

SELF-DEFENCE AGAINST NON-STATE ACTORS: NEW CHALLENGES ARISING FROM THE MIDDLE
EAST

Amael Notini Moreira Bahia*

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Abstract

The present paper aims to analyse the principle of self-defence, codified by article 51 of the United Nations Charter, in the light of the attacks perpetrated by non-state actors, when the State from which such attacks were launched was not involved and did not consent to it. In this regard, the paper presents the traditional framework of the principle of self-defence as one of the exceptions to the prohibition of the use of force. Secondly, the paper discusses how the international community has answered, from a legal perspective, to threats imposed by the attacks of non-state actors perpetrated without the consent of the host State, in the absence of an agreement among UNSC permanent members, considering the existing practice related to this issue. Finally, the rule of self-defence will be analysed in the light of the current events related to the Islamic State of Iraq and Syria (ISIS) in Syria.

* Undergraduate student of Law in Universidade Federal de Minas Gerais, with academic exchange in Université Paris 1 Panthéon Sorbonne and Fudan University. This paper was based on a research project conducted in cooperation with Prof. Paola Reyes (Universidad Nacional Mayor de San Marcos), to whom I owe the sincerest gratitude for the contributions and insights on my research.

Résumé

Le présent article vise à analyser le principe de la légitime défense, codifié par l'article 51 de la Charte des Nations unies, à la lumière des attaques perpétrées par des acteurs non étatiques, lorsque l'État à partir duquel ces attaques ont été lancées n'était pas impliqué et n'y a pas consenti. À cet égard, ce manuscrit présente le cadre traditionnel du principe de la légitime défense comme l'une des exceptions à l'interdiction du recours à la force. Par ailleurs, nous examinerons la manière dont la communauté internationale, d'un point de vue juridique, a répondu, aux menaces imposées par les attaques d'acteurs non étatiques perpétrées sans le consentement de l'État hôte, en l'absence d'un accord entre les membres permanents du CSNU, compte tenu de la pratique existante en la matière. Enfin, la règle de la légitime défense sera analysée à la lumière des événements actuels liés à l'État islamique d'Irak et de Syrie (ISIS) en Syrie.

INTRODUCTION

On 20th July of 2015, a suicide bomber, suspected to be a member of the Islamic State of Iraq and the Levant (ISIS), attacked the city of Suruc, in Turkey. The attack killed 30 people and injured at least 100 others. Three days later, five ISIS militants approached the north Syrian border and killed a soldier, injuring two others. The rising of the ISIS was accompanied by a series of similar attacks, threatening peace and security in several countries. As of 2018, the ISIS had already performed 143 attacks in 29 countries, killing a total of 2,043 people¹. Progressively, the ISIS began to be perceived as an unprecedented threat to peace and security in the Middle East, given its significant military and financial resources. However, it was still only a non-state actor (NSA). A Global Coalition (the largest in history, with 79 members) was created in order to fight this organisation, and its efforts have been devoted to both military operations and humanitarian aid². With the approval of the Iraqi Prime Minister, the coalition launched the operation “Inherent Resolve”, that was responsible for several airstrikes on ISIS targets³. However, as the ISIS expanded to Syria, new problems began to arise. The coalition did not have the consent of the Syrian government to fight the ISIS in its territory, and Russia blocked the Security Council authorization to use force in this situation, which left the coalition with only one last legal resource to justify its actions in Syrian territory: self-defence⁴. Given the new context of international peace and security, the legality of the exercise of the right of self-defence against attacks of NSA operating in other countries began to be discussed⁵. This approach, at first, seems to be incoherent with the traditional approach of the United Nations Charter, as there would be a conflict in its application to a concrete situation between the sovereign equality of States and an inherent right to survival⁶, as a State cannot be held responsible for all actions originating from its territory⁷.

¹ T. Lister, R. Sanchez, M. Bixler, S. O’Key, M. Mohammed Tawfeeq, “ISIS goes global: 143 attacks in 29 countries have killed 2043”. Available online : <https://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html>, (retrieved on [30 November 2020]).

