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**A NEVER-ENDING TUG-OF-WAR:  
THE INHERENT RIGHT OF SELF-DEFENSE AGAINST NON-STATE  
ACTORS**

UM “JOGO DA CORDA” SEM FIM:  
O DIREITO INERENTE DE LEGÍTIMA DEFESA CONTRA ATORES NÃO  
ESTADUAIS

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**Abstract:** Within the scope of *jus ad bellum*, the right of self-defense attracts the greatest legal controversies. The long doctrinal debate surrounding it reveals the difficulty in determining its scope and precise limits during a unilateral military reaction against terrorist organizations. Here, we integrate this debate, arguing that this right is no longer only capable of being invoked in the event of an armed attack already perpetrated by a State, but it also does not have enough elasticity – without distorting it – to accommodate self-defense against terrorism. The cases of Afghanistan and Syria, on the one hand, reflect this controversy. On the other hand, they demonstrate the need for *jus ad bellum* to quickly adapt to reality. Therefore, we propose an intermediate position – the Unwilling and Unable doctrine, which allows the implemented system not to be distorted if it is properly defined, and if it is no longer indiscriminately invoked by States.

**Keywords:** Jus ad Bellum; Right of Self-Defense; Principle of Sovereignty; Non-State Actors; Unwilling and Unable Doctrine

**Resumo:** No âmbito do *jus ad bellum*, o direito de legítima defesa atrai as maiores controvérsias jurídico-legais. O longo debate doutrinal em seu redor revela a dificuldade em determinar o escopo e os precisos limites deste direito aquando de uma reação militar unilateral contra organizações terroristas. Neste artigo, integramos esse debate, defendendo que este direito já não é apenas passível de ser invocado aquando de um ataque armado já perpetrado por um Estado. Mas também não apresenta uma elasticidade tal – sem ser desvirtuado – para acolher a legítima defesa contra o terrorismo. Os casos do Afeganistão e da Síria se, por um lado, refletem esta controvérsia, por outro lado, demonstram a necessidade do *jus ad bellum* se adaptar rapidamente à realidade. Assim, propugnamos uma posição intermédia – doutrina *Unwilling and Unable* – que permite que não se descaracterize o sistema implementado se for devidamente delimitada, e se deixar de ser indiscriminadamente invocada pelos Estados.

**Palavras-chave:** Jus ad Bellum; Direito de Legítima Defesa; Princípio da Soberania; Atores Não Estaduais; Doutrina *Unwilling and Unable*

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## 1. Introduction

### 1.1. The decline of collective security and the rise of unilateralism

In light of recent events, the United Nations (UN) High Commissioner for Human Rights, Volker Türk, stressed that “[the] right to peace is the mother of all human rights [and] without peace, all other rights are quashed”<sup>2</sup>. And this was the very reason why the UN was established<sup>3</sup>.

Peace and war have always been two sides of the same coin. The favorable perception of one has always depended on the destructive impression of the other. In fact, it was precisely when confronted with the trail of devastation and misery left by war that the immeasurable value of peace was recognized, and consequently protected as a fundamental purpose of the UN through the *jus cogens*<sup>4</sup> norm of the prohibition of the threat or use of force in international relations – the lynchpin of contemporary international law.

As enshrined in Article 2(4)<sup>5</sup> of the UN Charter, the prohibition of the use of force is the core of the *jus ad bellum* regime, which guarantees the implementation of the system solemnly consolidated with the UN Charter – the prevention of war, considered the most prominent aspiration (along with the protection of human rights) of international politics, on behalf of maintaining international peace and security<sup>6</sup>. Just as war is a feature of human behavior and law an important instrument for regulating human behavior, so is international law (Dörr, Randelzhofer, 2012: 204). Indeed, the *jus ad bellum* – as a part of international law that was designed for a state-centric system – established *prima facie* a very comprehensive and consensual framework with the ability to regulate States’ behavior. The truth, however, is that “jus ad bellum is a perennial wellspring of controversies” (Milanovic, 2018: 38). Let us clarify these statements.

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2. 55<sup>th</sup> Session of the Human Rights Council, “Türk’s global update to the Human Rights Council, 4 March 2024. Available at: <https://www.ohchr.org/en/statements-and-speeches/2024/03/turks-global-update-human-rights-council>.

3. “We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and [...] to unite our strength to maintain international peace and security. [...] [Thus, we] have resolved to combine our efforts to accomplish these aims,” UN Charter Preamble.

4. Under article 53 of the Vienna Convention on the Law of Treaties (1969), “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

5. “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. [...] 4. 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.”

6. “As Lauterpacht observed, the purpose of law is the attainment of peace. International law has the specific purpose of preventing armed conflict – the most serious disruption of peace – by directly prohibiting the use of force and supplying alternative means for international actors to resolve their differences.” (O’Connell, 2019: 9).

For the first time in history, not only war<sup>7</sup>, but also the use of force in general, were ruled out from international relations. In order to guarantee that the aims enshrined in the UN Charter were accomplished, this prohibition was considered of such a vital nature that it in no way could have been treated as an individual interest of States. Now, it is understood as a value common to the international community. So, war is no longer a prerogative of States' sovereignty, neither an instrument of their foreign policies. Therefore, "the modern *jus ad bellum* reflects an understanding that States' authority to pursue their individual interests by armed force, as a constant source of instability in the international community, must be regulated and bolstered by a collective system<sup>8</sup> of peace enforcement" (Faix, Svcevic, Watts, 2024). Hence, when Member States agreed to go further and attempted to fully collectivize the use of forcible measures through the Security Council (SC), in order to protect the welfare of their own peoples and meet their obligations to the wider international community<sup>9</sup>, they accepted the new boundaries imposed to their sovereignty.

The authorization of the use of force by the SC in the context of collective security is considered the main exception to the prohibition of force (Tladi, 2019: 31). Nonetheless, this rule too would naturally come with exceptions. In pragmatic terms, we should accept that sometimes the use of force is necessary to avoid or diminish a greater evil, therefore absolving its malignant element (Friman, 2017: 15) on behalf of the pre-established international order. In this context, however, the existence of an aristocratic body<sup>10</sup> with permanent members with greater rights and power than other States, the pressures of international politics, and the dissociation between States' security needs and the international law security model (Faix, Svcevic, Watts, 2024) means that the collective security system has not functioned as arguably intended most of the time, having been in a state of partial paralysis for most of its existence (Henderson, 2024: 3). For instance, we have been witnessing the impossibility of the SC to take on the role of guardian of international peace and security against constant vetoes from

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7. In the aftermath of World War I, a first attempt was made to establish an international system guaranteeing international peace and security, based on the ideal of a collective security system, with the aim of preserving the territorial integrity and political independence of States. However, the League of Nations never prohibited war. Instead, it outlined a compulsory dispute resolution system, which did not prevent war, but only postponed its consummation (Buchan, Tsagourias, 2021: 10). In 1928, French Minister of Foreign Affairs Aristide Briand and US Secretary of State Frank Kellogg signed the parchment that for the first time in history declared war illegal (Hathaway, Shapiro, 2018: 11). However, the term 'war' created a legal vacuum, as States continued to resort to force, arguing that their actions did not reach the level required to fulfill the legal type of war (Buchan, Tsagourias, 2021: 13), which was taken into consideration when drafting the UN Charter.

8. As the Report of the High-level Panel on Threats, Challenges and Change (2004: 17) made clear, "history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be".

9. Report of the High-level Panel on Threats, Challenges and Change (2004: 17).

10. The Council is, for practical and efficiency reasons, an aristocratic body, since only a small number of States are part of it (Azeredo Lopes, 2020: 43).

Russia and the US regarding the invasion of Ukraine and the use of force by Israel in Gaza, respectively<sup>11</sup>.

On the other hand, the SC's dysfunctionality breeds a general tendency on States' part to trust their inherent right of self-defense rather than the collective security system, given that "the international collective security system is directly interrelated with the concept of defence for the stronger and more reliable the collective security system, the lesser the need for individual or collective unilateral defence. Conversely, the weaker and more unreliable the collective security system, the greater the need for individual or collective unilateral defence" (Friman, 2017: 11). The inherent right of self-defense is the only legal justification that permits States to use force unilaterally, as States have always reserved the right of defense, at least initially, against the perpetrator (Azeredo Lopes, 2020: 81). In this exception lies the crux of the controversy surrounding the *jus ad bellum* regime.

