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Self-Defence against Non-State Actors: Possibility or reality?

Legítima defensa contra actores no estatales: ¿Posibilidad o realidad?

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ABSTRACT: The United Nations Charter has enshrined the general prohibition of the use of force as well as the exception to it through the inherent right of States to defend themself if an armed attack occurs under article 51. However, the proliferation of non-State actors and the response given by States to them are challenges the international community faces to maintain international peace and security. International law must find a balance between the legitimate need of States to defend themselves from the threats that non-State actors present and at the same time to defend the essential principles of sovereign equality, territorial integrity and prohibition of the use of force.

KEYWORDS: international security, equality of States, sovereignty, international tribunal, international conflict.

RESUMEN: La Carta de las Naciones Unidas ha consagrado la prohibición general del uso de la fuerza, así como la excepción a la misma mediante el derecho inherente de los Estados a defenderse si se produce un ataque armado en virtud del artículo 51. Sin embargo, la proliferación de agentes no estatales y la

respuesta que les brindan los Estados son desafíos que enfrenta la comunidad internacional para mantener la paz y la seguridad internacionales. El derecho internacional debe encontrar un equilibrio entre la legítima necesidad de los Estados de defenderse de las amenazas que presentan los actores no estatales y al mismo tiempo defender los principios esenciales de igualdad soberana, integridad territorial y prohibición del uso de la fuerza.

PALABRAS CLAVE: seguridad internacional, igualdad de Estados, soberanía, tribunal internacional, conflicto internacional.

INTRODUCTION

It is well known that the United Nations (UN) Charter[1] was envisioned as a framework of an international community of nation-States (art. 4, para.1). Furthermore, in order to maintain international peace and security, it prohibits the threat or use of force by its Member States (art. 2, para. 4). Even though, Chapter VII of the UN Charter allows, as an exception, the inherent right of every State to defend itself against armed attacks, in both individual and collective manner (article 51) (Van Den Hole, 2003, pp. 73-80).

However, non-state actors (NSAs) have entered into the international scene using "*force*" and some States have based its counter-terrorism answer under the international law governing the use of self-defence. This new sort of response could have blurred the lines between the universally accepted prohibition of the use of force and its exception, as treaties, custom, and case law do not address the issue in a way that allows States to defend themselves by targeting NSAs directly.

For instance, the "Islamic State of Iraq and the Levant" (ISIL) or the "Islamic State of Iraq and Syria" (ISIS), more commonly

1 The U.N. Charter was adopted June 26, 1945, and entered into force on October 24, 1945. Currently, the Charter has 193 States Parties.

known as "Islamic State" (IS), emerged in 2014 (Mueller and Stewart, 2016). By that time, ISIS captured parts of territories of Iraq (the entirety of northern) and Syria (Mosul, border regions), and it generated severe threats to the security of several States developing a rudimentary governance system in these territories based on an estimated of 30,000 militants (Qureshi, 2018, p. 5).

The initiative to form a coalition to fight against the Islamic State received broad support and commitment from many States, including the United States of America (US). While the United States airstrikes on Iraq were justified as the Iraqi government itself asked for military intervention to tackle the threat of NSAs in its territory (Arimatsu and Schmitt, 2014, p. 6; Flasch, 2016, p. 38), the military operations in Syria lacked the consent of the Syrian government. European states and Canada confined their military interventions against ISIS on Iraqi soil. However, they did not question the legality of US military operations in Syria (Akande and Vermeer, 2015).

The article focuses on one of the most controversial issues in modern international law as it addresses the claim of certain States to "*use force in self-defence*" in response to "*armed attacks*" by NSA launched from other States when the attacks are not necessarily attributable to the latter. It is not the purpose of this research to provide a comprehensive study of this issue, but rather to identify the different approaches and edges on the matter.

The article is divided into three parts. The first part will set out the current debate about the possible interpretations of the UN Charter right of self – defence. The second part will analyse the right of self – defence in the case-law of the International Court of Justice. The third part will present a general overview of States practice. The article concludes that International law must find a balance between the legitimate need of States to

defend themselves and to defend the essential principles of International Law.

