

# Revisiting the Right of Self-Defence against Non-State Armed Entities

I.M. LOBO DE SOUZA

## *Abstract*

This article explores and appraises international legal developments regarding the right to self-defence against vicarious aggression — that is, armed attacks by non-state entities that are sponsored or hosted by a foreign state. Despite efforts to develop a normative framework and mechanisms of accountability to curb states' use of non-state entities as proxies for armed activity, some states continue to view these entities as valuable tools for the realization of their foreign policy goals. Consequently, international practice shows general recognition of a right of self-defence against non-state armed entities. There is also an emerging body of authoritative opinion, backed by an evolving state practice, that supports the extension of the application of this right against a non-state entity's host or sponsoring state, provided some conditions are met.

*Keywords:* Use of force; *jus ad bellum*; self-defence; armed attack; vicarious aggression; non-state entities; intervention.

## *Résumé*

Cet article explore et évalue les développements juridiques internationaux concernant le droit à la légitime défense contre l'agression du fait d'autrui, c'est-à-dire contre des attaques armées par des entités non-étatiques parrainées ou hébergées par un État étranger. Malgré les efforts déployés pour mettre au point un cadre normatif et des mécanismes de responsabilisation pour limiter l'utilisation, par les États, d'entités non-étatiques pour la réalisation d'interventions armées à l'étranger, certains États insistent sur de telles stratégies afin d'atteindre leurs objectifs en matière de politique étrangère. En revanche, la pratique internationale démontre une reconnaissance générale d'un droit de légitime défense contre des entités armées non-étatiques. Une doctrine émergente, soutenue par une pratique en évolution des États, appuie l'extension de l'application de ce droit à l'encontre de l'État qui parraine ou héberge une telle entité non-étatique, sous réserve de certaines conditions.

*Mots-clés:* Usage de la force armée; *jus ad bellum*; légitime défense; attaque armée; agression par le fait d'autrui; entités non-étatiques; intervention.

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I.M. Lobo de Souza, PhD, Associate Professor, International Relations, Federal University of Paraíba, Brazil; Senior Research Fellow, Centre for Defence and Security Studies, University of Manitoba, Winnipeg, Canada.

## INTRODUCTION

The ties of association between states and non-state armed entities (or groups) engaged in joint enterprises that cause harm to other states and civilians are an old and multifaceted problem. There is enough evidence in state practice to justify the assertion that most non-state entities engaged in armed activities depend upon the active support, connivance, acquiescence, or collusion of a state to be able to subsist, flourish, and launch attacks against their targets. Despite the efforts of the international community to develop a normative framework and mechanisms of accountability to counter such vicarious aggression, some states continue to consider armed non-state entities to be valuable tools for the accomplishment of their foreign policy goals. Given the extent of engagement by states in this practice, they must be acting under the assumption that armed intervention by indirect means is generally more effective in promoting specific foreign policy goals than direct intervention or no intervention at all. A common feature of these interventions or acts of aggression is that states use their invisible hand (that is, covert operations) to support, finance, organize, direct, encourage, influence, or control these non-state entities and their armed operations.

Surely one of the greatest motivations behind the use of non-state entities as proxies in armed activities in or against other states is the perception that this is an effective way to circumvent current legal restrictions on states' direct use of force. According to general international law and the *Charter of the United Nations (UN Charter)*, the use of force in international relations is proscribed except in cases of individual or collective self-defence or when such force is authorized by the competent organ of the United Nations (UN) in the operation of the collective security system.<sup>1</sup> When force is used unilaterally by a state — that is, without the express authorization or endorsement of the UN Security Council (UNSC) — no matter what legal justification is advanced by that state, the other state often counterclaims that it has been the victim of an armed attack and thus invokes the right to use force in self-defence. If the state that suffered the armed attack is militarily strong, then a long, exhausting, and devastating armed conflict may follow (for example, the Iraq–Iran conflict during the 1980s).

A unilateral use of force by a state may also bring about a determination, by the UNSC, of the occurrence of a breach of the peace or an act

<sup>1</sup> See, *inter alia*, *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, arts 2(4), 39, 42, 51 [*UN Charter*]; Stephen Schwebel, "Aggression, Intervention and Self-Defence" (1972-II) 136 *Rec des Cours* 473; Jose Ruda, *Panorama del Derecho Internacional Público Contemporáneo* (Washington, DC: Comité Jurídico Interamericano, 1984) 62; Oscar Schachter, "International Law in Theory and Practice" (1982) 178 *Rec des Cours* 133; *Yearbook of the International Law Commission, 1951* (New York: United Nations, 1951) vol 2 at 133ff [*ILC Yearbook 1951*].

of aggression, which enables the UNSC to activate its powers under Chapter VII of the *UN Charter*, unleashing, for example, sanctions against the aggressor. In any case, the legal position of the state that first resorts to force is somewhat weaker, since UN General Assembly Resolution 3314 — taken to reflect customary law — prescribes that the first use of armed force by a state in contravention of the *UN Charter* constitutes *prima facie* evidence of an act of aggression (the priority principle).<sup>2</sup> Therefore, a state that overtly employs unilateral armed force incurs the risk of being held internationally responsible for violation of the principle that prohibits the use of force in international relations and for the commission of an act of aggression. Furthermore, the armed forces of the state are obliged to follow the rules of international humanitarian and human rights law in their military operations, and should those rules be disrespected, members of the armed forces may be subject to investigation and prosecution for war crimes and crimes against humanity, while the state itself could be held responsible for egregious human rights violations.

This whole normative framework (*jus ad bellum*, *jus in bello*, international human rights law) and its various apparatuses of accountability have been designed to limit, as far as possible, states' unilateral uses of force in international relations and to safeguard the efficient operation of the collective security system. When combined with the impact of other deterrence and dissuasion mechanisms, the restraints of domestic and international public opinion, not to mention the material and financial costs of the use of force, states are subject to considerable disincentives to engaging in direct armed activities against other states.

In contrast, the same foreign policy aims may be achieved indirectly by using non-state armed entities as proxies — that is, in a way that makes the attribution of international responsibility to the sponsoring state extremely difficult, thus affecting the incidence of legal consequences and the range of counter-measures that may be taken against it by the victim state. Complexity is added by the not unusual practice of having non-state entities act from the territory of a state other than the sponsoring state, while, in other instances, non-state entities may be covertly assisted by two or more states. In these ways, sponsoring states can be coadjutants to acts that violate the fundamental principles of the non-use of force and non-intervention, international humanitarian law, and human rights law and yet manage to forestall the corresponding legal consequences. It is true that international humanitarian law and human rights norms may apply to the conduct of armed groups, but this will not necessarily entail the responsibility of the sponsoring state unless the strict legal criteria of attribution are met.

<sup>2</sup> *Definition of Aggression*, GA Res 3314 (XXIX), UNGAOR, UN Doc A/RES/3314 (1974), art 2 [Resolution 3314].

For all of these reasons, some states have been inclined to consider the indirect use of force highly advantageous and to resort to acting through armed non-state entities in order to extend their long and invisible arm. It should not be surprising that, since the end of the Cold War, there has been a proliferation of internal and internationalized armed conflicts in which armed non-state entities or groups have been major protagonists and gross violations of human rights and humanitarian law have been prevalent.<sup>3</sup> While part of the blame for the continuing use or support of armed non-state entities by states may be assigned to the current state of the law on the matter, no less relevant are the limitations of the institutions, procedures, and mechanisms designed to interpret and enforce it. The use of force among states is sufficiently regulated by international law. Yet the international legal regime that constrains the use of force by armed groups is still in development. In particular, there seems to remain notable legal ambiguities in connection with the legal consequences for states that play a role in the carrying out of armed attacks by non-state entities. Taken together with the shortcomings and uncertainties in interpretation and application of the rules on state responsibility when non-state armed groups are involved, these ambiguities represent the gravest limitations on the international community's efforts to contain armed conflict.

This article explores and appraises international legal developments regarding the right to self-defence against vicarious aggression, arguing for the existence of an ongoing normative process that will recognize a wider and more effective notion of the right of self-defence for states that are the victims of armed attacks by non-state entities. In the next section, we offer a brief account of the general law on the use of force and intervention in so far as non-state armed groups are concerned. Next, we describe and discuss the current state of the law on vicarious aggression and the corresponding right to self-defence against state sponsors of such aggression. We then consider the existence of a right of self-defence against non-state armed groups themselves and whether such a right may be exercised within the territory of a host state. Throughout, we advance constructive suggestions and normative prescriptions to address legal loopholes, ambiguities, and contradictions that may continue to provide enticement for indirect uses of force.

#### BRIEF OVERVIEW OF THE LAW ON ARMED ACTIVITIES BY NON-STATE ENTITIES

An intricate set of primary norms has been developed over the years by the international legal system to deter and attach legal ramifications to the use of armed groups by states as proxies in armed activities. International law

<sup>3</sup> See *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, United Nations, UN Doc S/2001/331 (2001) at para 3.

recognizes that certain types of association between states and non-state entities that result in armed activities against third states may constitute a violation of the principle of non-use of force in international relations. The 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration)*, which enunciates an authoritative interpretation of the principle of non-use of force enshrined in Article 2(4) of the *UN Charter*, singles out two such types of association as unlawful uses of force by one state against another.<sup>4</sup> According to the declaration, it is a violation of the principle of non-use of force to (1) organize or encourage the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state or (2) organize, instigate, assist, or participate in acts of civil strife or terrorist acts in another state or to acquiesce in organized activities within its territory directed towards the commission of such acts, when the acts referred to involve a use of force.

Three categories of armed activities are thus mentioned in the *Friendly Relations Declaration*: armed incursions, (armed) acts of civil strife, and terrorist acts involving the use of force. Armed incursion can be defined as an armed attack that takes the form of a temporary raid and is trans-boundary in nature, violating the territorial integrity and sovereignty of the affected state. International practice shows many instances in which states have accused others of armed incursions into their territory.<sup>5</sup> Irregular forces and armed bands or mercenaries are referred to in the *Friendly Relations Declaration* in order to illustrate the categories of non-state entities that could be involved in the commission of an armed incursion.

<sup>4</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res 2625(XXV), UNGAOR, UN Doc A/RES/25/2625 (1970) [*Friendly Relations Declaration*]. The declaration has been relied upon extensively by the International Court of Justice (ICJ) in its interpretation of the non-use of force principle. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at paras 87–88 [*Israeli Wall*]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 at para 80 [*Kosovo*]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] ICJ Rep 14 at paras 191–93 [*Nicaragua*]; *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at para 58. See also G Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen aan den Rijn, Netherlands: Sijthoff, 1979) at 101: “We would not doubt that paragraphs 8 and 9 are interpretative elaborations of paragraph 4 of article 2 of the Charter.”

<sup>5</sup> For example, in 2008, Djibouti alleged a massive armed incursion by Eritrean troops, classifying it as an unlawful use of force. See *Letter Dated 11 June 2008 from the Permanent Representative of Djibouti to the United Nations Addressed to the President of the Security Council*, UN Doc S/2008/387 (2008); *Official Records of the Security Council*, 24 June 2008, UN Doc S/PV.5924 (2008) at 6.

An armed band's incursion into the territory of one state from the territory of another for a political purpose has also been characterized by the International Law Commission (ILC) as an offence against the peace and security of mankind.<sup>6</sup>

The use of force in the form of acts of civil strife — that is, in an armed conflict of a non-international character — involves the participation of so-called armed opposition groups in insurgent activities within a state and against the government they oppose or even among such groups.<sup>7</sup> Notice that the *Friendly Relations Declaration* adopts a far-reaching interpretation of the principle, admitting attribution of responsibility for acts of commission (organization, assistance, or participation), acts of omission (acquiescence in organized activities), and even mere instigation or encouragement, provided they relate to acts involving the use of force. Broad as this may be, the act of instigation was recognized as a basis for international responsibility by the ILC's special rapporteur on state responsibility, Roberto Ago, when he observed that “the attribution to the state, as a subject of international law, of the conduct of persons who are in fact operating on its behalf or *at its instigation* is unanimously upheld by the writers on international law who have dealt with this question.”<sup>8</sup>

These types of association lead to activities that might be termed “indirect” or “vicarious” uses of force. It stands to reason that the indirect use of armed force ought to be as intolerable and objectionable as the direct use of force. The reasoning behind this is crystal clear: if states are duty-bound to abstain from the use of force in international relations by the direct deployment of their regular armed forces, they should be equally prohibited from doing so in a veiled way, through the medium of non-state entities such as armed groups.<sup>9</sup>

The *Friendly Relations Declaration* adds that the organization, assistance, fomentation, financing, incitement, or toleration of subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another state, or interference in civil strife in another state, shall constitute

<sup>6</sup> See *ILC Yearbook 1951*, *supra* note 1, vol 2 at 135.

<sup>7</sup> For a stricter definition of armed opposition groups, see *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609, art 1 [*Additional Protocol II*].

