view, Weisbord sees the possibility for progressive development over time, both formally with regard to the ICC, and in many local settings where the content of the norm can be defined and applied.

Indeed, from a pluralist perspective the limited reach of ICC jurisdiction may actually be beneficial, both because it renders the jurisdictional assertion less subject to immediate backlash and because it provides more room for courts, tribunals, and other actors at other levels in the international system to offer alternative approaches to defining the crime itself. Pluralists argue that institutional frameworks that allow for multiple interpretations can help build legitimacy and foster norm development and inculcation over time. Especially in an environment of intense conflict over the contours of the norm, asserting broad ICC jurisdiction to prosecute aggression could backfire: indeed, such assertions of jurisdiction could generate further resistance to the entire court as illegitimate, particularly given preexisting hostility to the ICC from powerful countries such as the United States. Thus, although some might be concerned that limiting the ICC's jurisdictional reach will undermine accountability, we must remember that the ICC will never prosecute large numbers of people anyway, so the important question is the long-term seepage of the norm into local settings. And that process of norm inculcation, paradoxically, might be better fostered by a restrained jurisdictional reach because it reduces resistance to the court and provides more space for localized development of the contours of the crime of aggression over time. For example, the proposed African Court of Justice and Human Rights will use an interpretation of the crime of aggression that builds on the Kampala definition, but expands it in significant ways.[26]

Pluralism is, of course, just one lens through which to view the crime of aggression. Yet, it is a particularly helpful one in the current era. The ICC, like so many other supranational institutions—from the North Atlantic Treaty Organization to the European Union, from the World Health Organization to the World Bank, and the United Nations itself—face unprecedented levels of resistance and attack. Indeed, as recently as June 2020 the Trump administration announced new, draconian sanctions against the ICC.[27] Muscular assertions of international authority and the rigid imposition of new norms risk provoking even more intense nationalist backlash. In this context, pluralist safety valves, which embrace competing interpretations and approaches, may be the best hope for the international system. As Weisbord's book so ably demonstrates, Jackson's efforts at Nuremberg to establish a crime of aggression, while seemingly "unsuccessful" at the time, helped pave the way for Kampala, and in turn Kampala opens space for new arguments in new contexts. The process of norm development never ends, and it is not a bad thing for those designing international institutions to acknowledge—and perhaps sometimes even facilitate—the ongoing process of legal pluralism that inevitably follows the establishment of any formal legal rule.

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Self-Defence Against Non-state Actors. By Mary Ellen O'Connell, Christian J. Tams, and Dire Tladi. Cambridge, UK: Cambridge University Press, 2019. Pp. xxv, 285. Index.
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While an issue that extends way before the events of September 11, 2001 and their aftermath,

[26] *See* Sergey Sayapi, *The Crime of Aggression in the African Court of Justice and Human and Peoples' Rights*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 314–35 (Charles C. Jalloh, Kamari M. Clarke & Vincent O. Nmehielle eds., 2019).

[27] Reuters, *Trump Authorizes Sanctions Over ICC Afghanistan War Crimes Case*, N.Y. TIMES (June 11, 2020), *at* https://perma.cc/Q4RD-PME9.

self-defense against nonstate actors has undeniably become one of the pressing issues of our more recent time, and has generated a significant amount of academic debate within—and literature from—the international legal community.[1] The questions of "if" and, if so, "when" and "how" the invocation of the international legal right of self-defense might be permissible as a response to the actions of nonstate actors have generated, and continue to generate, a wide range of responses, indicating that they are far from finding themselves settled. Indeed, the debate between the so-called "restrictivists" and "expansionists" on these interconnected questions is very much a live one and remains open.