### 1.1.1. The right of self-defense

Under Article 51 of the UN Charter<sup>12</sup>, States can act in individual or collective self-defense as an emergency response to an armed attack, but only until the SC acts<sup>13</sup>. In other words, this right arises in the context of the State injured due to an internationally wrongful act, namely an armed attack in violation of Article 2(4) of the UN Charter. In fact, on behalf of a functional *jus ad bellum* regime, and given the need to restore the legality protected in Article 2(4) of the UN Charter, establishing exceptions to the rule was inevitable, especially since there are certain justifications that "clarify that a conduct that *prima facie* violates a rule is lawful" (Tams, 2019: 95).

As aforementioned, the UN system was designed and built around the States and the ideal of peaceful coexistence between them. Thus, in order to create the most homogeneous international community possible, with due respect

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11. The UNSC Res S/2022/155 (25 February 2022), and the UNSC Res S/2022/720 (30 September 2022) about the Russia-Ukraine war were both vetoed by Russia. The UNSC Res S/2023/773 (18 October 2023), the UNSC Res S/2023/970 (8 December 2023), and the UNSC Res S/2024/173 (20 February 2024) about the Israel-Hamas war were not adopted due to US veto. Available at: [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/working\\_methods\\_theveto-7.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/working_methods_theveto-7.pdf).

For more information: <https://www.aljazeera.com/news/2022/10/1/russia-vetoes-un-resolution-on-ukraine-annexation-china-abstains>  
<https://www.aljazeera.com/news/2024/2/21/world-condemns-uss-latest-un-security-council-veto-on-gaza-ceasefire>.

12. "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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

13. Quoting Tom Ruys (2010: 82), "As far as possible concrete measures are concerned, it stands beyond doubt that the imposition of military enforcement measures in accordance with Article 42 UN Charter suspends the exercise of the right to self-defence. [...] Self-defence is a provisional remedy, subject to the control of the Security Council - as well as the discretionary power of the Council to determine the existence of a threat to the peace, a breach of the peace or an act of aggression, it seems logical that it is up to the Council to determine when the 'necessary measures' have been taken".

to its differences, it was necessary to develop a dynamic harmony based on the guiding principles of the new international order capable of winning the consensus of States. If, on the one hand, the principles of sovereignty and respect for territorial integrity remain central and foundational to the UN system and international law and are held as fundamental by the vast majority of the international community (Tladi, 2019: 63); and, on the other, if States decide to accept SC acting on their behalf, then the guarantee of an inherent right of self-defense is inextricably linked to the principle of sovereignty. Thus, this right constitutes “one of the last remaining vehemently guarded domains of state sovereignty in the modern hegemony of communal dominion and supremacy of the collective” (Friman, 2017: vii). In order to safeguard the principle of prohibition of the use of force and to prevent the subversion of the norm in favor of the exception, this right must not unlimitedly favor state sovereignty, however, and must be accommodated within the restrictions imposed by the general principles of equality, necessity, proportionality, and attribution (O’Connell, 2019: 66).

Although on an abstract level it was possible, through checks and balances, to harmonize the main pillars of the implemented international system, this balance revealed its fragility when the international sphere was invaded by non-state actors, namely by terrorist organizations. Among these is ISIS, a sophisticated and transnational terror network, and Al-Qaeda which, with a structure that differs in terms of goals, means, financing and recruitment from any other terrorist organization in the past (Azeredo Lopes, 2020: 127), has every capacity to carry out armed attacks that jeopardize the security of States and their nationals, and which thus corrupts the ultimate goal of maintaining international peace and security. Considering, for instance, the attacks of 11 September 2001, the ISIS attacks of 13 November 2015 in France, and recently Hamas’s attacks of 7 October 2023 against Israel<sup>14</sup>, the statement that non-state actors are totally capable of perpetrating armed attacks is unavoidable (Henderson, 2024: 400). Terrorist organizations have become a major security concern for States in all parts of the world (Peters, Marxsen, 2019: 1). Indeed, terrorism has been qualified by the SC as “one of the most serious threats to international peace and security”<sup>15</sup>.

Bear in mind that the language of “the existence of any threat to the peace, breach of peace, or act of aggression”, enshrined in Article 39<sup>16</sup> of the UN Charter, refers to the SC competence to authorize force under chapter VII of the UN Charter, and not to trigger self-defense under Article 51 of the UN Charter (Chinkin, Kaldor, 2017: 144). However, if the SC itself integrated terrorism into threats to the peace, expanding this concept, and as it is totally undeniable that non-state violence directed against a State can be even more serious – in terms of effects and means – than interstate violence (Azeredo Lopes, 2020: 130), it was already expected for States to explore a way of unilaterally defending themselves capable of receiving acceptance or, at least, state acquiescence. Evidently, the justification for doing so without violating the imperative norm that prohibits the use of force in international relations involves invoking the right of self-defense, as it is solid ground. Firstly, because it is a right expressly enshrined and recognized in a

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14. Despite doubts regarding its classification as a terrorist organization, there can be no doubt as to the fact that a terrorist attack was carried out.

15. UNSC Res. 2178, 24 September 2014.

16. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

treaty as an exception to the aforementioned *jus cogens* norm. Secondly, because it is simultaneously an inherent right resulting from custom, which can absorb the result of certain evolutionary processes<sup>17</sup>, thus allowing States to adapt the rules on the use of force to changes resulting from security needs and certain moral and political standards (Buchan, Tsagourias, 2021: xvii). Yet, triggering the right of self-defense in this context will inevitably clash with the principle of sovereignty and territorial integrity of the State where those organizations are located, as they do not operate in a vacuum devoid of sovereignty.

Notwithstanding the intrinsic relationship between the peremptory norm prohibiting the use of force and the principles of sovereignty and non-intervention being called into question when combating terrorist organizations, States have begun to contemplate that if military force is required for their protection and assertion within international community – i.e., for their self-interest – they will use it no matter what international law says, which clearly shows an evolving relationship between norms, necessity, and power (Milanovic, 2018: 44). This underscores that the *jus ad bellum* regime “more than any other domain of international law, is an area where law and power politics collide” (Ruys, Corten, Hofer, 2018: 1). Hence, States started to argue that a shift has occurred in the international legal order, by recognizing the possibility of acting in self-defense as per Article 51 of the UN Charter against terrorist groups, and no longer just against sovereign States. From this moment onward, States started to relegate the so-called common interests, in favor of a legitimate phenomenon of war, based on the exception of self-defense, imbued in geo-political assumptions about the importance of military power and deeply rooted ideas of national state security (Chinkin, Kaldor, 2017: 4).

The customary nature of the right of self-defense – which can instill evolutionary changes resulting from state practice and sedimentation of *opinio juris* – has generated lively debates around the requirements for self-defense, namely armed attack, the conditions of necessity, proportionality, and immediacy of this legal justification, and also its defensive nature (Tams, 2019: 101). The expansionists have quite a flexible interpretation of the norm safeguarding the right of self-defense. So, it follows that doctrines such as “self-defense against non-State actors”, “preventive self-defense”, or the right of “humanitarian intervention”<sup>18</sup> can be accepted as conforming to the rules. On the other hand, restrictivists defend a much stricter interpretation of the prohibition, in favor maintaining the status quo<sup>19</sup>, and so making it

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17 Customary international law is not static, and its foundation depends on two elements: an objective/material element and a subjective element. That is, it is based, respectively, on the practice of States that derives from a conviction about the legally permissible or obligatory nature of the conduct at hand (*opinio juris sive necessitatis*). International Law Association, Final Report of the Committee on Statement of Principles Applicable to the Formation on General Customary International Law, 2000: 7.

