



Two or more wrongs make a right? – The evolution of the customary right of self-defence in the post 9/11 era, and the effect of ‘unlawful’ state behaviour on the formation of custom on the right of self-defence against non-state actors

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Thesis Presented for the Degree of
DOCTOR OF PHILOSOPHY
in the Department of Public Law
Faculty of Law
UNIVERSITY OF CAPE TOWN

March 2021

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Dedication

To my parents,

Arife and Ziya Kislá

Acknowledgements

As the PhD experience is an academically and personally challenging task, I am incredibly grateful for the encouragement and support I have received throughout this experience.

This thesis is dedicated to my parents, Arife and Ziya Kisla, who always stood behind me and believed in the path I had chosen. I cannot thank you enough for the sacrifices you made in order to enable me to go to university and follow my dreams. My deepest gratitude also goes to the rest of my family. Derya, Deniz, Seda and Elif supported me on this journey no matter the obstacles I faced.

I am deeply grateful for the guidance, dedication and encouragement of my supervisor, Cathleen Powell. Whether it was a holiday or the weekend, Cathy always took the time to provide invaluable feedback. Our insightful discussions and your mentorship were key pillars of this experience and my personal development as a scholar.

I am tremendously grateful for the support of my partner Gillian, whose patience and optimism carried me through the crucial last stages of this PhD journey when I would usually disappear for hours behind the screen of my laptop. I am sincerely thankful for the friends I made during this incredible experience whose company and empathy very often saved the day.

I would also like to show my utmost respect and thanks to the administrative staff at the University of Cape Town. I would like to thank Maurice and Patricia from the law faculty specifically as your door was always open. I am also sincerely grateful for the support from the entire law library team: Sadiq, Zoelfa, Anthea and Chezlen – you provided a perfect environment to conduct such research.

In a pandemic that has changed and challenged our lives in so many ways, today I feel nothing but gratitude for being in this ineffable and privileged position of finishing this chapter of my life.

List of Abbreviations

AU	African Union
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ISIS	Islamic State of Iraq and Syria
NAM	Non-Aligned Movement
NSA	Non-State Actor
OAS	Organisation of America States
PKK	Kurdish Workers' Party
SAS	Specially Affected States
UK	United Kingdom
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

Abstract

The attacks of 9/11 constitute a crucial point in the development of the right of self-defence against a non-state actor in customary international law. More and more states used force against non-state actors while claiming their right of self-defence in the post-9/11 era. Situations such as the US fight against the Taliban in Afghanistan, Russian attacks on Chechen fighters in Georgia or the fight against ISIS in Syria raise the question of whether the customary right of self-defence is still unchanged. While most of such situations were considered unlawful uses of the right to self-defence, this thesis focuses on the question of whether customary international law in this respect has evolved to allow for some of such uses of force.

Building on a discussion of the theoretical framework of the formation of custom, this thesis examines traditional as well as non-traditional approaches to the elements of state practice and *opinio juris*. I then analyse the widely held view in the scholarship that the customary right to self-defence has not changed. As I identify weaknesses of such examinations of the customary right of self-defence, this thesis examines an alternative approach to the formation of custom. As an alternative, I discuss the applicability and requirements of the doctrine of specially affected states and re-examine the situations from the 21st century when states exercised their right of self-defence against non-state actors. The thesis argues that, if one were to apply the doctrine of specially affected states, one can argue that the customary right of self-defence against non-state actors has changed. To prevent abuse of such an interpretation, I discuss to what extent *opinio juris* or other sources of international law could limit such a formation of custom. In the example of the right of self-defence, this thesis analyses to what extent a re-interpretation of the element of *opinio juris* is required and how concepts like *jus cogens* or general principles of international law could be employed as limiting factors to such a formation of custom resulting from the doctrine of specially affected states.

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Chapter 1. Introduction

On many occasions during my early career, I had the opportunity to speak to high-ranking diplomats in the German Foreign Ministry and the Ministry of Defence. When I asked about the German position on the issue of whether, under Article 51 of the UN Charter, an armed attack from a non-state actor might entitle a state to use force in self-defence, I usually received more or less the same answer. People consulted on the issue responded that they would definitely not have said so two or three years ago, but now their point of view was that an armed attack might come from a non-state actor and trigger the right of self-defence.

For me, this raised the question of what has changed for states within such a short period of time. It also raised the question of what such a right of self-defence against a non-state actor ('NSA') looks like and whether it sets out the same requirements as does the right of self-defence against states. This was the starting point of the research question in this thesis, which examines whether the right of self-defence under customary international law has changed. Specifically, I focus on the exercise of the right of self-defence against an NSA and whether customary international law in this respect has changed in the post-9/11 era.

After the terrorist attacks of 9/11, the United States ('US') invaded Afghanistan with the legal justification that it was exercising its inherent right of self-defence.¹ The same justification was used by Israel when it launched a

¹ John Negroponte 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', 7 October 2001, UN Doc S/2001/946.

large-scale military campaign against Hezbollah on Lebanese territory.² In the instances of drone warfare in Somalia (since 2011), Yemen (since 2002) and Pakistan (since 2004), the US also claimed that its use of force was justified by the right of self-defence.³ After the terrorist attacks in November 2015 in Paris, France also claimed that it was exercising its right of self-defence when it attacked ISIS on Syrian territory.⁴ When we consider the conduct of states in the 'war against terrorism' over the last 19 years, it appears that the right of self-defence has never been more crucial in international law and has never been claimed more extensively.

Against the background of the use of force under the right of self-defence in the post-9/11 era, I examine whether the use of force against NSAs has changed customary international law, bearing in mind that such instances of the use of force were regarded as unlawful by a number of scholars at the time.⁵ Several post-9/11 situations, such as the US attacks against al-Qaeda in Afghanistan, the US drone warfare in Pakistan and Yemen, and the fight against ISIS in Syria, will guide the examination of the use of force throughout this thesis.

² Dan Gillerman 'Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council', 12 July 2006, UN Doc A/60/937-S/2006/515 at 1.

³ See The Bureau of Investigative Journalism 'Get the data: Drone wars' available at <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last accessed 5 January 2021); Jane Mayer 'The predator war' *The New Yorker*, 26 October 2009, available at <https://www.newyorker.com/magazine/2009/10/26/the-predator-war> (last accessed 5 March 2021); Greg Miller 'CIA said to use outsiders to put bombs on drones' *LA Times*, 13 February 2009, available at <https://www.latimes.com/archives/la-xpm-2009-feb-13-fg-uspakistan13-story.html> (last accessed 18 December 2020).

⁴ Ben Doherty 'France launches "massive" airstrike on ISIS stronghold of Raqqa' *The Guardian*, 16 November 2015, available at <https://www.theguardian.com/world/2015/nov/16/france-launches-massive-airstrike-on-isis-stronghold-in-syria-after-paris-attack> (last accessed 23 February 2020).

⁵ See JJ Paust 'Use of armed force against terrorists in Afghanistan, Iraq, and beyond' (2002) 35 *Cornell Int'l LJ* 533; M Bothe 'Terrorism and the legality of pre-emptive force' (2003) 14 *European Journal of International Law* 227; O Corten 'The "unwilling or unable" test: Has it been, and could it be, accepted?' (2016) 29 *Leiden Journal of International Law* 777; C Kress 'Some reflections on the international legal framework governing transnational armed conflicts' (2010) 15 *Journal of Conflict & Security Law* 245.

I argue that there has been a shift in exercising and applying the customary right of self-defence against NSAs in the 21st century, compared to its use in the 20th century. The conduct by a group of states suggests that they have attempted to extend the scope of application of the right of self-defence with concepts like 'pre-emptive self-defence', the 'unwilling or unable' test, or lifting the territorial limitation on the right of self-defence.⁶ However, are the developments of the post-9/11 era still in line with the current understanding of the right of self-defence or has the customary right of self-defence changed? While the predominant view in the scholarship did not find a legal basis for such use of force, other legal opinions seem to find such use of force acceptable. However, they could not agree on a legal basis for it.⁷ On the basis of the specially affected states (SAS) doctrine and a particular reading of customary international law, I argue against the prevailing view in the scholarship. After a discussion of the requirements and the scope of the SAS doctrine, I argue, on the basis of an analysis of several post-9/11 situations, that the customary right of self-defence has changed. To support my argument, I present and explain the failings in the prevailing view in the scholarship that there has not been a shift of customary international law on the right of self-defence.⁸

⁶ See National Security Strategy of the United States, September 2002 at 6; Department of Justice *White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qaeda or an Associated Force* (hereinafter: *White Paper*), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf> (last accessed 12 January 2021) at 3; Sergey Lavrov 'Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, 12 September 2002', 11 September 2002, UN Doc S/2002/1012; Samantha Power 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' 23 September 2014, UN Doc S/2014/695.

⁷ See Paust (n 5) at 557; J Brunnée & SJ Toope 'Self-defense against non-state actors: Are powerful states willing but unable to change international law?' 2017 *International and Comparative Law Quarterly* 1; Corten 'The "unwilling or unable" test' (n 5); Kress (n 5) at 250.

⁸ See Brunnée & Toope 'Self-defense against non-state actors' (n 7) at 23–24; Corten 'The "unwilling or unable" test' (n 5); K Tibori-Szabó 'The "unwilling or unable" test and the law of self-defence' in *Fundamental Rights in International and European Law* (2016).

A discussion of how such a change in customary international law may fit into the concept of international law is essential in this context. Therefore, I go on to illustrate the elements that might limit the formation of custom if a small group of states were to shape and steer the formation of customary international law in such an important area.

Chapter 2 starts with an introduction to the right of self-defence against the background of its use in the 21st century. This chapter focuses on states exercising the right of self-defence in the post-9/11 era and especially the use of force against non-state actors like al-Qaeda or ISIS. This will also involve an overview of the political situation in the 'war against terrorism'. In addition, I illustrate the nature and origin of the right, which is crucial for the assessment throughout the thesis. This discussion will involve an examination of the requirements of the right, particularly the *Caroline* requirements.⁹

Chapter 3 examines the question of how customary international law is established. The theoretical framework is essential for the chapters that follow. The research question is whether customary international law of the right of self-defence has changed. In this regard, chapter 3 introduces the concept of general custom and particular custom.

Article 38 of the Statute of the International Court of Justice ('ICJ') describes customary international law as 'international custom, as evidence of a general practice accepted as law'.¹⁰ Article 38 of the ICJ Statute reveals the two requirements of the positivist, traditional approach to custom, which are state practice and *opinio juris*. This part of the thesis illustrates the current views on the traditional approach to the formation of customary international law based

⁹ 'Caroline case' (1837) 29 *British and Foreign State Papers* at 1137.

¹⁰ Article 38 of the ICJ Statute.

on international jurisprudence, such as the *North Sea Continental Shelf* cases, the *Asylum* case, and the *Nicaragua* case.¹¹ Against this background, I conduct an in-depth analysis of the requirements of the traditional, positivist approach. Within this analysis, I focus on the relationship between state practice and *opinio juris*. The International Law Commission ('ILC') concludes that *opinio juris* is 'a general practice that is accepted as law' and must be distinguished from mere usage or habit.¹² In an ideal scenario, the practice-related behaviour and the normative element contained in the *opinio juris* would be balanced.¹³ However, as Koskenniemi observed, such a separation of state practice and *opinio juris* is impossible to sustain in reality.¹⁴ While I agree with Koskenniemi that the constitutive elements of custom are indistinguishable, I will maintain the structural separation of those two elements for the purpose of this thesis since it remains the predominant view in the scholarship. The consequences of the circularity of state practice and *opinio juris* will lay the foundation for understanding custom in this thesis and specifically in the subsequent chapters. Besides discussing the constitutive elements of custom, I examine the extent to which the inactivity or silence of a state can be interpreted as confirmation of a customary rule.

¹¹ *Asylum* case (*Colombia v Peru*), ICJ Judgment, 20 November 1950 (hereinafter: *Asylum* case) at 255–257; *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) ICJ Judgment, 20 February 1969 (hereinafter: *North Sea Continental Shelf* cases) paras 72–78; *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ICJ Judgment, 27 June 1986 (hereinafter: *Nicaragua* case) para 184.

¹² Conclusion 3, Report of the ILC, 70th Session, 30 April to 1 June and 2 July to 10 August 2018, UN Doc A/73/10 (hereinafter: 'ILC Report 2018') at 119.

¹³ M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (2006) 410–411; see also A Alvarez-Jiménez 'Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000–2009' (2011) 60 *International & Comparative Law Quarterly* 681 at 687–689.

¹⁴ See Koskenniemi *From Apology to Utopia* (n 13) 431, 434.

Chapter 4 introduces the widely held view in the scholarship that the rule of customary international law on the right of self-defence has not changed.¹⁵ This chapter will analyse several examinations of state practice and *opinio juris* regarding the right of self-defence. The current scholarship focuses largely on the consistency of state practice regarding the application of the 'unable or unwilling' test. It appears that developments within the right of self-defence are often considered as isolated events. The scholarship seems to pay insufficient attention to *opinio juris* and alternative approaches to the formation of custom.¹⁶ Therefore, I also examine Brunnée and Toope's interactional approach; they argue that there has not been any shift of customary international law regarding the 'unwilling or unable' test.¹⁷

In chapter 5, I argue that customary international law on the right of self-defence against NSAs has changed and I contest the views outlined in the previous chapter. The basis of this argument is an analysis of custom through the lens of the SAS doctrine. The starting point of this examination are the *North Sea Continental Shelf* cases, where the ICJ concluded that:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative

¹⁵ See Brunnée & Toope 'Self-defense against non-state actors' (n 7). See also AS Deeks 'Unwilling or unable': Towards a normative framework for extraterritorial self-defense' (2012) 52 *Virginia Journal of International Law* 483 at 549–550; O Corten *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2010) 785–791; Corten 'The "unwilling or unable" test' (n 5) at 797–798; Tibori-Szabó (n 8).

¹⁶ See Brunnée & Toope 'Self-defense against non-state actors' (n 7). See also Deeks (n 15) at 549–550; T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal of Conflict and Security Law* 289; T Reinold 'State weakness, irregular warfare, and the right to self-defence post-9/11' (2011) 105 *American Journal of International Law* 244; CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359; Cf Corten 'The "unwilling or unable" test' (n 5) at 797–798; Tibori-Szabó (n 8) 86.

¹⁷ Brunnée & Toope 'Self-defense against non-state actors' (n 7) at 20.

participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.¹⁸

I illustrate the legal basis for and the support by states and scholarship for the SAS doctrine. In addition, I discuss the criteria of the SAS doctrine and explain how it applies in relation to principles on the formation of general custom. I therefore link the discussion of the SAS doctrine to the discussion of the legal framework in chapter 3. On this basis, I analyse state practice and *opinio juris* with reference to post-9/11 situations. In all the situations discussed, a state exercised its right of self-defence against an NSA in another state. I argue that states like the US, the UK, France, Russia, Yemen and Syria qualify as SAS, and I illustrate how this qualification might assist the development of a new rule of customary international law. On the premise that the customary right of self-defence has changed, I discuss the terms of the new rule that has developed. As the ICJ has already established that the right of self-defence under customary international law and Article 51 of the UN Charter 'do not overlap exactly', the separation of the right of self-defence under treaty law and customary law appears to be crucial.¹⁹ I further point out that one must distinguish between the customary right of self-defence against states and the right of self-defence against NSAs. On this basis, I illustrate how the unwilling or unable test fits into the new developed customary right and that it has replaced the traditional attribution test, which requires effective control.

Chapter 6 introduces a more abstract discussion of the constraints on custom formation observed in chapter 5. I discuss how the element of *opinio juris* might have to be re-thought in order to become a more objective element that is anchored within normative elements. I also examine the extent to which the general principles of international law can be employed in the interpretation

¹⁸ *North Sea Continental Shelf* cases (n 11) para 73.

¹⁹ *Nicaragua* case (n 11) para 176.

of *opinio juris* and as a stand-alone tool to limit custom formation. Furthermore, I examine how *jus cogens* may be employed to limit or guide the formation of custom. Ultimately, I discuss how the constraints presented in this chapter might affect the formation of custom as discussed in chapter 5.

Chapter 7 concludes the thesis and gives an overview of the main findings of each chapter. I further present the main submission of this thesis, which is that the customary right of self-defence against NSAs has evolved and includes the unwilling or unable test. As I show throughout this thesis, such a submission is based on a particular reading of the formation of customary international law.

Chapter 2. The right of self-defence: Theory and practice in the post-9/11 era

The post-9/11 era and the growing threat by non-state actors ('NSAs') in the 21st century illustrated that international law was not capable of dealing with NSAs that operate transnationally. This chapter starts with an introduction to the origins of the right of self-defence and the requirements for when a state can act in self-defence as well as how a state must exercise its right of self-defence. This thesis submits that if the customary right of self-defence against NSAs has changed, and if the unwilling or unable test forms part of it, key requirements like an armed attack or the *Caroline* requirements must still be applied. Therefore, a basic understanding of those requirements is crucial to understanding the limited scope of change that can be derived from a change of custom in the form of the unwilling or unable test.

This chapter provides an overview of the legal challenges posed by the 'war on terrorism' and of how jurisprudence, scholarship and state practice have attempted to deal with the issue of exercising the right of self-defence against NSAs. Key questions that have emerged in the post-9/11 era are:

- Can an NSA mount an armed attack against a state?
- What standard of attribution must be applied if a victim state uses force against an NSA within the territory of another state?
- Is attribution required at all in order to determine whether a state might act in self-defence against an NSA?

As I discuss further below, the view that an armed attack might emanate from an NSA is growing. If we accept this premise, the requirement of attribution might become superfluous. As I suggest in this chapter, the ICJ jurisprudence on this issue does not provide any clarity since the court addressed the question whether self-defence is lawful if an NSA can be attributed to a

territorial state.¹ In this context, the post-9/11 era represents a time where states tried to fill that gap in international law. I submit that the application of the doctrine of safe haven, the Bush doctrine and the unwilling or unable test are the outcome of that era. While an entire thesis could be written on each aspect or question discussed in this chapter, I intend to provide an overview of the various questions that may have an effect on the application and scope of the unwilling or unable test.

I. Nature and origin of the right of self-defence

The principle of self-defence derives from the principle of self-help, which exists in all primitive legal systems.² Against this background, self-defence can be regarded as a permissible form of 'armed self-help'.³ Furthermore, the principle of self-defence is based on the condition that the parties to a conflict cannot lawfully use force at the same time.⁴

The defining moment of the right of self-defence under customary international law goes back to the *Caroline* case in 1837.⁵ In the aftermath of the *Caroline* incident, the British authorities and the US Secretary of State laid down the essential elements of self-defence.⁶ They agreed that there had to be 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.⁷

¹ I regard territorial states as states where an NSA is located that is being targeted as the result of another state exercising its right to self-defence. See also chapter 5.II.1.

² See Y Dinstein 'International law as a primitive legal system' (1986) 19 *NYUJ Int'l L & Pol* 1 at 12.

³ See also Report of the International Law Commission, 32nd Session [1980] II (2) ILC Ybk 1 at 54; TR Krift 'Self-defense and self-help: The Israeli raid on Entebbe' (1977) 4 *Brook J Int'l L* 43 at 55-56.

⁴ Y Dinstein *War, Aggression and Self-Defence* 5ed (2011) 190.

⁵ RY Jennings 'The Caroline and McLeod cases' (1938) 32 *AJIL* 82. It should be noted that in the *Caroline* case was an example of self-defence against an NSA.

⁶ MN Shaw *International Law* 8 ed (2017) 861.

⁷ *Ibid* 861.

The nature of the right of self-defence has to be reviewed against the background of the prohibition on war and the use of force, and the development of international law. Until the beginning of the 20th century, the right of self-defence had almost no significance in international law. It constituted a mere political excuse for a state to use force.⁸ The principle of self-defence became more critical only when the universal liberty to wage war was condemned by Article 1 of the Briand-Kellogg-Pact in 1928.⁹ The Briand-Kellogg-Pact initiated a progression from the *jus ad bellum* (law on the use of force) to the *jus contra bellum* (law on the prevention of war).¹⁰ However, this progression had some major weak points, one of which was that the right of self-defence was not addressed at all in the text of the treaty.¹¹ Eventually, the right of self-defence found its way into the UN Charter.

Article 51 of the UN Charter states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹²

⁸ See R Ago, acting as Special Rapporteur of the ILC 'Addendum to the Eighth Report on State Responsibility' (1980) 2(1) *ILC Yearbook* 13, 52; see also Jimenez de Arechaga 'International law in the past third of a century' (1978) 159 *RCADI* 1 at 346.

⁹ See J Verhoeven 'Les "etirements" de la legitime defence' (2002) 48 *AFDI* 49, 52; Article 1 Briand-Kellogg-Pact.

¹⁰ See M Howard '*Temperamenta belli: Can war be controlled?*' (1979) *Restraints on War* 1, 11.

¹¹ Dinstein (n 4) 192-193.

¹² Article 51 of the UN Charter.

Article 51 of the UN Charter must be read in conjunction with Article 2(4), which is the prohibition on the use of force. Under Article 2(4) of the UN Charter, any member state should refrain 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 UN.¹³ As I illustrate throughout this thesis, more and more states are using the right of self-defence against NSAs in the post-9/11 era. This has raised the question in the scholarship whether the inter-state reading of Article 51 of the UN Charter, which is derived from Article 2(4) of the UN Charter, still applies.¹⁴

With regard to the nature of the right, the legislative history of Article 51 of the UN Charter indicates that the purpose of the entire clause was to serve more as an approval of regional security arrangements, rather than to fulfil the function it does today.¹⁵ The French version of Article 51 of the UN Charter renders 'inherent right' as '*droit naturel*' which may be translated as 'natural law'.¹⁶ According to the *travaux préparatoires*, the negotiating states also discussed when the right of self-defence may be used. For instance, Turkey proposed that the right of self-defence should be used only in a case of emergency or where a state was being attacked.¹⁷ Other states supported the idea that the Security Council should authorise the exercise of the right in 'cases of immediate danger'.¹⁸

¹³ Article 2(4) of the UN Charter.

¹⁴ See KN Trapp 'Can non-state actors mount an armed attack?' in *The Oxford Handbook on the Use of Force in International Law* (2015) 679–696; N Tsagourias 'Self-defence against non-state actors: The interaction between self-defence as a primary rule and self-defence as a secondary rule' (2016) 29 *Leiden Journal of International Law* 801; C Stahn 'Terrorist acts as armed attack: The right to self-defense, article 51 (1/2) of the UN Charter, and international terrorism' (2003) 27 *Fletcher F World Aff* 35.

¹⁵ Dinstein (n 4) 189.

¹⁶ Article 51 of the UN Charter (French version); see also Dinstein *ibid* 191.

¹⁷ United Nations Conference in International Organisations, San Francisco 1945, Amendments to Dumbarton Oaks Proposals, Vol XXII at 781.

¹⁸ *Ibid* at 681.

According to Article 51 of the UN Charter, the right of self-defence is an inherent right of a state.¹⁹ According to the ICJ, the right of self-defence is a fundamental right of a state, which is necessary to ensure its survival. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* case, the ICJ stated that:

Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.²⁰

Some commentators argue that self-defence is not only a right but, more importantly, a duty.²¹ However, as Dinstein pointed out, such an argument is not 'in conformity with international law' and 'a state subjected to an armed attack is vested with a right, hence an option, to resort to counter-force'.²²

I submit that based on the origin of the right of self-defence, which is derived from the principle of self-help, and the arguments that were presented during the negotiations on the UN Charter, one may argue that the right of self-defence has a defensive character and that it should be a reaction to a situation of attack or threat.

II. Requirements of the right of self-defence

This section presents the settled requirements for exercising the right of self-defence. As these requirements will form part of the discussion throughout this thesis, it is essential to have a basic understanding of them in relation to

¹⁹ Article 51 of the UN Charter.

²⁰ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996 (hereinafter: *Nuclear Weapons* case) at 263 para 96.

²¹ E Vattel *The Law of Nations or the Principles of Natural Law* Book III (1916) 246.

²² Dinstein (n 4) 191.

the right of self-defence against an NSA. Therefore, I will provide a summary of the requirements of the right of self-defence.

1. Armed attack

Article 51 of the UN Charter states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations

In other words, an armed attack is a key element for exercising the right of self-defence. There are different facets to the requirements for an armed attack. There has been a lively debate about whether the formulation 'an armed attack occurs' also includes anticipatory or pre-emptive self-defence.²³ While Tams pointed out that there is a 'move towards accepting the doctrine of anticipatory self-defence',²⁴ I explain further below that the doctrine of pre-emptive self-defence has been rejected.²⁵ With regard to the main argument of this thesis, however, the legal validity of anticipatory or pre-emptive self-defence has less importance.

The more important question with regard to armed attacks is whether an armed attack can come from an NSA and which gravity threshold must be met. The question of whether an armed attack can be mounted by an NSA is connected to the attribution question, which will be discussed further below.²⁶

²³ See L van den Hole 'Anticipatory self-defence under international law' (19) *Am U Int'l L Rev* 69; J Crawford & I Brownlie *Brownlie's Principles of Public International Law* 8 ed (2012) 751-753; M Bothe 'Terrorism and the legality of pre-emptive force' (2003) 14 *European Journal of International Law* 227; SD Murphy 'The doctrine of preemptive self-defense' (2005) 50 *Vill L Rev* 699; see also C Gray *International Law and the Use of Force* 3ed (2008) 128-148.

²⁴ CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359 at 390.

²⁵ See chapter 2.III.2.

²⁶ See chapter 2.III.

With regard to the gravity question, the *Nicaragua* and *Oil Platforms* cases stated that only the 'most grave' forms of force may qualify as an armed attack, thus allowing the use of force in self-defence.²⁷ The attack must be of a certain quality and gravity in order to meet the requirement of an armed attack.²⁸ Moreover, the ICJ concluded in the *Oil Platforms* case that, when determining the requirement of an armed attack, one must also consider the attackers' intention, the amount of force used, and the gravity of the resulting harm.²⁹ With regard to the threat or force used by NSAs, there is no general answer to the gravity question since this always depends on each case. However, as the 9/11 attacks showed, one might argue that the attack itself constitutes the severe gravity required by Article 51 of the UN Charter. Alternatively, one may argue for the 'cumulative approach',³⁰ in terms of which attacks by al-Qaeda before 11 September 2001 would constitute an armed attack under Article 51.

