Leiden Journal of International Law (2016), 29, pp. 19–42
© Foundation of the Leiden Journal of International Law 2016 doi:10.1017/S0922156515000631

Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World

ANDRÉ DE HOOGH*

Abstract
This contribution investigates restrictivist reasoning on the origin of armed attacks, and concentrates on the interpretation of Article 51 of the UN Charter and the use of state practice. One particular aspect is examined: the linkage of the armed activities of non-state actors to a state required for an exercise of the right of self-defence to be justified in relation to that state. Many authors have moved away from a restrictive interpretation of Article 51 of the Charter and customary international law, and have proposed various legal constructs –complicity, aiding and abetting, harbour and support, unwillingness or inability to act– to allow for the invocation of self-defence even when armed activities of non-state actors cannot be attributed to a state and its substantial involvement is doubtful. Noticeable among authors generally, with certain exceptions, is a certain lack of concern to account for whatever method of interpretation or analysis they employ.

Key words
self-defence; armed attack; non-state actors; attribution of conduct and substantial involvement; interpretation and customary international law

Those who cannot remember the past
are condemned to repeat it.
George Santayana, The Life of Reason[1]

1. Introduction

The *laissez-fair* attitude of the nineteenth century, with the liberty to go to war seen as an attribute of the sovereignty of states,[2] slowly gave way to new thinking with the 1899 and 1907 Hague Peace Conferences.[3] Some change of heart was indeed noticeable, and the beginning of the twentieth century brought increasingly strict

* Associate Professor in International Law, University of Groningen, Department of International Law [a.j.j.de.hoogh@rug.nl].

1 G. Santayana, 'The Life of Reason: or the Phases of Human Progress, Introduction and Reason in Common Sense', in M. Wokeck and M. Coleman (eds.), *The Works of George Santayana* (2011), 172.

2 E.g., T. Ruys, '*Armed Attack' and Article 51 of the UN Charter, Evolutions in Customary Law and Practice* (2010), 11.

3 B. Baker, 'The Hague Peace Conferences (1899 and 1907)', 2009 (November) MEPIL, available at <www.opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e305>.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

rules limiting the use of force or war by states.[4] But that century nevertheless saw two World Wars disrupt international relations and the lives of countless individuals. The UN Charter (the Charter),[5] which was negotiated to set up the new post-war organization to replace the discredited League of Nations, broke radically with the past and attempted to install a collective security system with a force monopoly for the Security Council and a narrow exception for self-defence.

Those educated in the international legal tradition of the post-war period may be surprised to see the tidal change of thinking in the post 9/11 world. Although one could certainly not speak of a consensus on various legal problems that arose in relation to the use of armed force by states, mainstream scholarship before the 9/11 attacks tended to favour restrictive rules over permissive norms.[6] Instead, what we see now is the suggestion that self-defence is permissible in anticipation of imminent attacks or threats, an expansive interpretation of the notion of armed attack, increasing acceptance of the 'pinprick' or 'accumulation of events' theory, and an understanding that armed attacks may not only originate from states but also from non-state actors.

This last topic forms the subject-matter of the current contribution. According to conventional wisdom, the exercise of the right of self-defence was predicated upon an armed attack by another state. This implied that armed activities of non-state actors needed to be attributable to a state or, at the very least, that the state was substantially involved in these. Since the 9/11 attacks, these rules have been (re)interpreted to allow for self-defence against a state that supports non-state actors carrying out armed activities in other states, harbours them, or is unwilling or unable to repress such armed activities within its territory. Some even contend that self-defence may be invoked against non-state actors based in a particular state independently of that state's conduct.

It should be understood that this contribution does not intend to provide substantive analysis on the merits of this or that interpretation of Article 51 of the Charter or comparable rules of customary international law. Nor is it intended to engage in substantive discussion of the rules of treaty interpretation or the method(ology) of customary international law creation. Rather, the purpose is to identify and trace restrictivist reasoning by authors upon and following the 9/11 attacks, and to critically assess the accountability provided, or lack thereof, with respect to the rules of interpretation and method(ology) of customary international law creation. In using the term 'restrictivist', this contribution does not aim to qualify specific authors, their arguments and positions (per se) as such, and nor is it intended to suggest that those are the result of a deliberate choice rather than the result of considered reasoning.

---

4 See the 1907 (Hague) Convention (II) Respecting the Limitation of Employment of Force for the Recovery of Contract Debts, (1908) 2 *AJIL*, *Supplement*, 81–5; the 1919 Covenant on the League of Nations, (1919) 13 AJIL, *Supplement*, 128–40; the 1928 General Treaty for Renunciation of War as an Instrument of National Policy, XCIV *LNTS* 57–64 (1929).

5 The 1945 Charter of the United Nations, 24 October 1945, XV *United Nations Conference on International Organization*, 335–54.

6 See C. Tams, 'The Use of Force against Terrorists', (2009) 20 EJIL 359, at 362–73.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

This contribution will deal with the interpretation of Article 51 of the Charter and state practice and its acceptance (as law) evidenced by the 9/11 attacks and later practice and responses thereto. To this purpose, Section 2 will address the silence of Article 51 as to the origin of an armed attack primarily in terms of contextual and teleological interpretation. Section 3 will look at the attribution of armed activities of non-state actors to a state, or its substantial involvement therein, to allow for the exercise of the right to self-defence. Finally, Section 4 will investigate certain issues of method concerning subsequent practice establishing the agreement of the parties and practice accepted as law.

2. THE INTERPRETATION OF THE SILENCE OF ARTICLE 51: AN ARMED ATTACK BY A STATE

This section will mainly discuss restrictivist reasoning in terms of contextual and teleological interpretation. Although Article 51 of the UN Charter requires the existence of an armed attack as a *conditio sine qua non* for the exercise of the right of self-defence, it fails to specify from whom or which entity such an attack should originate. Drawing upon this silence, many authors have claimed that measures of self-defence may be taken by a state in response to attacks by non-state actors operating from the territory of another state.[7] In this regard, Judge Higgins's observation that there is nothing in Article 51 that indicates that self-defence is available only in case of attacks by states is frequently quoted.[8] As a matter of deductive reasoning, various authors make the argument that this silence signifies that Article 51 not only covers armed attacks by states but also those by non-state actors, and sometimes this argument is framed in reverse – that armed attacks by non-state actors are not excluded from the scope of Article 51.[9] Responses of more restrictivist inclined authors have been to draw attention to the context and *telos* of the Charter.

What can be deduced from the context of the Charter as a whole in order to answer the question whether attacks by non-state actors are included or excluded

7 T. Franck, 'Terrorism and the Right of Self-Defense', (2001) 95 AJIL 839, at 840; S. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 HILJ 41, at 50; C. Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (½) of the UN Charter, and International Terrorism', (2003) 27 WFWA 35, at 36; N. Printer, 'The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen', (2003) 8 UCLA JIL&FA 331, at 351; B. Feinstein, 'A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them', (2004) 17 CJTL 51, at 67; N. Ronzitti, 'The Expanding Law of Self-Defence', (2006) 11 JC&SL 343, at 348; D. McKeever, 'The Contribution of the International Court of Justice to the Law on the Use of Force: Missed Opportunities or Unrealistic Expectations?', (2009) 78 NJIL 361, at 383; K. Zemanek, Armed Attack, MPEPIL, 2009 (April) para. 16, available at <www.opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>.

8 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 215 (Judge Higgins, Separate Opinion) where Judge Higgins claims that the restrictive view is due to the ICJ's holding in *Nicaragua* that action by irregulars may constitute an armed attack if sent by or on behalf of a state and if reaching a certain scale and effects; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 103–4, para. 195. Contrary, McKeever, *supra* note 7, at 383, who argues that the ICJ was broadening the possibilities for actions of non-state actors to fit within the rules on self-defence; see Murphy, *supra* note 7, at 50–1, as to the silence of Art. 51.

9 Ruys, *supra* note 2, at 490; R. van Steenberghe, *La légitime défense en droit international public* (2012) 270–1, who also makes this argument, at 270–81, in relation to the preparatory works and subsequent practice.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

under Article 51? Generally, Article 2(4) of the Charter is taken as a starting point: This prohibits UN members from having recourse, in their international relations, to the threat or use of force against other states or which is inconsistent with the purposes of the UN.[10] It follows that the obligation imposed by Article 2(4) does not address non-state actors, and their violent actions consequently do not violate what could be called the *jus contra bellum*.[11] In the same vein, the reference to 'international relations' is interpreted to mean that armed action will only violate Article 2(4) if directed against a state.[12]

This is relevant to the construction of Article 51 because the right of self-defence is available only in response to unlawful armed attacks.[13] The reason for this is the necessity to prevent regression into a sequence of equally valid self-defence claims, and in this way to break an otherwise inevitable vicious circle.[14] If non-state actors cannot violate Article 2(4) and there is no rule of customary international law to this effect addressed to them, then the exercise of the right of self-defence must, generally, be directed against the unlawful conduct of a state, and, specifically, against an illegal use of force (of a certain gravity), in order to be justified.[15] In other words, there must be an identity between the unlawful armed attack and the use of force prohibited to member states under Article 2(4) of the Charter.[16]

Another contextual aspect frequently referred to is the general rule–exception relationship that exists between Articles 2(4) and 51.[17] If the right of self-defence

10 Murphy, *supra* note 7, at 50, points out that while Art. 2(4) prohibits uses of force against a state, Art. 51 remains silent as to the origin of the attack; similarly A. Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law', (2011) 44 CILJ 729, at 739.

11 M. Krajewski, 'Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September und seine Folgen' (2002), 40 AVR 2002, 183, at 195–6, mentions that international law only provides rights and obligations for private persons on an exceptional basis; see also Printer, *supra* note 7, at 346–7.

12 McKeever, *supra* note 7, at 382; Tams, *supra* note 6, at 385. On *de facto* regimes and the right of peoples to self-determination, see O. Corten, *The Law against War, The Prohibition on the Use of Force in Contemporary International Law* (2010), 126–97.