18. These last two legal constructions will not be explored here because they go beyond the scope of the article.

19. Commenting on the contrast between the restrictive and permissive approaches, Arimatsu and Schmitt [Louise Arimatsu and Michael Schmitt, ‘Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape’, Columbia Journal of Transnational Law Bulletin 53 (2014), 1–29 (29)], state that “there is inherent ambiguity in the law governing the use of force by States. Such ambiguity should not be surprising because States are caught on the horns of a dilemma. On the one hand, clear and restrictive norms serve to enhance international peace and security by limiting what States may do in terms of force. Yet, on the other, opacity benefits the State when it is facing threats”.

generally much less likely that new exceptions or new interpretations tending to make the rule more flexible or even to set it aside will be viewed as acceptable (Corten, 2021: 4). Hence, “at the narrowest end of the spectrum, the use of force in self-defence would only be permitted in cases where an armed attack by a State has already commenced. At the other, more permissive, end of the spectrum, the use of force would be permitted where there is a possibility of an attack by a non-State actor operating on the territory of a third State” (Tladi, 2019: 16).

### 1.2. A Right of Self-Defense Against Terrorism?

Regarding the existence of a right of self-defence against terrorism, it has already been clarified that a terrorist organization possesses all the means to engage in armed attacks. Furthermore, the position adopted by the International Law Association (ILA) is that “self-defence is a right that exists in order that States are able to protect themselves when attacked from outside their borders [and] is a right triggered by an act, rather than the actor, [which means that] the source of attack does not change the fact that the State must be able to stop it from causing harm” (2018: 14)<sup>20</sup>. However, the concept of self-defence against terrorism cannot gain acceptance in the current legal framework because it vehemently distorts it. According to this doctrinal construction, there is a bilateral relationship established between a state actor and a non-state actor.

Yet, the *jus ad bellum* regime is necessarily state-centric. Moreover, as highlighted by Christian Henderson (2024: 401), “non-state actors are not located on the high seas or in outer space but are rather normally located and operate within the territory of another state. As such, and given that the prohibition of the use of force concerns the ‘international relations’ between states, there are the rights and obligations of a third party – the territorial state – that also form part of the equation in determining the legality of measures in self-defence in response to an armed attack by a non-state actor”.

Therefore, self-defence can never be solely claimed against the non-state actor (Milanovic, 2018: 40), as it would rely on a purely fictitious bilateral relationship, severing any connection to the current framework of international law. Now, firstly, let us clarify that we are observing the existence of a multilateral relationship between the State victim of an attack by non-state actors, between the non-state actor and the third State where they are located, and the injured State and this third State, which must be assessed in its entirety. Secondly, Article 51 of the UN Charter is an exception to Article 2(4) of the UN Charter. Thus, and within the scope of their intrinsic connection, if the rule prohibits the use of force against the territorial integrity and political independence of a State, the exception must precisely preclude the wrongfulness of the use of force against this territorial integrity or political independence. If the guiding thread of the *jus ad bellum* regime is lost, if the balance between the principles of prohibition of the use of force and sovereignty, and – inherently – non-intervention is corrupted, the meaning of the norms will inevitably be subverted, with a much broader exception and an increasingly narrower rule.

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20. Report on Aggression and the Use of Force, COMMITTEE ON THE USE OF FORCE, Sidney Conference.

Although this doctrinal proposal is not supported by us<sup>21</sup>, this does not mean that a State cannot react against a terrorist organization, even if this may involve using force against a State, or *in* another State, against the terrorist organization. Rather, it means that this needs to happen within the current legal framework. “In other words, state A needs a self-defence claim against state B because non-state actor C operates from B’s territory, and using force against it would presumptively violate Article 2(4) against state B. The question, therefore, is whether it is ever permissible for A to use force on B’s territory without B’s consent, if C’s attack is not attributable to B” (Milanovic, 2018: 39). The essence of the Charter must then be a guide for States. Therefore, when a State resorts to the use of force against non-state actors in another sovereign State, the host State must be given primacy (Shah, 2020: 113). So, what needs to be justified is a breach of international law vis-à-vis another State. To reiterate, military responses against non-state actors cannot thus meaningfully be seen as a bilateral relationship between the responding State and targeted non-state actors (Tams, 2019: 98).

Firstly, and in light of the above, two aspects must be clarified:

- a) If the State where non-state actors are located gives its express and valid consent to the government of the State victim of an armed attack perpetrated by those actors, a true exception to the prohibition of the use of force does not exist, which means that the *jus ad bellum* framework does not need to be invoked. In other words, the international relations of a State are not affected if it consents to the use of armed force by another State in its territory, given that sovereign States are in principle free to leverage their territory (i.e., they also have the right to dispose of their exclusive right to use that territory, and thus to allow military operations of other States in their State’s territory [Dörr, Randelzhofer, 2012: 215]). Yet, it is difficult to envision the use of force without consent from the territorial State that does not in some measure go against its territorial integrity or political independence<sup>22</sup>. Hence, if an intermediary approach is not created, there will be cases in which States will not be able to defend themselves against armed attacks by non-state actors through force in a foreign host State’s territory without consent (Trapp, 2015: 202).
- b) If consent for intervention is not given by the host State, it is possible to assess the possibility of attributing the actions of non-state actors to the host State<sup>23</sup>. Indeed, to preserve the inter-state reading of

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21. It should be noted that, as has been revealed, this position is not univocally supported. As Christine Gray (2018: 120) highlighted, “law on self-defence is the subject of the most fundamental disagreement between states and between writers.”

22. Report on Aggression and the Use of Force, Committee on the Use of Force, International Law Association (2018: 5).

23. Under the ICJ’s jurisprudence, it has been emphasized that *prima facie* a State cannot be held responsible for the acts of all individuals whose activities originate within its territory, unless it is possible to attribute certain conducts to a State in accordance with the provisions outlined in the “Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)” (2001). For the matter at hand, to establish the responsibility of a State for the conduct of a person or group of persons under international law is only possible “if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct” (article 8 of the ARSIWA), and this “if” – the nexus in question – requires that the State exercises effective control over the non-state actor. This was the position adopted by the ICJ in the Nicaragua Case, in which it stated that “United States participation, even if preponderant or decisive, in the financing, organizing,

Article 51 of the UN Charter, there is a legal mechanism with the ability to accommodate the need to respond to attacks by non-state actors – that of attribution. This is because Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any State. Using defensive force against the base of operations of non-state actors within a foreign host State's territory – even if that defensive force only targets the non-state actors which have launched an attack – still amounts to a violation of the host State's territorial integrity. Therefore, if Article 51 is to become a true exception to the prohibition of the use of force as set forth in Article 2(4), it should respond in some way to the violation of the host State's territorial integrity, which the principle of attribution enables. Nonetheless, the “effective control” standard of attribution proposed by the International Court of Justice (ICJ) is virtually impossible to fulfill<sup>24</sup>, meaning that the option of responding in self-defense would not arise in most cases if this standard of attribution was applied<sup>25</sup>. Additionally, States could not defend themselves against an attack from a non-state actor that is located within the territory of another State, and where it is not possible to demonstrate an element of control by the host State over the actions of the non-state actor. The attacks of 9/11 and the immediate aftermath – the invasion of Afghanistan – are the ultimate example of this paradigm (Henderson, 2024: 405-406). Considering this reasoning, it is pertinent to ask: does the exercise of the right of self-defense depend on the concept of ‘control’? Is the right of self-defense about control, or conversely, is the principle of attribution about control?

In light of the above, it is imperative to ponder the following – since it is entirely conceivable that an armed attack may be perpetrated by a non-

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training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed” [Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (merits), para. 115, 1986 ICJ].

24. In accordance with the ICJ's arguments, the ‘effective control’ test is highly demanding, as it requires proof of tactical control through specific instructions given to the non-state actor to adopt a certain behaviour. Therefore, merely financing, organizing, training, supplying and militarily equipping a group is not sufficient to attribute conduct to a State.