2. The *Caroline* requirements

The main conditions for an act of self-defence can be derived from the *Caroline* case.³¹ This holds that an act of self-defence has to meet the requirements of immediacy, necessity and proportionality. The ICJ concluded in its Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case that 'the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law', which applies equally to Article 51.³² The court reaffirmed the requirement of

²⁷ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ, Judgment (Merits), 27 June 1986 (hereinafter: *Nicaragua case*) para 195; *Oil Platforms case (Iran v US)* ICJ, Judgment, 6 November 2003 (hereinafter: *Oil Platforms case*) paras 62–64.

²⁸ *Nicaragua case* (n 27) para 195.

²⁹ *Oil Platforms case* (n 27) paras 62–64.

³⁰ *Ibid* para 64.

³¹ *Caroline case* (1837) 29 *British and Foreign State Papers* at 1137.

³² *Nuclear Weapons case* (n 20) at 245.

necessity and proportionality in its judgments in the *Oil Platforms* case³³ and the *Armed Activities* case.³⁴ In 2007, the *Institut de Droit International* confirmed that necessity and proportionality are essential components of the normative framework of self-defence.³⁵ The third element, a temporal element, is the one of immediacy.³⁶

(a) *Immediacy*

According to the *Caroline case*, the pending attack has to be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’.³⁷ As I explain further below, this definition represents the definition of immediacy for anticipatory self-defence. In the case of an ongoing attack, where the victim state defends itself immediately, this criterion will most likely be satisfied.³⁸

In recent years there has been the attempt by some states, like the US, to extend the definition of immediacy. For instance, a White Paper³⁹ by the US’s Department of Justice, which aims to address the issue of the killing of US citizens in foreign countries, requires an ‘imminent threat of violent attack

³³ *Oil Platforms* case (n 27) para 76.

³⁴ *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ, Judgment (hereinafter: *Armed Activities* case) 19 December 2005, para 147.

³⁵ *Institut de Droit International* Resolution ‘Self-Defence’ (2007) 72 AIDI 233.

³⁶ Noam Lubell *Extraterritorial Use of Force against Non-State Actors* (2011) 44. See also P Malancuk *Akehurst’s Modern Introduction to International Law* 7 ed (1997) 316; KC Kenny ‘Self-defence’ in *United Nations: Law, Policies and Practice Vol. II* 1162, 1167.

³⁷ Lubell *ibid*; Malancuk *ibid*; Kenny *ibid*. Also see Shaw (n 6) 861.

³⁸ Michael Schmitt ‘Targeted killing and international law: Law enforcement, self defence, and armed conflict’ in Roberta Arnold & Noelle Quenivet (eds) *International Humanitarian and Human Rights Law: Towards a New Merger in International Law* (2008) 535.

³⁹ The *White Paper* by the Department of Justice of the United States laid down the legal framework for a lethal operation against a US citizen who is a member of a terrorist group: see Department of Justice *White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qa’ida or an Associated Force* (hereinafter: *White Paper*) available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf> (last accessed 12 January 2020).

against the United States' to use lethal force in a foreign state.⁴⁰ However, the definition of 'imminent' in this context is set out in the White Paper as follows:

[T]he condition that an operational leader presents an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on US persons and interests will take place in the immediate future.⁴¹

The White Paper is a good example of how a state might interpret and extend the right of self-defence. Another example that I discuss further below is the Bush doctrine, which argues in favour of pre-emptive self-defence.

(b) Necessity

Any act in self-defence has to meet the requirement of necessity. According to the *Oil Platforms case*, the state acting in self-defence must be able to identify the party responsible for the armed attack, there must be an intent by the responsible party to attack the victim state, the act of self-defence must be necessary to prevent further armed attacks, and forceful measures have to be the only option to fend off further armed attacks.⁴²

Regarding the right of self-defence against an NSA, some authors argued that the necessity test requires that each territorial state must be unwilling or unable to put an end to the armed attack by an NSA.⁴³ Lubell further pointed out, that the necessity test must be assessed in the context of a threat of a potential armed attack in the future, which links to the debate on anticipatory

⁴⁰ Ibid 3.

⁴¹ Ibid.

⁴² *Oil Platforms case* (n 27) paras 74-76.

⁴³ See Lubell (n 36) 67; R van Steenberghe 'Self-defence in response to attacks by non-state actors in the light of recent state practice: A step forward?' (2010) 23 *Leiden Journal of International Law* 183 at 207; Trapp 'Can non-state actors mount an armed attack?' (n 14) at 694-695.

or pre-emptive self-defence.⁴⁴ On this basis, one may argue that the requirement of necessity also includes the ‘unable or unwilling’ test, which will be examined further below.⁴⁵

Since I argue in this thesis that the customary right of self-defence has changed and that the unwilling or unable test has become part of this new customary right, the question is how and where the unwilling or unable test fits in. While some might argue that the unwilling or unable test is another attribution test, others might argue that it replaces the attribution requirement for the right of self-defence against NSAs. If one follows the latter view, the question that remains is whether the unwilling or unable test constitutes a stand-alone requirement or whether it also forms part of the necessity test. While Lubell argued that the unwilling or unable test formed part of the necessity requirement, I will address this question further below, after examining whether the customary right of self-defence has changed.⁴⁶

(c) Proportionality

Another requirement of the act of self-defence is proportionality, in terms of which any measures taken to avert a threat must be proportionate. Brownlie described the requirement of proportionality as ‘the essence of self-defence’.⁴⁷ In the context of using force against NSAs, Kress called for a more stringent standard of proportionality.⁴⁸ Schmitt suggested that in the case of terrorism, striking an entire terrorist cell may be justified ‘even though not mandated by the need to thwart the particular imminent attack in question’.⁴⁹ Lubell argued

⁴⁴ Lubell (n 36) 67.

⁴⁵ See chapter 2.III.3, chapter 2.III.4 and chapter 5.III.

⁴⁶ See the discussion in chapter 5.IV.

⁴⁷ I Brownlie *International Law and the Use of Force by States* (1963) 279.

⁴⁸ Claus Kress ‘Some reflections on the international legal framework governing transnational armed conflicts’ (2010) 15(2) *Journal of Conflict and Security Law* 245 at 250.

⁴⁹ Schmitt (n 38) 535.

in favour of a territorial limitation to the requirement of proportionality.⁵⁰ He claimed that in the case of multiple terrorist bases in different states, multiple acts of self-defence in different states would each have to be proportional once the requirements of necessity and armed attack or imminent threat of potential armed attacks are met in each state.⁵¹ This possibility was also raised during the Falklands/Malvinas conflict of 1982.⁵²

With regard to the purpose of the proportionality requirement, Kress and Lubell's approaches insisted on the standard that the measures taken must be balanced against the removal of the threat. By way of contrast, Schmitt argued that striking the terrorist cell alone might already be proportionate in itself. On the one hand, the approaches of Kress and Lubell appear to be acceptable, due to their conformity with the nature of proportionality. On the other hand, Schmitt did go beyond the removal of an imminent threat and appeared to endanger the principle of proportionality when the target is a terrorist cell. According to his approach, targeting a terrorist cell would be proportional under any circumstances.

(d) Conclusion

This brief description of the *Caroline* requirements illustrates their crucial role when states exercise their right of self-defence against NSAs. The discussion above revealed that the standard of the requirements of immediacy, necessity and proportionality might change with regard to the right of self-defence against NSAs. However, using the right of self-defence against NSAs does not set aside the *Caroline* requirements and their significance for exercising the right of self-defence. For instance, with regard to the requirement of

⁵⁰ Lubell (n 36) 67.

⁵¹ Ibid.

⁵² See Rosalyn Higgins *Problems and Process: International Law and How We Use It* (1994) 232; Christopher Greenwood 'The relationship between *ius ad bellum* and *ius in bello*' (1983) 9 *Review of International Studies* 221 at 223–224.

proportionality, commentators like Lubell or Kress called for an even stricter standard of proportionality. While I argue in this thesis that the customary right of self-defence has changed, it is important to remember that the *Caroline* requirements still apply. Therefore, principles like necessity or proportionality are essential for the legality of exercising the right of self-defence. In addition, even if the unwilling or unable test forms part of the necessity requirement, this does not mean that the core element of necessity does not apply anymore. The act of self-defence must be necessary to prevent further armed attacks and the use of force must be the only option available. The same rationale applies to the requirement of an armed attack that I discussed in the previous section. The unwilling or unable test does not dilute the crucial importance of the armed attack or, alternatively, the requirements for anticipatory self-defence.

III. The right of self-defence against NSAs in the post-9/11 era: A change in state behaviour

This part of the thesis focuses on developments in state behaviour and how these relate to the right of self-defence against NSAs. In the post-9/11 era, some doctrines like anticipatory or pre-emptive self-defence were revived when states were challenged by transnational terrorism.⁵³ All the doctrines or interpretations presented above constitute an attempt by states to change the right of self-defence in order to prevent their state practice from being regarded as illegal. As I discuss throughout this thesis, the invasion of Afghanistan in 2001, the drone warfare in Pakistan and Yemen, and the fight

⁵³ As there is no settled definition of terrorism in international law, I adopt the working definition of terrorism as it is set out by the Special Tribunal for Lebanon. The Tribunal concludes that a definition in customary international law for times of peace has emerged and defines terrorism as follows: 'This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or refrain from taking it; (iii) when the act involves a transnational element'. See Special Tribunal of Lebanon, Appeals Chamber, 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging', Case no. STL-11-01/I, 16 February 2011, para 85.

against ISIS in Syria constitute milestones in the development of state practice and *opinio juris*.

1. The 'war on terrorism': Armed attacks emanating from NSAs and the question of attribution

In the aftermath of the terrorist attacks on 11 September 2001, the US initiated its so-called 'war on terrorism'.⁵⁴ On 20 September 2001, President Bush declared in a joint session to Congress that 'any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime'.⁵⁵ With Resolution 1373, the Security Council reaffirmed the 'inherent right of self-defence' as recognised by Resolution 1368 on 28 September 2001.⁵⁶ In a letter to the Security Council dated 7 October 2001, the US notified the UN that, due to the attacks of 9/11, it would invoke its right of self-defence. This entailed the use of force against al-Qaeda in Afghanistan.⁵⁷ The main question that arises from this scenario is whether a victim state may use force on the territory of another state against an NSA in response to an attack by that NSA. In order to answer such a question, one also has to answer the following two questions. First, can an armed attack emanate from an NSA? Second, could the attacks by al-Qaeda be attributed to Afghanistan, thus permitting the US to use force on the territory of Afghanistan?

⁵⁴ President George W Bush, Address to a Joint Session of Congress and the American People, 20 September 2001, available at https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html (last accessed 2 December 2020).

⁵⁵ *Ibid.*

⁵⁶ United Nations Security Council Resolution 1373, 28 September 2001, S/Res/1373.

⁵⁷ John Negroponte 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', 7 October 2001, UN Doc S/2001/946 (hereinafter: 'US letter to UN Security Council, 7 October 2001').

(a) *Can an armed attack emanate from an NSA?*

There has been some support for the view that an armed attack might come from an NSA.⁵⁸ While Dinstein pointed out that Security Council resolutions 405 and 419 (1977) ‘referred to an “act of armed aggression” perpetrated by mercenaries against the State of Benin’ and that Article 1 of the Abuja-Non-Aggression and Common Defence Pact from 2005 referred to NSAs in the definition of aggression, Dinstein considered the attack of 9/11 as a ‘defining moment’.⁵⁹ Other authors have also confirmed the view that an armed attack can emanate from an NSA.⁶⁰ Furthermore, Higgins, Kooijmans and Buergenthal JJ in the *Wall* case argued in their separate opinions that, in terms of the wording of Article 51, and following the attitude of the Security Council towards the 9/11 terrorist attacks, the article does not limit the armed attack to one arising from a state.⁶¹ Stahn further confirmed that:

The recognition that acts of private actors may give rise to an armed attack is anything but revolutionary. The term ‘armed attack’ was traditionally applied to states, but nothing in the Charter indicated that ‘armed attacks’ can only emanate from states.⁶²

Therefore, it appears that an armed attack in terms of the right of self-defence can emanate from an NSA. This conclusion has crucial implications for the element of attribution, discussed below.

⁵⁸ See *Armed Activities* case (n 34), separate opinion of Judge Kooijmans, para 36.

⁵⁹ Dinstein (n 4) 227, referring to Security Council resolutions 405 and 419 (1977) and Article 1 of the African Union Non-Aggression and Common Defence Pact (adopted 1 January 2005).

⁶⁰ See C Stahn ‘Terrorist acts as armed attack: The right to self-defence, article 51 (1/2) of the UN Charter, and international terrorism’ (2003) 27 *Fletcher F World Aff* 35 at 35–46; ME O’Connell, CJ Tams & D Tladi *Self-defence against Non-state Actors* (2019) 124–125, 164–166; cf T Ruys ‘Armed Attack’ and Article 51 of the UN Charter: *Evolutions in Customary Law and Practice* (2010) 485–489.

⁶¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004 (hereinafter: *Wall* case) separate opinion of Higgins J, para 33; separate opinion of Kooijmans J, para 35; separate opinion of Buergenthal J, para 6.

⁶² Stahn (n 60) at 42.

(b) *What is the point of an attribution requirement if we accept that an armed attack might emanate from an NSA?*

Another aspect of the right of self-defence against NSAs is attribution. The US's claim of self-defence against al-Qaeda in Afghanistan raised the question of whether the conduct of al-Qaeda could be attributed to the territorial state.⁶³ The ICJ established the 'effective control' test in the *Nicaragua* case, stating that:

Participation ... in the financing, organizing, training, supplying and equipping of the contras ... is still insufficient in itself ... for the purpose of attributing to the United States the acts committed by the contras For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁶⁴

In terms of this approach, Afghanistan had to have effective control over al-Qaeda and had to have directed its actions so that the actions by al-Qaeda could be attributed to the territorial state. However, at the time, there was no evidence that the territorial state, Afghanistan, had effective control over al-Qaeda. With regard to the attribution of state responsibility, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') developed a more flexible approach in the *Tadic* case, where the court applied the 'overall control' test.⁶⁵ Compared to the 'effective control' test, the 'overall control' test requires only overall control over an NSA and not exclusive operational

⁶³ For a description of a territorial state see chapter 5.II.1.

⁶⁴ *Nicaragua* case (n 27) para 115.

⁶⁵ *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber, Judgment, 15 July 1995, Case No IT-94-1-A, paras 132-136, 159-167; see also *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No IT-94-A, para 145.

command.⁶⁶ As Cassese pointed out, the test of 'overall control' is satisfied if a state equips, finances, trains, provides operational support or coordinates and helps in the general planning of the 'organised and hierarchically structured' NSA's acts.⁶⁷

In 2001, there was no publicly known information on whether the Taliban supported al-Qaeda or Osama Bin-Laden, or even controlled and directed him to conduct the 9/11 attacks.⁶⁸ Furthermore, the Taliban was not listed as a 'sponsor' of terrorism until 1999.⁶⁹ Although al-Qaeda had bases in Taliban-controlled areas, this did not qualify as 'effective control' or 'overall control'. Even if the Taliban regime had known about the terrorist attacks, such knowledge would not have met the threshold of control set out by the 'effective control' or 'overall control' tests. Therefore, the 'effective control' and 'overall control' tests represent a very high threshold of control, which was apparently not met in the case of Afghanistan.

Against this background, several scholars supported the view that the 'effective control' test was not the appropriate test for international terrorist acts and had to be replaced.⁷⁰ Among those who rejected the 'effective control'

⁶⁶ *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber, Judgment, 15 July 1995, Case No IT-94-1-A, paras 132–136, 159–167; see also *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No IT-94-A, para 120. It should be noted that even though the 'effective control' test was developed in the context of a question of state responsibility and the 'overall control' test was developed in the context of international criminal law, both tests address the question of attribution of certain conduct to a state.

⁶⁷ A Cassese 'The Nicaragua and Tadić tests revisited in light of the ICJ judgment on genocide in Bosnia' (2007) 18 *European Journal of International Law* 649.

⁶⁸ JJ Paust 'Use of armed force against terrorists in Afghanistan, Iraq, and beyond' (2002) 35 *Cornell Int'l LJ* 533 at 542.

⁶⁹ Lori Damrosch 'Sanctions against perpetrators of terrorism' (1999) 22 *Hous J Int'l L* 63 at 67–68.

⁷⁰ M Byers 'Terrorism, the use of force and international law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401; R Wolfrum 'The attack of September 11, 2001, the wars against the Taliban and Iraq: Is there a need to reconsider international law on the recourse to force and the rules in armed conflict' (2003) 7 *Max Planck Yearbook of United Nations*

test, there was disagreement about which requirements should apply in such a situation. On the one hand, some scholars argued that a state might be responsible for a terrorist group if that state is merely hosting or tolerating the presence of non-state terrorist groups.⁷¹ On the other hand, the prevailing view was that the requirement of attribution should be abolished and that an attack by a non-state terrorist group might qualify as an 'armed attack' even if there was no connection with a state.⁷² For instance, Stahn argued that if we accept that an armed attack can come from an NSA, the requirement of attribution becomes superfluous.⁷³ Therefore, Stahn argued in favour of an 'external link' requirement, which is satisfied if the NSA is acting outside the territory of the victim state.⁷⁴ As Trapp pointed out, one must distinguish two different scenarios with regard to exercising the right of self-defence in such situations. One has to distinguish between force used against the state from whose territory NSAs operate and force used against NSAs within the territorial state.⁷⁵ With regard to the ICJ jurisprudence in this context, Trapp argued that the element of attribution is necessary only if a state uses force against another state from whose territory the NSA operates.⁷⁶ Taking state practice from the post-9/11 era into account, Trapp argued that when a state uses force specifically against the NSA, and that force is not directed against the territorial state, such use of the right of self-defence does not require an attribution test.⁷⁷ In this case, Trapp described the function of the unwilling or unable test as a bridging element between the requirements for the use of force

Law 1 at 34; G Travalio & J Altenburg 'Terrorism, state responsibility, and the use of military force' (2003) 4 *Chicago Journal of International Law* 97, 98-100; Stahn (n 14) at 42.

⁷¹ Byers *ibid*; Wolfrum *ibid* at 34; Travalio & Altenburg *ibid* at 98-100.

⁷² Stahn (n 14) at 42.

⁷³ *Ibid* at 43-44.

⁷⁴ *Ibid* at 44.

⁷⁵ Trapp 'Can non-state actors mount an armed attack?' (n 14) at 686.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at 689-694.

and how to use force in terms of the necessity element.⁷⁸ I agree with Trapp that the unwilling or unable test replaces the attribution test and becomes a test that has an impact on when and how to use force.⁷⁹

(c) *The doctrine of safe haven*

The situation in Afghanistan shows that the legal framework of the right of self-defence did not provide a solution for NSAs acting from a territorial state that did not meet the standard of the 'effective control' or 'overall control' tests. What emerged from the discussions in the scholarship, jurisprudence and practice by states was the doctrine of safe haven. Under this approach, the requirement would be satisfied if a territorial state harboured or supported a terrorist group in any way.⁸⁰ An indication of the safe haven approach can be found in the US's letter of 7 October 2001 to the Security Council.⁸¹ In this letter, the US described the Taliban regime as lacking territorial control and refusing to remove the threat posed by al-Qaeda.⁸² In addition, in a speech on 20 September 2001, President Bush described states like Afghanistan under the Taliban regime as safe havens.⁸³ On 14 November 2001, in Resolution 1378, the Security Council further condemned the Taliban for supporting al-Qaeda and stated that Afghanistan provided a safe haven for al-Qaeda.⁸⁴ Resolution 1378, therefore, reaffirmed the decision by the Security Council in Resolutions 1368 and 1373 that states should not provide a safe haven for terrorist groups. Considering the reaction of the US and the Security Council to the situation in Afghanistan, the evidence suggests that Afghanistan constituted a safe haven,

⁷⁸ Trapp suggests that the unwilling or unable test is a requirement and replacement of attribution on when to use force in self-defence and as part of the element of necessity on how to use force in self-defence. See *ibid* at 694–695.

⁷⁹ See chapter 5.III–IV.

⁸⁰ A von Arnould *Völkerrecht* (2019) para 1088.

⁸¹ US letter to UN Security Council, 7 October 2001 (n 57).

⁸² *Ibid*.

⁸³ President Bush's address to a joint session of Congress and the nation, 20 September 2001 (n 54).

⁸⁴ UN Security Council, Resolution 1378, UN Doc S/Res/1378, 14 November 2001.

at least in the eyes of the US and the Security Council. This approach allowed the US to attribute the conduct of al-Qaeda to the Taliban regime and provided the basis for the use of self-defence in Afghanistan. As will be explained further below, the concept of a safe haven is very similar to the unwilling test.

(d) A gap in the law at the beginning of the 21st century

The first years of the 21st century also revealed that an armed attack in terms of the right of self-defence might come from an NSA.⁸⁵ By implication, the question is: if an NSA can mount an armed attack, should the victim state not be in a position to exercise its right of self-defence against that NSA? At the beginning of the century, the conundrum exposed the limits of the right of self-defence in the case of NSAs. As the right of self-defence was based on an inter-state understanding, it naturally had difficulties with addressing the circumstances of an NSA. As I examine in more detail below, and as pointed out by Judge Kooijmans in his separate opinion in the *Armed Activities* case, the ICJ did not address the question of whether a state is entitled to exercise its right of self-defence if the NSA's conduct is not attributable to a territorial state.⁸⁶ As pointed out by Stahn, the requirement of attribution is no longer relevant if we accept that an armed attack might emanate from an NSA outside the territory of the victim state.⁸⁷

This scenario demonstrates that the traditional scope of the right of self-defence is not appropriate and practicable in the context of transnational terrorism. It further illustrates that the jurisprudence and the scholarship tried to bring transnational terrorism into line with the paradigm of state responsibility at the beginning of the century. As the example of al-Qaeda in

⁸⁵ *Armed Activities* case (n 34) paras 143–146; Dinstein (n 4) 227–230; *Wall* case (n 61) separate opinion of Judge Buergenthal, para 6; *Wall* case (n 61) separate opinion of Higgins J, para 33; *Wall* case, separate opinion of Kooijmans J, para 35.

⁸⁶ *Armed Activities* case (n 34) separate opinion of Judge Kooijmans, para 26.

⁸⁷ Stahn (n 14) at 42–44.

Afghanistan and other examples in this thesis illustrate, the threat posed by NSAs does not fit within the parameters of attribution, which requires either effective control or overall control by the territorial state. It appears only logical that, since the 9/11 attacks, state practice must have developed in another direction, and that neither the effective control test nor the overall control test with regard to exercising the right of self-defence against NSAs can be applicable.

2. The Bush doctrine / pre-emptive self-defence (2003)

With the 2002 National Security Strategy of the Bush administration, the Bush doctrine was formally shaped. In the context of an attempt to disrupt and destroy terrorist organisations, the 2002 National Security Strategy states that 'we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country ...'.⁸⁸

The Bush administration elaborated upon the reasons why the pre-emptive use of force was necessary, and set out its interpretation of the right of self-defence:

For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilisation of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such

⁸⁸ National Security Strategy of the United States, September 2002 at 6.

attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction.⁸⁹

The US administration also justified its use of pre-emptive force in the 2002 National Security Strategy:

We cannot let our enemies strike first The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends.⁹⁰

In conclusion, the use of pre-emptive force would enable a state to conduct an attack even in the absence of an actual or manifestly imminent attack.

One commentator argued in favour of pre-emptive self-defence and stated that the old interpretation of the right of self-defence ceased to be reliable in a world of non-state terrorist groups.⁹¹ Another commentator argued that the right of self-defence requires a more flexible standard with a less flexible focus on the temporal imminence of an armed attack.⁹²

Other commentators supported the 'inherent right' theory, in terms of which it is assumed that the inherent right of self-defence is different from the one stated in Article 51 of the UN Charter.⁹³ As Bothe pointed out, this view stated that 'a broader interpretation of admissible self-defence is still the law, that older conceptions of permissible self-defence have somehow survived the entry into force of the Charter of the United Nations.'⁹⁴ However, this theory

⁸⁹ Ibid at 15.

⁹⁰ Ibid.

⁹¹ R Wedgwood 'The fall of Saddam Hussein: Security Council mandates and preemptive self-defence' (2003) 97 *The American Journal of International Law* 576 at 582–585.

⁹² J Yoo 'Using force' (2004) 71(3) *University of Chicago Law Review* 729–797 at 730.

⁹³ See AC Arend & RJ Beck *International Law and the Use of Force* (1993) 186; Bothe (n 23) at 232–233.

⁹⁴ Bothe *ibid* at 232.

has 'numerous weaknesses, starting with its interpretation of customary international law before the adoption of the [UN] Charter'.⁹⁵ O'Connell argued that before the adoption of the UN Charter, the use of force was generally lawful.⁹⁶ She stated that the UN Charter 'was adopted for the very purpose of creating a far wider prohibition on force'.⁹⁷ Another argument is that the use of force in the absence of an armed attack and at the discretion of one state would fundamentally undermine Article 2(4) of the UN Charter as well as the ICJ judgment in the *Nicaragua* case, where the court explicitly rejected the use of force in the absence of an armed attack.⁹⁸

The majority of scholars rejected the doctrine of pre-emptive self-defence.⁹⁹ Damrosch argued in this context that force in the shape of self-defence should be the last and not the first resort.¹⁰⁰ Paust argued that self-defence cannot be exercised on the grounds of expectations, anticipations and fear.¹⁰¹

Greenwood argued that:

The right of anticipatory self-defence is quite narrowly defined. Ever since the United Kingdom-US exchange on what has become known as the *Caroline* case in 1837-38, the right has been confined to instances where the threat of armed attack was imminent. In my opinion, that still reflects international law and, in so far as talk of a doctrine of 'pre-emption' is intended to refer to a broader

⁹⁵ ME O'Connell 'The myth of preemptive self-defence', Paper prepared in conjunction with the ASIL Presidential Task Force on Terrorism, at 13.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See article 2(4) of the UN Charter; *Nicaragua* case (n 27) paras 193-195.