Given the topicality of the subject under focus, it is perhaps understandable that this volume is the first in the innovative *Max Planck Trialogues on the Law of Peace and War* (Series), edited by Anne Peters, managing director at the Max Planck Institute for Comparative Public Law and International Law Heidelberg, and Christian Marxsen, head of the Max Planck Research Group.[2] As the name of the Series might suggest, the idea for each volume is for "three scholars whose geographical, professional, theoretical, and methodological backgrounds and outlooks differ greatly" (p. xi) to engage in a conversation—or "trialogue"—on a particular issue. The Series seeks to highlight not only the pluralism that exists within contemporary international legal scholarship, but also the divergence and disagreement which "should ultimately contribute to a richer understanding of the set of international legal questions tackled in each volume" (p. xi). While the Series consciously positions itself "in line with the current trend of increased self-circumspection of international legal scholarship"[3] (p. xxv), the "multiperspectivist" or "multisituationalist" approach adopted can also be seen as complementing the current interest in comparative international law.[4]

With this as a background, the Trialogue under review "raises a seemingly simple yet complex set of interrelated questions" (p. 10). Indeed, the editors state the key driving question, and the one presumably provided to the authors, as: "Does international law as it stands allow for self-defence against non-State actors on the territory of a non-consenting State" (*id.*). Within this, they pose a set of interesting sub-questions: "Has an evolution of the law occurred in this regard, and, if yes, when and how? Assuming there has been legal evolution, what does this mean in terms of legal policy? What are the repercussions for the entire regime of the *ius contra bellum*, and for the international legal order at large?" (*id.*).

While this volume falls within a well-developed literature on these issues, it nonetheless represents a welcome contribution to this existing literature by bringing together three eminent—and well published—voices in the debate under focus in the conversational format of a "trialogue." Dire Tladi is professor of international law at the University of Pretoria, South Africa, as well as a member of the UN International Law Commission and special rapporteur on peremptory norms of general international law (*jus cogens*), and a member of the Institut de Droit International. Not only does Tladi have extensive experience as a scholar in South Africa, but also in the practice of international law, which makes his contribution to the

[1] *See, e.g.*, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARV. INT'L L.J. 41 (2002); Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AJIL 244 (2011); Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012); LINDSEY MOIR, REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, *JUS AD BELLUM* AND THE WAR ON TERROR (2010).

[2] The second book in the Series on the "Law Applicable to Armed Conflict" by Ziv Bohrer, Janina Dill, and Helen Duffy was published in 2020, and the third on "Intervention by Invitation" by Olivier Corten, Gregory H. Fox, and Dino Kritsiotis is also in progress.

[3] *See, e.g.*, INTERNATIONAL LAW AS A PROFESSION (Jean D'Aspremont, Tarcisio Gazzini, André Nollkaemper & Wouter Werner eds., 2017); Andrew Lang and Susan Marks, *People with Projects: Writing the Lives of International Lawyers*, 27 TEMP. INT'L & COMP. L.J. 437 (2013).

[4] *See, e.g.*, COMPARATIVE INTERNATIONAL LAW (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg eds., 2018).

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Trialogue a valuable one. Christian Tams is professor of international law at the University of Glasgow, UK, and an academic member of Matrix Chambers, London. As the editors note, Tams "was invited to the Trialogue as someone who has been exposed to both the doctrinal rigour of the German legal system as well as to the case- and practice-oriented perspective commonly found in the Anglo-Saxon approach to international law" (p. 11). Finally, Mary Ellen O'Connell, who is the Robert and Marion Short Professor of Law and research professor of international dispute resolution at the Kroc Institute for International Peace Studies, University of Notre Dame, United States, was "invited to the Trialogue for her normative approach to international law, at the core of which is a strong sceptical attitude toward the utility and morality of using military force" (p. 12).

Bookended by a useful introduction and conclusion by the Series editors, the volume contains each of the authors' chapters in turn, with no apparent rationale for the order in which they are presented. The chapters reveal several interesting points of conversion and diversion between the authors that not only provide a valuable debate on the issue under focus, but are also illuminating in regards to what they reveal about approaches to international law more generally.

An immediate issue of note is how the central question posed by the volume's editors is received and interpreted by each of the authors. While, as noted above, the editors qualified this key question with a series of sub-questions, the parameters of the question and the issues involved are not elaborated upon, which—whether intentionally or not—results in each of the authors interpreting this question—and thus designing their investigation and analysis—notably differently.