1. ARTICLE 51 UN CHARTER

The general prohibition on the threat or use of force is a treaty rule, a customary rule, and an international law principle (G.A. Res. 2625 (XXV), Oct. 24, 1970). Therefore, the prohibition has a binding nature that applies to all States worldwide. Moreover, it is well-established that the right of all States to defend themselves is a principle of international law, and it was customary international law (CIL) before the adoption of the UN Charter (Jennings, 1938, pp. 82–99; U.N. Sec. Council, Res. 1368 (2001); U.N. Sec. Council, Res. 1373 (2001); Nicaragua case, para. 176).

Article 51 provides for the protection of a State's "inherent right" to self-defence if an armed attack occurs or is imminent (Nicaragua case, para. 194). Here, the use of force must satisfy the criterion of necessity (last resort), proportionality (the level of force is reasonable to counter that threat), and immediacy (Dinstein, 2011; Nuclear Weapons, para. 40-41). Additionally, the State exercising self-defence shall immediately inform the UN Security Council (SC) of the measures taken and shall subordinate its action at the disposal of that body. Therefore, the measures taken will be temporal until SC takes appropriate action.

2. POSSIBLE INTERPRETATIONS ON THE UN CHARTER RIGHT OF SELF-DEFENCE

It is clear the elements that present Article 51; however, what happen if a State is attacked by a NSA located in another State (host State) which has not provided its consent (Dinstein, 2011, p. 118; Corten, 2008, p. 389)[2] or support to the NSA's actions? Would it be possible for the attacked State to allege, under article 51 of the UN Charter, self-defence to target NSAs directly? In the exercise of self-defence, some argue in favour of a more restrictive approach of the UN Charter. Others, however, support its expansive interpretation. The doctrine efforts to address the new challenges are essential, but not necessarily have been enough to cover all the necessities that came up with the new scenario.

On the one hand, the restricted approach of self-defence based on the textual interpretation of what is stated in article 51, along with article 2.4, would lead us to believe the right of self-defence is reserved only for armed attacks launched by States, the full and primary subjects of international law. Therefore, to trigger the right to self-defence, an armed attack carried out by NSAs must be attributable to the host State (Cassese, 1989, pp. 589 and 596 – 597). By this approach, there is not a denial to attack NSA as such. However, the use of force operates exclusively, as an exception, between States, as it implies targeting the State territory in which NSA operate avoiding contradictions to the international law and preventing unilateral military interventions.

2 It is a corollary of the principle of the sovereignty of States that is backed by broad state practice. The commentary to article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries mentions different modalities of military intervention (establishment of a military base or foreign troops) as examples of behaviours whose illegality is excluded by the consent of the territorial State. Additional information is provided by the definition of the aggression. The intervention will be valid as long as it remains within the limits of the expressed consent, which must be granted freely, clearly and effectively, and not be vitiated by error, fraud, corruption or coercion.

For instance, Olivier Corten (Corten, 2016) has said that, according to with international law, Article 51 of the UN Charter "*should not be re-written or re-interpreted*" (UNSC S/PV.7621, Feb 15, 2016, pp. 33–34).) having a restrictive and classical reading of the UN Charter. In this context, it is worth noting "*A plea against the abusive invocation of self-defence as a response to terrorism*" (Centre de Droit International, 2016). The instrument does not deny as such the possibility of using self-defence in the context of the fight against terrorism, but it recalls that such a resort to force is an exception to the prohibition of the use of force and then must be in conformity with the conditions laid down in the UN Charter.

On this basis, he sets out two main ideas. The first one is related to the self-defence as a last resort only relevant when other means – peaceful measures (police and judicial cooperation), military measures (with the cooperation of the territorial State) or the referring the situation to the SC – are not available or have failed. The second one related to the necessity to identify the conditions for validly invoking self-defence, once the other means have been exhausted. According to the plea,

> "*This may occur either where acts of war perpetrated by a terrorist group can be attributed to the State, or by a substantial involvement of that State in the actions of such groups. (...) However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State's territory without its consent*" (Centre de Droit International, 2016).