13 J. Kammerhofer, *Uncertainty in International Law, A Kelsenian perspective* (2011), 39–40. This does not turn self-defence into a sanctioning mechanism per se, since its purpose is to protect the state against unlawful armed attacks and not to implement the responsibility of the attacker; see Krajewski, *supra* note 11, at 186; J. Verhoeven, Les «étirements» de la légitime défense, XLVIII AFDI 2002, 49, at 58–9.

14 Kammerhofer, *supra* note 13, at 39–40; see also R. Kolb, *Ius contra bellum, Le droit international relatif au maintien de la paix* (2009), 293.

15 C. Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', (2008) *NILR* 159, at 169, observing the State must be involved 'in the activities of the armed group;' and that responsibility for failure to prevent such activities does not suffice for purposes of self-defence; Kammerhofer, *supra* note 13, at 39–40.

16 Contrary C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995), 208–9, and footnote 885, who circumvents this demand of identity by holding that self-defence is available against armed attacks that are not permitted (*unerlaubt*) by international law. Some authors argue for international legal personality of non-state actors: Krajewski, *supra* note 11, at 196–9; Printer, *supra* note 7, at 333–4; N. Tsagourias, 'Non-state actors in peace and security: Non-state actors and the use of force', in J. d'Aspremont (ed.), *Participants in the International Legal System, Multiple Perspectives on Non-State Actors in International Law* (2011), 326 at 326–8. Critical views were given by Verhoeven, *supra* note 13, at 61–62; Antonopoulos, *supra* note 15, at 170. Others have noted that Art. 51 does not prohibit armed attacks: Ruys, *supra* note 2, at 490; Kammerhofer, *supra* note 13, at 47. Yet the Court claimed that '*the prohibition of armed attacks* may apply to the sending by a State of armed bands to the territory of another state'. *Nicaragua*, *supra* note 8, at 103, para. 195 (emphasis added).

17 Kammerhofer, *supra* note 13, at 49–51; K. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors', (2007) 56 ICLQ 141, at 145–6; Antonopoulos, *supra* note

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

could be freely exercised in response to armed activities of non-state actors and would allow their targeting by military force, whatever territory they might be found in, this implicates Article 2(4).[18] However, the use of force in self-defence needs to be invocable and justifiable as against the state on whose territory it takes place and not merely against the non-state actors concerned.[19] *A fortiori*, as Kammerhofer quite astutely points out, military action by a state against non-state actors does not require any justification *in se* by way of self-defence under the *jus contra bellum*, since Article 2(4) prohibits the use of force against states.[20]

Moving now from context to object and purpose, the relationship between self-defence and collective security may be raised. Wolfrum's commentary witnesses that the Charter's object and purpose is to prevent and suppress the use of armed force in international relations through the institution of a collective security system.[21] Otherwise, the maintenance of international peace and security is claimed as the Charter's fundamental purpose, and a restrictive interpretation of armed attack or Article 51 as an exception to the prohibition of the use of force is called for.[22]

In assessing the reasoning of authors in relation to the silence of Article 51, the following observations may be made with respect to the methods of interpretation. First, it may be observed that the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT), although covering 'constituent instruments of an international organization' (Article 5), is not applicable to the Charter due to its non-retroactivity (Article 4).[23] In consequence, only rules of treaty interpretation established under customary international law apply, and one would have expected more frequent mention of this circumstance.[24] Second, it may be noted that only some authors making use of this or that element of interpretation make any actual

---

15, at 169; Tams, *supra* note 6, at 385; M. Kowalski, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard', (2010) XXX PYIL 101, at 122.

18 For interpretation of terms, see A. Randelzhofer and O. Dörr, 'Article 2(4)', in B. Simma et al. (eds.), *The Charter of the United Nations, A Commentary*, Volume I (2012) 200, at 215–16, paras. 37–9; A. Henriksen, '*Jus ad bellum* and American Targeted Use of Force to Fight Terrorism Around the World', (2014) 19 JC&SL 211, at 219–20; see also Ruys, *supra* note 2, at 377.

19 See B. Michael, 'Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence', (2009) 16 Aust. JIL 133, at 140–2; Trapp, *supra* note 17, at 145–6; G. Molier, 'The War on Terror and Self-Defence against Non-State Actors, An International Law Perspective', in A. Ellian, G. Molier and D. Suurland (eds.), *Terrorism: Ideology, Law and Policy* (2011), 305, at 316.

20 Kammerhofer, *supra* note 13, at 38–39.

21 R. Wolfrum, 'Preamble', in B. Simma et al., *The Charter of the United Nations, A Commentary*, Volume I (2012) 101 at 103–105, paras. 5 and 10; R. Wolfrum, 'Article 1', in B. Simma et al. (eds.), *The Charter of the United Nations, A Commentary*, Volume I (2012) 107 at 112–13, paras. 15–19. Certain authors have observed that the US response to the 9/11 attacks (unjustifiably) prioritized unilateral responses over collective action, and that the Security Council had been prepared to authorize military action. For example, see J. Charney, 'The Use of Force against Terrorism and International Law', (2001) 95 AJIL 835, at 837; P. Klein, 'Le droit international a l'épreuve du terrorisme', (2006) 321 RCADI 203, at 395.

22 Molier, *supra* note 19, at 310; Kowalski, *supra* note 17, at 123, adding that expansion to non-state actors would depreciate the prohibition of the use of force; see also Krajewski, *supra* note 11, at 187; A. Randelzhofer and G. Nolte, 'Article 51', in B. Simma et al. (eds.), *The Charter of the United Nations, A Commentary*, Volume II (2012), 1397, at 1403–04, para. 10, in relation to the gap between use of force and armed attack; Kolb, *supra* note 14, at 269–71.

23 The 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

24 Exceptionally, M. Schmidl, *The Changing Nature of Self-Defence in International Law* (2009), 43; S. Kadelbach, 'Interpretation', in B. Simma et al. (eds.), *The Charter of the United Nations, A Commentary*, Volume I (2012), 71, at 75–76, paras. 7–8; Randelzhofer and Nolte, *supra* note 22, at 1400–01, para. 4.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

reference to the rules of interpretation and to Articles 31 and 32 of the Vienna Convention.[25] Indeed, hardly any provide an account of the elements of interpretation or their weight, and little attempt is made to qualify arguments in terms of elements of interpretation.

The particular assertions regarding the silence of Article 51 as to the origin of an armed attack appear at times to function as a knock down argument, making redundant any subsequent inquiry as to the proper construction of Article 51. Certainly, its silence makes a determination of the ordinary meaning of its *terms* impossible, but this does not prejudge the use of other elements of interpretation. In assessing this silence, authors do not problematize the general rule of interpretation as to ordinary meaning of terms, even when the interpretation of silence in a treaty has been addressed in different contexts.[26]

However, authors do generally contextualize silence by making reference to Article 2(4) of the Charter, and indicate that the use of force in self-defence on the territory of another state in response to armed activities of non-state actors requires that such use of force is invocable and justifiable against the territorial state. The suggestion that non-state actors may be targeted in self-defence independently from any linkage to the territorial state – whether evidenced by attribution of their activities, the territorial state's (substantial) involvement therein, or the territorial state's unwillingness or inability to repress such activities[27] – is not generally admitted by authors as a matter of contextual interpretation.

Although the *telos* of the Charter is mentioned at times, relatively little weight appears to be given to this element of interpretation, and expansionist authors do not engage with it much. The commentary of the International Law Commission (ILC) suggests by reference to a treaty's object and purpose, and good faith, that an interpretation should be preferred that allows the treaty to have appropriate effects.[28] When discussing collective security or the maintenance of international peace and security, authors mostly do not argue these to make a choice between one or another interpretation of the silence in Article 51 of the Charter. Moreover, at times the interpretation of that silence is rather linked to the *telos* of self-defence rather than the Charter,[29] without however accounting for the fact that Article 31(1) of the VCLT speaks of the object and purpose of the treaty rather than its individual clauses.[30]

25 Cf. Section 4, *infra*; see Orr, *supra* note 10, at 739; Antonopoulos, *supra* note 15, at 161; R. van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?', (2010) 23 LJIL 183, at 186.

26 For example, the doctrine of implied powers as evidenced by ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174; *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion of 13 July 1954, [1954] ICJ Rep. 47, at 56–7; *Legality of the Threat or Use of Nuclear Weapons by a State*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 66, at 78–9; and on the interpretation of silence, I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), 110.

27 Cf. Section 3, *infra*.

28 ILC, Commentary Interpretation of Treaties, Introduction, (1966) Vol II YBILC 218, at 219, para. 6.

29 Kreß, *supra* note 16, at 214–215; Kowalski, *supra* note 17, at 119.

30 But with Kowalski, *supra* note 17, at 123, setting the purpose of Art. 51 against the fundamental purpose of the Charter.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

The preparatory works of the Charter are referred to with some frequency, though authors come to contradictory conclusions as to the inter-state character of self-defence.[31] No attempts are made to explain or justify recourse to the preparatory works, whether to confirm the meaning found by application of Article 31 or to determine a meaning when this is left ambiguous or obscure or leads to an unreasonable result.[32] Furthermore, very few of the contributions surveyed make reference to the reports of the United Nations Conference on International Organization,[33] instead basing their claims in this respect on secondary sources.