⁹⁹ See Bothe (n 23) at 227; Michael Reisman & Andrea Armstrong 'The past and future of the claim of pre-emptive self-defence' (2006) 100 *AJIL* 525 at 526; Lubell (n 36) 55; Dinstein (n 4) 196-197; James Crawford *Brownlie's Principles of International Law* 7 ed (2008) 733-734.

¹⁰⁰ L Damrosch 'Sanctions against perpetrators of terrorism' (2000) 22 *Houston Journal of International Law* 63 at 68.

¹⁰¹ J Paust 'Post-9/11 overreaction and fallacies regarding war and defence, Guantanamo, the status of persons, treatment, judicial review of detention, and due process in military commissions' (2004) 79 *Notre Dame Law Review* 1335 at 1343.

rights to respond to threats, which might materialise some time in the future, I believe that such a doctrine has no basis on law.¹⁰²

Attorney General Lord Goldsmith argued in his legal opinion to Prime Minister Blair in March 2003 about the Iraq war that the doctrine of pre-emptive self-defence does not exist or is not recognised in international law.¹⁰³ He stated that:

However, in my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law.¹⁰⁴

Shaw argued that the right of pre-emptive self-defence introduced by the Bush administration 'goes beyond the *Caroline* criteria' and is therefore not acceptable under international law.¹⁰⁵ Especially against the backdrop of the criterion of proportionality, a unilateral use of force based on the assumption of a threat or armed attack cannot be proportional under the right of self-defence.¹⁰⁶

The discussion above illustrates that the doctrine of pre-emptive self-defence and the right to use force in the absence of immediacy is not in accordance

¹⁰² C Greenwood 'The legality of using force against Iraq', Memorandum to the UK Government, 12 October 2002, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaaff/196/2102406.htm> (last accessed 21 February 2021).

¹⁰³ L Goldsmith 'Iraq: Resolution 1441' (Secret Memo to the Prime Minister), 7 March 2002, available at <https://www.theguardian.com/politics/2005/apr/28/election2005.uk> (last accessed 21 February 2021).

¹⁰⁴ Ibid.

¹⁰⁵ Shaw (n 6) 868.

¹⁰⁶ Ibid. See also UN Secretary General's Report, 'In larger freedom: towards development, security and human rights for all', 21 March 2005, UN Doc A/59/2005, paras 124–125.

with international law. Nevertheless, this unlawfulness under international law did not prevent the US administration from invading Iraq in 2003. Therefore, the Bush doctrine illustrates a failed attempt to widen the scope of self-defence by going beyond the scope of anticipatory self-defence.

By contrast, anticipatory self-defence requires a threat to be imminent.¹⁰⁷ In the aftermath of the 9/11 attacks, the US applied the concept of anticipatory self-defence in other situations, for example, its drone warfare programme in Pakistan and Yemen. In this regard, a White Paper by the Department of Justice stated that conducting an attack on a US citizen (who is a member of a terrorist organisation) in a foreign state also requires an 'imminent threat of violent attack against the United States'.¹⁰⁸ While some commentators have observed a move towards anticipatory self-defence and have argued that it has become part of the right of self-defence, the question of anticipatory self-defence must still be settled.¹⁰⁹

3. The 'unwilling or unable' test

In the post-9/11 era, various situations illustrated the application and recognition of the unwilling or unable test in the context of the right of self-defence. In terms of the unable or unwilling test, a state may use force under the right of self-defence if the armed attack came from an NSA that operates from a territory where the host state is unwilling or unable to remove the

¹⁰⁷ Ibid 867.

¹⁰⁸ *White Paper* (n 39) at 3.

¹⁰⁹ See NA Shah 'Self-defence, anticipatory self-defence and pre-emption: International law's response to terrorism' (2007) 12 *Journal of Conflict & Security Law* 95 at 103, 110; Tams (n 24) at 390; MJ Glennon 'The fog of law: Self-defense, inherence, and incoherence in Article 51 of the United Nations Charter' (2001) 25 *Harv JL & Pub Pol'y* 539 at 546-549; D Svarc 'The use of military force in the fight against terrorism: International legal framework' (2006) 6 *ISIL YB Int'l Human & Refugee L* 142 at 151-153; AN Guiora 'Anticipatory self-defence and international law – a re-evaluation' (2008) 13 *Journal of Conflict and Security Law* 3; Van den Hole (n 23) at 69.

threat posed by the NSA.¹¹⁰ At the same time, an attacked state may not exercise force under the right of self-defence if the territorial state¹¹¹ is willing or able to remove the threat in its territory.¹¹² According to Stahn, the unwilling or unable test is based on the conception of sovereignty as responsibility, including duties to third states and the 'relative character of territorial integrity', which places states under an obligation to remove the danger in their territory.¹¹³ However, the unwilling or unable test is not new or a test that had never been applied before the fight against ISIS in Syria.

Brownlie pointed out that the unwilling or unable test 'has been explained in terms of legitimate self-defence on limited occasions in the present century [20th century].'¹¹⁴ Brownlie further stated that:

In 1916, after frequent depredations on American territory, an American military force was collected and sent into Mexican territory to disperse the bands operating under the leadership of Villa. Lansing, the Secretary of State, alleged the unwillingness of the Mexican authorities to remove the menace and did not consider the American action to be illegal. ... When Soviet troops entered Outer Mongolia in 1921 the action was justified as having been taken after failure, in spite of repeated requests, of the Chinese Government to liquidate White Guard bands and organisation preparing to invade the Soviet Republics from Mongolia. ... The Soviet reply states that there was no infringement of the Pact since the action was taken in self-defence against armed bands of the counter-revolutionaries mobilised by the Nanking Government along the Manchurian border.¹¹⁵

¹¹⁰ AS Deeks 'Unwilling or unable': Towards a normative framework for extraterritorial self-defence' (2012) 52 *Virginia Journal of International Law* 483 at 487.

¹¹¹ I regard territorial states as states where an NSA is located that is being targeted as the result of another state exercising its right to self-defence. See also chapter 5.III.1.

¹¹² Deeks (n 110) at 487.

¹¹³ Stahn (n 14) at 47.

¹¹⁴ I Brownlie 'International law and the activities of armed bands' (1958) 7 *International & Comparative Law Quarterly* 712 at 732.

¹¹⁵ *Ibid* at 732, 733.

As Deeks pointed out, the unwilling or unable test can be traced back to the 18th century when it served 'as a guide for belligerents as to when they may enforce neutrality law in the face of violations by the enemies or by neutral states.'¹¹⁶ Deeks further showed in her examination of the unwilling or unable test that the military manuals of the US, the UK and Canada apply the unwilling or unable test as part of the law of neutrality.¹¹⁷

In 1981, Israel invoked the unable or unwilling test when it conducted attacks in Lebanon against the Hezbollah and the Palestine Liberation Organisation. Israel stated before the Security Council that:

Members of the [Security] Council need scarcely be reminded that under international law, if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defence.¹¹⁸

In 1996, Turkey also justified its use of force against the Kurdish Workers' Party (PKK) in Iraq, by claiming that Iraq was unable to remove the threat posed by the PKK.¹¹⁹

¹¹⁶ Deeks (n 110) at 497-503.

¹¹⁷ Ibid at 500, referring to US Department of Army 'Law and Land Warfare', Field Manual No. 27-10, 18 July 1956, para 520; Office of the Judge Advocate General (Canada) 'Law of Armed Conflict at the Operational and Tactical Levels', Joint Doctrine Manual, 13 August 2001, para 1304(3); UK Ministry of Defence 'The Manual of the Law of Armed Conflict 01/04' (2004) para 13.9E.

¹¹⁸ UN Security Council, Official Records, 36th Session, 292nd mtg. at 5, UN Doc S/PV.2292, 17 July 1981.

¹¹⁹ Minister for Foreign Affairs of Turkey, Letter dated July 2, 1996 from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, UN Doc S/1996/479, 2 July 1996.

For instance, in the post-9/11 era, the US applied the unwilling or unable test to its drone warfare in Yemen and Pakistan.¹²⁰ In addition, Russia used force against Chechen rebels on Georgian territory who had conducted attacks in Russia in 2002.¹²¹ According to the Russian administration, Georgia was unable or unwilling to remove the threat of the Chechen rebels.¹²² As I explain throughout this thesis, the unable or unwilling test has been the subject of a lively debate in the scholarship in the post-9/11 era.¹²³ While the critique of the unwilling or unable test as part of the customary right of self-defence focused on the inconsistency of practice, this thesis will have a fresh look at that analysis and conduct an assessment through the lens of the specially affected states (SAS) doctrine.

4. Conclusion

The situation in the aftermath of the 9/11 attacks showed that international law was not equipped to deal with the threat of an NSA that acts transnationally. This chapter further showed how the 'war against terrorism' and the acceptance that an armed attack can emanate from an NSA relates to the unwilling or unable test. While the ICJ jurisprudence addressed the issue whether an armed attack can come from an NSA and whether such an NSA can be attacked if it can be attributed to a territorial state, the practice by states paints another picture. Some commentators have argued that if we accept that

¹²⁰ *White Paper* (n 39) at 5; Samantha Power 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General', 23 September 2014, UN Doc S/2014/695.

¹²¹ Sergey Lavrov 'Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, 12 September 2002', 11 September 2002, UN Doc S/2002/1012.

¹²² *Ibid.*

¹²³ Deeks (n 110) at 487; D Ahmed 'Defending weak states against the unwilling or unable doctrine of self-defence' (2013) 9 *J. Int'l L & Int'l Rel.* 1 at 4; G Williams 'Piercing the shield of sovereignty: An assessment of the legal status of the unwilling or unable test' (2013) 36 *UNSWLJ* 619 at 631; J Brunnée & SJ Toope 'Self-defense against non-state actors: Are powerful states willing but unable to change international law?' 2017 *International and Comparative Law Quarterly* 1. See the discussion in chapters 4 and 5.

NSAs can mount an armed attack, the requirement of attribution becomes superfluous.¹²⁴

It appears that states identified this gap in international law, which was whether a state can exercise its right of self-defence against an NSA if the acts by the NSA are not attributable to the territorial state, or in which circumstances a state might be allowed to defend itself. The separate opinions in the *Wall* case and the *Armed Activities* case presented in this chapter also confirmed this gap in international law.¹²⁵ While some attempts by states, such as using the concept of pre-emptive self-defence, went too far and did not find any acceptance, it appears that states became more eager to use the unwilling or unable test as part of their right of self-defence. A detailed analysis of the state practice in this regard will be conducted in the chapters that follow.¹²⁶ Such an analysis requires a discussion of the theoretical framework for the formation of customary international law, which will be undertaken in the next chapter.

¹²⁴ See Trapp 'Can non-state actors mount an armed attack?' (n 14) 694; Stahn (n 14) at 43–44; Van Steenberghe (n 43) at 207.

¹²⁵ Trapp *ibid.*

¹²⁶ See chapters 4 and 5.

Chapter 3. Theoretical framework for the formation of customary international law

The theoretical framework is essential for the chapters that follow and for the examination of whether customary international law on the right of self-defence against a non-state actor ('NSA') has changed. Therefore this chapter analyses the theoretical framework for the formation of custom. Article 38 of the statute of the International Court of Justice ('ICJ') describes customary international law as 'international custom, as evidence of a general practice accepted as law'.¹ This chapter of the thesis discusses the traditional, positivist² approach to custom and its constitutive elements, namely state practice and *opinio juris*, based on international jurisprudence and the scholarship. As I examine the development of custom, the following questions are crucial: How do the constitutive elements, state practice and *opinio juris*, interact? Where can we find evidence of these two elements? Can we use the same piece of evidence to prove both constitutive elements of custom? In addition, I address the question of whether silence or acquiescence can be interpreted as confirmation of a rule. As this chapter describes and explains the theoretical framework, it also identifies the contradictions and challenges of the positivist approach to custom.

I. What is custom? General custom

According to Article 38 of the ICJ Statute, custom constitutes one of the sources of international law.³ The *Nicaragua* case confirms that important principles

¹ Article 38 of the ICJ Statute.

² For a description of the traditional positivist approach, see MN Shaw *International Law* 8ed (2017) 36-40.

³ Article 38 of the ICJ Statute.

such as the prohibition on the use of force, non-intervention, self-defence and respect for sovereignty constitute customary international law.⁴

Custom can be described as a decentralised and dynamic source of law that can be ambiguous, due to disagreements about its interpretation or the lack of textual limitations.⁵ As I illustrate in this chapter, the ambiguity results from the lack of a clear definition of state practice and *opinio juris*, which ultimately leads to competing views about how custom is created and its binding character. Some authors deny the value of custom as a source of international law and regard it as too lethargic to accommodate changes of custom.⁶ By contrast, D'Amato argued that custom as a source of international law involves a dynamic process of law creation, which is more important than treaty law due to its generality and universal application.⁷ Other commentators have suggested that custom is decreasing in importance due to the massive increase in the pace and variety of state activities,⁸ which may raise difficulties for consolidating all the information. Therefore, elements such as consistency might be impacted, making it more difficult to determine state practice and *opinio juris*. These different views show how the flexibility or lack thereof create disagreements about its binding nature.

In this context, the element of generality is crucial for the application of custom. The generality of custom is inevitably connected to how we assess the binding force of international law and whether we adopt a naturalistic approach⁹ or a consensual approach to custom. Under a natural-law based or

⁴ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ, Judgment, 27 June 1986 (hereinafter: *Nicaragua case*) paras 183–215.

⁵ Shaw (n 2) 54; T Bennett & J Strug *Introduction to International Law* (2013) 13; A Clapham *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (2012) 57–63; H Thirlway *The Sources of International Law* 2ed (2019) 60, 61.

⁶ See W Friedmann *The Changing Structure of International Law* (1964) 121–123.

⁷ AA D'Amato *The Concept of Custom in International Law* (1970) 12.

⁸ C de Visscher *Theory and Reality in Public International Law* (1957) 161, 162.

⁹ See P Malanczuk *Akehurst's Modern Introduction to International Law* 7 ed (1997) 15, 16.

'naturalistic' approach, the binding nature of custom derives 'from principles of justice which ha[ve] a universal and eternal validity'.¹⁰ In terms of the natural law approach, law is to be found, not made.¹¹ Therefore, natural law does not require states to consent to a rule.¹² By contrast, the consensual approach argues that whether a rule of custom applies to a state depends on the state's consent.¹³ Koskenniemi described these two opposing approaches as 'ascending' and 'descending'. According to the 'ascending' point of view, the binding force derives from the consent and behaviour of the states.¹⁴ By contrast, the 'descending' approach argues that the binding force derives from something other than a state.¹⁵ In this context, Koskenniemi identified concepts such as 'justice, common interests or [the] nature of the world community'.¹⁶ As I will illustrate further below, whether custom follows a consensual or natural-law based approach is decisive for interpreting the constitutive elements of custom.

II. The fragmentation of custom: Particular custom

The developments in the 20th and 21st centuries illustrate a fragmentation of custom. Fragmentation is linked to the responsiveness of custom to the 'social context, variations in state will and interest' of states.¹⁷ The fragmentation of custom can be viewed in two ways. First, fragmentation may constitute a threat to general custom and present the danger of political abuse since, in the case of particular custom, state interests play a significant role in creating the

¹⁰ Ibid 15, 16.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid 47.

¹⁴ M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (2006) 59–60.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid 390; see also ILC 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682, 13 April 2006, paras 99–122, 492–493.

rule.¹⁸ Second, fragmentation may be a 'healthy phenomenon'.¹⁹ According to this second view, general custom is too undeveloped for current developed societies, for which a more concrete custom constitutes the solution.²⁰ Another result of fragmentation is the development of particular custom.²¹ According to the concept of particular custom, it may be possible that a rule binds only a set of states.²² According to Akehurst, this kind of custom may exist in groups of states linked by historical, racial, political, religious or other affinities.²³ Akehurst stated that 'special' custom would always conflict with general custom and argued that, in the case of a conflict, such 'special' custom would not be binding upon the states that are bound only by general custom.²⁴ In its latest report on the formation of customary international law, the International Law Commission ('ILC') stated in Conclusion 16 that:

A rule of particular customary international law, whether regional, local or other, is a rule of customary law that applies only among a limited number of States.²⁵

This formulation by the ILC illustrates that geographical circumstances are not the only factors that give rise to a rule of particular custom. The ILC's commentary on Conclusion 16 further reveals its reasoning:

¹⁸ Koskenniemi *From Apology to Utopia* (n 14) 389, 390.

¹⁹ *Ibid* 394.

²⁰ *Ibid* 392-394.

²¹ See *Case concerning Right of Passage over Indian Territory (Portugal v India)* ICJ, Judgment, 12 April 1960 (hereinafter: *Right of Passage case*) at 39; *Asylum case (Colombia v Peru)*, ICJ, Judgment, 20 November 1950 (hereinafter: *Asylum case*) at 276-277.

²² See HG Espiell 'La doctrine du Droit international en Amérique Latine avant la première conférence panaméricaine (Washington, 1889)' (2001) 3 *Journal of the History of International Law* 1 at 1.

²³ M Akehurst 'Custom as a source of international law' (1976) 47 *British Yearbook of International Law* 1 at 28.

²⁴ *Ibid* at 29.

²⁵ Report of the ILC, 70th Session, 30 April to 1 June and 2 July to 10 August 2018, UN Doc A/73/10 (hereinafter: 'ILC Report 2018') at 154.

The expression 'whether regional, local or other' is intended to acknowledge that although particular customary international law is mostly regional, subregional or local, there is no reason in principle why a rule of particular customary international law could not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by a treaty or otherwise.²⁶

As the examination in this thesis shows, while there is no geographical link between the states that favour the change of the customary rule on the right of self-defence, there might be another link in the form of 'a common cause, interest or activity' that gives rise to the particular rule of custom.²⁷

As the analysis below shows, elements like generality, duration and consistency are crucial for determining whether state practice and *opinio juris* are sufficient to establish a new rule. Depending on the rule and custom in question, the scale between those elements might differ. This reasoning seems to apply especially to the formation of particular custom. Within the formation of particular custom, one might have a higher consistency of state practice due to the lower number of states involved, but the threshold of generality might be lower due to the limited application of the rule. In this regard, this thesis focuses primarily on the formation of general custom.

III. Constitutive elements of customary international law

Article 38 of the ICJ Statute describes customary international law as 'international custom, as evidence of a general practice accepted as law'.²⁸ Article 38 reveals the two requirements of the traditional positivist approach,

²⁶ Ibid at 155.

²⁷ Ibid.

²⁸ Article 38 of the ICJ Statute.

which are state practice and *opinio juris*.²⁹ Koskenniemi pointed out that, under the positivist approach, in theory, the practice-related behaviour and the normative element of *opinio juris* are independent and separate.³⁰ This section will, therefore, examine the elements and requirements of these two elements. As this analysis illustrates, state practice is the more tangible element of the two. While this section focuses on general custom, I will also point out how it differs from particular custom.

1. State practice

In order to determine the element of state practice, it is crucial to know what kind of evidence can be used in this regard. In the next section, I first discuss what kinds of acts qualify as state practice. The next question is how yardsticks of generality, duration and consistency correlate with respect to the element of state practice. This sets out the legal framework under the positivist approach to custom of how to ascertain the element of state practice.

(a) *What qualifies as state practice?*

A major question about state practice is whether it includes both physical and verbal acts by states. I argue that both physical and verbal acts contribute to the element of state practice, and therefore I show that the question also entails a discussion of the evidentiary value of physical and verbal acts.

²⁹ For a description of the traditional positivist approach, see Shaw (n 2) 36–40; see also J Crawford & I Brownlie *Brownlie's Principles of Public International Law* 8 ed (2012) 24–28; Bennett & Strug (n 5) 17–21.

³⁰ Koskenniemi *From Apology to Utopia* (n 14) chapter 6; M Koskenniemi 'The normative force of habit: International custom and social theory' (1990) 1 *Finnish Yearbook of International Law* 77 at 90. It should be noted that Koskenniemi understands the positivist concept of custom as neither an 'apology' nor 'utopia'. According to Koskenniemi, as soon as a rule tends towards state practice or *opinio juris*, it becomes either 'apology' or 'utopia'. Koskenniemi argues that the positivist concept of custom is inconsistent and faulty. His examination of custom reveals the circularity of state practice and *opinio juris* which, according to Koskenniemi, proves that those elements are not independent.

In 1970, D'Amato proposed that only physical acts should qualify as state practice.³¹ He rejected the approach that a claim by a state might also contribute to state practice.³² D'Amato stated that 'until it [a state] takes enforcement action, the claim has little value as a prediction of what the state will actually do'.³³ In this context, D'Amato referred to claims in diplomatic correspondence and other statements by states.³⁴ This view was supported by Judge Read's dissenting opinion in the *Norwegian Fisheries* case, where the Judge held that claims would not constitute evidence of state practice.³⁵

By contrast, in the *North Sea Continental Shelf* cases, the ICJ held that claims by states might contribute to state practice.³⁶ In the *Rights of United States Nationals in Morocco* case, the ICJ suggested that evidence of state practice might be found in diplomatic correspondence or conference records.³⁷ In addition, the ICJ used claims in other cases as evidence of state practice.³⁸ Therefore, D'Amato's approach constitutes a minority view, which is not supported by most of the ICJ jurisprudence.³⁹ However, it should be noted that the value of physical acts or claims, whether made in *abstracto*⁴⁰ or not, may differ with

³¹ D'Amato (n 7) 88.

³² *Ibid.*

³³ *Ibid* 50, 51, 88.

³⁴ *Ibid* 50, 51.

³⁵ *Fisheries case (United Kingdom v Norway)* ICJ, Judgment, 18 December 1951 (hereinafter: *Norwegian Fisheries* case), dissenting opinion of Judge Read, at 191.

³⁶ See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ, Judgment, 20 February 1969 (hereinafter: *North Sea Continental Shelf* cases) at 32, 33, 47.

³⁷ *Case concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* ICJ, Judgment, 27 August 1952 (hereinafter: *Rights of United States Nationals in Morocco* case) at 200, 209. While a claim can be a claim of a right or a claim about what the law is, such a distinction is unimportant for the examination of state practice in this context.

³⁸ See *Asylum* case (n 21) at 266, 277; *Fisheries Jurisdiction* case (*United Kingdom of Great Britain and Northern Ireland v Iceland*) ICJ, Judgment, 2 February 1973 (hereinafter: *Fisheries Jurisdiction* case) at 56–58, 119–120, 135.

³⁹ See also Akehurst (n 23) at 2–3.

⁴⁰ Thirlway goes even further and states that an 'assertion made in *abstracto* of the existence of a legal right or legal rule is not an act of state practice'; see HW Thirlway *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972) 58.

regard to the element of state practice. In the end, in accordance with ICJ jurisprudence, Akehurst concluded that 'state practice covers any act or statements by a state from which views about customary law may be inferred'.⁴¹ Examinations of state practice in the 21st century confirm Akehurst's conclusion.⁴² The ILC also regarded verbal acts as evidence of state practice while it highlighted the evidentiary value of such verbal acts. According to the ILC, verbal statements may qualify as state practice, and the ILC stated in Draft Conclusion 6 of its report on the identification of customary international law that '[p]ractice may take a wide range of forms. It includes both physical and verbal acts.'⁴³

Even though the ILC states that 'in principle no form of practice has a higher probative value than others in the abstract', it accepts that in particular cases, 'it may be that different forms (or instances) of practice ought to be given a different weight when they are assessed in context.'⁴⁴ On this basis, one may argue that, from an evidentiary standpoint, there might be a scenario where physical practice may be more significant than verbal practice for the element of state practice.⁴⁵ The ICJ reiterated its position regarding physical and verbal acts in the *Jurisdictional Immunities* case, stating that:

In the present context, State practice of particular significance is to be found in the judgments of national courts ..., the legislation of those States ..., the

⁴¹ Akehurst (n 23) at 10.

⁴² See Draft Conclusion 6, ILC Report 2018 (n 25) at 133–134; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* ICJ, Judgment, 3 February 2012 (hereinafter: *Jurisdictional Immunities* case) para 55; International Law Association, Final Report of the Committee, Statement of Principles applicable to the Formation of General Customary International Law, London (2000) (hereinafter: 'ILA Report 2000') at 14, 15.

⁴³ Draft Conclusion 6, ILC Report 2018 (n 25) at 133.

⁴⁴ ILC Report 2018 (n 25) at 134: This comment refers to draft conclusion 6 which states that 'practice may take a wide range of forms' which 'includes both physical and verbal acts'.

⁴⁵ See ILC Report 2018 (n 25) at 134; see also *Jurisdictional Immunities* case para 55.

claims to immunity advanced by States before foreign courts and the statements made by States ...⁴⁶

The International Law Association ('ILA') argued in the same vein when it acknowledged that verbal acts may contribute to the element of state practice as long as they are public.⁴⁷ The ILA also agreed that, in some cases, from an evidentiary standpoint, a verbal practice might not have the same 'weight' as physical practice.⁴⁸ Translating such reasoning to the right of self-defence and the situation of territorial states⁴⁹ that make only vague statements or remain silent, one could argue that such behaviour may have a very limited impact on the elements of custom. Bellinger supported this argument in this comment in the ICRC study on customary international humanitarian law:

Although manuals may provide important indications of state behaviour and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational state practice in connection with actual military operations.⁵⁰

Bellinger seemed to assign more evidentiary value to physical acts in the exercise of the respective right or rule. With regard to the right of self-defence, this could mean that the conduct of states exercising their right of self-defence might contribute more to the element of state practice than their conduct that do not express their interpretation of the right through its exercise.

In the *Nicaragua* case, the court seemed to be sceptical about the evidentiary value of verbal acts when it stated that:

⁴⁶ *Jurisdictional Immunities* case (n 42) para 55.

⁴⁷ ILA Report 2000 (n 42) at 14, 15.

⁴⁸ *Ibid* at 13.

⁴⁹ I regard territorial states as states where an NSA is located that is being targeted as the result of another state exercising its right to self-defence. See also chapter 5.II.1.

⁵⁰ JB Bellinger III & WJ Haynes II 'A US government response to the International Committee of the Red Cross study of customary international humanitarian law' (2007) 89 *International Review of the Red Cross* 433 at 445.