On the other hand, the expansive approach focuses on the possibility of invoking the right to self-defence against NSAs on the basis that the customary right of self-defence which is pre-existent to and broader than the UN Charter, together

with the fact that article 51 does not specify the source of the armed attack. Indeed, it does not specify that a State must have carried out the armed attack; therefore, textual reading of the article would allow the inclusion of NSA. This approach would allow States to defend themselves, under the international law to use force in self-defence (Dinstein, 1987), directly against NSAs, regardless of the territorial host State's non-involvement in the attacks or the source of an attack (International Law Commission, 2016). In this context, some support the raising of a new rule, although incipient, of customary international law by which States would be able to intervene militarily only targeting NSA located in foreign territory.[3]

For instance, Michael Scharf has supported the evolution of the right to use force in self-defence directly against NSA. For him, the use of force against ISIS has given rise to a "*Grotian Moment*", namely, "*an instance of rapid formation of a new rule of customary international law*" related to the right of States to attack NSA when the territorial State is "*unable or unwilling*" to suppress the threat they pose (Scharf, 2016). Regarding the "*unable or unwilling*" test, Ashley Deeks has considered that there has been virtually no discussion of what that test requires. However, she has provided guidance on what inquiry a victim State must undertake when assessing whether it is necessary to use force in self – defence against a NSA located in another State's territory to impose significant limits (Deeks, 2012).

There are others, which have taken a middle of the road position accepting the expansive definition of the right to use force in self-defence based on a broader interpretation of its customary requirements. Although this approach would be interesting, it must be complemented with a coherent and practical development. For example, Kimberley Trapp has

3 Article 3g) of the "*[d]efinition of [a]ggression*" prohited to States from sending armed bands, groups, irregulars or mercenaries, that carry out acts of armed force against another State of such gravity as to amount to an act of armed aggression.

pointed out that nothing in Article 51 limits the actors against whom defensive force can be used as the balance between the right of self-defence against NSA in foreign States territory and the right of States to respect for their territorial integrity lies in the customary law elements of the right of self-defence itself. Therefore, the use of force must be necessary and proportionality in order to amount to a legitimate exercise of self-defence. Therefore, the customary requirements operate as a mediator between the security interests of States victim and States in whose territory the NSA operates (Trapp, 2008, pp. 141 – 156).

Certainly, the doctrinal efforts to address the new legal challenges are impressive, but not necessarily have been enough to cover all the necessities that came up with new scenarios. In any event, they must be complemented with a coherent and practical development based on the rulings from the Internacional Court of Justice (ICJ) and the States practice.

3. THE RIGHT OF SELF-DEFENCE IN THE CASE-LAW OF THE INTERNATIONAL COURT OF JUSTICE

Increased scrutiny of self – defence has involved the case-law of the International Court of Justice (ICJ). The first time that the ICJ issued a merits judgment on self-defence was in the *Nicaragua Case* (1986). Later, the Court dealt with the topic in its *Nuclear Weapons Advisory Opinion* (1996). Furthermore, it handed down the *Oil Platforms Case* (2003), the *Wall Advisory Opinion* (2004), and the *Congo Case* (2005).

In *Nicaragua Case*, Nicaragua alleged that the United States (US) supported the *contras*' actions against Nicaragua's government; At the same time, the US claimed that its actions amount to self-defence (along with El Salvador) against the armed attacks launched by rebel groups, in El Salvador, supported by the Nicaraguan Government. In the assessment whether American assistance to the Nicaraguan *contra* forces

amounted to a legitimate exercise of the right of collective self-defence, the ICJ took into account the relationship between the State and NSA and defined the rules on attribution (Nicaragua case, para. 101–104 and 106–108).[4] Therefore, it accepted that the *jus ad bellum* could be violated by "*the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state*" (Nicaragua case, para. 195). Consequently, "*[b]y adopting a restrictive approach to attribution the Court effectively restricted seld-defence to the inter-state context*" (Tams, 2009, pp. 368–369), the ICJ rejects the American justification of self-defence[5].

In the *Nuclear Weapons Advisory Opinion*, the ICJ was asked to rule on the compatibility of the threat or use of nuclear weapons with the rules of international law, in particular, the provisions of the UN Charter.[6] According to the Court, articles 2, paragraph 4 and 51 the UN Charter do not refer to specific weapons, then the rule apply to any use of force, regardless of the weapons employed (para. 39). Also, it stated that the right of self-defence is subject to the conditions of necessity and

4 The ICJ held that the US was responsible for financing, training, and providing logistical support to the *contras* (including the supply of intelligence as to Nicaraguan troop movements). The ICJ held that Nicaragua was not responsible for the arms traffic (para. 154–155).