² US embassy & consulates in Canada, “Fact Sheets: The Global Coalition – Working to Defeat ISIS”. Available online: <https://ca.usembassy.gov/fact-sheets-the-global-coalition-working-to-defeat-isis/>. (retrieved on [30 November 2020]).

³ M. Scharf, “How the War Against ISIS Changed International Law”, *Case Western Reserve Journal of International Law*, 2016, vol. 48, p. 1–54, p. 8–10.

⁴ *Ibid.*

⁵ F. Paddeu, “Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence”, *Leiden Journal of International Law*, 2017, vol. 30, p. 93–115, p. 93–94.

⁶ A. Larsson, “The Right of States to Use Force against Non-State Actors – Is the “Unwilling or Unable” Test Customary International Law?”, Stockholm University, 2015, p.1. Available online: <https://www.diva-portal.org/smash/get/diva2:854914/FULLTEXT01.pdf> (retrieved on [30 November 2020]).

⁷ M. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge University Press, 2013. p. 185.

The objective of this paper is to discuss the legal framework related to States answers to attacks perpetrated by NSA launched from the territory of a State that does not give support neither consents to it, considering thus if the injured State would be legally able to invoke its right of self-defence in order to attack the NSA within the territory of the host State. In this sense, firstly, the traditional framework of the principle of self-defence will be presented. Secondly, the paper discusses how the international community has answered, from a legal perspective, to threats imposed by the attacks of NSA perpetrated without the consent of the host State, in the absence of a resolution from the United Nations Security Council (UNSC). Finally, the rule of self-defence will be analysed in the light of the recent events related to the ISIS in Syria.

1. THE PRINCIPLE OF SELF-DEFENCE

The general prohibition of the use of force and its exceptions have always been focused on States⁸. The United Nations Charter (UN Charter) states under its article 2 (4) that all State members shall refrain from the threat or use of force against the territorial integrity or political independence of any State⁹. This obligation is also reflected on customary international law, as ruled by the International Court of Justice's (ICJ) case law¹⁰. The prohibition of the use of force has only a few exceptions, which are: (i) the authorization of the United Nations Security Council; (ii) the right of self-defence; and (iii) the consent of the territorial State. Some authors also advocate for an alleged right of humanitarian intervention, which is, however, not supported by the text of the UN Charter or by international custom¹¹. This paper will focus specifically on the right of self-defence and its implications in relation to NSA.

The right of self-defence is enshrined on article 51 of the UN Charter and represents the possibility of legally using force in response to an armed attack. As an exception to the prohibition of the use of force, the inherent right to self-defence may be exercised under certain

⁸ M. Hakimi, "Defensive Force against Non-State Actors: The State of Play", *International Legal Studies*, t University of Michigan Law School Scholarship Repository, 2015, vol. 91, p. 1–31, p. 4–5. Available online: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2379&context=articles> (retrieved on [30 November 2020]).

⁹ United Nations, Charter of the United Nations, 1945. art. 2(4).

¹⁰ International court of justice (ICJ), Case concerning military and paramilitary activities in and against Nicaragua : Nicaragua v United States of America. Merits. 1986; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion. 2004; ICJ, Case Concerning Armed Activities on the Territory of Congo: Democratic Republic of Congo v. Uganda. Merits. 2005.

¹¹ International law association, Final Report on Aggression and the Use of Force, p.21. Available online: https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf, (retrieved on [30 November 2020]).

criteria. Firstly, article 51 of the UN Charter clearly establishes that self-defence may only be permitted in case an armed attack occurs¹²; secondly, the armed attack must have been aimed specifically at the targeted country, and not consequence of an accident or mistake.¹³ Furthermore, the right of self-defence must be exercised in conformity with the international law principles of proportionality and necessity¹⁴. It is also paramount to state that the right of self-defence is only a temporary remedy “until the Security Council has taken the measures necessary to maintain international peace and security”¹⁵. The UNSC has taken several steps to maintain international peace and security in the face of the threats posed by NSA, as observed in Res. 1373 and Res. 1540. However, in the absence of a prompt and significant response from the UNSC, there are several doctrinal controversies when it comes to the discussion of the application of the right of self-defence against attacks organised and executes by NSA.