The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States.⁵¹

On this basis, I submit that verbal acts may contribute to the element of state practice.⁵² It should, however, be noted that, in general, making a verbal statement about the right of self-defence appears to be much easier than physical acts of self-defence. Therefore, although I agree that verbal statements, in general, qualify as state practice, their contribution to the formation of custom has to be assessed on a case-by-case basis. As the scenarios below will illustrate, such an assessment is crucial for territorial states⁵³ that remain silent or do not object to the use of force on their territory by a third state.

Regarding a change of custom, a crucial part of state practice is practice by states that is generally perceived as unlawful. However, D'Amato's approach to physical acts does not distinguish between lawful and unlawful acts. Such a distinction is also not provided in the approaches of Thirlway and Akehurst.⁵⁴ If we are trying to establish how customary law changes, not distinguishing between lawful and unlawful practice makes sense. In order to achieve a change in state practice or customary international law, a state must deviate from the existing rule at some point.

With regard to a change of custom, the ICJ concluded in the *Nicaragua* case that inconsistencies between the act of a state and the rule may constitute a

⁵¹ *Nicaragua* case (n 4) para 184.

⁵² See the discussion in chapter 3.III.1(a).

⁵³ I regard territorial states as states where an NSA is located that is being targeted as the result of another state exercising its right to self-defence. See also chapter 5.II.1.

⁵⁴ See Thirlway (n 40) 58; Akehurst (n 23) at 10.

breach of that rule, but that they may also constitute 'indications of the recognition of a new rule.'⁵⁵ Moreover, the ICJ reached the following conclusion about a modification of custom:

Reliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards a modification of customary international law.⁵⁶

Therefore, the ICJ acknowledged the possibility that customary international law may emerge from an unlawful practice by states. This may result in a scenario where the 'new' rule competes with the old rule. Danilenko concluded in this context that 'if the new practice acquires a certain degree of stability and generality, the prior customary rules gradually begin to lose their validity.'⁵⁷ As Danilenko confirmed, 'changing law by violating its requirements results from the fact that in the international community states are not only subjects of law but also law-creating agencies'.⁵⁸

Unlawful practice by a state can therefore contribute to state practice, as I illustrate further below. As I noted in the previous chapter, states have exercised their right of self-defence, which was perceived as unlawful in some instances. As I examine further below, what might have been unlawful 15 years ago may now have become a new rule of customary international law.

(b) Generality of practice: Widespread and representative

In this section I examine whether a minimum number of states must conduct or support a certain practice to meet the requirement of state practice and to

⁵⁵ *Nicaragua case* (n 4) para 186.

⁵⁶ *Ibid.*

⁵⁷ GM Danilenko *Law-making in the International Community: Developments in International Law* (1993) 124.

⁵⁸ *Ibid.*

create a new rule of custom. The ICJ concluded in the *North Continental Sea Shelf* case that 'a very widespread and representative participation in the convention might suffice of itself'.⁵⁹ The ICJ stated that this would be possible even 'without any considerable period of time'.⁶⁰

However, the question of quantity of state practice is relative and is influenced by the kind of custom in question. Therefore, the question of quantity cannot be answered definitively by providing a percentage. There is no agreement on the particular number of states that have to participate in the practice in question to meet the standard of quantity.

One approach requires all states to agree to a rule or a practice before it can become a customary rule.⁶¹ Given the existence of over 200 states and the fact that such uniform consent is rare, this approach appears to be old-fashioned and unrealistic.

Another approach bases its argument on the wording of Article 38(1)(b) of the ICJ Statute, which requires 'general practice'. Article 38(1)(b) takes the discussion of quantity back to the question of generality, which appears to be a flexible requirement. Nevertheless, this did not prevent the ICJ from applying a more stringent approach to the requirement of 'general practice' when it concluded that 'a very widespread and representative participation' is required.⁶² However, the ICJ's conclusion leads to the question of what 'widespread and representative participation' means. It reveals that vague terms like 'general practice' are open to interpretation and can simply be

⁵⁹ *North Sea Continental Shelf* cases (n 36) para 73.

⁶⁰ *Ibid.*

⁶¹ See *Tinoco Claims Arbitration (Great Britain v Costa Rica)* 1 UN Rep. Int'l Arb. Awards 369 (1923) at 375, 381; see also *The Case of the S.S. Lotus (France v Turkey)*, Permanent Court of International Justice Judgment, 7 September 1927 (hereinafter: *Lotus* case), dissenting opinion of Judge Weiss at 43, 44.

⁶² *North Sea Continental Shelf* cases (n 36) at 3, 42, 43.

replaced by other vague terms. Just as the ICJ does not provide a clear definition, nor does the ILC define 'widespread and representative'.⁶³ However, one cannot deny that the term 'widespread and representative' relates to the elements employed in international law to describe aspects of state practice, namely generality, consistency and duration.⁶⁴ The ILC merely concludes in this context that 'the practice of "widespread and representative" does not lend itself to exact formulations, as circumstances may vary from one case to another.'⁶⁵ In this regard, the ICJ jurisprudence seems to suggest that there is a relativity between the elements of duration, generality and consistency.⁶⁶ With regard to the *Right of Passage* case, one may argue that if there is a high degree of consistency and duration, a lower degree of generality does not prevent the creation of custom.⁶⁷ Therefore, the discussion of generality reveals no clear definition of the term and, by implication, no definition of quantity in terms of state practice.

Looking at this issue from the other end of the spectrum, one may also ask how many states must dissent to prevent the fulfilment of the requirement of state practice. According to Judge Tanaka, a few states cannot prevent the formation of a rule.⁶⁸ At the same time, Judge Tanaka stated that a very large majority would be required to meet the requirement of state practice.⁶⁹ If we follow the decision in the *North Sea Continental Shelf* cases, half of the states is not enough.⁷⁰

⁶³ See ILC Report 2018 (n 25) at 136–137.

⁶⁴ The ILC uses the terminology of 'widespread and representative' to define a general practice under its draft conclusion 8. See ILC Report 2018 (n 25) at 136–137.

⁶⁵ ILC Report 2018 (n 25) at 136–137.

⁶⁶ See *Right of Passage* case (n 21) at 40; see also *Dispute regarding Navigational and Related Rights* (Costa Rica v Nicaragua), ICJ, Judgment, 13 July 2009 paras 140–144.

⁶⁷ See *Right of Passage* case (n 21) at 40.

⁶⁸ *South West Africa* case (*Liberia v South Africa*), ICJ, Judgment, 18 July 1966, dissenting opinion of Judge Tanaka at 291.

⁶⁹ *Ibid.*

⁷⁰ *North Sea Continental Shelf* cases (n 36) para 76.

On this basis, the short answer to the question of quantity is that strict numbers or percentages will not provide a comprehensive solution. This becomes even more crucial in cases of particular custom, such as the *Right of Passage* case, where the court concluded that even two states might create a rule of custom between those states if no practice contradicts the rule.⁷¹ In this context, the court focused on the element of uniformity, and one might infer that the threshold for uniformity increases as the threshold for generality decreases.⁷² However, regarding general custom, the requirement of uniformity would change, since it is not feasible for all states to agree to a general rule of custom. Therefore, the interpretation derived from the *Right of Passage* case does not apply to general custom.

With regard to changing a rule of customary international law, Lauterpacht and D'Amato argued that the better established a rule is, the greater the quantity of practice must be to overturn it.⁷³ From a generality standpoint of custom, this makes sense. A settled and established rule cannot be overturned by only a few states, even if those states are more powerful than the great majority of states who follow the established practice.

The question of quantity is relative and depends on the customary rule in question. As stated in this section, while a percentage might be a useful indicator, such an indicator cannot replace a case-by-case analysis. With regard to general custom, the threshold of quantity might not be as high as required by particular custom, due to the less critical element of generality. As we will see further below, there may also be scenarios where a small number of states may shape state practice and *opinio juris* and ultimately steer the creation of a customary rule.

⁷¹ *Right of Passage* case (n 21) at 9.

⁷² *Ibid* at 40.

⁷³ D'Amato (n 7) 60, 61; H Lauterpacht 'Sovereignty over submarine areas' (1950) 27 *Brit YB Int'l L* 376 at 393.

(c) *Time factor*

Time has always been another highly crucial factor in the requirement of state practice for the formation of general custom. In the *Right of Passage* case, the ICJ found that practice over a period of 125 years created a rule of custom.⁷⁴ By contrast, the ICJ stated in the *North Sea Continental Shelf* cases that the fact that the practice has been carried out for 'only a short period of time is not necessarily, of itself, a bar to the formation of a new rule of customary international law'.⁷⁵ In his dissenting opinion, Judge Tanaka argued that the time factor is relative to the 'occasion and circumstances' since 'the formation as a whole must be considered as an organic and dynamic progress'.⁷⁶ Judge Lachs followed this line of argument when he concluded that time is relative to the 'movement of events'.⁷⁷

Based on the ICJ jurisprudence, the time factor of the practice in question is relative to the circumstances of each case. This becomes even more crucial in the context of technical improvements in communication and global access to information. Practice may now not take as long to establish itself worldwide as it did at the beginning of the 20th century. The use of abstract numbers, which call for a particular period of time, appears to be outdated. In the age of the internet, social media platforms and 24-hour news outlets, one may very well argue that the factor of time has become more relative than ever to the circumstances of the practice. However, this does not mean that the element of time will become obsolete in the future. The time factor in the form of duration is still essential for determining elements like consistency. As modern international law and the evolution of the right of self-defence show, states do change their minds. Therefore, the longer a state conducts a specific state

⁷⁴ *Right of Passage* case (n 21) at 40.

⁷⁵ *North Sea Continental Shelf* cases (n 36) para 74.

⁷⁶ *North Sea Continental Shelf* cases (n 36) dissenting opinion by Judge Tanaka, at 178.

⁷⁷ *North Sea Continental Shelf* cases (n 36) dissenting opinion by Judge Lachs, at 230.

practice, the more consistent that state practice might be for the formation of custom.⁷⁸

(d) Consistency of practice

In order to meet the requirement of state practice under the traditional approach to the formation of customary international law, the practice must be consistent. In the *Asylum* case, the ICJ stated that no customary rule had been established since the practice was not 'constant' and 'uniform'.⁷⁹ In the *Norwegian Fisheries* case, the ICJ acknowledged that minor inconsistencies would not prevent the establishment of state practice.⁸⁰ In the *Nicaragua* case the ICJ concluded that custom does not require 'absolutely rigorous conformity with the rule'.⁸¹ Moreover, the court stated that-

instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁸²

Thirlway interpreted the element of consistency in relation to duration thus: 'If the issue to be resolved arises frequently, and is regulated in essentially the same way on each occasion, the time required may be short.'⁸³ Thirlway confirmed that percentages cannot provide a general answer to the question of consistency. He noted that consistency is dependent on duration and how

⁷⁸ H Thirlway *The Sources of International Law* 2ed (2019) 74, 76.

⁷⁹ *Asylum* case at 276-277.

⁸⁰ *Norwegian Fisheries* case (n 35) at 138.

⁸¹ *Nicaragua* case (n 4) para 186.

⁸² *Nicaragua* case (n 4) para 186.

⁸³ Thirlway *Sources of International Law* (n 78) 74.

many states acted in the same manner. This allows states to differ slightly in their interpretation of a specific rule or what those states consider to be legally binding.

Nevertheless, such minor inconsistencies may affect the amount of practice that is needed to establish a rule.⁸⁴ With regard to a change of custom, Akehurst pointed out that a new rule can replace a former rule only if it establishes a consistent practice.⁸⁵ However, it is not feasible to provide percentages in order to determine when a consistent state practice is reached. At the same time, an indication of when state practice is inconsistent cannot be indicated with percentages.

The jurisprudential and scholarly discussion appears to struggle with the definition of consistency. It appears that scholars think in binary terms, where states either accept or reject a rule. As the examination of the customary right of self-defence in this thesis shows, consistency is a make or break element in the formation of a new rule.⁸⁶

2. *Opinio juris*

The other constitutive element of custom is *opinio juris*. The requirement of *opinio juris* is one of the most contentious concepts in international law. Questions such as how to ascertain the content of *opinio juris* or where to look for evidence of *opinio juris* are crucial. As I will show in this section, there appears to be no settled definition of *opinio juris*. In this section I provide an overview of the concept of *opinio juris* and explain how it relates to the element of state practice. In addition, I discuss where evidence of *opinio juris* can be

⁸⁴ See *North Sea Continental Shelf* cases (n 36) at 13, 15, 18.

⁸⁵ Akehurst (n 23) at 20–21.

⁸⁶ See chapter 4.I; see also chapter 5.III.

found. In this context, I illustrate how blurry the lines are between evidence of state practice and *opinio juris*.

(a) *What is opinio juris?*

This section will demonstrate the traditional and non-traditional approaches to the element of *opinio juris*. I examine the purpose of *opinio juris* within the process of creating customary international law.

(i) *Traditional approach*

According to the traditional approach, custom may be created only if state practice is combined with the 'belief that a state activity is legally obligatory'.⁸⁷ Article 38 of the ICJ Statute describes international custom 'as evidence of a general practice that is accepted as law'.⁸⁸ According to the positivist approach, *opinio juris* depends on consent by states.⁸⁹ The ICJ confirmed the need for *opinio juris* for the creation of custom in the *North Sea Continental Shelf* cases, when it stated that 'only if such abstention were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom'.⁹⁰ The court further held that:

The states concerned must therefore feel that they are confirming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is no in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁹¹

⁸⁷ Shaw (n 2) 62.

⁸⁸ Article 38 of the ICJ Statute.

⁸⁹ See ILC Report 2018 (n 25) at 138.

⁹⁰ *North Sea Continental Shelf* cases (n 36) para 78.

⁹¹ *North Sea Continental Shelf* cases (n 36) para 77.

Therefore, the court accepted that state practice on its own may not create customary international law and described what the state's conscience may look like. This view was also confirmed in the *Nicaragua* case, where the court held that 'for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitatis*'.⁹² The court concluded as follows:

Either the states taking such action or other states in a position to react to it, must have behaved so that their conduct is evidence of a belief that his practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element is implicit in the very notion of the *opinio juris sive necessitates*.⁹³

This approach by the ICJ appears to set a high threshold for the requirement of *opinio juris* since it requires that the belief of a state must refer to an already existing rule of law. However, in terms of this approach, custom would not be able to develop or even begin, since a state would always have to refer to an already existing rule of law. Therefore, this strict approach appears to be shortsighted and not comprehensive enough to apprehend custom's evolving nature. Assuming that customary rules can change or develop, we are left with the following question: in terms of which concept of *opinio juris* may a new rule of customary international law emerge? The notion of an emerging rule is crucial in this context, as is its distinction from an already established rule.

Shaw proposed a more flexible approach and stated that changing a rule of customary international is a process 'whereby states behave in a certain way in the belief that such behaviour is law or is becoming law'.⁹⁴ Shaw recognised that in order to meet the requirement of legality, the definition of legality must

⁹² *Nicaragua* case (n 4) para 207.

⁹³ *Ibid.*

⁹⁴ Shaw (n 2) 64.

be modified to the element of something that is 'becoming law'.⁹⁵ In the next step, such a rule would have to pass the test of the international community, which would be determined by rejecting or accepting that new or emerging rule.⁹⁶ The ICJ seemed to suggest a similar view when it held that 'reliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards a modification of customary international law'.⁹⁷ However, such an approach requires other states to determine whether one rule supersedes another.⁹⁸ Such an approach would also require the change of a customary rule at a defined moment in time, which appears unrealistic in practice. Therefore, in order to conform to the more dynamic nature of a change of custom, a more flexible concept might be required.

Judge Tanaka, in his dissenting opinion in the *North Sea Continental Shelf* cases, suggested a more flexible approach that deviates from the positivist notion that states must consent to an already existing rule when he stated that there is–

no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of state practice.⁹⁹

Judge Tanaka made it clear that *opinio juris* is not merely shaped by a subjective motive of an individual state but that there is something else outside that is derived from a need in the international community. As Judge Tanaka does not explain what the international community's need encompasses, this

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ *Nicaragua* case (n 4) para 207.

⁹⁸ *Shaw* (n 2) 87.

⁹⁹ *North Sea Continental Shelf* cases (n 36) dissenting opinion by Judge Tanaka, at 176.

remains open to interpretation. One might argue that elements such as morality or values, which the international community needs to function, might play a greater role under the element of necessity. Tunkin seemed to agree with such an approach when he stated that:

In reality, the term 'opinio juris', understood in this sense, signifies that states must act in the conviction that the respective norm of international law already exists, and it follows from this that such a norm can not appear in consequence of state practice but must be assumed to exist irrespective of such practice. This reasoning inevitably leads to the conclusion that a customary norm as postulated by the said concept of *opinio juris* is not a customary norm at all, growing out of the international practice of States, but rather represents a certain norm of 'natural law'.¹⁰⁰

According to Tunkin, it appears that the element of *opinio juris* is not related to the state's practice; it exists irrespective of the practice of states. While this view does not represent the predominant view in the scholarship, it does help with the issue of states trying to change custom by interpreting and applying rules in bad faith. While good faith forms an essential part of international law, there is no guarantee that states always act in good faith and not in bad faith. The approach by Tunkin and his reference to natural law may prevent a deliberate misunderstanding of *opinio juris* or the use of *opinio juris* in bad faith. In this regard, Tunkin argued for a more independent approach to the elements of state practice and *opinio juris*.

For now, let us accept the premise that *opinio juris* is the psychological element that describes a state's will or belief to be bound by a certain rule. In this context, *opinio juris* does not only include what a state has to do but also includes what a state is allowed to do. In that case, a state must believe in

¹⁰⁰ GI Tunkin *Theory of International Law* (1974) 132.

something. In other words, there must be something that causes this belief. Following the natural law-based approach that law is derived from principles of justice and is to be found,¹⁰¹ that something may have a normative value that can determine the character of a rule. For instance, if we consider the right of self-defence, we might argue that it constitutes an exception to the prohibition on the use of force, and that it can therefore have only a defensive character. This defensive character underpins the very nature of the right of self-defence. It is inherent in the norm and cannot be changed even if states have a uniform belief that self-defence is not an exception to the prohibition on the use of force and that it can, therefore, be both offensive and defensive in character. Brunnée and Toope follow a similar line of argument when they establish the criteria of legality within their 'interactional theory', which I will examine in more detail below.¹⁰² Otherwise, the concept of *opinio juris* would be in danger of becoming more of a religious concept than a legal one since it would be determined by the prevailing belief or will of states.

It becomes clear that proponents of the view that *opinio juris* incorporates moral or social needs call for a communal interpretation of the element.¹⁰³ This view aims to root *opinio juris* in a value-based system of the international community. *Opinio juris* as something that goes beyond state consent will be discussed in more detail in chapter 6.¹⁰⁴

¹⁰¹ Malanczuk (n 9) 15, 16.

¹⁰² J Brunnée & SJ Toope *Legitimacy and Legality in International Law: An Interactional Account* (2010) 65–86. Brunnée and Toope argue that 'shared understandings' within the international community constitute the basis for social norms to emerge. Once they exist, they become the background knowledge of how actors perceive themselves and the world and may become the root of legal norms; see chapter 4.II.

¹⁰³ See the discussion in chapter 6.I.2; see also *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, ICJ, Judgment, 5 October 2016, dissenting opinion of Judge Concado Trindade, paras 303, 305.

¹⁰⁴ See the discussion of *opinio juris* in chapter 6.I.

It should be noted, however, that views such as those of Judge Tanaka and Tunkin constitute a clear departure from the positivist approach, which relies on state consent as the determining factor of *opinio juris*. As Akehurst pointed out, 'practice accompanied by a sense of moral or social obligation does not always create a rule of customary law.'¹⁰⁵ This critique followed the ICJ's conclusion in the *South West Africa* case, which held that:

Throughout this case it has been suggested ... that humanitarian considerations are sufficient in themselves to generate legal rights and obligations The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form.¹⁰⁶

Within the traditional approach, the following questions arise: which state conduct may be regarded as an act that qualifies as *opinio juris* and which acts should be regarded as merely political decisions? These questions will be examined further below. At the same time, we must also ask whether *any* political action or decision is also a legal act. This stage in the discussion leads to the concept of 'articulation' set out by D'Amato.¹⁰⁷

By reviewing the ICJ jurisprudence, one may infer that *opinio juris* is a purely subjective element, which is often called the psychological element of custom.¹⁰⁸ It becomes clear that *opinio juris* determines whether an act may become custom.¹⁰⁹ However, the traditional approach lacks a modified definition of legality for something that is considered law before it has become law.

¹⁰⁵ Akehurst (n 23) at 35.

¹⁰⁶ *South West Africa* case (*Liberia v South Africa*), ICJ, Judgment, 18 July 1966, para 49.

¹⁰⁷ D'Amato (n 7) 75.

¹⁰⁸ See A Zimmermann, CJ Tams, K Oellers-Frahm & C Tamuschat *The Statute of the International Court of Justice: A Commentary* (2012) Article 38, paras 223–230.

¹⁰⁹ See D'Amato (n 7) 47–50; see also Akehurst (n 23) at 33.

(ii) Non-traditional approaches

In this section I present the non-traditional approaches to the element of *opinio juris*. On the one hand, I present the view that the element of *opinio juris* is not necessary. On the other hand, I examine how the element of *opinio juris* can be interpreted under the theory of ‘articulation’.

There is support for the first approach in the ICJ jurisprudence, where the court found a rule of customary international law merely by examining state practice.¹¹⁰ For instance, as Akehurst pointed out, Kelsen and Guggenheim argued against the necessity of the element of *opinio juris* for the formation of customary international law but changed their minds in their later work.¹¹¹ As Akehurst and D’Amato noted, *opinio juris* is the distinguishing element when it comes to the question of whether state conduct is linked to a legal obligation or not.¹¹²

With reference to the non-traditional approach that *opinio juris* is not required for the formation of custom, some authors also took the view that consistent state practice already implies that there is a legal duty with which to conform.¹¹³ However, such an approach appears to shift the determination of whether state conduct is ‘accepted as law’ purely to an assessment that is based on state practice. In such a scenario, state practice would determine whether conduct was legally binding or not. By implication, this approach assumes that there is a legal obligation behind all state conduct. This approach struggles in a scenario where there is a legal obligation but contrary state practice. As Koskenniemi pointed out, state practice and *opinio juris* are meant

¹¹⁰ See *Fisheries Jurisdiction* case (n 38) at 24–26; see also *Nottebohm case (Liechtenstein v Guatemala)* ICJ, Judgment, 6 April 1955, at 21–23.

¹¹¹ See Akehurst (n 23) at 33; see also J von Bernstorff *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010) 168–169.

¹¹² Akehurst (n 23) at 33; D’Amato (n 7) 47–50.

¹¹³ See H Lauterpacht *The Development of International Law by the International Court* (1982) 380.

to prevent customary international law from becoming a pure apology for state practice or a utopian model of *opinio juris* without any reference to existing state practice.¹¹⁴ This process of balancing requires two independent reference points that can be weighed against one another.¹¹⁵ However, according to Koskenniemi, the positivist approach is faulty: state practice and *opinio juris* are not independent of one another.¹¹⁶ Each element can only be established with reference to the other one. Therefore, the positivist conception of custom is circular and indeterminate.¹¹⁷

In 1970, D'Amato suggested another approach, and substituted *opinio juris* with the theory of 'articulation'.¹¹⁸ D'Amato's theory of articulation refers to Roger Fisher's idea of articulation and the 'promulgative articulation' of Lon Fuller.¹¹⁹ D'Amato stated that:

The articulation of a rule of international law – whether it be a new rule or a departure from and modification of an existing rule – in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law.¹²⁰

¹¹⁴ Koskenniemi 'The normative force of habit' (n 30) at 93; Koskenniemi *From Apology to Utopia* (n 14) 410–411.

¹¹⁵ See Koskenniemi 'The normative force of habit' (n 30) at 93; Koskenniemi *From Apology to Utopia* (n 14) 410–411.

¹¹⁶ Koskenniemi *From Apology to Utopia* (n 14) 410, 411; see also Koskenniemi 'The normative force of habit' (n 30) at 90.

¹¹⁷ Koskenniemi 'The normative force of habit' (n 30) at 89–90; Koskenniemi *From Apology to Utopia* (n 14) 410–411, 437–438.

¹¹⁸ D'Amato (n 7) 74.

¹¹⁹ *Ibid* 75.

¹²⁰ *Ibid*.

According to D'Amato, any state, court, international organisation or writer might articulate a rule.¹²¹ However, a single writer could not articulate a new rule contrary to the existing rule if a consensus of the international community does not support the new articulation.¹²² At this point, D'Amato's theory of articulation reveals itself in essence to be an approach which depends on state practice. According to D'Amato, a single writer or state may not change an existing rule as long as the requirement of consensus does not support it, and therefore a change of customary international law becomes very difficult in practice. Such an approach also depends strongly on the conduct or 'articulation' by states. It thereby minimises the element of *opinio juris* within the formation process of customary international law. In other words, custom runs the risk of becoming a mere 'apology'.¹²³

On this basis, the attempt by D'Amato to reformulate the element of *opinio juris* reveals the internal contradiction that Koskenniemi pointed out. I agree with Koskenniemi's criticism of the positivist approach in that regard. The so-called reformulation of *opinio juris* by D'Amato results in an assessment of the quantity and consistency of state practice. What appears to be an elegant solution, at first sight, reveals itself to be another state practice based on interpretation of the subjective element.

As this section demonstrates, there have been attempts to deny, reformulate or substitute the element of *opinio juris* in the scholarship. However, so far, the traditional approach still prevails.

¹²¹ Ibid 76-77, 85-86.

¹²² Ibid 77.

¹²³ See Koskenniemi *From Apology to Utopia* (n 14) 410-411, 414.