5 It should be noted that, through the definition of aggression of Resolution 3314, the ICJ contemplates two modes of connection: the "sending by the State or on its behalf" of the armed group, or the "substantial participation" of the State in the use of the armed force of the non-state actor against another State. The ICJ does not determine what this substantial participation consists of, but it does exclude "assistance to the rebels in the form of weapons provision or logistical or other support." (I.C.J. Reports 1986, para. 195).

6 The Court handed down its advisory opinion on the question concerning whether '*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*'" (Nuclear Weapons, para. 1–9). The ICJ affirmed that there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons, that threat or use is contrary to article 2, para. 4, of the UN Charter, and it fails to meet the requirements of article 51. However, it could not conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake (para. 10 – 18, and 105).

proportionality as a rule of customary international law[7]. Judge Guillaume in his separate opinion stresses that neither the UN Charter nor any conventional or customary rule can detract from the natural right of self-defence, including the possibility to resort to nuclear weapons if that resort is the ultimate means for ensuring its survival (para. 8, 9 and 12). Judge Fleischhauer seems to confirm this view but adding objectives elements to reconcile the conflicting principles as the extreme situation and the requirement of proportionality (para. 6). However, to Judge Koroma, the use of nuclear weapons in any circumstance would at the very least result in the violation of the principles and rules of the international law and is, therefore, unlawful.

The *Oil Platforms Case* was around the issue of the legality of the use of force concerning two attacks against Iranian oil platforms by the US during the Iran-Iraq Warv (para. 23).[8] Iran rested its claims on the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran, as well as on broader international law.[9] The US asserted that it was acting in self-defence as the Iranian platforms were being used for military

7 The Court said "*[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed*". It argued that the proportionality principle might "*not in itself exclude the use of nuclear weapons in self-defence in all circumstances*". Nevertheless, a proportional nuclear response in self-defence, "*must, in order to be lawful, also meet the requirements of the law applicable in armed conflict*" taking into account, at the same time, the nature of nuclear weapons and the risks associated in addition to that (para. 41 – 43).

8 The events occurred during the "Tanker War" in the 1980-1988 war context. Iran and Iraq attacked military and commercial vessels of varying nationalities in the Persian Gulf, including vessels from neutral countries. Later, the United States placed neutral countries' vessels under U.S. registry. However, these ships were attacked during 1987 and 1988. In particular, on October 16, 1987, the Kuwaiti oil tanker, *Sea Isle City,* which had been re-flagged to the United States, was hit by a missile while in Kuwaiti waters. Later, on April 14, 1988, the U.S. naval vessel USS *Samuel B. Roberts* was struck by a mine in international waters near Bahrain. In both cases, and some days later, U.S. naval forces took action against Iranian oil platform (para. 23-24, 44, 66-67 and 69.

9 Article I of the Treaty provided that "*there shall be firm and enduring peace and sincere friendship between the United States of America and Iran*" and article X(1) provided that there should be freedom of commerce and navigation between the parties' territories.

purposes, including surveillance of US vessels.[10] In examining Article XX(1)(d) of the Treaty, the Court found that the US attacks on the Iranian oil platform had exceeded the boundaries of international law on self-defence. Indeed, for the ICJ, the US failed to produce sufficient evidence to prove that there had been an "armed attack" on the United States by Iran (para. 61 and 72). Moreover, even if they had constituted "armed attacks", could not be regarded as having been "necessary" responses to the attacks on the two American vessels (para. 76). While the US attack might have been considered proportionate if it was necessary, the Court thought that the US attack was not proportional.[11]

In the *Wall Advisory Opinion,* Israel invokes its right of self-defence against terrorist attacks committed by Palestinian groups (para. 138); however, the ICJ gave limited consideration to Israel's claim that the construction of a security wall within the Occupied Palestinian Territories was a defensive measure of self-defence against terrorist attacks because it exercised control over territories from which the terrorist attacks originated (Ruys, 2010, pp. 474–475). The Court repeated the position it took in *Nicaragua* that NSA armed attacks must be imputable to a foreign State in order to activate the right of self-defence (para. 139). However, the Court's Opinion has been interpreted as, at least, implicitly recognizing a right to use force in self-defence against NSA, while refusing to accept such a right as applicable in these circumstances (Murphy, 2005; Canor, 2006, pp. 129–132). It also held that the occupied territories from which terrorist attacks were launched were

10 The US denied that it had breached its obligations to Iran under Article X(1). We asserted that its actions were necessary to protect its national security and fell within Article XX (1)(d) of the Treaty of Amity regarding the application of measures to fulfil the obligation for the maintenance or restoration of international peace and security or to protect its essential security interests.

