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Prohibiting the Use of Force by Non-State Actors: Time to Move to International Regulation

Proibição do Uso da Força por Atores Não Estatais: É Hora de Avançar para aRegulação Internacional?

Prohibir el Uso de la Fuerza por Actores No Estatales: ¿Es Hora de Avanzarhacia una Regulación Internacional?

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ABSTRACT

This article underscores the pressing need to expand the scope of the prohibition of the use of force principle, firmly established in international law, to encompass non-state actors (NSAs). Conventional wisdom holds that the legality of employing force by NSAs within a specific state's territory is subject to domestic lawrather than international regulations. However, recent years have borne witness to an unprecedented surge in the use of force by NSAs, resulting in consequences that transcend national boundaries. Notable examples include organisations such as ISIS, Boko Haram, and even private military companies like Wagner, the Russian private military company. Hence, it becomes pivotal to raise the question of whether international law should exert its influence over the conduct of NSAs. While international law does indeed govern the use of force by NSAs to some extent, particularly from a *jus ad bellum* perspective, this control remains rather limited. This paper undertakes a comprehensive examination of this issue and contends that international legal principles pertaining to the prohibition of the use of force should be extended to encompass NSAs, including the application of *jus in bello* principles.

Keywords: Non-state actors, use of force, self-defence, aggression, ISIS, occupation,armed attack.

RESUMO

Este artigo destaca a urgente necessidade de expandir o escopo do princípio daproibição do uso da força, solidamente estabelecido no direito internacional, para abranger atores não estatais (ANS). A sabedoria convencional sustenta que a legalidade do uso da força por ANS dentro do território de um estado específico estásujeita à legislação interna, em vez de regulamentos internacionais. No entanto, nos últimos anos, testemunhamos um aumento sem precedentes no uso da força por ANS, resultando em consequências que transcendem as fronteiras nacionais. Exemplos notáveis incluem organizações como o ISIS, Boko Haram e até mesmo empresas militares privadas como o Wagner, a empresa militar privada russa. Portanto, torna-se fundamental levantar a questão de se o direito internacional deveexercer sua influência sobre a conduta dos ANS. Embora o direito internacional de fato regule o uso da força por ANS até certo ponto, especialmente sob a perspectiva do *jus ad bellum*, esse controle permanece bastante limitado. Este artigo realiza uma análise abrangente dessa questão e argumenta que os princípios jurídicos internacionais relativos à proibição do uso da força devem ser estendidos para abranger ANS, incluindo a aplicação dos princípios do jus in bello.

Palavras-chave: Atores não estatais, uso da força, autodefesa, agressão, ISIS, ocupação, ataque armado.

RESUMEN

Este artículo subraya la urgente necesidad de ampliar el alcance del principio de prohibición del uso de la fuerza, firmemente establecido en el derecho internacional, para incluir a los actores no estatales (ANE). La sabiduría convencional sostiene que la legalidad del uso de la fuerza por parte de los ANE dentro del territorio de un estado específico está sujeta a la legislación nacional en lugar de a regulaciones internacionales. Sin embargo, en los últimos años hemos sido testigos de un aumento sin precedentes en el uso de la fuerza por parte de los ANE, resultando en consecuencias que trascienden las fronteras nacionales. Ejemplos notables incluyen organizaciones como ISIS, Boko Haram e incluso empresas militares privadas como Wagner, la empresa militar privada rusa. Por lo tanto, se vuelve fundamental plantear la cuestión de si el derecho internacional debería ejercer su influencia sobre la conducta de los ANE. Si bien el derecho internacional de hecho regula el uso de la fuerza por parte de los ANE hasta cierto punto, especialmente desde una perspectiva de *jus ad bellum*, este control sigue siendo bastante limitado. Este artículo lleva a cabo un examen exhaustivo de esta cuestión y sostiene que los principios

jurídicos internacionales relativos a la prohibición del uso de la fuerza deben ser ampliados para incluir a los ANE, incluyendo la aplicación de los principios del jus in bello.

Palabras-clave: Actores no estatales, uso de la fuerza, autodefensa, agresión, ISIS, ocupación, ataque armado.

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I. Introduction

This paper delves into the prospect of extending the application of the prohibition of the use of force, as defined by international law, to non-state actors (NSAs). It is well-established that the legality of NSAs' use of force within the confines of a specific state's territory falls under the purview of domestic law, rather than international regulations.[1] Historically, international law governing the legality of the use of force has not extended to internal conflicts, as it predominantly pertains to state actors.[2] Indeed, the legal framework for the use of force, as established by the UN Charter, is exclusively applicable to states.[3] The UN was founded and sought to overcome the perceived previous failures by almost completely outlawing inter-state conflict.("United Nations, Charter of the United Nations", [s.d.]) [4] Accordingly, the Charter obliges state members to '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'. (UN Charter, Article 2(4)) This reaffirms that the legality of inter-state use of force is regulated by international law, while domestic law governs the legality of within-state use of force.[5] International law not only refrains from regulating the use of force within a sovereign state but also underscores the explicit prohibition of states from intervening in internal conflicts. This pivotal implication finds

[1] An example of this is the application of domestic terrorism provisions in the UK to the use of force by the Irish Republican Army and other paramilitary groups in Northern Ireland between 1969 and 1998.
[2] This refers to the legality of the use of force by armed groups and not to the applicability of international humanitarian law rules to such groups. For more information, see (O'CONNEL, 1991)
[3] The prohibition of the threat or use of force by states has been labelled by the International Court of Justice (ICJ) as a cornerstone of the United Nations (UN) Charter. ("Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda", [s.d.], p. para 148; "Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)", 1986)
[4] Under the UN Charter there are only two exceptions to this prohibition. These are self-defence (Article 51) and force authorised by the UN Security Council (UNSC).
[5] This fact does not apply to all types of non-state actors. International organisations, especially those that have powers to conduct military operations such as the North Atlantic Treaty Organization (NATO), the European Union (EU), the Economic Community of West African States (ECOWAS), and the UN itself, are bound by the prohibition of the use of force rule under customary international law.

its foundation in the principle of non-intervention, clearly articulated in Article 2(7) of the UN Charter,[6] which places an obligation on states to refrain from interfering in the domestic affairs of other states.(GORDON, [s.d.])

In recent years, the use of force by NSAs has escalated to unprecedented levels, with its impact increasingly transcending national borders. This development raises a critical question: should international law assume a regulatory role in governing the actions of NSAs?

While the use of force by NSAs is subject to certain constraints under international law, particularly within the framework of *jus ad bellum*, these regulatory measures remain relatively limited in scope. International law predominantly addresses the use of force by NSAs under *jus ad bellum* to justify a state's exercise of self-defense in response to armed attacks by such actors. Moreover, when NSAs engage in acts constituting international crimes, their actions fall under the purview of international criminal law.

This paper adopts a critical perspective to examine whether the use of force by NSAs should be more comprehensively regulated under international law. It conducts an in-depth analysis of the various rules within international law that directly and indirectly pertain to NSAs. The article begins by offering precise definitions of relevant concepts, including the "use of force," before focusing on a case study analyzing the actions of the Islamic State in Iraq and Syria (ISIS).

Building on this foundation, the paper explores the applicability of *jus ad bellum*, with a particular focus on the use of force within the context of self-defense. Ultimately, it argues that the transnational consequences of NSA activities necessitate robust regulatory

[6] In the Nicaragua case, the ICJ concluded that 'no such general right of intervention, in support of the opposition within another State, exists in contemporary international law', ("Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)", 1986, p. para 209)

mechanisms under international law. This conclusion represents a significant contribution to the field. The research methodology centers on a meticulous examination of ISIS's activities, providing a concrete basis for addressing the broader question of NSA regulation under international law.

II. The Use of Force by ISIS

The primary objective of this study is to critically examine whether the military actions undertaken by ISIS can be classified as a "use of force" under international law. Achieving this requires a comprehensive elucidation of the concept of "use of force" as defined by international legal frameworks and a historical analysis of the emergence and operations of ISIS in Iraq and Syria.

