accept that a series of armed incidents temporally and geographically related and conducted by the same author could cumulatively amount to an armed attack.<sup>124</sup> Likewise, a small-scale one-off armed attack against a discrete military unit such as a warship can trigger tactical defensive measures to ward off such an attack. These defensive measures are referred to by different names.<sup>125</sup>

At present, there is general agreement that an armed attack must originate or be controlled from outside the territory of the defending State for self-defense to apply.<sup>126</sup> If the attack meets the *de minimis* threshold of harm, it will qualify as an armed attack when directed against the territory of the defending State or its military forces located abroad.<sup>127</sup>

Finally, there must be credible and persuasive evidence as to the author of an attack before exercising the right of self-defense. While it is clear that the burden of proving that an armed attack occurred falls on the defending State,<sup>128</sup> the applicable standard for such proof is somewhat ambiguous.<sup>129</sup> Proving authorship is often difficult since the attacks may be conducted covertly or through unconventional methods. However, there is no separate standard for identifying the author of an unconventional attack. In all instances, the burden of proving the occurrence of an armed attack and the author is the same, whether it is a State or NSAG. In either case, the evidence must be convincing.

122. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 191, 195 (June 27).

123. *Id.* at 543 (dissenting opinion by Jennings, J.).

124. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶ 64 (Nov. 6).

125. DINSTEIN, *supra* note 2, at 261–63; Hans F.R. Boddens Hosang, *Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 415 (Terry D. Gill & Dieter Fleck eds., 2015).

126. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 194, ¶ 139 (July 9).

127. Terry D. Gill, *Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS*, *supra* note 125, at 213.

128. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶ 57 (Nov. 6).

129. James Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 163, 178–79 (2009).

B. *Is Failure to Prevent One's Territory from Being Used by a NSAG Enough to Trigger the Right of Self-Defense?*

In responding to an armed attack or imminent threat of an armed attack by a NSAG, the necessity of acting brings to the fore an important question related to the duty of every State to prevent the use of its territory as a base of operations by an armed group against another State. Indeed, exercising vigilance over its territory and safeguarding the interests of other States is a core duty of the sovereign.

This long-recognized duty is found in key international tribunal decisions, including the 1928 *Island of Palmas* arbitral award<sup>130</sup> and the 1949 *Corfu Channel* judgment.<sup>131</sup> Further, a due diligence duty to prevent NSAGs from using a State's territory to conduct attacks against other States has been explicitly recognized in U.N. General Assembly Resolution 2625<sup>132</sup> and acknowledged as customary international law by the ICJ.<sup>133</sup> However, the contours of this duty are not entirely settled. For example, some authors have asserted that the duty is not absolute and that failure to observe it does not give rise to the right of a victim-State to take forcible action.<sup>134</sup>

Certainly, the duty of vigilance is not absolute. No State can prevent all unlawful acts perpetrated on or from its territory that can cause harm to another State. However, once a State becomes aware of a threat of attack or of an actual attack against another State originating from its territory, it must undertake all feasible means to halt such activity and forestall future attacks. It is unlikely that a NSAG can conduct armed attacks against another State from a base of operations in a territorial State without either State being aware of such activity. Where there is such knowledge, the duty to take effective action is indisputable.

The territorial State is obligated to cooperate with the targeted State.<sup>135</sup> Once an armed attack is underway or is imminent and no other means are available to prevent the attack, necessity *ad bellum* allows the targeted State to

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130. *Island of Palmas* (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

131. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22–23 (Apr. 9).

132. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

133. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27).

134. See, e.g., GRAY, *supra* note 2, at 248; Theodore Christakis, *Challenging the "Unwilling and Unable" Test*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLK-ERRECHT 19, 20 (2017); Lehto, *supra* note 59, at 12–13 (2018).

135. IDI Resolution, *supra* note 106, ¶ 10.

employ military force to forestall continued attacks, including in the territorial State. However, the force used must be proportional and adhere to the limits set forth by the principle of necessity.