11 In its judgment, the Court "*[f]inds the actions of the [US] against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1(d), of the 1955 Treaty of Amity (...), as interpreted in the light of international law on the use of force; (...)*".

under Israeli control and therefore could not be view as attacks launched from abroad[12]. Thus, the Court did not address any light regarding the State's right to use defensive force directly against NSA in foreign territory.

In *Congo Case*, the Court held that the attacks carried out by rebel groups operating from the Congo's territory against Uganda are "*non-attributable to the DRC*" (para. 146), because the circumstances giving rise to the right to self-defence are not satisfied.[13] The ICJ reaffirmed the position taken in *Nicaragua* but the context of the definition of aggression. The Court did not rule out that a lesser degree of State involvement could form the basis for attributing the armed activities of NSA to the State from whose territory they operate – but regarded attributability for an armed attack as limited to the definition of aggression. Besides, the ICJ did not stipulate that armed attacks in the sense of article 51 require an armed attack by one State against another. Instead, it noted that Uganda's measures were carried out against Congo (para. 118, and 147). Furthermore, therefore focused its decision on the grounds of attribution. The decision reflects the distinction between force used in self-defence against Congo and NSA within Congo while refusing to address the conditions for the latter. As Uganda's use of force was not directed against Ugandan NSA, the ICJ did not consider the cases under which such a force would be legitimate (para. 140 and 145).

12 However, the critique of that position deals with the fact that if Palestine is sufficiently an international entity for appearing before the Court and benefiting from the protections of international humanitarian law, then it should be sufficiently international to apply the prohibition of armed attacks on other States (ICJ, Separate Opinion of Judge Higgins, para. 34).

13 Uganda sought to justify control over Congolese territory (airports and towns) by invoking its right of self-defence. However, the ICJ considered that the armed attacks referred to by Uganda did not come from the armed forces of the Congo, but a rebel group opposed to the Ugandan government (ADF). According to the Court, even if the conditions for the exercise of the right of self-defence had been given, it could hardly be considered that Uganda's actions were proportionate to the cross-border attacks to which they intended to respond (para. 147).

In the light of the preceding, under the ICJ's case law, the victim State may not resort to force in response to attacks by NSA unless the NSA had effective control of the State or the NSAs actions were attributable to that State. Therefore, if none of those situations exists, the use of force by the victim State will be considered an unlawful armed attack since it contradicts the principles of the sovereign equality of States and the prohibition of force in international relations (Nicaragua case, para. 191 and 195; Oil Platforms case, para. 101, 195–196; Legal Consequences of the Construction of a Wall, para. 139; Congo case, para. 146).

The ICJ has not guided the cases under which a victim State is entitled to use force in self-defence directly against NSA nor, except for those as mentioned above, has made particular statements related to the source of the armed attack. Nevertheless, as it proclaimed in the Nuclear Weapons Advisory Opinion, in any event, the exception to the prohibition of the use of force under self-defence should be exercised in conformity with the principles of proportionality and necessity.

4. GENERAL OVERVIEW OF STATES PRACTICE

Since the 2011 Syrian civil war, organised networks have spread out across borders, overtaking cities (Couzigou, 2016). In 2014, the ISIS shook the international scene, by posing a new -- and possibly the greatest -- threat to peace and security in the Middle East (Di Giovanni, McGrath and Sharkov, 2014; Flasch, 2015, p. 3). ISIS enjoys financial and military resources (i.e. massive wealth, sophisticated training and organization, access to destructive weaponry, and others) and controls some territory of both Syria and Iraq as well as an area in Libya. ISIS has killed and injured thousands of people, IS-related violence has led to the displacement of over a million people, and its atrocities have extended to other countries in the Middle-East, West-Africa, and Europe (Zerrouky, Audureau and Vaudano,

2015). The conduct of ISIS cannot be attributed to the Assad government and thus to Syria.[14]