For the purposes of the traditional theory of self-defence, the armed attack must have been made by a foreign State, and there must also be *prima facie* evidence of this attack in order to demonstrate a presumption of its occurrence¹⁶. Accordingly, in the *Case Concerning Oil Platforms*, the ICJ decided that the United States had the burden of proving that Iran was responsible for the attacks, and that the offenses qualified as “armed attacks”, in order for it to legally justify the attack of the Iranian platforms as an act of self-defence¹⁷. The ICJ further decided on the *Military and Paramilitary Activities in and Against Nicaragua* that the “armed attack” could be comprised not only of actions of the regular armed forces of the State, but also included the sending of armed bands, groups or mercenaries, as long as the gravity of the attack would amount to an armed attack if it were conducted by regular armed forces¹⁸, in accordance with the definition of aggression provided by the United Nations General Assembly on its Resolution 3314 (XXIX)¹⁹.

Concerning the principles of proportionality and necessity, it is essential to verify their effects and methods of application by the international jurisprudence. Firstly, in the Caroline incident (1837), Canada was under British control and facing a rebellion when the British forces

¹² Some authors also recognize the possibility of self-defence when the attack is imminent. See : M. Alder, “The Inherent Right of Self Defence in International Law”, *Dordrecht*: Springer, 2013. p. 120–121.

¹³ *Ibid.*

¹⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion. 1996. para. 40–41.

¹⁵ United Nations, *Charter of the United Nations*, 1945. art. 51.

¹⁶ *Ibid.*

¹⁷ ICJ, *Case Concerning Oil Platforms: Islamic Republic of Iran v United States of America*. 2003. para. 51.

¹⁸ ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua: Nicaragua v United States of America*. Merits. 1986. para. 195.

¹⁹ United Nations general assembly, *Definition of Aggression*: UN Doc. A/ RES/3314, 1974. art. 3(g).

attacked the *SS Caroline*, a US steamer that supplied the rebel forces with munitions and personnel²⁰. The attack was conducted within the US territory, thus causing a violation of sovereignty. In this context, a formula was elaborated in order to analyse necessity and proportionality, and its core elements are still applied by international courts.

The principle of necessity determines that the right of self-defence might be exercised as a last resort, thus limiting self-defence to the protection of the vital interests of the State and precluding the use of force against trivial breaches of international law²¹. This assertion leads to the requirement of the exhaustion of the means of peacefully settling the dispute. Only then, if these attempts have failed, the State may resort to the use of force in self-defence²². Judge Schwebel explained this requirement in his Dissenting Opinion for the *Military Activities in Nicaragua* case, in which he stated that if there are peaceful means to achieve the ends sought by forceful measures, the actions cannot be understood as necessary²³. For instance, in the *Oil Platform's* case, the ICJ decided that for the actions of the US to be necessary, it had to complain to Iran about the alleged military activities committed²⁴.

The principle of proportionality has not been clearly defined by the doctrine. The ICJ tends to state its remarks related to this principle in a logic that is intrinsically connected to the factual aspects of the case²⁵. The cases brought before the Court involved clear examples of disproportionality on the exercise of self-defence, and the principle was not outlined in clear terms, as its violation was flagrant²⁶. However, in the *Nuclear Weapons Advisory Opinion* the ICJ made a broad statement that the use of nuclear weapons should not be considered disproportionate in all circumstances²⁷. As even this extreme response may not be regarded as a violation of the principle of proportionality, an uncertainty remains in relation to its application. In this regard, Robert Alexy argued, in his theory of the Weight Formula, that the intensity of an interference can be measured in a scale in order to determine the weight of

²⁰ J. Green, *The International Court of Justice and Self-Defence in International Law*, Oxford : Hart Publishing, 2009. p. 65.

²¹ G. Schwarzenberger, "The fundamental principles of international law", *Collected Courses of International Law*. Vol. 87. Leiden: Brill | Nijhoff, 1995, p. 333.

