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The Use of Force Against Terrorist Attacks: The Two Facets of Self-Defence

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THE USE OF FORCE AGAINST TERRORIST ATTACKS: THE TWO FACETS OF SELF-DEFENCE

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ABSTRACT

This article considers the legality of the use of defensive force by a state against terrorists on the territory of a third state from where terrorists launched the attack. It first considers justifications based on attribution and on the "unable and unwilling" test. It concludes that these constructions leave many legal, factual, and conceptual questions unsettled. It thus goes on to put forward a construction based on the two facets of self-defence: a primary rule and substantive right which justifies the use of force against terrorist attacks; and a circumstance precluding wrongfulness (CPW) which excuses responsibility for the incidental breach of the territorial state's sovereignty. The article then argues that the territorial state can claim compensation for any material loss caused by the self-defence action. This construction offers a more coherent understanding of the operation of self-defence and a stronger legal basis for using defensive force against terrorists on the territory of third states.

Key words: self-defence, circumstances precluding wrongfulness, terrorists, attribution, "unable and unwilling," compensation.

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INTRODUCTION

In this article, I consider the question of how the right of states to use force by way of self-defence, as formulated in Article 51 of the UN Charter and customary law,[1] interacts with self-defence as a circumstance precluding wrongfulness ("CPW") formulated in Article 21 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") when defensive force is used against terrorist attacks on the territory of a third state where the terrorists are located and from where they launched the armed attack.[2]

The question of how states can lawfully defend themselves against terrorist attacks originating from third states, which has attracted the interest of states as well as scholars, is important because terrorist attacks or, more generally, non-state attacks, are frequent nowadays.[3]

I begin by discussing incidents where states claimed that they acted in accordance with their right to self-defence when countering terrorist attacks, and present reactions thereto. I then explain and assess current legal approaches regarding the use of defensive force against terrorists. After this mapping exercise, I put forward a proposal for assessing the legality of defensive force against terrorist attacks on the territory of third states by combining the two facets of self-defence: (1) self-defence as substantive right and primary rule permitting the use of unilateral force to counter armed attacks and (2) self-

1. U.N. Charter art. 51. According to the first sentence of Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

2. *Report of the International Law Commission on the Work of its Fifty-Third Session*, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83 (Dec. 12, 2001), Supp. No. 10, U.N. Doc. A/56/10 (Vol. I)/Corr.4, art. 21, *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 27, U.N. Doc. A/CN.4/SER.A/12001/Add.1 (Part 2) [Hereinafter *ARSIWA*].

3. *See generally* Thomas M. Franck, *Terrorism and the Right to Self-Defense*, 95 AM. J. INT'L L. 839, 839 (2001); Jutta Brunnée & Stephen J. Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable to Change the International Law?*, 67 INT'L & COMPAR. L. Q. 263, 265 (2018); Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 361 (2009); Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183, 183 (2010); Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 2 (2015); Nicholas Tsagourias, *Self-Defence Against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEIDEN J. INT'L L. 801, 801, 803 (2016); Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. INT'L L. 563, 563-64 (2017); Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 48 NETH. INT'L L. REV. 159, 160 (2008); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 3 (2010); Paulina Starski, *Right of Self-Defense, Attribution and the Non-State Actor: Birth of the "Unable or Unwilling" Standard?*, 75 HEIDELBERG J. INT'L L. 455, 461 (2015); Erika de Wet, *The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution*, 32 LEIDEN J. INT'L L. 91, 91-92 (2019).

defence as a secondary rule, and more specifically, a CPW excusing responsibility for any incidental breach of international law obligations committed in the course of the self-defence action. I will finally consider the legal consequences of this construction in the sense of reparations owed to the third state.

In my opinion, this construction provides a coherent legal justification for the use of defensive force against terrorist attacks on the territory of another state.

I. TERRORIST INCIDENTS AND STATE REACTIONS

In April 2023, Israel launched strikes in Southern Lebanon and Gaza in response to a barrage of terrorist attacks from Gaza and Southern Lebanon against Israeli territory.[4] The attacks from Lebanon were the largest since the 2006 war between the two countries.[5] Israel blamed Hamas for the attacks.[6] According to the IDF, "terrorist infrastructures belonging to Hamas" were hit in Lebanon.[7]

The US State Department said that Israel has legitimate security concerns and has every right to defend itself,[8] and the UK Foreign Secretary recognised Israel's right to self-defence.[9] During the debates in the Security Council ("SC"), most states supported Israel's right to self-defence and raised questions about the protection of civilians from attacks.[10]

4. Lucy Williamson & David Gritten, *Israel Blames Hamas for Lebanon Rocket Barrage as Tensions Rise*, BBC NEWS, (Apr. 6, 2023), https://www.bbc.com/news/world-middle-east-65204423 [https://perma.cc/GW39-VHG7].

5. *Id.*

6. *Id.*

7. Emanuel Fabian & Toi Staff, *Israel Hits Hamas Targets in Lebanon, Gaza in Response to Rocket Attacks*, TIMES ISR. (Apr. 7, 2023), https://www.timesofisrael.com/israel-hits-hamas-tunnels-weapons-sites-in-response-to-rocket-attacks-from-gaza-lebanon [https://perma.cc/BH8R-8KPX].

8. Jacob Magid & Toi Staff, *US Says Israel has 'Right to Defend Itself' After Lebanon Rockets; UN Urges Restraint*, TIMES ISR., (Apr. 6, 2023), https://www.timesofisrael.com/us-says-israel-has-right-to-defend-itself-after-lebanon-rockets-un-urges-restraint/ [https://perma.cc/VT3Z-4BSL].

9. Press Release, James Cleverly, Sec'y of State for Foreign, Commonwealth, and Dev. Affs., Calls for De-escalation at Jerusalem's Holy Sites: Foreign Secretary Statement (Apr. 7, 2023), https://www.gov.uk/government/news/calls-for-de-escalation-at-jerusalems-holy-sites-foreign-secretary-statement [https://perma.cc/3HLK-CCKH]; Barbara Woodward, Ambassador, United Nations Sec. Council, The situation in Israel and the Occupied Palestinian Territories continues to deteriorate: UK statement at the Security Council (May 24, 2023), https://www.gov.uk/government/speeches/the-situation-in-israel-and-the-occupied-palestinian-territories-continues-to-deteriorate-uk-statement-at-the-security-council [https://perma.cc/JY6S-5MDA].

