

## SYMPOSIUM ON UNAUTHORIZED MILITARY INTERVENTIONS FOR THE PUBLIC GOOD

### THE USE OF FORCE AS A PLEA OF NECESSITY

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Article 2(4) of the [UN Charter](#) contains a general prohibition of the use of force.<sup>1</sup> Articles 42 and 51 authorize departures from this prohibition in two circumstances: Security Council authorization<sup>2</sup> and self-defense.<sup>3</sup> These two circumstances are conceptualized as justifications. They provide for [legally-warranted departures](#) from the general rule.<sup>4</sup> As a result, a justified use of force is not wrongful. Justifications are different from excuses where the action remains wrongful, but the wrongdoer may be released from responsibility for the wrongdoing.

In recent practice, states have claimed authority to act forcibly in two circumstances that are not covered by the Charter-mandated justifications: against nonstate actors conducting attacks from within another state, and in cases in which a foreign state is engaged in atrocities against its own citizens. This essay explains why, at best, states can only try to *excuse* these actions after the fact. The essay demonstrates that the law on the use of force has accommodated certain pleas of necessity that have often been mistakenly categorized as self-defense. [The plea of necessity](#) is not a justification; it is conceptualized as an excuse under the law of state responsibility.<sup>5</sup>

#### *Defenses and State Responsibility*

As [Vaughan Lowe](#) illustrates, a legal system may wish to provide a defense for emergency drivers who breach the speed limit on the way to the hospital.<sup>6</sup> There are two ways of achieving this goal. One is to give them an explicit authorization to breach the speed limit. The other one, however, does not authorize speeding, but rather ensures that emergency drivers are not prosecuted for such a breach of traffic rules. The first (justification) relaxes the norm itself and may well result in wider disobeying of the speed limit than the second, which merely provides

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<sup>1</sup> [UN Charter](#) art. 2(4).

<sup>2</sup> *Id.* art. 42.

<sup>3</sup> *Id.* art. 51.

<sup>4</sup> Cf. Kent Greenawalt, [The Perplexing Borders of Justification and Excuse](#), 84 COLUM. L. REV. 1897, 1927 (1984).

<sup>5</sup> On the issue of necessity in the use of force, the present essay seeks to expand on some excellent ideas presented in the following works: THOMAS FRANCK, [RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS](#) (2002); Robert D. Sloane, [On the Use and Abuse of Necessity in the Law of State Responsibility](#), 106 AJIL 447 (2012); Anthea Roberts, [Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?](#), in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (Philip Alston & Euan Macdonald eds., 2008); Ian Johnstone, [The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism](#), 43 COLUM. J. TRANSNAT'L L. 337 (2004–05).

<sup>6</sup> Vaughan Lowe, [Precluding Wrongfulness or Responsibility: A Plea for Excuses](#), 10 EUR. J. INT'L L. 405, 410 (1999).

for a carefully weighed excuse of culpability where the norm was doubtlessly breached.<sup>7</sup> In other words, it is better if the general norm is strong and “catches” more violators whose excuses are then considered on a case-by-case basis.

In international law, defenses are enumerated in the “circumstances precluding wrongfulness” in the [International Law Commission \(ILC\)’s Articles on Responsibility of States for Internationally Wrongful Acts \(ARSIWA\)](#).<sup>8</sup> While ARSIWA do not make a systematic distinction between the different types of defenses, some concepts adopt the logic of justifications (e.g., self-defense) and others that of excuses (e.g., necessity, distress).<sup>9</sup>

Necessity is elaborated in Article 25 ARSIWA. The ILC Commentary to Article 25 provides:

[N]ecessity consists ... in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.<sup>10</sup>

Under carefully defined circumstances, the plea of necessity therefore *excuses* nonperformance of an obligation where a grave danger exists either to the state or to the international community as a whole. As such, necessity is not a justification; it is an excuse, which, under special and carefully defined circumstances, mitigates against responsibility for nonperformance of a legal obligation. Some concepts of the law on the use of force fall under the doctrine of necessity in the sense of Article 25 ARSIWA, yet have often been categorized as self-defense under Article 51 UN Charter.<sup>11</sup>

#### *Self-Defense Against Nonstate Actors*

In the [Wall Advisory Opinion](#), the ICJ pronounced: “Article 51 of the Charter ... recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”<sup>12</sup> The ICJ thus confined self-defense to relations between states. [Some writers](#) have nevertheless argued that an armed attack can come even from a nonstate actor and thus trigger the right to self-defense.<sup>13</sup> Accepting such an expansive reading of Article 51 and its customary reflection leads to the question of where (i.e., in which territory) the right to self-defense is to be exercised.

The right of self-defense is a justification, but the attacked state does not need any justifications under *jus ad bellum* for using force in its own territory against another state or indeed against a nonstate actor. The purpose of the right to self-defense is that, subject to such an action being necessary and proportionate, it gives the attacked

<sup>7</sup> [Id.](#)

<sup>8</sup> Int’l Law Comm’n, [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#) ch. V, UN Doc. A/56/10 (2001) [hereinafter ARSIWA].