A. Meaning of the "use of force"

This paper will only deal with NSA conduct constituting 'armed force' as commonly understood in international law.(RANDELZHOFER; DÖRR, 2012, p. 208–210) The 'gravity of threshold' for the term 'armed force' forms the main focus for debate. In the *Nicaragua Case*, the ICJ found 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'.("Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)", 1986, p. paras 51 & 64) Following on from the ICJ's findings, the Independent International Fact-Finding Mission on the Conflict in Georgia found that the 'prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity' and that '[o]nly very small incidents lie below this threshold, for instance, the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft'.(INDEPENDENT INTERNATIONAL FACT-

FINDING MISSION ON THE CONFLICT IN GEORGIA REPORT, VOLUME II, 2009, p. 242) Ruys cites examples of conduct failing to meet the minimum threshold of intensity as 'operations aimed at rescuing nationals abroad, 'hot pursuit' operations, small-scale counterterrorist operations abroad, and localised hostile encounters between military units'.(RUYS, 2014, p. 159) It is not possible, however, to provide an exhaustive list of acts constituting 'use of force'. It is perhaps better to objectively attempt to determine whether the minimum threshold of gravity or intensity has been met on a case-by-case basis. This paper, therefore, limits itself to exploring NSA conduct that can be said to reach the minimum threshold of intensity as commonly understood. Terrorist tactics, for example, vary and include using explosive devices,(EUROPEAN UNION TERRORISM SITUATION AND TREND REPORT 2017, [s.d.], p. 15) vehicles as lethal weapons(YAN, 2017) and offences against the person, such as stabbing attacks.(BBC, 2017) Despite their inherent brutality, such criminal conduct cannot always be categorised as 'armed force' as understood within international law. There is hardly any doubt that the actions of ISIS in Iraq and Syria undeniably amount to the deployment of "armed force" as recognized under international standards. Instances of such actions encompass the use of heavy weaponry to carry out armed assaults against their opponents, including the military forces of Iraq and Syria, as well as various armed groups.[7] Consequently, this paper places its primary emphasis on examining this type of conduct.

[7] It was reported that ISIS deployed different types of weapons designed and manufactured in more than 25 countries. Examples were anti-tank missiles (Russian Kornet and Metis systems, Chinese HJ-8, and European MILAN and HOT missiles), and surface-to-air missiles (Chinese FN-6 MANPADS). (AMNESTY INTERNATIONAL, 2015)

B. ISIS's Use of Force

ISIS was a regime which at some point was governing a population of around 10 million and covered a territory of 88,000 square kilometres.(COMERFORD, 2017; HARRISON, 2017) It was a complex society with courts, administration, health, schools, financial institutions and, most importantly, an army which was organised and commanded via a military council. (JOHNSTON, 2014) While Al Qaeeda had been active in the 2000s, its action was focused on episodic terror attacks rather than engaging in open and prolonged hostilities. At one point, ISIS/ISIL was thought to have recruited somewhere between thirty and forty thousand foreign fighters. It conducted its military operations with the stated intent of establishing a caliphate and has done so in a violent way. (JOHNSTON, 2014) If a state had undertaken the same conduct, there is no doubt that it would have been subject to Article 2(4) of the UN Charter prohibiting the use of force and all the serious consequences which would flow from that. ISIS/ISIL established power in Northern Syria in 2014 and then moved to the North of Iraq later that year. (BLACK, 2014) Such a movement has considerable human consequences. It has been reported that between January 2014 and 31 October 2015, 118,802 people were killed and 36,245 wounded in Iraq alone by ISIS.(HUMAN RIGHTS OFFICE OF THE UNITED NATIONS; HIGH COMMISSIONER FOR HUMAN RIGHTS AND UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, [s.d.]) If such action had been undertaken by Syria invading Iraq, then it would have been subject to the full rigours of international law. However, ISIS/ISIL is not a state, and so, ostensibly, Article 2(4) does not apply to its actions. ISIS/ISIL seems subject to less international regulation than a state in the same position.

While there is certainly a growing body of literature which addresses the increasing 'internationalisation' of NSAs engaged in violent acts, this has followed a consequentialist

analysis. For example, there has been considerable analysis of the applicability of international legal measures countering international terrorism,(VAN DEN HERIK; SCHRIJVER, 2013; WASEEM AHMAD, 2017) international humanitarian law (IHL)(CUYCKENS; PAULUSSEN, 2019; MCKEEVER, 2020) and possible applications of the ICC statute.(MACMILLAN, 2018; MUCH, 2006) However, as can be seen in the case of ISIS/ISIL, when it comes to the issue of NSAs' use of force *per se*, there is a sudden retreat from seeing this in terms of international law. ISIS/ISIL was not like the Revolutionary Armed Forces of Colombia (FARC), the Irish Republican Army (IRA), *Euskadi Ta Askatasuna* (ETA) in wanting to break away from a 'host' state. It is also not like Al Qaeda in wishing to create upheaval and upturn regimes but without wishing to establish a state-like entity. ISIS/ISIL was unusual in its desire to establish an ever-expanding caliphate involving the annexation of territories via violence and the use of force.

While ISIS/ISIL's influence and power have been considerably diminished in recent times, its methods have highlighted the new actors using force, which would have traditionally been the capacity only of states. Boko Haram, a terrorist organisation that is active in Nigeria, is another pertinent example in this field.(IYI; STRYDOM, 2018) This analysis, therefore, will have broader interest and value to those working in the field of the use of force.

The benefit of the applicability of this particular legal regime is that international mechanisms countering the illegal use of force should replace those applied by domestic law. As this paper highlights, the current practice shows that the intervention of the UNSC in internal conflicts can only occur when there is a threat to international peace security based on different reasons, including violations of human rights and IHL. This paper argues that mere within-state use of force would be sufficient to be regulated by

international law even if there is no threat to international peace. Using international, rather than national, law to hold NSAs legally accountable for their uses of force would make the legal consequences similar to those arising from the use of force by states. In other words, rather than leaving states to deal with the use of force by NSAs, international mechanisms established to counter the use of force by states could be employed in these cases. These include Chapter VII of the UN Charter;[8] countering the illegal use of force through regional arrangements in accordance with Chapter VIII of the UN Charter;[9] international criminal responsibility for those believed responsible;[10] and non-acknowledgement of any state caused by illegal use of force such as boundaries changes.[11] Accordingly, even if an NSA's use of force does not lead to consequences such as violations of human rights or IHL, it should remain prohibited by international law.

III. The Applicability of *Jus ad Bellum*

As the branch of law regulating resort to the use of force, the *jus ad bellum* embraces Article 2 (4) of the UN Charter and the associated exceptions of self-defence and Chapter VII action by the UN Security Council.[12] As mentioned previously, however, the general prohibition principle is seen as being only applicable to states.

The increasing deployment of substantial military force by NSAs, such as ISIS, raises valid and pressing legal questions regarding the consequences of their actions within the

[8] Chapter VII of the UN Charter provides the UNSC with the competence to maintain international peace and security. The UNSC is allowed, according to the Charter, to "determine the existence of any threat to the peace, breach of the peace, or act of aggression", and accordingly to take coercive and non-coercive measures to "restore international peace and security". See Chapter VII of the UN Charter.
[9] Article 53 of the UN Charter authorises the regional organisations to take military action in accordance with the UNSC consent as a mechanism to maintain international peace and security.
[10] Under international law the mere use of illegal force can lead to international criminal responsibility. Example is crime of "aggression". The results of the use of force, even the legal one, can constitute international crimes such as war crimes, genocide and crime against humanity. See (AKANDE; TZANAKOPOULOS, 2017)
[11] This includes considering any consequences of the use of force void. It means that international law does not recognise any situation caused by the illegal use of force. (FERENCZ, 2015)
[12] Arts 39 & 51 of the UN Charter.

framework of jus ad bellum. Specifically, it prompts inquiries into whether the conduct of NSAs could entail distinct implications under this body of law, thereby warranting regulation by international law. Consequently, given that the use of force typically results in specific international consequences, the subsequent sections will thoroughly examine whether the military actions of NSAs can be categorized as a 'threat to international peace and security,' an 'act of aggression,' or an 'armed attack within the context of self-defense.' This focus is particularly pertinent since it is highly likely that the military actions of NSAs could lead to one of these implications concerning the prohibition of the use of force

A. Conceiving the Use of Force by NSAs as a Threat to International Peace

This section seeks to prove that there are many cases where the use of force by NSAs has been dealt with by international law rather than national law. The UNSC has classified such uses of force as a threat to international peace and security. For example, the UNSC Res. 2249 (2015) considers acts of terrorist groups such as ISIS, the Al-Nusrah Front, and all other individuals and entities associated with Al-Qaida as a threat to international peace and security.("UNSC Res 2249", [s.d.]) Indeed, the UNSC did address the use of force by NSAs directly. For example, it asked 'states and *other actors*' to respect arms embargoes imposed by its resolutions("UNSC Res 1474", [s.d.]) or to comply with ceasefire agreements reached within non-international armed conflicts (NIACs).[13]