Tladi largely frames his investigation around the question of whether self-defense is permissible in the territory of nonconsenting innocent states in response to attacks by nonstate actors located there. With a focus on the qualifying adjective "innocent" throughout his chapter, Tladi would seem to restrict his analysis to situations beyond that of simply "nonconsenting" states, as per the question posed by the editors. Indeed, interpreting the question in this way restricts the analysis to states that are simply *unable*—and therefore innocent of any wrongdoing—to take any action against nonstate actors operating from their territory. While the claim has rather controversially been made that states that are in the position of being unable to take the necessary action against nonstate actors operating from their territory open themselves up to military action by a defending state,[5] an equally controversial claim—and one that has arguably led to greater debate—concerns military action in self-defense against states that are—or at least portrayed as being—*unwilling* to take the necessary action. This has brought to the fore the interesting and topical question of the level of involvement a state needs to have with the specific activities of the nonstate actors (the "state nexus," as Tams terms it (see p. 104)) to either be able to attribute their actions to it—including whether the ubiquitous yet restrictive "effective control" test still stands in this context, or ever did—or to be able to say at least that sufficient wrongdoing has been committed by the territorial state to open up its territory to military action by a defending state in response to the attacks of the nonstate actors.

There are today many examples of states justifying self-defense in the territories of other states on the basis that the territorial state is in some way responsible for the activities of the nonstate actors located there, whether that be due to it actively "supporting" them, being "unwilling" to stop them, being "complicit" in their actions, "harboring" them, or "aiding and abetting" them. While falling short of making the claim that the territorial state is "effectively controlling" the nonstate actor's activities, these doctrines all implicitly or otherwise advance the claim that a lesser involvement by the state make the activities of the nonstate actors in some measure attributable to the territorial state, something which Tladi acknowledges (see, e.g., p. 41). It is, as such, a shame that he is of the view that

[5] *See, e.g.*, Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 770 (2012).

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addressing this issue "would require an assessment—well beyond the scope of [his] contribution" (pp. 86–87). With much debate regarding the so-called "unable or unwilling" doctrine at present,[6] one gets the feeling that only half of this doctrine is covered by Tladi in his contribution. Reading his thoughts on the other half would have been a welcome addition to an otherwise excellent and erudite contribution to the volume.

Tams, on the other hand, focuses his investigation on what he describes as the "threshold question" (p. 92), that is, if the right of self-defense under Article 51 of the UN Charter can be invoked against the attacks of nonstate actors. As Tams notes, this provides "focused engagement with a crucial question" (p. 94), but it also perhaps at first glance presents an unnecessary limitation in that it appears to be rather narrowly focused on whether "armed attacks" can be perpetrated purely by nonstate actors, and not *Self-Defence Against Non-state Actors*, as the volume is titled, which is a broader issue and one which incorporates into the equation a host of other factors. Indeed, it is a question of not just if nonstate actors are capable of perpetrating armed attacks but also if—and, if so, under which circumstances—action might be taken upon the state's territory where they happen to be located. However, while the first part of Tams's chapter provides a detailed examination of the interpretation of Article 51 in addressing the first issue—not only its textual contours but also its context and object and purpose—the second part of the chapter regarding subsequent state practice provides a dense and careful exploration of the second issue, in particular that of attribution of the attacks of nonstate actors to states. The focus of the chapter is in that sense somewhat broader than what the "threshold question" might at first glance appear to allude to.

That is not to say, however, that Tams provides a holistic assessment of all relevant issues. Indeed, and to his credit, Tams acknowledges that his chapter does not address issues such as the gravity, if any, required for the attacks, and what Tams describes as "contextual factors," including "the strength of the reacting State's factual case and the persuasiveness of its claim that military action is necessary as a measure of last resort and that it be exercised on the territory of the targeted States" (p. 169).