10. *See* U.N. SCOR, 78th Sess., 9309th mtg. at 3-4, 7, 11-18, 20-22, U.N. Doc. S/PV.9309 (Apr. 25, 2023), https://documents-dds-ny.un.org/doc/UNDOC/PRO/N23/116/33/PDF/N2311633.pdf?OpenElement [https://perma.cc/EE4J-WMCA]; U.N. SCOR, 78th Sess., 9309th mtg. at 7,

Lebanon condemned Israel's strikes as a "flagrant violation of Lebanon's sovereignty."[11] In its letter of complaint to the SC, Lebanon stated that it "rejects the use of its territory as a platform for undermining stability, and that it maintains its legitimate right to defend itself" and condemned Israel's attacks as "an act of aggression because they constitute a flagrant violation of the sovereignty of Lebanon, a threat to the stability that southern Lebanon has enjoyed, a blatant violation of Security Council resolution 1701 (2006) and a threat to international peace and security."[12]

At the same time, in response to attacks on Israel by Hezbollah launched from Syria, Israel targeted sites in Syria which manufactured drones used to attack Israel, as well as training camps.[13] In its letters of complaint to the SC, Syria condemned the attacks as acts of aggression and a violation of Syrian sovereignty.[14]

Israel is a state that has long relied on the right to self-defence to respond to terrorist attacks on its territory launched from neighbouring states. For example, in 1981 it justified its raids in Lebanon against Hezbollah and the PLO because "under international law, if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary

24-25, U.N. Doc. S/PV.9309 (Resumption 1) (Apr. 25, 2023), https://www.un.org/unispal/wp-content/uploads/2023/05/S.PV_.9309RESUMP1_250423.pdf [https://perma.cc/7892-CMLJ].

11. Emanuel Fabian, Toi Staff, & Agencies, *Lebanon Says It Will Complain to Security Council Over Israeli Retaliatory Strikes*, TIMES ISR., (Apr. 7, 2023), https://www.timesofisrael.com/after-rockets-and-israeli-strikes-lebanon-says-it-will-complain-to-security-council/ [https://perma.cc/QZN5-FK79].

12. Identical letters dated 7 April 2023 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/77/861-S/2023/258 (Apr. 14, 2023), https://digitallibrary.un.org/record/4010174?ln=en [https://perma.cc/2D59-JGKQ].

13. Emanuel Fabian, *IDF Said to Hit Sites Belonging to Hezbollah in Southern Syria, Then Drops Flyers*, TIMES ISR., (Apr. 19, 2023), https://www.timesofisrael.com/idf-said-to-hit-sites-belonging-to-hezbollah-in-southern-syria-then-drop-flyers/ [https://perma.cc/4YG6-3XGN]; Emanuel Fabian, *Israeli Strikes in Syria Said to Target Training Bases for Hezbollah's 'Golan File'*, TIMES ISR., (June 1, 2022), https://www.timesofisrael.com/israeli-strikes-in-syria-said-to-target-training-base-for-hezbollahs-golan-file/ [https://perma.cc/A8JD-ZYYE].

14. Permanent Rep. of Syrian Arab Republic to the U.N., Identical letters dated 22 March 2023 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/77/813-S/2023/214 (Mar. 23, 2023), https://digitallibrary.un.org/record/4008261?ln=en [https://perma.cc/R58X-Z3V6]; Permanent Rep. of Syrian Arab Republic to the U.N., Identical letters dated 4 April 2023 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/77/846-S/2023/245 (Apr. 14, 2023), https://digitallibrary.un.org/record/4009666?ln=en [https://perma.cc/5MA9-8NXQ]; Permanent Re. of Syrian Arab Republic to the U.N. Identical letters dated 7 March 2023 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/77/795–S/2023/181 (Mar. 10, 2023), https://digitallibrary.un.org/record/4006996?ln=en [https://perma.cc/BB8H-XAZY].

measures in its own defence."[15] In 1986, Israel engaged in a protracted operation in Southern Lebanon in response to raids and attacks by Hezbollah, claiming that it was acting in self-defence.[16] Reactions to Israel's actions were mixed with criticisms focusing on the disproportionate nature of the operation and the loss of civilian life.[17]

The U.S.-led air strikes against Daesh (ISIL) in Syria between 2015 and 2017 offer another example where states relied on their right to self-defence to justify their actions.[18] In its letter of complaint to the SC, Syria condemned the actions as violating its sovereignty.[19]

The use of force by way of self-defence in response to terrorist attacks is not a prerogative of some states, however.

Iran, for example, justified its actions against Kurds in Iraq in the 1990s and early 2000s as self-defence following a series of transborder raids and attacks by Kurdish militias.[20] According to Iran, these groups had their headquarters and military bases in Iraq where military training, financial and logistical support,

15. U.N. SCOR, 36th Sess., 2292d mtg. ¶ ¶ 54–55, U.N. Doc. S/PV.2292 (July 17, 1981).

16. *See Special, Israelis Attack Villages in Southern Lebanon*, N.Y. TIMES (Feb. 28, 1986), https://www.nytimes.com/1986/02/28/world/israelis-attack-villages-in-southern-lebanon.html [https://perma.cc/ZJW9-NE3X]. Israel again invoked its right to self-defence in 2006. Permanent Rep. of Israel to the U.N., Identical letters dated 12 July 2006 from the Permanent Rep. of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/937-S/2006/515. Israel's right of self-defence has been recognised by the U.K., Peru, Denmark, France, and Argentina, although they raised concerns about the proportionality of the action. U.N. SCOR, 61st Sess., 5489th mtg. at 12, U.N. Doc. S/PV.5489 (July 14, 2006). It has also been recognised by the U.N. Secretary-General. U.N. SCOR, 61st Sess., 5492d mtg at 3, U.N. Doc. S/PV.5492 (July 20, 2006).

17. *See e.g.*, U.N. SCOR, 61st Sess., 5498th mtg. at 3-4, U.N. Doc. S/PV.5498 (July 30, 2006).

18. *See* Permanent Rep. of the U.S. to the U.N., Letter dated 23 Sept. 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); Permanent Mission of Turkey to the U.N., Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015); Permanent Rep. of Australia, Letter dated 9 Sept. 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015); Permanent Rep. of the U.K. to the U.N., Letter dated 7 Sept. 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. S/2015/688 (Sept. 7, 2015); Permanent Rep. of France to the U.N., Identical letters dated 8 Sept. 2015 from the Permanent Rep. of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015).