25. Quoting Tom Ruys (2010: 513), “most problematically, recent rulings of the ICJ have exacerbated the confusion over the applicability of self-defence in *ratione personae* terms. If the Nicaragua case was long considered the Bible of the *Ius ad Bellum*, it must nevertheless be understood to be the Old Testament. So far, the apostles of the Peace Palace have been unable to come up with a new manual. The implication is a growing gap between the ‘law in practice’ and the ‘law in the books’, which is further accentuated by the various separate or dissenting opinions addressing the law on the use of force. An in-depth analysis of legal doctrine is hardly more satisfactory. [...] A proper mapping of the different views is impeded by the diverging meaning ascribed to key concepts, such as ‘pre-emptive’ and ‘preventive’ self-defence, or ‘imputability/attribution’ of private conduct.”

state actor acting entirely without any connection to the host State, is it plausible to ask the victim State to endure the attack without being able to respond with force? Furthermore, would it be reasonable for a State victim of armed attacks by non-state actors to endure those attacks indefinitely due to a lack of consent from the host State to intervene in its territory?

In an attempt not to distort the legal regime established in the UN Charter, and to reconcile it with the emerging challenges that do not fit into the traditionalisms of an international system developed in the aftermath of the most devastating war between States, we propose an intermediate thesis – the Unwilling and Unable doctrine. This doctrine acknowledges and addresses the danger posed by non-state actors, while remaining committed to an approach based on inter-state rights to the interaction between Articles 2(4) and 51 of the UN Charter (Trapp, 2015: 202). Although the abovementioned theory is a familiar subject that has been discussed for some time now among specialists, it is still a hot topic that calls upon a reappraisal, especially when we are confronted with a lack of guidance in international law on its application and with a general disagreement in the doctrine regarding its requirements. With that being said, and after briefly discussing the obstacles raised in the context of the lack of consent and the impossibility of establishing the attribution nexus, the topics raised by the ILA will be followed as a guideline: “i) whether, conceptually, a State may invoke the right to self-defence in the case of an attack by an extraterritorial non-state actor; ii) what steps must be taken before any such right can be exercised; iii) whether force against the non-state actor can be distinguished from force against the host State; iv) whether the host State might be in violation of international law due to the activities of the non-state actor; v) if so, whether this justifies force against the host State itself”<sup>26</sup>.

## 2. The use of force against non-state actors

### 2.1. A paradigm shift in international relations: the war on terror

For a considerable amount of time, the international community tried to stick to an extensive interpretation of the prohibition of the use of force, along with a more or less restrictive reading of the right of self-defense, in order to avoid the distortion of the implemented international legal system. With rare exceptions, States refrained from eroding the scope of Article 51 of the UN Charter by asserting new or contested applications of the right of self-defense. While this system may not be flawless, for too long States had generally embraced it. And it was relatively stable. However, this delicate equilibrium was fundamentally disturbed by the 9/11 attacks (Ruys, 2010: 2). After the Al-Qaeda attacks, the following US-led invasions of Afghanistan in 2001 and Iraq in 2003 intensified the doubts concerning the effectiveness of *jus ad bellum* regarding the 21<sup>st</sup> century security environment (Faix, Svicevic, Watts, 2024). This happened mainly because, since then, the US changed their position on international relations, claiming that force can be used against the acts of non-state actors – in order to fight terrorism, “American state sovereignty can be combined with intervention in other states, proxy wars [...] and the current drone campaign” (Chinkin, Kaldor, 2017: 82).

After the 9/11 attacks, and after accusing the Taliban Government of Afghanistan of “threatening people everywhere by sponsoring and

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26. Report on Aggression and the Use of Force, Committee on the Use of Force, International Law Association (2018: 15).

sheltering and supplying terrorists”<sup>27</sup>, President Bush made it clear that the US would make “no distinction between the terrorists who committed these acts and those who harbor them”<sup>28</sup>. These statements came to fruition and culminated in the invasion of Afghanistan in 2001, under the US’s inherent right of self-defense, not because such attacks could be attributed to the Afghan State under the effective control test, but rather because the Afghan State could not – or, more strictly speaking in this context, did not *want* to – prevent<sup>29</sup> the presence of the terrorist organization in its territory (Azeredo Lopes, 2020: 127). Thus, not only did the US target Al-Qaeda, but also Taliban locations, and the infrastructure of the Afghan State, which raised some questions regarding the nature of the action carried out in self-defense – supposedly only considered defensive<sup>30</sup> in the face of aggression. In this case, however, it seems to have been considered a legitimate goal not only to neutralize in that territory Al-Qaeda’s training and aggressive capabilities, but also to replace the Taliban regime that was quickly removed from the government, although it was not defeated as a military force (Azeredo Lopes, 2020: 123).

In this context, the doctrinal movement<sup>31</sup> defends that UNSC Resolutions 1368 and 1373<sup>32</sup> recognized the possibility of the right of self-defense against terrorism being legal and possible and, in this sense, qualify the US response to the 9/11 attacks as “instant custom”<sup>33</sup>, modifying the existing norms (Ruys, 2010: 58). But it is imperative to highlight the fact that if, on the one hand, the SC has never considered Afghanistan responsible for those attacks – since, formally speaking, it did not attack the US (Azeredo Lopes, 2020: 122) – on the other hand, it also did not recognize the right of self-defense against terrorism. Also, note that the US chose to justify their actions based on the right of self-defense, under the attribution criterion, albeit from a renewed perspective. This means that there was an effort to justify their actions as lawful (i.e., within an inter-state relationship and with some consideration for ICJ jurisprudence). Consider the following premises:

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27. President of the United States of America, “Address to the Nation on the Terrorists Attacks”, 11 September 2001. Available at: <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>.

28. *Id.*

29. The US stated that the 9/11 attacks and the ongoing threat from Al-Qaeda resulted from “the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by this organization as a base of operation” (UN Doc. S/2001/946, 7 October 2001).

30. As highlighted by Chinkin, Kaldor (2017: 134), “the legality of the use of force in contemporary international law does not depend upon the justness of the cause, but on whether it is a purely defensive response to aggression.” As self-defence is the only exception to the prohibition of the use of force other than UN Security Council (SC) authorisation under UN Charter, chapter VII, it is unsurprising that states argue that particular exercises of force fall within the exception, thereby seeking to expand the meaning of the wording of article 51 and the scope of legal coercive action. It is equally unsurprising that such claims are resisted by other states.”

31. Judge Kooijmans, in his Separate Opinion in the Wall Advisory Opinion (ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004), considered that SC Resolutions 1368 and 1373 have added “completely new elements [to Article 51]” (para. 35) which would permit the use of force in response to acts of terrorists “without ascribing these acts of terrorism to a particular State [which] marks undeniably a new approach to the concept of self-defence” (para. 35).

32. UN Doc S/RES/1368, 12 September 2001; UN Doc S/RES/1373, 28 September 2001.

33. See, for example, Langille (2023).

- a) The aforementioned Resolutions, by recognizing “the inherent right of individual or collective self-defence in accordance with the Charter” (S/RES/1368 (2001)), chose to validate, under Article 51, a response that would be adopted by the US and their allies, since the 9/11 attacks undeniably constituted one of the most severe forms of the use of force, which inevitably and consequently triggered a military reaction by the US. Therefore, it proved to be preferable to formally recognize the right of self-defense rather than guarantee any opening for action outside the mechanisms established by the UN Charter (Azeredo Lopes, 2020: 122). Nevertheless, recognition was the only thing that happened, especially because at that time it was still not completely clear who had carried out the attacks (Henderson, 2024: 407). Therefore, it does not seem reasonable to assert – and even less to support an argument – that these Resolutions result in evidence of practice supporting an expansive reading of the right of self-defense against non-state actors.
- b) The US chose to frame an extended claim of self-defense capable of justifying action against Al-Qaeda, which had already perpetrated acts of violence amounting to an armed attack, and against a State for having willingly harbored the terrorist group, which translates into a certain level of attribution (the ‘harboring’ standard of attribution), however a lower one, since the threshold of effective control could not have been met in this particular case. Also, it is worth mentioning that adhering to the traditional approach of the ICJ, under the aforementioned test, would enable Afghanistan to evade its responsibility. Although this was a step beyond the existing law prior to 11 September 2001, this framing was a much smaller step than if the US had claimed a right to attack terrorists who simply happened to be within another country’s territory (Byers, 2018: 636). This avoided provoking the concerns that would have been generated by a broader claim allowing military action in any country against terrorism<sup>34</sup>. Furthermore, this position shows that the US were also thinking strategically in choosing not to rely on the Afghan Government’s consent.