O'Connell, by contrast, does not so much seek to answer a specifically framed question, but rather to provide a firm rebuttal to what she perceives as the various strands of an expansive or "flexible" interpretation of the right of self-defense (p. 178). However, in terms of scope, O'Connell also draws into the discussion the issues of imminence, the so-called "unable or unwilling" doctrine, the human right to life, the wisdom, utility, and morality of using force, whether terrorist acts should be treated as crimes rather than armed attacks for the purposes of the right of self-defense, and, with that, the potential role of law enforcement. Constraints of space do not permit O'Connell to go into much depth here, and not all of these issues are perhaps strictly relevant to the central question of the volume, but their inclusion is a welcome acknowledgement of the breadth of issues involved.

While the authors interpret the question—and frame their investigations—differently, all three authors have the UN Charter as their general point of departure. In particular, underpinning their respective contributions is the question of the breadth and scope of the right of self-defense, as found in Article 51 of the Charter. Yet, this is where they diverge in respect to their approaches to the sources of international law relevant to the inquiry and the possibilities for, and methods of, interpretation and change.

As the "restrictivists" of the Trialogue, O'Connell and Tladi are of the view that the right of self-defense is, and has always been, of a restrictive state-centric nature not encompassing the right of self-defense against attacks by nonstate actors that are not attributable to states. While both authors stress that it is through a methodical assessment of the law that leads them to this view, there are also clear policy rationales present. O'Connell, on the one hand, is open in her aim of "expanding the options for

[6] See, perhaps most recently, Craig Martin, *Challenging and Refining the "Unable or Unwilling Doctrine,"* 52 VAND. J. TRANSNAT'L L. 387 (2019).

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peace, not the excuses for war" (p. 257). Tladi, however, makes the argument throughout his chapter that the "mechanism for collective action [through the UN] is the primary tool through which threats to the peace and security, including threats to individual States, are to be addressed" (p. 87). In addition, and interestingly, Tladi is open in regards to his concern about "an interpretation of law that facilitates the 'de-constraining'" of militarily powerful states, something which he clearly seeks to avoid (p. 21). Tams, on the other hand, and representing what might be termed a "cautious expansionist," sees no impediment in principle to the right applying to nonstate actors and, in addition, while increasing in both prevalence and prominence following the attacks of September 11, 2001, state practice, during the entire era of the UN Charter, has witnessed defensive force in response to the attacks of nonstate actors.

A central theme of O'Connell's chapter is her positioning of the prohibition of force as a *jus cogens* norm, upon the basis that "[c]ontrols on the use of force . . . are . . . essential to any legal system, going to the very reason for law" (p. 228). Tladi (see p. 26) and Tams (see p. 110), while not providing underpinning reasoning in the same way as O'Connell, are both in agreement regarding its general peremptory status. However, whereas Tladi and Tams both adhere to a doctrinal methodology and rarely look beyond positivism in the identification, interpretation, and modification of the law, at the other end of the jurisprudential spectrum O'Connell strenuously eschews such methods for those grounded more in natural law and morality. Consequently, for O'Connell, peremptory norms "are discerned, rather than created through positive law method" (p. 228). This does raise the question as to how these norms are "discerned." As she explains, and in revealing the depths of her positioning within natural law: "We develop law through reason, drawing on our understanding of the natural world, as well as transcendent inspiration engendered by beauty or faith" (p. 254). While it is not immediately apparent how one is to understand "transcendent inspiration engendered by beauty or faith," this also raises questions as to who possesses the authority to "discern" such norms? On this issue O'Connell claims that "[d]escriptions of the character of *ius cogens* as well as evidence of the existence of particular *ius cogens* norms can be gathered from the work of the UN International Law Commission (ILC), decisions of the ICJ and other courts, and the work of scholars" (p. 229). While, as noted above, O'Connell steers clear of positivist methods in her analysis, she also does not, however, provide any reasoning for why the work of these actors possess the authority to contribute such evidence of the existence and contours of *jus cogens* norms, while the practice and opinions of states do not. However, it is what this fundamental difference of view means for the possibility for, and processes of, interpretation and change of the law on self-defense that is of central importance to the volume. Indeed, an important sub-question posed by the editors is, as noted above, "[h]as an evolution of the law occurred in this regard, and, if yes, when and how?"