19. Permanent Rep. of the Syrian Arab Republic, Identical letters dated 17 Sept. 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sept. 21, 2015).

20. Permanent Rep. of the Islamic Republic of Iran, Letter dated 29 July 1996 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/1996/602 (July 29, 1996).

and intelligence services were provided by Iraq.[21] For Iran its actions were "a defensive measure in the exercise of its inherent right to self-defence, [] without prejudice to Iran's policy of respecting the sovereignty and territorial integrity of Iraq."[22]

In 2017, Egypt launched air strikes against Daesh training camps located in Libya following a series of terrorist attacks in Egypt attributed to Daesh.[23] In its letter to the SC, Egypt claimed that it was acting in accordance with its right to self-defence against the terrorist organisation responsible for a series of terrorist attacks originating from Libya.[24] Egypt also "stresse[d] that the defensive strikes were directed solely at the members and positions of terrorist organizations, and not at the State of Libya."[25] Certain states supported Egypt's actions whereas others remained silent.[26] The General Secretary of the League of Arab States said that the airstrikes were very well justified.[27] Libya's internationally recognised Government—the Government of National Accord—condemned the airstrikes as a violation of Libya's sovereignty.[28]

Turkey is another state that relied on self-defence to justify operations in Iraq and Syria, mainly against the Kurdistan Workers' Party ("PKK").[29]

21. *Id.*

22. *Id*. Permanent Rep. of the Islamic Republic of Iran, to the U.N. Letter dated 25 May 1993 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/25843 (May 25, 1993); *see* Chargé d'affaires a.i. of the Islamic Republic of Iran to the U.N., Letter dated 9 Nov. 1994 from the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/1994/1273 (Nov. 10, 1994); Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated 13 Mar. 2000 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/2000/216, annex (Mar. 14, 2000); Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated 22 Mar. 2001 from the Permanent Rep.of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/2001/271, annex (Mar. 26, 2001).

23. Permanent Rep. of Egypt to the U.N., Letter dated 27 May 2017 from the Permanent Rep. of Egypt to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2017/456 (June 1, 2017).

24. *Id*.

25. *Id*.

26. Daley J. Birkett, *Another Hole in the Wall? Evaluating the Legality of Egypt's 2017 Airstrikes Against Non-State Targets in Libya Under the* Jus ad Bellum, 69 NETH. INT'L L. REV. 83, 90-92 (2022).

27. *Id*. at 91.

28. *Id*.

29. *See* Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Identical Letters dated 27 June 1996 from the Charge d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Security-General and to the President of the Security Council, U.N. Doc. S/1996/479, annex (July 2, 1996); Permanent Rep. of Turkey to the U.N., Identical Letters dated 3 Jan. 1997 from the Permanent Rep. of Turkey addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1997/7 (Jan. 3, 1997); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Identical letters dated 20 Jan. 2018 from the Chargé

Whereas there was some support for Turkey's operations, there were also criticisms, with Iraq and Syria condemning the actions as violations of their sovereignty.[30] In 2019, Turkey launched a military operation into north-eastern Syria to counter the imminent terrorist threat caused by the Kurdish Democratic Union Party, which Turkey considered to be the Syrian branch of the PKK.[31] In its letter to the SC, Turkey invoked its right to self-defence,[32] but Syria condemned it as an act of aggression and violation of its sovereignty.[33]

All of this shows that a pattern is developing where states suffering terrorist attacks launched from another state take self-defence action against the responsible terrorist organization and its infrastructure on that state's territory, whereas the host state usually condemns the action as a violation of its sovereignty.

II. MAPPING CURRENT APPROACHES TO THE USE OF DEFENSIVE FORCE AGAINST TERRORIST ATTACKS

In this section, I will present and assess current legal approaches to the use of defensive force against terrorist attacks.[34] There are roughly two approaches to such uses of force: the first relies on attribution whereas the second relies on the "unable and unwilling" doctrine.

A. Attribution

According to the first approach, in order for the victim state to act in self-defence against terrorist attacks, the attacks should be attributed to a particular

d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2018/53 (Jan. 22, 2018).

30. *See* Permanent Observer for the League of Arab States to the U.N., Letter dated 24 Sept. 1996 from the Permanent Observer for the League of Arab States to the United Nations Addressed to the Secretary-General, U.N. Doc. S/1996/796, annex 1 (Sept. 26, 1996); On behalf of the Non-Aligned Movement, see Permanent Rep. of South Africa to the U.N., Letter dated 6 June 2000 from the Permanent Representative of South Africa to the United Nations addressed to the Secretary-General, U.N. Doc. A/54/917-S/2000/580, annex (June 16, 2000), ¶ 137.

31. Permanent Rep. of Turkey to the U.N., Letter dated 9 Oct. 2019 from the Permanent Rep. of Turkey to the United Nations addressed to the President of the Security Council, S/2019/804 (Oct. 9, 2019).

32. *Id*.

33. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated 17 Jan. 2019 from Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2019/55 (Jan. 18, 2019); Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated 31 Oct. 2019 from Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2019/856 (Nov. 4, 2019).

34. With terrorist attacks I mean terrorist armed attacks that is, grave uses of force as the ICJ defined them in the Nicaragua case. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115-18 (June 27).

state according to the attribution criteria found in the law of state responsibility. In this way, that state becomes the author of the armed attack and, consequently, the target of the self-defence action. If the terrorist attack is not attributed to a state, the victim state cannot exercise its right to self-defence on the territory of another state, unless of course it secures SC authorisation to use force or the territorial state consents to the use of force.[35]

This construction is based on the premise that self-defence operates between states in that the author of an armed attack and the target of the self-defence action should be a state, and it has been confirmed by the International Court of Justice ("ICJ") in its jurisprudence.[36] This construction of self-defence also deals with the question of the violation of the territorial state's sovereignty because such a violation is ingrained and justified by the self-defence action. Put differently, self-defence against an armed attack launched by a state or attributed to a state does not give rise to any secondary claim of a violation of its sovereignty.

However, there are certain conceptual, legal, and factual problems with this approach.

