Although the matter remains unsettled, there may be reason to accept that when faced with a specific imminent armed attack based on objectively verifiable indicators, States may engage in measures to defend themselves in order to prevent the attack.[87] Any such measures would have to conform to all the earlier stated requirements of armed attack,[88] necessity and proportionality, which will further constrain the anticipatory use of force, and must give primacy to effective measures by the Security Council. If a State falsely describes its forcible measures as anticipatory self-defence when there was in fact no imminent armed attack to justify such action, its use of force will be examined in light of the prohibitions of the use of force and aggression.

B.2.c. Self-Defence against Non-State Actors

An additional controversial area in the realm of self-defence is the question of resort to self-defence against non-state actors located in other States. The use of force in such circumstances is not a new phenomenon and has occurred in numerous situations over the past two centuries.[89] The legal debate in the context of self-defence became, however, a particularly prominent issue following the attacks against the US in September 2001. One approach to self-defence assumes that its primary relevance is in the context of armed attacks by States (or acts of groups attributable to States).[90] This seemed to be the position of the ICJ in its 2004 advisory opinion,[91] although in a later case the Court appeared to have noted that the issue was not yet settled, and the interpretation of the Court's position has been the subject of much debate.[92] Article 51 does not specify that the armed attack which gives rise to self-defence must have been carried out by a State, and therefore leaves room for a reading that includes attacks by non-state actors that have no connection to the State. Moreover, there is considerable State practice stretching back to the *Caroline* incident, and especially since 2001, which lends support to the claim of self-defence in such circumstances.[93] Ultimately, the argument in support of this rests upon the notion that self-defence is a right that exists in order that States are able to protect themselves when attacked from outside their borders. Self-defence is a right triggered by an act, rather than the actor. The source of attack does not change the fact that the State must be able to stop it from causing harm. Although the issue is still debated,

[87] White House, *supra* n. 84; UK Attorney General's Speech at the International Institute for Strategic Studies on 11 January 2017 (available at: <www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>); Australian Attorney-General's lecture, "The Right of Self-Defence Against Imminent Armed Attack in International Law", at the T C Beirne School of Law, University of Queensland, 11 April 2017 (available at: <www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255>). For an analysis of the meaning of imminence, see N. Lubell, "The Problem of Imminence in an Uncertain World", in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at p. 697.

[88] Meaning that there must be not merely an imminent attack, but an imminent *armed* attack. See *Nicaragua* v. *United States of America*, *supra* n. 2, at para. 35 ("what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible lawfulness *of a response to the imminent threat of an armed attack* which has not yet taken place has not been raised") (emphasis added), and para. 194 ("the issue of the lawfulness of a response to the imminent threat of an *armed attack* has not been raised") (emphasis added); T. D. Gill, "The Law of Armed Attack in the Context of the Nicaragua Case", in 1 *Hague Yearbook of International Law* 30 (1988), at p. 35.

[89] See the *Caroline* case of 1837, and the US incursion into Mexico in 1916, as examples for the pre-Charter practice of States. For a detailed account of the practice of States before 1945 and up to 1994 (with further references), see C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen in Fällen staatlicher Verwicklung in Gewaltakte Privater* (Berlin: Duncker & Humblot, 1995).

[90] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n. 2, at para.139; J. Kunz, *supra* n. 81, at p. 878; M. Bothe, "Terrorism and the Legality of Pre-emptive Force", in 14 *European Journal of International Law* 227 (2003), at p. 233; S. Alexandrov, *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996), at pp. 182-183; G. Simpson, in E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* – working paper (The Royal Institute of International Affairs, 2005), at pp. 27-28.

[91] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n. 2, at para. 139.

[92] See, for example, the debate surrounding the ICJ's position on this issue in *DRC* v. *Uganda*: S. A. Barbour and Z. A. Salzman, "The Tangled Web: The Right of Self-Defense against Non-State Actors in the *Armed Activities* Case", in 40 *New York University Journal of International Law and Politics* 53 (2007-2008); A. Orakhelashvili, "Legal Stability and Claims of Change: The International Court's Treatment of *Jus ad Bellum* and *Jus in Bello*", in 75 *Nordic Journal of International Law* 371 (2006), at pp. 394-396; S. Verhoeven, "A Missed Opportunity to Clarify the Modern *Ius ad Bellum*: *Case Concerning Armed Activities on the Territory of the Congo*", in 45 *Military Law and Law of War Review* 355 (2006), at pp. 358-360.