Thus, so far, it is possible to definitively conclude that the Resolutions only contain a condemnation of the terrorist attacks and a reaffirmation of the right of self-defense. In any case, they imply that the inherent right of self-defense permits the use of force in the territory of a State where the original attack could not, in any way, be attributable to the third State – indeed they do not mention non-state actors at all (Tladi, 2019: 70). Regarding the matter of the possible rise of a more relaxed attribution criterion, and even though the US has aligned itself with this guide so as not to completely distort the regime enshrined in the wake of ICJ jurisprudence, it seems that here the need to change the rules for imputing conduct to the State is not exactly at

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34. As Dire Tladi (2019: 67) points out, “the post 9/11 attacks have provided the most solid basis for departing from the test set by the International Court of Justice in the Nicaragua case largely because the US intervention in Afghanistan was undertaken with virtually no condemnation by other States. It is possible, however, that the lack of condemnation, particularly of the initiation of the US attacks on Afghan territory, was more out of a sense of solidarity with the United States than any belief in the legality of the action [...] I will assume that the lack of response was not merely out of politeness. Nonetheless, a careful assessment of the 9/11-related practice does not support the expansive interpretation of self-defence.”

stake. Therefore, by carefully assessing UNSC Resolution 1373, it becomes evident that within the scope of international law, much more rigorous and - conversely - much less tolerant obligations have emerged in relation to States that collude, even through passivity, with terrorist organizations (Azeredo Lopes, 2020: 141). Now, this Resolution to reaffirm principles protected under the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" (Res. 2625)<sup>35</sup>, along with the decisions, among others, to "(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens"<sup>36</sup>, presents a panoply of obligations - and not just rights - that international law imposes on any State in relation to its territory, prohibiting the violation of the rights of other States in or from it. This means that a State that harbors and allows terrorist organizations to benefit from its territory is committing a wrongful act that pierces the veil of its sovereignty. A State cannot have its sovereignty protected, and therefore cannot invoke the prohibition of the use of force when it is violating international obligations by breaching the rights of other states (Azeredo Lopes, 2020: 140). In sum, although the principle of sovereignty must be fully guaranteed, the attack is allowed against these non-state actors because the territorial State does not comply with the positive international obligations that are inherent to its sovereignty, placing itself in a state of serious non-compliance.

As will be explored below, this is one of the assumptions of the proposed intermediate position - the Unwilling and Unable doctrine - which should effectively resolve all controversies that obscure its requirements, since it presents itself as a more appropriate solution (if properly constructed and without being abused). Even though a State may have been supportive of the non-state actors, it seems farfetched to translate this level of support into an equivalence of acts; that is, that the acts perpetrated by the non-state actors are those of the State (Henderson, 2024: 413), namely because it seems that then the use of force is directed against the State itself, and not against non-state actors, but within its territory - a circumstance that seems to more accurately reflect the State practice.

## 2.2. Repelling an armed attack perpetrated by non-state actors under the right of self-defense: if, how and where?

In the 21<sup>st</sup> century, there have been efforts to adapt the international legal framework relating to the use of force. After the striking events of 2001, one of the key questions raised was whether Article 51 of the UN Charter has undergone a revolutionary change, so that it now allows a State to defend himself against attacks perpetrated by non-state actors even if the armed

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35. "Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."

36. UN Doc S/RES/1373, 28 September 2001.

attacks cannot be attributable to the host State (Gray, 2018: 207), or if the host State has not given valid consent to the victim State to violate the former's integrity. This potential scope of the right to use force against terrorist attacks has proved especially controversial in the Middle East.

In 2014, the US launched a massive air campaign against ISIS in Iraq and Syria. "The so-called 'Islamic State' is a terrorist group<sup>37</sup> that proclaimed itself as a 'world caliphate'" (Corten, 2018: 873), constituting a global and unprecedented threat to international peace and security. In fact, ISIS has sought to undermine state control through the Middle East, since this organization was able to gain control over significant parts of Iraq and Syria, in which it installed a *de facto* government, and elaborated a domestic political, legal, and judicial system (Corten, 2018: 874). In light of these events, Iraq decided to send a letter to the SC on 25 June 2014 to "call on Member States to assist us by providing military training, advanced technology and the weapons required to respond to the situation, with a view to denying terrorists staging areas and safe havens"<sup>38</sup>. A few weeks later, the US answered their prayers, and *Operation Inherent Resolve* started, with a very particular detail, however. The US (and some other States) have also carried out airstrikes in Syria, which (contrarily to Iraq) had not requested such assistance. Despite the lack of SC authorization or Syrian consent, the US has argued that, under international law and the right of self-defense, it was lawful to use force against ISIS, under the Unwilling and Unable doctrine<sup>39</sup>, which precludes the wrongfulness of the use of force against a State (*in casu*, Syria) that is not *willing* to, or does not *have the capacity* to cooperate so that its territory is not used as a safe haven for terrorist organizations (Azeredo Lopes, 2020: 135). In this regard, it must be highlighted, however, that ISIS had not perpetrated an armed attack against the US, so the claim of individual self-defense must rest on the matter of imminence.

Despite the blurry justifications for those kind of incursions in Syrian territory, the US maintains its presence in Syria to this day. Indeed, the Biden Administration has been involved since February 2021 in tit-for-tat attacks, not only with ISIS, but even more so with Iranian-backed militant groups in Syria for attacks that they have suffered in Iraq. This resulted in three letters submitted by the US to the UN Security Council between February 2021 and

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37. The UN (UNSC Res. S/RES/2249, 20 November 2015), as well as the US ([Foreign Terrorist Organizations - United States Department of State](#)) and the European Union ([L\\_2016068EN.01001701.xml \(europa.eu\)](#)) designated ISIS as a terrorist organization.

38. Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General (UN Doc. S/2014/440, 25 June 2014).

39. In the Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, Samantha Power asserted that "ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. 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. 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 military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq" (Un Doc. S/2014/695).

August 2022, justifying their use of force under the right of individual self-defense based on the unwilling and unable theory<sup>40</sup>.

In February 2021, the American operation was undertaken ten days after the attack against facilities in Iraq. So, there was not an ongoing armed attack, neither an imminent one. The attack was in fact over. But the US' justification also covered the need to use force under their right of self-defense, because "Iran-supported non-State militia groups are engaged in ongoing planning for future such attacks"<sup>41</sup>. Nonetheless, the victim State never demonstrated or sustained that Syria was unwilling or unable to deal with this armed group - this means that airstrikes were carried out on the territory of another State, without its consent, against a non-state actor. Why did the US not strike the groups in Iraq where the US operates with the consent of the territorial government, if they posed a threat to US forces in Iraq, but instead in Syria?

In June 2021, the US "has undertaken targeted strikes against facilities at two locations in Syria and one location in Iraq near the Iraq-Syria border. These facilities were used by Iran-backed militia groups that have been involved in a series of unmanned aerial vehicle (UAV) and rocket attacks against US personnel and facilities in Iraq"<sup>42</sup>. The Biden Administration still justified the strikes as lawful measures of self-defense under international law (Bridgeman, Finucane, 2022), specifically the U/U theory, and in response to future threats or attacks<sup>43</sup>. In August 2022, history repeated itself in terms of attacks and justifications provided<sup>44</sup>. And it continued throughout 2023, with similar cases in March<sup>45</sup>, and in July, when the US targeted the IS leader

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40. "States must be able to defend themselves, in accordance with the inherent right of self-defence 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 by non-State militia groups responsible for such attacks. The United States remains prepared to use necessary and proportionate force in self-defence to respond to future threats to the United States and Coalition forces" (Letter dated 27 February 2021 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UNSC Doc. S/2021/202, 3 March 2021).

41. Letter dated 27 February 2021 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (UNSC Doc. S/2021/202, 3 March 2021).