²² J. Green, *The International Court of Justice and Self-Defence in International Law*, Oxford: Hart Publishing, 2009. p. 80.

²³ ICJ, Case concerning military and paramilitary activities in and against Nicaragua : Nicaragua v United States of America. Merits – Dissenting Opinion of Judge Schwebel, 1986, para. 201.

²⁴ ICJ, Case Concerning Oil Platforms : Islamic Republic of Iran v United States of America, 2003, para. 76.

²⁵ M. Brent, "Responding to attacks by non-state actors: the attribution requirement of self-defence", *Australian International Law Journal*, 2009, vol. 16, p. 133–160, p. 136.

²⁶ *Ibid.*

²⁷ ICJ, Legality of the threat or use of nuclear, Advisory opinion, 1996, para. 42.

competing reasons, which is, nevertheless, a complex analysis based on the rational legal discourse that may lead to different results depending on the premises applied²⁸.

Judge Higgins argued in her Dissenting Opinion to this advisory proceeding that the self-defence had to be exercised on the proportion needed to repel the attack, restoring thus the State's security.²⁹ In this sense, it is not necessary to establish a symmetry between the initial attack and its response, as the proportion is related to the restoration of security. This position was reaffirmed by Judge Schwebel on the *Military Activities in Nicaragua* case, in which he affirmed that self-defence may be disproportionate in relation to the attack suffered, as long as the response is needed to repulse the initial attack³⁰.

2. SELF-DEFENCE AND NON-STATE ACTORS

The principle of self-defence will now be analysed on the context of the international practice related to the armed attacks perpetrated by NSA without the consent or the support of the host State. Generally, if a NSA attacks a State with the support of other State, the victim State may exercise its right to self-defence due to the attribution of the international illegal act to the supporting State or the NSA itself³¹. In this sense, the attacks sponsored by States are connected with the traditional theory of self-defence because of the attribution element, and thus still fall within the scope of article 51 of the UN Charter.³² Even though the article does not specify that a State must be the perpetrator of the armed attack, the ICJ has declared on its advisory opinion on the *Legal Consequences of the Construction of a Wall* that the UN Charter provides the right of self-defence exclusively to inter-State conflicts³³.

In contrast to this decision, Judge Higgins argued that self-defence may be used even if the armed attack is not attributable to a State, allowing the victim State to use force within the

²⁸ R. Alexy, "The Construction of Constitutional Rights", in G. Stopler, *Law & Ethics of Human Rights*, Berlin: Walter de Gruyter GmbH & Co. KG, 2011. p. 30–32.

²⁹ ICJ, *Legality of the threat or use of nuclear weapons*, Advisory opinion – Dissenting Opinion of Judge Higgins, 1996, para. 5.

³⁰ ICJ, *Case concerning military and paramilitary activities in and against Nicaragua : Nicaragua v United States of America*. Merits – Dissenting Opinion of Judge Schwebel, 1986, para. 212.

³¹ ICJ, *Present problems of the use of armed force in internationale law: self-defense*, art. 10 (i). Available online: <https://igps.files.wordpress.com/2008/02/idi-sd.pdf> (retrieved on [30 November 2020]).

³² N. Brahimi, "Extraterritorial self-defence against non-state actors – With focus on the 'unwilling or unable' doctrine", *Bergen: Universitetet I Bergen*, 2016. p. 16. Available online: <http://bora.uib.no/bitstream/handle/1956/15467/152861943.pdf?sequence=1&isAllowed=y> (retrieved on [30 November 2020])

³³ ICJ, *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory opinion, 2004, para. 139.

territory of the host State in order to protect itself³⁴. Judge Koojimans supported this position through the analysis of the United Nations Security Council's resolutions on the aftermath of the 9/11 terrorist attacks, stating that there has been a change on the law of self-defence.³⁵ Furthermore, Judge Buergenthal also presented his dissent by declaring that the right of self-defence may be triggered by an armed attack carried out by an NSA, but his opinion did not delineate clearly the extension of this right³⁶.