3. The standard to determine an armed attack by a state: attribution and/or (substantial) involvement

For restrictivist authors, a contextual and teleological interpretation of Article 51 supports the necessity of some linkage of the armed activities of non-state actors to a state in order to qualify as an armed attack by a state, but this raises the question as to the substance of that connection. Many different options have been put on the table, but this section will explore especially the reasoning relevant to the question of attribution of the armed activities of non-state actors to a state or that state's (substantial) involvement therein. That (conceptual) division has formed the basis of discussion, following the court's seminal treatment of (the definition of) armed attack in the *Nicaragua* case.[34]

In respect of the armed activities of non-state actors, the argument has been made that the lack of protection by a territorial state establishes the necessity of self-defence by another state, irrespective of the legality or illegality of the former state's conduct. As such, even the breach of due diligence obligations, which require a state to prevent its territory from being used to the detriment of another state, would not be required.[35] The link between the territorial state and the non-state actors consists, so it is claimed, in the inability or unwillingness of that state to stop their activities,[36] which does not necessarily constitute a wrongful act.[37] Since the law of state responsibility and the law of self-defence are different branches, the linkage evidenced by this inability or unwillingness founds the necessity of self-defence, i.e.,

---

31 See T. Ruys and S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', (2005) 10 JC&SL 289, at 291; Orr, *supra* note 10, at 739; Kowalski, *supra* note 17, at 97; Ruys, *supra* note 2, at 369–70; van Steenberghe, *La légitime défense*, *supra* note 9, at 270–1.

32 Orr, *supra* note 10, at 739, mentions that Art. 51 is ambiguous and then moves on to the preparatory works.

33 Exceptionally, e.g., Ruys, *supra* note 2, at 369.

34 *Nicaragua*, *supra* note 8 at 103–104, para. 195, drawing upon the Definition of Aggression, G.A. 3314 (XXIX), UN Doc. A/RES/3314(XXIX) (14 December 1974), Art. 3(g) available at <www.un.org/documents/ga/res/29/ares29.htm>.

35 van Steenberghe, *supra* note 25, at 199–202; van Steenberghe, *La légitime défense*, *supra* note 9, at 352–353; see also Kolb, *supra* note 14, at 274.

36 van Steenberghe, *supra* note 25, at 200–201; van Steenberghe, *La légitime défense*, *supra* note 9, at 352; G. Wettberg, *The International Legality of Self-Defense Against Non-State Actors, State Practice from the U.N. Charter to the Present* (2007), at 208; C. Greenwood, 'Self-Defence', MPEPIL, para. 18, at <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL>, arguing the necessity of self-defence in relation to unwilling or unable States.

37 van Steenberghe, *supra* note 25, at 200–1; van Steenberghe, *La légitime défense*, *supra* note 9, at 352.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

that no alternative ways are available to defend against the non-state actors.[38] For some, the non-state actors concerned may be targeted, but self-defence against the state would require attribution of their armed activities.[39]

This may be contrasted to slightly different reasoning, in which the inability or unwillingness of the territorial state to prevent the armed activities of non-state actors is linked to the breach of positive or due diligence obligations.[40] With respect to positive obligations, reference is made to the Declaration on Principles of International Law, which embodies the obligation not to engage in 'organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing in organized activities within its territory directed towards the commission of such acts*, (. . .).'[41] As to due diligence obligations, these are based on the general duty for a state not to allow the use of its territory for acts by private persons contrary to the rights of other states, and to use reasonable means to prevent such acts.[42] Although not always clearly articulated, it is then the breach of such positive or due diligence obligations that would excuse or justify the violation of the territorial integrity of a state.[43]

The first scenario, that the inability or unwillingness of a state to protect another state against armed activities of non-state actors founds the necessity of self-defence irrespective of any link to a state, is rejected as a matter of restrictivist reasoning, because to consider private attacks as an armed attack would lead to the absurd result that a state could be subjected to military force without having violated international law.[44]

As to the second scenario, linking the inability or unwillingness of a state to breach of due diligence (and positive) obligations, it has been observed that these involve duties to protect rather than duties to abstain. Negligence in dealing with, or tolerance of, the armed activities of non-state actors would violate the former duties but not the latter, and a breach of obligation in this respect cannot give rise

38 van Steenberghe, *supra* note 25, 201–2; van Steenberghe, *La légitime défense*, *supra* note 9, at 352–354; Trapp, *supra* note 17, at 145–7, who does make reference (147) to breach of obligations for this scenario; and more generally, A. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', (2012) 52 VJIL 483, at 494–5.

39 Trapp, *supra* note 17, at 142–5, 150, and 155; Krajewski, *supr*a note 11, at 202–5, argues that in case of self-defence against non-state actors the territorial State has a duty of tolerance by analogy to the law of neutrality, and considers, 205–7, the US actions against the Taliban unjustified; see also Stahn, *supra* note 7, at 42–3; Kolb, *supra* note 14, at 275, claims self-defence is allowed against a non-state actor with a territorial basis.

40 Kowalski, *supra* note 17, at 125–8, adding that necessity and proportionality would require targeting only the non-state actor, unless the territorial State were to come in on its side; in a similar vein, Feinstein, *supra* note 7, at 57–67, but continuing, 67–73, with an aiding and abetting construction; Trapp, *supra* note 17, at 147.

41 Trapp, *supra* note 17, at 147 and footnote 34; Kowalski, *supra* note 17, at 125–8; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Resolution 2525 (XXVI), Annex, (emphasis added), UN Doc. A/RES/2625(XXV) (24 October 1970) available at <www.un.org/documents/ga/res/25/ares25.htm>.

42 Randelzhofer and Nolte, *supra* note 22, at 1417–18, paras. 37–8, pointing to encouragement, direct support, planning, awareness, and shelter, and (419, para. 41) to inability to prevent such acts; Ruys and Verhoeven, *supra* note 31, at 305–6.

43 Trapp, *supra* note 17, at 147; Kowalski, *supra* note 17, at 125, indicating that breach of the positive obligation alone would not suffice and linking it to inability or unwillingness of the territorial State to prevent such acts.

44 Ruys and Verhoeven, *supra* note 31, at 312.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

to self-defence against the territorial state.[45] In addition, a due diligence obligation is one of means and not of result, and it requires a State to employ all reasonable measures in the circumstances, requiring awareness and the means to act. As such, a failure to exercise due diligence with respect to armed activities of non-state actors 'does not automatically qualify as an "indirect use of force" '.[46]

Discarding self-defence against non-state actors in the absence of a link to the territorial state, other than presence or to the breach of positive or due diligence obligations, the debate has mainly focused on the role of the attribution of armed activities to the territorial state or its substantial involvement therein.

The general rules relating to the attribution of conduct to a state are formulated in Articles 4 to 11 of the Articles on State Responsibility (ASR).[47] However, these also envisage in Article 55, which is titled *lex specialis*, that the general rules may not apply to the extent that special rules govern.[48] The Court made reference to the latter in the *Genocide* case, when it formulated an evidentiary standard:[49] '[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.'

The 9/11 attacks have served as a catalyst to the debate, as the question was raised as to whether these attacks – planned and executed by al-Qaeda – could be attributed to Afghanistan so as to allow the invocation and exercise of the right of self-defence by the United States. Various bases of attribution under the law of state responsibility have been put forward, in particular Articles 4, 5, and 8–11 of the ASR. Most commonly attribution under Article 8 is discussed, which allows for the attribution of conduct of 'private' individuals or groups acting under the instructions, direction or control of a state.[50] As instructions or direction tend to be difficult to prove, the debate has focused on the standard of control required to attribute the armed activities of a non-state actor to a state.

In this context authors discuss the open conflict between the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY) over the appropriate standard of either effective control or overall control. The ICJ first determined 'effective control' to be the proper standard in the *Nicaragua* case in 1986.[51] The ICTY in part disagreed and argued for 'overall control' in relation to organized armed groups in the *Tadić* case in 1999,[52] but the ICJ maintained

45 Ruys and Verhoeven, *supra* note 31, at 305–8; also, Antonopoulos, *supra* note 15, at 169, holding that responsibility for failing to prevent armed activities of non-state actors is not in itself sufficient for a plea of self-defence; Michael, *supra* note 19, at 154–5, claiming toleration does not suffice to attribute armed actions of non-state actors to the territorial State.

46 Ruys, *supra* note 2, at 375–7; and Ruys and Verhoeven, *supra* note 31, at 318.

47 ILC, Articles on Responsibility of States for Internationally Wrongful Acts (2001) Vol II YBILC 26–30.

48 ILC, Commentary on Articles on Responsibility of States for Internationally Wrongful Acts (2001) YBILC, at 140–1, Art. 55.

49 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, [2007] ICJ Rep. 43, at 208–9, para. 401.

50 ILC Commentary, *supra* note 48, Art. 8.

51 *Nicaragua*, *supra* note 8 at 64–5, paras. 115–16.

52 *Prosecutor v. Dusko Tadić*, Judgment, Appeals Chamber, IT-94-1-A, 15 July 1999, available at <www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>, 39–62, paras. 98–145 and especially 117, 120–2, 130–1, 137 and 145.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

its earlier position in the *Genocide* case in 2007.[53] The effective control standard requires operational control over the specific activities of non-state actors,[54] whereas the overall control standard requires involvement of the state in the organization, planning and coordination of an operation.[55] This difference is important in order to determine whether specific acts committed within a larger operation are attributable to a state.[56]

Contributions of authors tend to deal with attribution issues, and may be divided into: those affirming the necessity of attributing the armed activities of non-state actors to a state; those who discuss the role of attribution but with an independent role for substantial involvement; those claiming that the standard of control to attribute such activities under Article 8 of ASR is too strict and/or has been modified; and those who argue that special rules of attribution exist in relation to an armed attack for purposes of deciding whether self-defence may be invoked.