<sup>8</sup> *Yearbook of the International Law Commission, 1971* (New York: United Nations, 1971) vol 2 at 266 [emphasis added].

<sup>9</sup> Discussing the *travaux préparatoires* of the *Friendly Relations Declaration*, *supra* note 4, in particular, the origins of its eighth and ninth paragraphs, Rosenstock has observed: “It was argued that to fail to mention such acts might give rise to the unwarranted conclusion that states could do indirectly what they were prohibited from doing directly.” See R Rosenstock, “The Declaration of Principles of International Law Concerning Friendly Relations: A Survey” (1971) 65 *AJIL* 713 at 720.



violations of another principle — the principle of non-intervention. The International Court of Justice (ICJ) has noted that, in so far as the element of coercion is present, which occurs when the intervention takes the form of an indirect use of force, this principle is “very similar” to the non-use-of-force principle.<sup>10</sup> The difference between the two concepts obviously lies in the purpose of the acts of the non-state entity that is being supported or tolerated by the intervening state.

The striking similitude between some of the duties arising out of the non-use-of-force principle and the scope of the principle of non-intervention in matters within the domestic jurisdiction of another state produces a particular legal consequence. If an armed group engages in armed activities against a state for the ultimate policy goal of undermining the government, supporting secession, and/or provoking regime change, the state that has organized or assisted such a group may be in violation of both principles of international law, for which it might be held internationally responsible. After acknowledging this possibility, the court found, in the *Nicaragua* case, that the actions of the United States had in fact violated both principles.<sup>11</sup> The same conclusion was reached by the ICJ regarding Uganda’s support of irregular forces operating in the territory of the Democratic Republic of the Congo.<sup>12</sup> Reflecting this possibility, the *Friendly Relations Declaration* affirms that the principles of international law it enunciates are inter-related in their interpretation and application, such that each principle should be construed in the context of the others.

The legal regime relating to armed activities by non-state entities recognized in the *Friendly Relations Declaration* parallels to some extent the inter-American norms formulated in the 1933 *Montevideo Convention on the*

<sup>10</sup> *Nicaragua*, *supra* note 4 at paras 192, 205. It will be recalled that, in 1984, Nicaragua instituted proceedings against the United States, claiming that the latter, by engaging in military and paramilitary activities in and against Nicaragua, was internationally responsible for violations of conventional and customary international law. After rejecting the US objections on jurisdiction and admissibility of the claim (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, [1984] ICJ Rep 392 [*Nicaragua — Jurisdiction and Admissibility*]), the ICJ held that the United States was in breach of its obligations under customary international law not to intervene in the affairs of another state, not to use force against another state, and not to violate the sovereignty of another state. In addition, the United States was also found to be in breach of some of its obligations under the *Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua*, 21 January 1956, 367 UNTS 3. For discussion of the ICJ’s decision and its impact, see Herbert Briggs et al, “Appraisals of the ICJ’s Decision: *Nicaragua v. United States (Merits)*” (1987) 81 AJIL 77.

<sup>11</sup> *Nicaragua*, *supra* note 4 at paras 247, 292.

<sup>12</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, [2005] ICJ Rep 168 at para 345 [*Armed Activities*].

*Rights and Duties of States*.<sup>13</sup> After affirming the non-intervention principle, the *Montevideo Convention* provides that the territory of a state may not be the object of any measures of force imposed by other states “directly or indirectly.”<sup>14</sup> The 1957 *Protocol to the [1928] Convention on Duties and Rights of States in the Event of Civil Strife* expands on this provision by committing each contracting state to control and prevent the flow of arms and war material from its territory and to prohibit any person from deliberately participating in the preparation, organization, or carrying out of a military enterprise for the purpose of starting, promoting, or supporting civil strife in another state.<sup>15</sup>

## SELF-DEFENCE AGAINST STATE SPONSORS OF VICARIOUS AGGRESSION

### THE GRAVITY REQUIREMENT

According to Resolution 3314, the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the direct state acts of armed force listed in the resolution, or its substantial involvement therein, may amount to an act of aggression.<sup>16</sup> Thus, for a state to commit vicarious aggression, it is not sufficient to send an armed group to act against another state. It is a requirement that this group engage in acts of armed force comparable in gravity (or effects) to those listed in the resolution (invasion, attack, bombardment, or blockade by the regular armed forces of a state). The ICJ has reaffirmed the scope of this type of armed aggression and stated that this particular provision of Resolution 3314 reflects customary international law, which means that this norm is supported by a general, consolidated practice of states accompanied by *opinio juris generalis*.<sup>17</sup> The normative weight of Resolution 3314 is evidenced by the fact that the amendments to the *Rome Statute of the International Criminal Court* defining the crime of aggression reproduce, word by word, its text.<sup>18</sup>

<sup>13</sup> *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 [*Montevideo Convention*].

<sup>14</sup> *Ibid.*, arts 8, 11.

<sup>15</sup> *Protocol to the Convention on Duties and Rights of States in the Event of Civil Strife*, 1 May 1957, 338 UNTS 4138, arts 1, 5, online: Organization of American States (OAS) <<http://www.oas.org/juridico/english/treaties/c-14.html>>.

<sup>16</sup> Resolution 3314, *supra* note 2, art 3(g).

<sup>17</sup> *Nicaragua*, *supra* note 4 at para 195.

<sup>18</sup> *Rome Statute of the International Criminal Court*, 1 July 2002, UN Doc A/CONF.183/9 (2002). See *Review Conference of the Rome Statute of the International Criminal Court Official Records*, ICC Doc RC/11 at Resolution RC/Res.6, Annex I. The text of the amendments is also reproduced in UN Doc C.N.651.2010.TREATIES-8 (Depositary Notification), online: <<https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf>>.



What is the difference, if any, between aggression and the use of force, given that Resolution 3314 defines aggression by express reference to the text of Article 2(4) of the *UN Charter*? Aggression is defined in Article 1 of Resolution 3314 as the “use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.” In other words, aggression is an unlawful use of force or the use of force in contravention of the *UN Charter* or general international law. The novelty introduced by Resolution 3314, however, is the recognition of distinct forms of the use of force since it characterizes aggression as “the most serious and dangerous use of force.”<sup>19</sup>

The Institut de droit international (IDI) concurs with the approach of differentiating between categories of uses of force in order to regulate the incidence of the right of self-defence. In its 2007 resolution, the IDI distinguished armed attacks of “lesser intensity” from those of “a certain degree of gravity,” stating its understanding that counter-measures in the form of police actions apply to the former and the use of force in self-defence to the latter.<sup>20</sup> As a matter of principle, this distinction might survive scrutiny, but what acts would qualify as sufficiently grave as opposed to less intense?

Be that as it may, the ICJ endorsed a similar distinction in *Military and Paramilitary Activities in and against Nicaragua*, maintaining that the proscriptions regarding indirect aggression contained in the *Friendly Relations Declaration* relate to “less grave forms of the use of force,” while aggression would be the gravest.<sup>21</sup> From this perspective, the use of force constitutes the genus, and aggression is a species of it, differentiated from other uses of force by virtue of the characteristics enumerated in Resolution 3314. This distinction may seem unwarranted at first sight, but one must understand that the ICJ had a special end in mind — namely to define the conditions under which a state could exercise its inherent right of self-defence in accordance with Article 51 of the *UN Charter* and customary international law.

Article 51 authorizes a state to use force in self-defence when it is a victim of an armed attack. Therefore, defining what constitutes an armed attack — especially when an armed group or irregular force is involved — is of paramount importance to the determination of situations in which the use of force in self-defence is lawful. The ICJ, citing Resolution 3314,

<sup>19</sup> See Resolution 3314, *supra* note 2, preamble.

<sup>20</sup> Institut de droit international (IDI), Session de Santiago, *Present Problems of the Use of Armed Force in International Law*, Resolution 10A (2007) at para 5, online: <[http://www.justitiaetpace.org/idiE/resolutionsE/2007\\_san\\_02\\_en.pdf](http://www.justitiaetpace.org/idiE/resolutionsE/2007_san_02_en.pdf)>.

<sup>21</sup> *Nicaragua*, *supra* note 4 at para 191. This view was reaffirmed in *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, [2003] ICJ Rep 161 at para 51 [*Oil Platforms*].

has expressed the view that “the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, *because of its scale and effects*, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”<sup>22</sup> It is the court’s understanding, therefore, that the concept of armed attack, which authorizes resort to the right of self-defence, may include armed activity by armed bands, provided it occurs “on a significant scale” and produces sufficiently grave effects. In line with this finding by the ICJ, an authoritative body of opinion endorses a broad concept of armed attack that includes, as protagonists, non-official agencies such as armed bands and other entities not forming part of the regular forces of the state.<sup>23</sup>

#### THE ACCUMULATION THEORY

The precise extent and effects required to qualify armed activity as aggression were not defined by the court in *Nicaragua* or in any other case since, but a good starting point for ascertaining this threshold would be to refer to the specific situations or examples listed in Resolution 3314. Indeed, the court’s view does not seem to sanction a higher or distinctive threshold for armed attacks by non-state entities (as distinct from armed attacks by states directly), since it refers to military actions of the regular armed forces of a state as the relevant point of comparison.<sup>24</sup>

A point that deserved, but did not receive, the court’s explicit attention in the *Nicaragua* case is whether a series of successive attacks by non-state entities that are relatively minor in scale and effect could, by accumulation, amount to an armed attack under Article 51 of the *UN Charter*. Such an accumulation theory would solve the conundrum that an individual attack by a non-state entity is not, as a rule, of sufficient gravity and scale to be classified as an armed attack, such that any military response by the victim state in self-defence would immediately attract charges of being disproportionate and an unlawful act of reprisal.<sup>25</sup> To be sure, if the accumulation

<sup>22</sup> *Nicaragua*, *supra* note 4 at para 195 (emphasis added).

<sup>23</sup> See, eg, Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963) at 361; C Stahn, “Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism” (2003) 27 *Fletcher F World Aff* 38 at 42–43; A Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense” (2011–12) 52 *Virginia J Int’l L* 483 at 492–93.

<sup>24</sup> *Nicaragua*, *supra* note 4 at para 195.

<sup>25</sup> L Sicilianos, “L’invocation de la légitime défense face aux activités d’entités non-étatiques” in A Kiss, ed, *Annuaire de la Haye de droit international* (The Hague: Martinus Nijhoff, 1989) 147 at 155–57.

of incidents is disallowed as a basis for invoking the right of self-defence against non-state entities, the unavoidable consequence is an “encouragement for low-grade terrorism” or unremitting indirect aggression that most commonly affects civilians and vulnerable persons.<sup>26</sup> Bearing in mind the risks associated with outright rejection of the accumulation theory, it is notable that this approach has indeed been ventilated by the court in two cases and that there is a growing body of authoritative opinion and state practice that lend support to it.<sup>27</sup>

At any rate, the ICJ also made a brief statement in the *Nicaragua* case that is open to an interpretation that might protect the vital interests of the victim state even if the accumulation theory is discarded. In response to the United States’ claim that Nicaragua was intervening in neighbouring countries by providing assistance to armed opposition groups and launching transborder attacks, the court observed that “a use of force of a lesser degree of gravity” could entitle the victim state to take “proportionate counter-measures.”<sup>28</sup> Setting aside the debate as to whether there is a real difference between actions in self-defence and counter-measures in response to foreign intervention, the court is here expressing its view as to what is permissible when acts of intervention involving the use of force, though of lesser intensity, take place. This is important because, as noted above, an attack by an armed group may not, in isolation, be considered of sufficient magnitude and scale to be classified as an armed attack. The use of force as a counter-measure against the non-state perpetrator of the attack and its sponsor state might arguably — according to this interpretation — be lawful, provided it respects the criterion of proportionality.

#### SUBSTANTIAL INVOLVEMENT IN AN ARMED GROUP’S ATTACK

In the *Nicaragua* case, the ICJ drew another important distinction between unlawful armed attacks under Article 51 of the *UN Charter* (or acts of

<sup>26</sup> R Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 2004) at 250.

<sup>27</sup> See *Oil Platforms*, *supra* note 21 at para 64: “Even taken cumulatively ... these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a ‘most grave’ form of the use of force”; *Armed Activities*, *supra* note 12 at para 146: “The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC”; Y Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2011) at 221: “A persuasive argument can be made that, should a distinctive pattern of behaviour emerge, a series of pin-prick assaults may be weighed in its totality and count as such an armed attack”; M Hakimi, “Defensive Force against Non-State Actors: The State of Play” (2015) 91 *Int’l L Stud* 17 (and works cited therein).