While all three authors agree that the traditional view of the right of self-defense was interstate in nature, thereby ruling out self-defense in the absence of attacks being attributable to a state, it stands to reason that any expansion or more flexible interpretation of the right of self-defense—either in its treaty or customary form—would necessarily lead to a contraction of the *jus cogens* norm found within Article 2(4) of the UN Charter. The obligation and the right are, in this sense, "communicating vessels" (p. 264). Such a contraction of the prohibition is a possibility for Tladi and Tams, focusing as they do on the rules of interpretation contained within the Vienna Convention on the Law of Treaties (VCLT), in particular that of subsequent state practice. Indeed, as Tams argues, "the meaning of force in Article 2(4) . . . is not God-given; it needs to be established—and in this process, the means of interpretation mentioned in Articles 31 to 33 of the VCLT have their place" (p. 110). However, the removal of state practice and opinions (at least outside of the context of the collective forum of the UN) from the equation by O'Connell provides a supporting pillar for

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another of her key themes, that is, that *jus cogens* norms, and in this case the prohibition of force, has a durability that sets it apart from other norms of international law that are subject to positivist methods of interpretation and change. In this respect, "diluting and contradicting the prohibition on the use of force through interpretation is impermissible" (see pp. 248, 251) so that "contrary State practice, policy arguments, and even competing moral conceptions cannot undermine" (p. 228) or diminish the "established meaning" of the norm (p. 244).

There are potential flaws in both ends of the argument, in that whereas O'Connell dismisses even the possibility of interpretation through the utilization of state practice which leads to a contraction of the prohibition, Tams, in the other direction, seemingly underplays—or even overlooks—the high threshold for such a contraction of the prohibition. Indeed, while Tams acknowledges the peremptory nature of the prohibition of force, he also dismisses any "special regime" (p. 111) applying to it, although such special rules are arguably inherent in the very regime from which he draws the rules on treaty interpretation from, and upon which he places such emphasis in his contribution to the Trialogue. Indeed, it was notable that Tams makes no reference to Articles 53 and 64 of the VCLT, seeing as they would seem to set out the "special regime" applicable to *jus cogens* norms, including a high threshold for their interpretation and modification, both of which would arguably require, at the very least, acceptance "by the international community of states as a whole."[7] By contrast, while O'Connell makes reference to these provisions and gives the VCLT some credence in respect to *jus cogens* norms, this is only so far as to acknowledge that treaties in conflict with such norms are void *ab initio* (p. 229), and overlooks any role that "states" potentially play in their interpretation and modification under these rules.

Tams concedes "that if peremptory norms were subject to a special regime of interpretation, then this would have to apply to the ban on force *as limited by self-defence*" (p. 111 (emphasis in original)). Some scholars have taken what would seem to be a minority view that the prohibition of force *and* the right of self-defense are *both* of *jus cogens* nature,[8] as Tams appears to do in his comment that "self-defence operates on the same hierarchical level as the ban on force" (p. 111), while others are of the arguably more commonly held view that it is only the prohibition of force, if anything, that is *jus cogens*.[9] However, whichever position one would seem to take, the right of self-defense nonetheless represents an exception to the prohibition of force, so that if an interpretation of the right is advanced which is broader in nature than that representing the status quo, then for it to have any chance of sticking it would need to be credibly asserted that it has been—one way or another—accepted by states "as a whole" that the prohibition has been squeezed in response to an expanding interpretation of an exceptional right. Indeed, they are, as noted above "communicating vessels," whose ebb and flow have an impact upon each other. Ultimately, even for those who question the *jus cogens* nature of the prohibition,[10] Tams's conclusion on this point that "[f]or the crucial question relevant here—is self-defence available against armed attack by non-State actors? —*ius cogens* offers fairly little" (p. 111) would seem at least a trifle dismissive, or perhaps even overlooking a fundamental aspect in Tams's own methodology.

Of equal interest in the volume, however, is the fact that while Tladi and Tams share a similar doctrinal outlook their respective assessments diverge as much as they converge at different

[7] Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331.