As previously asserted herein, the use of military-like force *within* a particular state territory is mainly regulated by domestic law.(O'CONNEL, 1991) There are two important implications arising from this. Firstly, state power to suppress such conduct is unhampered by international law. Secondly, an armed group's use of force against state

[13] For example, ("UNSC Res 1584", [s.d.])

forces or another armed group within the same state is not outlawed by international law.(DABONE, 2011)

One notable exception to this system of national regulation is the use of force by peoples 'against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. ("Additional Protocol (I)", [s.d.], p. art 1 (4)) The use of force in these circumstances is governed by international law, which will be discussed subsequently. Another exception concerns the situation where the UNSC can classify the use of force by non-state armed groups as 'representing a threat to international peace and security'[14] , which triggers the Council's powers to adopt the necessary measures to deal with this threat. (ORAKHELASHVILI, 2015) ("UNSC Presidential Note S/23500", [s.d.]) Vark notes that the term 'threat to peace' is the 'most flexible and dynamic of the three terms in UN Charter Article 39, and it is here that the UNSC enjoys the widest discretion'. (VÄRK, 2009, p. 218) Despite the referral to "threat to the peace" many times in the UN Charter, such as in Articles 1 (1), 2 (4) and 99, the Charter does not provide a definition for this term. The Black Law Dictionary defines "threat" as '[a] communicated intent to inflict harm or loss of another or on another's property...[or] 2. An indication of an approaching menace'. While it defines "peace" as 'the tranquillity, security, and freedom from commotion or disturbance'. It can be noticed that "peace" is defined negatively by referring to the absence of war as a main precondition for peace status. However, the UNSC has extended the meaning of "peace" by considering that threats to peace cannot only be caused by war between states but also by economic, social, humanitarian and

[14] Under Article 39 of the UN Charter, the UNSC has the competence to determine the existence of a breach to international peace and security, a threat to international peace and security and an act of aggression. Art. 39 of the UN Charter.

ecological crises. Accordingly, "threat to the peace" is defined as ''the intention to injure, damage or endanger the freedom of public disturbance or tranquillity.[15]

UNSC practice has established a particular connection between the use of force and threat to international peace and security. [16] This has particularly related to inter-state use of force. (KRISCH, 2012, p. 1279) [17] However, the considerable rise of non-international armed conflicts has led to the employment of the "threat to international peace" concept as an implication of these conflicts. Heavy fighting between different military factions *within* a state has been classified by the UNSC as a 'threat to international peace and security in many occasions'.(DE WET, 2004) Examples include the former Yugoslavia, (UN Doc S/RES/713, 25 September 1991) Somalia, (UN Doc S/RES/733, 23 January 1992) Angola,("UNSC Res 864", [s.d.]) Rwanda, (UN Doc S/RES/929, 22 June 1994); UN Doc S/RES/918, 17 May 1994) Albania("UNSC Res 1101", [s.d.]) and Liberia.("UNSC Res 788", [s.d.]) The International Criminal Tribunal for the former Yugoslavia (ICTY) clearly stated that "threat to the peace" as set out in the UN Charter, Article 39 may include, as one of its species, internal armed conflicts'.(PROSECUTOR V TADIC, 1995, p. para 30) More recently, acts of terrorism not involving significant militaristic conduct have been held to constitute a threat to international peace and security.("UNSC Res 1189", [s.d.]; "UNSC Res 1269", [s.d.]; "UNSC Res 1373", [s.d.]; "UNSC Res 1566", [s.d.]) It can therefore be said that although terrorist acts can be committed within state borders, they are regulated by

[15] For more information see Galván, Mónica Lourdes De La Serna, 'Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?' (2011) 11 Anuario Mexicano de Derecho 147.

[16] It is well accepted that the threat to international peace cannot only be caused by the use of military force but by various other reasons. In this regard, the 1992 President of the UNSC stated that '[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'. See ("UNSC Presidential Note S/23500", [s.d.], p. 23500)

[17] One example is the Iran/Iraq war (1980-1988) where the UNSC found that 'the prolongation of the conflict between…[them was causing]…heavy losses of human lives and considerable material damage and endangering peace and security'. See UNSC Res. 582 (1986) relating to Iran/Iraq war. UNSC Res 582 (24 February 1986) UN Doc S/RES/586.

international law in addition to domestic law.[18] For present purposes, there are two reasons for determining the existence of a threat to international peace and security: the use of force *and* terrorism.

The classification of terrorist acts as constituting a threat to international peace and security has significantly increased over the last twenty years. UNSC Resolution 1373 (2001) is considered the cornerstone of UN efforts to counter-terrorism.(REHMAN, 2005, p. 91) Issued in accordance with Chapter VII of the UN Charter, it explicitly states that international terrorism is considered a threat to international peace and security.("UNSC Res 1373", [s.d.]) This is_mainly due to the atrocities committed by terrorist groups against civilians in recent years.[19]

In the *Wall* Advisory Opinion, Judge Kooijmans stated that '[t]he Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorises it to act under Chapter VI1 of the Charter. Indeed it actually did so in Resolution 1373 (2001) without ascribing these acts of terrorism to a particular State'.("Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", 2004, p. para 35) Further, the US District Court for the District of Columbia has stated that 'terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani* generis, an enemy of all mankind'. ("Flatow v. Islamic Republic of Iran", [s.d.], p. para C3).

[18] Under domestic law, three elements can be referred to in the context of a terrorist crime taking international character. These elements are: '(1) an illegal violent act, (2) intended to terrorize or coerce, (3) of an international nature'. See Thomas Weatherall, 'The Status of the Prohibition of Terrorism in International Law: Recent Developments' (2015) 46 Georgetown Journal of International Law 589.

[19] The SC Resolution 2309 (2016), for example, explicitly reaffirmed 'that terrorist attacks against civil aviation, like any act of international terrorism, constitute a threat to international peace and security, and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed'. See UNSC Res 2309 (22 September 2016) UN Doc S/RES/2309.

As the underlying act which creates the threat to international peace and security, which is certainly a matter of international regulation, it follows that terrorist acts, including the use of force, are open to similar regulation. This would then mean nothing more than the application of the international principle prohibiting the use of force by international terrorist organisations, with the consequence that the UNSC should deal with it as it would deal with the use of force by states. One may conclude that the use of force by terrorist groups is internationally prohibited. This is not a consequence of the application of the prohibition of the use of force principle but because of the attachment of the use of force to terrorism. However, this may mean an indirect application of the use of force prohibition to terrorist groups.

There were around 1057 Resolutions issued by the UNSC in the context of NIACs between 1990-2013(FOX; BOON, 2018, p. 663) and they have concerned human rights,[20] IHL("UNSC Res 2093", [s.d.]), and international criminal responsibility.("UNSC Res 1231", [s.d.]; "UNSC Res 1355", [s.d.]) The UNSC has addressed NSAs by imposing obligations on all parties to NIACs, including armed groups, to cease hostilities[21] or to respect a peace agreement.(FOX; BOON, 2018, p. 687) Imposing sanctions against those who did not fulfil these obligations, including armed groups, evidences an increased international interest in the internal use of force.[22] This is not to say that the UNSC has created a customary rule relating to *jus ad bellum* in NIAC, but its practices can be understood as evidence of customary law.(FOX; BOON, 2018, p. 657) Indeed, various international bodies have cited UNSC resolutions as evidence of customary law. The ICJ, for example, examined UNSC resolutions relating to the unilateral declarations of independence to conclude whether

[20] Examples of these resolutions include : ("UNSC Res 2067", [s.d.]; "UNSC Res S/RES/2127", [s.d.]; "UNSC S/RES/1468", [s.d.])
[21] This happened in 100% of the NIAC occurred after 1990. See (FOX; BOON, 2018, p. 683)
[22] The UNSC imposed sanction for not respecting peace agreements in 85% of the NIACs happened after 1990.

there is a normative value of these resolutions.("Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", 2010, p. para 81) The International Committee of the Red Cross study on Customary International Humanitarian Law provided UNSC practices as evidence of customary law in many situations.[23] In *Prosecutor v. Tadić,* the ICTY found that UNSC resolutions adopted unanimously and related to violations of IHL in internal conflicts that led to criminal responsibility for the perpetrators can represent 'great relevance to the formation of *opinio juris*'.("Prosecutor v. Tadić", 1995, p. para 133) The Inter-American Court of Human Rights relied on the UNSC resolutions to establish the existence of a norm prohibiting amnesty for crimes against humanity.("Case of Almonacid-Arellano et al v. Chile", 2006, p. para 107)

The logical conclusion, therefore, is that issuing this significant number of resolutions concerning the use of force within a state territory should be reflected within the international legal system. Accordingly, international law should counter the illegal use of force by NSAs even if such use does not violate IHL or international human rights law. This is not to suggest that the mere use of force by NSAs would automatically lead to international legal implications, but that where such use reaches a particular threshold which amounts to a particular intensity of the use of force as recognised by international law.