Self-defense is an exception to the Article 2(4) prohibition on the use of force in another State. Consequently, the territorial State has no right to interfere with proportionate measures of self-defense directed against the NSAG, as there is no self-defense against self-defense.<sup>136</sup>

Regarding the second point that a due diligence failure by the territorial State does not give rise to the right of self-defense, it is not the failure that creates the right; instead, it is the occurrence or imminence of an armed attack emanating from its territory coupled with the lack of feasible alternatives that gives rise to this right. Where there is a failure of the territorial State to meet its due diligence duty, the unable and unwilling test is used by some States and commentators to determine when recourse to self-defense is justified.<sup>137</sup> Under this test, the NSAG's attack is not attributed to the territorial State, nor is it held responsible. But its inability or unwillingness to prevent its territory from being used by NSAGs to carry out armed attacks renders

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136. United States v. von Weizsaecker et al. (Ministries Case), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL LAW NO. 10, at 314, 329 (1949).

137. See, e.g., Ashley Deeks, *Unwilling or Unable: Toward a Normative Framework for Extra-territorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012). For the U.S. position on the test, see Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/695 (Sept. 23, 2014).

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.

For the U.K. endorsement of the test, see Jeremy Wright, Attorney-General of the United Kingdom, Address at the International Institute for Strategic Studies: The Modern Law of Self-Defence (Jan. 11, 2017), <https://www.ejiltalk.org/the-modern-law-of-self-defence/>. For the Australian endorsement, see George Brandis, Attorney-General of Australia, Remarks at the TC Beirne School of Law, University of Queensland: The Right of Self-Defence against Imminent Armed Attack in International Law (Apr. 11, 2017), <https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/>; see also Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test?*, LAWFARE (Oct. 10, 2016), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>.

self-defense on its territory by the defending State lawful.<sup>138</sup> The Chatham House Principles,<sup>139</sup> the Bethlehem Principles,<sup>140</sup> and to a certain extent, the Leiden Policy Recommendations<sup>141</sup> endorse this test. At the same time, critics characterize the unwilling or unable standard as incompatible with international law on the use of force.<sup>142</sup>

The inability or unwillingness of a State to prevent a NSAG from operating from its territory and the impact this has on the exercise of extraterritorial self-defense is discussed below. But it is important to note here that the mere failure of a State to meet its due diligence obligation to prevent harm does not in itself give rise to a necessity for self-defense. Where there are feasible alternatives, this would remove the necessity to act. While a failure to exercise vigilance may well give rise to responsibility and a duty of reparation to the injured State, it does not automatically result in the necessity needed to act in self-defense.<sup>143</sup> Therefore, a lack of due diligence does not provide a stand-alone justification for the exercise of self-defense.

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138. Deeks, *supra* note 137, at 495; Lindsay Moir, *Action against Host States of Terrorist Groups*, in OXFORD HANDBOOK OF THE USE OF FORCE, *supra* note 5, at 720, 730.

139. Wilmshurst, *supra* note 104, at 969

If the right of self-defence . . . is to be exercised in the territory of another State, it must be evident that that State is unable or unwilling to deal with the non-State actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial State cannot be obtained.

140. Bethlehem, *supra* note 3, at 776 (Principle 11)

The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is . . . unwilling to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack.

141. LEIDEN POLICY RECOMMENDATIONS, *supra* note 112, ¶ 42

Where a state is itself supporting or encouraging the actions of terrorists on its territory, it may well be unwilling to avert or repel the attack and action in self-defence may be necessary. Self-defence may also be necessary if the armed attack cannot be repelled or averted by the territorial state. States relying on self-defence therefore must show that the territorial state's action is not effective in countering the terrorist threat.

142. See, e.g., Olivier Corten, *The 'Unwilling or Unable' Test: Has it Been, and Could it Be, Accepted?*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 777 (2016); O'Connell, *supra* note 25, at 384; Lehto, *supra* note 59; Brunnée & Toope, *supra* note 58; Christakis, *supra* note 134; Craig Martin, *Challenging and Refining the "Unwilling and Unable" Doctrine*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 25 (2019).

143. Kinga Tibori-Szabó, *The "Unwilling and Unable" Test and the Law of Self-Defence*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 73, 90, 95–96 (Christophe Paulussen et al. eds., 2016).