(b) *Opinio juris: Proof and evidence*

While the previous section gave an overview and understanding of *opinio juris*, in this section I focus on where one can find evidence and prove the element of *opinio juris*. Proof and evidence of *opinio juris* are crucial for the examination in this thesis of whether the right of self-defence against NSAs has changed. As has been demonstrated, the concept of *opinio juris* is contested and lacks a settled definition. This is particularly true when it comes to the question of how to prove *opinio juris* with regard to a particular rule. As I illustrate in this section, on the basis of ICJ jurisprudence and the scholarship, state practice and *opinio juris* are not distinguishable. In addition, I show that the issue of having two elements that overlap also translates to the question of evidence. Therefore, I submit that evidence of state practice can also serve as evidence of *opinio juris*.

According to the ILC, evidence of *opinio juris* may take a number of forms. The ILC stated in Conclusion 10(2) of its 2018 report that:

Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.¹²⁴

According to the ILC, this does not constitute an exhaustive list of the forms of evidence of *opinio juris*. The ILC states that ‘pronouncements and physical actions concerning the practice in question may only be indicative of acceptance as law supporting an alleged rule’.¹²⁵ An overlap of state practice and *opinio juris* can definitely not be denied and will be addressed in more

¹²⁴ ILC Report 2018 (n 25) at 140.

¹²⁵ Ibid.

detail below. The ILC concludes that the clearest indication of *opinio juris* may be found in 'an express public statement on behalf of a state that [the] given practice is permitted, prohibited or mandated under customary international law'.¹²⁶ Such statements may be made in 'multilateral settings' or in written or oral pleadings before courts and tribunals.¹²⁷

For a more detailed understanding of the evidence of *opinio juris* one has to examine the jurisprudence of the ICJ. A closer examination of this jurisprudence reveals that the ICJ does not provide an approach that directly proves *opinio juris* and instead uses indirect evidence from which it infers the existence of *opinio juris*. By taking this approach, the ICJ further confirms that state practice and *opinio juris* are, indeed, indistinguishable. This approach may be illustrated with the *Nicaragua* case, where the ICJ connected the question of proof of *opinio juris* to the practice, holding that:

The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.¹²⁸

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ *Nicaragua* case (n 4) para 184.

In addition to the practice of states, the ICJ also used General Assembly resolutions as the basis for proving the existence of an *opinio juris*.¹²⁹ In the *Western Sahara* case, the court held that the right of self-determination had reached the status of customary international law on the basis of General Assembly Resolution 1514 of 14 December 1960 and General Assembly Resolution 2625 of 24 October 1970.¹³⁰ The *Nicaragua* case also upheld the value of General Assembly resolutions for the element of *opinio juris* when the ICJ stated that '*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions'.¹³¹ In its Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, the court made a clear assessment of the normative value of General Assembly resolutions when it held as follows:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.¹³²

This statement by the ICJ constitutes a clear acceptance of the normative value that a General Assembly resolution may have for the concept of *opinio juris*. However, it notes that it is also important to look at the conditions of adoption.

¹²⁹ See *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996 (hereinafter: *Nuclear Weapons* case) at 226, 254, paras 64–73; see also *Western Sahara* case, ICJ, Advisory Opinion, 16 October 1975 (hereinafter: *Western Sahara* case) at 31–33; *Case concerning East Timor (Portugal v Australia)* ICJ, Judgment, 30 June 1995 at 90, 102; *Nicaragua* case at 100, 101; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004 at 136, 171, 172.

¹³⁰ *Western Sahara* case (n 129) para 55.

¹³¹ *Nicaragua* case (n 4) para 188.

¹³² *Nuclear Weapons* case (n 129) para 70.

The ICJ does not elaborate on this point and its meaning. It is unclear whether this is directed to a state's motives whilst voting for a resolution or whether it addresses merely the general circumstances under which a resolution was adopted. What remains is a confirmation that the ICJ follows its line in proving *opinio juris* with indirect evidence.

In addition to General Assembly resolutions, the ICJ also refers to the codification of conventions when it identifies *opinio juris*. In the *North Sea Continental Shelf* cases, the court referred to Article 6 of the 1958 Convention on the Continental Shelf when it dealt with the proof of the existence of a customary rule.¹³³ As Zimmermann pointed out, the court has also made extensive use of the 1969 Vienna Convention on the Law of Treaties and Conventions on the Law of the Sea of 1958 when it assessed whether a rule was custom or not, without explaining whether or to what extent those codifications might be evidence of *opinio juris*.¹³⁴ On the one hand, Zimmermann remarked that the ICJ almost never explains why it considers a convention to be evidence of *opinio juris*. On the other hand, one might argue that a convention might contribute to or represent the communal morality in that regard. In addition, the ICJ even referred to the ILC's Draft Articles after their first reading in order to determine the customary nature of a rule.¹³⁵ The ICJ never goes into detail when it is confronted with proving *opinio juris* and does not explain why it regards a General Assembly resolution, convention or the ILC Draft Articles as evidence. Therefore, one might question the ICJ's methodology concerning the element of *opinio juris*.

The main submission that can be derived from the examination in this section is that the ICJ acts without a clear definition of the element of *opinio juris* and

¹³³ *North Sea Continental Shelf* cases (n 36) paras 63–68.

¹³⁴ See Zimmermann (n 108) Article 38, para 229.

¹³⁵ See *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ, Judgment, 25 September 1997, paras 47, 50–54.

that it derives evidence of *opinio juris* from facts. It has never established the standard that has to be met in order to fulfil the requirement of *opinio juris*. When it finds proof of *opinio juris*, it does so by using only circumstantial evidence or what it calls 'indirect evidence'.¹³⁶ With regard to the assessment and usage of such indirect evidence, the ICJ seems to have forgotten that it had already established the requirements for the concept of indirect evidence.¹³⁷ Without going into the details of the procedural law and the principle of the free assessment of evidence at the court, one might question the ICJ's approach from the perspective of legal reasoning. Ultimately, the examination in this section shows that evidence of *opinio juris* also qualifies as evidence of state practice. From an evidentiary standpoint, the lines between state practice and *opinio juris* have become blurred and cannot live up to the positivist theory of custom.

In this context, Lauterpacht recognised the difficulty of positive proof of *opinio juris* and suggested that instead of looking for positive proof, a court should look for negative proof in order to prove that a rule was not legally binding.¹³⁸ Lauterpacht referred to the *Asylum* case and argued that the concept of negative proof is practical.¹³⁹ However, the approach of the ICJ, which is to use indirect proof, appears to be more practical. Since *opinio juris* is still a legal concept, evidentiary matters cannot be left aside. Lauterpacht's approach lacked a clear solution for the positive proof of *opinio juris*. His approach

¹³⁶ See *The Corfu Channel case (Merits)*, ICJ, Judgment, 9 April 1949, at 18.

¹³⁷ See *Corfu Channel* case *ibid* at 18, 30. See also MP Scharf & M Day 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13 *Chi J Int'l L* 123 at 131: 'The Court held that the liberal reliance on circumstantial evidence is permissible if two conditions are met: (1) the direct evidence is under the exclusive control of the opposing party; and (2) the circumstantial evidence does not contradict any available direct evidence or accepted facts.' For the purposes of this thesis, 'circumstantial' evidence in this context has the same meaning as 'indirect' evidence.

¹³⁸ Lauterpacht *The Development of International Law* (n 113) 380.

¹³⁹ *Ibid*.

focused too much on the negative proof and tried to avoid the problem at hand.

With regard to the question of evidence, Koskenniemi questioned the ICJ's approach to indirect evidence. This critique goes back to his critique of the positivist approach of state practice and *opinio juris*. In the example of General Assembly resolutions as evidence of *opinio juris*, Koskenniemi pointed out that one may not deduce a state's views about the law merely by its vote on a resolution.¹⁴⁰ Koskenniemi stated that the act of voting may derive merely from a political gesture or an alliance.¹⁴¹ According to Koskenniemi, the belief or will behind a vote was decisive for the psychological element and one cannot infer any reflection of *opinio juris* by merely looking at the voting practice of a resolution or codifying conference.¹⁴² On this basis, Koskenniemi pointed out that it is impossible to prove the internal aspect.¹⁴³ At least, it appears that *opinio juris* cannot be proved by the means that are usually accessible since states are abstract entities. This makes it difficult or even impossible to determine the 'belief' or 'feel' of states. Koskenniemi further pointed out that even if one were able to determine the internal aspect, the so-called psychology, then such custom formation would lose its normativity and would become a mere apology for state interests.¹⁴⁴

Koskenniemi's critique of the positivist approach to state practice and *opinio juris* reinforces the need for a non-traditional approach to *opinio juris* as including elements like communal morality or needs that provide a normative perspective.¹⁴⁵ While I agree with Koskenniemi's critique of the positivist

¹⁴⁰ Koskenniemi *From Apology to Utopia* (n 14) 434.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* 435.

¹⁴³ *Ibid.* 437. Koskenniemi accounts the psychological element (*opinio juris*) as the law's 'internal aspect' that distinguishes it from mere coercion. See also Koskenniemi 'The normative force of habit' (n 30) at 90.

¹⁴⁴ See Koskenniemi *From Apology to Utopia* (n 14) 437.

¹⁴⁵ See chapter 3.III.2(a)(2).

approach to state practice and *opinio juris* as being indistinguishable, I disagree with his critique that the element of *opinio juris* cannot be determined by external factors such as practice by states. In the example of states voting in the General Assembly, one might counter that a set of facts, including the vote, behaviour and practice of the past, might give an indication of the element of *opinio juris*. While such a result might not be in accordance with the positivist perception of the constitutive elements, the ICJ jurisprudence suggests that it has become a useful tool for finding evidence of *opinio juris*. As I point out further below in the example of letters by states to the Security Council, a single letter might not always give a clear indication of what states think is lawful. However, this is not say that a single letter cannot provide that kind of evidence at all. Ultimately, it depends on the external circumstances of the past and present.

With regard to external circumstances, it would not be the first time that such external factors determine the subjective element. For instance, in terms of international criminal law, Article 30 of the Rome Statute states that 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events' might determine the mental element.¹⁴⁶ While states are abstract entities in the eyes of international law, the decisions made by states do not occur in a vacuum. Such decisions are the product of past behaviour as well as expectations for the future. Therefore, if a state votes for the criminalisation of certain conduct in a General Assembly vote, that might very well represent how that state regards the law at the moment and how it might assess the situation in the future.

If we cannot accept external factors as proof of *opinio juris*, this will result in a scenario where it appears to be almost impossible to find evidence of *opinio*

¹⁴⁶ Article 30(3) of the Rome Statute.

juris. I agree with the approach taken by the ICJ that evidence of state practice can also serve as evidence of *opinio juris*. In this respect, if one examines the formation of a customary rule, it is impossible to determine the element of *opinio juris* separately from establishing state practice.

In summary, from an evidentiary standpoint, drawing a clear dividing line between state practice and *opinio juris* is difficult. However, in comparison to state practice, not any kind of source can contribute to *opinio juris*. Identifying *opinio juris* depends more on the content of the source one is examining. In this context, the content should be a manifestation of the belief that state conduct is legally obligatory or becoming obligatory. Therefore, from an evidentiary standpoint, the ascertainment of whether something proves state practice or *opinio juris* is flexible. In addition, a source of evidence might be proof of both state practice and *opinio juris*.

3. Circularity of state practice and *opinio juris*: A matter of 'yin and yang'

The previous sections showed how intertwined the constitutive elements of custom are; this section will examine the interplay between the two traditional elements of custom within the formation process of customary international law. In order to determine whether the customary right of self-defence has changed, one has to understand the dynamics between state practice and *opinio juris*. Depending on whether there is an element that prevails over or dominates the other element, such a theoretical assessment is crucial for the formation of custom. In this regard, Koskenniemi's description of the interplay between state practice and *opinio juris*, which he described as circularity, reveals the dynamics of the constitutive elements of custom.

The concept of circularity with regard to the elements of state practice and *opinio juris* implies that both elements affect each other and establish each

other's existence at the same time.¹⁴⁷ In this context, Koskenniemi demonstrated that there can be no state practice without *opinio juris* and at the same time there can be no *opinio juris* without state practice.¹⁴⁸ This concept may best be illustrated using the concept of 'yin and yang', a principle from Chinese philosophy. Koskenniemi pointed out that the positivist view of custom created a situation which he called 'hopelessly circular'.¹⁴⁹ Koskenniemi worked under the narrative that the positivist concept of custom requires the element of state practice and *opinio juris* to be independent of each other.¹⁵⁰ In his view, however, the circularity prevented any independence of those elements.¹⁵¹ As pointed out, state practice and *opinio juris* are meant to prevent customary international law from becoming a pure apology of state practice or a utopian model of *opinio juris* without any reference to existing state practice.¹⁵² In this context, Koskenniemi's main point was to illustrate that the positivist approach to customary international law is incoherent.

If Koskenniemi is right, it would be pointless to delineate any boundaries between state practice and *opinio juris*.¹⁵³ In addition, from a temporal perspective, it can be argued that since state practice and *opinio juris* are developing simultaneously, it is rarely possible to determine whether there is *opinio juris* or which element in the formation process came first. This would result in a 'chicken or egg' discussion. Custom must therefore, according to Koskenniemi's notion of the positivist approach, be perfectly centred between

¹⁴⁷ See Koskenniemi *From Apology to Utopia* (n 14) chapter 6.

¹⁴⁸ Ibid 431, 434, chapter 6.

¹⁴⁹ Ibid 434.

¹⁵⁰ Koskenniemi 'The normative force of habit' (n 30) at 90.

¹⁵¹ Ibid at 90, 91.

¹⁵² Ibid at 93; Koskenniemi *From Apology to Utopia* (n 14) 410–411.

¹⁵³ See also International Committee of the Red Cross Study (ICRC), *Study on Customary International Humanitarian Law* (2005) (hereinafter: 'ICRC study') at 181, available at https://www.icrc.org/eng/assets/files/other/icrc_002_0860.pdf (last accessed 5 April 2020) at 181–182.

the ideas of *Apology* and *Utopia*. Koskenniemi suggested that positivism veers across a spectrum of apology and normativity.¹⁵⁴

As we have seen, in the positivist approach, *opinio juris* focuses on whether a state believes that a rule is legally binding. However, I argued above that the discussion about drawing a line between state practice and *opinio juris* is not a question of the evidentiary source but rather a question of definition. If we accept the elements of a natural law-based approach, there might also be a scenario where *opinio juris* does not include any state practice and a clearer separation might be possible.

Using the circularity of state practice and *opinio juris*, one might argue that the circular approach represents a practical solution. The approach of applying a more flexible approach to the concept of custom to the extent that state practice and *opinio juris* do not have to be two wholly independent elements makes it easier to argue for the existence of a customary rule. As Koskenniemi pointed out, that there cannot be any practice without *opinio juris*.¹⁵⁵

On this point, I agree with Koskenniemi, and submit that the constitutive elements of custom prove each other's existence and that the formation process of custom is circular. As discussed in the previous section, state practice and *opinio juris* are not distinguishable, which means that evidence of state practice could also serve as evidence of *opinio juris* and vice versa. However, since the separation of state practice and *opinio juris* is still the predominant view in the scholarship and international jurisprudence, in this thesis I will conduct separate investigations of state practice and *opinio juris* as part of my argument that the customary rule of self-defence has changed. I

¹⁵⁴ See Koskenniemi 'The normative force of habit' (n 30) at 93; Koskenniemi *From Apology to Utopia* (n 14) 410–411.

¹⁵⁵ See Koskenniemi *From Apology to Utopia* (n 14); see also Koskenniemi 'The normative force of habit' (n 30) at 90, 91.

will also suggest an approach to *opinio juris* that renders it independent from state practice.¹⁵⁶

IV. The meaning of acquiescence and inaction for the formation of customary international law

Apart from the interplay between state practice and *opinio juris*, states' reaction to an emerging or new rule is also essential to the formation of custom. The ICJ defined acquiescence as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.¹⁵⁷ In the context of the ICJ judgment in the *Gulf of Maine* case, one might argue that if a state is not protesting against a rule and acquiesces in the practice of other states, that state has accepted such practice as legitimate.¹⁵⁸ However, in the *Lotus* case, the ICJ stated that acquiescence may amount to consent to a customary rule only 'if such abstention were based on their [the states] being conscious of having a duty to abstain would it be possible to speak of an international custom'.¹⁵⁹

A major question is under what circumstances acquiescence and inaction can be interpreted as confirmation of state practice or *opinio juris*. As Starski pointed out, one cannot deny that silence by states may confirm or at least accelerate the formation process of custom.¹⁶⁰ The question is in what circumstances silence may contribute to state practice or *opinio juris* and ultimately confirm the formation of a new customary rule.

¹⁵⁶ See chapter 6.I.

¹⁵⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, ICJ, Judgment, 20 January 1984 (hereinafter: *Gulf of Maine* case), para 130.

¹⁵⁸ See IC MacGibbon 'Customary international law and acquiescence' (1957) 33 *Brit YB Int'l L* 115 at 131; Shaw (n 2) 66–67.

¹⁵⁹ *The Case of the S.S. Lotus (France v Turkey)*, Permanent Court of International Justice Judgment, 7 September 1927, at 28.

¹⁶⁰ See P Starski 'Silence within the process of normative change and evolution of the prohibition on the use of force: Normative volatility and legislative responsibility' (2017) 4 *Journal on the Use of Force and International Law* 14 at 42, 43.

In the *Temple of Preah Vihear* case, the ICJ concluded that if states must and can act but do not, then the lack of response can be viewed as consent.¹⁶¹ Similarly, in the *Fisheries* case, the ICJ held that 'general toleration of the international community' leads to binding international law.¹⁶² Some commentators have agreed with the notion that silence can be an expression of *opinio juris*, acquiescence or concurrence in a new emerging rule of custom if certain prerequisites are met.¹⁶³ In this context, Mendelson concluded that 'if their [inactive states'] interests are affected, [they] are expected to protest, with the result that, if they do not, they are bound by the rule'.¹⁶⁴ Starski made a similar argument when she stated that–

[the] effects of silence do not depend on the intentions of the silent state but on the legitimate expectations of other states, and the international community as a whole, that a state speaks.¹⁶⁵

Mendelson and Starski seemed to suggest that it is not the intention of the silent state but the international community's legitimate expectation as a whole that is more important. Of course, this would depend on the rule in question. In the example of the right of self-defence, one might argue that the international community has the legitimate expectation that states that do not want to be bound by a rule will object. Danilenko diverges from Mendelson and Starski on the last element.¹⁶⁶ Danilenko also sets out two requirements

¹⁶¹ The ICJ describes this condition as *si loqui debuisset ac potuisset*. See the *Temple of Preah Vihear* case (*Cambodia v Thailand*) ICJ, Judgment, 6, 23, 15 June 1950, at 23.

¹⁶² *Norwegian Fisheries* case (n 35) at 139.

¹⁶³ Shaw (n 2) 66–68; GM Danilenko 'The theory of international customary law' (1988) 31 *German YB Int'l L* 9; MH Mendelson 'The formation of customary international law' (1998) 272 *Recueil des Cours*; E Schweiger 'Listen closely: What silence can tell us about legal knowledge production' (2019) 6 *London Review of International Law* 391; MacGibbon (n 158) at 115; Starski (n 160) at 14.

¹⁶⁴ Mendelson (n 163) at 186. The terminology of Mendelson with regard to 'interests are affected' is not the same as the meaning of specially affected states under the concept of SAS.

¹⁶⁵ Starski (n 160) at 24.

¹⁶⁶ Danilenko 'The theory of international customary law' (n 163) at 40–41.

for when those inactive states' silence may constitute approval of a practice. First, a state's interests or rights must be directly or indirectly affected. Second, a state must be 'aware of the legal claims for which consent is presumed in case of the absence of protest'.¹⁶⁷ With regard to the second requirement, Danilenko concluded that 'no notification or official declaration of relevant legal claims' is required.¹⁶⁸ With reference to the jurisprudence of the ICJ, Danilenko pointed out that the element of awareness does not even require positive knowledge by the inactive state.¹⁶⁹ It appears that, under Danilenko's approach, awareness might be defined as something that the state ought to have known.

In addition, there is the view that, depending on the element in question – state practice or *opinio juris* – the factors that have to be taken into account differ. For instance, Lewis, Modirzadeh and Blum concluded that:

With respect to customary international law, it appears that state practice may, under certain circumstances, include inaction. Intention and deliberateness appear to be factors to consider when evaluating such purported inaction, as well as whether a sense of legal obligation (rather than political, diplomatic, strategic, or policy concerns) animated or otherwise sufficiently contributed to the State's inaction. Finally in this connection, the degree of factual knowledge may be raised in respect of its potential role in discerning whether a State deliberately declined to act. Regarding evidence to establish that a general practice is accepted as law (*opinio juris*), it appears that failure to react over time to practice may serve as such evidence, provided that States were in a position to react and that the circumstances called for some reaction.¹⁷⁰

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid, referring to the *Norwegian Fisheries* case (n 35) at 138, 139; *Gulf of Maine* case (n 157) at 304.

¹⁷⁰ DA Lewis, NK Modirzadeh & G Blum 'Quantum of silence: Inaction and *jus ad bellum*' 2019 *Harvard Law School Program on International Law and Armed Conflict* at 32.

With regard to the element of state practice, the authors consider deliberateness and intention, sense of legal obligation, and a degree of factual knowledge as factors that have to be taken into account. In the case of *opinio juris*, the authors stated that the failure to react over time to practice may serve as evidence, assuming that such a state was in a position to react.¹⁷¹ The authors also do not disregard the notion that such acquiescence might also apply to the rules of the *jus ad bellum*.¹⁷²

The ILC also concluded that one has to separate between inaction in terms of state practice and *opinio juris*, while confirming that inaction may count as practice or *opinio juris*.¹⁷³ With regard to state practice, the ILC stated that the inaction must be a conscious decision to refrain from acting in a given situation.¹⁷⁴ With regard to *opinio juris*, the ILC referred to the *North Sea Continental Shelf* cases and concluded that the tolerating of a certain practice may serve as evidence of *opinio juris* if two requirements are met.¹⁷⁵ First, a reaction to the practice must be necessary, for instance, when a certain practice directly or indirectly affects state interests.¹⁷⁶ Second, the reacting state must have knowledge of the particular practice. Furthermore, the state must have 'sufficient time and ability to act'.¹⁷⁷ With regard to *opinio juris*, the ILC stated that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.'¹⁷⁸

¹⁷¹ Ibid.

¹⁷² Ibid at 33–40.

¹⁷³ Draft Conclusion 6(1) and 10(3) of the ILC Report 2018, ILC Report 2018 (n 25) at 133, 141–142.

¹⁷⁴ ILC Report 2018 (n 25) at 133.

¹⁷⁵ Ibid. See also *North Sea Continental Shelf* cases (n 36) para 33.

¹⁷⁶ ILC Report 2018 (n 25) at 133.

¹⁷⁷ Ibid at 142.

¹⁷⁸ Draft Conclusion 10 of the ILC Report 2018, ILC Report 2018 (n 25) at 140–142.

The ILC confirmed that silence can be interpreted as evidence of *opinio juris* only when the state in question is affected by the practice in question and if that state is 'in a position to react'.¹⁷⁹ The ILC defined a state 'in a position to react' as one that has knowledge of the practice in question, 'which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge'; in addition, there had to be 'sufficient time and ability to act'.¹⁸⁰

Therefore, the ICJ jurisprudence and the scholarship reveal the main criteria for determining when silence can be interpreted as acceptance or confirmation. With regard to state practice, there are three major factors. First, the inactive state's interests must be affected. Second, the inactive state must be aware that its silence might be read as consent to a certain rule. With regard to the element of *opinio juris*, crucial factors to take into account are the passage of a reasonable time to react, that the state must be in a position and have the ability to react, and that the circumstances called for a reaction. Given the technological developments in the 21st century in the form of the internet, one might argue that states and their respective ministries can access public information about a certain practice that affects such states.

The scholarship and the ICJ jurisprudence show that inactivity can be interpreted as consent to the formation of general customary international law. Within the meaning of general customary international law, states that do not object to a certain state practice or *opinio juris* could be bound by that new crystallised rule.

¹⁷⁹ ILC Report 2018 (n 25) at 142.

¹⁸⁰ Ibid.

V. Conclusion

The discussion in this chapter illustrates the complex framework that governs the formation of custom. As discussed in this chapter, the positivist notion of custom requires state practice and *opinio juris*. The positivist approach assumes that these elements are separate from one another, are purely factual. As they serve merely to establish what states have consented to, they do not provide any normative or moral element. As this chapter illustrated with reference to Koskenniemi, the separation of state practice and *opinio juris* is impossible to sustain. Koskenniemi pointed out that both constitutive elements of custom establish the other's existence and he observed a circularity in the formation of custom. Koskenniemi's critique is compelling. However, the predominant view in the scholarship is that both elements have to be established. This thesis will search for both separately and suggest ways of distinguishing between them even when they both seem to rest on the same evidence. As I demonstrate in chapter 4, even though state practice and *opinio juris* are part of the same spectrum under the positivist approach, it is sometimes possible that one end of the spectrum can be clearly identified as *opinio juris* and the other one as state practice.¹⁸¹

With regard to state practice, the discussion in this chapter showed how verbal acts could be interpreted as state practice and the extent to which elements such as quantity, duration and consistency will play a role in the formation process of custom. Regarding the element of *opinio juris*, I agree with the traditional positivist approach for the purpose of the examination in chapters 4 and 5.

¹⁸¹ See the discussion of German activities related to the fight against ISIS in Syria in chapter 4.II.2. In addition, in chapter 6, I suggest a different approach to determining *opinio juris*, which deviates from the positivist approach which makes it fairly easy to separate state practice and *opinio juris*.

In addition, the discussion in this chapter revealed the circumstances in which silence can be interpreted as confirming a rule. With regard to the SAS doctrine, which I introduce in chapter 5, inactivity and silence appear to be crucial to the discussion of custom formation.