[23] Examples are Rules 1 (distinguish between civilians and combatants); 96 (the taking of hostages is prohibited); 11 (Indiscriminate attacks are prohibited); 28 (medical and religious personnel and objects); 31 (humanitarian relief personnel must be respected and protected); 32 (respect for and protection of humanitarian relief objects), 33 (personnel and objects involved in a peacekeeping mission) and others. See (HENCKAERTS; DOSWALD-BECK, 2005)

B. 'Aggression' committed by NSAs

The issues raised by NSAs committing acts of aggression are directly relevant to this article's main question. Aggression is linked to the prohibition of the use of force, as it is defined as the illegal use of armed force that represents a manifest violation of the UN Charter.(STAHN, 2010, p. 875)

Under the UN Charter, aggression is one of three situations that can be suppressed by the UNSC through forcible and non-forcible measures.[24] Aggression is also a core crime under the Statute of the International Criminal Court (ICC) falling within that Court's jurisdiction. The ICJ previously held 'outlawing the act of aggression' to constitute an *erga omnes* obligation in international law. (*Belgium v. Spain,* [1970] ICJ Rep 3 paras. 32-34) Despite the significance of these determinations, finding a settled definition has been a considerable challenge.[25]

Two important international documents assist in defining aggression. The first is the UNGA Resolution 3314 and the second is that adopted by the 2010 Kampala Review Conference, which amended the ICC Statute. (Review Conference of the Rome Statute, RC/Res.6, Annex I) Both definitions do not refer to the commission of an act of aggression by an armed group without that group having a link with a state.[26]

Several provisions should be met to describe conduct as a crime of aggression. First, the crime of aggression can only be committed by 'a person in a position effectively to exercise control over or to direct the political or military action of a *State*'. (Review

[24] The other two situations are threat to and breach of international peace and security. Chapter VII of the UN Charter.
[25] Noah Weisbord, 'Prosecuting Aggression' (2008) 49 Harvard International Law Journal 161.
[26] Article 8 *bis* of Annex I to the Review Conference Res.6, similarly to the General Assembly Res. 3314, defines "act of aggression" as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.'

Conference of the Rome Statute, RC/Res.6, Annex I, preprint 8 bis, para 1) This is why aggression is called a leadership crime.(WEISBORD, 2008, p. 43) Second, the role of the leader-perpetrator should include planning, preparing, initiating, or executing the aggression conduct. Third, the act of aggression should be committed by a state against another state.(WEISBORD, 2008) This is where the connection between the definitions of the UNGA Resolution and the Kampala Conference can be seen where the involvement of a state is required in both, although they address different types of responsibility (state responsibility and individual accountability). Fourth, the illegal act should 'by its character, gravity and scale, [constitute] a manifest violation of the Charter of the United Nations'.(Review Conference of The Rome Statute, 2010, Preprint 8 Bis, Para 1) This means that the act of aggression only includes the most dangerous illegal armed force.(Review Conference of The Rome Statute, 2010, p. Annex II)

Under the definition of aggression, conduct amounting to armed force by an armed group can only be considered as 'aggression' if it is conducted on behalf of a state. The UNGA considers '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State' as an act of aggression committed by a state and not by such armed groups. (UNGA Res 3314 (n 41) art 3 (g)) Consequently, as international criminal law stands, armed groups cannot commit an act of aggression that is prosecutable before the ICC because the international definition of aggression is not applicable to them.[27] In practice, as May mentioned, '[t]here is no reason to think that only States can wage aggressive wars. In contemporary times, we have seen NSAs, including terrorist groups, wage war against States and against other NSAs'.(MAY, 2009, p. 336)

[27] This approach has been criticised by some as it is outdated and does not response to increase use of force by NSAs. See (WEISBORD, 2009)

Additionally, there is a suggestion that instead of prosecutions for the state-focused crime of aggression, leaders of non-state groups could be prosecuted for alternative crimes not requiring state involvement. In other words, the conduct of aggression could be tactically prosecuted as for example, genocide, crime against humanity and war crimes.(LEE, 2014, p. 71) If a leader of an armed group, for example, ordered his followers to conduct an armed attack against civilians of another state, his aggressive conduct may be alternatively charged as a war crime. These are indeed distinctive crimes, and each has particular provisions that should be met to establish international criminal responsibility.

However, while the re-focussing of charges is a prosecutorial option, it may be better instead to revisit the UNGA definition to consider the possibilities a purposive interpretation might offer. As paragraph 4 makes clear, the definition's main purpose is to guide the UNSC in determining the existence of aggression (as s stipulated within the UN Charter) and related state responsibility.(LEE, 2014, p. 16) A purposive approach to the 1974 definition may allow for interpretations which embrace aggressive acts committed by NSAs.(LEE, 2014, p. 47) For example, the UNGA was clear that the term 'state' was to be understood broadly as being without prejudice to questions of recognition' (Art. 1 (a), UNGA Res. 3314) thereby including the acts of entities whose statehood is disputed and which have not received official recognition as a state. (LEE, 2014, p. 48)

Different examples could be provided in support of such an expansive interpretation.28 The 2005 African Union Non-Aggression and Common Defence Pact defines aggression

[28] For more detail on these examples see (BEYTENBROD, 2011)

to include the use of armed force by non-state armed actors. Article 1 (c) of the Pact provides:

> *"Aggression"* means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organisation of States or **non-State actor(s)** or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union. ("African Union Non-Aggression and Common Defence Pact", [s.d.], p. art 1 (c))

This is understood as meaning that aggressive military acts such as invading, occupying and armed attacks cannot only be committed by states but also by armed groups.(DABONE, 2011, p. 405) Indeed, the African Union's approach is understandable due to the increasing prominence of NSAs in engaging in armed violence across the Continent.(ENGEL; PORTO, 2013) The importance of Pact's definition of aggression can be seen as an African *lex specialis*, and it cannot lead to the amendment of the general law of the use of force.(ORAKHELASHVILI, 2015, p. 172) A further example of acknowledging committing aggression by NSAs is the UNSC Resolution 405 (1977), where the UNSC condemned 'the act of armed aggression perpetrated against' Benin by French mercenaries.("UNSC Res 405", [s.d.]) (ORAKHELASHVILI, 2015, p. 172)

Thus, leaving aside the non-viability of ICC prosecutions for NSA-perpetrated aggression, there is clearly an appetite to address it and regional evidence for a treaty basis to do so, which potentially gives creditability to a re-imagining of the 1974 UNGA definition. This would be welcome given the prominent role NSAs play in contemporary conflicts and their increasing capacity for large-scale and prolonged violence in the terms envisaged by the 1974 definition.[29] Indeed, states themselves have described the military activities

[29] UN General Assembly Resolution 3314 (1974), Article 3 considered the following acts as an act of aggression, regardless of a declaration of war; '[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.'

of NSAs as armed attacks or acts of aggression. In its October 2001 letter to the UNSC, which justified intervention in Afghanistan, the US characterised the 9/11 terrorist attacks as "armed attacks", which thereby gave rise to an Article 51 right of self-defence for the US.(Letter of John Negroponte to the President of the Security Council, 2001) Similarly, France described the ISIS-launched terrorist attacks in Paris in 2015 as 'an armed aggression against France' that could justify individual self-defence.("UN Doc S/PV.7565", [s.d.]) Characterizing the actions of NSAs as acts of aggression would not only carry implications within the framework of international criminal law but also hinges on the notion of state responsibility. This is contingent upon the capacity to attribute wrongful actions to a state stemming from its failure to prevent the activities of NSAs. Typically, acts of aggression by NSAs can be classified into categories such as invasion, armed attacks, and occupation, which will be subject to detailed examination in the subsequent sections.