Within the first category, certain authors have affirmed the necessity of attribution of armed activities of non-state actors.[57] Corten and Dubuisson affirm this necessity and deny that the right of self-defence may be exercised against another state in its absence. However, it is to be noted that they discuss two distinct acts of attribution – that of the armed attack and that of the armed activities. With respect to the former, they investigate the extent of 'substantial' involvement, whereas with regard to the latter, they examine the rules of attribution under the law of state responsibility.[58]

Regarding the attribution of the 9/11 attacks, Murphy suggested, contingent upon the facts, that attribution could take place based on Articles 2, 4 and 5 of the ASR for toleration by Afghanistan of a terrorist group engaged in earlier attacks, on Article 9 for allowing al-Qaeda to exercise governmental functions in projecting force abroad, or on Article 11 because Afghanistan's *de facto* government adopted al-Qaeda's conduct by not extraditing its operatives.[59] However, many authors have denied attribution based on Articles 8–11 ASR in view of the available facts regarding the connection between al-Qaeda and the Taleban government both before and after the attacks.[60]

---

53 *Genocide*, *supra* note 49, at 207–11, paras. 398–407.

54 Molier, *supra* note 19, at 414–15.

55 *Tadić*, *supra* note 52, at 58–9, paras. 131, 137, 145; see J. Paust, 'Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?', (2014) 45 GJIL 411, at 432–4.

56 ILC, Commentary *supra* note 48, Art. 8 at 47–9, paras. 3 and 8, indicating that conduct is not attributable if it related incidentally or peripherally to an operation and escaped the control of the State. Contrary *Tadić*, *supra* note 52, at 58–9, para. 137.

57 O. Corten and F. Dubuisson, 'Opération «liberté immuable»: Une extension abusive du concept de légitime défense', (2002) RGDIP 51, at 55–70; H. Hofmeister, 'When is it right to Attack So-called 'Host States'? An Analysis of the Necessary Nexus between Terrorists and their Host States', (2007) 11 SYBIL 75–84, 78, but proposing, 80–3, a refined harbouring theory.

58 Corten and Dubuisson, *supra* note 57, at 55–65 and 65–70.

59 Murphy, *supra* note 7, at 50–1.

60 Krajewski, *supra* note 11, at 189–191; Ruys and Verhoeven, *supra* note 31, at 313–14; Kowalski, *supra* note 17, at 115–18. The 'sending by or on behalf of a State' in Art. 3(g) of the Definition of Aggression has been interpreted to call for application of Art. 8 of ASR: M. Byers, 'Terrorism, the Use of Force and International Law after 11 September', (2002) 51 ICLQ 401, 407–8 and footnote 38; Corten and Dubuisson, *supra* note 57, at 65–70); Randelzhofer and Nolte, *supra* note 22, at 1415, referring to the theory of *de facto* organs; Ruys and Verhoeven, *supra* note 31, at 300–1; Klein, *supra* note 21, at 387–8; Tams, *supra* note 6, at 368–9; Zemanek,

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

Within a second category of reasoning, attribution of the armed activities of a non-state actor to a territorial state constitutes a sufficient but not a necessary condition for the invocation of self-defence, since self-defence is also available if a territorial state is substantially involved in those armed activities (*infra* this section).[61] Authors adhering to this kind of reasoning invoke the Definition of Aggression and/or the ICJ's observations in this respect in the *Nicaragua* case.[62] As such, an armed attack by a state may be said to have taken place even in the absence of attribution of such activities.

The third category of reasoning expounds that the 9/11 attacks and responses thereto contributed to a change of the standard of attribution under Article 8 of the ASR. Thus it has been argued that the effective control test of the *Nicaragua* case was overturned, and that the overall control standard propagated by the ICTY in the *Tadić* case sufficed to attribute the 9/11 attacks to Afghanistan.[63] This reasoning is supplemented by a variety of other legal constructions, such as attribution taking place under an active support standard,[64] a refined harbouring thesis,[65] or a low(er) degree of involvement.[66]

But perhaps these last positions should more properly be ranged among the last category of authors positing the existence of special rules of attribution. As a basis for such special rules of attribution applicable to determine the existence of an armed attack, it is argued that the support of terrorists below the level of direction or control, or providing them with safe haven, suffices.[67] Adding to this, it is suggested that where a state is unwilling or unable to prevent armed activities of non-state actors the breach of the positive obligation to prevent such activities would allow

supra note 7, at para. 6. Others have noted that the Court was not discussing attribution but the concept of armed attack: Michael, *supra* note 19, at 137–9; and van Steenberghe, *supra* note 25, at 196. On attribution, see earlier A. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Draft Articles on State Responsibility, The Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', (2001) 72 BYBIL 255.

61 Verhoeven, *supra* note 13, at 56–9; Ruys and Verhoeven *supra* note 31, at 314.

62 Definition of Aggression, *supra* note 34, at Art. 3(g); *Nicaragua*, *supra* note 8, at para. 195.

63 Stahn, *supra* note 7, at 37 and 47, adding the trend may be to provide for the responsibility of host states for merely tolerating or harbouring terrorists; contrary Kowalski *supra* note 17, at 113–15, who – while supporting the overall control standard – denies that this would allow attribution of the 9/11 attacks, and noting that this would not provide a remedy if a state were not sufficiently involved or unable or unwilling to repress armed activities of non-state actors; Kolb, *supra* note 14, at 276–7, noting that logistical support and financing are sufficient to turn a State into a complicit. M.E. O'Connell, 'Lawful Self-Defense to Terrorism', (2002) 63 *University of Pittsburgh Law Review* 889, at 899–902, finds Afghanistan responsible for the acts of al-Qaeda while noting (at 902, footnote 85) that the links between the two were less substantial than required for purposes of attribution.

64 Michael, *supra* note 19, at 145–55, requiring sanctuary in combination with State cooperation or logistical or other support.

65 Hofmeister, *supra* note 57, at 80–3, asserting state support as a *conditio sine qua non* for the armed activities, clear evidence of harbouring, and awareness moderated by a due diligence requirement; see also Ruys, *supra* note 2, at 503. In a similar vein Antonopoulos observes that practice appears to accept self-defence in response to armed activities of an armed group of great intensity, when in progress, and the armed group is permanently hosted in another State: Antonopoulos, *supra* note 15, at 171.

66 Schmidl, *supra* note 24, at 238, when the government oppresses the population and is considered illegitimate.

67 Tams, *supra* note 6, at 384–7, drawing analogies to inter-State complicity and aiding and abetting in criminal law. ILC Commentary, *supra* note 48, at 65–7, Art. 16 ; applied by analogy in *Genocide*, *supra* note 49, at 216–19, paras. 418–24.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

for their attribution.[68] Similarly, Randelzhofer and Nolte assert that any form of substantial involvement not only leads to attribution, but also allows for this when a state is unwilling or unable to deal with (large-scale) armed activities of non-state actors.[69]

However, in view of the incoherent practice since the 9/11 attacks, Ruys has come to the conclusion that there is no clearly expressed *lex specialis*.[70] Although admitting the possibility of an evolution of the rules of attribution embodied in Articles 8, 11 and 9 of the ASR,[71] he highlights that attempts at revision in the context of self-defence appear artificial and counter-intuitive in view of the basic premise underlying the rules on attribution – that a state is only responsible for its own conduct, i.e., for the conduct of persons acting on its behalf.[72] Rather, changes in the law ought to be seen from the perspective of the primary rule(s) of self-defence in terms of substantial involvement of a state in the armed activities of non-state actors.[73]

This brings us to substantial involvement. While some claim that the armed activities of non-state actors need to be attributable to a state, others argue that a state's substantial involvement in such armed activities constitutes an armed attack attributable to the state.[74] Nevertheless, as Verhoeven observes, the sending of armed bands or substantial involvement in their activities presupposes that the state is engaged, and he points to Article 1 of the Definition of Aggression which stipulates that '[a]ggression is the use of armed force by a State'.[75] In his view, substantial involvement of a state is not a requirement of attribution under the law of state responsibility, and he considers that lesser forms of involvement might be sufficient to speak of an act of aggression.[76] It has been stressed in a similar vein that state involvement is not necessary to show attribution, but is required to show: whether an armed attack has taken place;[77] with support of a state that must be a *conditio sine qua non* without which armed activities of a non-state actor could not have taken place;[78] or that substantial involvement constitutes a principle of attribution under

68 Kowalski, *supra* note 17, at 126–128, adding that necessity and proportionality would require targeting only the non-state actor, unless the State were to come in on its side; similarly Feinstein, *supra* note 7, at 57, with an aiding and abetting construction. See also J. Beard, 'America's New War on Terror: The Case for Self-Defense under International Law', (2002) 25 HJL&PP 559, at 578–82.

69 Randelzhofer and Nolte, *supra* note 22, at 1417–19, paras. 37 and 41, stressing such factors as encouragement, direct support, planning, awareness, reasonable steps, and shelter.

70 Ruys, *supra* note 2, at 491. van Steenberghe, *supra* note 25, at 194–5, asserts that practice does not support the requirement of attribution since states invoking self-defence do not claim that the territorial state itself committed an armed attack.

71 Ruys, *supra* note 2, at 490–1.

72 Ruys, *supra* note 2, at 491–2, by reference to the ICJ's statement in the *Genocide* case, *supra* note 49 at 210, para. 406.

73 Ruys, *supra* note 2, at 493.

74 Dubuisson and Corten, *supra* note 57, at 55–65; Paust, *supra* note 5, at 433–4.

75 Verhoeven, *supra* note 13, at 56–8; and also Klein, *supra* note 21, at 387.

76 Verhoeven, *supra* note 13, at 57–8.

77 van Steenberghe, *supra* note 25, at 195.

78 Krajewski, *supra* note 11, at 191–3, envisaging the armed attack in terms of substantial involvement of the State, and continuing, 193–5, to reject safe haven as a ground for attribution, since the Court had denied (*Nicaragua*, *supra* note 8, at para. 195) that the provision of weapons, or logistical or other support, could be considered an armed attack.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

the primary rules of self-defence.[79] Such reasoning then suggests a special rule of attribution of the armed activities or the armed attack, with substantial involvement as the standard of attribution.