To address the issue, Iraq has requested that the United States (USA) assist it in defending itself against ISIS. Therefore, since September 2014, the USA, along with other States, launched attacks against ISIS in Iraq and Syria (Mills, 2017). However, it must be considered that "[w]hile the Iraqi government has consented to foreign military action against ISIS within Iraq, the Syrian government did not. Rather, Syria protested that the airstrikes in Syrian territory were an unjustifiable violation of international law" (Scharf, 2016). The USA informed the Security Council that the military actions against ISIS on Syrian territory are were lawful acts of collective self-defence on behalf of Iraq (Scharf, 2016), while Iraq claimed its right to individual self-defence[15]; and also, lawful acts of individual and collective self-defence against the threat that ISIS and other terrorist groups in Syria represent for "many other countries", including USA and its allies. The USA formulated the following justification:

> *"States must be able to defend themselves, following 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. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate*

14 Under international law, the conduct of a person may be attributed to a State where the acts were done under the instructions, direction or control of the government of the State. However, Such control is not exercised by the Assad government over IS (Article 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001).

15 Then, it was not only the attacks of ISIS against Iraq on its border with Syria but also the request of Iraq for the USA to lead international efforts to attack the military strongholds and sites of ISIS in Syria.

> *military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq... Also, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies." (*U.N. Sec. Council, Letter from the Permanent Representative of the United States of America to the United Nations *addressed to the Secretary-General*, U.N. Doc. S/2014/695, (Sep 23, 2014).

Additionally, in the beginning, France restricted its action to the Iraqi territory; however, following the 2015 and 2016 ISIS attacks in Paris and Nice, it expanded its military intervention in Syria based on the right to individual self-defence. In the notification addressed to the Security Council, France invokes art. 51 of the Charter, but without specifying whether it was proceeding under the title of the individual or collective self-defence. France formulated the following justification:

> *"By resolutions 2170 (2014), 2178 (2014) and 2199 (2015) in particular, the Security Council has described the terrorist acts of [ISIL], including abuses committed against the civilian populations of the Syrian Arab Republic and Iraq, as a threat to international peace and security. Those acts are also a direct and extraordinary threat to the security of France.*
>
> *In a letter dated 20 September 2014... the Iraqi authorities requested the assistance of the international community in order to counter the attacks perpetrated by ISIL.*
>
> *By Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic." (*U.N. Sec. Council, Letters from the Permanent Representative of France

> to the United Nations *addressed to the Secretary-General and the President of the Security council*, U.N. Doc. S/2015/745, (Sep 9, 2015).

Moreover, many States were taking action in Syria and Iraq on different legal bases. As explained by Dapo Akande and Marko Milanovic:

> "*The US-led coalition relies on consent concerning action taken within Iraq, and the collective self-defence of Iraq about the action taken in Syria. However, the US, the UK and perhaps France have also referred to individual self-defence concerning strikes in Syria. Russia for its part (and presumably Iran) would rely on consent from the Syrian government about their action in Syria, and like Syria regard actions taken by Western states in Syria without the consent of the Syrian government to be unlawfu*l" (Akande and Milanovic, 2015).[16]

While ISIS has raised following examples of invocations by States of the right to self-defence against an NSA, it is interesting to note that this kind of invocations has existed before. Since 1837 Caroline incident (Collins and Rogoff, 1990, pp. 81-107; Reisman, 1999, pp. 42-47)[17] until 1998 when the USA used the justification of self-defence for its attack against Al Qaeda facilities in Afghanistan as a response to terrorist attacks on the U.S. embassies in Nairobi and Dar Es Salaam (U.N. Doc. S/1998/780, Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, (Aug. 20, 1998).

16 Regarding Russia, it must be considered that the consent by Syria to the resort to force by Russia provides legal grounds for Russian military action. See, Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

17 A famous historic case based on the armed attacks against Canada and the recognition of the right to use necessary and proportionate military force in self-defence as a response to NSA attacks launched from the U.S. territory.

Another relevant example was 2006 when Israel invoked the right of self-defence against Hezbollah in Lebanon (U.N. Sec. Council, 5503 Meeting, *The situation in the Middle: East Letter from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/PV.5503 (July 31, 2006). Despite its actions were disproportionate Human Rights Watch, 2009, p. 49), many States accepted the Israel's right to defend itself" (Trapp, 2015, p. 691).