1. Invasion

Invasion is one of the first examples of aggression provided under Article 3 of the UNGA Resolution 3314 (1974).[30] While a legal definition of 'invasion' is elusive, it has, been identified as 'the movement of military units into an area belonging to another state'(ZWANENBURG; BOTHE; SASSÒLI, 2012, p. 37) and clearly anticipates the use of military force by foreign forces against a state. Time represents a significant factor in differentiating between "invasion" and "occupation" with the latter starting once the former concludes. An invasion can be distinguished from an "armed attack" in that an "armed attack" typically pertains to the utilization of military force against a sovereign

[30] This is why it is examined here as a matter of *jus ad bellum* although it is mainly covered within *jus in bello*.

state, whereas "invasion" specifically denotes the movement of military forces into the territory of another state. In principle, the possibility of an invasion being carried out by NSAs is excluded due to the requirement of state involvement. Nevertheless, this prerequisite could be waived if the aforementioned suggestions concerning the potential for NSAs to commit acts of aggression are accepted. Consequently, such invasions would encompass military actions initiated by entities like ISIS towards Syrian and Iraqi territories. This distinction becomes especially apparent in the case of Iraq, where there was an offensive military maneuver by ISIS forces originating from Syria and encroaching into Iraqi territory.(WITHNALL; ROMERO, 2015) ISIS launched aggressive military operations against both Syrian and Iraqi forces, which led to ISIS gaining full control over many Syrian and Iraqi cities.(UNAMI, [s.d.]) As it was reported by the press that:

> To the soundtrack of a haunting Quranic chant, they watched as a bulldozer burst through a sand berm separating Nineveh in Iraq from the neighbouring Syrian province of al Hassaka, followed by US-made Jeeps and Humvees with Iraqi army insignia that had been captured in the recent fighting.(BLACK, 2014)

Clearly, such military movement of ISIS meets the technical requirements of invasions and implies the attribution of responsibility for such conduct to these NSAs.

2. Armed Attack

The definition of aggression also includes “attack by armed forces”.[31] Article 3 (d) of the Definition of Aggression provides that ‘[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State’ is a further example of an act of aggression. A question arises as to whether the use of military force by NSAs can be considered as an "armed attack," thus falling within the definition of aggression. Whether or not an armed attack can be committed by NSAs will be explored in the context of examining a state exercising self-defence against armed attacks undertaken by NSAs.

[31] The meaning of “armed attack” will be explained in the next part.

What requires to be affirmed is that an 'armed attack' within the meaning of Article 51 of the UN Charter certainly constitutes an act of aggression. This can be proved by the fact that UNSC, for example, recognised the right of the US for self-defence in response to the 9/11 terrorist attacks, which would mean an implicit acknowledgement of the possibility of launching armed attacks by NSAs. ("UNSC Res 1368", [s.d.]) (KRISCH, 2012, p. 1293)

3. Occupation

The main interest of this paper is in examining the conduct of NSAs within *jus ad bellum*. While occupation is mainly regulated by *jus in bello* it is not precluded from being a matter of *jus ad bellum*. Article 3 (a) of the 1974 UNGA Resolution 3314 specifies acts that qualify as aggression to include '[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military *occupation*, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof'. Consequently, the question of whether an occupation is legal or not is, without doubt, a *jus ad bellum* question. Chehtman has correctly assumed that an occupation act might occur as a part of self-defense against an illegal attack launched from occupied territory.(CHEHTMAN, 2015, p. 24) Accordingly, the occupation becomes illegal if it results from illegal use of force, and vice versa.("Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations", [s.d.], p. principle 1, para. 10; RATNER, [s.d.]) However, whether or not "occupation" occurs and which rules should be applied is a *jus in bello* question. This question does not affect the legality or illegality of the occupation. According to the International Committee of the Red Cross, '[o]nce a situation exists which factually amounts to an occupation the law of occupation applies –

whether or not the occupation is considered lawful'.(ICRC, 2004) Therefore, in order to determine whether an NSA can commit an occupation act, *jus in bello* should be consulted.

By virtue of The Hague Regulations 1907, Article 42, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'.("Hague Convention IV respecting the Laws and Customs of War", [s.d.]) Accordingly, it is primarily a question of fact when any given power can occupy a given territory.(CHEHTMAN, 2015, p. 21) According to the UK Manual of the Law of Armed Conflict, two conditions should be met to determine the existence of 'a state of occupation'. '[F]irst, that the former government has been rendered incapable of publicly exercising its authority in that area; and, second, that the occupying power is in a position to substitute its own authority for that of the former government'.("THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT", 2004) The jurisprudence of the ICTY has also provided some assistive guidelines to identify those situations where a 'state of occupation' can be said to exist:

1- The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly
2- The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation
3- The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt
4- A temporary administration has been established over the territory

5- The occupying power has issued and enforced directions to the civilian population.("Prosecutor v. Naletilic´ and Martinovic", [s.d.], p. para 213)

The ability of having an NSA deemed to be an occupying power has been safely approved when that NSA is under the "overall control" of a *state*. This is known as "occupation by proxy".(GILDER, 2017) This concept was mainly developed by the ICTY.("Prosecutor v. Du[ko tadi]", [s.d.], p. para 137) The Court found that due to controlling some of Bosnia and Herzegovina's territory, the Croatian Defence Council (an organised armed group created by Croats within Bosnia and Herzegovina) could exercise occupation by proxy if the overall control test is employed.("Prosecutor v. Du[ko tadi]", [s.d.], p. para 137) This is why it is believed that the implication of the application of 'occupation' status to such armed groups gains greater force when such groups are acting as proxies for a state.(GAL, 2014, p. 66) This interpretation was provided to Article 29 of Geneva Convention IV[32] by Judge McDonald in her dissenting opinion in the *Tadić* Trial Chamber judgment.("Prosecutor v. Du[kotadi] a/k/a/ 'Dule'", [s.d.], p. para 298) Article 29 could be interpreted… to be regulating a situation whereby one state occupies another state's territory using an agent (a proxy)'.(GAL, 2014, p. 65) As alluded to previously, this type of occupation requires that such an NSA reaches a level of organisation fulfilling the IHL principles in accordance with Additional Protocol II to the 1949 Geneva Conventions, one of which is to exercise control over a territory.(PROTOCOL ADDITIONAL II, 1977, p. Art 1) Additionally, a state should have "overall"[33] control over an NSA.(GAL, 2014, p. 66) Indeed, in such scenario, it is an aggressive act of a state rather than of NSAs.

[32] Article 29 reads as '[t]he Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred'. (GENEVA CONVENTION IV, 1949)

[33] "Effective" control should exist in accordance with the ICJ perspective concerning the type of control should a state have over an armed group in order to be responsible about the acts of such group. For more information see ("Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of

The question, then, is whether NSAs can commit an occupation act *without* state involvement. If an armed group launched an armed attack against a neighbouring state and controlled part of its territory without any state involvement, could this be considered as an "occupation"? Clear examples of such behaviour include ISIS's control over certain Iraqi and Syrian territories for more than three years,(BBC, 2018) and the control by ISIS-affiliated Boko Haram over the Lake Chad Basin region, which comprises Nigeria, Niger, Chad and Cameroon.(COMOLLI, [s.d.])

In practical terms, some occupation requirements may readily apply to the conduct of some armed NSAs. For example, ISIS effectively spread in Iraq and Syria, exploiting the chaos and divisions in both countries. Despite ISIS' failure to meet the statehood requirements, its capability to effectively and authoritatively replace the presence of Iraqi and Syrian forces and administrations in both countries on a considerable scale became clearly and rapidly evident. These facts comprehensively support the assertion that the criteria for 'occupation', as established by Article 42 of the 1907 Hague Regulations, could be met by ISIS, which should make such an NSA an "occupying power".