Irrespective of the precise characterization of substantial involvement, the battleground has shifted to the level of involvement required to qualify the armed activities of non-state actors as an armed attack. As already recounted above, arguments have been made that a state may invoke the right to self-defence under lower standards of involvement,[80] or when a state aids and abets the armed activities of non-state actors to which they substantially contribute.[81] In the *Nicaragua* case, the ICJ stipulated that an armed attack did not include assistance to rebels taking the form of weapons deliveries or logistical or other support, although it added that these might be a threat or use of force, or amount to intervention.[82] Those discussing the ICJ's (restrictive) interpretation have pointed to the dissents of Judges Jennings and Schwebel,[83] with the former indicating that the combination of different forms of assistance might well be crucial in an armed attack and the latter arguing that such forms of involvement are tantamount to an armed attack.[84]

However, the latter's reading of substantial involvement in the Definition of Aggression and its history has been refuted.[85] Involvement of a state requires knowledge and participation, and the latter needs to be substantial – excluding accessory or incidental involvement and toleration.[86] Additionally, restrictivist argument holds that a state must engage in a combined attack with non-state actors and its involvement would require preparation and execution of armed activities, without controlling them, by making available its infrastructure, equipment and services.[87]

In assessing reasoning on attribution, it may first of all be noted that all authors reference the rules on state responsibility as formulated by the International Law

79 Kowalski, *supra* note 17, at 106–7 and 109 (more broadly, 105–10); Ruys, *supra* note 2 at 490, observed that a complicating factor is that Art. 51 of the UN Charter obtains characteristics of both primary and secondary law.

80 Verhoeven, *supra* note 13, at 56–8; Byers, *supra* note 60, at 409–10, arguing that due to the contested character of the rule and the legal strategy of the US, the right to self-defence could be exercised against states which actively support or willingly harbour terrorists that already committed attacks; Feinstein, *supra* note 7, at 72–3, suggesting a harbour or harbour and support standard.

81 Ruys and Verhoeven, *supra* note 31, at 314–17, otherwise denying that moral support could qualify as aiding and abetting.

82 *Nicaragua*, *supra* note 8, at 103–4, para. 195.

83 Krajewski, *supra* note 11, at 191–2; Ruys and Verhoeven, *supra* note 31, at 303–4; Ruys, *supra* note 2, at 415–16.

84 *Nicaragua*, *supra* note 8, at 543 (Dissenting Opinion, Judge Jennings); *Nicaragua*, *supra* note 8, at 341–7, paras. 162–171 (more broadly, 331–47, paras. 154–71) (Dissenting Opinion, Judge Schwebel), discussing the preparatory works of the Definition of Aggression.

85 Dubuisson and Corten, *supra* note 57, at 55–65; Klein, *supra* note 21, at 370–4; Ruys, *supra* note 2, at 389 and 418; see also Corten, *supra* note 12, at 447–50.

86 Dubuisson and Corten, *supra* note 57, at 56; Klein, *supra* note 21, at 372, notes that support of terrorist groups, taken by itself, was rejected in the drafting process.

87 Corten, *supra* note 12, at 446–7. Supported by Ruys, *supra* note 2, at 387–90, indicating that relatively minor forms of assistance and certainly toleration would be insufficient to justify the invocation of self-defence, and suggesting that overall control of a state could transform the armed activities of a non-state actor into an armed attack by a state; Paust, *supra* note 55, at 433–4, making a distinction between general support for a non-state actor and support for specific armed attacks; L.-A. Sicilianos, 'L'invocation de la légitime défense face aux activités d'entités non-étatiques', (1989) 2 HYIL 147, at 153–4, had earlier raised the question whether the ICJ in *Nicaragua* had emptied 'substantial involvement' of its substance.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

Commission in 2001. As such, those rules are taken to reflect customary international law, although little attempt is made to establish this independently from earlier studies. Of course, in 2007 the ICJ affirmed in the *Genocide* case that the rules embodied in Articles 4 and 8 of the ASR reflect customary international law.[88] Exceptionally, van Steenberghe dispenses with attribution as a requirement altogether, noting that states invoking self-defence do not claim that the territorial state has, itself, committed an armed attack.[89]

When considering the standard of control required under Article 8 of the ASR, most authors proceed on the understanding that this is effective control as maintained by the ICJ and ILC rather than overall control for organized armed groups as asserted by the ICTY.[90] Although van Steenberghe claims that a large number of scholars have attempted to attribute the 9/11 attacks, orchestrated and executed by al-Qaeda, to Afghanistan,[91] the survey above paints a somewhat different picture. Rather, their attribution to Afghanistan under Articles 4 and 8–11 of the ASR is, overall, denied by authors with the exception of a few.[92] Moreover, a potential ground for attribution such as *de facto* status of organ under Article 4(2) of the ASR is not raised at all by any author, and most likely will not be raised due to the ICJ's even more demanding 'complete dependence and control' test set out in the *Genocide* case.[93]

However, of those arguing a change in the law, only a few have asserted a change in the general rules of attribution as established in the ASR. Instead, many have made the case for a special rule allowing for the attribution of the armed activities of non-state actors to a state in certain circumstances. Among the latter, relatively few seem to argue in favour of lesser forms of support, and most have used legal constructions that would attribute such activities to a state in case of sanctuary and support, complicity, aiding and abetting, or a state being unwilling or unable to repress such activities. With respect to this last, a connection is regularly made with a state's breach of its positive or due diligence obligations to not tolerate and to repress the armed activities of non-state actors within its territory. Ruys has denied the existence of special rules of attribution, pointing to incoherent practice.[94]

If a change in the law on self-defence cannot be established by reference to the (general or special) rules of attribution, this does not exclude the possibility that it could lie with the concept of armed attack and the involvement of a state in the armed activities of a non-state actor. When considering the required level of involvement, substantial or otherwise, similar kinds of movements may be detected as with attribution. Although some have insisted on a restrictive reading of substantial

88 *Genocide*, *supra* note 49, at 202, para. 385, at 207–8, para. 398.

89 van Steenberghe, *supra* note 25, at 194–5.

90 Klein, *supra* note 21, at 389–90; Corten, *supra* note 12, at 450–4, invoking the *Genocide* case to deny the relevance of the overall control standard.

91 van Steenberghe, *La légitime défense*, *supra* note 9, at 311–12.

92 Affirming attribution: Murphy, *supra* note 7, at 50–1; seemingly, O'Connell, *supra* note 63, at 899–902; Stahn, *supra* note 7, at 47, on the basis of the overall control standard. Denying attribution: Krajewski, *supra* note 11, at 189–91 and 195, in relation to Art. 8 and 11 of the ASR; Stahn, *supra* note 7, at 37, on the basis of the effective control standard; Ruys and Verhoeven, *supra* note 31, at 300–1 and 313–14, in relation to Art. 8 and 11 of the ASR; Kowalski, *supra* note 17, at 113–18, in relation to Art. 8–11 of the ASR.

93 *Genocide*, *supra* note 49 at 204–6, paras. 390–5.

94 Ruys, *supra* note 2, at 490–3.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

involvement and endorse the ICJ's observations in the *Nicaragua* case,[95] others have suggested that less than substantial involvement by a state may suffice to invoke self-defence against that state. Otherwise, a certain trend can be seen to the effect that awareness of the armed activities of non-state actors is required, and that more than mere presence on the territory of a state, or even their toleration, is required to invoke self-defence against that state.

Scholarship seems to have moved away from restrictivist positions with respect to the attribution of armed activities of non-state actors or a state's substantial involvement therein, although some pockets of resistance may be noticed. However, it would be a mistake to qualify all those arguing changes in the law to be expansionists, since quite often the legal constructions put forward attest to a concern to narrow the opportunities for states to invoke self-defence in relation to armed activities of non-state actors. Moreover, to the extent that authors argue changes of the law, these are contingent on their reading of examples from state practice, the justifications put forward by victim states and responses by other states. This brings us to the next section.

4. (SUBSEQUENT) PRACTICE, AGREEMENT OF THE PARTIES, AND ACCEPTANCE AS LAW

In deploying their reasoning, authors tend to make use of arguments derived from examples from practice and responses thereto. As such, they assert, expressly or implicitly, either that such practice and responses are relevant to determine a particular interpretation of Article 51 of the UN Charter using Articles 31(3)(b) or (3)(c) of the VCLT, or that these evidence the content of the customary rule of self-defence in international law (Article 38(1)(b) of the Statute of the ICJ).[96] This section will consider the way in which authors have referenced practice and responses in terms of method of interpretation or as evidence of a rule of customary international law.

In the context of the 9/11 attacks,[97] Security Council Resolutions 1368 and 1373 have been commented upon for their recognition of the right of self-defence.[98] A core conclusion, not as such assailed by anybody, is that the Council recognized the right of self-defence in relation to the 9/11 attacks,[99] but serious disagreement exists as to the (legal) foundation on which this rested. Subsequent to the 9/11 attacks,

---

95 Krajewski, *supra* note 11, at 191–3, denying substantial involvement of Afghanistan in the 9/11 attacks; Dubuisson and Corten, *supra* note 57, at 54–64; Klein, *supra* note 21, at 370–4; Ruys, *supra* note 2, at 382–90.

96 The 1945 Statute of the International Court of Justice (1945), 39 AJIL, Supplement, 215–29.

97 For account of events, see S. Murphy (ed.), 'Terrorist Attacks on World Trade Center and Pentagon', (2002) 96 AJIL 273; Schmidl, *supra* note 24, at 108–16; Wettberg, *supra* note 36, at 152–63; Ruys, *supra* note 2, at 394–406, 419–33, and 443–72; Corten, *supra* note 12, at 455–66; K. Szabó, 'Anticipatory Action in Self-Defence, The Law of Self-Defence – Past, Present and Future', (2010) Ph.D. thesis, University of Amsterdam,195–215 and 226–30; UK, Responsibility for the Terrorist Atrocities in the United States: BBC, The UK's bin Laden dossier in full, 4 October 2014, paras. 1, 4, 11–13, at <news.bbc.co.uk/2/hi/uk_news/politics/1579043.stm>; US, National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report, especially 65–7 and 251–2, at <govinfo.library.unt.edu/911/report/911Report.pdf>.