42. Letter dated 29 June 2021 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (UNSC Doc. S/2021/614, 30 June 2021).

43. Letter dated 29 June 2021 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (UNSC Doc. S/2021/614, 30 June 2021).

44. "This military response was taken after non-military options proved inadequate to address the threat, with the aim of de-escalating the situation and preventing further attacks. As the United States has noted in prior letters to the Security Council, States must be able to defend themselves, in accordance with the inherent right of self-defence 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 by non-State militia groups responsible for such attacks.", Letter dated 26 August 2022 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (UNSC Doc. S/2022/647, 29 August 2022).

45. See more in <https://www.reuters.com/world/middle-east/us-carries-out-air-strikes-syria-after-deadly-attack-2023-03-24/>.

in Eastern Syria<sup>46</sup>. At the moment, it is clear that for the US the U/U theory is a lawful claim to act under their inherent right of self-defense.

### *2.2.1. The Unwilling and Unable Doctrine*

Under the Unwilling and Unable theory, a State victim of attacks by a non-state actor can use force in self-defense against non-state actors located in a different State (the host State) without that State's consent, so long as the host State is unwilling or unable to effectively address the threat posed by the non-state actors. But it should be noted that this theory can only be invoked within and in compliance with the requirements that constitute the right of self-defense: armed attack or imminent armed attack, necessity, and proportionality. Concerning the principle of attribution, this one is excluded from the equation<sup>47</sup>. This happens because, in the context of this doctrinal construction, part of the justification that removes the illegality of the use of force that violated the territorial integrity of a State does not result from the fact that the attacks perpetrated by non-state actors are attributed to it. Rather, it occurs before the fact that the concept of sovereignty has undergone changes due to the evolution of time, and cannot currently be seen solely as a right of States, but as a right from which inherent responsibilities result<sup>48</sup>, given that it is undeniable that "the absolutist character of sovereignty is increasingly constrained in the context of globalization and through the multiple roles played by non-state actors" (Chinkin, Kaldor, 2017: 80).

The concept of sovereignty resulting from Westphalia and which was postulated in the UN Charter is intrinsically linked to the concept of independence. A sovereign State is an independent State, enjoying "the rights inherent in full sovereignty"<sup>49</sup>. Nevertheless, the relationship between state sovereignty and the authority to use force has been undergoing profound and complex challenges through times. Indeed, in 1928, moments before the signing of the first Pact – the Kellogg-Briand Pact – which would exclude the right to wage war from international relations, in the Island of Palmas case, arbitrator Max Huber declared that "territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war"<sup>50</sup>. Here, seeds were planted for an understanding that rights cannot exist without obligations – a State cannot

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46. See more in <https://www.reuters.com/world/middle-east/us-central-command-says-they-killed-isis-leader-usamah-al-mahajir-eastern-syria-2023-07-09/>.

47. Note that this is not a unanimous position. As Mary Ellen O'Connell (2019: 184) stated, "To determine the party that must bear the consequences, the law of state responsibility includes principles of attribution. UK legal adviser Daniel Bethlehem has, however, proposed a right to attack states that are 'unable or unwilling' to control terrorist actors within their jurisdiction. The proposal may be intended to displace all the elements required for self-defence – significant armed attack, necessity, proportionality, and attribution – to allow a state to justify attacking another state by declaring it 'unable or unwilling'. The utter vagueness of such a declaration would undermine any restraint in the regime of self-defence."

48. This view is adopted by Kimberley Trapp (2015: 200), who recognizes "a shift in international law from 'sovereignty as a right' to 'sovereignty as a responsibility' [which] is contextually relevant in interpreting the right to use force in self-defence".

49. Res. 2625 (n 84).

50. Island of Palmas Case (Netherlands/US), II RIAA, 839.

want to see its non-intervention principle protected if it does not reciprocally guarantee it. Furthermore, Res. 2625 also recognized that “each State has the duty to comply fully and in good faith with its international obligations to live in peace with other States”. Now, these examples unravel the far-reaching changes in the global context, which affects to some degree the established formal rules (Chinkin, Kaldor, 2017: 38), one of the most recent developments being the U/U theory, which seems to be a natural corollary of the principle of state sovereignty (Shah, 2020: 118).

Nowadays, although the right of self-defense is state-centric and this view is the only one that allows the maintenance of the status quo, we cannot be strict to the point of not accepting a reaction against armed groups, because it is by now obvious that they have the ability to launch attacks of such gravity as those that, in a certain moment, we thought only States could perpetrate. Therefore, in this case, the right of self-defense is invoked without an armed attack in the strict sense (i.e., by a State), but rather because host States may lose their protection under Article 2(4) of the UN Charter if they have broken their duties of due diligence<sup>51</sup> or violated other international legal obligations (Gray, 2018: 247) (for instance, by harboring and allowing terrorist organizations to benefit from its territory to commit a wrongdoing). Indeed, States are legally obligated to not only refrain from providing positive assistance in support of the armed activities of non-state actors against other States, but also to take due diligence in ensuring that their territory is not used by non-state actors for such activities. In this context, a State that hosts a terrorist organization cannot invoke its sovereignty as a shield to deter and inhibit an armed response from the State victim of an armed attack carried out by those organizations. In this sense, States have both positive and negative obligations. So, it is the inability or unwillingness of the States to prevent attacks that would leave their territorial integrity susceptible to a limited breach by the victim State (Henderson, 2024: 415), because a State cannot have its sovereignty protected, and therefore cannot invoke the prohibition on the use of force when it violates international obligations by violating the rights of other States. The principle of sovereignty is now “as much about responsibilities as it is about rights” (Trapp, 2015: 207).

Despite the above, it should be noted that before any invocation of this nature the victim State must always seek a solution with the host State, to which can request it to take the necessary measures to put an end to the ongoing violation, or to secure its consent to defend itself in its territory (Henderson, 2024: 417).

Although this theory provides the advantage of combining the interstate regime of *jus ad bellum* with the possibility of providing a lawful response to attacks perpetrated by non-state actors, its practical application by States does not occur within the scope and limits of the right of self-defense, getting mixed with concepts, problematic in themselves, such as the possibility of responding to future attacks, distorting the requirement of necessity, and increasingly nearing an approach to the concept of armed reprisals. In addition to preventing it from being legally established as a result of customary international law, this breadth that has characterized the U/U “threatens to make self-defence the exception that swallows the rule

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51. “Due Diligence” means a minimum level of efforts which a State must undertake to fulfill its international responsibilities. See more in Krieger, Heike, and Anne Peters (2021).

against war” (Hathaway, Shapiro, 2018: 416). This controversy can be analyzed in relation to the cases mentioned above:

a) Afghanistan, 2001 – **Able Yet Unwilling State**

In the wake of what has been explained, there is no doubt that *in casu* a large-scale armed attack was perpetrated by Al-Qaeda. However, two other substantive criteria need to be fulfilled in order to invoke the right of self-defense – while necessity will determine when defensive action would be permissible, proportionality is the standard to evaluate what could be done in self-defense (Ruys, 2010: 124).

Necessity appears throughout international law as a limit on coercive action by states (i.e., limits the use of force by mandating that no peaceful alternatives exist prior to a resort to force), which matches the fact that the right to self-defense is a right of *ultima ratio* – force must be a last resort after all peaceful means have failed (O’Connell, 2019: 66). Moreover, the necessity requisite holds that action in self-defense must in principle be directed against the actual source(s) of the armed attack(s) (Ruys, 2010: 519). Finally, and most importantly, necessity has a temporal element, which rules out the possibility of being in favor of a punitive action, or a preventive right of self-defense.

On the other hand, proportionality requires that any lawful use of force is not excessive in relation to the injury to which it responds. This is considered a functional requirement, because proportionality of a concrete intervention can only be assessed not by comparing the attack and the response thereto in terms of the relative casualties and damage caused, the weapons used and the number of troops deployed, but by testing the defensive action against the objective of halting and repelling the attack(s) (Ruys, 2010: 519).

