

# Humanising the Right of Self-Defence

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Non-state actors have occupied the landscape of *jus ad bellum* discourse for some time now, with the focus of the discussion occasionally shifting as a result of contemporary international events. Nowadays, the discussion focuses on whether self-defence against non-state actors may be exercised in the territory of another state without its consent. States and scholars have been increasingly resorting to the “unable or unwilling” test in this context, which allows self-defence to be invoked where a state (hereinafter: “the territorial state”) is either unwilling or unable to effectively repel an armed attack carried out from within its territory.

Although backed by decades-long practice, the “unable or unwilling” test has only recently attracted significant attention. Critics argue that it undermines the sovereignty of the territorial state as well as the prohibition on the use of force (enshrined in Art. 2 (4) of the Charter of the United Nations [UN Charter]), while proponents highlight the inherent right of any state to defend itself against armed attacks (acknowledged in Art. 51 of the UN Charter). Much of the debate tends to focus on the normative status of the test, and specifically on whether it is *lex lata* or *lex ferenda*. I would like to approach the issue from a different angle and focus instead on the assumptions underlying the various arguments, with the hope that doing so will reveal both their implications and where they fall short.

Critics of the test often emphasise that the territorial state is not responsible for the armed attack in question, and they consequently base their objection on two grounds. First, it is argued that self-defence can only be invoked vis-à-vis an actor if it had violated the prohibition on the use of force. As the territorial state has not violated this prohibition – because it is not “substantially involved” in the attack,<sup>1</sup> and because the attack cannot be attributed to it – the use of force in its territory is not covered by self-defence. I will call this *the symmetry argument*. Second, the critics claim that because the territorial state is not responsible for the attack it should not suffer the consequences attached to self-defence, namely infringement of sovereignty,

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<sup>1</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 103 (June 27).

harm to persons and damage to infrastructure. I will call this *the unjustified effects argument*.

These two arguments merit serious consideration, and I shall address them one by one. As noted above, the symmetry argument assumes that self-defence may only be invoked vis-à-vis an actor which had violated the prohibition on the use of force. However, there is nothing in the Charter or in *jus ad bellum* generally that supports this assumption. While self-defence is indeed an exception to the prohibition to use force, the relationship between the two norms is not symmetrical; a violation of the prohibition to use force is not necessary for the right of self-defence to arise.<sup>2</sup> It is therefore unsurprising that Art. 51 refers only to the existence of an armed attack – regardless of the actor that had carried out the attack – and does not limit the application of the right of self-defence to actors of a certain type.<sup>3</sup> Of course, this does not mean that the right is open-ended; its parameters are curtailed by requirements such as necessity and proportionality.

The unjustified effects argument is likewise problematic. By claiming that the territorial state is not responsible for the attack and should therefore not suffer the consequences of the response to an attack emanating from its territory, the argument essentially prefers the territorial state over the victim state. This preference seems arbitrary. If none of these states is responsible for the armed attack, why should the territorial state be preferred? After all, even if the territorial state is not to be blamed for the attack – and that is often not the case – the unjustified effects argument equally applies to both states.

Moreover, as the armed attacks carried out by non-state actors nowadays affect an increasing number of people, it is necessary to think of self-defence not only through a prism of abstract concepts such as sovereignty and territorial integrity but also by considering its effect on the lives and well-being of real individuals. Once we view self-defence this way, it becomes clear that any legal position we adopt effectively prefers the lives of certain individuals over those of others. Which lives should we prefer? I would like to consider three options and their humanitarian implications.

First, it is possible to prefer those residing in the territorial state, as the critics do, and leave the victims helpless. Alternatively, it is possible to pre-

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<sup>2</sup> Even scholars who argue that armed attacks by non-state actors do not violate the prohibition on the use of force nevertheless support the invocation of self-defence against these same actors. See, for example: O. Corten, *The Law Against War*, 2010, 128 et seq.

<sup>3</sup> This argument is widely used to explain why self-defence may be invoked against non-state actors as well as against states. As used here, however, it indicates that self-defence may be invoked not only vis-à-vis the author of the attack but also vis-à-vis other relevant parties, including the territorial state.

fer, completely and unconditionally, the victims of the armed attack and allow the *immediate* exercise of self-defence. Finally, it is possible to strike a middle ground, as the “unable or unwilling” test does, and adopt a *varying* preference: The territorial state is accorded the opportunity to repel the armed attack by itself, but if it is unable or unwilling to do so, the victim state is allowed to act subject to the usual conditions for self-defence.

Each of these three options prefers the citizens of one state over the citizens of another, and each preference must be justified convincingly. Arguably, the “unable or unwilling” test justifies its own preference more persuasively than the other two options, and, by not rendering victims of armed attacks helpless, the balance it strikes better captures the underlying rationale of self-defence.

At the same time, the three options are hardly exhaustive. In a world where conflicts vary greatly, any proper interpretation of self-defence must pay attention to details. For example, it is difficult to see why states *unwilling* to repel attacks should be treated the same as states *unable* to do so. It is also unclear whether the law should be as restrictive in situations where the defensive response exclusively affects lawful targets with no humanitarian costs. Differences in facts should translate to differences in law, and while we do not yet have a sufficient level of nuance in the law, we should nevertheless strive to achieve it.