Chapter 4. Arguments in support of the contention that the rule of customary international law on the right of self-defence has not changed in the post-9/11 era

This chapter examines the widely held view in the scholarship that the rule of customary international law on the right of self-defence has not changed. I introduce and evaluate arguments in the scholarship that the rule of customary international law regarding the right of self-defence has not changed.¹ Most of the authors who argue that customary international law has not changed apply the traditional approach to the formation of custom.² In this context, it seems that some commentators tend to focus on state practice with regard to the application of the unwilling or unable test and pay relatively little attention to *opinio juris*.³ It also appears that developments within the right of self-defence are often considered as isolated events. This chapter aims to identify flaws in the arguments that the right of self-defence against a non-state actor ('NSA') under customary international law has not changed. I examine the analysis of state practice and *opinio juris* in the scholarship about

¹ See J Brunnée & SJ Toope 'Self-defense against non-state actors: Are powerful states willing but unable to change international law?' 2017 *International and Comparative Law Quarterly* 1; T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal of Conflict and Security Law* 289; T Reinold 'State weakness, irregular warfare, and the right to self-defense post-9/11' (2011) 105 *American Journal of International Law* 244; CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359; ME O'Connell, CJ Tams & D Tladi *Self-defence against Non-state Actors* (2019) 77–80; O Corten 'The "unwilling or unable" test: Has it been, and could it be, accepted?' (2016) 29 *Leiden Journal of International Law* 777 at 797–798; K Tibori-Szabó 'The "unwilling or unable" test and the law of self-defence' in *Fundamental Rights in International and European Law* (2016) 73–96; cf AS Deeks 'Unwilling or unable': Towards a normative framework for extraterritorial self-defense' (2012) 52 *Virginia Journal of International Law* 483 at 549–550.

² The traditional approach to the formation of custom requires a consistent and widespread state practice as well as *opinio juris*. See T Bennett & J Strug *Introduction to International Law* (2013) 17–21.

³ See Brunnée & Toope 'Self-defense against non-state actors' (n 1); Ruys & Verhoeven (n 1); Tams (n 1); Tibori-Szabó (n 1) 73–96.

the right of self-defence against NSAs. I then focus on how the unwilling or unable test is treated and rejected by the scholarship.

As an alternative to the traditional positivist approach to custom, I also examine the interactional approach of Brunnée and Toope. Brunnée and Toope argue that there has not been a shift within customary international law with regard to the unwilling or unable test.⁴ Brunnée and Toope argue that a shift of customary international law might violate the principle of the rule of law and that it is not supported by state practice.⁵

The examination in this chapter does not serve to prove that the unwilling or unable test has become law, but rather identifies flaws in the prevailing argument that the right of self-defence has not changed. It further lays the foundation for the following chapter, in which I argue that customary international law can be shaped by a group of states rather than the entire collective of states.

I. The rule of customary international law on the right of self-defence has not changed: The traditional view

In this section I examine the traditional view in the scholarship, which operates according to the narrative that custom consists of state practice and *opinio juris*. Therefore, a change of custom can occur only if both these elements are present. On this basis, I discuss the work of other scholars on the question of whether custom has developed in respect of the right of self-defence against an NSA.

⁴ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 20.

⁵ Brunnée and Toope applied their developed 'interactional law' approach: see *ibid* at 15–18.

With regard to the right of self-defence against NSAs, recent discussions in the scholarship have focused on the unwilling or unable test.⁶ This section analyses the various arguments and examines whether they are still tenable, especially against the backdrop of the attacks against ISIS in Syria. These attacks appear to have given traction to a change of the customary rule of self-defence against NSAs.

1. A discussion of state practice in the scholarship: The unwilling or unable test

Those scholars who argue against a change in customary law state that there is no practice that is consistent and widespread enough in order to meet the requirement of state practice.⁷ However, most of the time, it is unclear what the authors define as state practice. As I demonstrated in the previous chapter, state practice does not have a fixed definition.⁸ Its interpretation and definition are somewhat flexible and adapt to the kind of custom that is in question.

(a) *Analysis of state practice: More than just an emerging trend?*

According to these scholars, state practice shows that either there is a lack of consistency, or the element of widespread and representative practice is not satisfied. In order to show the development of state practice, I present the various examinations of state practice in chronological order.

⁶ See Kevin Jon Heller 'Ashley Deeks' problematic defence of the "unwilling or unable" test', 15 December 2011, available at <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> (last accessed 7 December 2020); Corten 'The "unwilling or unable" test' (n 1); Deeks (n 1); G Williams 'Piercing the shield of sovereignty: An assessment of the legal status of the unwilling or unable test' (2013) 36 *UNSWLJ* 619; Brunnée & Toope 'Self-defense against non-state actors' (n 1).

⁷ See Heller 'Ashley Deeks' problematic defence' (n 6); Corten 'The "unwilling or unable" test' (n 1) at 786-791; Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 8-15; D Ahmed 'Defending weak states against the unwilling or unable doctrine of self-defence' (2013) 9 *J. Int'l L & Int'l Rel.* 1 at 10, 12; Ruys & Verhoeven (n 1) at 310-313.

⁸ See chapter 3.III.1.

In 2005, Ruys and Verhoeven analysed state practice on the right of self-defence, asking to what extent an attribution to the territorial state⁹ is required in order for the victim of the attack to have the right to exercise self-defence on the host state's territory. Rejecting the unwilling or unable test, Ruys and Verhoeven concluded that attribution of the conduct of an NSA to the territorial state is required to trigger the right of self-defence:

In the end, the present authors are of the opinion that this extreme position must be rejected, not only because legal literature traditionally confirms the need for state involvement in private attacks, but mostly because state practice has consistently upheld the need for a certain link with a state.¹⁰

Ruys and Verhoeven based their conclusion partly on the state practice of self-defence against NSAs after the Cold War until the attacks of 9/11, which illustrated to them a 'very controversial issue, governed by a great amount of uncertainty'.¹¹ However, they interpreted state practice against the backdrop of the *Nicaragua* case, which required a 'substantial involvement' and which they interpreted as 'aiding and abetting'.¹² Ruys and Verhoeven concluded with regard to the effective control test that it sets a threshold that is too high and that, in practice, 'it would be nearly impossible for states to exercise their right of self-defence'.¹³ With regard to the practice by states, Ruys and Verhoeven stated that 'states have in the overwhelming majority of occasions invoked the (active or passive) support provided by a state to a nonstate actor, without attempting to impute the private attacks to the state in question.'¹⁴

⁹ For the purposes of this examination, I consider territorial states as states where an NSA is located that is being targeted by another state exercising its right to self-defence.

¹⁰ Ruys & Verhoeven (n 1) at 312.

¹¹ Ibid at 296.

¹² Ibid at 314–317, 319. In the *Nicaragua* case the ICJ applied the effective control test: *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ, Judgment, 27 June 1986 (hereinafter: *Nicaragua* case) para 115.

¹³ Ruys & Verhoeven (n 1) at 313.

¹⁴ Ibid at 314.

While it may seem that Ruys and Verhoeven suggested that the rule might have changed, they rejected this view and argued that in order to attribute an NSA to a host state, there has to be a substantial involvement by the host state.¹⁵ In the absence of such substantial involvement, they regard the self-defence as illegal.¹⁶

In their examination, the authors also considered the unwilling or unable test. However, even though they acknowledged the number of cases from the first half of the 20th century that Brownlie noted,¹⁷ as well as the number of cases¹⁸ from the second half of the 20th century, the authors concluded as follows:

In recent years, shifts in state practice, security doctrines and legal literature seem to support a loosening of the conditions [of the right of self-defense] hereof. ... The authors do, however, reject the legality of self-defense in the absence of substantial state involvement, even with regard to failed states, as the acceptance of this idea would seriously erode the prohibition on the use of force and the principle of non-intervention and would overly jeopardise international peace and security.¹⁹

It must be noted that Ruys and Verhoeven did not reject the unwilling or unable test based on a lack of state practice. Instead, Ruys and Verhoeven rejected the legality of the unwilling or unable test based on policy grounds, despite the existing practice by states. It is also unclear how the prohibition on the use of force will erode if states apply an existing exception to that

¹⁵ Ruys and Verhoeven argue in favour of a re-interpretation of the concept of 'substantial involvement' to also include 'aiding and abetting': *ibid* at 314–317.

¹⁶ *Ibid* at 312.

¹⁷ *Ibid* at 317. Brownlie points out five cases in which states have exercised their right of self-defence in a situation where the host state was either unwilling or unable. See I Brownlie 'International law and the activities of armed bands' (1958) 7 *International & Comparative Law Quarterly* 712 at 732.

¹⁸ Ruys and Verhoeven state that the concept of 'unwilling or unable' was used by Israel, Rwanda, Turkey and Iran. See Ruys & Verhoeven (n 1) at 317.

¹⁹ *Ibid* at 319.

prohibition. Nevertheless, Ruys and Verhoeven observed a shift in the practice by states which does not meet the threshold of state practice due to the lack of certainty.²⁰

In 2009, Tams examined the state practice of the right of self-defence and identified a move away from the traditional view of the *Nicaragua* case, which required the attribution test of 'effective control'. Tams concluded that:

What [States] no longer seem to do is to identify links that are strong enough to amount to 'effective control' as required by the *Nicaragua* test. Instead, contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defence directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory - either because of its support below the level of direction and control or because it has provided a safe haven for terrorists.²¹

At the time of his article, Tams did not go into the details of state practice on the unwilling or unable test since this concept appeared to be too radical for him.²² However, the examination by Tams showed that states do not prioritise the 'effective control' test from the *Nicaragua* case as a test of attribution, but instead apply a broader concept of attribution. Such conduct by states illustrates that there is a development within the right of self-defence against NSAs.

While Tams stretched the concept of attribution but considered it necessary, Van Steenberghe did not regard attribution as necessary at all. In his analysis of state practice in the post-9/11 era from 2010, Van Steenberghe rejected the

²⁰ Ibid at 296.

²¹ Tams (n 1) at 385.

²² Ibid.

notion that the unwilling or unable test constitutes an attribution test.²³ Van Steenberghe instead concluded that:

The correct interpretation of recent state practice amounts to considering that the latter evidences a clear tendency towards allowing states to act in self-defence in response to attacks, even if these attacks are committed only by non-state actors. ... As a result, one should conclude more precisely, if one does not analyse the recent state practice separately – that is, without taking into account *Enduring Freedom* – that this practice actually confirms the evolution of the law of self-defence.²⁴

The analysis of Van Steenberghe suggested that the right of self-defence had already evolved to the stage where the victim state might use force in self-defence even if the armed attack comes from an NSA. In addition, Van Steenberghe proposed that the link to the territorial state, in the form of the unwilling or unable test, should rather be considered as part of the necessity requirement of the *Caroline* test.²⁵

In 2011, Reinold conducted an examination which was more focused on the unwilling or unable test and noted the conflicting legal arguments about the element of attribution of NSAs to host states: '[T]he issue of attribution remains indeterminate because the intervening states in our case studies proffered various legal rationales or, in some cases, none at all.'²⁶ Reinold examined situations in Eurasia, Asia, Africa, the Middle East and South America.²⁷ Against the background of the previous chapter, one might argue that the 'various legal rationales' are evidence of state practice and *opinio juris*

²³ R van Steenberghe 'Self-defence in response to attacks by non-state actors in the light of recent state practice: A step forward?' (2010) 23 *Leiden Journal of International Law* 183 at 194–197, 207.

²⁴ *Ibid* at 207.

²⁵ *Ibid*.

²⁶ Reinold (n 1) at 285.

²⁷ *Ibid* at 246.

by the states in question.²⁸ It is important to note that Reinold did not confirm the ICJ's finding on this issue, which is that (1) attribution is still a requirement for valid self-defence; and (2) the attribution test requires effective control. However, she noticed the emergence of a development of practice by states and concluded:

Despite the ambivalences one cannot help but note the emerging trend that states are making indiscriminate use of the unwillingness and inability scenarios to justify military action in states harboring irregular forces.²⁹

Trapp remarked as follows in her assessment of defensive force against NSAs:

While state practice suggests support for the legitimacy of such a right [to use defensive force only against NSAs operating from a foreign territory in response to un-attributable armed attacks] in principle (as discussed above), commentators continue to gravitate towards attribution as the fuel powering an inter-state reading of Article 51.³⁰

Trapp is another proponent of the view that state practice has deviated in the post-9/11 era. The rejection of the attribution requirement by Trapp suggests a change within the customary right of self-defence.

Deeks also examined state practice regarding the unwilling or unable test.³¹ While Deeks also referred to the previously mentioned cases from the 20th

²⁸ As discussed in the previous chapter, I agree with Koskenniemi's observation that state practice and *opinio juris* are indistinguishable. Therefore, one might interpret evidence of state practice as evidence of *opinio juris*. See chapter 3.V.

²⁹ Reinold (n 1) at 285.

³⁰ KN Trapp 'Can non-state actors mount an armed attack?' in *The Oxford Handbook on the Use of Force in International Law* (2015) 694–695.

³¹ See Deeks (n 1).

century, she came to a different conclusion from those noted above.³² Deeks interpreted the practice before 2012 as follows:

More than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.³³

Deeks concluded that 'state practice affirms that it [the unwilling or unable test] is a well-entrenched norm'.³⁴ However, Deeks was criticised for taking the position that the unwilling or unable test is lawful. Heller criticised her analysis of state practice and her methodology,³⁵ stating that:

The current state of the legal regime governing extraterritorial attacks against non-state actors is one of the most difficult and controversial areas of international law, requiring a careful analysis of state practice and *opinio juris*. Unfortunately, such an analysis is absent from Deeks' essay. Instead, Deeks ... provides little more than a few isolated examples of extraterritorial attacks that have ostensibly been justified under the 'unwilling or unable' rubric, and ignores all of the contrary examples.³⁶

According to Heller, the examples³⁷ provided by Deeks do not meet the threshold of state practice or bring about a change of custom. However, it remains unclear how Heller interprets state practice as an element of custom.

³² See Ruys & Verhoeven (n 1) at 317–318.

³³ Deeks (n 1) at 486.

³⁴ *Ibid* at 500–501.

³⁵ Heller 'Ashley Deeks' problematic defence' (n 6).

³⁶ *Ibid*.

³⁷ Deeks refers to the following situations as evidence of state practice: Russia's attacks on Chechen rebels in Georgia; Israel's attacks on Hezbollah and the PLO in Lebanon; Turkey's attacks on the PKK in Iraq; Soviet Union's attack on White Guard bands in Outer Mongolia; US attacks on Viet Cong soldiers in Cambodia during the Vietnam War; US attacks on Al-Qaeda in Afghanistan and the Sudan; and Columbia's attacks on the FARC in Ecuador. See Deeks (n 1).

Depending on the definition of state practice, one might come to a different conclusion and argue that the state practice at hand might be evidence of a change. As illustrated in the previous chapter, elements of state practice like generality, duration or consistency are relative to the circumstances of a rule and the custom in question. While the element of generality might require a majority of states to practise the unwilling or unable test relating to the right of self-defence, given the long history of the unable and unwilling test, one might argue that, from an historical perspective, the element of consistency might be satisfied. Nevertheless, I agree that under the traditional formation of custom, the element of generality in Deeks' examination constitutes a weak point.

Ahmed also rejected the examination by Deeks since, according to Ahmed, Deeks did not properly engage with the ICJ's decisions in the *Armed Activities* case and the *Wall* case in her examination and failed to argue that the element of state practice is satisfied.³⁸ Ahmed stated that:

Indeed, even in terms of state practice, of the thirty-six cases Deeks cites since 1817 involving extraterritorial uses of force against non-state actors, she notes that only five countries, Israel, the United States, the United Kingdom, Russia and Turkey have 'specifically invoked the unwilling or unable test or a closely related concept'.³⁹

As Ahmed did not provide a definition of state practice in his analysis, it is unclear on which definition of state practice he based his argument. In addition, as I explain further below, taking the separate opinions in the *Armed Activities* case into account, one might argue that the ICJ did not answer the question of whether force may be used against an NSA if the conduct of the

³⁸ Ahmed (n 7) at 11. For a rejection of Deeks' argument see also Williams (n 6) at 634.

³⁹ Ahmed *ibid.*

NSA cannot be attributed to the host state.⁴⁰ Ahmed failed to explain what the outcome of an engagement with those ICJ cases would be. Therefore, it is unclear on which basis Ahmed rejected Deeks' examination and analysis of the element of state practice.

In 2019, giving an overview of the post-9/11 era and focusing on the fight against ISIS in Syria, Tladi also criticised an inconsistency in the practice by states that engaged in the fight against ISIS.⁴¹ With reference to a statement by the Non-Aligned Movement ('NAM') that Article 51 of the UN Charter should not be re-interpreted, Tladi argued that there has not been widespread support for a change in the customary right of self-defence.⁴² I explain further below why such an interpretation of the NAM is not convincing.⁴³

The critique by scholars like Ahmed, Heller, Tams, Reinold and Tladi is representative of the view in the scholarship that the unwilling or unable test has not yet become custom. The main concern expressed by this view is that the state practice is not widespread and representative, i.e. does not meet the threshold of generality and consistency. In addition, scholars like Ruys and Verhoeven appear to reject the argument of sufficient state practice, based on policy grounds.⁴⁴ In other words, while scholars acknowledge a trend of state practice, such state practice is rejected on grounds that are derived from somewhere other than state conduct. Various commentators also tend to examine customary international law without setting out a clear or at least a working definition of state practice and *opinio juris*, and this seems to weaken their legal arguments.

⁴⁰ See the discussion of the separate opinion by Judge Kooijmans and Judge Simma in chapter 4.I.2.

⁴¹ O'Connell, Tams & Tladi (n 1) 77-78. Tladi claims that Germany and Belgium distanced themselves from the unwilling or unable test. I discuss those two letters in chapter 4.II.2.

⁴² Ibid 78-80.

⁴³ See chapter 4.II.2. See also Tams arguing in favour of a re-interpretation of the right of self-defence: ibid 112-125, 166.

⁴⁴ Ruys & Verhoeven (n 1) at 319.

(b) *Interpreting silence as confirmation: The example of fighting ISIS in Syria*

In addition, it appears that the question of acquiescence is usually not discussed in the required depth in the examination of custom on the right of self-defence. As already discussed in the previous chapter, the ICJ defined acquiescence as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.⁴⁵ According to the ICJ's judgment in the *Gulf of Maine* case, a state that is not protesting against a rule and acquiesces in the practice of other states can be considered to be a consenting state.⁴⁶ Against the number of states which have an ambiguous position in relation to the unwilling or unable test, one might argue that, based on the lack of a clear objection, such practice has been accepted.⁴⁷

Starski addressed the question of how silence might be interpreted with regard to the formation of custom in the context of the fight against ISIS in Syria. Starski stated in this context that most of the 193 states of the UN remained silent on the issue of pre-emptive self-defence or the unwilling or unable test.⁴⁸ With regard to the concept of unwilling or unable and fighting ISIS in Syria, Starski concluded as follows:

If we nevertheless assume that these actions and contestations indicate nascent normative dynamics with regard to Art. 51, the process of norm

⁴⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, ICJ, Judgment, 20 January 1984 (hereinafter: *Gulf of Maine* case) at 305.

⁴⁶ See *Gulf of Maine* case *ibid* at 66–67; see also IC MacGibbon 'Customary international law and acquiescence' (1957) 33 *Brit YB Int'l L* 115 at 131; MN Shaw *International Law* 8 ed (2017) 66–67.

⁴⁷ See for an overview of the objecting states and those with an ambiguous position to the concept of 'unwilling or unable': E Chachko & A Deeks 'Who is on board with "unwilling and unable"?' (10 October 2016) available at <https://www.lawfareblog.com/who-board-unwilling-or-unable#ArabCountries> (last accessed 5 December 2020).

⁴⁸ P Starski 'Silence within the process of normative change and evolution of the prohibition on the use of force: Normative volatility and legislative responsibility' (2017) 4 *Journal on the Use of Force and International Law* 14 at 62.

evolution could have been potentially accelerated by the US initiative against ISIL starting in September 2014, which tied itself onto the 9/11 legality-narrative.⁴⁹

Starski concluded that the silence by the international community should not be interpreted as acquiescence and called for the 'legislative responsibility' of the silent states.⁵⁰ However, Starski rejected a change by acquiescence in the example of the right of self-defence, based on her assessment of Article 51 of the UN Charter as *jus cogens* and the lack of consistency, frequency and clarity of existing state practice.⁵¹ Starski stated in this regard that:

[T]he inextricable link between Art. 2(4) and Art. 51 conveys *jus cogens* nature onto the right of self defence as well. It is beyond the scope of this article to examine whether Articles 2(4) and 51 constitute *jus cogens* in toto or – as appears to be more arguable – only at their substantive core.⁵²

However, this raises the question whether Article 51 of the UN Charter constitutes *jus cogens*. The prohibition on the use of force in terms of Article 2(4) of the UN Charter is considered *jus cogens* by some authorities,⁵³ but the question of the right of self-defence and its *jus cogens* nature appears not to be settled. In addition, it remains unclear how the suggested *jus cogens* character of the right of self-defence prevents silence from being interpreted as acquiescence.

Starski then concluded that the indeterminate practice by states 'failed to establish a legitimate expectation to react'.⁵⁴ For the sake of this argument, I

⁴⁹ Ibid at 62.

⁵⁰ Ibid at 60, 65.

⁵¹ Ibid at 62, 63, 65.

⁵² Ibid at 42, 43.

⁵³ *Nicaragua* case (n 12) para 190.

⁵⁴ Starski (n 48) at 63.

assume that the right of self-defence is a *jus cogens* norm. Does the *jus cogens* nature not achieve the opposite of what Starski is claiming? Due to the *jus cogens* nature, should not each state have a natural interest in any development of the right of self-defence, since those developments might change existing *jus cogens*? On this basis, Starski's argument that the 'resilience to change' of a *jus cogens* norm does not establish a legitimate expectation to react is incomprehensible.⁵⁵ Given the importance of the right of self-defence for any state and the growing threat of NSAs in the 21st century, I submit that there should be a natural interest of each state which establishes a legitimate expectation to react. Ultimately, Starski herself pointed out that:

The global terrorist threat is ever present and operations comparable to Syria are very likely to appear in the future. The stronger the dynamics, the more compelling is the responsibility of states to end the state volatility by speaking up in a legally relevant and determinate manner.⁵⁶

Therefore, Starski's argument, which relies on the claimed *jus cogens* nature of the right of self-defence, does not appear convincing.

(c) Conclusion: Concerns of the scholarship

The analysis in this section reveals the major concerns of most of the scholars who argue that the element of state practice is not fulfilled with regard to the unwilling or unable test. The points of concern with regard to state practice are consistency and generality. On this basis, Starski argued that, due to the lack of consistency, the silence of states should not be interpreted as acquiescence.

⁵⁵ Ibid at 62.

⁵⁶ Ibid at 65.

However, the sliding scale approach could also be used to assess state practice.⁵⁷ Based on the previous chapter on state practice and the sliding scale between the three elements of generality, duration and consistency, one might argue that Deeks was not wrong to conclude that the element of state practice might be fulfilled in this case. While other commentators might not go as far as Deeks, they seemed to argue that state practice suggests that the requirement of attribution is not necessary for the right of self-defence against NSAs that are not acting under the control of a territorial state.⁵⁸ Assuming that the rule in question is one of particular custom, one could even argue that the threshold of generality is very low.

As discussed in the previous chapter, a rule of customary international law may develop in a short period of time.⁵⁹ In addition, Judge Tanaka argued in his dissenting opinion in the *North Sea Continental Shelf* cases that 'the formation as a whole must be considered as an organic and dynamic progress'.⁶⁰ Such a view means that state practice is also part of an 'organic and dynamic progress'. Judge Lachs followed this line of argument when he concluded that the time factor with regard to state practice is relative to the 'movement of events'.⁶¹ Under the premise that the new rule, here the unwilling or unable test, forms a part of particular and not general custom, one might argue that the requirement of duration is met. Not only in the post-9/11 era but also before then, states have exercised their right to self-defence by applying the unwilling or unable test. Deeks and Brownlie illustrated that

⁵⁷ For description of the sliding scale between generality, duration and consistency see chapter 3.II.

⁵⁸ Trapp 'Can non-state actors mount an armed attack?' (n 30) 694–695; Van Steenberghe (n 23) at 207.

⁵⁹ See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ, Judgment, 20 February 1969 (hereinafter: *North Sea Continental Shelf cases*) para 74.

⁶⁰ *North Sea Continental Shelf cases* *ibid*, dissenting opinion by Judge Tanaka at 178.

⁶¹ *North Sea Continental Shelf cases* *ibid*, dissenting opinion by Judge Lachs at 230.

such behaviour by states had been conducted for over a century.⁶² Considering the fact that the unwilling or unable test has been applied by states for over a century, one might argue that the element of duration is fulfilled.⁶³

With regard to the much criticised element of consistency, one might come to a similar conclusion. One might argue that the conduct by states is consistent to the extent that the targeting state is usually exercising force on the territory of the host state because the territorial state is unwilling or unable to remove an NSA. This becomes even more evident if one considers the most recent practice by states, as I explain in chapter 5.⁶⁴ It should be noted that the state practice regarding the fight against ISIS in Syria is exemplary for the indistinguishability of state practice and *opinio juris*. Therefore, I also discuss the evidence at hand with respect to the element of *opinio juris*. Nevertheless, taking the practice among those states into account, one might argue that the conduct by the targeting states is consistent when it comes to the right of self-defence against NSAs.

In addition, if one analyses state practice through the lens of particular custom, one might argue that the two crucial elements of state practice – duration and consistency – might be fulfilled. Especially when considering the practice of states since 2014, the argument of an inconsistent practice regarding attacks on NSAs in states that are unwilling or unable to remove the threat might be contested. As this section shows, most of the proponents of the traditional view that there is insufficient state practice refer to examinations of state practice that took place before 2014.

⁶² See Deeks (n 1); Brownlie 'International law and the activities of armed bands' (n 17) at 732.

⁶³ For a description of particular custom, see chapter 3.II.

⁶⁴ See chapter 5.III.1(g); see also chapter 4.II.2.

Ultimately, the discussion in the scholarship about sufficient state practice shows that there are valid reasons why this element of custom might not be fulfilled. It appears that the predominant view in the scholarship is that there is no widespread and representative state practice that is based on a lack of consistency and generality. Based on the limited number of states that have actively participated and shared a consistent practice, one might conclude that the element of consistency is not met in this context. However, there are flaws in the arguments of scholars who argue against a new formation of custom, as this chapter has illustrated so far. While there might be ways to argue against such a determination of custom under the traditional framework, those arguments do not constitute the predominant view in the scholarship.