Regarding this specific case, it seems defensible to consider that these two requirements were also met. The nature of the perpetrators of this attack justified that greater tolerance was given to a defensive reaction that no longer aimed properly at halting and repelling the armed attack. As the perpetrator was not immediately identified, an immediate response could not be demanded<sup>52</sup>. A State cannot be deprived of its right to defend itself in this situation.

In sum, a delay may be necessary to collect evidence and identify the attacker, because negotiations with the State upon whose territory the non-state actors are located will be necessary to determine whether it is able and willing to take the necessary action itself to end any ongoing threat presented by the actors (Henderson, 2024: 313). Indeed, the United States demanded that Osama Bin Laden be handed over and set a deadline, a request that was declined by the Taliban. After the refusal and a confirmation by the Taliban that the harboring of Al-Qaeda was deliberate (Byers, 2018: 633), the US decided to act under their right of self-defense<sup>53</sup>.

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52. “There is no clear-cut distinction between ‘premeditated’ reprisals and ‘spontaneous’ self-defence. Some level of preparation may be needed for the attacked State to mount an appropriate and coordinated response or to collect intelligence on the source and specifics of the attack.”, Ruys (2010: 100).

53. “The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United

In a nutshell, it seems legitimate to consider that all the requirements were fulfilled and, since Afghanistan had every capacity (able) to dictate another course of action but was evidently reluctant to do so (unwilling), not fulfilling the responsibilities that arise from its right to sovereignty, and thus leaving its territorial integrity susceptible to the actions of the victim State.

b) Syria, 2014 - **Unable Yet Willing State**

The interventions by Western States in Syria are particularly relevant for this article, as they were undertaken without Damascus's consent, under the banner of self-defense against ISIS in the absence of a link between the ISIS operations and the Syrian State.

From the onset, the illegality of this extraterritorial use of force is demonstrated by the absence of any attempt to obtain Syrian consent (Corten 2018: 892). Although, according to the logic of the *Bethlehem Principles*<sup>54</sup>, if the host State is not able to deal effectively with the non-state actor, there is no need to seek consent (Henderson, 2024: 421). Daniel Bethlehem argues that contemporary circumstances should take into consideration the reality surrounding the use of force regime<sup>55</sup>, which requires the possibility to act under the right of self-defense – apparently within the scope of the *jus ad bellum* – against an imminent or actual armed attack by non-state actors without the host State consent. However, the exercise of this right, in the authors' view, must comply with the guidelines of the proposed principles. Thus, regarding consent, this requirement simply does not apply “in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the non-state actor or is otherwise unwilling to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack” Bethlehem's Principle 11<sup>56</sup>. Furthermore, “there must also be a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defense, whether for reasons

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States and the international community, the Taliban regime has refused to change its policy,” UN Doc. S/2001/946, 7 October 2001.

54. Former UK legal adviser Daniel Bethlehem, together with US State Department lawyers, endeavoured to establish state practice and *opinion juris* to support that a State may act in self-defense against an imminent or actual armed attack carried out by non-state actors in the territory of a non-consenting State under the auspices of the Unwilling and Unable theory. To this end, Bethlehem proposed a set of sixteen principles intended to “work with the grain of the UN Charter as well as customary international law” (Bethlehem, 2012: 4). These principles, titled “Principles relevant to the scope of a State's right of self-defense against an imminent or actual armed attack by nonstate actors”, are indicative and non-exhaustive, reflecting the authors' perspective in favour of a dynamic and evolving interpretation of the *jus ad bellum*, particularly the right of self-defense, which “is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day” (Bethlehem, 2012: 3).

55. Quoting Bethlehem (2012: 4), “There is little intersection between the academic debate and the operational realities. The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.”.

56. Bethlehem's Principle 11.

of disclosure, delay, incapacity to act, or otherwise, or would increase the risk of armed attack, vulnerability to future attacks, or other development that would give rise to an independent imperative to act in self-defense”<sup>57</sup>.

Nonetheless, this view does not aim to protect the goals of *jus ad bellum*, as it facilitates the use of force in disregard of the principle of state sovereignty, awarding freedom to the exception of self-defense that subverts the meaning of the rule. The U/U theory can only benefit the international legal system if it is objectively limited and duly respected. Moreover, we can never forget that it is the existence of an armed attack that triggers the right of self-defense against the perpetrators of the attack, but that if there is no actual or imminent use of force amounting to an armed attack, the U/U doctrine cannot provide a legal justification for the use of force in self-defense (Chinkin, Kaldor, 2017: 145). Therefore, it is concluded *a priori* that this was an illegal invocation of the right to self-defense. Nevertheless, it is pertinent to analyze the controversy surrounding an “unable” State. Assad’s regime in Syria was clearly willing to take action against ISIS: military efforts were taken against that NSA, which indicates it was able and willing. In fact, Assad’s government invited assistance to bolster its effort<sup>58</sup> – just not from the US, UK, or France (O’Connell, 2019: 227). Despite its willingness and continued military action against the group, it was not entirely straightforward that Syria was able to prevent ISIS from operating and continuing to carry out attacks from its territory against Iraq (Henderson, 2024: 423).

Indeed, there are situations where a State might be actively attempting to prevent attacks from non-state actors but is not succeeding – either because it lost control over the territory or because of its own military weakness. This is the paradigmatic case of an unable state, like Syria. In such cases, if the State has exercised due diligence in an attempt to halt the attacks, it is in no violation of any international obligation. However, Syrian efforts did not prevent American intervention and that of its allies, as “the Syrian regime has shown that it cannot and will not confront these safe havens effectively itself”<sup>59</sup>. But who is responsible for this value judgment? The State which another intends to defend?

Within the scope of U/U, there has been a tendency to justify an action in an unable host State under the principle of necessity. “The reasoning seems to be the following: when a state is threatened or attacked by a non-state actor, it can use self-defence against it, provided that it is ‘necessary,’ even if it implies bombing the territory of another state, killing some of its nationals, and destroying some of its public goods” (Corten, 2018: 893). In this sense, we have witnessed a distortion of this basic principle of the right of self-defense which, being subject to broad interpretations, appears to be confused with the concept of ‘state of necessity’. It bears repeating that the necessity requirement must never be interpreted as opening a right of self-

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57. Bethlehem’s Principle 12.

58. “The consent of Damascus was invoked as a legal basis justifying the military operations led by Russia within Syrian territory. Syria itself sent a letter specifying that «The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts of the Syrian Government and the Syrian Arab Army» (UN Doc. S/2015/789)”, Corten (2018: 879).

59. Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (UN Doc S/2014/695, 23 September 2014).

defense, but as restraining its exercise (Corten, 2018: 894). In Christian Henderson's words (2024: 426), "if the unable or unwilling doctrine is located within the principle of necessity, rather than providing a restraint upon the actions of states the principle would, instead, seem to constitute an enabler of action in providing a broad freedom in determining where to focus the justificatory discourse".

Therefore, we believe that in this specific situation – in which the State that claims the right to defend itself has not even suffered an armed attack, and has not obtained consent to intervene in another territory – the State cannot legitimately invoke this doctrine, as it goes beyond its limits. No State has the right to interfere in the internal affairs of other States, particularly when the State where the non-state actor is located is doing everything to combat them within its own territory. More complex to unravel will be the hypothesis in which a State actually experiences an armed attack but does not obtain consent from the host State to react against the non-state actor, which is demonstrating itself willing to combat them, but is unable to carry it out. Could the refusal of consent be understood as a lack of willingness on the part of the State to effectively prevent its territory from being used to violate the rights of other States?

#### c) Tit-for-Tat Attacks, 2021 – (most probably) Armed Reprisals

Contrary to the aforementioned examples, this scenario deals with multiple claims of U/U. Since 2021, the conflict has expanded to include US hostilities against Iranian-backed militia groups that support the Syrian Government, without any clear military objective beyond deterring future attacks and ensuring the defeat of ISIS. At the time, the interpretation of the U/U theory was even broader than before, with the US arguing that they may also use force against Iran-backed militia groups, because the Government of Syria is unwilling or unable to prevent the leveraging of its territory by non-ISIS groups (Bridgeman, Finucane, 2022). This approach seemingly upends Article 2(4) of the UN Charter. We are witnessing the ability of those who shroud their actions under the U/U doctrine to distort the right of self-defense – to the point that it becomes a justification for abusing the principle of equal sovereignty and territorial integrity, as well as for never-ending actions. This also denotes significant political abuse, because only the right of sovereignty of States with less economic and/or military power is called into question.