A perhaps more significant argument against the applicability of 'occupation' status to the acts of NSAs is that the current legal rules concerning 'occupation' are currently only applicable to states rather than to NSAs.(ICRC, 2004) This argument stems from the nature of international humanitarian rules, which are either treaty-based or customary. Both sources appear principally addressed to states, while the position of NSAs remains uncertain. There is a belief that 'it is authoritatively accepted that [IHL] treaties can bind non-state armed groups'.(MURRAY, 2014, p. 2) Under conventional and customary

America)", 1986) However, "overall control" is required according to the ICTY interpretation of the level of state control over an armed group in order to attribute the acts of such group to that state. See (PROSECUTOR V TADIC; ICTY, 35 ILM 32, 1996) To compare between the positions of ICJ and ICTY see (CASSESE, 2007)

international law, 'each party to the conflict must respect and ensure respect for international humanitarian law'.(HENCKAERTS; DOSWALD-BECK, 2005, Rule 139) This includes a non-state armed group party to a non-international armed conflict. The Geneva Conventions 1949, Common Article 3 explicitly states that '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply' specific humanitarian rules.(CASSESE, 1981, p. 429; KLEFFNER, 2011, p. 443; MURRAY, 2014) Furthermore, there are many occasions when international bodies have directly addressed non-state armed groups to remind them to respect international human rights and IHL.(JANABY, 2016b, p. 151) For example, UNSC Resolution 1216 (1998) concerning the situation in Guinea-Bissau called 'upon all concerned, including the Government and the Self-Proclaimed Military Junta, to respect strictly relevant provisions of international law, including humanitarian and human rights law'. (UNSC Res 1216 (21 December 1998) UN Doc S/RES/1216) In Resolution 2139 (2014) concerning the humanitarian situation in Syria, the UNSC asked the Syrian Government and armed opposition groups to respect and 'put an end to all forms of violence, irrespective of where it comes from, cease and desist from all violations of international humanitarian law and violations and abuses of human rights, and reaffirm their obligations under international humanitarian law and international human rights law'. (UN SC Res 2139 (22 February 2014) UN Doc S/RES/2139) The Commission of Inquiry on Syria found that '[a]lthough anti-Government armed groups are, *per se*, not a party to the [International Convention for the Protection of all Persons from Enforced Disappearance], their actions may be assessed against customary international legal principles, and they are subject to criminal liability for enforced disappearances amounting to a Crime against Humanity'. (UNHRC, REPORT OF THE INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN

ARAB REPUBLIC; UN DOC A/HRC/22/59, 2012) The logical question then is what would preclude the status of 'occupation' as regulated by IHL, from applying to NSAs. In this regard, the "functional approach" is proposed to apply in the scenario where the armed forces of NSAs are in control of a territory of a state.(GAL, 2014, p. 72)[34] According to the ICRC Commentary to 1949 Geneva Convention IV, the protection provided by this convention 'should be applied as soon as troops are in foreign territory and in contact with the civilian population there.'(ICRC, 1958) Accordingly, once the civilian population are under the control of the enemy armed forces or has fallen into their hands, the relevant provisions of Geneva Convention IV become applicable regardless of whether or not the other requirements of the occupation are met.(ICRC, 1958) It is, consequently, acknowledged that the provisions of Geneva Convention IV can be fulfilled by 'state-like' non-state armed groups such as Hamas, Hezbollah and the Taliban.(GAL, 2014, p. 74) It is clear that the main purpose of suggesting the 'functional approach', within the context of *jus in bello*, is to provide protection to the civilians under the control of their enemy in the context of IHL. This means that the protection provided to civilians should not be affected by the lack of the fulfilment of 'occupation' provisions. Indeed, this understanding is clearly suggested to apply to UN administration, for example, in Eastern Slavonia (UNTAES), East Timor (UNTAET), and Kosovo (UNMIK/KFOR).(ICRC, 2012)

Whether control of the NSA over a territory of a state can be described as an occupation within *jus ad bellum* is a rather controversial question. The UNSC raised concerns concerning 'the safe haven [ISIS] established over significant parts of Iraq and Syria'.("UNSC Res 2249", [s.d.]) Interestingly, Germany described the control of ISIS over

[34] For more information about the 'functional approach' or 'variable-geometry theory' see (ICRC, 2012)

Iraqi and Syrian territory as "occupation".[35] Similarly, Belgium stated that 'ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not, at this time, exercise effective control', thus enabling it to launch "armed attacks" against states, and accordingly self-defence could be employed.("UN Doc S/2016/523", [s.d.], p. 523) Accordingly, this paper proposes that, from the *jus ad bellum* perspective, the extent to which occupation acts can be committed by NSAs requires employing the wide scope of the aggression definition adopted by the UNGA. This may be applicable to the conduct of state-like entities. As aforementioned, acts of NSAs might be considered as acts of aggression, particularly if there is doubt about whether a like-state entity is actually a state or not.

C. Use of Force in the Context of Self-defence

This part examines the legal implications of the use of force by NSAs within the right of self-defence. This will be done by studying the possibility of exercising state self-defence against non-state armed attacks and also investigating the right of NSAs to use force against a state as a part of self-defence.

1.Self-defence against Armed Attack of NSAs

Circumstances, wherein an armed attack is launched by a non-state armed group, constitute the subject of hot debate concerning the scope of the right of self-defence established by Article 51 of the UN Charter. This provides that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed

[35] In the letter addressed to UN the President of the Security Council, the German Permanent Mission to the UN justified its military conduct against ISIS as a part of collective self-defence after by stating that 'ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic'. ("UN Doc S/2015/946", [s.d.], p. 946)

attack occurs against a Member of the United Nations'. The question is whether a victim state can resort to self-defence when it is attacked by a non-state armed group.(FRANCK, 2001) It is well established that, under the rules of attribution, an armed attack involving armed groups can invoke the right to self-defence if the attack is attributed to a state.("Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)", 1986, para 195) The problematic situation arises, however, when considering whether a military act of an NSA would be considered an "armed attack" for Article 51 purposes where such a group is *not* under the control of a state. Despite the ICJ's approach that self-defence cannot be exercised against armed groups operating without the support of a state,("Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", 2004, p. para 139)[36] an emerging scholarly approach believes that Article 51 of the UN Charter should be interpreted in accordance with new developments in international law represented by growing the threat of NSAs.(DINSTEIN, 2012; FRANCK, 2001; KAJTÁR, 2013; RANDELZHOFER; DÖRR, 2012; TAMS, 2009) Consequently, this approach asserts that Article 51 does not require the attribution of an armed attack by an armed group to a state in order to invoke the right to self-defence.(FRANCK, 2001; TAMS, 2009) It follows that a state can exercise the right to self-defence if attacked by a non-state armed group from the territory of a third state, especially when the latter is unable or unwilling to stop such an attack. (BRUNNÉE; TOOPEA, 2018, p. 266) This debate was effectively launched after the 9/11 terrorist attacks and the invasion of Afghanistan by the US-led Coalition. The question is,

[36] The Court reaffirmed its position in the *Congo v Uganda* case by establishing that armed attack of organised armed groups can only be invoked to exercise the right of self-defence when it is attributed to states. However, the Court accepted that there is 'no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'. ("Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda", [s.d.], p. paras 146-147) The latter position of the ICJ is understood that the Court acknowledges the possibility of exercising self-defence against large-scale attacks not attributed to states. See (RANDELZHOFER; DÖRR, 2012)

accordingly, whether the US military action undertaken in Afghanistan represents the legitimate exercise of the Article 51 right to self-defence based on the classification of the Al-Qaeda 9/11 terrorist attack as an "armed attack". It is believed that state practice since 2001 has increasingly supported this approach, particularly when the UNSC acknowledged the right of the US to defend itself against Al-Qaeda terrorist attacks. The UNSC Resolution 1368 (2001) referred to 'the inherent right of individual or collective self-defence' in the context of dealing with Al-Qaeda 9/11 terrorist attack.("UNSC Res 1368", [s.d.]) Similarly, dealing with the same matter, the UNSC Resolution 1373 (2001) reaffirmed the right of states to exercise individual or collective self-defence.("UNSC Res 1373", [s.d.]) Despite the lack of explicit reference to the term "armed attack" in both resolutions, admitting the right to self-defence is an implicit acknowledgement of the existence of armed attack. This is because there would be no self-defence without an armed attack, according to Article 51 of the UN Charter.

This question of the right of self-defence against NSAs has also been raised in regard to the Western countries' airstrikes carried out against ISIS in Syria.(COUZIGOU, 2016) After many ISIS terrorist attacks in various (especially Western) countries, states such as the US,[37] UK(MOYNIHAN, 2015) and France (BOWCOTT, 2015) carried out airstrikes against ISIS in Iraq and Syria.(SHERWOOD, 2014) Iraq had already requested Coalition military support to help defeat ISIS,[38] and therefore the question of the legality of airstrikes in Iraq

[37] In its letter to the UN Secretary General, the US clearly justified its use of force in Syria as a part of individual and collective self-defence under Article 51 of the UN Charter. See UNSC, S/2014/695 (23 September 2014).
[38] In June 2014 and September 2014, Iraq sent a letter to the President of the UN Security Council seeking military assistance in fighting ISIS. The September 2014 letter stated that the Iraqi Government welcomed the commitment that was made by 26 States to provide the country '…with all necessary support in its war against ISIL, including appropriate military assistance through the provision of air cover in coordination with the Iraqi armed forces and in accordance with international law, without endangering the safety of civilians, ensuring that populated areas are not struck and respecting Iraq's sovereignty.' The letter also provided that Iraq 'in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, [has] requested the United States of America to lead international efforts to

has not arisen in the context of intervention by invitation.(DUFFY, 2015) In contrast, Syria objects to any use of force by the international collation against ISIS in its territory; however, this does not extend to its position regarding Russian military support.(VISSER, 2015) The Syrian position renders the Coalition's airstrikes against ISIS in Syria open to legal challenge.