First, Article 51 of the UN Charter recognises the inherent right of states to self-defence when an armed attack occurs, but it does not specify who the author of the armed attack must be to trigger this right. An armed attack is not defined as such because of its author but is an event or occurrence which can be realised in many different ways and by different actors, not only states. As international experience also demonstrates, terrorists or non-state actors in general are very well capable of launching armed attacks independently from states.[37] If armed attacks were confined to states, this would leave a gap in the law of self-defence because states would not be able to defend themselves against non-state armed attacks. Furthermore, if the state representatives involved in the negotiations of the UN Charter wanted to confine armed attacks to states, they could have done so. One should recall in this regard Article 2(4) of the UN Charter, which imposes an obligation on all UN members (that is, states) to refrain from the use of force in their international relations.[38] This provision clearly specifies who should be the author and the victim of a use of force, something that is lacking from the definition of self-defence in Article 51.

35. C. Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETH. INT'L L. REV. 159, 169-71 (2008).

36. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 at 194 (July 9); *see also* Oil Platforms, Judgement, (Islamic Republic of Iran v. U.S.), 1996 I.C.J. Rep. 803, ¶ 51 at 820 (Dec. 12).

37. For instance, the "9/11" attacks.

38. Article 2(4) reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Second, this construction places self-defence within the framework of the law of state responsibility, which as is well known, is premised on two conditions: attribution and breach.[39] It seems to view the armed attack as a breach of the norm prohibiting the use of force which, being committed by a non-state actor, should be attributed to a state in order to constitute a breach since non-state actors are not subjects of international law and, therefore, not bound by the prohibition on the use of force. A corollary to this approach is to view self-defence as a sanction to a prior delict. According to Bowett, self-defence is a response to the delictual conduct of the state targeted by the self-defence action.[40] This is reminiscent of Kelsen's theory of war as sanction to illegality.[41] However, the theory of war as sanction has long been rejected in international law,[42] and as was said earlier, self-defence in Article 51 is formulated as a reaction to a factual event—an armed attack—and not to a breach of Article 2(4) on the non-use of force. In other words, the trigger of self-defences has been objectified in the UN Charter. It is true that in the Nicaragua case the ICJ defined an armed attack as a grave use of force, but it did this in order to describe the nature of the armed attack and not in order to assimilate it to a breach of Article 2(4).[43] Furthermore, the Court has consistently applied the law of self-defence to armed attacks (not the law of state responsibility), whereas it applied the law of state responsibility to breaches of the use of force rule.[44]

Third, the attribution approach to self-defence conflates primary rules defining substantive rights and obligations with secondary rules. Self-defence in Article 51 and customary law is a primary rule defining a state entitlement, whereas attribution is a secondary rule defining the conditions for holding states responsible for breaches of primary rules.[45] Attribution as a secondary rule assists in identifying the subject of an international law obligation for purposes of holding it responsible for its breach and for this reason should not be used to determine the content and scope of the primary rule. Moreover, the law of self-defence and the law of state responsibility have different rationales. The role of self-defence is to justify the use of unilateral force to ward off armed attacks, whereas the role of state responsibility is to hold states responsible for violations of international law.

39. ARSIWA, *supra* note 2, art. 2.

40. D. W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 20 (1958).

41. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 61 (Robert W. Tucker ed., 2d ed. 1966).

42. *See generally* U.N. Charter, ch.VII (stating that the U.N. shall decide when there has been a breach and how to respond).

43. Nicar. v. U.S., 1986 I.C.J. Rep. 14, ¶ 191 (June 27).

44. *E.g.*, *id.* ¶ 195.

45. *See* Roberto Ago, Special Rapporteur, *Second Report on State Responsibility*, [1970] 2 Y.B. Int'l L. Comm'n, 233, 178, 179, 195-96, U.N. Doc. A/CN.4/.

Fourth, if the attribution criteria were to apply, they are quite narrow and strict, leaving dangerous gaps in the scope of self-defence. The main attribution criterion which will apply to terrorist attacks is that provided in ARSIWA Article 8, which requires an agency relationship between a state and a terrorist actor.[46] Such a link can be established if, as ARSIWA Article 8 says, the state "instructs," "directs," or "controls" the terrorist actor who commits the armed attack.[47] Instruction requires specific and explicit orders, and direction requires a state to take the lead short of issuing orders.[48] Control, according to the way it has been interpreted in jurisprudence, should be effective in the sense that the state's input in the armed attack by the non-state actor should be indispensable.[49] It transpires that all three bases of attribution require very close, and indeed hierarchical, relations between terrorists and states, but such relations are quite rare. Instead, there are many different forms of collaboration between terrorists and states spanning over a gamut of financial, political, ideological, and military relations which can be covert or open. There are also difficulties in proving the links between states and terrorists due to a lack of evidence or because of difficulties in collecting and assessing evidence since relations can be clandestine or based on new technologies. Furthermore, many terrorists operate from failed or failing states in which case applying these criteria is counterintuitive because they require a central government. Consequently, if these criteria are to apply, armed attacks by terrorists will remain unattributable and victim states will be denied the right to defend themselves.

In response to these difficulties, attempts have been made to relax the attribution criteria. For example, it has been suggested that the threshold of control should be lowered to "overall control." According to this criterion, a state "wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity," and "it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law."[50]

46. ARSIWA, *supra* note 2, at art. 8; Oliver D. Frouville, *Attribution of Conduct to the State: Private Individuals*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 257, 257 (James Crawford et al. eds., 2010).

47. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 110-13 (2002).

48. Nicholas Tsagourias & Michael Farrell, *Cyber Attribution: Technical and Legal Approaches and Challenges*, 31 EUR. J. INT'L. L. 941, 941–67, 954-55 (2020).

49. *See* Nicar. v. U.S., 1986 I.C.J. Rep. 14, ¶¶ 115-17 (June 27); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. ¶¶ 307, 385, 390–93, 402-06, 413-14 (Feb. 26).