[8] *See, e.g.*, Alexander Orakhelashvili, *Changing* Jus Cogens *Through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 157, 165 (Marc Weller ed., 2015).

[9] *See, e.g.*, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 3, 3 (1999).

[10] *See* James Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215 (2011).

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points.[11] To begin with, although they each provide comprehensive coverage of the respective arguments regarding whether the text, context, and object and purpose of Article 51 of the Charter supports a right of self-defense against nonstate actors, they each reach diametrically opposed conclusions. Tladi, on the one hand, argues that "[w]hile the Charter does not stipulate that the armed attack must be by 'a State', this has, until recently, been the generally accepted interpretation of Article 51" and, moreover, "this interpretation is consistent with the context of the Charter provisions" (p. 87). Tams, on the other hand, argues that "the text of Article 51, on balance, supports a broad construction of self-defence that permits responses against armed attacks by non-State actors" (p. 124). While this "is not contradicted by contextual arguments" (*id.*), it is also argued that "[p]urposive and historical considerations, in turn, do not offer firm guidance either way" (*id.*) Neither of the two authors is necessarily incorrect on this point, at least based upon an application of the rules of the VCLT and the ingredients which each chooses to throw into the cauldron in reaching their conclusions. Yet, the disagreement vividly exposes the indeterminate nature of the law on the issue under focus, even before one ventures into the realms of assessing subsequent state practice.

However, in the context of the "subsequent practice" element of treaty interpretation, which Tladi and Tams both place a significant focus on in their respective analyses, their methodologies and conclusions again differ to a notable degree, again arguably demonstrating the indeterminacy in the law. In this respect, while Tladi takes a more conservative approach in his treatment of subsequent state practice, Tams is clearly more liberal. This liberal-conservative divide between the two authors is reflected, for example, in their respective approaches to the significance of "mixed reactions" to state practice. Tams argues in his chapter that due to the "Definition of Aggression,"[12] the International Court of Justice's 1986 decision in the *Nicaragua* case, and the ILC's work on state responsibility, a framework emerged which, in effect, portrayed self-defense as being restricted to armed attacks either undertaken directly by a state's armed forces or by other actors under the effective control of the state. In both cases the right was, in effect, one of an interstate nature. Indeed, this developed to provide a "straitjacket" (p. 135) upon any flexibility that might have emerged from the notion of "substantial involvement" included within Article 3(g) of the "Definition of Aggression." Yet, at the same time throughout the UN Charter era—and, notably, not just following the events of September 11, 2001—not only has there been evidence of significant state practice involving self-defense actions against attacks by nonstate actors on the territory of third states (see pp. 136–39; 143–49) but incidences of such practice have also often been met by mixed reactions (see pp. 139–41; 149–54). This, Tams argues, means that the door is—and to an extent has always been during the era of the UN—if not completely open then at least ajar to the idea of self-defense against nonstate actors located upon the territory of another state and whose actions cannot be fully attributed to the state.

However, in responding to this, Tladi argues that "[i]f Tams' assessment is correct that the examples he cites were met with 'mixed reactions' then that already precludes their interpretive value as subsequent practice because they cannot be deemed as establishing the agreement of the members of the United Nations as to the interpretation of Article 51" (p. 73). Indeed, for Tladi the mixed and inconsistent reactions by which instances of self-defense against nonstate actors have been met means that the *lex lata* still requires full attribution of the attacks by the nonstate actors to the territorial state.

Tladi, however, is not a so much of a restrictionist that he is not at least open to the possibility that

[11] This may not seem particularly surprising in light of Tams's observation that even within legal doctrine "[t]here remains a surprising degree of uncertainty as to how the question of self-defence against non-State actors should be approached" (p. 92) so that there is not "one obvious 'natural outcome'" (p. 93).

[12] GA Res. 3314 (XXIX) (1974).