<sup>28</sup> See *Nicaragua*, *supra* note 4 at paras 248–49.

armed aggression) that involve “the despatch by one state of armed bands into the territory of another state” and “assistance to rebels in the form of the provision of weapons or logistical or other support,” which, according to the court, “may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states.”<sup>29</sup> This distinction founded the conclusion that assistance to rebels by a state does not authorize the use of armed force in individual or collective self-defence, a view that is shared by some authors.<sup>30</sup>

One should pause and ponder the broad implications of this proposition. Pursuant to this position, if a state provides training, arms and munitions, financial assistance, food, military equipment, intelligence, and even means of transportation to an armed rebel group that engages in armed activities against another state or its government, it would not be tantamount to armed aggression by the sponsoring state but, merely, a violation of the non-use-of-force principle and/or the non-intervention principle. The armed insurgent group may have been fully empowered to commit armed aggression against the victim state, and it may have actually engaged in military activities on a significant scale, but because it was not sent by the sponsor state, the latter will have committed no armed aggression and should not suffer military retaliation otherwise justifiable on the grounds of self-defence.

Surely this view serves to encourage further acts of intervention and vicarious aggression, for it relieves states from the most undesirable consequence stemming from an act of aggression: a forcible response. Judge Jennings sharply criticized this view in *Nicaragua*, arguing that “to say that the provision of arms, coupled with ‘logistical or other support’ is not armed attack is going much too far” and that this conclusion was “neither realistic nor just” but, rather, restricted without justification the requirements of lawful self-defence.<sup>31</sup> Judge Schwebel shared this criticism, adding that “the Court appears to offer — quite gratuitously — a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival.”<sup>32</sup>

An analysis of the *travaux préparatoires* of Resolution 3314 was undertaken by Judge Schwebel to demonstrate that the ICJ’s decision fundamentally followed the reasoning behind a proposal submitted by a group of small

<sup>29</sup> *Ibid* at paras 195, 247.

<sup>30</sup> *Ibid* at para 211. Judge Ruda emphatically endorsed this view, affirming that “juridically, the concept of ‘armed attack’ does not include assistance to rebels” (*ibid* at 174, para 13 (separate opinion of Judge Ruda)). See also P Zanardi, “Indirect Military Aggression” in A Cassese, ed, *The Current Legal Regulation of the Use of Force* (The Hague: Martinus Nijhoff, 1986) 112.

<sup>31</sup> See *Nicaragua*, *supra* note 4, 528 at 543 (dissenting opinion of Judge Jennings).

<sup>32</sup> *Ibid*, 259 at para 177 (dissenting opinion of Judge Schwebel).

and middle powers that was ultimately defeated in the negotiations leading to the adoption of Resolution 3314. This proposal recognized only direct armed aggression among states and denied recourse to the right of individual or collective self-defence against a state that organized or supported an armed group's subversive or terrorist activities against other states.<sup>33</sup>

The ICJ also seems to have neglected an important consideration in advancing its distinction between sending and supporting or assisting armed groups. As noted above, the court considered the whole of Article 3(g) of Resolution 3314 to be reflective of customary international law. Therefore, the substantial involvement of a state in the sending of armed bands that carry out armed aggression against another state ought also to be considered an act of aggression. Having ignored this part of the provision, the issue of what actions might amount to "substantial involvement" passed unnoticed in the court's decision. However, a tentative, illustrative list of such actions was provided by Judge Schwebel in his dissenting opinion:

[N]ot only the provision of weapons and logistical support, but also participation in the re-organization of the rebellion; provision of command-and-control facilities on its territory for the overthrow of the government of its neighbour by that rebellion; provision of sanctuary for the foreign insurgent military and political leadership, during which periods it is free to pursue its plans and operations for overthrow of the neighbouring government; provision of training facilities for those armed bands on its territory and the facilitation of passage of the foreign insurgents to third countries for training; and permitting the rebels to operate broadcasting and other communication facilities from its territory in pursuance of their subversive activities."<sup>34</sup>

Indeed, supporting actions such as these should not be taken as less grievous than the "act of sending" an armed group. After all, an armed group could not be sent — and surely could not launch a successful armed attack on behalf of a state — without such operational and logistical support. As the United States maintained in the *Nicaragua* case, "while specific attribution is impossible, it is unquestionable that much of this cost — and a large portion of the thousands of deaths which have taken place in the past four years — would not have been incurred but for the substantial support provided by and through Nicaragua to the Salvadoran guerrillas."<sup>35</sup>

<sup>33</sup> *Ibid* at paras 162–65.

<sup>34</sup> *Ibid* at para 171.

<sup>35</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, "Counter-Memorial of the United States of America (Jurisdiction and Admissibility)" (17 August 1984), [1984] ICJ Pleadings (vol 2) 3 at 59, para 195.

This argument is even more persuasive if one considers the difficulty of proving the “act of sending” as opposed to the “act of providing assistance.” Arms and ammunition, for example, are rather easier to find and trace than orders or directives originating from the sponsoring state, given that vicarious aggression is usually undertaken in such a way as to conceal the involvement of the sponsoring government.<sup>36</sup>

This debate over the distinction between “sending” and “assisting” resurfaced in the 2005 case, *Armed Activities on the Territory of the Congo*. There, Uganda argued that the phrase “substantial involvement therein” includes the provision of logistical support and that, as a result, “the giving of logistical support to armed bands with knowledge of their objectives constitutes an armed attack.”<sup>37</sup> The Democratic Republic of the Congo (DRC) argued, in turn, that substantial involvement requires that the sponsoring government give “specific instructions or directions” to the armed group or that it “controls” the performance of such acts.<sup>38</sup> This last view, however, seems to be more concerned with the attribution of state responsibility for the actions of the armed group (an argument that surely favoured the DRC’s position in the case, as it is difficult to apply rules of attribution to any particular situation). The ICJ sidestepped the issue raised by Uganda, turning its attention solely to the question of attribution — that is, whether the alleged armed attacks by the armed group against Uganda could be attributed to the DRC.<sup>39</sup>

The distinction between “sending” and “assisting” does not appear in the definition of aggression contained in the 2005 *African Union Non-Aggression and Common Defence Pact*. This treaty defines an act of aggression as “the sending by, or on behalf of a Member State or the provision of any support to armed groups, mercenaries, and other organized trans-national criminal groups which may carry out hostile acts against a Member State, of such gravity as to amount to the acts listed above, or its substantial involvement therein”.<sup>40</sup> Equating assistance to sending highlights the connection

<sup>36</sup> See, eg, Conflict Armament Research, *Islamic State Weapons in Iraq and Syria: Analysis of Weapons and Ammunition Captured from Islamic State Forces in Iraq and Syria* (London: Conflict Armament Research, 2014), online: <[http://conflictarm.com/wp-content/uploads/2014/09/Dispatch\\_IS\\_Iraq\\_Syria\\_Weapons.pdf](http://conflictarm.com/wp-content/uploads/2014/09/Dispatch_IS_Iraq_Syria_Weapons.pdf)>. Detecting the manufacturer or origin of the weapon does not, however, determine the complete chain of custody or establish beyond a doubt the attribution of international responsibility.

<sup>37</sup> See *Armed Activities*, *supra* note 12 at paras 29–30.

<sup>38</sup> See *Armed Activities on the Territory of the Congo*, [2002] ICJ Pleadings, vol 1 at para 3.135 (République de la République Démocratique du Congo, 29 May 2002).

<sup>39</sup> See *Armed Activities*, *supra* note 12 at para 146.

<sup>40</sup> See *African Union Non-Aggression and Common Defence Pact*, 1 January 2005, art 1 (c) (viii), online: <[http://www.au.int/en/sites/default/files/treaties/7788-file-african\\_union\\_non\\_aggression\\_and\\_common\\_defence\\_pact.pdf](http://www.au.int/en/sites/default/files/treaties/7788-file-african_union_non_aggression_and_common_defence_pact.pdf)> (emphasis added).



between the resulting armed action perpetrated by the armed group and the political objectives of the sponsoring state. It is indeed difficult to conceive that a state would provide substantial support to an armed group without knowledge of this entity's aims and agenda, including the eventual targets of its armed actions. Otherwise, how could the supporting state, for example, be reassured that the armed group would not turn its weapons against that state's own population and officials? Why would a state spend money, intelligence, and other resources, and "donate" weapons and equipment, unless it sees the actions of the armed group as advancing its own foreign policy agenda?

For these reasons, substantial support should be taken as presumptive evidence of the act of sending the armed group, or of the fact that the armed group is acting on behalf of the supporting state, assimilating this armed group to a *de facto* organ of that state. In conclusion, notwithstanding the court's position and reservations, the foregoing considerations suggest that it is unjustified to exempt a state from responsibility for the commission of armed aggression when it has played a significant role in encouraging and enabling armed attacks by a non-state armed entity.

#### THE ORIGIN OF THE NON-STATE ENTITY

The ICJ's advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Israeli Wall)* set out another condition for the exercise of self-defence by the victim state: that the attack by the armed group originate from abroad.<sup>41</sup> In a similar vein, the North Atlantic Treaty Organization's (NATO) first invocation of Article 5 of the *North Atlantic Treaty* initially sought to determine whether the 11 September 2001 armed attack suffered by the United States had come from abroad.<sup>42</sup> Unlike the court in *Israeli Wall*, however, NATO did not view the origin of the attack as a condition precedent for the exercise of self-defence but, instead, as a question relating to whether the situation came within the solidarity clause under the *North Atlantic Treaty*.<sup>43</sup> The reasoning underlying such an inquiry was that armed attacks emanating from domestic non-state entities should be dealt with by the security apparatus of the state under its domestic legal system rather than by outside intervention. However, the question still remains as to whether foreign state assistance to a domestic armed opposition group that enables it to carry out domestic armed attacks will attract the international responsibility of the foreign state concerned (for violation of the non-intervention and/or non-use of force principles).

<sup>41</sup> See *Israeli Wall*, *supra* note 4 at para 139.

<sup>42</sup> *North Atlantic Treaty*, 4 April 1949, 34 UNTS 244, Can TS 1949 No 7, art 5.

<sup>43</sup> See E Buckley, "Invoking Article 5" (2006) NATO Review 1, online: <<http://www.nato.int/docu/review/2006/issue2/english/art2.html>>.

## SELF-DEFENCE AGAINST NON-STATE ENTITIES ENGAGED IN ARMED ATTACKS

The acceptance by the ICJ, in the *Nicaragua* case, that armed groups can commit aggression did not touch upon the question of whether the state victim of the armed attack can lawfully exercise its right of self-defence directly against that non-state entity. (One should recall that the right of collective self-defence was being invoked by the United States against another state — namely Nicaragua — as opposed to a non-state entity as such.) In a subsequent advisory opinion relating to the construction of a wall by Israel in the occupied Palestinian territory, the ICJ seems to have rejected this possibility.<sup>44</sup> Considering the Israeli argument of self-defence against Palestinian armed groups, the court succinctly stated that Article 51 of the *UN Charter* applies to armed attacks by one state against another state. Based on this restrictive interpretation, the court summarily dismissed Israel's self-defence argument given that Israel did not "claim that the attacks against it are imputable to a foreign state."<sup>45</sup> According to this view, in a situation of armed attack by a non-state entity, the victim state can only claim a right of self-defence against another state to which responsibility for the attack may be clearly attributed.<sup>46</sup>

This matter was also raised in the 2005 *Armed Activities* case, where Uganda alleged that it had used force in self-defence against armed groups launching cross-border attacks against it from Congolese territory. Following its previously settled position that the right of self-defence can only be invoked against another state, the ICJ looked for legal and factual circumstances that might establish the DRC's responsibility for these attacks. In the absence of a basis for attributing the rebel groups' armed activities to the DRC, the court dismissed Uganda's legal justification for its use of force in DRC territory based on self-defence. Even though Uganda had asserted a right of self-defence against the non-state entities themselves, the court declined to address "whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."<sup>47</sup> One is therefore bound to conclude that the court has shown itself to be rather reluctant to accept the existence of a right of self-defence against non-state entities as such.

The ICJ's interpretation of Article 51 and the right of self-defence in the *Israeli Wall* advisory opinion did not receive unanimous endorsement

<sup>44</sup> *Israeli Wall*, *supra* note 4.

<sup>45</sup> *Ibid* at para 139.

<sup>46</sup> Notice that Resolution 3314 defines aggression as "the use of armed force ... by a State against the sovereignty, territorial integrity or political independence of another State." Resolution 3312, *supra* note 2, art 1.

<sup>47</sup> See *Armed Activities*, *supra* note 12 at para 147.

from the bench. Judges Higgins, Buergenthal, and Kooijmans could not share the finding that the wording of Article 51 subjects the exercise of self-defence to the occurrence of an armed attack by states or attributable to states only.<sup>48</sup> Judges Buergenthal and Kooijmans, in particular, made reference to the legal novelty introduced by UNSC Resolutions 1368 and 1373, which recognized the right of self-defence in a situation of armed attack originating from a non-state entity without restricting its application to acts attributable to states.<sup>49</sup> Indeed, the context and text of these resolutions suggest that they were intended to include the non-state actor responsible for the attacks within the scope of the right of self-defence.