[93] For example, US operations against Al-Qaida in Afghanistan and the support this received from other States; Iran and Turkey (separately) against Kurdish groups in Iraq; Israel against Hezbollah in Lebanon and Islamic Jihad in Syria; Ethiopia in Somalia, and others. See the analysis in N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), ch. 1-3.

there is growing recognition – including through State practice – that there are certain circumstances in which a State may have a right of self-defence against non-state actors operating extraterritorially and whose attacks cannot be attributed to the host State.[94] The military operations by numerous States from a variety of regions on Syrian territory against the so-called Islamic State since 2015 have, in particular, demonstrated the readiness of a considerable number of States to invoke Article 51 in the context of operations against a non-state actor.[95]

Nonetheless, the modalities of how self-defence might be carried out in this context do raise considerable challenges. A key question in this regard is that allowing for self-defence against non-state actors in the territory of a third State can appear to allow States forcibly to violate the territorial integrity of that State and cause harm on its territory, when the latter does not bear responsibility for the armed attack. The State in which the non-state actor is located (the host State) is likely in these circumstances to consider itself a victim of unlawful force. Consequently, the debate over self-defence against the non-state actor itself is inextricably linked to the question of whether this violates the prohibition of the use of force against the host State. Care must be taken not to conflate a number of issues: 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.

While the first two issues can be dealt with separately,[96] the last three are often intertwined. The fact that a non-state actor was operating from its territory does not automatically open the host State to lawful forcible measures against it by the victim State. Indeed, claiming such a position would risk neglecting the implications created by allowing for force directly against a State that might not be responsible for the initial armed attack.[97] If the armed attack by the non-state actor can be attributed to the host State, then the right to self-defence may be directed against the State. However, without attribution of the armed attack, the host State may have been in violation of other rules of international law – including Security Council resolution 1373 (2001)[98] – but it is mistaken to say that such a violation automatically allows for forcible measures against the host State. Not all violations of international law give rise to the right to use force in self-defence. Accordingly, if the armed attack

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[94] Henderson, *supra* n. 8, ch. 8 (with references and further reading). See also O. Schachter, "The Extraterritorial Use of Force Against Terrorist Bases", in 11 *Houston Journal of International Law* 309 (1988-1989), at p. 311; F. Berman, D. Bethlehem, C. Greenwood, V. Lowe, A. Roberts, P. Sands and M. Shaw, all in *Chatham House Principles of International Law*; S. Murphy, "Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", in 99 *American Journal of International Law* 62 (2005), at pp. 64, 67-70*;* Wood, *supra* n. 43,; M. E. O'Connell, C. J. Tams and D. Tladi, "*Self-Defence Against Non-State Actors*", in A. Peters and C. Marxsen (eds.), *The Max Planck Trialogues on the Law of Peace and War*, Vol. I (2018).

[95] See letters to the Security Council by Canada, Turkey, the UK, the US, Australia, France, Denmark, Norway and Belgium: Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (S/2015/2)2; Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (S/2015/563); Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (S/2015/688); Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (S/2014/695); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (S/2015/693); Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council (S/2015/745); Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council (S/2016/34); Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council (S/2016/523); Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council (S/2016/523). These letters reflect a mixture of claims relying on collective and individual self-defence. Claims of collective self-defence in aid of Iraq must still rest on the recognition that Iraq had the right to engage in cross-border self-defence against IS. See also White House, *supra* n. 87, at pp. 9-10.

[96] *Supra* n. 62-76, n. 89-94 and accompanying text.

[97] This is a particular danger for smaller/weaker States. See D. Ahmad, "Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defense", in 9 *Journal of International Law and International Relations* 1 (2013).

[98] See, more generally regarding the legal requirement of due diligence in relation to terrorist activity on a State's territory, R. Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (The Hague: TMC Asser Press, 2008).

is legally one of the non-state actor alone, the victim State may have a right to use force in self-defence against the armed group, but not against the State. It is precisely in such cases, where the actions of the non-state actor cannot be attributed to a State, where the heart of the debate lies.