98 SC Resolution 1368, preamble, para. 3; SC Resolution 1373, S/RES/1373 (2001), preamble para. 4, both available at <www.un.org/en/sc/documents/resolutions/2001.shtml>.

99 E.g., O'Connell, *supra* note 63, at 892; Zemanek, *supra* note 7, para. 15.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

the US and the UK invoked the right to self-defence and reported their actions to the Security Council. The former claimed that al-Qaeda had a central role in the attacks and was supported by the Taliban regime in Afghanistan, whereas the latter invoked also individual self-defence.[100] Immediate responses to the 9/11 attacks, and the actual assistance given to the US, have been invoked to support the idea that the right to self-defence could not only be invoked, but this right could also be exercised with respect to Afghanistan for its harbouring and/or support for al-Qaeda, or in relation to al-Qaeda independently from the involvement of Afghanistan in the attacks themselves.[101]

A thorough study by Kreß came out in 1995, discussing in detail the practice of states and their involvement in the armed activities of non-state actors.[102] Since the 9/11 attacks, various other authors have followed suit. Studies investigating later incidents and situations include: Russian incursions into Georgia in 2001 and 2002 to combat Chechen terrorists;[103] an Israeli bombardment of a Hezbollah camp in Syria in 2003 in response to an attack on Haifa;[104] the Rwandan military activities in 2004 in the Democratic Republic of Congo (DRC) in response to attacks by former militia involved in the genocide;[105] the Ugandan threat of cross-border action in the DRC in response to activities of the Lord's Resistance Army in 2005;[106] the Ethiopian intervention in Somalia in response to infiltrations of the Union of Islamic Courts in 2006;[107] the Israeli intervention in Lebanon in response to military acts of Hezbollah in 2006;[108] Israeli armed interventions in the Gaza strip in 2004 and 2008;[109] the Turkish military interventions in north Iraq in 2007 and 2008 against the Kurdistan Workers' Party (PKK);[110] the Colombian military crossing the border with Ecuador to combat terrorists belonging to the Revolutionary Armed Forces of Columbia (FARC) in 2008;[111] and the US cross-border drone strikes in Pakistan in response to Taleban and al-Qaeda attacks in 2008–2009.[112]

---

100 US, letter 7 October 2001, S/2001/746; UK, letter 7 October 2001, S/2001/747.

101 Murphy, *supra* note 7, at 46–50, arguing broad acceptance of the US claims compared to earlier incidents; Byers, *supra* note 60, at 405–10, arguing a change of customary international law to allow for self-defence against States that willingly harbour or actively support a terrorist group; Beard, *supra* note 68, at 561–78, contrasting the wide support or acceptance of the US response to earlier examples; Krajewski, *supra* note 11, at 195–9, using SC practice and NATO and OAS responses to argue on subjectivity of non-state actors; Stahn, *supra* note 7, at 36, arguing that criticism was based on other grounds than armed attack by non-state actors and that many supported or did not criticize; Printer, *supra* note 7, at 353–5, arguing the UN failed to renounce the US self-defence claim in relation to the 9/11 attacks; B. Langille, 'It's "Instant Custom": How the Bush Doctrine became Law after the Terrorists Attacks of September 11, 2001', (2003) 26 BCI&CLR 145, at 151–6, arguing that the resolutions and their acceptance constitute instant custom.

102 Kreß, *supra* note 16, at 42–102, and 346–54 for his conclusions (English summary).

103 Corten, *supra* note 12, at 184; van Steenberghe, *supra* note 25, at 307; Ruys, *supra* note 2, at 464–6.

104 Corten, *supra* note 12, at 183; Wettberg, *supra* note 6, at 192–5; Ruys, *supra* note 2, at 447–9.

105 van Steenberghe, *supra* note 25, at 307–8; Ruys, *supra* note 2, at 466–8.

106 Ruys, *supra* note 2, at 468–9.

107 Ruys, *supra* note 2, at 469–71.

108 Corten, *supra* note 12, at 183–4 and 463–4; van Steenberghe, *supra* note 25, at 296–8; Wettberg, *supra* note 36, at 114–23; Schmidl, *supra* note 24, at 143–98; Ruys, *supra* note 2, at 449–57.

109 Wettberg, *supra* note 36, at 195–203; van Steenberghe, *supra* note 25, at 298–9.

110 Corten, *supra* note 12, at 184–5; van Steenberghe, *supra* note 25, at 303–6; Ruys, *supra* note 2, at 457–62.

111 Corten, *supra* note 12, at 185 and 464–5; van Steenberghe, 308–9; Ruys, *supra* note 2, at 462–4.

112 Ruys, *supra* note 2, at 471–2.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

Regarding the 9/11 attacks and examples from later practice, the legal justifications claimed and the responses by other states, the following topics will be raised consecutively: the interpretation of Resolutions 1368 and 1373; the scope and relevance of practice; the legal justifications put forward and their connection to attribution and substantial involvement; and the assessment of responses.

Restrictivist reasoning as to the interpretation of Resolutions 1368 and 1373 has focused on language, location and competence. As to language, the generality of the references to self-defence have been noted,[113] along with a certain ambiguity, because the 9/11 attacks were qualified as a threat to peace rather than an armed attack.[114] Corten asserts that the Resolutions do not challenge or change the law, since self-defence is only recognized 'in accordance with the Charter'.[115] Regarding location, it has been observed that the references to self-defence are contained in the preambles rather than the operative paragraphs.[116] More fundamentally, the Security Council's competence to provide some kind of authorized interpretation has been questioned.[117] Moreover, as the Security Council does not purport to lay down rules of customary international law, its resolutions must be subjected to the same kind of scrutiny as General Assembly resolutions, and the legal opinions of all states must be carefully analysed.[118]

With respect to the interpretation of Security Council resolutions, few references are made to the observations of the ICJ in the *Namibia* opinion or to the ICJ's elaboration in the *Kosovo* opinion.[119] Questions regarding the relevance of Security Council resolutions to the determination of a rule of customary international law have been raised especially in view of the Council's limited composition, and the need for confirmation by the wider international community is stressed.[120] The ICJ's cautionary tale in the *Nicaragua* case and *Nuclear Weapons* opinion,[121] regarding

113 Verhoeven, *supra* note 13, at 62–4.

114 Ruys and Verhoeven, *supra* note 31, at 311–12; McKeever, *supra* note 7, at 384–5, adding that the 9/11 attacks involved some degree of state complicity; Kowalski, *supra* note 17, at 124, noting the resolutions do not refer to armed attack and cannot be read to conclusively affirm that non-state actors can be an autonomous source of armed attacks; Ruys, *supra* note 2, at 441, observing that no in depth discussion took place of the Taleban's responsibility for al-Qaeda's acts.

115 Corten, *supra* note 12, at 181–2; similarly, McKeever, *supra* note 7, at 384–5, invoking the World Summit Outcome, which stipulates that the provisions of the Charter are sufficient to address the full range of threats to the peace. GA Resolution 60/1, World Summit Outcome, A/RES/60/1, 12 September 2005, para. 79.

116 Ruys and Verhoeven, *supra* note 31, at 311–12; McKeever, *supra* note 7, at 384–5, adding that self-defence and non-state actors are not combined in one paragraph; Kowalski, *supra* note 17, at 124.

117 Corten, *supra* note 12, at 182.

118 Corten, *supra* note 12, at 45–6; similarly, Ruys, *supra* note 2, at 39 and 49.

119 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 53, para. 114; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, at 442, para 94; see generally M. Wood, 'The Interpretation of Security Council Resolutions', (1998) 2 MPYUNL 73; and K. Boon, Are Security Council acts relevant to the formation of customary international law?, 26 June 2014, at <opiniojuris.org/2014/06/26/security-council-acts-relevant-formation-customary-international-law/>.

120 Murphy, *supra* note 7, at 46, noted that the GA after 9/11 condemned the terrorist acts but did not characterize them as an armed attack and did not recognize the right of self-defence. By contrast, O'Connell, *supra* note 63, at 892, observed that the GA did not condemn the use of force against Afghanistan.

121 Nicaragua, *supra* note 8, at 99–100, para. 188, holding that *opinio juris* may be derived, *with due caution*, from the attitude of states towards certain General Assembly resolutions; *Legality of the Threat or Use of Nuclear*

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

the way in which the contribution of General Assembly resolutions to customary international law must be assessed, is infrequently recounted.

Moving to state practice, authors frequently reference the *Caroline* incident of 1837 invoking it as an example of self-defence against armed activities of non-state actors.[122] In this respect, only a few authors suggest its limited relevance, with Antonopoulos decrying the near 'theological reverence' for Webster's formula and noting that self-defence in those days was not 'an exception in law to a prohibition established by law'.[123] As such, his view is that this deprives pre-Charter practice of any significance.[124]

As to the extent of practice required to establish a rule, the claim has been made that the Bush doctrine, asserting the right of self-defence against states that harbour terrorists, led to a rule of instant customary law.[125] Opposed to this is the view that one particular incident cannot create a rule.[126] The ICJ's avowal in the *North Sea Continental Shelf* cases that a short period of time is not necessarily a bar to the creation of a rule is referenced,[127] but some add the Court's restrictive qualification that within such a period of time practice must have been 'extensive and virtually uniform'.[128] The number of incidents or situations in which self-defence is invoked in relation to armed activities of non-state actors has been said to be on the rise when compared to practice before the 9/11 attacks.[129]

Authors generally do not reference relevant cases, such as the *Asylum* and *Nicaragua* cases, with the former requiring a 'constant and uniform usage' and the latter indicating that only a general practice is required, which does not need to be in 'absolutely rigorous conformity with the rule'.[130] As to the breadth of practice, it may be noted that overall, authors do not attempt to quantify the extent of state practice required to establish a rule of customary international law, instead preferring to note trends. Another question, whether the practice required to establish an exception could be less extensive than that needed to found the general rule, appears not to have been raised.