The 2005 *Armed Activities* case also shows disagreement among judges on this matter. Judge Kooijmans argued that Article 51 of the *UN Charter* does not proscribe a state from resorting to force in self-defence if it suffers an armed attack by non-state entities that could be classified as an armed attack had it been “carried out by regular armed forces.”<sup>50</sup> In such circumstances, Judge Kooijmans added, it would be “unreasonable to deny the attacked state the right to self-defence merely because there is no attacker state, and the Charter does not so require.”<sup>51</sup> Judge Simma expressed full agreement with Judge Kooijmans’ position, estimating that UNSC Resolutions 1368 and 1373 represented an endorsement of the view that “large-scale attacks by non-state actors can qualify as ‘armed attacks’ within the meaning of Article 51.”<sup>52</sup>

Considering the destructive capability showed by a non-state entity in the 11 September 2001 terrorist attacks, Christopher Greenwood has argued that “it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependent upon whether their acts could somehow be imputed to a state.”<sup>53</sup> State practice and the practice of international organizations seem to sanction this divergent view. After the 11 September 2001 terrorist attacks against the United States, several countries — in addition to the United States — notified the UNSC of measures taken under Article 51 of

<sup>48</sup> See *Israeli Wall*, *supra* note 4, 240 at paras 5–7 (declaration of Judge Buergenthal), 207 at paras 33–34 (separate opinion of Judge Higgins), and 219 at paras 35–36 (separate opinion of Judge Kooijmans).

<sup>49</sup> UNSC Resolution 1368, UN Doc S/RES/1368 (12 September, 2001) [Resolution 1368]; UNSC Resolution 1373, UN Doc S/RES/1373 (28 September, 2001) [Resolution 1373].

<sup>50</sup> See *Armed Activities*, *supra* note 12, 306 at para 29 (separate opinion of Judge Kooijmans). This view should be taken as being in accordance with the ICJ’s interpretation (in *Nicaragua*, *supra* note 4) of what Resolution 3314, *supra* note 2, says about vicarious aggression.

<sup>51</sup> See *Armed Activities*, *supra* note 12, 306 at para 30 (separate opinion of Judge Kooijmans).

<sup>52</sup> *Ibid.*, 301 at paras 11–12 (separate opinion of Judge Simma).

<sup>53</sup> See Christopher Greenwood, “International Law and the ‘War against Terrorism’” (2002) 78(2) *Int’l Affairs* 301 at 307.

the *UN Charter* against Al-Qaeda (a non-state entity) and its sponsoring or harbouring government, the Taliban regime.<sup>54</sup> It is noteworthy that many of those states also made explicit reference to UNSC Resolutions 1368 and 1373. Besides the UNSC, five formal and informal regional arrangements (NATO,<sup>55</sup> the parties to the *Security Treaty between the United States, Australia, and New Zealand (ANZUS)*,<sup>56</sup> the European Union (EU),<sup>57</sup> the Rio Group,<sup>58</sup> and the Organ of Consultation under the *Inter-American Treaty of Reciprocal Assistance*<sup>59</sup>) recognized the occurrence of an armed attack by a non-state entity and the corresponding right of individual or collective self-defence.

The relevance of a UNSC determination, such as that made in Resolutions 1368 and 1373, should not be under-estimated.<sup>60</sup> This organ has been entrusted under the *UN Charter* with the management of the UN collective

<sup>54</sup> See the following Letters from the respective permanent representatives addressed to the President of the UNSC: United States (UN Doc S/2001/946 (2001)), France (UN Doc S/2001/1103 (2001)), Canada (UN Doc S/2001/1005 (2001)), Germany (UN Doc S/2001/1127 (2001)), Netherlands (UN Doc S/2001/1171 (2001)), Australia (UN Doc S/2001/1104 (2001)), New Zealand (UN Doc S/2001/1193 (2001)), Poland (UN Doc S/2002/275 (2001)), Norway (UN Doc S/PV.4414 (2001) at 13), Egypt (UN Doc S/PV.4414, Resumption 1 (2001) at 22), and United Kingdom (UN Doc S/2001/947 (2001)). Ten other states (Albania, Bulgaria, Croatia, Estonia, Latvia, Lithuania, Macedonia, Romania, the Slovak Republic, and Slovenia) pledged assistance to the United States under Article 5 of the *North Atlantic Treaty*, *supra* note 42, even though at the time they were not parties to the treaty (see UN Doc A/56/466 (2001)).

<sup>55</sup> See NATO Press Release M-NAC-2 (2001)159 and Statement by NATO Secretary General, 2 October 2001, online: NATO <<http://www.nato.int/docu/speech/2001/s011002a.htm>>.

<sup>56</sup> *Security Treaty between the United States, Australia, and New Zealand*, 1 September 1951, [1952] ATS 2. See Letter dated 23 November 2001 from the permanent representative of Australia to the United Nations, UN Doc S/2001/1104 (2001).

<sup>57</sup> See *Statement of the General Affairs Council of the European Union, on Behalf of the European Union, on Action against the Taliban Following the Terrorist Attacks in the United States*, UN Doc S/2001/967 (2001); *Council Conclusions: Action by the European Union Following the Attacks in the United States of America*, UN Doc S/2001/980 (2001).

<sup>58</sup> See UN Doc A/56/637-S/2001/1091 (2001). The Rio Group comprises an informal regional arrangement of twenty-four Latin American and Caribbean states.

<sup>59</sup> See Organization of American States (OAS), *Terrorist Threat to the Americas*, Resolution adopted at the First Plenary Session of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc OEA/Ser.F/II.24, RC.24/RES.1/01 (21 September 2001), online: <<http://www.oas.org/OASpage/crisis/RC.24e.htm>>; *Inter-American Treaty of Reciprocal Assistance*, 2 September 1947, 21 UNTS 324, online: OAS <<http://www.oas.org/juridico/english/treaties/b-29.html>>.

<sup>60</sup> Authors like *Abi-Saab*, however, argue that these resolutions made only a general statement amounting to a “without prejudice clause” designed to reserve the future application of the right of self-defence should the requirements for its exercise be found to be present. See *G Abi-Saab*, “The Proper Role of International Law in Combating Terrorism” (2002) 1 *Chinese J Int'l L* 309.

security system. This is why the *UN Charter* confers upon it the primary responsibility for the maintenance of international peace and security.<sup>61</sup> The ICJ's position on self-defence, and its construction of Article 51, do not affect the competence of the UNSC under the *UN Charter* to make its own determination as to the occurrence of an act of aggression (or breach of peace), an armed attack, or a threat to international peace and security and to recognize, authorize, or endorse the lawful use of force in self-defence. The practice of the UNSC shows instances of such determinations being made and of measures being taken on the basis of Chapter VII.<sup>62</sup> Indeed, the competence of the UNSC in determining the occurrence of aggression and exercising its powers under Chapter VII of the *UN Charter* is reaffirmed in the body of Resolution 3314.<sup>63</sup> Granted, considering that the UNSC is a political body, enjoying and exercising a large degree of discretion, it is not certain that it will necessarily follow in all situations the strict legal criteria espoused by the ICJ in its jurisprudence.<sup>64</sup>

The terrorist attacks of 11 September 2001 represent a landmark case in which the right of self-defence against non-state entities and their sponsor states was recognized in state practice, but there are other instances. In 2006, Israel launched military operations against Hezbollah, invoking its right to self-defence under Article 51 of the *UN Charter*.<sup>65</sup> In doing so,

<sup>61</sup> *UN Charter*, *supra* note 1, art 24.

<sup>62</sup> In UNSC Resolution 546, UN Doc S/RES/546 (1984) at paras 2–3, the UNSC condemned the “armed attacks” and “acts of aggression” committed by South Africa against Angola’s sovereignty and territorial integrity and placed demands upon South Africa and other states while reaffirming Angola’s right to self-defence in accordance with Article 51 of the *UN Charter*. In UNSC Resolution 573, UN Doc S/RES/573 (1985) at paras 1–2, the UNSC condemned Israel for “the act of armed aggression ... against Tunisian territory,” demanding that Israel abstain from such acts or “from threatening to do so.”

<sup>63</sup> Resolution 3314, *supra* note 2, arts 2, 4, 6.

<sup>64</sup> As Judge Simma rightly pointed out, the UNSC may, for political reasons, decline to classify a situation as a case of aggression, whereas the ICJ is guided by the law only (see *Armed Activities*, *supra* note 12, 334 at para 3 (separate opinion of Judge Simma). Roberts and Zaum argue that the *UN Charter*, notably in its Chapters VI and VII, provides a framework for selectivity (in the sense of discretion) by the UNSC that encompasses its right to make determinations and to exercise its powers under Chapter VII. See Adam Roberts and Dominik Zaum, *Selective Security: War and the United Nations Security Council since 1945* (London: International Institute for Security Studies, 2008) at 11–15.

<sup>65</sup> Hezbollah is here considered a non-state entity, an armed group, without prejudice to the legal nature of its ties to the government of Lebanon. According to the UN Commission of Inquiry on Lebanon, international humanitarian law would classify Hezbollah as “an armed group, a militia, whose conduct and operations enter into the field of application of article 4, paragraph 2(b), of the Third Geneva Convention of 12 August 1949.” See Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc A/HRC/3/2 (23 November 2006) at 23, para 57.

it expressly singled out Lebanon, Syria, and Iran as being responsible for supporting Hezbollah.<sup>66</sup> Though the UNSC failed to recognize explicitly, in a resolution, Israel's right of self-defence in this case, it characterized Hezbollah's actions on 12 July 2006 as an "attack" and emphasized the large-scale effects of the conflict.<sup>67</sup> In the debates that ensued in the UNSC, several countries recognized Israel's right to self-defence, though some of them also questioned or called for its compliance with the legal requirement that its actions in self-defence be proportional.<sup>68</sup> The UN secretary-general reiterated before the UNSC his conviction that Israel had the right to defend itself under Article 51 of the *UN Charter* while also calling for restraint on the part of Israel.<sup>69</sup> The Group of Eight (Canada, the United States, Russia, Italy, France, Germany, Japan, and the United Kingdom) issued a statement on the Middle East, adopted during the St. Petersburg Summit, conceding Israel's right to self-defence in this situation while also stressing the need for Israel to be "mindful of the strategic and humanitarian consequences of its actions."<sup>70</sup> True, Israel's military actions were also the object of severe criticism by a number of countries, but, interestingly enough, these focused mostly on the unlawful use of force against Lebanon,<sup>71</sup> failing to condemn Israeli actions taken

<sup>66</sup> See Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937-S/2006/515 (2006).

<sup>67</sup> In the words of UNSC Resolution 1701, "hundreds of deaths and injuries on both sides, extensive damage to civilian infrastructure and hundreds of thousands of internally displaced persons." See UNSC Resolution 1701, UN Doc S/RES/1701 (2006).

<sup>68</sup> Those countries were: Peru (UN Doc S/PV.5489 (2006) at 14), Argentina (UN Doc S/PV.5489 (2006) at 9), Denmark (UN Doc S/PV.5489 (2006) at 15), Greece (UN Doc S/PV.5489 at 17), France (UN Doc S/PV.5489 (2006) at 17), United Kingdom (UN Doc S/PV.5489 (2006) at 12), United States (UN Doc S/PV.5493 (2006) at 17) and Slovakia (UN Doc S/PV.5493 (2006) at 18).

<sup>69</sup> See UN Security Council, Provisional Verbatim Record of the 5492<sup>nd</sup> Meeting, UN Doc S/PV.5492 (2006) at 3: "I have already condemned Hizbollah's attacks on Israel and acknowledged Israel's right to defend itself under Article 51 of the United Nations Charter. I do so again today."

<sup>70</sup> See *Letter from the Permanent Representative of the Russian Federation to the United Nations*, UN Doc S/2006/556 (2006): "It is also critical that Israel, while exercising the right to defend itself, be mindful of the strategic and humanitarian consequences of its actions."