A distinction must be made between force against the non-state actor and force against the host State.[99] In practical terms, this amounts to a differentiation between forcible measures taken *against* the host State, as opposed to forcible measures taken *within* the host State. However, this distinction does not absolve the need to ensure that Article 2(4) is not violated. The preferred approach to Article 2(4) of the Charter aims to prevent any such semantic exception to the prohibition of the use of force. Indeed, such a distinction is not dissimilar to certain arguments aiming to justify humanitarian intervention as not violating Article 2(4). No matter how temporary and limited the incursions are, they will still fall within the scope of Article 2(4).[100] Accordingly, using force within the territory of another State – even if the forcible measures are limited to strikes against a non-state actor – must be considered as within the notion of force as it exists in Article 2(4) of the Charter. Distinguishing between forcible measures *within* but not *against* the State does not, therefore, provide a solution for the *jus ad bellum* concerns.[101] As a consequence, the use of force in such circumstances will not be lawful unless justified by self-defence or Security Council authorisation. By accepting that self-defence may be invoked against a non-state actor located in another State, even absent attribution to this other State, the ensuing non-consensual force would not be a violation of Article 2(4) as it would be a lawful exercise of an exception to the prohibition.

Self-defence against non-state actors must adhere to all the requirements and restrictions placed on the exercise of self-defence generally. It can only be triggered by an armed attack, and it has been argued that the required gravity threshold for determining an event as an armed attack may be higher in the context of triggering a right to self-defence against non-state actors.[102] Moreover, its exercise is conditioned by the requirements of necessity and proportionality.[103] In the current context, necessity requires that, if possible, the host State be given the opportunity to halt and prevent the attacks by the non-state actor through its own law enforcement or other lawful means. This should be viewed as the preferred solution and the necessity principle requires it to be pursued within all reasonable bounds before force is employed.

Not infrequently, reference is made in this context to a requirement that the host State be unable or unwilling to take adequate action against the non-state actor.[104] Rather than being relied upon as a new justification for resort to force, the unable or unwilling test should be viewed as a component of the necessity criterion. It is an additional test that must be satisfied when taking action against a non-state actor on the territory of another State in response to an armed attack, and does not obviate the need to adhere to all other obligations attached to the exercise of self-defence. Even if seeking resolution through the host State proves futile, forcible measures by the victim State must be proportionate and be limited to those strictly necessary in the context of self-defence

[99] For example, an air attack against an isolated camp of the non-state actor might have little effect on the host State itself (Columbia against the FARC in Ecuador; Israel against the Islamic Jihad in Syria). See also Canada's position that "Canada's military actions against ISIL in Syria are aimed at further degrading ISIL's ability to carry out attacks. These military actions are not aimed at Syria or the Syrian people, nor do they entail support for the Syrian regime", as well as Australia, both at *supra*, n. 76.

[100] Randelzhofer and Dörr, *supra* n. 12, at pp. 215-217.

[101] There will however remain a difference with regard to the *jus in bello*, since the classification of a conflict as international or non-international will largely rest on the question of the parties to the conflict. If there is no fighting between the two States but only between the victim State and the armed group, then this may be classified as a non-international armed conflict. See E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012).

[102] See discussion in C. Kreß, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts", in 15 *Journal of Conflict & Security Law* 245 (2010), at p. 249; Lubell, *supra* n. 93, at pp. 50-51; F. Berman, D. Bethlehem, C. Greenwood, V. Lowe, A. Roberts, P. Sands and M. Shaw, all in *Chatham House Principles of International Law.*

[103] See section B.2.a above.