The US, UK and France all argue that their use of force against ISIS in Syria is legally justified based on their right under UN Charter Article 51 to collective and individual self-defence.(COUZIGOU, 2016; DUFFY, 2015, p. 308; SLINEY, 2015) 'Collective self-defence' is employed because Iraq had asked for assistance in fighting ISIS, and consequently, the use of force by the international Coalition was to defend Iraq. (DUFFY, 2015, p. 308) They argue that the right to individual self-defence is a response to the threat ISIS poses, particularly to Western countries.(LANG, [s.d.]) In its letter to the UNSC, the US asserts that States ''must be able to defend themselves, in accordance with the inherent right to individual and collective self-defence'.("UN Doc S/2014/695", [s.d.], p. 695; "UN Doc S/2015/745", [s.d.], p. 745) The UK sent a similar letter to the UNSC referring to Article 51 of the UN Charter and confirming that its air strikes in Iraq and Syria are part of collective self-defence.("UN Doc S/2014/851", [s.d.], p. 851) France initially justified its military conducts against ISIS in Iraq and Syria as collective self-defence, but then after the 2015 terrorist attacks in Paris, its justification became individual self-defence.("UN Doc S/PV.7565", [s.d.]) Australia and Canada also justified their military operations against ISIS in Iraq and Syria as constituting self-defence.("UN Doc S/2015/221", [s.d.], p. 221) Germany referred to Article 51 on the right to self-defence and UNSC Resolution 2249 (2015).("UN Doc S/2015/946", [s.d.], p. 94) This Resolution was adopted after the

strike ISIL sites and military strongholds, with [its] express consent'. See UNSC, S/2014/691 (22 September 2014); UNSC, S/2014/440 (25 June 2014).

Paris terrorist attacks. It described ISIS as a 'global and unprecedented threat to international peace and security' particularly because of 'its control over significant parts and natural resources across Iraq and Syria' and 'called member states to take all necessary measures… on the territory under the control of ISIL… , in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL'.("UNSC Res 2249", [s.d.]) Belgium, similarly, justified its military participation in the war against ISIS by linking UNSC Res 2249 and self-defence.("UN Doc S/2016/523", [s.d.], p. 523)

One of the main arguments supporting expanding self-defence's scope to include self-defence against NSAs' armed attacks is the increase in supportive state practice.(TAMS, 2009) After analysing many examples of state invocations of Article 51 against NSA attacks, Tams concluded that 'the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state'.(TAMS, 2009, p. 318) In support of this position, he cited some examples, including the US use of force against Al-Qaeda,[39] the 2008 use of force by Turkey against the PKK in the North of Iraq,(TOM, 2008) and the 1998 bombardment of terrorist bases in Sudan and Afghanistan by the US in response to attacks on its embassies in Kenya and Tanzania.(LOBE, 1999)[40]

Consequently, it seems that the classification of the use of force by NSAs against states as an "armed attack" is now more acceptable. However, the scale and effects of NSA violence should have a gravity threshold in order for particular states to deem themselves able to

[39] The US use of force after the 9/11 terrorist attacks was strongly supported by states. See (FRANCK, 2001; TAMS, 2009)

[40] Other examples include Iranian use of force against the Mujahedin-e Khalq Organization base in Iraq during the 1990s, 2007 Russian air attacks against Chechen bases in Georgia, and 2008 Colombian military operations against the Revolutionary Armed Forces of Colombia—People's Army (FARC) in Ecuadorian territory. See (TAMS, 2009, p. 380)

legitimately exercise self-defence.(CRAWFORD; BROWNLIE, 2012, p. 748) The application of Article 51 of the UN Charter to the conduct of NSAs can logically create an inquiry concerning the applicability of Article 2 (4) to such actors since the meaning of "armed attack" always refers to the use of force.(RANDELZHOFER; DÖRR, 2012, p. 1409)

Using force as a part of self-defence against an NSA armed attack launched from within state territory raises concerns regarding the territorial integrity of that state, especially when it does not consent to the use of force on its territory.(COUZIGOU, 2016) In response to this concern, the "unwilling and unable" standard is proposed.(BRUNNÉE; TOOPEA, 2018; COUZIGOU, 2016; DEEKS, 2012)According to this standard, the consent of the state in which a military NSA is operating is not required for the exercise of self-defence by victim states.(DEEKS, 2012, p. 487) Under international law, every state has an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.("Corfu Channel Case (United Kingdom v. Albania)", 1949, p. 22) The failure of the state to fulfil this obligation due to its inability or unwillingness would then legally justify victim states to use force on its territory against an NSA. Indeed, different states use the "unwilling and unable" standard to justify their use of force in self-defence. This includes: the 2011 US military operation in Pakistan to kill Al-Qaeda leader Osama bin Laden without the Pakistan Government's consent;(DEEKS, 2012, p. 485) the 2014 US military operation against ISIS in Syria without the Syrian Government's consent;("UN Doc S/2014/695", [s.d.], p. 695) Turkey's military operation against ISIS in Syria in 2015;[41] and Canada,("UN Doc S/2015/221", [s.d.], p. 221) Australia,("UN Doc S/2015/745", [s.d.], p. 745) Germany("UN Doc S/2015/946", [s.d.], p. 946) and

[41] Turkey resorted to military force as an exercise of the inherent individual and collective self-defence because 'the regime in Syria is neither capable of nor willing to prevent these [ISIL] threats emanating from its territory which clearly imperil the security of Turkey and safety of its nationals'. ("UN Doc S/2015/563", [s.d.], p. 563) Turkey also justified its military conduct against Kurdish Workers' Party (PKK) as a part of self-defence and because Iraq is unable to stop PKK's attacks. (DEEKS, 2012; "UN Doc S/1996/479", [s.d.], p. 479)

Belgium("UN Doc S/2016/523", [s.d.], p. 523) all resorting to the "unwilling and unable" test to justify their military operations against ISIS.(TSAGOURIAS, 2016) This "unwilling and unable" standard significantly changes the traditions of international law.(BRUNNÉE; TOOPEA, 2018, p. 264) It is used to be mainly applicable within the law of state responsibility where the failure of the state to prevent an NSA from using its territory to attack another state would lead to international responsibility, and accordingly, countermeasures short of force would be applicable.(BRUNNÉE; TOOPEA, 2018, p. 264; "Corfu Channel Case (United Kingdom v. Albania)", 1949, p. 22; TSAGOURIAS, 2016)However, it is now suggested to be applicable within the right of self-defence. Maybe this is why it is asserted that the "unwilling and unable" test should be read within the law of necessity(LUBELL, 2017, p. 219) , meaning that exercising military self-defence should be the last resort.(LUBELL, 2017, p. 220) This means that if an armed attack of NSAs can be countered by any other means, it would not be legal to exercise self-defence.