<sup>71</sup> See Saudi Arabia (UN Doc S/PV.5493 (2006), Resumption 1 at 20); Islamic Republic of Iran (UN Doc S/PV.5493 (2006), Resumption 1 at 30); Djibouti (UN Doc S/PV.5493 (2006), Resumption 1 at 32); Sudan (UN Doc S/PV.5493 (2006), Resumption 1 at 38); United Arab Emirates (UN Doc S/PV.5493 2006, Resumption 1 at 42).



against Hezbollah. Rather, most countries condemned Hezbollah's attacks against Israel.<sup>72</sup>

The November 2015 terrorist attacks in two French cities, for which the so-called Islamic State (ISIL) claimed responsibility, generated a legal response from a significant group of states that supports the existence of a right of self-defence against non-state actors. In the aftermath of the attacks, the defence ministers of the EU agreed — with no dissenting vote — to activate, for the first time, the mutual defence clause under the *Treaty of the European Union*.<sup>73</sup> This provision obliges all EU member states to provide aid and assistance to a member state that is a “victim of armed aggression on its territory.”<sup>74</sup> EU members, instead, could have acted pursuant to the solidarity clause under the *Treaty on the Functioning of the European Union*, but this provision applies to situations where a member state “is the object of a terrorist attack or the victim of a natural or man-made disaster.”<sup>75</sup> Clearly, the intention was to characterize the attacks as armed aggression and not merely as terrorist acts. Supported by the consensus position of the other twenty-seven member states of the EU, France classified the attacks as an “act of war” and an “armed aggression,” claiming that its armed actions against ISIL were justified as legitimate collective and individual self-defence, in accordance with Article 51 of the *UN Charter*.<sup>76</sup> Reference to the right of self-defence was also made by the representatives of the United States and the United Kingdom, during the discussions held in the UNSC, in order to justify their own military actions against ISIL.<sup>77</sup>

<sup>72</sup> See, eg, Democratic Republic of the Congo (UN Doc S/PV.5489 (2006) at 13), Tanzania (UN Doc S/PV.5489 (2006) at 13), China (UN Doc S/PV.5489 (2006) at 11), Ghana (UN Doc S/PV.5489 (2006) at 8), Japan (UN Doc S/PV.5489 (2006) at 11). Qatar, by contrast, showed a somewhat ambivalent position on the issue. Being an Arab country, it owed solidarity to Lebanon. On the other hand, Qatar — alongside other Gulf countries — opposed the role played by the Shiite organization Hezbollah and its sponsor state, Iran, in Lebanon. Therefore, while Qatar recognized “the right of all States, including Lebanon, to defend themselves”, it opposed vehemently Israel's use of force against Lebanon, perhaps implying that it supported Israeli armed actions against Hezbollah (UN Doc S/PV.5489 (2006) at 10).

<sup>73</sup> See *The EU's Mutual Assistance Clause: The First Ever Activation of Article 42(7) TEU*, online: <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2015\)572799](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)572799)> [*First Ever Activation*].

<sup>74</sup> *Treaty on European Union*, [2010] OJ C83/13, art 42(7) [*TEU*].

<sup>75</sup> *Treaty on the Functioning of the European Union*, [2010] OJ C83/47, art 222 [*TFEU*]. See *First Ever Activation*, *supra* note 73.

<sup>76</sup> See UN Doc S/PV.7565 (2015) at 2 (for political reasons, France decided not to invoke Article 5 of the *North Atlantic Treaty*, *supra* note 42).

<sup>77</sup> Security Council, Provisional Verbatim Record of the 7565<sup>th</sup> Meeting, UN Doc S/PV.7565 (2015) at 4, 9.

UNSC Resolution 2249, which was adopted unanimously in response to the ISIL attacks on France, made no express mention of the right to self-defence.<sup>78</sup> However, implicit endorsement of the applicability of this right could arguably be inferred from a systematic interpretation of its provisions. In its preambular paragraph, Resolution 2249 characterizes ISIL and its actions as “unprecedented threats to international peace and security” — language that is reminiscent of Article 39 of the *UN Charter*, which may indicate that the UNSC considered itself to be acting under Chapter VII. In its first operative paragraph, Resolution 2249 condemns the ISIL terrorist attacks in Paris (and other places) while observing that it has “the capability and intention to carry out further attacks,” signalling the continuance of the threat.<sup>79</sup> The resolution then calls upon member states to take “all necessary measures” against ISIL in Iraq and Syria. In the practice of the UNSC, the expression “all necessary measures” (or “all necessary means”) is legal and diplomatic code for the use of force.<sup>80</sup> Finally, the resolution urges all member states to continue fully to implement Resolutions 1368 and 1373, which as seen above refer explicitly to the individual and collective right of self-defence.<sup>81</sup>

One should not think that instances of state practice are limited to the year 2001 and onwards. In 1998, for example, Uganda invoked Article 51 of the *UN Charter* to justify forceful measures against foreign-sponsored rebel groups operating within the DRC.<sup>82</sup> The United States also claimed to be acting in self-defence under Article 51 when it launched military operations against Al-Qaeda in response to armed attacks against its embassies and nationals abroad.<sup>83</sup> In light of this state practice, two law-determining agencies, the IDI and the International Law Association (ILA), as well as other research institutions and individual researchers, have endorsed the

<sup>78</sup> UNSC Resolution 2249, UN Doc S/RES/2249 (20 November 2015) [Resolution 2249].

<sup>79</sup> *Ibid* at para 1.

<sup>80</sup> See, eg, UNSC Resolution 678, UN Doc S/RES/678 (29 November, 1990) [Resolution 678]; UNSC Resolution 1973, UN Doc S/RES/1973 (17 March 2011) at paras 4, 8 [Resolution 1973].

<sup>81</sup> See Resolutions 1368 and 1373, *supra* note 49. Admittedly, Resolution 2249, *supra* note 78, does not use the strongest or most direct language to authorize the use of force. The resolution, for example, does not expressly state that the UNSC is “acting under Chapter VII of the Charter” nor does it use the word “authorize” in connection with the “all necessary means” clause. One can only speculate as to the reasons for the attenuated language, but it may be relevant to recognize that the resolution was dealing with several terrorist attacks in different parts of the world.

<sup>82</sup> See General Assembly, Provisional Verbatim Record of the 95th Plenary Meeting, UN Doc A/53/PV.95 (1999) at 14.

<sup>83</sup> See *Letter from the Permanent Representative of the United States to the United Nations*, UN Doc S/1998/780 (1998).

view that states may lawfully exercise their right to self-defence against non-state entities.<sup>84</sup>

## EXTENDING ACTIONS IN SELF-DEFENCE AGAINST A NON-STATE ENTITY TO THE TERRITORY OF THE HOST STATE

### GENERAL CONSIDERATIONS

There is sufficient evidence in state practice and support from law-determining agencies to authorize the view that when a victim state exercises its right to self-defence against armed aggression by a foreign-based, or foreign-supported, armed group, it may, under certain circumstances, be entitled to extend this forcible response to the territory of the state that is hosting, supporting, or harbouring the group. The reach of the right to self-defence against non-state entities located in the territory of another state is grounded in a solid legal tradition. It can be traced back to the old legal maxim *sic utere tuo ut alienum non laedas*, which applies to an owner of property (in this case, the territorial state), requiring it to use its property in a way that does not cause injury or harm to others.<sup>85</sup> This axiom has become a generally accepted principle of international law applicable to the broad field of international responsibility,<sup>86</sup> including in connection with the use of international watercourses,<sup>87</sup> territorial waters,<sup>88</sup> other

<sup>84</sup> See International Law Association (ILA), *Report of the Seventy-Sixth Conference* (Washington: ILA, 2014) at 661; IDI, *supra* note 20 at para 10. E Wilmshurst, “The Chatham House Principles of International Law on the Use of Force in Self-Defence” (2006) 55 ICLQ 969; “Article 51 is not confined to self-defence in response to attacks by States. The right of self-defence may apply also to attacks by non-state actors”; S Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?” (2005) 99 AJIL 67; “[W]hatever the original meaning of Article 51 might have been, subsequent state practice appears to support the permissibility of responding in self-defense to an attack by a non-state actor.”

<sup>85</sup> See B Boczek, *International Law: A Dictionary* (Lanham, MD: Scarecrow Press, 2005) at 37. The maxim also applies to common spaces, according to *The Marianna Flora; The Vice Consul of Portugal, Claimant* (1826) 11 Wheaton’s Rep 1 at 42.

<sup>86</sup> According to Oppenheim, “[t]he maxim *sic utere tuo ut alienum non laedas* is applicable to relations of states no less than to those of individuals ... [I]t is one of those general principles of law recognized by civilized states which the International Court is bound to apply by virtue of Article 38 of its Statute.” See R Jennings and A Watts, eds, *Oppenheim’s International Law*, 9th ed (Oxford: Oxford University Press, 2008) vol 1 at 408.

<sup>87</sup> The fifth report of the ILC’s special rapporteur on the law of the non-navigational uses of international watercourses refers to this principle to justify the obligation of every watercourse state to utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse states. See UN Doc A/CN.4/421 & Corr.1-4 and Add.1 & 2 (1989) at 115, n 143.

<sup>88</sup> See J Westlake, *International Law*, part 1 (Cambridge: Cambridge University Press, 1910) at 313 (Westlake mentions the principle in his argument against the use of floating mines by a state in its territorial waters, as this could cause damage to “unoffending foreigners”).

marine areas,<sup>89</sup> and outer space,<sup>90</sup> as well as generally in relation to the protection of the environment.<sup>91</sup> No less important, though, is its association with the doctrine of the abuse of rights. As Hersch Lauterpacht has pointed out, a “large part of the law of intervention is built upon the principle that obvious abuse of rights of internal sovereignty, in disregard of the obligations to foreign states ... constitutes a good legal ground for dictatorial interference.”<sup>92</sup>

This principle has been affirmed in authoritative international jurisprudence. The *Island of Palmas* arbitration award of 1928 asserted the duty of every state, arising from its territorial sovereignty, to protect the rights of other states within its territory.<sup>93</sup> In the 1949 *Corfu Channel* case, the court affirmed what it considered to be a general and well-recognized principle, namely “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.”<sup>94</sup> Finally, the same principle underlies Article 3(f) of Resolution 3314, which characterizes as an act of aggression “the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state.”<sup>95</sup> The UN secretary-general’s *Survey of International Law in Relation to the Work of Codification of the International Law Commission* summarized well the state of international law on this matter back in 1949: “There has been general recognition of the rule that a state must not permit the use of its territory for purposes injurious to the interests of other states in a manner contrary to international law. This rule has been applied, in particular, with regard to the duty of states to prevent hostile expeditions against the territory of their neighbours.”<sup>96</sup>

<sup>89</sup> See Y Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2015) at 273–74.

<sup>90</sup> L Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (The Hague: Martinus Nijhoff, 2008) at 150–53.

<sup>91</sup> See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 29: “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States ... is now part of the corpus of international law relating to the environment.”

<sup>92</sup> H Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011) at 296.

<sup>93</sup> See *Island of Palmas (Netherlands, USA)*, (1928-II) RIAA 839.

<sup>94</sup> See *Corfu Channel*, Merits, Judgment, [1949] ICJ Rep 4 at 22.

<sup>95</sup> Resolution 3314, *supra* note 2, art 3(f). Article 3(g) also implies — though not exclusively — that the armed band that perpetrates an armed attack is sent from the territory of the state that is charged with an act of aggression.

<sup>96</sup> See *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission — Memorandum submitted by the Secretary-General*, UN Doc A/CN.4/1/Rev.1 (1949) at para 57.

In state practice, reference can be made to the *Caroline* affair (1837–41), a historic, landmark international dispute from which key requisites for the lawful exercise of self-defence were derived.<sup>97</sup> This case concerned a cross-border armed operation by British forces against the steamboat *Caroline*, which was being used to provide assistance to a rebel band located at the border between then Upper Canada and the US state of New York. The ensuing exchange of notes between the British and US governments indicated that both nations agreed with the general principle that limited cross-border armed operations against armed opposition groups located in another state's territory were permissible only as an extraordinary measure of self-defence, provided the requirements of necessity and proportionality were fully satisfied.<sup>98</sup>

One should not under-estimate the continuing relevance of the *Caroline* case for the appraisal of state practice. In examining the guiding criteria of proportionality and necessity for the lawful exercise of self-defence, for example, scholarship continues to reference the *Caroline* affair.<sup>99</sup> Similarly, and notwithstanding the significant normative developments that have taken place since the adoption of the *UN Charter* regarding the use of force, the *Caroline* affair continues to be referenced in the literature, particularly with respect to the right of anticipatory self-defence in the face of an imminent armed attack as well as to the right of self-defence against non-state actors.<sup>100</sup>

Drawing from an extensive analysis of states' domestic and international practice, Lauterpacht reached the conclusion that international law "imposes upon the state the duty of restraining persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states." He thought this obligation would flow not only from the law of neutrality but also, primarily, from the

<sup>97</sup> See Avalon Project, British-American Diplomacy, *The Caroline Case*, online: <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp)>.

<sup>98</sup> See JB Moore, *A Digest of International Law* (Washington, DC: Government Printing Office, 1906) vol 2 at paras 217, 409–14.

<sup>99</sup> See, *inter alia*, Thomas Buergenthal & Sean Murphy, *Buergenthal and Murphy's International Law in a Nutshell*, 5th edition (St Paul, MN: West, 2007) at 400–01; Malcolm N Shaw, *International Law*, 7th edition (Cambridge: Cambridge University Press, 2014) at 820–21.

<sup>100</sup> See, eg, Wilmshurst, *supra* note 84 at 965, 967, 970 (this position was specifically upheld by Sir Franklin Berman, Christopher Greenwood, Vaughan Lowe, Nicholas Wheeler, and Daniel Bethlehem). Ian Brownlie, on the other hand, considered reliance on this precedent to justify a customary legal right of anticipatory self-defence "indefensible." See James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012) at 751.