Weapons, *supra* note 26, at 226, para. 70, affirming the need to look at the content of GA resolutions and the conditions of their adoption.

122 W.M. Reisman, 'International Legal Responses to Terrorism', (1999) 22 HJIL 3, at 42–7; Murphy, *supra* note 7, at 50; Orr, *supra* note 10, at 740. See thorough discussion, in relation to necessity and proportionality of self-defence, in J. Green, *The International Court of Justice and Self-Defence in International Law* (2009), 63–76.

123 Antonopoulos, *supra* note 15, at 161, in relation to imminent armed attacks. Also critical Kolb, *supra* note 14, at 265–7; and T. Ruys, 'Guest Post: Self-Defence and Non-State Actors in the Cold War Era – A Response to Marty Lederman', 12 March 2015, available at <www.opiniojuris.org/2015/03/12/guest-post-self-defence-and-non-state-actors-in-the-cold-war-era-a-response-to-marty-lederman/>.

124 Antonopoulos, *supra* note 15, at 161.

125 Langille, *supra* note 101, at 154–6.

126 Krajewski, *supra* note 11, at 206–7; Verhoeven, *supra* note 13, at 63–4; Corten, *supra* note 12, at 40–1.

127 Michael, *supra* note 19, 150. ICJ, *North Sea Continental Shelf case (Germany v. Denmark)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 43, para. 74.

128 Corten, *supra* note 12, at 40–1.

129 Ruys and Verhoeven, *supra* note 31, at 294–96; Tams, *supra* note 6, at 378–81, both taking the post-Cold War period as frame of reference.

130 *Asylum case (Colombia v. Peru)* Judgment of 20 November 1950, [1950] ICJ Rep. p. 266, at 276–7; *Nicaragua*, *supra* note 8, at 98, para. 186.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

Regarding the relevance of practice, the legal justification put forward by the state invoking self-defence is considered crucial. van Steenberghe is singularly explicit in this respect, by positing that state practice must constitute an application of the law on self-defence, and he investigates legal justifications (not) invoked to show their relevance to assess an evolution of the law.[131] Others discount certain examples for examining whether attribution is no longer relevant, since the state invoking self-defence precisely premised its claim on attribution of the armed activities of the non-state actor concerned.[132]

Speaking in relation to non-intervention, the ICJ accepted that customary international law might change as a result of new claims, and it held:[133]

> [t]he significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.

Clearly then, the broadening of the right to self-defence is possible too, whether through interpretation or customary international law. However, the ICJ also observed, although rarely referenced, that declarations made by states at times constitute 'statements of policy, and not an assertion of existing rules of international law', and spoke of intervention justified 'on the political level' but not 'on the legal level'.[134]

Attribution is generally discussed in relation to examples from practice, because it is necessary to determine whether a precedent that supports self-defence beyond the stricter confines of armed attacks by states exists.[135] With respect to the 9/11 attacks and substantial involvement, the close links that existed between the Taleban and al-Qaeda have been noted, with Corten qualifying this as more than 'mere tolerance and diffuse support'.[136] Ruys contemplates that the required nexus between non-state actors and states might not have become redundant, considering the emphasis on the Taleban's harbouring and support of al-Qaeda.[137] Similarly, regarding the 2006 Israeli actions against Lebanon, the former pointed to the close ties of Hezbollah to, and forming part of, the Lebanese government and considering self-defence to be

131 van Steenberghe, *supra* note 25, at 187–91. Ruys *supra* note 2, 469–71. Ruys notes that Ethiopia's use of force in Somalia should rather be seen as intervention by invitation.

132 Michael, *supra* note 19, at 146–7; and Ruys, *supra* note 2, at 424–6, both mentioning the bombing of the West Berlin disco in 1986 and the failed assassination attempt on former President Bush in 1993.

133 *Nicaragua*, *supra* note 8, at 108–9, para. 207.

134 *Nicaragua*, *supra* note 8, at 108–9, paras. 207–8. See Corten *supra* note 12, 31–2; Ruys, *supra* note 2, at 36, 38–9, and 40; and van Steenberghe, *La légitime défense*, *supra* note 9, at 135.

135 Corten, *supra* note 12, at 461–2, noting that NATO's declaration invoking Art. 5 of its constituent treaty was premised on the attacks being 'directed from abroad', and suggesting, 463–4, attribution of Hezbollah actions to Lebanon because of its close ties to and members within the Lebanese government; Ruys, *supra* note 2, at 454–5, denying attribution of Hezbollah actions, and noting, 459, that the connection between the PKK and Iraqi authorities remained below the *Nicaragua* and *Tadić* thresholds and that no active support was given.

136 Corten, *supra* note 12, at 462–3.

137 Ruys, *supra* note 2, at 439–42, but denying attribution and claiming Taleban support remained below the threshold of substantial involvement. Rather, so he claims, 440, the US position was premised on a harbouring doctrine.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

applicable for that reason.[138] The latter generally denied attribution, but noted that Hezbollah constitutes somewhat of a state within a state, with practically exclusive control over the south of Lebanon, which might allow attribution under Article 9 of ASR.[139]

In assessing the responses of other states in terms of agreement to any particular interpretation or *opinio juris*, restrictivist reasoning challenges the extent of support for self-defence actions, the qualification and implications of support or condemnations of action allegedly taken in self-defence, and the assessment of silence either in support or against a claim of self-defence. To start with the extent of support, the statement of the Organization of the Islamic Conference (OIC), consisting of 57 member states, could not be seen to show support for the legal doctrine propounded by the US in response to the 9/11 attacks.[140] With respect to the 2003 Israeli action against Hezbollah in Syria, it has been noted that general support for a wide right to use force against terrorist camps in another state was lacking.[141]

The nature of support or condemnation has drawn diverse restrictivist comments. First, the argument has been made that some support voiced for the US action in self-defence after the 9/11 attacks was political in nature and could not be (easily) qualified in legal terms.[142] The emotionally charged atmosphere surrounding the 9/11 attacks may have led states to respond out of emotion rather than legal conviction.[143] Second, condemnations are sometimes said to be based on grounds other than the *petitio principii* of self-defence against an armed attack by a non-state actor, such as lack of evidence, lack of necessity, or disproportionality of action in self-defence.[144] Implicit in this argument is the inference that states which condemn on other grounds support the principled claim of the state invoking self-defence.[145] In relation to the 2006 Israeli actions against Lebanon, restrictivists retorted that it was unclear whether states based their condemnations exclusively on disproportionality, or whether they also rejected the Israeli claim as a matter of principle.[146]

138 Corten, *supra* note 12, at 463–4.
139 Ruys, *supra* note 2, at 455–7.
140 Corten, *supra* note 12, at 462.
141 Ruys, *supra* note 2, at 449.
142 Corten, *supra* note 12, at 462, further asserting that some states were pressured into support. Ruys and Verhoeven, *supra* note 31, at 292–4, note that in the decolonisation period condemnations were politically motivated rather than based on legal grounds; Trapp, *supra* note 17, at 153, observing that condemnations of Israel were due to concerns for the Middle East peace process and the implementation of the Roadmap.
143 Corten, *supra* note 12, at 462; Ruys, *supra* note 2, at 441–2, pointing to Ratner's qualification of the Eiffel Tower factor.
144 Stahn, *supra* note 7, at 36; Trapp, *supra* note 17, at 153–5, and noting, 152–3, that states did not comment on the legal issue of action in self-defence targeting terrorist bases in states complicit with or acquiescing in terrorist operations.
145 Wettberg, *supra* note 36, at 71–2, makes this argument in general; Ruys, *supra* note 2, at 451–5, but does observe, 455, that States did not explain why the right to self-defence was applicable in the circumstances, no opinions were expressed on the legality of self-defence against attacks by non-state actors, and no reference was made to Resolutions 1368 and 1373; see generally van Steenberghe, *La légitime défense*, *supra* note 9, at 167–8.
146 Corten, *supra* note 12, at 463–4.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

Silence comes into the debate in different voices. Thus, lack of condemnation is at times argued to support a purported rule.[147] Restrictivist authors respond by pointing to factors that may explain lack of condemnation. In the case of the 9/11 attacks, for instance, the circumstance, condemned by the Security Council before the attacks,[148] that Afghanistan had allowed its territory to be used for the export of terrorism by al-Qaeda.[149] With respect to the Turkish incursions into northern Iraq, Ruys noted that states generally followed the lead of the US and the EU not to take any clear legal position, with muted criticism due to the limited objectives and proportionality of the operations concerned.[150] Although he considers that this may support an interpretation that a nexus between a non-state actor and the territorial state is not required in situations where the latter is unwilling or unable to prevent attacks, he warns that, in view of the lack of legal scrutiny by the international community, 'acquiescence is a fickle barometer of *opinio iuris*'.[151] With respect to other incidents or situations, it has been noted that at times, when the facts remained unclear, intervening states refrained from expressing their legal claim, and international legal scrutiny was minimal or absent.[152] More generally, the interpretation of precedents may prove difficult because of divisions among states and imprecise discourse,[153] that states 'frequently invoke only political or moral considerations' or mix them up with legal ones, and at times remain silent on the issue of legal justification.[154]

In assessing the use by authors of practice and responses in relation to the armed activities of non-state actors and the right of self-defence, a preliminary remark is that at times no clear indication is given as to the source investigated or the purpose of discussion of practice and responses.[155] Nevertheless, it does appear that most authors set forth their analysis or make arguments with a view to establishing the content of a rule of customary international law. In doing so they generally do not reference such cases or opinions of the ICJ as are pertinent to assess the weight to be given to examples from practice, the legal justification offered and responses thereto,[156] and many do not attempt to establish their method of investigation.[157]

147 Verhoeven, *supra* note 13, at 62–3; Stahn, *supra* note 7, at 36; Printer, *supra* note 7, 353–5, discussing possible limitation of self-defence as a result of measures by the Council; Ruys and Verhoeven, *supra* note 31, at 296 and 314, in relation to cross-border military action by Burundi and the US.