2. *Opinio juris: A change of belief?*

The prevailing view in the scholarship is that even if one assumes that the element of state practice in the formation process of custom is met for a change of the customary right of self-defence in the post-9/11 era, there would still be insufficient *opinio juris*.⁶⁵ While state practice usually constitutes the focus of the analysis in the scholarship, the element of *opinio juris* is usually not discussed to the extent that it should be.

In 2005, the ICJ held in the *Armed Activities* case that if the activities of an NSA were attributable to a host state, the victim state would be entitled to act in self-defence.⁶⁶ However, as Judge Kooijmans pointed out in his separate opinion, the court did not address the issue of whether a victim state would

⁶⁵ See Williams (n 6) at 633, 634; Corten 'The "unwilling or unable" test' (n 1) at 780–785; Trapp 'Can non-state actors mount an armed attack?' (n 30) 692; J Brunnée & SJ Toope 'Norm robustness and contestation in international law: Self-defence against non-state actors' 2017 at 17, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985655 (last accessed 6 January 2021); Brunnée & Toope 'Self-defence against non-state actors' (n 1) at 15.

⁶⁶ *Armed Activities on the Territory of Congo (DRC v Uganda)*, ICJ, Judgment, 19 December 2005 (hereinafter: *Armed Activities* case) paras 146–147. In the *Nicaragua* case the ICJ concluded that the effective control test is the one that determines whether the requirement of attribution is satisfied: *Nicaragua* case (n 12) para 115.

be entitled to act in self-defence if there is no attribution to the host state.⁶⁷ Judge Kooijmans further pointed out that if the actions by the NSA qualify as an armed attack, 'there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defence.'⁶⁸ Judge Simma agreed with Judge Kooijmans that a lack of territorial control had become one key characteristic of territorial states that have to address the issue of NSAs.⁶⁹ Therefore, the separate opinions by Simma and Kooijmans show that, at the beginning of the century, the *opinio juris* of self-defence against NSAs was not settled. It is crucial to bear this in mind before I examine the analysis of the rule in the scholarship in the post-9/11 era.

In response to the article by Deeks, who proposed that custom with regard to the right of self-defence had changed to include the unwilling or unable test, Heller and Ahmed focused on the methodical issue that Deeks did not find one case in which states clearly stated that they were following the unwilling or unable test out of a sense of legal obligation or *opinio juris*.⁷⁰ According to Ahmed, Deeks' claim is further untenable since in none of the cases examined had states exercised their right of self-defence under the unwilling or unable test based on a sense of legal obligation.⁷¹

This might undoubtedly constitute a flaw in Deeks' examination. However, the examination in the previous chapter showed that evidence of state practice can be interpreted as evidence of *opinio juris*. As illustrated, the ICJ does not provide a clear definition of *opinio juris*.⁷² In addition, the ICJ itself uses indirect evidence, which usually includes state practice, to determine the

⁶⁷ *Armed Activities* case (n 66), separate opinion of Judge Kooijmans, para 26.

⁶⁸ *Ibid* para 29.

⁶⁹ *Armed Activities* case (n 66), separate opinion of Judge Simma, para 12.

⁷⁰ Deeks states in a footnote that she did not find one single case where a state was following the concept of 'unwilling or unable' based on a sense of legal obligation: Deeks (n 1) at 503. See the response from Heller 'Ashley Deeks' problematic defence' (n 6); Ahmed (n 7) at 15.

⁷¹ Ahmed (n 7) at 11; see also Heller 'Ashley Deeks' problematic defence' (n 6).

⁷² See the discussion in chapter 3.II.2.

element of *opinio juris*.⁷³ Therefore, the letters of states to the Security Council might provide evidence of *opinio juris*.⁷⁴ A more comprehensive review might thus be necessary in some cases, which looks beyond the reporting mechanism of letters to the Security Council under Article 51 of the UN Charter. For instance, the justification for the attacks on ISIS provided by the German government in the Bundestag stated that Syria was unwilling or unable to remove the threat of the NSA.⁷⁵ The German government used the unwilling or unable test to justify its right of self-defence.⁷⁶ In addition, the German Federal Constitutional Court took that justification into account when it concluded that international law does not prohibit the use of force under the right of self-defence against NSAs even if such force affects territorial states.⁷⁷ A comprehensive analysis of the German approach, therefore, illustrates support for the unwilling or unable test. While the letter to the Security Council did not mention the terms ‘unwilling’ or ‘unable’, the letter described Syria as a state that was unable to remove the threats posed by the NSA. Although the letter to the Security Council might be interpreted as ambiguous, the German government illustrated its clear thinking process when it described Syria as an ‘unwilling and unable’ state in its justification before the German parliament.

Corten is one of the few scholars who has conducted a detailed analysis of the element of *opinio juris*. In 2016, Corten concluded that there is no ‘*communis*

⁷³ See the discussion in chapter 3.II.2(b).

⁷⁴ See Heiko Thoms ‘Letter dated 10 December 2015 from the Charge d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council’, 10 December 2015, UN Doc S/2015/946 (hereinafter: ‘Letter from Germany to the UN Security Council’); see also Benedicte Frankinet ‘Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council’, 7 June 2016, UN Doc S/2016/523 (hereinafter: ‘Letter from Belgium to the UN Security Council’).

⁷⁵ Deutscher Bundestag, Drucksache 18/6866, 1 December 2015 at 2–3.

⁷⁶ *Ibid.*

⁷⁷ Federal Constitutional Court of Germany (17 September 2019) 2 BvE 2/16, paras 6, 50–51.

opinio juris' with regard to the unwilling or unable test.⁷⁸ Corten examined the attacks on ISIS on Syrian territory from 2014 onwards and rejected the notion that there is changed *opinio juris* on the right of self-defence, for several reasons. According to Corten, even among those states that invoked the right of self-defence to target ISIS in Syria, there was no agreement about the scope of that right.⁷⁹ Reinold and Tams reached a similar conclusion in their assessment of *opinio juris* regarding the right of self-defence against NSAs.⁸⁰

The question is how detailed such concepts or doctrines under the right of self-defence need to be. Looking at the concept of anticipatory self-defence, which goes back to the *Caroline* case in 1837, the scholarship and the states are still discussing the scope of such a right.⁸¹ Therefore, it appears to be disingenuous for scholars to ask for a detailed definition of such a concept. Even if states agreed to the concept in a treaty, there would still be questions or terms open to interpretation. Article 51 of the UN Charter is a clear example of such a scenario. Therefore, the scholarship seems to demand the impossible here.

For example, Corten criticised states such as Canada and Australia for changing their position.⁸² Based on his analysis, Corten concluded that there is no *opinio juris* due to a lack of consistency.⁸³ He then referred to the reaction of other states to the legality of the strikes against ISIS in Syria, which were conducted by the US-led coalition. According to Corten, 'a substantial number

⁷⁸ Corten 'The "unwilling or unable" test' (n 1) at 780–785.

⁷⁹ Ibid at 781.

⁸⁰ Reinold (n 1) at 284–286; Tams (n 1) at 385–386.

⁸¹ See AN Guiora 'Anticipatory self-defence and international law – a re-evaluation' (2008) 13 *Journal of Conflict and Security Law* 3; J Mulcahy & CO Mahony 'Anticipatory self-defence: A discussion of the international law' (2006) 2 *Hanse L Rev* 231; DR Rothwell 'Anticipatory self-defence in the age of international terrorism' (2005) 24 *U Queensland LJ* 337.

⁸² Corten points out that at first Australia was not convinced by the legality of the strikes in Syria and later changed its mind to being convinced by the legality. He also points to a similar development in Canada: see Corten 'The "unwilling or unable" test' (n 1) at 781, 782.

⁸³ Corten points out that at first Australia was not convinced by the legality of the strikes in Syria and later changed its mind to being convinced by the legality. He also points to a similar development with regards to Canada: see *ibid* at 781, 782.

of participants in the coalition never referred to the “unwilling or unable” test inside the UN.⁸⁴ The basis of his conclusion are the letters by those states to the Security Council to report their use of the right of self-defence and minutes of the Security Council meetings.⁸⁵ On the basis of the minutes of a Security Council meeting, Corten interpreted the reaction by the Arab states as not supporting the unwilling or unable test.⁸⁶ However, a review of the minutes also reveals that none of the Arab States in question objected to the unwilling or unable test.⁸⁷

As pointed out earlier in this section, in the example of Germany, the sole reliance on letters to the Security Council might not always be sufficient to determine the element of *opinio juris*. In the end, based on the asserted inconsistency of the unwilling or unable test and its application among those members of the US-led coalition, Corten concluded that there is no ‘sincere and genuine *opinio juris* in favour of the “unwilling or unable” standard.’⁸⁸

In 2017, Brunnée and Toope followed the view of Corten that the unwilling or unable test still suffers from protracted contestation and argued that ‘these concerns are not merely those of academic commentators, but are shared by a great number of states.’⁸⁹ Unfortunately, Brunnée and Toope did not elaborate on the identity of these ‘great number of states’. Nevertheless, on this basis, the authors concluded that ‘the inherent contradiction between an expansive right to self-defence and the prohibition on the use of force is among the legality factors that are holding back the acceptance of the “unwilling or unable” test as international law.’⁹⁰

⁸⁴ Ibid at 782.

⁸⁵ Ibid at 780–785.

⁸⁶ Ibid at 785.

⁸⁷ Security Council Meeting on the Maintenance of International Peace and Security, UN Doc S/PV.7527, 30 September 2015.

⁸⁸ Corten 'The "unwilling or unable" test' (n 1) at 785.

⁸⁹ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 18.

⁹⁰ Ibid at 18–19.

However, in 2016, Deeks and Chachko conducted another examination regarding the unwilling or unable test which aimed to show which states endorsed or supported the concept and which states objected to it.⁹¹ The authors concluded that ten states explicitly endorsed the unwilling or unable test. Those states were the US, the UK, Germany, the Netherlands, the Czech Republic, Canada, Australia, Russia, Turkey and Israel.⁹² The examination also covered the period before the 9/11 era and illustrated that these ten states based their legal justification on the concept of unwilling or unable on various occasions.⁹³ One should be aware, however, that not all these ten states use the term 'unwilling or unable'. For instance, the Dutch Foreign Minister stated that '[i]t is also evident that the Syrian authorities are incapable of stopping these armed attacks.'⁹⁴

In addition, Chachko and Deeks identify a second group of countries which they describe as displaying 'implicit endorsement'.⁹⁵ The authors list three states in this group: Belgium, Iran and South Africa. The letter by Belgium to the Security Council states that 'the Syrian Arab Republic does not, at this time, exercise effective control' which, according to Belgium, justifies attacks on ISIS in Syria under the right of self-defence.⁹⁶ This letter reflects the sense of legal obligation by Belgium at that time. In 2001, Iran made its position clear when it stated that:

[T]he Islamic Republic of Iran expects the Government of Iraq to take appropriate measures in conformity with the rules and principles of

⁹¹ See Chachko & Deeks (n 47).

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ T Ruys, N Verlinden & L Ferro 'Digest of State Practice 1 January–30 June 2015' (2015) 2 *Journal on the Use of Force and International Law* 257 at 282.

⁹⁵ See Chachko & Deeks (n 47).

⁹⁶ Letter from Belgium to the UN Security Council (n 74).

international law as well as its obligations under the relevant Security Council resolutions ... to put an end to the use of its territory for cross-border attacks and terrorist operations against the Islamic Republic of Iran, which would render unnecessary measures in self-defence in accordance with article 51 of the Charter of the United Nations.⁹⁷

This letter was sent to the Security Council in April 2001 in order to remove the threat of the Mujahedeen.⁹⁸ It becomes clear that even if states are not explicitly using the term 'unwilling or unable' they might base their justification for the use of force on the inability or unwillingness of a host state where the NSA is located.

However, states do refer to the key elements of the concept, such as attempts to remove the threat or a lack of territorial control.⁹⁹ This further illustrates that not only a handful of states endorse the unwilling or unable test. The examination by Chachko and Deeks showed that at least 13 states endorsed such a changed rule of self-defence in 2016. By contrast, only three states explicitly objected to the unwilling or unable test.¹⁰⁰ The post-9/11 era, in particular, shows an increase in states approving the unwilling or unable test, either explicitly or implicitly.¹⁰¹ Therefore, one cannot deny that there is an element of *opinio juris* in support of the unwilling or unable test.

Against this backdrop, one might argue that the attacks on ISIS in Syria represent a moment in which a potential rule becomes law. As set out at the beginning of this section, the question of self-defence against NSAs was not settled at the turn of the century. The post-9/11 era presents a scenario where

⁹⁷ Hadi Nejad-Hosseinian 'Letter dated 18 April 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council', 18 April 2001, UN Doc S/2001/381.

⁹⁸ Ibid.

⁹⁹ Chachko & Deeks (n 47).

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

states are keen to use tests like 'unwilling or unable' to remove the threat of NSAs in other countries. In the context of the attacks on ISIS in Syria, such a development cannot be disregarded any longer. Taking all these developments into account, the argument that there is no *opinio juris* with regard to the unwilling or unable test has its flaws. However, in terms of the traditional approach to customary international law, it remains unclear whether new *opinio juris* has been established.

3. Conclusion: The unwilling or unable test is not part of customary international law under the traditional positivist approach

As examined in this chapter so far, the scholarship provides valid but not irrefutable reasons why the element of *opinio juris* might not be fulfilled for the unwilling or unable test. The lack of widespread and representative state practice and the lack of a detailed scope and consistent *opinio juris* constitute major arguments in the scholarship. However, in several cases, it is often not clear which understanding the scholar in question has of *opinio juris* or state practice.¹⁰² As we have seen in the previous chapter, *opinio juris* and state practice are not concepts with a fixed definition or interpretation. However, without an understanding of the scholars' definition of state practice or *opinio juris*, how can one know whether the analysis of custom includes inaction as one of the constitutive elements of custom? How do we know what kind of definition is being applied to *opinio juris*? Does the author follow a traditional or a non-traditional approach that includes a more normative approach to identifying the element of *opinio juris*? Does the author follow the traditional positivist approach to trying to separate the constitutive elements of custom or does the author accept the issue of circularity? The answer to these questions tends to be omitted in the analysis of custom. However, any analysis that does not provide a theoretical framework has methodological faults.

¹⁰² See Heller 'Ashley Deeks' problematic defence' (n 6); Ahmed (n 7); Corten 'The "unwilling or unable" test' (n 1); see also Ruys & Verhoeven (n 1), Tams (n 1).

At the same time, the examination in this chapter shows the malleable relationship between practice and *opinio juris*. As evidence for the two constitutive elements of custom can be found in the same place, e.g. letters to the Security Council, the lines between state practice and *opinio juris* become blurry. For instance, Corten's analysis reveals the potential impact of a sole reliance on one source of evidence for the element of *opinio juris*.¹⁰³ The attempts to identify *opinio juris* in relation to the unwilling or unable test further reveal that the scholarship itself has difficulties separating the two elements of custom. One might argue that the element of *opinio juris*, the sense of a legal obligation by the states, has been influenced by state practice and the facts surrounding such state practice. This observation further supports the view expressed in the previous chapter that the two constitutive elements of custom are indistinguishable.¹⁰⁴

As the ICJ concluded in the *Nicaragua* case and the *Armed Activities* case, a state might exercise its right to self-defence against an NSA if the conduct of that NSA is attributable to the territorial state. As pointed out, the ICJ did not answer the question of whether a right of self-defence exists if the conduct of the NSA is not attributable to the territorial state.¹⁰⁵ Ruys and Verhoeven made a similar observation in 2005 when they concluded that states had not applied the effective control test in order to attribute acts of an NSA to a territorial state.¹⁰⁶ Moreover, post-9/11 situations show that acts by an NSA are not always attributable to the territorial state. On this basis, scholars like Reinold and Van Steenberghe seemed to suggest that the unwilling or unable test does not constitute another attribution test with a much lower threshold, but that

¹⁰³ Corten 'The "unwilling or unable" test' (n 1).

¹⁰⁴ See the discussion in chapter 3.III.3.

¹⁰⁵ *Armed Activities* case (n 66), separate opinion of Judge Kooijmans, para 26.

¹⁰⁶ Ruys & Verhoeven (n 1) at 313–314.

the unwilling or unable test instead replaces the attribution test.¹⁰⁷ Victim states that exercised their right of self-defence reacted to this set of facts by applying the unwilling or unable test. At the same time, such state practice revealed the belief and sense of a legal obligation by other states, which can be observed in the example of the fight against ISIS in Syria. The analysis of the scholarship reveals the predominant challenge of custom, which is to identify the two constitutive elements of custom separately. It also appears to be unclear which definition of state practice and *opinio juris* scholars are using to conduct their examinations.

As indicated in the analysis above, if one applies existing evidence of state practice and *opinio juris* to the framework of particular custom, one might reach a different result. As set out in the previous chapter, while there is no geographical link between the states that engaged in the practice analysed above, such a link might derive from ‘a common cause, interest or activity’ that gives rise to the particular rule of custom.¹⁰⁸ However, given the universal character of the right of self-defence, it does not appear to be feasible to identify which states would be bound by such a rule. Would it be only the victim states of an armed attack that emanates from an NSA? Or would the territorial states also be bound by such a rule of particular custom? While the ILC suggested that particular custom cannot exclusively arise among states with a geographical link¹⁰⁹, it appears that the concept of particular custom on the basis of common interest or cause has not evolved enough to be applicable at this stage.

However, this raises the question of whether an alternative approach to the formation of custom exists and how such an approach could be applied.

¹⁰⁷ See Van Steenberghe (n 23) at 194–197, 206–207; Reinold (n 1) at 284–286.

¹⁰⁸ See Report of the ILC, 70th Session, 30 April to 1 June and 2 July to 10 August 2018, UN Doc A/73/10 (hereinafter: ‘ILC Report 2018’) at 155.

¹⁰⁹ Ibid.

Moreover, the question is whether an alternative approach to the formation of custom might lead to results other than the ones presented in this chapter so far. One alternative is the interactional approach of Brunnée and Toope, which I will discuss in the next section. Another alternative is the doctrine of specially affected states ('SAS'), which I will examine in the next chapter. While a small group of states should not shape the formation of custom in terms of the traditional view, the question is whether there is another approach to identifying the formation of custom. The SAS doctrine might offer an alternative to the traditional identification of custom.

II. Brunnée and Toope: The interactional approach

Over the past two decades, Brunnée and Toope have suggested an alternative approach to the formation of international law, namely, the interactional approach.

Their analysis of whether the right of self-defence has changed concluded that the unwilling or unable test has not become part of customary international law.¹¹⁰ Brunnée and Toope argued that their interactional approach provides a unique perspective with regard to the formation of custom.¹¹¹ This section analyses to what extent the interactional approach is applicable to the formation of customary international law and examines the arguments of Brunnée and Toope.

1. Interactional approach: The theory of everything?

Before I enter into a discussion of the arguments that are offered by Brunnée and Toope, it is essential to understand the legal narrative in which they operated. Brunnée and Toope based their arguments on the interactional approach which they developed in order to explain the binding power of

¹¹⁰ See Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 20.

¹¹¹ Ibid at 16.

international law.¹¹² In a nutshell, the interactional approach is based on the premise that ‘all legal norms are embedded in, and must be broadly in line with, social norms that arise from the practices and understandings of the society in which they operate.’¹¹³ Shared understandings within the international community constitute the basis for social norms to emerge and become legal norms.¹¹⁴ Brunnée and Toope argued that legal norms may not emerge from social norms alone but must also meet the criteria of legality.¹¹⁵ Brunnée and Toope relied heavily on the eight criteria for legality that were set up by Lon L. Fuller.¹¹⁶ According to Brunnée and Toope, ‘norms that are based in shared understanding and that largely meet the criteria of legality must continually be upheld through norm implementation, application and interpretation that also meet the criteria of legality’.¹¹⁷

In their earlier work, Brunnée and Toope concluded that the ‘interactional theory of international law is first and foremost a theory of obligation’.¹¹⁸ According to Brunnée and Toope, ‘interactionalism reveals that the power of international law rests in a felt sense of obligation, rooted in a specific form of legal legitimacy’.¹¹⁹

It is not quite clear whether the interactional approach is a substitute for the elements of the traditional view that custom requires state practice and *opinio*

¹¹² Ibid at 15. See also J Brunnée & S J Toope *Legitimacy and Legality in International Law: An Interactional Account* (2010) chapter 1.

¹¹³ Brunnée & Toope ‘Self-defense against non-state actors’ (n 1) at 15; see also J Brunnée & S Toope ‘International law and constructivism: Elements of an international theory of international law’ (2000) 1 *Columbia Journal of Transnational Law* at 67–69.

¹¹⁴ Brunnée & Toope *Legitimacy and Legality* (n 112) 56–124.

¹¹⁵ Brunnée & Toope ‘Self-defense against non-state actors’ (n 1) at 16.

¹¹⁶ Ibid at 16. See also LL Fuller *The Morality of Law* (1969) 33–94, 152–186. Fuller proposes eight criteria: generality, promulgation, non-retroactivity, clarity, non-contradiction, not requiring the impossible, relative constancy over time, and congruence between legal norms and actions of officials operating under the law.

¹¹⁷ Brunnée & Toope ‘Self-defense against non-state actors’ (n 1) at 16.

¹¹⁸ Brunnée & Toope *Legitimacy and Legality* (n 112) 124.

¹¹⁹ Ibid.

juris or whether it serves as a tool for identifying the elements of custom under the positivist approach. While Brunnée and Toope distanced themselves from the positivist approach, they appeared to be undecided on this question of whether the interactional approach is a substitute for or serves as a tool for identifying elements of custom.¹²⁰ In 2019, Brunnée and Toope delineated the interactional approach thus: 'Our interactional approach helps explain the strange, even 'mysterious' ... requirement of customary international law that one must prove *opinio juris*, the subjective belief that a practice is required by law.'¹²¹

In 2017, in their assessment of whether the unwilling or unable test has become custom, they described the interactional approach as '[providing a unique perspective on the interplay between the state practice and *opinio juris* required to form and uphold customary international law.'¹²²

In 2011, Brunnée and Toope stated that the interactional approach 'helps to explain the traditional formulation of customary law as arising from state practice plus *opinio juris*'.¹²³ This supports the view that the interactional approach is not a substitute for the elements of state practice and *opinio juris*. Assuming it is an interpretation tool for elements of custom, it would also mean that the interactional approach can be applied to give substance to the element of *opinio juris*.¹²⁴

¹²⁰ Ibid 46–55. See also J Brunnée & SJ Toope 'Persuasion and enforcement: Explaining compliance with international law' (2002) 13 *Finnish YB Int'l L* 273 at 292–295; J Brunnée & SJ Toope 'International law and constructivism: Elements of an interactional theory of international law' (2000) 39 *Colum J Transnat'l L* 19; Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 16.

¹²¹ J Brunnée & SJ Toope 'Norm robustness and contestation in international law: Self-defense against nonstate actors' (2019) 4 *Journal of Global Security Studies* 73 at 76.

¹²² Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 16.

¹²³ J Brunnée & SJ Toope 'Interactional international law: An introduction' (2011) 3 *IT* 307 at 314.

¹²⁴ See chapter 3.III.2(a)(2).

An assessment of earlier work on the interactional approach reveals, however, that the approach is not supposed to fall under the positivist paradigm but rather constitutes its own paradigm.¹²⁵ While the interactional approach explains the binding force of international law, it might work together with the positivist approach to custom. In this way, the interactional approach appears to provide a wider range of criteria for identifying the *opinio juris* element of a rule. Therefore, one might apply the interactional approach to the positivist paradigm of custom and consider it to be a supplementary angle in that regard.

Considering the development of the interactional approach from the beginning of the century up until today, in the work of Brunnée and Toope, it appears that interactional law can be used as a perspective to interpret and identify state practice and *opinio juris*. Brunnée and Toope confirmed this view in their assessment of the customary right of self-defence and whether it has changed.¹²⁶

2. Shared understandings (factual basis): Meeting the element of state practice

Brunnée and Toope analysed the shared understandings with regard to the unwilling or unable test in the context of the right of self-defence. Against this backdrop, the shared understandings are based on a factual analysis.¹²⁷ Brunnée and Toope referred to the evolution of the right of self-defence before they assessed the reaction by states to the exercise of the right of self-defence

¹²⁵ See Brunnée & Toope *Legitimacy and Legality* (n 112) 20–55; J Brunnée & SJ Toope 'Persuasion and enforcement' (n 120) at 292–295; J Brunnée & SJ Toope 'International law and constructivism' (n 120); J Brunnée & SJ Toope 'Interactional international law: An introduction' (n 123) at 314–316; J Brunnée & SJ Toope 'Norm robustness and contestation in international law' (n 121) at 76.

¹²⁶ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 16.

¹²⁷ *Ibid* at 5–15.

in terms of the unwilling or unable test.¹²⁸ In order to find reliable evidence of the legal opinions of the intervening states, Brunnée and Toope relied on the official letters that were sent to the Security Council, in accordance with the states' obligation to report on self-defence measures.¹²⁹ However, this raises the question of why public statements or declarations made by the governments involved are not taken into consideration for this assessment. Brunnée and Toope focused very strongly on Germany's letter to the Security Council on 10 December 2015 and the letter sent by Belgium.¹³⁰ The German letter states 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 ... 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.¹³¹

Brunnée and Toope interpret the letter, due to its reference and the lack of the wording 'unwilling or unable', as a narrower justification than the concept of 'unwilling or unable'.¹³² However, even though the letter does not clearly use the words 'unwilling or unable', it still endorses the concept since the justification for Article 51 of the UN Charter is based on the lack of effective control. On this basis, the letter claims that measures may be taken without the consent of the Syrian state.¹³³ The same may be said about the Belgian letter

¹²⁸ Ibid.

¹²⁹ Ibid at 7, 8.

¹³⁰ Ibid at 10. See also Letter from Germany to the UN Security Council (n 74); see also Letter from Belgium to the UN Security Council (n 74).

¹³¹ Letter from Germany to the UN Security Council *ibid*.

¹³² Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 10. See also the same argument under the positivist approach of custom: O'Connell, Tams & Tladi (n 1) 77.