50. Prosecutor v. Dusko Tadic´, Case No. IT-94-1-A, Judgment, ¶¶ 131, 137 (Int'l Crim. Trib. For the Former Yugoslavia) (July 15, 1999). ICJ rejected the "overall control" criterion for the law of state responsibility. *See* Application of the Convention on the Prevention and Punishment of the

Although the overall control criterion is somewhat more permissive, it does not mean that it is less demanding because it requires significant state input to the activities of an organized group; however, not all terrorist groups are organised and even if they are organised and collaborate with states, such as Hezbollah, they can also exhibit a broad degree of autonomy. For example, whereas Iran provides most of Hezbollah's weapons and funding, Hezbollah also receives hundreds of millions of dollars from legal businesses, international criminal enterprises, and the Lebanese diaspora.[51] This makes Hezbollah increasingly self-sufficient and, although it maintains an alliance with Iran, it enjoys autonomy over actions and activities. Its political and military structure is robust which allows it to formulate policies and strategies and make its own decisions.[52] For example, Hezbollah has developed its own stockpile of sophisticated weapons and has used them against rivals "without the need for prior permission from Iran."[53]

Another way of relaxing the attribution criteria is by accepting complicity in the activities of terrorist actors or lack of due diligence as an additional criterion for attributing their acts to a state. Following the "9/11" attacks, neither the United States nor other states used the attribution criteria of ARSIWA Article 8 to justify the self-defence against the Taliban because no evidence existed to support the claim that the government of Afghanistan had ordered, directed, or had effective control over the attacks. In their letter to the SC, the United States justified its self-defence action against Afghanistan due to the fact that the attacks "have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan it controls to be used by this organization as a base of operation" and "[d]espite every effort by the United States and the international community, the Taliban regime has refused to change its policy."[54] The Security Council in Resolutions 1368 (2001) and 1373 (2001) confirmed the inherent right to individual and collective self-defence.[55] On September 12, 2001, the

Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 307, 385, 390–93, 404 (Feb. 26).

51. According to a 2020 State Department estimates, Iran sends the group some $700 million per year. *See* U.S. DEP'T. OF STATE, COUNTRY REPORTS ON TERRORISM 2020, 267 (2021), https://www.state.gov/wp-content/uploads/2021/07/Country_Reports_on_Terrorism_2020.pdf [https://perma.cc/LA3U-GES9].

52. *Id.* at 266.

53. Akbar Khan & Han Zhaoying, *Iran-Hezballah Alliance Reconsidered: What Contributes to the Survival of State-Proxy Alliance?*, 7 J. ASIAN SEC. & INT'L AFF. 101, 111 (2020).

54. Permanent Rep. of U.S. to U.N, Letter dated 7 Oct. 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Chargé d'affaires a.i. of the Permanent Mission of the U.K. to the U.N. Letter dated 7 Oct. 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001).

55. S.C. Res. 1368, (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2003).

U.N. General Assembly adopted a resolution "stress[ing] that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable."[56] In the same vein, the Organization of American States condemned the attacks and declared that "those responsible for aiding, supporting, or harbouring the perpetrators, organizers, and sponsors of these acts are equally complicit in these acts."[57] That said, whether complicity has become an attribution criterion is not settled.[58]

Introducing new attribution criteria or relaxing existing ones may have certain legal consequences. From a conceptual point of view, the question to be asked is whether the use of force is a special regime with its own attribution criteria. The law of state responsibility recognises the existence of special regimes in Article 54 and often distinguishes the law on the use of force or UN law from the law of state responsibility.[59] In the same vein, the ICJ acknowledged in the Bosnian Genocide case the possibility of applying different attribution criteria in different regimes.[60] As indicated above, it is not certain whether the use of force regime has curved out its own attribution criteria.

If the use of force regime has indeed carved out its own attribution criteria, there are two systemic implications of this state of affairs: one concerns the use of force regime and the other the regime of state responsibility. With regard to the former, it will lead to the "responsibilisation" of the use of force regime by using the law of state responsibility to define the content and scope of the use of force rules. However, as was said, these regimes are separate. With regard to the law of state responsibility, the whole edifice of the regime may need to be revisited to accommodate the needs of different regimes. This will lead to its fragmentation in contrast to its current claim to generality.[61]

B. The "Unable" and "Unwilling" Doctrine

The second approach to the use of force against terrorists contends that the victim state can directly target the terrorist group on the territory of a third state

56. G.A. Res 56/1, ¶ 4, U.N. Doc. A/RES/56/1 (Sept. 18, 2001).

57. Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, OAS Doc. OEA /Ser.F/II.23, RC.23/RES.1/01, ¶¶ 1, 3 (Sept. 21, 2001), https://www.oas.org /oaspage/crisis/RC.23e.htm [https://perma.cc/6C5V-UZVM]. The U.S. action was supported by NATO. *See* Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001). And the European Union.

58. Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. INT'L L. 563, 579-80 (2017).

59. *See* ARSIWA, *supra* note 2, at art. 54.

60. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 402-05 (February 26).

61. *See* Nicholas Tsagourias, *Self-Defence Against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEIDEN J. INT'L L. 801, 803 (2016).

if that state is "unable"' or "unwilling" to suppress its activities.[62] For example, in relation to its action against Daesh, the United States stated that "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."[63]

This approach recognises terrorists, or more generally, non-state actors, as independent authors of armed attacks and direct targets of self-defence action. While it thus responds to states' security concerns which the attribution construction of self-defence leaves unaddressed, there are several problems with this approach.

The first relates to the meaning of "unable" and "unwilling." States have never explained what "unable" or "unwilling" means, and they have never specified whether they used defensive force against an "unable" or "unwilling" state.[64] Scholarship has tried to identify some variables that states can take into account, but many questions still remain open.[65] For example, does the fact that a state refuses external assistance to suppress terrorist activities make it unwilling? As a matter of fact, the host state may reject offers of assistance for many reasons; for example, reasons that relate to national security or its own internal legitimacy. Also, what are permissible offers of assistance or permissible requests for assistance? Is inability measured in the abstract or in relation to results? It should also be noted that it is not clear whether the "unwilling" prong of the test reflects the toleration, harbouring, or acquiescence attribution criteria mentioned above leading to the attribution of the terrorist attacks to states, or whether it justifies the use of defensive force against the terrorists themselves.

The ICJ has not been very helpful in this regard. In the *Armed Activities* case, Uganda argued that states have a duty to prevent attacks by non-state actors

62. Ashley Deeks, *Unwilling or Unable: Towards a Normative Framework for Extraterritorial Self-Defence*, 52 VA. J. INT'L L. 483, 483-86 (2012); S. Mahmoudi, *Self-defence and "Unwilling or Unable" States*, 422 COLLECTED COURSES HAGUE ACAD. INT'L L. 249-399 (2021); Olivier Corten, *The Unwilling or Unable Test: Has it Been and Could It Be Accepted?*, 29 LEIDEN J. INT'L L. 777, 779 (2016).