Furthermore, the Court dismissed Uganda's argument of self-defence against a rebel movement operating within the territory of the Democratic Republic of the Congo (DRC) on the *Armed Activities on the Territory of Congo* case on the grounds that these actions could not be attributable to the DRC³⁷. However, the Court did not manifest itself in relation to "whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces"³⁸. Moreover, the attribution requirement was not created consensually, as it was criticized by Judges Simma and Koojimans, that expressly stated that the armed attack did not have to be attributed to a State in order for the victim State to act in self-defence.³⁹ The UNSC also did not accept the justifications given for the hostilities conducted in the Congolese territory, and called for the halt of these military activities.⁴⁰

In this sense, since the 9/11 terrorist attacks, many States have supported a broad interpretation of the right of self-defence, allowing the response to attacks executed by NSA, wherever they may be located⁴¹. In this context, the "Bush Doctrine" emerged. This position envisaged the possibility of waging preventive wars against terrorists and rogue States.⁴² This doctrine criticised the criteria of the occurrence of an armed attack for the right of self-defence

³⁴ ICJ, legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory opinion – Separate Opinion of Judge Higgins, 2004, para. 33: "There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State".

³⁵ ICJ, Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory opinion – Separate Opinion of Judge Koojimans, 2004, para. 35.

³⁶ ICJ, Legal consequences of the construction of a wall in the occupied Palestinian territory. Advisory Opinion – Declaration of Judge Buergenthal, 2004, para. 6.

³⁷ ICJ, Case concerning armed activities on the territory of Congo : Democratic Republic of Congo v. Uganda. Merits, 2005, para. 147.

³⁸ *Ibid.*

³⁹ ICJ, Case concerning armed activities on the territory of the Congo : Democratic Republic of the Congo v Uganda. Merits – Separate Opinion of Judge Simma, 2005, para. 12; ICJ, Case concerning armed activities on the territory of the Congo : Democratic Republic of the Congo v Uganda. Merits – Separate Opinion of Judge Koojimans, 2005, para. 30.

⁴⁰ United Nations security council, Resolution 1234, UN Doc. S/ RES/1234; United Nations security council, Resolution 1304, UN Doc. S/ RES/1304.

⁴¹ O. Corten, "A plea against the abusive invocation of self-defence as a response to terrorism". Available online :<https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/> (retrieved on [30 November 2020]).

⁴² R. Delahunty, J. Yoo, "The Bush doctrine: can preventive war be justified", *Harvard Journal of Law and Public Policy*, vol. 32. 2009, p. 843–865; p. 844–845.

to be invoked, as it claimed for the exercise of this right before the armed attack could be implemented, both against attacks attributable to States and NSA⁴³. However, this new interpretation has not been well accepted by a significant number of States. For instance, the Movement of Non-Aligned Countries, composed of 120 States, has declared that article 51 of the UN Charter is “restrictive and should not be rewritten or reinterpreted”⁴⁴.

This new dilemma about the interpretation of the right of self-defence highlights the conflict between the need of States to defend themselves from the NSA’s attacks, and the respect to the principles of the sovereign equality, territorial integrity and the prohibition of the use of force, pillars of international law that maintain the order in the international community⁴⁵.

This issue also raises an uncertainty in the matter of the legal relation among the host State and the victim State, since the first is not involved in the use of force of the NSA against the second. Would the exercise of self-defence by the victim State be considered a violation of the host State’s sovereignty and thus allow it to react with self-defence? This complex situation actually occurred when the US and other States attacked the ISIS within Syria’s territory in order to exercise the right of collective self-defence on behalf of Iraq. The Syrian government did not oppose immediately the attacks⁴⁶, but it eventually declared that any actions taken within its territory without its approval would be considered an aggression against Syria itself, and would be repelled by the exercise of the right of self-defence⁴⁷.