<sup>9</sup> [Id.](#) arts. 21, 24, 25.

<sup>10</sup> [Id.](#) art. 25, cmt. para. 2.

<sup>11</sup> Any exercise of the right of self-defense requires such an action to be necessary and proportionate. This is different than necessity as a self-standing defense under the law of state responsibility. The distinction is acknowledged even under ARSIWA, where self-defense is spelled out in Article 21 and necessity in Article 25.

<sup>12</sup> [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories](#), Advisory Opinion, 2004 ICJ REP 136, para. 139 (Jul. 9).

<sup>13</sup> Nicholas Tsagourias, [Self-Defence Against Non-State Actors: The Interaction Between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule](#), 20 LEIDEN J. INT’L L. 801, 808–10 (2016).

state a justification to use force in the territory of the attacker. To illustrate, if state Alpha attacks state Beta, Beta's "use of force" against Alpha within the territory of Beta is not a prima facie violation of Article 2(4) UN Charter. Beta does not need an Article 51 UN Charter justification within its own territory. If Beta, however, crosses the border to Alpha in pursuance of self-defense, such an action is prima facie caught by Article 2(4) UN Charter and Beta needs a justification.

If the attacker is a state, it has a territory. Nonstate actors are, however, *nonterritorial* actors under international law. The so-called Islamic State might have established a degree of control in the territories of Iraq and Syria, but for the purposes of international law these territories still belong to the states of Iraq and Syria. If we accept that a nonstate actor, such as the so-called Islamic State, can mount an armed attack in the sense of Article 51 or its customary reflection, an attacked state must rely on the right of self-defense to use force against that nonstate actor in the territory of another state.

### *The Unwilling or Unable Doctrine*

Some writers have suggested that the doctrine of "unwilling or unable states" applies in such circumstances,<sup>14</sup> meaning that where a state is unwilling or unable to prevent its territory from being used by nonstate actors to attack foreign states, the attacked state can exercise self-defense in the territory of this state. How does the application of this legal rule work? [In one view](#), use of force *in* an unwilling or unable state does not constitute use of force *against* such a state, and is therefore not "caught" by Article 2(4) UN Charter.<sup>15</sup> This argument conflates states with governments. Even if a cross-boundary use of force is not directed against the government forces of a foreign state, it remains a use of force against that state. This is because states are territorial legal entities under international law. Governmental ineffectiveness, or indeed unwillingness to act, does not make a state less of a state or shrink its boundaries for some purposes. It is not possible to define under international law an action against a state only as an action that is directed against its government.

This does not mean, however, that a state is simply off the hook under international law if it fails to act. Such a state may still breach its legal obligations and incur responsibility by omission, i.e., a failure to act. The unwilling or unable doctrine tries to do exactly that: attribute by omission the nonstate actor's armed attack to the state that was unwilling or unable to prevent it. This triggers Article 51 UN Charter and gives the attacked state the right to pursue the nonstate actor into the territory of another state.

In terms of legal mechanics, the unwilling or unable doctrine is nothing other than attribution by omission. However, unable is not quite the same as unwilling. Given the close-knit relationship between the Taliban Government of Afghanistan and Al Qaeda, it may have been plausible to attribute the acts of Al Qaeda to Afghanistan. This is different where attribution is sought of an armed attack to a state that is—despite its utmost efforts—*unable* to defeat the nonstate actor using its territory for sinister purposes. Attribution to an *unable* state in this case requires strict liability. The state becomes responsible for the actions of a nonstate actor even if it is not at fault. It is not entirely settled whether and in which circumstances international law applies strict liability.<sup>16</sup> The danger is that the choice of a theory of attribution in the law of the use of force (and also in other areas of international law) would be determined by a desired policy outcome, or even political expediency, rather than predetermined legal procedures.

<sup>14</sup> *Id.* at 808–13.

<sup>15</sup> See, e.g., [Letter Dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council](#), UN Doc. S/2015/946 (Dec. 10, 2015).

<sup>16</sup> [ARSIWA](#), *supra* note 8, art. 47, cmt. para. 5.

The unwilling or unable doctrine is thus problematic, at least where unable states are concerned, as it requires attribution of an armed attack to the state by omission and applies strict liability for this purpose. If this were not the case, it would be unclear how the right to self-defense could authorize the attacked state to pursue the nonstate actor into the territory of another state without that state's consent.

### *Necessity Rather than Self-Defense*

For these conceptual reasons, it is not tenable to say that an attack by a nonstate actor triggers self-defense under Article 51 UN Charter or its customary reflection. Rather, a more compelling approach to this problem is found in the use of a "necessity" excuse after the fact. At least where a state is *unable* to prevent its territory from being used by nonstate actors for attacks on another state, the attacked state may rather have a reasonable plea of necessity to enter the territory of the unable state and use force there.