63. Permanent Rep. of the U.S., *supra* note 18.

64. *See e.g.*, *id.*

65. Deeks, *supra* note 62, at 506. Ashley Deeks proposes five conditions to activate the test: "(1) attempt to act with the consent of or in cooperation with the territorial state, (2) ask the territorial state to address the threat itself and provide adequate time for the latter to respond, (3) assess the territorial state's control and capacity in the relevant region as accurately as possible, (4) reasonably assess the means by which the territorial state proposes to suppress the threat, and (5) evaluate its prior (positive and negative) interactions with the territorial state on related issues." *Id.*

from their territory against neighbouring states.[66] The Court's response was to say that the DRC did not violate its due diligence obligation because it was unable to stop rebel activities or because the measures it took were ineffective due to the factual circumstances prevailing at the time.[67] According to the Court, there was no toleration or acquiescence to such activities to engage the responsibility of the DRC.[68] The Court also rejected Uganda's argument that its use of force inside the DRC was in self-defence in response to the attacks emanating from DRC.[69] This was because Uganda invoked the self-defence justification only before the Court, whereas internal Ugandan documents spoke of "legitimate security interests" and because the evidence to support Uganda's claims of attribution to the DRC was insufficient.[70] For the Court, the alleged acts were not attributable to the DRC.[71] The ICJ did not express any views on whether a state can use force in self-defence against an able but unwilling state and whether such action should be directed against the territorial state or the non-state actors.

The second problem is that the "unable" and "unwilling" tests are used cumulatively and often interchangeably without distinguishing between them or distinguishing the consequences that may flow.

The third issue is more fundamental: whether the "unable" or "unwilling" test represents an additional ground for justifying the use of force in international law, or instead an additional criterion for using force by way of self-defence. In public statements or writings, the "unable" and "unwilling" test has been promoted as if it were an independent ground for justifying the use of force.[72] According to this view, the permitted uses of force are those based on SC authorisation in self-defence against an armed attack by a state or attributed to a state and in self-defence against state or a non-state actors when the host state is unable or unwilling to suppress non-state armed attacks. Sometimes, the "unable" and "unwilling" test is presented as an additional criterion for justifying the use of force by way of self-defence.[73] According to this view, in addition to an armed attack, the victim state can use defensive force against non-state actors only if the territorial state is also "unable" or "unwilling." In my opinion, the "unable" and "unwilling" test cannot be the source of a right or determine the availability of the right to self-defence, but can only be part of the necessity consideration attached to self-defence.

66. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 277 (Dec. 19).

67. *Id.* ¶ 303.

68. *Id.* ¶ 301.

69. *Id.* ¶¶ 149, 304.

70. *Id.* ¶ 143.

71. *Id.* ¶ 146.

72. *See* Deeks, *supra* note 62, at 488.

73. *See* Permanent Rep. of the U.S., *supra* note 18.

The fourth problem concerns the question of how the violation of the territorial state's sovereignty can be justified. As was said earlier, this question is not raised when self-defence is exercised against the state which authored the armed attack because the violation of its sovereignty is ingrained in the exercise of the right to self-defence. This is not the case here, however, because the territorial state is not the author of the armed attack but rather a third party that is often a non-involved bystander. This issue is not properly explained by those propagating the "unable" and "unwilling" test, other than by invoking similarities with the law of neutrality, according to which if a state breaches its neutral duties, belligerents can exercise their right to self-defence on neutral territory.[74]

Notwithstanding these problems, states have used the "unable" and "unwilling" test to justify their self-defence actions against non-state attacks emanating from states.[75]

III. THE TWO FACETS OF SELF-DEFENCE: A SUBSTANTIVE RIGHT AND A CIRCUMSTANCE PRECLUDING WRONGFULNESS

As evident from the preceding discussion, the two main legal approaches to the use of defensive force against terrorists do not adequately address the phenomenon of terrorist attacks launched from the territory of third states. The attribution construction of self-defence narrows down the scope of self-defence and exposes states to terrorist attacks by denying them the ability to counter them with force, whereas the "unable" or "unwilling" doctrine cannot explain the violation of another state's sovereignty when acting in self-defence. Both approaches also suffer from conceptual, factual, and systemic problems.

In my opinion, a legally coherent answer can be provided by combining the two facets of self-defence as a primary rule and substantive right and as a circumstance precluding wrongfulness.

In this section, I explain how the two facets of self-defence apply to the case of terrorist attacks and consider the consequences of their application in the sense of reparations owed to the third state. To begin, self-defence as formulated in Article 51 of the UN Charter and customary law is a right that belongs to states.[76] Regardless of whether Article 51 refers to the customary right of self-

74. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 168, 170 (1963); BOWETT, *supra* note 40, at 167; International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 309 INT'L REV. RED CROSS ¶ 22 (1995); UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 19, ¶ 1.42 (2004); NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT VOL. ¶ 16.4.2 (2d ed.); OFFICE OF GENERAL COUNSEL DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 939-40 ¶ 15.3.1.2, 944-45 ¶ 15.4.2 (2015).

75. *See* Deeks, *supra* note 62, at 487.

76. *See* U.N. Charter art. 51.

defence or to an inalienable right,[77] it contains a permission expressed in absolute terms ("[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence") to use force unilaterally to counter armed attacks, and lays down the conditions according to which states can lawfully exercise it.[78] This means that the use of force by way of self-defence is lawful *per se* and *ab initio*. It is not a breach of the rule prohibiting the use of force,[79] which is subsequently exonerated. Also, following the terminology introduced by Roberto Ago to the ILC Articles on state responsibility of primary rules setting out rights and obligations and secondary rules setting out the consequences that follow from a breach of primary rules,[80] Article 51 is a primary rule because it contains a permission.

The second point to make is that self-defence as a primary rule is not an international sanction; it is not a reaction to a prior breach of international law. I explained above views that treated self-defence as a response to a delict. Roberto Ago also held the same view. For him, "[a]cting in self-defence means responding by force to wrongful forcible action carried out by another," and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful. [81] If self-defence was a reaction to a delict, then countermeasures and self-defence would conceptually collapse into each other. Countermeasures in the law of state responsibility are treated as mechanisms to enforce compliance with international obligations and in particular the obligations that follow from a breach of international law.[82] Instead, the aim of self-defence as a substantive right and primary rule is to permit states to defend themselves against armed attacks and not to hold the author of the attack into account or punish them.