After the 9/11 attacks, action in self-defence by the US and its allies was no longer against Afghanistan that was not governed by the Taliban regime anymore, but directly against the Taliban forces and the Al-Qaeda (Couzigou, 2016). By that time, "the international community has been practically unanimous that the US invasion of Afghanistan was a lawful exercise of self-defence" (Akande and Milanovic, 2015), though some have expressed doubts because of the particular situation (Roberts, 2009, p. 15).[18] Besides, Russian Federation claimed its right to use force in self-defence on Georgian territory against Chechnya for Chechen attacks launched against Russia (U.N. Sec. Council, U.N. Doc. S/2002/854, (Jul 31, 2002).

In light of these events, some States seems to recognize the right to use force in self-defence targeting NSAs in foreign

18 In this particular case, the recognition of the right of self-defence is found in resolutions 1368 (2001) and 1373 (2001). However, in informing the Security Council about the military operation in Afghanistan against al Qaeda, the United States referred to the support of the Afghan Taliban regime. The Taliban Government had not been directly involved in the organization or execution of the attacks, nor did it possess the necessary degree of control. However, it granted al Qaeda refuge in violation of the obligation derived from the resolutions that requested the delivery of Bin Laden; and, the general obligation of every State to refrain from organizing, instigating, helping or participating in terrorist acts in another State or consenting to activities in its territory for the commission of such acts when they imply resorting to threat or use of force.

territory when the host State cannot be relied on to prevent or suppress terrorist actions. The international community's response to ISIS in Syria, through the UN SC Resolution 2249, does not endorse a legal justification or basis for military action. However, its call on States to use all necessary measures to fight against ISIS in Syria will likely be viewed as confirming that use of force in self-defence is permissible against NSA where the territorial state is unable to suppress their threat.

On the other side, some states are reluctant to recognize from the UN SC Resolutions any kind of legal authorization for the forcible action (Tams, 2009, pp. 379-381). Indeed, "*though the [UN SC] resolution [2249 (2015)] (...) might confer a degree of legitimacy on actions against IS, the resolution does not authorize any actions against IS, nor does it provide a legal basis for the use of force against IS either in Syria or in Iraq*" (Akande and Milanovic, 2015). The SC's practice to reference the inherent right to use of force under self-defence, while does not authorize such action, it gave an SC "*stamp of legitimacy*" to them. Indeed, as Milanovic affirmed, Resolution 2249 is ambiguous as it can be used to provide political support for military action, without endorsing any particular legal theory on which such action. However, the Resolution is also worded in such a way that it equally allows Russia, Syria and others to insist that the use of force in Syria without consent of the Syrian government is unlawful.

CONCLUSIONS

Self-defence constitutes an exception to the international prohibition on the use of force between States. The right to self-defence is guaranteed in Article 51 of the UN Charter and customary international law. The self-defence can be individual when the victim State reacts to an armed attack or collective when other States react to an armed attack on the request of the victim State.

The military interventions in Syria raise the question of whether a right to self-defence directly to NSA exists. On the one hand, some consider that the armed attacks must be attributable to a State before giving rise to a right to use force in self-defence in foreign territory. Consequently, the use of force operates exclusively between States, as it implies targeting the State territory where the NSA operates.

On the other hand, some support raising a new right under international law to use force in self-defence directly against NSA, regardless of the territorial host State's non-involvement in the attacks. From this point of view, such a new rule, although incipient, is based on CIL. Therefore, States would be able to intervene militarily only targeting NSA located in foreign territory.

International law needs to provide legal solutions to this situation from a practical point. However, it is not an easy task since it would be necessary to balance the legitimate interests from both sides. The legitimate need of States to defend themselves by one side and respect the principles of sovereign equality, territorial integrity and the prohibition of the use of force, by another side.

Moreover, we must recall that international law is a tool constructed based on and influenced by the values and interests of its subjects, primarily States. As such, international law rules represent, at first, the values of a community at a certain point of time but should be, it is possible, malleable according to the needs of new scenarios as the asymmetrical threats coming from NSAs.

Furthermore, a first step should be to clarify whether the values safeguarded by the UN Charter remain the same or, instead, in this new context, there is room for new approaches. In any case, it must be taking into account that self-defence is always the last resort, only applicable when other means –

peaceful (police and judicial cooperation) or military measures (with the cooperation of territorial State) or the referring the situation to the SC – are not available.

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