“well-established customary rule that the territory of a state must not be allowed to serve as a base for military or naval operations against another state.”<sup>101</sup>

When this legal principle is violated with the consequence that an armed attack is suffered by another state, some of the most fundamental rights of the victim state are violated. Surely inspired by the vital role played by this principle in the maintenance of international peace and security, the UNSC occasionally calls on states to “prevent armed individuals and groups from using their territory to prepare and launch attacks on neighbouring countries”<sup>102</sup> or stresses that “every Member State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts.”<sup>103</sup>

In view of these legal considerations, the IDI has conceded the lawfulness of the use of force in self-defence against a state that directs, instructs, or controls a non-state entity that launches a cross-border armed attack.<sup>104</sup> This view is warranted by the fact that in these cases the non-state entity acts as a *de jure* or *de facto* agent of the directing, instructing, or controlling state, such that international responsibility can be attributed to that state.<sup>105</sup> It is submitted, however, that the scope of self-defence may be extended to reach the territory of a host state irrespective of whether it has played a role in directing, instructing, and controlling the non-state entity, particularly in situations where the host state is unwilling or unable to restrain and disband the armed group.

#### HOST STATE UNWILLINGNESS OR INABILITY TO CONTROL THE NON-STATE ENTITY

It is generally recognized that failed or failing states are the main safe haven for armed groups due to the existence of ungoverned or ill-governed spaces in their territory.<sup>106</sup> What, then, is the appropriate response when the host or harbouring state is both a failed state and unwilling or unable to control or neutralize armed bands operating from its territory?

<sup>101</sup> H Lauterpacht, “Revolutionary Activities by Private Persons against Foreign States” (1928) 22 AJIL 105 at 126–27.

<sup>102</sup> See, eg, UNSC Resolution 1467, UN Doc S/RES/1467 (2003).

<sup>103</sup> See, eg, UNSC Resolution 1189, UN Doc S/RES/1189 (1998).

<sup>104</sup> See IDI, *supra* note 20 at para 10.

<sup>105</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43 at paras 391–92.

<sup>106</sup> Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (London: Stationery Office, 2008) at 14.



In determining a state's responsibility for armed attacks launched against foreign targets by non-state entities located in its territory, the approach adopted by the ICJ seems to take into account the territorial government's capacity to exercise its authority and jurisdiction effectively. In the *Armed Activities* case, Uganda contended that the DRC had breached its duty of vigilance by tolerating or acquiescing in the cross-border armed activities of anti-Ugandan rebel groups operating from DRC territory.<sup>107</sup> Counsel for Uganda argued for full responsibility of the host state and the consequential applicability against it of the right to self-defence, asserting that when a state "tolerates the activities of armed bands and the armed attacks which they launch against a neighbouring state, the failure to control renders the state harbouring such armed bands susceptible to action in accordance with Article 51 by the victim state."<sup>108</sup> Sound as this viewpoint may seem, it is at variance with the position maintained by the ICJ. The argument was dismissed by the court on the grounds that the DRC's omission was justified by the difficult terrain where the armed groups operated and the lack of central government control over that territory.<sup>109</sup>

Judge Kooijmans found this view too simplistic, inasmuch as it exempted the state from showing that it had made an effort to fulfil its duty of vigilance by adopting measures calculated to prevent rebel bands from launching cross-border attacks.<sup>110</sup> Indeed, it should be insufficient for a host state simply to allege, as a circumstance precluding the wrongfulness of its conduct, powerlessness to exercise control over part of its territory or armed groups located there, given that the state's "inability to discharge the duty does not relieve it of the duty."<sup>111</sup> The state should have to show efforts in good faith to prevent its territory from being used for acts contrary to the rights of other states. Concrete actions of prevention (through domestic law enforcement measures) and cooperation with potential or actual victim states, designed to address promptly the threat emanating from its territory, ought to be the standard of conduct by which wrongfulness is judged. Along these lines, the IDI recognized, in its 2007 resolution, an international legal obligation of cooperation in this situation: "The state from which the armed attack by non-state actors is launched has the obligation to cooperate with the target state."<sup>112</sup>

<sup>107</sup> See *Armed Activities*, *supra* note 12 at para 277.

<sup>108</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (18 April 2005), CR 2005/7, 8 at para 92 (oral argument of Professor Ian Brownlie).

<sup>109</sup> See *Armed Activities*, *supra* note 12 at paras 300–01.

<sup>110</sup> *Ibid.*, 306 at paras 81–84 (separate opinion of Judge Kooijmans).

<sup>111</sup> Wilmschurst, *supra* note 84 at 970.

<sup>112</sup> See IDI, *supra* note 20 at para 10.

Cooperation is a particularly relevant tool for any failed state that wants to compensate for its lack of adequate resources to deal with armed groups in its territory. Inaction or omission, by contrast, may give rise to charges of aggression. According to the 1933 *Convention for the Definition of Aggression (London Convention)*, for instance, the failure to discharge the obligation of cooperation could be considered an act of aggression.<sup>113</sup> This convention classifies as an act of aggression the “provision of support to armed bands formed in its territory which have invaded the territory of another state, or refusal, notwithstanding the request of the invaded state, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.”<sup>114</sup> Despite its conventional nature and *res inter alios acta* effect, this provision is at least recognition of the importance attached by the parties to appropriate efforts to counter the transnational threat posed by armed groups. Later, at the Nuremberg trials, the general normative significance of the *London Convention* was affirmed when the chief prosecutor for the United States called it “one of the most authoritative sources of international law” on the subject of aggression and made express reference to its provisions in order to define what constitutes an aggressor state.<sup>115</sup>

The view that states are under a legal duty of prevention and cooperation in regard to armed actions of non-state entities located in their territory seems to be in accord with state practice. In the *Caroline* case, for instance, the United States was accused of providing a safe haven to rebel bands operating against British possessions in what later became Canada. The US government argued that its conduct was in conformity with international law (in particular, the non-intervention principle), drawing Britain’s attention to preventive measures taken in that regard, such as its laws on neutrality and an act of Congress adopted in 1838<sup>116</sup>

<sup>113</sup> See *Convention for the Definition of Aggression*, 3 July 1933, 147 LNTS 67 (1934) [*London Convention*]. Originally ratified by nine parties, including the Soviet Union, the provisions of the convention were reproduced in two other treaties ratified by the Soviet Union, Lithuania, Czechoslovakia, Rumania, Turkey, and Yugoslavia. See S Alexandrov, *Self-Defense against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996) at 71.

<sup>114</sup> *London Convention*, *supra* note 113, art 2(5) (emphasis added).

<sup>115</sup> See Office of the United States Chief Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, DC: United States Government Printing Office, 1946) vol 1 at 166. Solera credits the norms of the *London Convention*, *supra* note 113, designed fundamentally by the Soviets, with a long-lasting normative influence that persisted until the adoption of Resolution 3314, *supra* note 2. See Oscar Solera, *Defining the Crime of Aggression* (London: Cameron May, 2007) at 33.

<sup>116</sup> See *An Act Supplementary to an Act Entitled “An Act in Addition to the Act for the Punishment of Certain Crimes against the United States, and to Repeal the Acts Therein Mentioned,”* 28 April, 1818 (Statute II, Chapter XXXI, 10 March 1838). United States Statutes at Large, Session 2, ch. 15,31, 1838, at 212–14.

intended to restrain “military enterprises from the United States into the British Provinces.”<sup>117</sup>

A clearer example, involving a failed state and its efforts to protect the rights of other states from acts of domestic armed groups, is found in the 2011 cooperation arrangement between the government of Kenya and the transitional federal government (TFG) of Somalia.<sup>118</sup> This agreement was designed to deal with the threat posed by the armed group Al-Shabaab, which, operating from Somali territory, had launched successive armed attacks against both Kenya and Somalia, injuring and killing scores of government officials and civilians. By this arrangement, the two governments agreed to cooperate in “undertaking security and military operations, and to undertake coordinated pre-emptive action and the pursuit of any armed elements that continue to threaten and attack both countries.”<sup>119</sup> On the basis of this agreement, Kenya was able to pursue, into Somali territory, members of Al-Shabaab that were participating in cross-border attacks against it. In conveying the text of the agreement to the president of the UNSC, Kenya made it clear that it would be using force as “remedial and pre-emptive action,” thus indicating the legal basis of its actions: anticipatory or pre-emptive self-defence against a non-state entity, the extraterritorial scope of which would be sheltered by the said agreement.<sup>120</sup>

As the ICJ has noted, good faith in international relations is a vital principle of international law, whose function is to guide the fulfilment of legal obligations.<sup>121</sup> In cooperating with Kenya to address this common threat, the Somali government seems to be discharging its duty of vigilance in good faith while, at the same time, protecting its sovereign rights (since bilateral cooperation is a manifestation of the territorial state’s consent rather than a violation of its sovereignty or political independence).

By contrast, Afghanistan and Sudan have been accused of not showing good faith efforts to fulfil their duties as territorial sovereigns. When the United States launched military operations directed at Al-Qaeda targets in response to the 1998 armed attacks against its embassies and nationals, it sought to justify the cross-border nature of its acts by referring to the fact

<sup>117</sup> *Caroline case*, *supra* note 97.

<sup>118</sup> The agreement, concluded on 18 October 2011, is evidenced in a joint communiqué annexed to the *Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council*, UN Doc S/2011/646 [*Letter from Kenya to UN*].

<sup>119</sup> Joint Communiqué, *supra* note 118 at para 2.

<sup>120</sup> *Letter from Kenya to UN*, *supra* note 118.

<sup>121</sup> See *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, [1988] ICJ Rep 69 at 105, para 94.

that Al-Qaeda had maintained a network of facilities in Afghanistan and Sudan from which terrorist attacks had been launched against American targets and that the governments of Sudan and Afghanistan had not acted upon repeated efforts “to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization.”<sup>122</sup>

Similar grounds were alleged by Turkey in 2015 when it identified ISIL as the entity responsible for cross-border armed and terrorist attacks against Turkish nationals and members of its armed forces. Invoking Article 51 of the *UN Charter*, it launched military operations against ISIL targets located in Syria. Turkey justified its military actions in self-defence by arguing that Syria had become a “safe haven” for ISIL, an area used “for training, planning, financing and carrying out attacks across borders platform from which it launched armed attacks against Turkey.”<sup>123</sup> Most significantly for present purposes, Turkey contended that the Syrian government was “neither capable of nor willing to prevent these threats emanating from its territory which clearly imperil the security of Turkey and safety of its nationals.”<sup>124</sup>

Back in 1958, France justified military measures against Tunisian forces and rebel bands located in Tunisian territory by reference to numerous border violations and incursions into French territory by Algerian rebel bands, allegedly aided and abetted by the Tunisian authorities, and to the refusal of Tunisian authorities to take the necessary measures to prevent the recurrence of such incidents, despite several “warnings and suggestions” issued by France.<sup>125</sup>

Absence of effort in good faith to control and disband armed groups and to cooperate with a target state might thus be seen as just cause for that state’s use of force in self-defence in the territory of the host state. Conversely, to require the prior consent of the host state or a reasonable basis for attributing responsibility to that state might be considered an impediment to the exercise of the right of self-defence.<sup>126</sup> It is no wonder, therefore, that states continue to advance claims on the former basis. In 2002, Russia alleged that armed and terrorist attacks were being launched against Russia from a territorial enclave along the border between Georgia

<sup>122</sup> See *Letter from the Permanent Representative of the United States of America to the United Nations*, UN Doc S/1998/780 (1998).

<sup>123</sup> See *Letter from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations*, UN Doc S/2015/563 (2015).

<sup>124</sup> *Ibid.*

<sup>125</sup> See *Letter from the Permanent Representative of France to the President of the Security Council*, UN Doc S/3954 (1958).

<sup>126</sup> See Dire Tladi, “The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle” (2013) 107 *AJIL* 576.

and Russia. It claimed that such enclave was outside the control of Georgia, which seemed “unable or unwilling to counteract the terrorist threat” and that Georgia had not accepted several proposals for joint cooperative action to halt the cross-border incursions or, alternatively, requests for extradition of the perpetrators. Russia concluded with a warning that if Georgia is “unable to establish a security zone ... and does not put an end to the bandit sorties and attacks ... we reserve the right to act in accordance with Article 51 of the Charter of the United Nations.”<sup>127</sup>

The fulfilment of the obligation to cooperate with the victim state is often encouraged or endorsed by the UN — in particular, the UNSC — which considers cooperative arrangements a necessary element of a desirable political answer to cross-border attacks by armed groups involving two or more states. At the same time, a study of the practice of the UNSC shows a reluctance to adjudicate conflicting legal claims and attribute responsibility, as this might prejudice a political settlement that would be acceptable to the governments concerned.<sup>128</sup> In 1998, amid the humanitarian crisis in Darfur, the UNSC received letters from Chad and Sudan in which each accused the other of aggression through planning, training, arming, financing, and sending of armed groups involved in armed attacks against it.<sup>129</sup> Both states claimed to have acted in self-defence in response to such aggression. The UNSC adopted a resolution under Chapter VII of the *UN Charter* that made no determination as to which state had committed aggression or which could claim a lawful exercise of its right of self-defence. Instead, it offered the ingredients of a political solution to the crisis, expressing its concern “at the activities of armed groups and other attacks,” demanding the immediate cessation of violence by those armed groups and encouraging the governments of Sudan, Chad, and the Central African Republic to “ensure that their territories are not used to undermine the sovereignty of others” and to cooperate “with a view to putting an end to the activities of armed groups in the region and their attempts to seize power by force.”<sup>130</sup>

<sup>127</sup> See *Letter from the Permanent Representative of the Russian Federation to the United Nations*, UN Doc S/2002/1012 (2002). It must be noted that Georgia’s response did not deny incursions by armed bands from its territory but alleged that they were “mostly citizens of the Russian Federation,” while arguing that article 51 of the *UN Charter* did not apply to the case since Georgia had not attacked Russia. See *Letters from the Permanent Representative of Georgia to the United Nations*, UN Docs A/57/408 and S/2002/1033 (2002).