Now, recalling what was previously observed, the right of self-defense without an armed attack or an imminent armed attack is not a valid justification. And here, these tit-for-tat attacks are a response to threats and uses of force that do not reach the threshold of an armed attack in the terms established by the ICJ in the Nicaragua case<sup>60</sup>. In other words, here, the armed attack threshold is not met, which leads to invocations of the U/U theory not only against small-scale incursions, but also when any clear military objective beyond deterring future attacks exists. Therefore, can the

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60. "While the Court in Nicaragua refrains from defining the concept of 'armed attack', it does pronounce on the relationship between 'use of force' and 'armed attack'. It asserts that there exists a gap between Articles 2(4) and 51, and that it is necessary 'to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.", Ruys (2010: 140).

U/U theory be just a way of claiming a disguised right of preventive self-defense?

This is why, in the specific case of these tit-for-tat attacks, the right of self-defense is being so stretched (lack of an armed attack, lack of necessity to repel an attack, lack of burden of proof that the territorial State was unwilling or unable) that instead we should be talking about armed reprisals. Is the U/U contributing to the perpetration of retaliatory actions that are considered legitimate by States? Is it possible that the right of self-defense is absorbing the concept of armed reprisals?

Armed reprisals are acts of forcible self-help, involving an unlawful use of force by one State in response to a prior violation of international law by another – in other words, without any necessary temporal connection, with a sanctioning, punitive and dissuasive (preventive) purpose. Thus, while in the context of this definition it might be said that the main purpose of armed reprisals is law enforcement – that is, measures of coercion intended to impose a return to legality – the truth is that a response by way of reprisal does not intend to repel an armed attack because it does not depend on the existence of the armed attack (Azeredo Lopes, 2020: 168). This is why other aims, such as protecting a state's interests, retaliation, deterrence, and even punishment, have all been included under the concept of armed reprisals (Henderson, 2024: 307).

In a nutshell, it is quite clear why in this specific case we cannot preclude the wrongfulness of the acts under the right of self-defense. This is not a plausible justification, even less so when we are dealing with multiple claims of U/U – against ISIS and other armed groups without assessing the differences between these cases. But nearly ten years of the US's presence in Syrian territory shows the potential for this theory to be abused.

Despite the excesses, and therefore violations of Article 2(4) of the UN Charter addressed in these two last examples, we cannot discard the potential for the U/U theory to respond to non-state actors' attacks within the *jus ad bellum* regime, necessarily interstate. To do this, it is only necessary to define all its requirements, namely the meaning of "unable yet willing State", to understand what reaction it implies and reach a consensus regarding the principle from which this theory results, which should be that of sovereignty, and not that of necessity.

### **3. Conclusion**

#### **3.1. Where are we heading?**

The prohibition of the use of force, recognized as a peremptory norm of international law and firmly established under international customary law, is virtually undisputed. There is no general disagreement regarding the respect that the prohibition of the use of force demands as an imperative legal norm that sustains contemporary international law. That is why States – even when, consciously and with certainty, they know that they are violating the established legal regime – endeavor to show that the invoked justification exists as a legal norm in an abstract sense, and that its preconditions were fulfilled in a given case of armed force (Dörr, Randelzhofer, 2012: 218). They would rather carry the burden of argument on their behalf to clearly demonstrate that they did not violate the peremptory regime on the use of force, always based on the exception enshrined in the Charter, the right of self-defense. Now, even if a

controversial interpretation of the right of self-defense is at stake, States do not stop relying on it precisely because of the security provided. That is, the effectiveness of the prohibition of force, which is vital for its acceptance by States, is not called into question. What is deeply discussed is not so much the uncertainties surrounding the scope of Article 2(4) itself, but instead the scope and content of the right of self-defense. “Unlike necessity, hot pursuit, and armed reprisals, the right of self-defense is expressly recognized as an exception to the ban on force, which is strong enough to justify conduct that ostensibly violates a peremptory norm. A State invoking self-defense can be criticized for overstretching an exception, but it acts within the accepted system” (Tams, 2019: 100). This is the reasoning behind States’ attempts to justify a response against non-state actors.

As the world changed in 2001, one could only expect changes in terms of the balance that was sought to be maintained in the context of *jus ad bellum* as set out in the UN Charter. It is undeniable that the principles of sovereignty and respect for territorial integrity remain central and foundational to the UN system and international law (Tladi, 2019: 64). However, the truth is that one cannot ignore the fact that the existence of common interests, namely the maintenance of international peace and security achieved through a general principle that prohibits the use of force in international relations, and the emergence of new actors on the international scene, such as terrorist organizations, requires an adequate response from the current legal framework.

The controversy surrounding the (in)existence of a right of self-defense against terrorism has been one of the most divisive, and harshly and long-debated topics in doctrine. Until now, we know just this – although there is no consensus regarding the possibility of invoking the inherent right of self-defense directly against non-state actors located in the territory of a third State, there is also no consensus regarding the alternative. To support this statement, it suffices to mention the chilling events that have marked the relationship between Israel, Hamas, and Palestine, in relation to which “the *jus ad bellum* is a mess” (Milanovic, 2023). Although it presents a different profile from those cases discussed herein, the unexpected attack carried out by Hamas on 7 October 2023 against Israel<sup>61</sup> makes it quite clear that, if the *jus ad bellum* framework is not adapted to reality, what will exist will not be more than a legal framework written on paper, which will not be recognized as having any value in practice<sup>62</sup>. Regarding this case, there is no doubt that Hamas launched a terrorist attack in Israel comparable to an armed attack, with the sole objective of brutalizing civilians, capturing hostages – in short,

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61. “We make clear that the terrorist actions of Hamas have no justification, no legitimacy, and must be universally condemned. There is never any justification for terrorism. In recent days, the world has watched in horror as Hamas terrorists massacred families in their homes, slaughtered over 200 young people enjoying a music festival, and kidnapped elderly women, children, and entire families, who are now being held as hostages.”, Joint Statement on Israel of the leaders of France, Germany, Italy, the United Kingdom and the United States of America (<https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/09/joint-statement-on-israel/>).

62. Quoting Michael Glennon (2002: 549), “The international system has come to subsist in a parallel universe of two systems, one de jure, the other de facto. The de jure system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The de facto system consists of actual practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored de jure system. This decaying de jure catechism is overly schematized and scholastic, disconnected from state behaviour, and unrealistic in its aspirations for state conduct.”

terrorizing Israelis (Milanovic, 2023). In this sense, it was obviously expected that Israel would invoke its inherent right of self-defense under Article 51 of the UN Charter. Even leaving the analysis of this invocation for another occasion, it is impossible to escape this observation – the right of self-defense exists precisely for a State to defend itself, for a limited time, to the necessary extent and in a proportional manner. Can we, in good conscience, assert that Israel continues to ‘defend’ itself in accordance with the law? Differentiating between lawful self-defense and unlawful armed reprisals has shown to be a real challenge. And although the right of self-defense is imminently dynamic, dynamism does not mean senselessness.

In short, it seems to us that the *jus ad bellum* regime has never required as much pragmatism as it does now. For instance, the way that Western airstrikes on ISIS in Iraq, and from 2014 onwards in Syria have been justified seems to suggest that stretched notions of imminence, necessity and proportionality, and the assumption that self-defense can be claimed against non-state actors are being assimilated and normalized (Chinkin, Kaldor, 2017: 173). It is thus urgent to define the scope and limits of a theory that precisely allows this dynamism not to turn into folly. Now, if the U/U theory is as objectively delimited as possible, States will be much more cautious when invoking it, as the space for broad interpretations has been compressed. This could be an important and differentiated step towards more measured actions, in the name of a broad rule prohibiting the use of force in international relations, as set out in Article 2(4) of the UN Charter, which provides for a much more restricted exception – and not the opposite.

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