Third, self-defence can be triggered by a factual occurrence, such as an armed attack. Whether an armed attack exists does not depend on the status of its author as a state. An armed attack is also not conterminous with a violation of Article 2 (4) of the UN Charter.[83] When the ICJ defined an armed attack as a grave use of force, it provided a description of the nature of an armed attack.[84]

77. *See* Albrecht Randelzhofer & Georg Nolte, *Article 51, in* 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1427-28 (Bruno Simma et al. eds., 3rd ed. 2012); Marco Roscini, *On the 'Inherent' Character of the Right of State to Self-defence*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 634, 635 (2015); Nicar. v. U.S., Judgment, 1986 I.C.J. Rep. 14, ¶¶ 176, 193 (June 27).

78. U.N. Charter, art. 51.

79. *See* U.N. Charter, art. 2 ¶ 4.

80. Ago, *supra* note 45, at 179.

81. Roberto Ago (Special Rapporteur), *Eighth Report on State Responsibility,* [1980] 2 Y.B. Int'l L. Comm'n 53, U.N. Doc. A/CN.4/SER.A/1980.

82. *See* ARSIWA, *supra* note 2, at art. 22, 49-54.

83. U.N. Charter, art. 2 ¶ 4.

84. Nicar. v. U.S., 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

Fourth, self-defence as a right is exercised against the author of the armed attack, be that a state or a non-state actor.

It follows from this that if terrorists or, more generally, non-state actors commit an armed attack against a state from the territory of another state, the victim state's right to self-defence is immediately triggered and the victim state can take direct action against the author of the armed attack. This construction leaves no gaps in the scope of self-defence because it covers armed attacks committed by states but also those committed by terrorists or other non-state actors independently from states. It thus closes the gaps of the attribution approach or the ICJ "substantive involvement" standard.[85]

Having established that terrorist attacks can trigger the right to self-defence, the next question to consider is the lawfulness of its exercise on the territory of a third state.

When a state is the author of a terrorist armed attack, the self-defence action absorbs the violation of its sovereignty because this is inherent in the exercise of the right to self-defence. If the use of defensive force against a state was lawful but at the same time amounted to a breach of its sovereignty, it would lead to a rather absurd situation of the UN Charter recognising a right whose exercise would violate another UN Charter obligation—the obligation of states to respect each other's sovereignty.[86]

The problem arises when the territorial state is not the author of the armed attack but a third party in the relation between the author of the attack (the terrorist entity) and the victim state. In that case, the violation of that state's sovereignty cannot be absorbed by the right to self-defence.

It is in relation to this scenario that self-defence as a CPW formulated in ARSIWA Article 21 comes into play. Article 21 reads as follows: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."[87] Self-defence as a CPW is a secondary rule that belongs to the law of

85. *See* G.A. Res. 3314 (XXIX), at art. 3 (Dec. 14, 1974) (stating that "substantial involvement" in armed attacks can constitute an act of aggression); Nicar. v. U.S., 1986 I.C.J. Rep. 14, ¶ 195 (June 27) (discussing what constitutes an "armed attack"); Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*), Judgment, 2005, I.C.J. 168, ¶ 146 (Dec. 19) (explaining that DRC's involvement was insufficient to attribute the attack to the state); Tsagourias, *supra* note 3, at 816-17 (discussing when a lack of action may constitute a "substantial involvement"). For criticisms of the "substantial involvement" approach taken in these cases, see Nicar. v. U.S., Dissent, 1986 I.C.J. Rep. 528, 543 (Jennings, R., dissenting); Nicar. v. U.S., Dissent, 1986 I.C.J. 259, 268-69 (Schwebel, dissenting).

86. U.N. Charter art. 2, ¶ 1.

87. ARSIWA, *supra* note 2, at art. 21. For more on the changing perception of self-defence caused by the CPW in the ARSIWA, see THÉODORE CHRISTAKIS & KARINE BANNELIER, *La Légitime Défense en tant que «Circonstance Excluant L'illicéité»*, *in* LÉGITIMES DÉFENSES 233 (Université de Poitiers (France) ed., 2007); THÉODORE CHRISTAKIS, *Les «Circonstances Excluant*

state responsibility, and it was Special Rapporteur James Crawford who clarified the two facets of self-defence.[88] The role of ARSIWA Article 27 is not to establish a right or an entitlement, which is what UN Charter Article 51 does, but to excuse the responsibility of a state for collateral violations of international obligations committed during the exercise of the primary right of self-defence. This is because states operate within a network of legal relations and have many and different obligations which may be affected when they exercise the right to self-defence. As Crawford wrote, "in the course of self-defence, a State may violate other obligations towards the aggressor. For example, it may trespass on its territory, interfere in its internal affairs, disrupt its trade contrary to the provisions of a commercial treaty, etc."[89]

Applying the above to the case of terrorist attacks, both the territorial state and the state acting in self-defence should respect each other's sovereignty. When a state takes self-defence action against a terrorist actor on the territory of another state, its right to use force against the terrorist actor is justified by the primary rule of self-defence but the violation of the territorial state's sovereignty is not justified by the primary rule because the territorial state is a third party interposed between the terrorist actor and the victim state. ARSIWA Article 21 thus intervenes and recognizes that the defending state has breached its obligation to respect the sovereignty of the territorial state but excuses its responsibility because of the circumstances caused by the armed attack and the defensive action.

It should be noted in this regard that the ILC seems to view ARSIWA Article 21 as applying only to the relations between the attacking and defending state and not to third party states, but applying it to third party states can be justified by the fact that Article 21 as a secondary rule is of general application, which is how the ILC constructed the articles on state responsibility. Thus Article 21 applies to any incidental breach of an international law obligation occasioned by the exercise of the right to self-defence. How self-defence is defined and its scope is a matter for the primary rule, not Article 21, which is parasitic to the primary rule. As was seen, self-defence can also be exercised against non-state actors, not only states.

In order for responsibility for the incidental breach to be excused, the self-defence action should be lawful according to Article 21 and customary law.[90] The acting state should therefore direct its action against the terrorist actor, not the territorial state, and as the examples mentioned in Section I indicate, many

L'illicéité»: Une Illusion Optique? in DROIT DU POUVOIR, POUVOIR DU DROIT 223 (O. Corten et al. eds., 2007).