In this sense, if the right of self-defence were to be legally accepted to apply against NSA within the territory of a foreign host State, the violation of such State’s territorial integrity would have to be excused, otherwise it would lead to a right to counter the force used in the exercise of self-defence.⁴⁸ In order to overcome this issue, there is a doctrinal theory that refers to the willingness of the host State to prevent terrorists from using its territory to operate attacks against other States.⁴⁹ These arguments, however, raise once again the matter of State

⁴³ J. Maogoto, “Rushing to break the Law? ‘The Bush Doctrine’ of Pre-Emptive Strikes and the UN charter regime on the use of force”, *University of Western Sydney Law Review*, 2003, vol. 7, p. 1–34.

⁴⁴ United Nations security council, 7621st meeting: UN Doc. S/ PV.7621, 2016, p. 32–34.

⁴⁵ T. Ruys, S. Verhoeven, “Attacks by private actors and the right of self-defense”, *Journal of Conflict and Security Law*, Oxford, 2005, Vol. 10, p. 289-32; p. 310.

⁴⁶ Syrian Arab Republic, Identical letters dated 25 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/371.

⁴⁷ T. Ruys, N. Verlinden, L. Ferro, Digest of State practice 1 January - 30 June 2015, *Journal on the use of force and International Law*, Abingdon, 2015, vol. 2, p. 257–298, p. 273.

⁴⁸ K. Trapp, “The use of force against terrorists : a reply to Christian Tams”, *European Journal of International Law*. 2010, vol. 20. p. 1049–1055, p. 1050.

⁴⁹ C. Tams, “The use of force against terrorists”, *European Journal of International Law*, Oxford, 2009, vol. 20, p. 359–397, p. 385.

involvement on the NSA activities, requiring the entailment of the host State's responsibility for the victim State to act in self-defence⁵⁰.

One more challenge to be addressed when considering the self-defence against armed attacks of NSA is the compliance with the principles of necessity and proportionality. As the armed response against the NSA on the territory of a foreign host State threat its territorial integrity and its sovereignty, the threshold of the principles of proportionality and necessity are also affected by the inter-State relations among the victim and the host State⁵¹.

The principle of necessity, as previously noted, requires States to use force as their last resort, thus exhausting the procedural means to peacefully terminate the conflict before attempting to solve the conflict through force. In this regard, some authors argue that if the host State is doing reasonable efforts to prevent NSA from using its territory to attack other States, the defensive use of force would not be necessary, and the victim State should only cooperate with the host State⁵². However, if the host State is complicit with the operations carried out by the NSA within its territory, the defensive use of force would be necessary, otherwise the host State would be acting as a safe haven for such groups⁵³.

Nonetheless, once again the legal relation between the victim State and the host State becomes complex, as the complicity or lack of due diligence of a State towards attacks perpetrated by NSA against other States does not entail the legality of the defensive use of force, as this would not be a proper countermeasure to the international wrongful act committed.⁵⁴ Furthermore, the whole logic of the principle of necessity would be distorted, as it would enable the use of force instead of limiting it.⁵⁵

As for the principle of proportionality, it determines that the victim State would only be allowed to resort to defensive self-defence if the violation of the host State's territorial integrity could be considered lawful, and also contribute to the restoration of security within the victim State⁵⁶.

⁵⁰ *Ibid.*

⁵¹ N. Tsagourias, "Self-defence against non-state actors : the interaction between self-defence as a primary rule and self-defence as a secondary rule", *Leiden Journal of International Law*, 2016, vol. 29, p. 801–825, p. 817.

⁵² K. Trapp, "The use of force against terrorists : a reply to Christian Tams", *European Journal of International Law*. 2010, vol. 20, p. 1049–1055, p. 1053.

⁵³ *Ibid.*

⁵⁴ F. Paddeu, "Use of force against non-state actors and the circumstance precluding wrongfulness of self-defense", *Leiden Journal of International Law*, 2017, vol. 30, p. 93–115, p. 105–106.

⁵⁵ C. Gray, "The limits of force", *Collected Courses of International Law*, vol. 376, Leiden : Brill | Nijhoff, 2016, p. 111.

⁵⁶ K. Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors", *The International and Comparative Law Quarterly*, 2007, vol. 56, p. 141–156, p. 156.