[104] See letters by Australia, Canada, Turkey and the US, *supra* n. 95; Henderson, *supr*a n. 8, ch. 8, sections 3.2 and 3.2.1; A. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extra-Territorial Self-Defence", in 52 *Virginia Journal of International Law* 483 (2012); J. Brunnée and S. J. Toope, "Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?", in 67 *International & Comparative Law Quarterly* 263 (2018).

against the non-state actor. Accordingly, even if one accepts the right of self-defence against non-state actors, if the forcible measures taken by the victim State go beyond what is necessary and proportionate in relation to the threat from the non-state actor, this may be an instance in which self-defence comes in conflict with Article 2(4).[105] The situation has an added layer of complexity when the non-state actor is operating from more than one State. In such circumstances, a legitimate claim to engage in self-defence on the territory of one State does not provide automatic licence to use force on the territory of other States; the *jus ad bellum* rules as stated above must be applied in relation to each use of force in a new State.[106]

Although recent State practice can be read as allowing self-defence in these circumstances, certain aspects of the above discussion continue to be debated. It must be noted, in this context, that the Security Council has the power to take action directed against threats to the peace by armed groups, and has taken measures of this nature in the past.[107] By acting decisively in future situations of such type, the Council could reduce the risk of States taking matters into their own hands.

B.2.d. Rescue of Nationals Abroad

The rescue of nationals abroad has long presented a challenge to the application of the rules on the use of force. It is the subject of contrasting opinions, numerous cases of inconsistent State practice, and ambiguous case-law.[108] The first question to be asked is whether the sending of armed forces to rescue nationals on the territory of another State is an act within the scope of use of force covered by Article 2(4) of the UN Charter. If so, then there is a need to enquire whether there are legal grounds for allowing such operations, or whether they might be a violation of Article 2(4) of the UN Charter.

Arguments for excluding such operations from the scope of Article 2(4) rest partly upon the notion that the force is not intended to jeopardise the "territorial integrity or political independence" of the other State. This, however, appears to contradict the widely accepted approach to Article 2(4) which, as explained in section A.2 above, should include any forcible measures on the territory and without the consent of the territorial State.[109] Nevertheless, while adhering to this approach to Article 2(4), there may be room to describe certain rescue operations as not consisting of a use of force, for example in the case of operations to evacuate nationals from within general unrest or conflict (as opposed to situations in which they are being attacked or held by a specific party).[110] This will depend on the position taken in relation to the existence of a *de minimis* threshold and whether it depends on the nature or level of force.[111] Acceptance of such an approach would be enhanced in cases in which the sending State does not intend to engage in any hostilities and, in particular, if there was at least an attempt to seek permission and if the territorial State does not actively object to the evacuation operations.

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[105] See, for example, debates over Israel's actions against Hezbollah in Lebanon in 2006. There is strong argument that Israel had the right of self-defence against the Hezbollah, but that the nature of Israel's response was disproportionate. See also Separate Opinion of Judge Simma in *DRC* v. *Uganda*, *supra* n. 2, at paras. 13-14.

[106] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A /68/382), 13 September 2013, at para. 89.

[107] The Security Council has directly addressed armed groups in a number of resolutions, for example when demanding that "the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization" (UNSC res. 1244 (1999)). The Council has also authorized action in a number of situations involving violence by armed groups, for example in Somalia (UNSC res. 1725 (2006)), in the Democratic Republic of the Congo (UNSC res. 1484 (2003)), and more recently in the context of the ISIL (UNSC res. 2249 (2015)).

[108] See N. Ronzitti, "Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity", in 34 *Netherlands International Law Review* 407 (1987); W. Friedmann, "United States Policy and the Crisis of International Law", in 59 *American Journal of International Law* 857 (1965); L. C. Green, "Rescue at Entebbe - Legal Aspects", in 6 *Israel Yearbook on Human Rights* 312 (1976), at p. 312; L. Henkin, "The Invasion of Panama under International Law: A Gross Violation", in 29 *Columbia Journal of Transnational Law* 293 (1990); R. Wedgwood, "The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion", in 29 *Columbia Journal of Transnational Law* 609 (1991); T. Ruys, "'The Protection of Nationals' Doctrine Revisited", in 13 *Journal of Conflict & Security Law* 233 (2008).

[109] See earlier section on the scope of Article 2(4) of the UN Charter and similar discussion in sections on self-defence against non-state actors and on humanitarian intervention.

[110] 'Non-combatant evacuation operations' as opposed to 'forcible hostage rescues'.

[111] *Supra* n. 18-21.