2.NSA's Self-defence

It is clear that the self-defence discourse is mainly utilised to justify the use of force by a state as a part of its self-defence. However, there is another side to the discussion. One of the main requirements for Article 51 applicability is that a state is under "illegal" armed attack. (OCHOA-RUIZ; AGUADO, 2005) In this regard, a state cannot claim to be under an armed attack if it faces forcible measures authorised by the UNSC. This raises questions as to whether a state can still exercise self-defence against an armed attack launched by an armed group if the latter can legally justify its use of force against that state. For example, the PKK continually claims that its use of force against Turkish armed forces is in exercise of their right to self-defence. (HOSKEN, 2016) This claim is rarely examined

in academic literature, where the main focus is on the Turkish self-defence argument based on the PKK's military operations from inside Iraqi territory.(CORTEN, 2010, p. 184) Self-defense by NSAs may be considered in two distinct contexts: self-defense against their own national state and self-defense against foreign states. Both scenarios will be critically examined in the subsequent sections.

a) Self-defence against National State

The use of force by NSAs can be assumed when an armed group, operating from inside a foreign state, is attacked by its state of nationality. An example of such scenario is the use of force by the PKK against Turkish forces in Iraq.(HOSKEN, 2016) This scenario basically involves the NSA's extra-territorial use of force against its own state and is mainly regulated by domestic law rather than international law. However, it is also examined under international law under the term of the right to rebellion or the right to resist.[42] Even with the assumption that the threshold of force between both parties reaches the levels necessary to be classified as a NIAC, nationals of states do not have the right to combat in NIACs. If captured, they may be prosecuted for mere fighting by their state.("Internal conflicts or other situations of violence – what is the difference for

[42] The legal reference to the right to rebellion is believed to be clearer regionally. For example, Article II of the 1981 Universal Islamic Declaration of Human Rights provides that every person has the right to freedom and 'shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle'. Universal Islamic Declaration on Human Rights art. II Right to Freedom (1981). Article 20(2) of the African Charter of Human and Peoples' Rights (1981), is interpreted to include an acknowledgement of right to rebellion. This article provides that 'colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community'. In the context of advancing the right of people to peace, the UN Human Rights Council Advisory Committee proposed three standards:

1. All peoples and individuals have the right to resist and oppose oppressive colonial or alien domination that constitutes a flagrant violation of their human rights, including the right of peoples to self-determination, in accordance with international law.
2. All individuals have the right to oppose war crimes, genocide, aggression, apartheid and crimes against humanity, violations of other universally recognized human rights, any propaganda in favour of war or incitement to violence and violations of the human right to peace, as defined in the present declaration.

See (HUMAN RIGHTS COUNCIL, [s.d.]) See also (LIPPMAN, 1990)

victims?", 2012) The criminalisation of military acts of rebels against their states by domestic law does not mean that such acts are prohibited by international law.(BELLAL; DOSWALD-BECK, 2011, p. 14)

National law references the right to rebellion. The American Declaration of Independence (1776) gave the right to people to rebel against any government that violates their inalienable rights.(THE AMERICAN DECLARATION OF INDEPENDENCE, 1776) Article 2 of the 1789 French Declaration of the Rights of Man and Citizens classified "resistance to oppression" as one of the natural and imprescriptible rights of man.("French Declaration of the Rights of Man and Citizens", 1789) Similarly, the French Declaration of the Rights of Man and Citizens (1793) affirmed that '[r]esistance to oppression is the consequence of the other rights of man'("Declaration of the Rights of Man and Citizens", 1793, p. art 33) and that '[t]he law ought to protect public and personal liberty against the oppression of those who govern.'("Declaration of the Rights of Man and Citizens", 1793, p. art9) Accordingly, when the rights of people are violated by the government, insurrection would be legally justifiable.("Declaration of the Rights of Man and Citizens", 1793, p. art 35) Article 20 (4) of the 1949 German Basic Law provides that '[a]ll Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available'.("Basic Law for the Federal Republic of Germany", 1949, p. art 20 (4)) The Portuguese Constitution of 1976 provides similar text by recognising the right of everyone to 'resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression'.("Portugal's Constitution of 1976 with Amendments through 2005", [s.d.], p. art 21)

Although there has been debate as to whether international law recognises the "right to rebellion",(HONORÉ, 1988) it has always been described as indifferent. (REDAELLI, 2017, p. 8) Explicit acknowledgement of this right in international law, encourages some to deny its existence.(HONORÉ, 1988; REDAELLI, 2017, p. 8) Others, however, try to recourse to human rights law to support the existence of the right to rebel at the international level. For example, the Preamble of the Universal Declaration of Human Rights provides that 'whereas it is essential, if man is not to be compelled to have recourse, as a last resource, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.("Universal Declaration of Human Rights", [s.d.]) It is suggested that the right to rebellion must be acknowledged in order to respect and remedy fundamental human rights, and accordingly, the right to rebel is not a primary but a secondary right.(BELLAL; DOSWALD-BECK, 2011, p. 11; HONORÉ, 1988, p. 38) 'It exists only when a wrong has been committed. Its point is to provide remedy in the event of the violation on large scale of primary rights like the right to freedom from arbitrary arrest'.(HONORÉ, 1988, p. 38) In conclusion, international law neither establishes nor prohibits the right to rebel. Additionally, many recognised governments came into power through rebellion, thus proving that international law does not prohibit the right to rebel in certain circumstances.(BELLAL; DOSWALD-BECK, 2011, p. 13) Article 10 of the ILC Articles on State Responsibility arguably recognises this possibility.[43]

b) Self-defence against Foreign State

Another scenario envisages the use of force by an NSA as a part of self defence against an attack launched by a foreign state. This situation is particularly assumed when an NSA is

[43] Article 10 (1) of the ILC Articles on State responsibility provides that 'The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law'. (INTERNATIONAL LAW COMMISSION, [s.d.])

stronger than its national state. An example of this is the superior military capability of Hezbollah compared to the weakness of its national state Lebanon's official military.(JANABY, 2016a) The question arises as to whether Hezbollah can exercise self-defence to counter an armed attack launched by Israel against it on Lebanon's territory. The answer to this question would rely on the nature of the relationship between the armed group and the national state, and whether the latter has control over the NSA or consents to the use of force against the foreign attack. If the state has control over the NSA, the self-defence of such an actor would be seen as the use of force by the state itself.("Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)", 1986) However, as in the Hezbollah example, it is unlikely a state can have control over the NSA. In this case, it may be necessary to consider whether the national state consents to the use of force by the NSA to defend the territory under the latter's control.[44]

The nature of the attack may also be examined in order to decide if the NSA can exercise self-defence against a state. If the attack is described as "invading forces", then the use of force by the armed forces of the NSA may be legally justified. International law does recognise the right of '[i]nhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces'.("Geneva Convention (III) relative to the Treatment of Prisoners of War", 1949, art. 4 (6)) If invasion led to territorial occupation, the use of force by a local NSA might be seen as the use of force against alien occupation("Additional Protocol (I)", [s.d.]) , which would be characterised as the right to resistance under IHL.(RAZMETAEVA, 2014)

[44] See of example the effect of the state consent on the classification of the armed conflict between NSAs and a state, (BLOOM, 2008)

Consequently, the use of force by NSAs should be examined under both national and international law in order to conclude the legality of self-defence. Since the use of force by NSAs can have international legal implications, it is submitted that the time has come to interpret the prohibition of the use of force rule to be applicable to NSAs. The extension of Article 51's applicability to NSAs can clearly support this claim.

IV. Conclusion

In spite of the view that calls for the adoption of a new interpretation of the UN Charter,[45] the applicability of the prohibition of the use of force to NSAs does not explicitly stem from Article 2 (4) of the UN Charter. This Article is only applicable to states, and NSAs cannot be addressed by it. However, this paper has found that the 'actorness' of NSAs such as ISIS forms the main source for the application of a prohibition of the use of force to such actors. It was shown that there is evidence that the use of force by NSAs has legal implications at the international level. Their acts can constitute a threat to international peace and security, which accordingly should logically be prohibited. It is also internationally accepted that acts of NSAs can represent "armed attacks". Such classification would justify a state in exercising its UN Charter, Article 51 right to self-defence against armed NSAs. "Armed attacks" that justify the resort to self-defence are legally prohibited, and accordingly NSAs should internationally be banned from such illegal uses of force. This paper also found that NSA can constitute a "*de facto* occupying power". ISIS, for example, have proved its ability to have effective control over large areas of territory belonging to states such as Iraq and Syria. Such acts would fit with the meaning of 'aggression', which extends to include, among others, invasion and

[45] It is believed that 'the [UN] Charter regime on the use of force, notwithstanding its fundamental importance or even its role as a cornerstone, has been anything but static… [and] the international community has not formally amended the Charter rules, but has re-appraised them through interpretation'. See Tams, 360.

occupation. Aggression is an illegal act, and with the adoption of the wide meaning of the UNGA definition of aggression, NSAs should be obliged to refrain from it.

A further source of the prohibition of the use of force by international terrorist organisations is that the prohibition principle is universally accepted as a *jus cogens* rule. As such, this rule should be respected by *all actor*s and not only by states. NSAs are obliged to respect human rights, particularly those that are *jus cogens*. The use of force by NSAs would certainly lead to the breach of such rules. The consequence of accepting the conclusions of this paper is that key figures within NSAs might one day face the jurisdiction of the ICC for acts of aggression as well as for war crimes and crimes against humanity and that the use of force by such actors should be dealt with in the same way as states' use of force.

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