C. *What Makes Self-Defense Necessary on the Territory of “Unable” States?*

Determining whether a State is unable to prevent NSAGs from using its territory is a context-driven factual analysis. A number of authors suggest that the territorial State’s inability to take effective measures against NSAGs operating from their territory is tantamount to the level of involvement necessary to render action against those armed groups lawful.<sup>144</sup> Conversely, other authors have warned against conflating loss of territorial control with the absence of State jurisdiction and treating unable States as failed States.<sup>145</sup> The present authors agree that the extent to which a State is unable to control its territory can greatly differ. More importantly, it is only part of the assessment as to whether such inability renders self-defense permissible.<sup>146</sup>

Three scenarios can result in a State being “unable” to prevent an armed group from conducting operations amounting to an ongoing or imminent armed attack from its territory. First, the State may have imploded and ceased to be an effective sovereign with a functioning government. Somalia, for example, had no effective government for a prolonged period extending over years. This lack of governance was one of the reasons for various foreign military interventions on its territory, including Kenya’s in 2011.<sup>147</sup>

Second, the State, while having a functioning government and a degree of control over its territory is too weak to take action against a more powerful armed group entrenched on its territory. Here, the armed conflict between Israel and Hezbollah in 2006 is again instructive, as the Lebanese government could not disarm Hezbollah nor dislodge the group’s control of the southern part of the country. Even Israel, a very credible military power, struggled in its confrontation with Hezbollah.<sup>148</sup>

The third situation occurs when the State loses control over part of its territory due to internal fragmentation, civil conflict, or other factors. As a result, the State is unable to prevent an armed group from operating in its territory. This was the situation in Syria from the outset of the conflict until

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144. See, e.g., Moir, *supra* note 138, at 735.

145. See, e.g., Priya Urs, *Effective Territorial Control by Non-State Armed Groups and the Right of Self-Defence*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 31, 33 (2017); Lehto, *supra* note 59, at 13.

146. See, e.g., Trapp, *supra* note 26, at 694–95; Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations against Armed Groups*, 93 INTERNATIONAL LAW STUDIES 215, 219–20 (2017).

147. See *supra* note 83 and accompanying text.

148. See *supra* note 77 and accompanying text.



very recently. The Syrian government continued to function and was engaged in clear efforts to regain control of its territory. Nevertheless, it was incapable of preventing ISIS from taking over a sizable part of its territory, and from there taking control of a large portion of Iraqi territory and holding that territory for several years. In 2014, ISIS even threatened to take Baghdad after conquering Mosul, the second-largest city in the country.<sup>149</sup> The necessity of self-defense is, or clearly should be, obvious in this case. Fighting ISIS exclusively within Iraqi territory, while its base of operations and oil resources lay across the border in Syria, would have been an exercise in futility.

Of course, there are mixtures and variations of these scenarios. For example, Libya is presently a combination of the first and third scenarios. However, these three examples demonstrate situations where an armed group is capable of operating freely from a State's territory. While doing so, these groups conducted operations that constitute armed attacks giving rise to a necessity of self-defense, without any real complicity or support, much less control by the territorial State. The term "unable" is based on the inability of a State to prevent its territory from use by an armed group as a base of operations for attacks on other States.

Regardless of which scenario is the most relevant in a given situation, the territorial State's inability to exercise due diligence is not a violation of an obligation it owes the defending State. In each, the circumstances are beyond the State's control. But even in such cases, the targeted State may engage in self-defense actions in the territorial State only if there are no feasible alternatives to halt or preclude further armed attack by the NSAG. For example, where an attack has not begun or is not yet imminent, it may be possible to obtain consent from the territorial State to conduct an extraterritorial law enforcement measure or forestall an attack by the employment of measures on its own territory. If these alternatives would suffice to thwart an attack and forestall future attacks, the required necessity for an exercise of self-defense would no longer be present. However, once an attack has commenced, or is about to commence, and there are no alternatives to take self-defense measures in the territorial State to halt the attack and preclude further attacks, the targeted State may resort to self-defense against the NSAG in the territorial State. In this situation, there is a clear necessity to resort to self-defense.

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149. See *supra* note 89 and accompanying text; see also *Islamic State and the Crisis in Iraq and Syria in Maps*, *supra* note 90.

When necessity exists, self-defense actions do not require the territorial State's permission, nor subordination of the defensive response to conditions imposed by the territorial State. This is especially true if the conditions imposed by the territorial State would render the defensive action ineffective, infeasible, or otherwise unacceptable. In turn, the defending State has a duty to limit its intrusion into the territorial State to that required for its defense. Further, once the necessity of defense ceases, so too must any use of force on the territorial State's territory.