<sup>128</sup> See O Schachter, “The Quasi-Judicial Role of the Security Council and the General Assembly” (1964) 58 *AJIL* 961.

<sup>129</sup> See *Letter from the Permanent Representative of Chad to the United Nations*, UN Docs S/2008/21 and S/2008/332 (2008); *Letter from the Permanent Representative of the Sudan to the United Nations*, UN Doc S/2008/325 (2008).

<sup>130</sup> See UNSC Resolution 1834, UN Doc S/RES/1834 (2008).

## NEGATIVE CONSEQUENCES OF EXTENDING THE USE OF FORCE IN SELF-DEFENCE TO THE TERRITORY OF THE HOST STATE

As a corollary to the failure of a host state to fulfil its duty to prevent and cooperate, a state that suffers an armed attack from an armed group based in the host state ought to be able to implement forceful measures in self-defence against that group despite the fact that it is headquartered abroad.<sup>131</sup> The application of this principle, however, is not free from considerable difficulties. First, there is no doubt that any such forceful measures in self-defence would *prima facie* be deemed to violate the host state's territorial integrity and political independence and, thus, be regarded by that state as an infringement of the non-use-of-force principle and its sovereignty. For instance, when military forces from Uganda and Rwanda entered the DRC under the justification of defending themselves against armed groups operating from DRC territory, the DRC considered itself a "victim of armed aggression, as defined in resolution 3314."<sup>132</sup>

In addition, third states might consider the host state to be the victim of foreign aggression and, hence, offer military aid (possibly under the justification of collective self-defence), further aggravating the conflict. For instance, in 1999, following an express invitation by the Congolese government, Uganda's and Rwanda's actions in the DRC triggered military assistance to the DRC by three other African nations (Namibia, Angola, and Zimbabwe) on the basis of their commitments under the *Treaty of the Southern African Development Community*.<sup>133</sup> However, that said, no state should be allowed, as a matter of principle, to hide behind the shield of its sovereignty when it is pursuing shady foreign policy goals in connection with unlawful and vicarious uses of force.

Recognizing the windows of opportunity that would be open to great powers by recognition of this principle, authors have raised the objection that it would allow the strongest to act as *iudex in causa sua*, blurring the line between defensive and offensive (or aggressive) action and, ultimately, undermining the rule of law in the international community.<sup>134</sup>

<sup>131</sup> Israel was one of the first states to develop this legal justification expressly, claiming that it possessed the right to defend itself against "incursions or armed bands and other acts of terrorism from the territory of another State." This claim was, however, contested by many Arab states during the UNSC debates. See *Repertoire of the Practice of the Security Council, Supplement 1975-1980* (New York: United Nations, 1987) at 402.

<sup>132</sup> See *Armed Activities*, *supra* note 12 at para 23.

<sup>133</sup> *Treaty of the Southern African Development Community*, 17 August 1992, online: Southern African Development Community (SADC) <[http://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf)>. See UN Doc S/PV.3987 (1999) at 5, 9.

<sup>134</sup> See, eg, Manuel García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague: Martinus Nijhoff, 1962) at 116-18.



There is no question that the exercise of any right might be subject to abuse, undermining the rules-based international order. As Judge Lauterpacht has noted, every state is expected to avoid crossing “the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right ... and the abuse of that right.”<sup>135</sup> The risk of an abuse of right is bound to be particularly high if the intervening state is a great power, is acting on the basis of its own unilateral assessment of the facts, and if reprisal and punishment, rather than self-defence, are the true impetus for its actions.<sup>136</sup> One is also aware that in the misapplication of the principle, a powerful state might resort to false claims and staged incidents in order to justify armed intervention against weaker states.

The problem with this objection is that it applies equally to all principles and norms associated with the use of force in international relations. One cannot dissociate power politics from international politics. From a legal viewpoint, the misapplication or misinterpretation of any legal principle is always a possibility, given the limitations of an international legal system that reflects the decentralized nature of international society (further discussed later in this article). Legal justifications will ultimately be judged by members of the international community, and any resort to armed force is subject to the mechanisms of control and supervision of the UN collective security system (however (in)effective they might be).

#### AVOIDING THE ABUSE OF THE RIGHT TO USE OF FORCE IN SELF-DEFENCE IN THE TERRITORY OF A HOST STATE

In arguing for the right of a victim state to take armed action in the territory of a state harbouring or tolerating activities by armed non-state entities, Thomas Franck has suggested some criteria to be satisfied by the state exercising this right, including respect for the territorial integrity and political independence of the harbouring state and proportionality of the measures taken.<sup>137</sup> Indeed, the determination as to whether or not there has been an abuse of right in any situation will have to be made with reference to the criteria of necessity and proportionality.

<sup>135</sup> *South-West Africa — Voting Procedure*, Advisory Opinion, [1955] ICJ Rep 67, 90 at 120 (separate opinion of Judge Lauterpacht).

<sup>136</sup> Ian Brownlie, “International Law and the Use of Force by States’ Revisited” (2002) 1 Chinese J Int’l L 19.

<sup>137</sup> See Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2005) at 67–68. The conclusion of the author was based upon a thorough review of state practice and the practice of the United Nations.

NECESSITY IN SELF-DEFENCE AGAINST NON-STATE ENTITIES

Necessity dictates that no military intervention abroad in self-defence would be justified if the host or harbouring state takes immediate and effective measures to neutralize, disarm, and disband the armed group, adopts measures to hold accountable those responsible for crimes under international law (or is willing to extradite them), and shows a disposition to compensate for damages incurred by the victim state. This would be the ideal type of response from the host state, but one must concede that this attitude is likely to be rather unusual, such that it would be more realistic to expect a more measured reaction by the host state, one that takes into account its resources, its degree of control over the territory, and its foreign policy goals.

As for the victim state, it seems unreasonable to require that it await action by the harbouring or host state before taking forcible measures in self-defence in order to halt or repel an ongoing armed attack; after all, such a situation would leave the victim state “no choice of means, and no moment for deliberation.”<sup>138</sup> Equally, there is no reason why the victim state should await measures against the non-state entity by the host state when the latter is clearly unable or unwilling to take such measures. For instance, in 1996, Israel took military measures against Hezbollah, alleging an exercise of its right of self-defence under Article 51 of the *UN Charter*. During the ensuing debates in the UNSC, the representative of Egypt conceded that “firing Katyusha rockets across borders is indeed a proscribed act which must cease forthwith.” However, instead of upholding Israel’s right to self-defence, it proceeded to argue that Israel and Lebanon should have utilized the mechanisms provided by the armistice agreement in force and that these two countries could also have reached an agreement on security guarantees to be implemented by the UN.<sup>139</sup> This prescription could perhaps have played some role in settling the conflict in the long run and functioned as an element of a more comprehensive, regional settlement. At the time, however, Lebanon was unable to negotiate or implement any agreement with Israel for the simple fact that it clearly lacked control over its southern territory and the Hezbollah organization. The representative of Egypt must have known this since the UNSC had tried without success, since 1974, to assist Lebanon in re-establishing its authority and control over the area.<sup>140</sup> In cases like these, to expect the victim state

<sup>138</sup> See *Caroline* case, *supra* note 97.

<sup>139</sup> See UN Doc S/PV.3653 (15 April 1996) at 14–15.

<sup>140</sup> This is indeed expressly referred to in several resolutions of the UNSC. See, eg, UNSC Resolution 425, UN Doc S/RES/425 (1978): “Decides ... to establish a United Nations interim force for Southern Lebanon for the purpose of ... assisting the Government of Lebanon in ensuring the return of its effective authority in the area” and UNSC

to first seek the host state's cooperation in controlling and suppressing the armed group amounts to a denial, in practice, of the right of self-defence.

#### PROPORTIONALITY IN SELF-DEFENCE AGAINST NON-STATE ENTITIES

Proportionality would in principle constrain the military operation in self-defence to the targeting of the military assets of the armed group, in a way that complies with international humanitarian and human rights law. In contrast, a comprehensive military operation intended concurrently to target the non-state entity and promote regime change in the host state would be difficult to justify legally, as this would constitute a patent infringement of the non-intervention principle and would be hard to reconcile with the legitimate ends of the right to self-defence.

As it stands, the law seems to be unsettled as to whether the defending state is entitled to engage in "hot pursuit" of elements of the armed group into the host state's territory without the consent of the latter.<sup>141</sup> It might be argued that the forces of the victim state should stop at the border, giving the host state the opportunity to take immediate measures to prevent future attacks against the victim state. A factor that should be taken into account in the legal assessment of such a situation is whether the attack is one of a series of previous attacks that the host state has failed to prevent. If that is the case, there ought to be a legal presumption against the host state that it is unlawfully using the armed group as a proxy to promote its national and foreign policy objectives. As Derek Bowett has observed, "it is conceivable that the only measures of protection against subsequent attacks or incursions by armed bands may lie in pursuing them to destruction across the frontiers of a neighbouring state."<sup>142</sup>

If such a right of hot pursuit, regardless of the territorial state's consent, is to become generally recognized in state practice, there should be some degree of formal or informal coordination with the host state in order to avert the extension of the military action to the host state's military or civilian assets. Targeting the host state's military forces should be lawful only in self-defence — that is, in the face of an actual or imminent armed attack by the host state in the course of the victim state's defensive operations.

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Resolution 1701, UN Doc S/RES/1701 (2006): "Emphasizes the importance of the extension of the control of the Government of Lebanon over all Lebanese territory in accordance with the provisions of resolution 1559 (2004) and resolution 1680 (2006), and of the relevant provisions of the Taif Accords, for it to exercise its full sovereignty."

<sup>141</sup> According to Stone, international law recognizes that the victim state has "rights of self-help, extending to entry into the culprit's territory (at least in hot pursuit) to abate the depredations, if the harboring state was not willing or able to do so." See J Stone, "Hopes and Loopholes in the 1974 Definition of Aggression" (1977) 71 AJIL 237.

<sup>142</sup> Derek Bowett, *Self-Defence in International Law* (New York: Lawbook Exchange, 2009) at 40.

Equally, armed incursions in hot pursuit should not, as a rule, lead to the occupation of the host state. These legal standards, if followed, should limit the scope (and possibly the duration) of the armed conflict.

In practice, however, it would be extremely difficult to judge competing legal claims in a situation of hot pursuit. There are examples of state practice in which hot pursuit has been alleged, although such claims have usually been met with a conflicting claim of an unlawful armed attack by the other party. One such situation took place in 1997 when Angola alleged self-defence to justify the actions of its armed forces, which had entered Congolese territory in pursuit of armed groups immediately following the latter's armed attacks.<sup>143</sup> Similarly, a finely crafted legal justification for a cross-border military operation was advanced by Iran in 1996 in order to demonstrate full respect for the standards set by international law. First, Iran set out the factual basis for the right claimed (alleging that armed terrorist groups had launched transborder armed attacks against Iranian border towns from Iraq) and the scope of the right exercised (specifying that its forces had "pursued the retreating armed groups" and "targeted their training camps in Iraq"). It then proceeded to argue that the legal requisites for a lawful exercise of the right to self-defence had been satisfied, noting that the measures taken were both necessary and proportional, the operation had already been concluded, and that it respected the territorial integrity of Iraq (supposedly due to immediate withdrawal).<sup>144</sup>

There is some authority — though it is disputed — in support of the view that a state can use force to prevent the continuation of attacks in the foreseeable future. The view that self-defence should be solely a lawful instrument to stop an armed attack in progress by a non-state entity is deemed to be more in accord with the spirit of the *UN Charter*, which was designed to restrict the unilateral use of force in international relations so as to privilege the operation of the collective security system.<sup>145</sup> This is why, in the *UN Charter* framework (pursuant to Article 51), recourse to self-defence must be followed by a notification to the UNSC, which is then expected to take the necessary measures in order to restore international peace and security. Thus, the system presumes that the UNSC will intervene

<sup>143</sup> See *Letter from the Permanent Representative of Angola to the United Nations*, UN Doc S/1997/802 (1997). Angola, in turn, rejected the Congo's contention of having been the victim of an unlawful armed attack.