148 Security Council Resolution 1267, S/RES/1267 (1999), Preamble paras. 5–7 and paras. 1–2, available at <www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1267(1999)>.

149 Corten, *supra* note 12, at 182–3.

150 Ruys, *supra* note 2, at 459–60.

151 Ruys, *supra* note 2, at 461–2.

152 Ruys, *supra* note 2, at 404–5, 428 and 471.

153 Corten, *supra* note 12, at 465; and also Ruys, *supra* note 2, at 433, regarding Iranian incursions into Iraq.

154 van Steenberghe, *supra* note 25, at 187; see also Corten, *supra* note 12, at 38–40.

155 Beard, *supra* note 68, at 560–6, mentioning both the Charter and customary international law; Ruys and Verhoeven, *supra* note 31, at 292–8, only on the last page mentioning customary international law; Trapp, 145–155, only referencing the Court's statements on the customary self-defence requirements of necessity and proportionality; Tams, 378–82, coming to the conclusion that 'the current law' is 'in a state of flux'; Michael, 145–55, mentioning both Art. 31(3)(c) VCLT and customary international law.

156 Ibid. Exceptionally: Antonopoulos, *supra* note 15, at 160; Wettberg, *supra* note 36, at 67–8, 70–72; Corten, *supra* note 12, at 4–49; Ruys, *supra* note 2, at 6–52; van Steenberghe, *La légitime défense*, *supra* note 9, at 141–81.

157 But see Wettberg, supra *note* 36, at 67–8, 70–2; Corten, *supra* note 12, at 4–49; Ruys, *supra* note 2, at 6–52; van Steenberghe, *La légitime défense*, *supra* note 9 141–81.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

Some authors use practice and responses to interpret the UN Charter from the perspective of 'relevant rules of international law applicable in the relations between the parties' pursuant to Article 31(3)(c) of the VCLT.[158] Others refer to 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' pursuant to Article 31(3)(b) of the VCLT.[159] However, as with customary international law, little attempt is made to set out their understanding of the limitations on the use or weight of such elements of interpretation.[160]

The choice of element of interpretation and source is important because different standards apply for the assessment of practice and responses to establish an interpretation or to establish a rule of customary international law.[161] For purposes of interpretation, Article 31(3)(b) of the VCLT may require practice by only some of the parties, but it does require agreement by all of them.[162] The use of Article 31(3)(c) of the VCLT calls for a *renvoi* to customary international law and might require more extensive practice but probably not (explicit) acceptance by all States. Furthermore, Article 31(3)(b) VCLT only requires agreement, otherwise unqualified, whereas under Article 38(1)(b) of the ICJ Statute customary international law demands that the practice be accepted *as law*.

Authors tend to take three steps in assessing the contribution of practice and its acceptance as law to change customary international law. The first step is to identify and investigate examples from practice. The second step is to examine the claim or justification offered by the state invoking self-defence. The (ir)relevance of practice is wound up with that claim or justification and constitutes *opinio juris* of the state(s) invoking self-defence.[163] This then ties up with the third step, namely to assess the responses of both the target state and other states in response to the claim or justification offered.[164]

Sometimes the discussion is structured into timeframes, most commonly the Cold War, post-Cold War and post-9/11 periods.[165] In many contributions, responses

158 Michael, *supra* note 19, at 145, adding that practice may be relevant to a rule of customary international law independently; Ruys, *supra* note 2, at 19–22, who also contemplates, 22–9, a modification of the Charter through customary international law; van Steenberghe, *supra* note 25, at 141–7, discusses practice modifying a treaty independently from a rule of customary international law.

159 Verhoeven, *supra* note 13, at 52; van Steenberghe, *supra* note 25, at 185–7; Schmidl, *supra* note 24, at 43 and 108; and van Steenberghe, *La légitime défense*, *supra* note 9, at 141–3.

160 Ibid. Exceptionally: van Steenberghe, *supra* note 25, at 185– 7.

161 Contrary, van Steenberghe, *supra* note 25, at 185–187, who claims that keeping the analysis separate in order to determine an interpretation or a rule of customary international law is not strictly required, and he concludes, suggesting the similarity of the processes concerned, that 'the evolution of the law of self-defence through state practice merely requires that this practice be followed in *application* of this law and be *constant* and *general*.'

162 ILC Commentary, *supra* note 28, at 220.

163 See also Ruys, *supra* note 2, at 32–3, pointing to the increased weight of physical practice accompanied by legal justification. For early reference to *opinio juris*, see *Asylum* case, *supra* note 130, at 276–7; and *North Sea Continental Shelf* case, *supra* note 127, at 43–5.

164 Ruys, *supra* note 2, at 30–1. Corten, *supra* note 12, at 29–34, and Ruys, *supra* note 2, at 34–42, reference *Nicaragua*, *supra* note 8, at 108–9, para. 207 (emphasis added): '[t]he significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, *if shared in principle by other States*, tend towards a modification of customary international law.'

165 Ruys and Verhoeven, *supra* note 31, at 292–8; Tams, *supra* note 6, at 362–92.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

of states are assessed and quantified by reference to support or acceptance of self-defence claims, condemnation on other grounds than the *petitio principii* of action in self-defence, and lack of condemnation or criticism. Such arguments amount, quite often, to a claim of 'silence implies consent' (*qui tacet consentire videtur*).

In many of the contributions surveyed, restrictivist arguments have tended to be snippets of wisdom divorced, more often than not, from any broader discussion of sources and method. This may be contrasted with the monographs by Corten, Ruys and van Steenberghe whose main contribution does not lie with their substantive analysis of practice and responses per se, but with the thorough and extensive accounting of their approach. Thus, all three have sizable chapters on sources and method, in which they set out the standard(s) by which they intend to assess the weight of practice and responses.[166] Although one cannot expect similar extensive treatment in contributions such as articles in journals or chapters in books, occasionally one does find an exemplary combination of an account of method and analysis.[167]

5. CONCLUDING OBSERVATIONS: LOOKING AHEAD AND THE ROAD AHEAD

Corten, the restrictivist *pur sang*, comes to the conclusion that self-defence may only be invoked in response to armed attacks by states.[168] Attribution of armed activities of non-state actors is possible only if they are completely dependent on the state or when acting under the instructions, directions or control of the state.[169] The main conclusion by Ruys, rather more cautiously, is that *de lege lata* there is uncertainty as to the state of the law and he concludes, on that basis, that self-defence against attacks by non-state actors is 'not unambiguously illegal' in situations falling below the *Nicaragua* threshold.[170]

Be that as it may, the next stage in the conflict between restrictivists and expansionists will no doubt be the current crisis, with the US and others invoking the right to self-defence as a response to the armed activities of the Islamic State in Iraq and the Levant (ISIL). In its letter to the Security Council, the US specifically asserts that states must be able to defend themselves when the government of a state where the threat is located is unwilling or unable to prevent the use of its territory for attacks.[171] One would hope that international legal scholars would at least note the discrepancy between the US claim that Iraq requested it to strike ISIL in Syria and the request by Iraq to the US 'to strike ISIL sites and military strongholds, with our

166 Corten, *supra* note 12, at 4–49; Ruys, *supra* note 2, at 6–52; van Steenberghe, *supra* note 25, at 141–81.
167 van Steenberghe, *supra* note 25, at 185–202.
168 Corten, *supra* note 12, at 179–86.
169 Corten, *supra* note 12, at 450–4 and 460–6.
170 Ruys, *supra* note 2, at 487.
171 US, letter 23 September 2014, S/2014/695. For recent comment, K. Heller, 'The Seemingly Inexorable March of "Unwilling or Unable" Through the Academy', 6 March 2015, <opiniojuris.org/2015/03/06/the-seemingly-inexorable-march-of-unwilling-or-unable-through-the-academy/>.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press

express consent'.[172] Quite clearly, Iraqi consent only operates in relation to Iraqi territory.

But all will be in vain unless international legal scholars can come to some kind of understanding on appropriate rules of engagement. The current projects underway at the ILC – on subsequent agreements and subsequent practice in relation to treaty interpretation and on the formation of customary international law –[173] are therefore not merely opportune but indispensable: if only to avoid an argumentative freedom on the dancefloor, or battlefield, of treaty interpretation and customary international law where anything goes.[174]

172 Iraq, letter 22 September 2014, S/2014/691; also Iraq, letter 25 June 2014, S/2014/440. Note that Iraq has not declared itself the victim of an armed attack and does not invoke self-defence. In *Nicaragua, supra* note 8, at 103–5, paras. 195–200, the ICJ held that in case of collective self-defence one would expect a state to declare itself to be the victim of an armed attack, that a request to a third State is made to assist in collective self-defence, and that the absence of a report to the Security Council may indicate that the victim State may not have been convinced that it was acting in self-defence. See comment: M. Weller, 'Striking ISIL: Aspects of the Law on the Use of Force, ASIL Insight', 11 March 2015, <www.asil.org/insights/volume/19/issue/5/striking-isil-aspects-law-use-force>.

173 G. Nolte, First report on subsequent agreements and subsequent practice in relation to treaty interpretation, 19 March 2013, A/CN.4/660; G. Nolte, Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 26 March 2014, A/CN.4/671; M. Wood, First report on identification and evidence of customary international law, 17 May 2013, A/CN.4/663; M. Wood, Second report on identification of customary international law, 22 May 2014, ACN.4/672.

174 J. d'Aspremont, 'Customary International Law as a Dance Floor: Part II,' 15 April 2014, <www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/>.

https://doi.org/10.1017/S0922156515000631 Published online by Cambridge University Press