Who decides these delicate questions of necessity? As in all self-defense situations, the State exercising self-defense makes the initial decision, which is then subject to the approval, rejection, or acquiescence of the Security Council, as well as the broader international community.<sup>150</sup>

*D. What Makes Self-Defense Necessary on the Territory of "Unwilling" States?*

Where complicity exists between the territorial State and the NSAG operating from its territory, but the degree of complicity falls short of State control (hence the attack is not attributable to the territorial State), the situation is generally similar to that of "unable" States. There are, however, important differences. Here, the territorial State has effective control over its territory and is capable of taking action to halt the use of its territory by a NSAG as a base of operations, but chooses not to do so. Another way of characterizing this posture is to deem the State "unwilling."

Some authors suggest that self-defense is lawful in cases where the territorial State is unwilling to prevent the attacks due to its tolerance of and support for the NSAG.<sup>151</sup> While the lack of feasible alternatives to self-defense in the form of law enforcement or cooperation with the territorial State may stem from the refusal of the territorial State to exercise its duty as a sovereign, this refusal does not itself give rise to the right of self-defense. Necessity arises, as it does in all cases, from the combination of an ongoing or impending armed attack and the lack of feasible alternatives.

As in the former scenarios, in principle, the territorial State will not be responsible for the armed attack. Thus, there is no question of a new standard of imputing the attack to the State for failing to act or harboring the NSAG. Nonetheless, a State that tolerates, encourages, or supports a NSAG

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150. See DINSTEIN, *supra* note 2, at 253–58.

151. See, e.g., Moir, *supra* note 138, at 735; Guy Keinan, *Humanising the Right of Self-Defence*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 57, 59 (2017).

operating against another State violates the customary principle of non-intervention.<sup>152</sup> In addition, certain forms of support will constitute violations of the prohibition of the use of force, even if they fall short of constituting effective control of the NSAG, resulting in the attack being an indirect armed attack by the State itself.<sup>153</sup>

In sum, States must prevent the use of their territory by NSAGs to mount armed attacks against another State. Where a territorial State undertakes effective measures to neutralize the threat of an armed attack by a NSAG present on its territory, no necessity of self-defense will arise.<sup>154</sup> The targeted State may not take action in self-defense unless it is clear that the territorial State will not do so, and there are no other feasible alternatives to thwart the attack. However, no self-reliant “unable or unwilling” test replaces or supplants the principle of necessity, which remains the bedrock requirement for the exercise of self-defense. Still, the inability or unwillingness of a State to prevent armed groups from operating on its territory may well be a factor in assessing the need to act in self-defense.

*E. Can Self-Defense Be Exercised without the Consent of the Territorial State?*

Exercising self-defense against a NSAG on the territory of a State not responsible for the armed attack raises another controversial question: whether such defensive action is dependent on the consent of the territorial State. Several commentators require that the defending State ask for the territorial State’s consent before taking self-defense actions. This consent is described variously as an additional basis for using force and as a necessary step to permit the exercise of self-defense.<sup>155</sup>

Valid consent is a *separate* (and in some cases additional) basis for the use of force against a NSAG on another State’s territory. Because the use of force intrusion of the territorial State’s sovereignty occurs with its consent, it is not an exception to the Article 2(4) prohibition on the use of force, nor

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152. See, e.g., G.A. Res. 2131 (XX) (Dec. 21, 1965); see also *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 35 (Apr. 9).

153. U.N. Charter art. 2, ¶ 4; G.A. Res. 2625 (XXV), pt. I (Oct. 24, 1970).

154. See Trapp, *supra* note 26, at 694–95.

155. See, e.g., Deeks, *supra* note 137, at 519; Christakis, *supra* note 134, at 21; Urs, *supra* note 145, at 33.

the principle of non-intervention found in customary law. Accordingly, it violates neither.<sup>156</sup>

Without question, the consent of the territorial State cannot become a *conditio sine qua non* for the exercise of self-defense by the defending State, as to do so would render the right of self-defense nugatory. Certainly, whenever possible, the targeted State should seek an effective response from the territorial State or consent to take action against an armed group operating with a significant degree of impunity on its territory when there is a clear danger of attack in the future. Whether that is possible would depend on the factual situation, the relationship between the armed group and the territorial State, and the nature and imminence of the threat.