88. CRAWFORD, *supra* note 47, at 166; ARSIWA, *supra* note 2, at art. 21, ¶¶ 1-2; James Crawford (Special Rapporteur), *Second Report on State Responsibility*, ¶ 296, U.N. Doc. A/CN.4/498 (Mar. 17, 1999).

89. Crawford, *supra* note 88, ¶ 299.

90. ARSIWA, *supra* note 2, at art. 21, ¶ 6.

states have explicitly said that their defensive action is directed against the terrorist actor only.[91] The self-defence action should also satisfy the criteria of proportionality and necessity,[92] and should not engage the territorial state's human or material resources.[93]

Furthermore, the breach of the territorial state's sovereignty should be incidental to the self-defence action and not its main object.[94] Also, there should be a nexus between the breach and self-defence, in that the breach should be committed in the course of exercising the right to self-defence and should be occasioned by the self-defence action. A good example in this regard is the *Oil Platform* case where the United States, in the course of exercising its primary right to self-defence, invoked self-defence as a CPW to justify its breach of the 1955 Amity Treaty between the US and Iran.[95] The United States argued that its action against the oil platforms fell within the exceptions to the operation of the Treaty but then went on to say that even if they were deemed to be incompatible with the Treaty, they were not wrongful because of the operation of self-defence as a CPW.[96] Iran accepted this argument.[97]

A remaining question is whether notwithstanding the fact that responsibility for the breach has been excused by ARSIWA Article 21, the territorial state that suffered material damage and whose right to sovereignty has been breached has any claim to compensation. This brings to the fore the role of ARSIWA Article 27(b), which is about compensation for material loss in relation to CPW.[98] The role and scope of this article is quite ambivalent which is not helped by the fact that neither scholarship nor jurisprudence have provided any guidance about its content and scope.[99] According to the ILC commentary, compensation is

91. See *infra* notes 7, 16, 24, and accompanying text.

92. Nicar. v. U.S., 1986 I.C.J. Rep. 14, ¶¶ 194, 237; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); Islamic Rep. of Iran v. U.S., 2003 I.C.J. 161, 198 ¶ 76 (Nov. 6).

93. *See, e.g.*, Section I (explaining states' justifications of their actions against Daesh).

94. *See* U.N. Doc. A/CN.4/498, *supra* note 88, at ¶¶ 297, 299.

95. *See generally* Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899.

96. Oil Platforms (Islamic Rep. of Iran v. U.S.), Rejoinder Submitted by the United States of America, 2003 I.C.J 161 ¶ 5.02 (Mar. 23, 2001) (citing that the former Article 22 of the ILC's Draft Articles which is now Article 22).

97. *Oil Platforms (Islamic Rep. of Iran v. U.S.)*, Verbatim Record, 2003 I.C.J. Pleadings 1, ¶ 29 (Feb. 17).

98. ARSIWA, *supra* note 2, at art. 27 ("The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.").

99. Compensation in relation to CPW has been involved in a few cases. In *CMS Gas Transmission Co. v. Arg.,* it was held that "the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed." 44 ILM 1205, 1247 ¶ 388 (2005). It was also recognised by Hungary in its

different from reparations, which relate to wrongful acts.[100] This means that Article 27 operates outside the context of responsibility and thus covers situations of excused responsibility. Moreover, compensation is different from reparations in that reparations are broader and go beyond damage for material loss.[101]

There are other reasons why compensations should be provided in such cases. First of all, it is only fair to provide compensation for the material loss an innocent third state has suffered. Second, the availability of compensation will induce defending states to act with prudence and within the limits of a CPW.

Does Article 27 create an obligation to provide compensation? Article 27 is residual to ARSIWA Article 31, which provides for reparations in the case of the commission of internationally wrongful acts, because it covers situations where responsibility has been excused due to the existence of a CPW.[102] It is also residual to primary rules included in treaties or other regimes which may provide for an obligation to provide compensation in cases of a breach. It was argued by Kolb that "[t]he provision leaves the matter to agreement between the States concerned or to *ex gratia* action of the State benefitting from the CPW."[103] In my opinion, Article 27 establishes a right whose exercise falls within the discretion of the injured state. It follows from this that Syria has the right to seek compensation in relation to any material harm it suffered by the self-defence actions against Daesh; Iraq has a right to seek compensation from Turkey in relation to its actions against the Kurds; and similarly, Iran and Lebanon from Israel in relation to the cases discussed in Section I.

What should such compensation include? It should include monetary compensation for any material loss to public or private property as well as for any deaths and injuries to individuals caused by the self-defence action.

memorial to the I.C.J. in the Gabˇc´ıkovo-Nagymaros litigation that it should pay compensation notwithstanding the invocation of necessity but the I.C.J. did not deal with this issue because it rejected the plea of necessity as a CPW. Gabˇc´ıkovo-Nagymaros Project (Hung. v. Slovk.), Mem. of the Reb. of Hung., 1994 I.C.J. Pleadings ¶¶ 7.97, 9.18, 10.19 (May 2); Gabˇc´ıkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶¶ 51, 73 (Sep. 25).

100. ARSIWA, *supra* note 2, at art. 31.

101. *Id.* at art. 34-39; Mathias Forteau, *Reparation in the Event of a Circumstance Precluding Wrongfulness*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 887-88 (James Crawford et al. eds., 2010).

102. ARSIWA, *supra* note 2, at art. 31 ("1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.").

103. ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY 137 (2017).

CONCLUSION

This article has dealt with the question of how states can justify their use of force by self-defence against terrorist attacks on the territory of another state where terrorists are located and from where they launched the attacks. To address this question, the article first mapped out the current legal landscape and concluded that it leaves many legal, factual, and conceptual questions unsettled. It then put forward a construction based on the two facets of self-defence as a primary rule and substantive right, which justify the use of force against terrorist attacks, and as a CPW, which excuses responsibility for the incidental breach of the territorial state sovereignty. It is argued this construction offers not only a more coherent understanding of the operation of self-defence but also a stronger legal basis for using defensive force against terrorists on the territory of third states. This article argued further that the territorial state can claim compensation for any material loss caused by the self-defence action. In doing so, this article has also provided clarification on the content and scope of ARSIWA Article 27.