The plea of necessity of this kind has its foundations in the *Caroline* incident. As the ILC Commentaries to ARSIWA note: "The 'Caroline' incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present."<sup>17</sup>

What is often understood as a precedent for "anticipatory self-defense" in international legal doctrine was not self-defense at all, but a plea of necessity where one state pursued a nonstate actor into the territory of another state, and did so more than one hundred years before the Charter rules even existed. And even if a customary right to anticipatory self-defense existed prior to 1945, the Charter would have modified this rule with its Article 51 requirement that an armed attack must have occurred, in combination with the Article 103 supremacy clause.

There is no right under international law to anticipatory self-defense and no right to self-defense against nonstate actors. An anticipatory first strike on another state or pursuit of nonstate actors into the territory of an "unable state" in exceptional circumstances should rather be conceptualized as a plea of necessity and thus an excuse rather than a justification.

### *Humanitarian Intervention*

Humanitarian intervention can be [accommodated](#) within Articles 39 and 42 UN Charter.<sup>18</sup> The problem is where there exist pressing humanitarian reasons for an intervention, but the Security Council does not authorize the use of force. [This is another version](#) of the unwilling or unable doctrine, except that here it is the Security Council that is deemed to be unwilling or unable to act and authorize force on humanitarian grounds.<sup>19</sup> Such reasoning is perhaps best expressed in the aftermath of NATO's use of force against the Federal Republic of Yugoslavia in 1999. [Christine Chinkin](#) argued:

How can I, as an advocate of human rights, resist the assertion of a moral imperative on states to intervene in the internal affairs of another state where there is evidence of ethnic cleansing, rape and other forms of systematic and widespread abuse, regardless of what the Charter mandates about the use of force and its allocation of competence?<sup>20</sup>

<sup>17</sup> *Id.* art. 25, cmt. para. 5.

<sup>18</sup> See, e.g., [SC Res. 1973](#) (Mar. 17, 2011) in which the Security Council used its Chapter VII powers in order to protect civilians within their own state and not against an outside threat.

<sup>19</sup> See Emily MacKenzie, [United Kingdom Outlines its Position on Humanitarian Intervention and Responsibility to Protect \(January 14, 2014\)](#), ASIL INT'L L. IN BRIEF (Feb. 7, 2014, 5:06 PM).

<sup>20</sup> Christine Chinkin, [Kosovo: A "Good" or "Bad" War?](#), 93 AJIL 841, 843 (1999).

Bruno Simma talked about a “thin red line” that separated the intervention from being legal,<sup>21</sup> to which Antonio Cassese responded that the red line was not thin at all.<sup>22</sup> According to Cassese, the line separating legal and illegal use of force had doubtlessly been crossed, but in this particular case it was not a bad thing. Cassese separated law and ethics, and concluded: “[F]rom an *ethical* viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*.”<sup>23</sup>

The frustration was obvious. A legal scholar interpreting international law *de lege lata* in good faith could not conclude that the intervention was legal. At the same time, a legal scholar committed to human rights could not deny that the intervention ended atrocities and a grave humanitarian situation in Kosovo. The phrase “illegal but legitimate” emerged out of this frustration, which suggests that sometimes the prudent response will *not* be obeying the law but breaching it. This reasoning reflects a typical argument for excuses: illegal use of force is the choice of the lesser evil, a mitigating circumstance, a plea of necessity.

### Conclusion

The UN Charter rules on the use of force provide for a general prohibition and two justifications. But the Charter rules apply only in relations between states. Contemporary challenges regarding nonstate actors are conceptually difficult to accommodate within these rules and, if we try to accommodate them, the peril is that the whole system could be undermined with political expediency.

This essay has demonstrated that the way forward is to conceptualize the plea of necessity under the law of state responsibility as an excuse for an otherwise illegal use of force that may be available in extreme circumstances and “subject to strict limitations to safeguard against possible abuse.”<sup>24</sup> The logic of necessity as an excuse has been present in international legal doctrine for a long time, but has been often wrongly categorized as an expansion of the right of self-defense, or as a customary justification for the use of force on humanitarian grounds.

With a further expansion of justifications, the danger is that the Charter rules would become simply too vague, subject to too many creative interpretations, and as such invite ever-wider disobedience. Categorizing certain concepts as excuses provides more conceptual clarity, which preserves the strength of the original prohibition and makes the “anticipatory,” “humanitarian,” and “in the territories of unable states” resorts to force doubtlessly illegal under international law. Yet, under carefully defined exceptional circumstances, a state’s responsibility for such violations of the Charter rules could be mitigated.

<sup>21</sup> Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 6 (1999).

<sup>22</sup> Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 24–25 (1999).

<sup>23</sup> *Id.* at 25.

<sup>24</sup> *ARSIWA*, *supra* note 8, art. 25 cmt. para. 2.