However, once the necessity of resorting to self-defense in response to an ongoing or impending armed attack arises, the situation changes. There is no duty to seek consent when the necessity of self-defense is overriding or if doing so would significantly hamper the effectiveness of the defensive measures. There is *a fortiori* no need to seek consent where the territorial State is complicit in the attack or is otherwise colluding with the armed group without being directly responsible. Self-defense is an exception to the prohibition of intervention and a lawful base for using force, including its extra-territorial application. This exception remains valid even in the absence of consent by the territorial State once the conditions for its exercise are met.

Commentators have also criticized the distinction between forcible action *against* a State and *within* a State.<sup>157</sup> Under this view, even if the NSAG responsible for the armed attack is the sole target of the exercise of self-defense, the use of force violates the territorial integrity of the State in question. What these authors fail to consider is the very nature of self-defense as an exception to the prohibition on the use of force, an exception legitimizing the use of force on the territory of another State. While the use of armed force on the territory of a State that is not responsible for the armed attack is, and will remain, a concern, the reverse question is seldom asked: why

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156. For the work of the International Law Commission on consent, see JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 163–65 (2002). For consent as a ground for using force on another State's territory, see Terry D. Gill, *Military Intervention with the Consent of or at the Invitation of a Government*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS*, *supra* note 125, at 252, 252–55.

157. See, e.g., Lehto, *supra* note 59, at 21; Tladi, *supra* note 4, at 574–75.

should the territorial State be condemned to undergo armed attacks that violate its own territorial integrity for fear of violating the territorial integrity of the State from which the attacks emanate?<sup>158</sup>

F. *How Does Proportionality Affect the Exercise of Self-Defense on the Territory of an “Unable” State?*

The principle of proportionality requires that defensive action be limited to neutralizing the threat presented. In the case of “unable” States that cannot prevent an armed group from operating in their territory, it is clear that self-defense must be directed solely at neutralizing the ability of the armed group to conduct or continue its attack, and not at the territorial State. Proportionality dictates that the force used is restricted to that required for self-defense. This requirement may limit the geographical area of operations and targets attacked. It may also preclude the targeting of national assets of the territorial State unless it forcibly interferes with the lawful exercise of self-defense.<sup>159</sup> The use of disproportionate force such that it constitutes an attack on the territorial State would no longer be lawful self-defense.

The defending State should inform and cooperate with the territorial State as far as possible. However, this would not be required if it were likely to significantly compromise the effective neutralization of the armed group’s ability to carry on with an attack and continue to conduct attacks.

The defending State is responsible for providing compensation for any damage to the territorial State and its citizens resulting from its human error, equipment malfunction, faulty or reckless targeting, or disproportionate force.<sup>160</sup> Moreover, as a matter of comity, the defending State may also compensate for damage incurred because of the use of lawful force when the territorial State has no role in the attacks by the NSAG.<sup>161</sup> Of course, any

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158. See Keinan, *supra* note 151, at 58.

159. It is important to recall that there is no right of self-defense against self-defense. See *supra* note 136 and accompanying text.

160. Some of these situations (e.g., reckless targeting, lack of due diligence in the use of a weapon, or disproportionate force) would constitute violations of the law of armed conflict or exceed the bounds of self-defense for which international responsibility would result. This is clear, since while self-defense provides an exculpation for the use of force, it does not excuse violations of the law of armed conflict or the disproportionate use of force in the context of self-defense.

161. Damage which resulted from the lawful exercise of self-defense and did not constitute a violation of the law of armed conflict such as damage or injury to civilians or civilian objects which was not disproportionate under the law of armed conflict would not trigger

action involving the use of force must conform to applicable humanitarian and human rights law.

G. *How Does Proportionality Affect the Exercise of Self-Defense on the Territory of “Unwilling” States?*

As regards “unwilling” States, defensive actions are again restricted to those necessary to neutralize the threat posed by the armed group without engaging the territorial State unless forcibly opposed. In contrast to the unable State, there is no duty to cooperate with or compensate the territorial State for damage occasioned since, by definition, it has the means to act against the NSAG operating in its territory, but chooses not to act. While this does not make the territorial State a co-author of the NSAG attack, it is responsible for its failure to act.