Given the theoretical problems presented, as well as the conflicting State practice and jurisprudence on the matter⁵⁷, it can be observed that the application of the principle of self-defence to attacks perpetrated by NSA without the consent or the support of the host State by international law is disputed. Even if some authors seek to interpret article 51 of the UN Charter as allowing the use of defensive force against NSA, the problems created in relation to the legal relations between the victim State and the host State cannot be overlooked. Hence, this situation would also require the analysis of the inter-State characteristics of the conflict.

3. SYRIA AND THE ISIS

Considering the context of the fight against the ISIS in Syria, the practice of the States involved is not uniform. The United States has created a coalition that is currently said to be composed of 79 countries to aid in the fight against this NSA, and more than 14,200 strikes were already conducted within Syrian territory⁵⁸.

However, although several States support the campaign against the ISIS in Syria, many of them do not engage on the actual military conflict. For example, when the coalition first started to attack targets in Syria, ten Arab countries signed a joint statement to support these military operations⁵⁹.

Furthermore, it is essential to note that Russia and Iran, which are important actors in the conflict in Syria, have not intervened under the same legal justifications as the US-led coalition. Russia and Iran have sought to cooperate with the Assad regime to undertake their attacks and have intervened with its consent.⁶⁰ Even though this justification is also contested, its controversies are not related to the attacks perpetrated by NSA, but to the validity of Assad's invitation in the context of the Syrian civil war.⁶¹

⁵⁷ C. Tams, "The use of force against terrorists: a rejoinder to Federico Sperotto and Kimberley N. Trapp", *European Journal of International Law*, 2010, vol. 20, p. 1057-162, p. 1058-1060.

⁵⁸ BBC, "Islamic State and the crisis in Iraq and Syria in maps". Available online : <http://www.bbc.com/news/world-middle-east-27838034> (retrieved on [30 November 2020]).

⁵⁹ Office of the Spokesperson, Media Note : Jeddah Communique. Available online : <https://2009-2017.state.gov/r/pa/prs/ps/2014/09/231496.htm> (retrieved on [30 November 2020]).

⁶⁰ P. Boghani, "Who's who in the fight against ISIS?". Available online: <https://www.pbs.org/wgbh/frontline/article/whos-who-in-the-fight-against-isis/> (retrieved on 30 November 2020).

⁶¹ K. Bannelier-Christakis, "Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent", *Leiden Journal of International Law*, 2016, vol. 29, p. 743-775, p. 761-766.

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On the other hand, the US does not recognize the legitimacy of the Syrian government, its consent was not sought in order to conduct the attacks⁶². Although the US-led intervention faces legal challenges, as numerous international law experts have expressed their concerns about its legal basis⁶³, the US insists on its legality on the grounds that the intervention was done in the exercise of Iraq's right of self-defence⁶⁴. This justification is based upon the letter sent to the UNSC by the Government of Iraq, in which the support of the US is requested as follows:

“It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent”⁶⁵.

The justification of collective self-defence has also been adopted by many countries within the US-led coalition such as France⁶⁶ and the UK⁶⁷. However, following the terrorist attacks on Paris, France invoked the right to individual self-defence in order to implement its military activities against the ISIS.⁶⁸ Furthermore, some intervening States, such as the US, the UK, Australia and Canada, based their activities on the legal justification that Syrian was unable or unwilling to fight the ISIS. Meanwhile, other Western States, such as Germany, Denmark, Norway and Belgium, applied other legal basis to attack the ISIS, such as the Syrian loss of effective control on its territory.⁶⁹

⁶² T. Farell, “Are the US-led air strikes in Syria legal – and what does it mean if they are not?”. Available online: <https://www.telegraph.co.uk/news/worldnews/middleeast/syria/11116792/Are-the-US-led-air-strikes-in-Syria-legal-and-what-does-it-mean-if-they-are-not.html> (retrieved on [30 November 2020]).

⁶³ K. Makarechi, “Are U.S. Strikes on Syria Legal Under International Law?”. Available online : <https://www.vanityfair.com/news/politics/2014/09/us-strikes-syria-international-law> (retrieved on [30 November 2020]).