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the law *might* change, unlike O'Connell's staunchly held position against such a possibility, although he cautions against such a move. Indeed, he is open to a lowering of the required "effective control" or "sending by or on behalf" thresholds, in that while he "is less certain [than Tams] that the law *has* already shifted" he is "prepared to accept that it may be shifting in that direction" (p. 86) and sees the mixed reactions as a potential indicator of this. However, given the fact that any action would still take place on the territory of a state, he is against a removal of attribution entirely. In any case, such a complete removal of attribution is not something that Tams argues is reflected in the law as things stand, and neither does he advocate it, demonstrating perhaps a point of convergence between the authors.

While Tams is somewhat ahead of Tladi in his assessment as to where the law currently stands on the issue, there is also agreement between the two authors that there is currently no clear pattern in the state practice that does exist as to the precise legal premise upon which self-defense against nonstate actors may be taken, with states utilizing a variety of doctrines and justificatory mechanisms, including that the territorial state is "supporting," "harboring," "aiding and abetting," or being "complicit" in the activities of the nonstate actors, or more commonly today that the state is "unable or unwilling" to take the action necessary to put an end to them. None of these, the two authors agree, have emerged as the predominant basis. Ultimately, their conclusions are located at closer points along the "restrictionist"-"expansionist" spectrum than it might at first appear—or perhaps either might acknowledge themselves.

Finally, an important issue that, at least in the view of the current reviewer, all three authors provide insufficient attention to in the volume is the role of the principles of necessity and proportionality in self-defense against nonstate actors. Indeed, given that a sub-question posed by the editors is "[w]hat are the repercussions for the *entire regime* of the *ius contra bellum*, and for the international legal order at large?" (p. 10, emphasis added), it is a shame that the authors seemed to somewhat overlook the twin criteria of necessity and proportionality that are vital in understanding the right of self-defense.

While Tams acknowledges that Article 51 "does not address all issues expressly" and "it needs to be applied in conjunction with concepts such as necessity and proportionality that it does not mention" (p. 106), he nonetheless deems these concepts as being of purely an "operational" nature (p. 101) and which condition actions of self-defense rather than provide a "trigger" for them. O'Connell, in her contribution, also sees necessity and proportionality as principles that "condition" the "process" of using force, rather than as trigger principles in their own right (p. 233). Although she does view them as "essential components of the lawful resort to force" (p. 232), and does provide some coverage of their meaning and place within the *jus ad bellum*, she ultimately stops short of assessing their role in understanding and explaining the resort to self-defense against nonstate actors. In addition, and in contrast to both Tams and Tladi, but in line with her distinct focus on natural law, O'Connell posits these principles (alongside the principle of attribution) outside of the realms of customary international law and, instead, within the realms of "general principles" (p. 233), with the effect being that they "have similar characteristics to *ius cogens*" (p. 232), and, like such norms, "are formed through means other than voluntary consent or other affirmative material acts" (p. 233). While O'Connell does not provide any real support for this contention, it also cuts against the prevailing view of both the International Court of Justice and the academic community that they are established principles of customary international law, and are thus open to positivist methods of interpretation and change.

However, what both authors arguably overlook is that the customary criterion of "necessity" may, in addition to the treaty criterion of "armed attack," act as a trigger for self-defense and potentially provide a vital ingredient to understanding the "threshold question."[13] It is not, in this sense,

[13] Dapo Akande and Thomas Liefländer note that "when the use of force is in response to an attack by a nonstate actor[,] . . . necessity becomes a critical

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simply an *operational* or *conditioning* element of the right of self-defense, but also an *enabling* one. The fundamental role that necessity plays in the equation gauging the legality of the invocation of self-defense can arguably be seen in a number of ways. On a point of principle, a state may have been the victim of an armed attack but its right to resort to self-defense does not arise unless a "necessity" of self-defense can be established. On this point, as Tams notes himself, whether the invocation of the right has been lawful depends "on a host of contextual factors, among them . . . the persuasiveness of [the] claim that military action is necessary as a measure of last resort" (p. 169). In this sense, armed attack is a necessary, but by itself an insufficient, element to answering the "threshold question." Furthermore, it is perhaps even arguable that of the "armed attack" and "necessity" criteria it is the latter which is the more important enabler of self-defense, particularly when one looks at the practice of states and the rarity by which "armed attack" is referenced, at least compared to implicit or explicit references to actions in self-defense being "necessary." There is also practice which would seem to be in support of self-defense even in the absence of an armed attack, or at least a use of force with any significant gravity.