How does this differ from the *Corfu Channel* judgement in which the ICJ found the United Kingdom’s unilateral mine removal actions unlawful? It lies in the necessity to take action in self-defense if an armed attack is, or is about to be, launched from the territorial State’s territory and that State fails to act. British naval forces were not under attack when the United Kingdom sent its warships into Albanian waters to sweep the mines. The United Kingdom justified its action (unsuccessfully) as gathering evidence of Albanian complicity and removing a hazard to navigation, not that its ships were subject to an ongoing or impending attack.<sup>162</sup> Hence, *Corfu Channel* has no direct relevance to self-defense.<sup>163</sup> Rather, the judgement clearly establishes a territorial State’s duty to take all feasible measures to halt and, in so far as possible, prevent the harmful use of its territory. Moreover, when it fails to satisfy this duty, it must provide compensation for harm caused by this failure.

H. *When Does the Defending State Have to End its Actions?*

Self-defense is distinct from punitive action. It has as its purpose the neutralization of an ongoing or imminent armed attack and differs from a reprisal in that it is not purely or primarily an act of retribution for an unlawful

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an obligation to provide reparation. However, there is no reason why *ex gratia* compensation could or should not be offered. This was standard practice for many States participating in the ISAF mission as a matter of policy. This consideration is even more compelling when the injured State bears no responsibility for any wrongful conduct.

162. *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 34–35 (Apr. 9).

163. See *supra* note 131 and accompanying text.

use of force. It becomes operative when the necessity of self-defense manifests itself through an actual or imminent armed attack for which alternative means are either unavailable or inadequate.

Once a victim-State has exhausted any feasible alternatives, it may take defensive action as soon as it can do so. The determination of when this occurs depends on a number of factual considerations, including establishing authorship, mobilization and deployment of forces, taking diplomatic action, and marshaling the assistance of friendly States. This temporal dimension can be seen either as an independent condition referred to by some as “immediacy,”<sup>164</sup> or as part of the principle of necessity. However characterized, it serves to distinguish self-defense from purely punitive action, even though self-defense can have an element of retribution, as well as deterrence, as it aims to dissuade and prevent the attacker from continuing with its attack.

When the original attack is thwarted and the threat of continuing attack ended, the necessity required for self-defense is no longer present. At that point, defensive action must cease.<sup>165</sup> Self-defense is not a license to carry on a borderless and perpetual war or grounds to engage any armed group that poses a potential threat, irrespective of whether that threat is clear and present enough to justify armed measures on the territory of another State.

#### IV. CONCLUSION

Unquestionably, the drafters of the U.N. Charter did not have NSAGs foremost in mind when they agreed upon a final version of the Charter and Article 51. During the half-century between the drafting of the Charter and the end of the Cold War, States rarely confronted NSAGs acting independently; thus, there was no need or opportunity to develop State practice on this point. While autonomous non-State actors were not wholly unknown in the pre-Charter era, during most of the twentieth century self-defense revolved around States and NSAGs dependent on State direction, control, or support. However, the dearth of occurrence does not translate into the emergence of a prohibition against using self-defense against NSAGs. Moreover, since 9/11, considerable State practice has evidenced either the emergence of new rules or the reaffirmation of existing rules for the exercise of self-defense to armed attacks authored by NSAGs.

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164. See, e.g., Gill, *supra* note 2, at 151–54; DINSTEIN, *supra* note 2, at 287–88.

165. See Terry D. Gill, *When Does Self-Defence End?*, in OXFORD HANDBOOK OF THE USE OF FORCE, *supra* note 5, at 737, 750–51.

There is no convincing reason to distinguish between armed attacks conducted by autonomous NSAGs from those conducted by States or State-controlled armed groups. With some adjustments, the well-established conditions authorizing self-defense against armed attacks by States can also apply to armed attacks by NSAGs. Considerations of a territorial State's "inability or unwillingness" may well be relevant in assessing when a necessity of self-defense arises and how it should be conducted. We have shown how these conditions, in particular, the principle of necessity, serve as both the driver and the limiting function of the exercise of self-defense. We hope this contribution will clarify some of the issues concerning whether and how self-defense should be exercised when confronting armed groups acting independently of State control to mount armed attacks, particularly as the capacity and lethality of these groups continues to increase.