<sup>144</sup> See *Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations*, UN Doc S/1996/602 (1996).

<sup>145</sup> This is precisely the view expressed by the representative of Qatar in a UNSC session: "[T]he acts of self-defence must take place directly following armed aggression and before the cessation of military operations by the forces of the aggressor State." See Security Council, Provisional Verbatim Record of the 2677th Meeting, UN Doc S/PV.2677 (1986) at 6.

and act to halt the aggression and prevent its recurrence, leaving the victim state with no need or justification to proceed with its own forceful measures.

The question arises, however, whether the victim state is under a legal obligation to cease any current or future acts of self-defence against the non-state armed group as soon as the UNSC adopts collective measures on the basis of Chapter VII of the *UN Charter*. There are those who argue that, once the UNSC is seized of the situation and exercises its responsibilities under the *UN Charter*, the right to self-defence loses its object and ceases to be applicable, without prejudice to its resurrection should a new armed attack occur.<sup>146</sup> This debate actually arose during consideration by the UNSC of the Falkland Islands/Malvinas conflict in 1982. Argentina argued for the cessation of all hostilities (thus affecting the use of force by the United Kingdom in self-defence) after the UNSC adopted a resolution addressing the situation, while the United Kingdom contended that the UNSC's measures had to be effective first in order that international peace and security be restored.<sup>147</sup> The practice of the UNSC seems to support the latter stance since it shows UNSC resolutions that recall the inherent right of self-defence while imposing binding coercive and non-coercive measures under Chapter VII.<sup>148</sup> The lesson to be learned is that the right to self-defence remains applicable until collective security measures have proven to be effective in restoring international peace and security, thus eliminating any imminent threat to the state concerned.

This view is vindicated by the recognized fact that the collective security system is imperfect at best. The fact that the *UN Charter* safeguards the inherent right of self-defence represents a recognition (or premonition) by the drafters that collective measures will not always work due to anticipated political restrictions surrounding the smooth operation of the UNSC. The latter's functioning is limited by the prerogative of the veto enjoyed by the permanent members of the UNSC, any of which can block action by the organ; not to mention the political agendas of all other states or coalitions of states represented in the organ from time to time, which can impair a sound and objective legal judgment or political settlement

<sup>146</sup> J Verhoeven, "Les 'étirements' de la légitime défense" (2002) 48 AFDI 72. In the debates on the use of force by the United States against Libya in 1985, for example, the representative of Algeria stated the view that "that provision of the Charter (Art. 51) provides for the suspension of such a right while the Security Council is seized of the situation." See Security Council, Provisional Verbatim Record of the 2676th Meeting, UN Doc S/PV.2676 (1986) at 5.

<sup>147</sup> *Repertoire of the Practice of the Security Council, Supplement 1981-1984* (New York: United Nations, 1992) at 326.

<sup>148</sup> Thomas Franck, "Terrorism and the Right of Self-Defense" (2001) 95 AJIL 839 at 841-42.

of any dispute.<sup>149</sup> The range of allies and sympathizers the victim or host states can mobilize will determine in large measure the degree of support for their cause and the legal justifications they adduce. Moreover, collective measures short of the authorization of force, such as provisional measures and sanctions, may not work as planned. For instance, in the Falkland Islands/Malvinas conflict, UNSC Resolution 502 demanded an “immediate withdrawal of all Argentine forces” from the islands, but this demand was not fulfilled despite the binding nature of the decision and the good offices and mediation efforts of the UN secretary-general, the Peruvian president, and the US secretary of state.<sup>150</sup> Asserting a continuing right of self-defence, the British military forces finally landed in the islands and retook them by force, exactly forty-nine days after the adoption of Resolution 502.

If account is also taken of legal developments that would extend the scope of the general right to self-defence to include imminent attacks, it must be admitted that states are allowed to resort to force in self-defence even after the “first wave of attacks” is complete, provided there are reasonable grounds to believe that further attacks are imminent.<sup>151</sup> Endorsement of this legal view is indeed found in state practice. For instance, in 1998, the United States justified its defensive action in response to armed attacks against its embassies and nationals abroad by reference to warnings by Al-Qaeda that strikes would “continue from everywhere” as well as to evidence that “further such attacks were in preparation.”<sup>152</sup> In view of this

<sup>149</sup> Waldock’s endorsement of anticipatory self-defence also finds justification in the limitations of the Security Council: “[I]f the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purpose of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow.” See Humphrey Waldock, “The Regulation of the Use of Force by Individual States in International Law” (1952-II) 106 *Rec des Cours* 498.

<sup>150</sup> UNSC Resolution 502, UN Doc S/RES/502 (3 April 1982).

<sup>151</sup> See *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc A/59/2005 (21 March 2005) at para 124: “Imminent threats are fully covered by Article 51.” *A More Secure World: Our Shared Responsibility: Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2 December 2004) at para 188: “[A] threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.” Wilmshurst, *supra* note 84 at 964: “[T]he view that States have a right to act in self-defence in order to avert the threat of an imminent attack ... is widely, though not universally, accepted.”

<sup>152</sup> See *Letter from the Permanent Representative of the United States of America to the United Nations*, UN Doc S/1998/780 (1998) [*Letter from the US to the UN*]. The bombing raid by the United States against Libyan targets in 1985 was also justified on the basis of alleged evidence that Libya “was planning multiple attacks in the future.” See Security Council, Provisional Verbatim Record of the 2674th Meeting, UN Doc S/PV.2674 (1986) at 17.



alleged imminent threat, the United States argued that it “had no choice but to use armed force to prevent these attacks from continuing.”<sup>153</sup> A slightly broader legal rationalization (for it did not refer to specific threats made) was advanced by the United States to justify its response to the terrorist attacks of 2001, as it alleged that defensive measures were designed to “prevent and deter further attacks on the United States.”<sup>154</sup> With regard to the same attacks, the British government set out the prevention of the “continuing threat of attacks from the same source” as the aim of its defensive action against Al-Qaeda.<sup>155</sup> The British attorney general’s reply to a question posed in Parliament on the matter clarified that “it must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.”<sup>156</sup>

The problem with this approach, however, is that it may confound self-defence and armed reprisal, at least in the eyes of the host state and its allies, giving rise to claims of an unlawful use of force. It must be mentioned in this regard that Chatham House adopts a slightly more restrictive view regarding imminent attacks by non-state entities, asserting that the territorial state should be given leeway to take domestic measures against the entity and that self-defence ought to be allowed only in cases of “compelling emergency.”<sup>157</sup>

Authors make a distinction between deterrence, punishment, and prevention for the purpose of determining the legitimate ends of self-defence and, therefore, whether its invocation is proportional or not and, hence, lawful or unlawful.<sup>158</sup> This intellectual exercise is certainly useful for academic purposes. In practice, however, one can hardly be expected to identify and separate the three purposes in any given situation since they are all inter-connected. In other words, there will always be an element of retribution, prevention, and deterrence attached to any purported defensive action. It is indeed the act of punishment — expected by the population

<sup>153</sup> *Letter from the US to the UN*, *supra* note 152.

<sup>154</sup> See *Letter from the Permanent Representative of the United States of America to the United Nations*, UN Doc S/2001/946 (2001).

<sup>155</sup> See *Letter from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations*, UN Doc S/2001/947 (2001).

<sup>156</sup> See Kaiyan Kaikobad et al, “United Kingdom Materials on International Law 2004” (2004) 75 BYIL 595 at 822–25.

<sup>157</sup> Wilmschurst, *supra* note 84 at 971.

<sup>158</sup> Kretzmer presents a useful discussion of this topic, favouring the application of the said distinction while recognizing the difficulties in separating the concepts. See D Kretzmer, “The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum” (2013) 24 EJIL 235 at 268–69, 274–75.

of the victim state — that adds credibility to the threat of future, automatic retaliation in case of further attacks, which in turn is relevant to the prevention and deterrence of repeat conduct by the non-state entity (and its sponsoring or host state).<sup>159</sup> Having said that, the language of the legal justification presented by the state exercising its right to self-defence should be carefully drafted in order to avoid any direct reference to retribution, focusing instead on self-defence, prevention, and deterrence. In this way, the state may avert the charge of having launched an unlawful armed reprisal.<sup>160</sup>

#### SELF-DEFENCE AGAINST NON-STATE ENTITIES IN A DECENTRALIZED INTERNATIONAL SYSTEM

In all situations where self-defence is invoked, the international mechanisms of control and supervision of the use of force are expected to play a role, however limited. This is bound to give rise to divergent legal and political claims. Any resort to force in self-defence will unleash a parallel political and legal battle in the international arena for general recognition of the right invoked and, conversely, of the characterization of such action as a violation of international law. Allies and sympathizers on both sides of the dispute will be mobilized, and their views may not necessarily reflect an objective legal assessment but, rather, their own political analyses of the costs and benefits of supporting either side.

In a decentralized international system, legal disputes involving conflicting international norms, legal claims, and justifications can only be finally settled by legal institutions — like the ICJ — or political bodies with relevant mandates, like the UNSC. Recognition, by other states and the political organs of international organizations (in particular, the UNSC), of the occurrence of an armed attack as well as ties of association between a non-state entity and a sponsoring or harbouring state can establish a strong legal case for, and add political legitimacy to, any exercise of the right to self-defence. Admittedly, there are not many instances in which such a determination has been made, but a landmark example would be the general position of states and that of the UNSC regarding the 11 September 2001 terrorist attacks against the United States.

<sup>159</sup> Deterrence works only when the threat of retaliation is credible in the eyes of the state or non-state entity to which the threat is addressed. See H Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia, OH: Columbia University Press, 2002) at 113–14.

<sup>160</sup> The *Friendly Relations Declaration*, *supra* note 4, clearly considers armed reprisal a violation of the non-use of force principle: “States have a duty to refrain from acts of reprisal involving the use of force.” Schachter regards this principle, and Article 2(4) of the *UN Charter*, *supra* note 1, as prohibiting “military action that is punitive in aim rather than defensive.” See Oscar Schachter, “Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis” (1984) 37 *J Int’l Aff* 245. See also Wilmschurst, *supra* note 84 at 969: “[T]he right of self-defence does not allow the use of force to punish an aggressor.”

How can the fragility of the UN collective security system be addressed, so that resort to self-defence may be unnecessary or less frequent? Arguing that self-defence is not an autonomous and purely discretionary right, being instead restricted by and subject to the law, Oscar Schachter suggests that the international legal system can be strengthened by “a structure of accountability built upon obligations, procedures and institutions” designed to enhance the prospects and effectiveness of third-party judgement.<sup>161</sup> The idea is that the definition of clear normative standards, the strengthening of the reporting system under Article 51 of the *UN Charter*, the establishment of effective monitoring and verification arrangements, and the adaptation as necessary of deliberative processes should contribute to the consolidation of the rule of law and ultimately limit the unilateral use of force (be it direct or indirect). Unfortunately, there remains a long way to go in order to accomplish this goal.

#### CONCLUDING REMARKS

This article has identified normative developments that would reinstate the legal foundations of the right to self-defence established in the distant past by the *Caroline* incident in so far as armed attacks by non-state entities are concerned. More than an aspiration, the review undertaken of international practice shows a general recognition of the right to self-defence against non-state armed entities. There is also an emerging body of authoritative opinion, backed by an evolving state practice, that supports the extension of the application of this right to action in or against a host or sponsoring state, in cases of vicarious aggression, provided some conditions are met. Indeed, such has been the view expressed by some relevant law-determining agencies, though the ICJ has yet to take a clear stand on this and related issues.

The development of international norms on self-defence, expanded to address the legal complexities of vicarious aggression involving non-state actors, is a rather tardy reaction of the international community to a plague that has affected for too long the stability of the international system and the efficacy of some of the most cardinal principles of international law. In a decentralized international system that agonizes under the shortcomings of its collective security system, a reappraisal of the right to self-defence is needed so that a state victim of vicarious aggression may respond more effectively, within the bounds of international law, to suppress and deter what may be a grave and continuing threat.

It may be argued that the recognition of a broader right of self-defence may instigate more conflict and violence. However, short of a political solution, the use of force in self-defence against non-state armed entities

<sup>161</sup> See Oscar Schachter, “Self-Defense and the Rule of Law” (1989) 83 *AJIL* 259 at 273–77.

could precipitate the end of an armed conflict, be it internal or internationalized. As to the recognized dangers of extending the conflict to include the host or sponsoring state, the exercise of the right to self-defence in such a state's territory should, as noted, be guided and limited by the criteria of necessity and proportionality and will, ultimately, be subject to legal appraisal by the international community and relevant international organs — in particular, the UNSC and/or the ICJ. Moreover, it is unlikely that weaker states will be eager to use force in self-defence in the territory of host states unless they may count on others in a collective exercise of self-defence. It is believed that recognition of the legal right of states to resort to forcible measures in response to armed attacks by non-state entities abroad may serve as a deterrent factor, thus dissuading the continued use of armed groups as proxies by states in pursuit of their foreign policy goals.