Lastly, while much of the debate has been on whether, and if so to what extent, it should be demonstrated that a territorial state is unable to take the necessary action against the nonstate actors, or whether the actions of the nonstate actors must be attributable to a state before self-defense is permissible, a number of scholars have, instead, distilled the issue down to one of *jus ad bellum* necessity, particularly if the measures in self-defense are not targeted directly toward the territorial state.[14] Indeed, the argument has been made that sovereignty may be temporarily violated when strictly *necessary* for the state to defend itself. Under this argument, whether the territorial state and its infrastructure itself are targeted or not depends upon whether the attacks of the nonstate actors can be attributed to the state, but in the absence of such attribution self-defense remains an exceptional option upon the principle of necessity. While the distinction between self-defense *on* the territory of a state and self-defense *against* the state itself is controversial, particularly as in both cases it could be argued that the state is the subject of a use of force, it is one only somewhat tentatively made in the chapters within the volume and arguably deserved to be explored more thoroughly.

While similarly omitting to discuss in his contribution the role that necessity (and proportionality) have in addressing the issue, Tladi displays some hostility toward them. Indeed, he "refuse[s] to be engaged with what may be termed a 'fact or circumstance specific' approach" that seeks to rely on concepts of necessity and proportionality as restraining tools but which in actual fact means that "the law really is in the eye of the beholder" (p. 21). However, this might be challenged on a number of grounds. Tladi himself makes an argument that Article 51 should be interpreted in its context, including "other principles of international law" (p. 63). Yet, while the "territorial integrity and sovereignty of other states" is raised as of importance in this respect, he does not include the principles of necessity and proportionality. This might seem particularly surprising in light of the editors' question regarding looking at the issue from the perspective of, and impact upon, the entire regime of the *jus ad bellum*. In addition, Tladi appears to omit discussion of these principles on the basis that they provide for, as noted above, a circumstance-specific approach. Upon this basis, Tladi's reasoning for omitting discussion of them might appear to be premised on a fear that they may lead to abuse of the right of self-defense. Yet, while basing action on the necessity of self-defense may, of course, lead to such abuse, the same might also be said of basing action upon the occurrence of an "armed

gateway for considering whether a forcible response is permitted at all." Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AJIL 563, 564 (2013).

[14] *See, e.g.*, Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-state Terrorist Actors*, 56 INT'L & COMP. L. Q. 141 (2007).

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attack," particularly given the uncertainty in regards to its *ratione materiae*, *temporis*, and *personae* elements.[15] Yet, that in itself does not displace the need to understand how both criterion operate in this context.

Ultimately, while the principles of necessity and proportionality may apply differently depending upon the circumstances, they remain, like "armed attack," terms of art within the *jus ad bellum* and possess a normative core from which guidance and restrictions on the right of self-defense, both in terms of its invocation and operation, can be garnered. In this respect, further discussion of their contours and requirements in the context under focus would have been welcome.

These minor misgivings aside, on balance the book certainly sets out what it seeks to achieve and provides the opportunity for three eminent scholars to enter into a "trialogue" that is at the same time provocative, illuminating, and, perhaps most of all, enriching. Beyond a general agreement among the authors that multilateral approaches should not be overlooked, the volume does not provide a clear way out of the impasse. Nonetheless, it showcases the richness and diversity of contemporary international legal scholarship on this controversial issue while at the same time highlighting all too vividly the indeterminacy surrounding it, including the way in which personally held views as to the purpose and function of law are reflected in the outcomes of legal inquiries. As such, the book is an extremely welcome addition to the literature. While it will no doubt prove to be an essential research resource it will also certainly be a useful reference point for both practitioners and those on a wide range of university courses.

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[15] On these, see, in particular, TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE (2010).

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