⁶⁴ S. Sengupta, C. Savage, “US invokes Iraq’s defense in legal justification of Syria strikes”. Available online: <https://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html> (retrieved on [30 November 2020]).

⁶⁵ Republic of Iraq, Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 2014, p. 2.

⁶⁶ M. Weller, “Permanent imminence of armed attacks : Resolution 2249 (2015) and the right to self defence against designated terrorist groups”. Available online : <https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/> (retrieved on [30 November 2020]).

⁶⁷ House of commons, Iraq : Coalition Against ISIL. Available online : <https://hansard.parliament.uk/Commons/2014-09-26/debates/1409266000001/IraqCoalitionAgainstISIL> (retrieved on [30 November 2020]).

⁶⁸ G. Kajtar, “The use of force against ISIL in Iraq and Syria – A legal battlefield”, *Wisconsin International Law Journal*, 2017, vol. 34. p. 535–584, p. 571.

⁶⁹ *Ibid.* p. 574–575.

Some of the intervening States also interpreted the Security Council Resolution 2,249 as allowing the operation against ISIS, but there is a significant doctrinal dissent on this matter. Several authors argue that this resolution is not binding and unable to create new legal justifications to the use of force beyond the UN Charter⁷⁰. Even though the resolution incorporates the traditional terms “all necessary means”, often used to refer to the actions implemented under Chapter VII of the UN Charter, it merely “calls upon” States to act, instead of actually “authorizing” the use of force, as done in previous binding resolutions. Furthermore, despite the adoption of UNSC Res. 2249, several States maintained their military actions against ISIS under the justification of the right of self-defence⁷¹.

Currently, the ISIS has lost presence in the most part of the territory it once held, and the discussion regarding the legality of the operations conducted by the US-led coalition is starting⁷². Nevertheless, as the practice of the States concerned is not completely uniform, the impact of this conflict in international law is yet to be determined. The course of this legal discussion is likely to greatly influence the decision on the legality of the military activities implemented on the fight against ISIS.

CONCLUSION

Besides the unprecedented threat that ISIS brought to international peace and security, other conflicts with NSA are emerging all over the world, which means that this legal controversy is yet to be settled. One example of these developments is the intervention, partially based upon the right of collective self-defence, against an alleged armed attack by the Houthis in Yemen.⁷³ Nonetheless, the doctrine is reluctant to endorse this legal justification in this context, as the conflict was not international until the external intervention of the intervening States⁷⁴.

The traditional concept of self-defence is bound to be influenced by the development of State practice and *opinio juris* as new threats arise. These developments are closely related to the responses given by the UNSC to these threats, since, in the absence of a clear authorization

⁷⁰ *Ibid.* p. 568–569.

⁷¹ *Ibid.*

⁷² Combined joint task force – Operation Inherent Resolve public affairs, Coalition forces announce shift as campaign against ISIS progresses in Iraq, Syria. Available online: https://www.army.mil/article/200136/coalition_forces_announce_shift_as_campaign_against_isis_progresses_in_iraq_syria (retrieved on [30 November 2020]).

⁷³ T. Ruys, O. Corten, A. Hofer, *The use of force in International Law : a case-based approach*, Oxford University Press, 2018, p. 904.

⁷⁴ *Ibid.*

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under Chapter VII, States will present justifications to intervene in situations that concern global and regional peace and security, as they have done in the fight against ISIS.

However, in the specific case of the right self-defence against NSA, several legal issues must be considered if this justification is to be accepted. Even if the traditional concept of self-defence is surpassed, the very notion of necessity and proportionality would also have to be modified, as the impact of the operation on the host State would be an essential element to be considered on the analysis of the legality of the exercise of the right of self-defence. It would also be paramount to establish a legal background to the violation of the territorial integrity of the host State, either if it is to be excused or justified by entailing its international responsibility. Hence, there are still many issues to be settled before a consistent interpretation and implementation of the right of self-defence against NSA may exist.