¹³³ Letter from Germany to the UN Security Council (n 74).

to the Security Council, which uses very similar wording to that of the German letter.¹³⁴

Besides the letter to the Security Council, one should, however, also consider the motion by the German government in the Bundestag. For the use of force against ISIS on the basis of Article 51 of the UN Charter, the German government used more detailed wording about the situation in Syria than in its letter to the Security Council.¹³⁵ The German government clearly stated in its motion, which was adopted by the Bundestag, that Syria was unable and/or unwilling to prevent terrorist attacks by ISIS.¹³⁶ Although Brunnée and Toope were aware this disparity, they regarded the wording of the motion merely as descriptive and did not take its legal value into account, due to their strict approach of only considering the letters to the President of the Security Council. However, since the motion adopted by the Bundestag on 1 December 2015 constituted the basis for any use of force under the German Constitution and therefore also the basis for the letter to the Security Council on 10 December 2015, Brunnée and Toope's argument is not convincing. In addition, the most recent judgment of the Federal Constitutional Court of Germany suggested that Germany adopted the unwilling or unable test in deciding to attack ISIS in Syria. In its decision, the court acknowledged that the German justification for exercising its right to self-defence was *inter alia* the unwilling or unable test.¹³⁷ With reference to the separate opinions by Judges Simma and Kooijmans, the court held that the exercise of self-defence by Germany against ISIS did not violate international law.¹³⁸ On this basis, one might argue that

¹³⁴ See Letter from Belgium to the UN Security Council (n 74).

¹³⁵ See Deutscher Bundestag, Drucksache 18/6866, 1 December 2015 at 2–3.

¹³⁶ See Brunnée & Toope 'Self-defence against non-state actors' (n 1) at 10. See also Deutscher Bundestag, Drucksache 18/6866, 1 December 2015, at 2.

¹³⁷ Federal Constitutional Court of Germany (17 September 2019) 2 BvE 2/16, para 6. It should be noted that the court dismissed the application in this matter based on a lack of *locus standi*.

¹³⁸ *Ibid* paras 49–51.

the German Federal Constitutional Court knew that Germany used the unwilling or unable test and did not object to the test.

This does not mean that the reporting function of sending letters to the Security Council by the state exercising its right of self-defence under Article 51 of the UN Charter has no normative meaning. As the ICJ held in the *Nicaragua* case, 'the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence'.¹³⁹ At the same time, one might argue that the existence of a letter reaffirms that the state in question is convinced that its conduct accords with the law. Nevertheless, one should not expect too much legal value from such a report since it serves more as a notification than as a justification. This view is supported by the format of the letter, which is rarely longer than two pages.¹⁴⁰ A thorough legal analysis cannot be expected within this format. One might therefore argue that, due to the format of the letter to the President of the Security Council, the German government did not provide a detailed assessment of the situation in Syria. Moreover, one might very well argue that the six-page motion in the Bundestag delivers a more detailed legal justification than the one-page letter to the Security Council.

Therefore, the argument by Brunnée and Toope that the practice, especially by the states involved in the use of force against ISIS in Syria, is not coherent cannot be sustained. All the states involved acknowledge, by referring either to Security Council Resolution 2249 or to the unwilling or unable test, that

¹³⁹ *Nicaragua* case (n 12) para 200.

¹⁴⁰ See Letter from Germany to the UN Security Council (n 74); Letter from Belgium to the UN Security Council (n 74); Samantha Power 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General', 23 September 2014, UN Doc S/2014/695 (hereinafter: 'Letter from the US to the UN Security Council'); Matthew Rycroft 'Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council', 3 December 2015, UN Doc S/2015/928 (hereinafter: 'Letter from the UK to the UN Security Council').

Syria is not in control of its whole territory.¹⁴¹ The states that refer to Resolution 2249 accept the fact that Syria is not in control of the territory that is occupied by ISIS, even if they do not use the term 'unwilling or unable' in their letters.¹⁴² Against this background, one might very well argue that this is a situation where Syria is evidently unable to remove the threat posed by the NSA. Those states which base the arguments in their letters to the Security Council on Resolution 2249 have an understanding of Article 51 of the UN Charter that is no different from the understanding of those states which define the host state as 'unable or unwilling' in their letters. In the context of the interactional approach, one might argue that the states involved in the conflict with ISIS share the same understanding of Article 51 of the UN Charter.¹⁴³

By looking at the practice of states, Brunnée and Toope also concluded that the 'state practice falls far short of the "widespread and consistent" practice required for the formation of customary international law'.¹⁴⁴ This conclusion is based on their assessment of the states involved in fighting against ISIS and the fact that 'no state from Africa, central or east Asia, or Latin America has even engaged in the debate'.¹⁴⁵ Assuming that Brunnée and Toope's assessment is correct, this still does not support the argument that the necessary threshold of state practice is not fulfilled. As stated before, the silence of a state might be interpreted as confirmation of a new rule.¹⁴⁶ Furthermore, one might also argue that if a state does not protest against a rule

¹⁴¹ See Letter from Germany to the UN Security Council (n 74); Letter from Belgium to the UN Security Council (n 74); Letter from the US to the UN Security Council (n 140); Letter from the UK to the UN Security Council (n 140).

¹⁴² Ibid. See also Chapter 5.III.1(g).

¹⁴³ See also Chachko & Deeks (n 47).

¹⁴⁴ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 15.

¹⁴⁵ Ibid.

¹⁴⁶ See chapter 3.IV.

and acquiesces in the practice of other states, such state has accepted the practice in question as legitimate.¹⁴⁷

In order to support their argument that the unwilling or unable test is not practised by most states, Brunnée and Toope use a document that was drafted by the Non-Aligned Movement ('NAM'), which is a grouping of 120 states.¹⁴⁸ The final document states that 'consistent with the practice of the UN and international law, as pronounced by the ICJ, article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted.'¹⁴⁹

However, this statement does not provide proof of an objection to the unwilling or unable test. First, the statement is very vague and not directly related to the unwilling or unable test. Second, the practice by several member states of the NAM shows a more ambiguous approach to the unwilling or unable test in relation to the right of self-defence.¹⁵⁰ Third, assuming that the statement in the final document is correct, it would mean that the right of self-defence under Article 51 could never change due to the exclusion of any re-interpretation or re-drafting of the rule. This results in a situation where Article 51, which is also customary international law, would not be amenable to any changes. However, the nature of custom shows that it is open to change, as illustrated in the previous chapter. Therefore, such an argument does not appear to be a tenable solution. In the end, the statement that Article 51 should not be re-written and re-interpreted seems to be a premature attempt to

¹⁴⁷ MacGibbon (n 46) at 131; Shaw (n 46) 66–67. See also for an overview of the reaction to the attacks on ISIS in Syria from 2014 onwards: Chachko & Deeks (n 47); see also the discussion of inactivity as confirmation of rule in chapter 3.IV.

¹⁴⁸ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 13.

¹⁴⁹ Non-Aligned Movement (NAM), 17th Summit of Head of State and Government of the Non-Aligned Movement, Final Document (17–18 September 2016), para 25.2, available at http://cns.miis.edu/nam/documents/Official_Document/XVII-NAM-Summit-Final-Outcome-Documents-ENG.pdf (last accessed 2 March 2021).

¹⁵⁰ This applies to Egypt, Jordan, Lebanon, Colombia, Uganda, Rwanda, India, Ethiopia, Iran and South Africa: see Chachko & Deeks (n 47).

delimit Article 51. As Tams pointed out, Article 51 is open to re-interpretation, which includes a reading that enables states to use force against NSAs.¹⁵¹ Therefore, even if one considers the NAM's statement as evidence of *opinio juris*, it is not clear what the *opinio juris* here is. Is it that the right of self-defence should never be able to develop or change? Even if one were to assume that the statement in question constitutes an objection to the practice of unwilling or unable, it does not eliminate the possibility that the customary right of self-defence has developed in a different direction from the right under Article 51 of the UN Charter. Taking the NAM's statement into account, this would also mean that the right of self-defence could never develop in any direction since it would not be open to re-interpretation. At this moment, the content of the NAM's statement is simply too vague to derive any clear *opinio juris* from it.

Ultimately, it becomes clear that there is a more significant consistency among the states that endorse the unwilling or unable test. As illustrated by the example of Germany, letters to the Security Council alone may not always represent the full picture.

3. Criteria of legality

Brunnée and Toope, based on their interactional approach, used the legality criteria that were proposed by Lon Fuller.¹⁵² They focused their assessment of the unwilling or unable test on the five criteria of legality, which will also form the basis of this section. In this section I examine whether Fuller's criteria of legality can be translated to the sphere of international law.

¹⁵¹ O'Connell, Tams & Tladi (n 1) 112-125, 166; It should further be noted that under Article 33(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), subsequent practice is crucial for the interpretation of a treaty provision. There is a considerable overlap between practice as understood under the VCLT and the formation of custom under the positivist paradigm.

¹⁵² See Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 16.

The interactional approach argues that a rule must be promulgated and known.¹⁵³ ‘Uncertainty’ as to whether a rule exists undermines the legality of that rule.¹⁵⁴ With regard to the unwilling or unable test, Brunnée and Toope concluded that such a concept or standard has not been promulgated as law, which they based on the uncertain scope of the right of self-defence against NSAs.¹⁵⁵ It is not quite clear how ‘promulgated’ and ‘known’ must be interpreted in this context. While Brunnée and Toope accepted that a customary rule can reach a point of sufficient promulgation without having a treaty provision, what the authors seemed to require in the case of the unwilling or unable test appears to be very specifically similar to a treaty provision.¹⁵⁶ If we interpret the element of certainty strictly, the threshold for a new rule to emerge appears to be very high, since the act of ‘promulgation’ may require consent or a discussion around a written document. Even though Brunnée and Toope stated that putting a rule in a treaty alone does not satisfy the element of promulgation, they tended to use examples which form part of an international law document.¹⁵⁷

With regard to the unwilling or unable test, it is unclear whether the element of promulgation could even be met under the standard that Brunnée and Toope set out. While certain elements form part of the unwilling or unable test, it remains unclear what the threshold is to satisfy the criteria of promulgation.¹⁵⁸ Due to the nature of customary international law, the unwilling or unable test cannot be clarified beyond a certain level.¹⁵⁹ In addition, as set out in a previous chapter, vagueness is an intrinsic element of

¹⁵³ Ibid at 17.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ See Brunnée & Toope *Legitimacy and Legality* (n 112) 8, 26, 49, 72, 185, 190.

¹⁵⁷ Ibid 49, 72, 190.

¹⁵⁸ For a discussion of the elements of the unwilling or unable test, see chapter 5.III.

¹⁵⁹ See chapter 3.I.

custom.¹⁶⁰ Due to the customary nature in question, one might be able to expect clarity of a rule to a certain degree.

With regard to Brunnée and Toope's argument that the unwilling or unable test is uncertain, one might argue that this concept has been used by a number of states in the last and the current centuries, which has revealed certain recurring elements.¹⁶¹ For instance, I illustrate in the next chapter that state practice shows that the inability of a state results from a situation where the territorial state attempted to remove the threat posed by an NSA.¹⁶² In addition, such a situation may result from a lack of territorial control by the territorial state. The state practice with regard to self-defence against NSAs further shows that the requirement of unwillingness includes the territorial state's opportunity to remove the threat over a certain period of time.¹⁶³ Therefore, one might argue that there is a level of certainty among states about the unwilling or unable test. Unfortunately, Brunnée and Toope did not provide a definition for certainty, which is required in this context. With regard to the customary nature that is in question, one can only expect a certain degree of certainty and a rule will always be somewhat vague. Given the number of states that have applied the unwilling or unable test, one might argue that there is certainty about the existence of the unwilling or unable test.

¹⁶⁰ See chapter 3.I.

¹⁶¹ Brownlie points out five cases in which states have exercised their right of self-defence in a situation where the host state was either unwilling or unable: see Brownlie 'International law and the activities of armed bands' (n 17) at 732. Ruys and Verhoeven state that the concept of 'unwilling or unable' was used by Israel, Rwanda, Turkey and Iran: see Ruys & Verhoeven (n 1) at 317. Deeks refers to the following situations as evidence of state practice: Russia's attacks on Chechen rebels in Georgia; Israel's attacks on Hezbollah and the PLO in Lebanon; Turkey's attacks on the PKK in Iraq; Soviet Union's attack on White Guard bands in Outer Mongolia; US attacks on Viet Cong soldiers in Cambodia during the Vietnam War; US attacks on Al-Qaeda in Afghanistan and the Sudan; and Columbia's attacks on the FARC in Ecuador: see Deeks (n 1). See also Chachko & Deeks (n 47) and chapter 5.III.

¹⁶² See chapter 5.III.2. and 3.

¹⁶³ See chapter 5.III.3(a).

Brunnée and Toope then focused on the requirement of clarity as an indicator of legality. It is argued that the lack of clarity about the concept of 'unwilling and unable' and the possibility of using such a concept in order to serve a state's self-interest constitutes a threat to the legality of such a rule.¹⁶⁴

Moreover, Brunnée and Toope argued that the legality element of non-contradiction is not fulfilled. They argued that, because Article 51 is an exception to Article 2(4) of the UN Charter, the right of self-defence must be interpreted in a restrictive way.¹⁶⁵ According to Brunnée and Toope, the unwilling or unable test results in an extensive interpretation of the right of self-defence, which obliterates the prohibition on use of force.¹⁶⁶

In the next step, Brunnée and Toope examined whether their requirement of 'reasonable demands' is met in the case of the unwilling or unable test.¹⁶⁷ According to this requirement, a rule should not ask the impossible to the extent that it should not result in a scenario where a state has to suffer an attack.¹⁶⁸ The authors argued that the standard of unwilling or unable would make it impossible for 'states that are willing but unable' to remove the threat of terrorist attacks from their territory to prevent military intervention.¹⁶⁹ However, the focus here is very much on the territorial state and leaves the primary addressee of the rule aside. The unwilling or unable test is clearly directed at the state that is considering exercising the right of self-defence. In this context, it should also be noted that the unwilling or unable test has been applied only to justify the use of force against NSAs and not the direct use of force against the host state. Brunnée and Toope's view also disregards the fact

¹⁶⁴ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 18.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid at 19.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

that usually there would usually be some kind of indication of the inability in the form of failed attempts to remove the threat or a lack of territorial control.

As the examination in the next chapter shows, the determination of a state as unwilling or unable is not conducted within a day.¹⁷⁰ The situations under examination show that such an assessment is usually the result of months, if not years, of territorial states proving to be unwilling or unable.

Brunnée and Toope's final element is that the demands of the rule and its exercise in practice have to be congruent.¹⁷¹ Brunnée and Toope argued that the unwilling or unable test has been exercised by only a small number of states and that the practice so far is not a 'widespread, consistent and representative practice of legality'.¹⁷² However, as noted earlier, the threshold for the elements of a widespread, consistent and representative practice is flexible and changes depending on the nature of custom that is in question.¹⁷³ One might argue that, due to the fact that global terrorism is a fairly recent development, the rule in question has not been enforced by a majority of states. One might also argue that the majority of the global community is not faced with the threat of terrorism by an NSA in another state to the extent that they would have considered using the right of self-defence. With regard to global terrorism, one might also argue that the past 19 years have resulted in the emergence of a new particular custom that does not apply universally. This would trigger different thresholds for the elements of 'widespread, consistent and representative' practice. This is also the starting point for the examination of the SAS doctrine in the next chapter, which argues that a limited number of states can shape the formation of custom.

¹⁷⁰ See chapter 5.III.

¹⁷¹ Brunnée & Toope 'Self-defense against non-state actors' (n 1) at 19.

¹⁷² Ibid.

¹⁷³ See chapter 3.III.1.

The proposed criteria for legality seem to set a higher threshold for a change in custom or the emergence of new custom. It becomes clear that the 'interactional approach' gives content to the traditional elements of custom which adds to the traditional positivist interpretation, especially concerning the element of *opinio juris*. However, Brunnée and Toope's interactional approach seems to set a very high threshold by requiring that a rule must be promulgated in order to meet the requirement of legality. While the interactional approach is also meant to accommodate change of custom, Brunnée and Toope tend to use treaty provisions in this context which suggests that the threshold for promulgation is too high.¹⁷⁴ With regard to the element of promulgation, the standard of legality that is required under the interactional approach appears to be one of a formulated rule that has been written down. However, such a standard disregards the nature of particular custom and general custom, which might emerge without being written down as law. It appears that the interactional approach is trying to slow down the process of change, which might appear to be a positive development if we view the right of self-defence against NSAs from a moral perspective. Against the background of the nature of custom, one also has to ask how detailed a rule must be in order to fulfil the criteria that have been proposed by Brunnée and Toope. Is it not in the nature of custom that a rule evolves and changes? If the answer is yes, is it even possible to define clear lines, especially in times of transition? Here again, the interactional approach sets a threshold that custom does not appear to meet.

4. The interactional approach: Is it a tenable alternative?

The application of the interactional approach to the right of self-defence leaves a number of questions unanswered. From a practical perspective, one must also note that the interactional approach has not yet been used by any court.

¹⁷⁴ Brunnée & Toope *Legitimacy and Legality* (n 112) 49, 72, 179, 185.

Brunnée and Toope's detailed argument about the unwilling or unable test is also not always persuasive. Sole reliance on letters to the Security Council appears to be insufficient if one is looking at the practice and states' sense of legal obligation. In the example of Germany, this has resulted in problems with the methodology. If the authors regard a state as a supporter of the unwilling or unable test only if they explicitly use these terms in their publications, this seems to be a very positivist approach. In addition, it becomes clear that the interactional approach displays difficulties when it has to identify a particular kind of custom that does not apply universally.

III. Conclusion: Is there a need for another approach to the formation of custom?

As discussed in this chapter, neither the traditional approach nor the interactional approach to the formation of custom concludes that the right of self-defence against NSAs has changed in the post-9/11 era. However, as illustrated, the question of the right of self-defence against NSAs was not settled at the beginning of the century. Nevertheless, both approaches highlighted a key observation, namely, that the unwilling or unable test has not been applied by the majority of the international community. While this might be a result of the fact that not every state in the international community is dealing with an NSA, it is also the starting point of the next discussion. The next chapter will conduct a detailed examination of the SAS doctrine.

Chapter 5. The right of self-defence in the post-9/11 era: A change of customary international law through the application of the SAS doctrine

As we saw in chapter 4, a major critique of the scholarship is that there is no widespread and representative state practice and a lack of consistency about the practice.¹ This chapter sets out arguments that support the view that customary international law on the right of self-defence has changed and contests the conclusions of the authors discussed in the previous chapter. The main question in this chapter is whether a group of states can steer or shape customary international law. The *Nuclear Weapons* case has already shown us that a few states might block the creation of customary international law.² In this case, the practice of a few states determined whether a rule had become law. If a few specially affected states ('SAS') have the power to shape and steer, the circumstances and the scope of such power have to be defined.³ While a few commentators even go so far as to argue that SAS alone can create a rule of custom by themselves, this is not the approach that I argue for in this chapter.⁴ Instead, I argue that SAS are more influential than non-SAS in the formation process of customary international law. With reference to international jurisprudence, practice by states and scholarship, I set out the

¹ See the analysis in chapter 4.I.

² See *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996 (hereinafter: *Nuclear Weapons* case) paras 71, 73. See also International Law Association, Final Report of the Committee, Statement of Principles applicable to the Formation of General Customary International Law, London (2000) (hereinafter: 'ILA Report 2000') at 26: While the ILA seems to assert that the creation and prevention of custom are two separate questions, it accepts that SAS can shape and steer both alternatives.

³ See also J-M Henckaerts 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 *International Review of the Red Cross* 175 at 180.

⁴ See MN Shaw *International Law* 8 ed (2017) 57-58. While there is the view within the scholarship that a small number of states can create customary international law by themselves, I argue that a group of states can steer or shape customary international law but that there is still the requirement of widespread and representative support by other states. I submit that while SAS can steer and shape a new rule of custom, the rule still needs the widespread and representative support of non-SAS.

scope and requirements of what this thesis understands to be the SAS doctrine. As there are different understandings of the SAS doctrine, I will discuss the requirements and scope of the doctrine as it is proposed in this thesis. On this basis, I examine post-9/11 situations and argue that the customary right of self-defence against non-state actors ('NSAs') has evolved.

This chapter, therefore, examines the SAS doctrine and assesses whether it can be applied to identify a change of custom in the right of self-defence against NSAs.

The starting point of this examination are the *North Sea Continental Shelf* cases, where the International Court of Justice ('ICJ') concluded as follows:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.⁵

As discussed further below, while this conclusion by the ICJ supports the view that the SAS doctrine exists, the ICJ's approach also has ramifications for the need for widespread and representative participation by other states.⁶ The SAS doctrine has not received much attention in the scholarship in the past 50 years. Nevertheless, Danilenko warned against the powerful effect and the threat of misuse of this doctrine 25 years ago:

⁵ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ, Judgment, 20 February 1969 (hereinafter: *North Sea Continental Shelf cases*) para 73.

⁶ See the discussion in chapter 5.II.4.

In the absence of a clear definition, the notion of ‘specially affected’ states may be used as a respectable disguise for ‘important’ or ‘powerful’ states which are always supposed to be ‘specially affected’ by all or almost all political-legal developments within the international community.⁷

Whether the SAS doctrine entails a threat of misuse by giving a small group of states too much power depends on how the doctrine is interpreted. Based on the ICJ’s jurisprudence and the scholarship, I discuss the requirements of the SAS doctrine, particularly when a state qualifies as ‘specially affected’, and what kind of practice might be considered under the doctrine. In this context, I discuss the extent to which the inactivity of SAS and non-SAS might constitute a part of forming a new customary rule. At this point, I also examine the element of widespread and representative support by non-SAS.

Through the lens of the SAS doctrine, I examine the development of the right of self-defence against an NSA. In this context, I introduce several situations from the post-9/11 era where states exercised their right of self-defence by using force against an NSA.⁸ I argue that the states in those situations qualify as SAS. On this basis, I discuss whether that group of states shaped or steered customary international law on the right of self-defence against NSAs to an extent that was sufficient to change customary law.

Finally, this chapter will illustrate the discrepancy between the right of self-defence against states and the right of self-defence against NSAs that developed in the post-9/11 era. As discussed in a previous chapter, international law at the beginning of the century did not provide an answer as to whether and how a state might use force under the right of self-defence

⁷ GM Danilenko *Law-making in the International Community: Developments in International Law* (1993) 96.

⁸ See chapter 5.III.1.

against an NSA whose conduct is not attributable to the territorial state.⁹ I argue that customary international law has filled this gap in the law. On this basis, I argue that the distinction between the right of self-defence against states and the right of self-defence against NSAs may have never been more significant.

I. The SAS doctrine: The legal basis of the doctrine

This section presents the legal basis of the SAS doctrine by examining the ICJ's jurisprudence, the scholarship, the application of the doctrine by states, and the reaction of states. The following question guides this examination: Is there a legal basis for the SAS doctrine? Using the *North Sea Continental Shelf* cases as a starting point, the next section analyses whether the SAS doctrine finds application in order to identify custom and the elements of state practice and *opinio juris*. I submit that the SAS doctrine satisfies the elements of state practice and *opinio juris*.

1. The ICJ's jurisprudence on the existence of the SAS doctrine and its application

In the *North Sea Continental Shelf* cases, the ICJ briefly elaborated on the SAS doctrine and concluded as follows regarding the practice of the states in question:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually conform in the sense of the provision invoked – and should moreover have occurred in such a way

⁹ See chapter 2.III.

as to show a general recognition that a rule of law or legal obligation is involved.¹⁰

Unfortunately, the court did not provide authority for its statements about the SAS doctrine.¹¹ Therefore, it is unclear whether the court derives the SAS doctrine from a legal principle, state practice or existing case law. However, based on the *North Sea Continental Shelf* cases, one can argue that the ICJ shows that there can be a difference in the quality or value of contributing practice when it comes to assessing the element of state practice.

With regard to the formation of a new rule, Judge de Castro, in his separate opinion in the *Fisheries Jurisdiction* case, concluded that:

For a new rule of international law to be formed, the practice by states, including those whose interests are specially affected, must have been substantially or practically uniform.¹²

According to Judge de Castro, the SAS doctrine is, therefore, a key part of the question of whether a rule has become customary international law.

In its Advisory Opinion in the *Nuclear Weapons* case, the ICJ examined whether there is a rule that prohibits the use of nuclear weapons. In this case, the US submitted that custom would require state practice, including practice from states whose interests were specially affected.¹³ The court examined previous

¹⁰ *North Sea Continental Shelf* cases (n 5) para 74.

¹¹ *Ibid* para 73.

¹² *Fisheries Jurisdiction* case (*United Kingdom of Great Britain and Northern Ireland v Iceland*) ICJ, Judgment, 25 July 1974 (hereinafter: *Fisheries Jurisdiction* case) separate opinion of Judge de Castro at 90-91.

¹³ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, Together with Written Statement of the Government of the United States of America (1995) (hereinafter: Letter from Acting Legal Adviser, *Nuclear Weapons* case) at 9.

General Assembly resolutions on the matter in order to decide whether the international community supported such a rule. The court found that a group of 20 states rejected such a resolution on the prohibition on the use of nuclear weapons.¹⁴ The ICJ concluded in its Advisory Opinion that:

[S]everal of the resolutions under consideration in the present case have been adopted with substantial number of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.¹⁵

By implication, one may argue that the ICJ would have confirmed the existence of *opinio juris* if there had not been states with negative votes about the resolutions concerned. It is important to stress that some of the negative votes were connected to the possession of nuclear weapons by states like the US, the UK and Russia. The court pointed out that some of the states that considered nuclear weapons lawful practised a policy of deterrence.¹⁶ This meant that they reserved the right to use those weapons under the right of self-defence.¹⁷ It appears that the court did consider the policy of deterrence and the non-recourse to nuclear weapons of the states in possession of such weapons as a common factor among those states.¹⁸ On this basis, the ICJ rejected the notion that the non-recourse to nuclear weapons over 50 years has established *opinio juris*.¹⁹ While the court's reasoning shows the difficulty of separating state practice and *opinio juris*, such reasoning also demonstrates

¹⁴ General Assembly resolution 1653 (XVI) (1961); see the *Nuclear Weapons* case para 71.

¹⁵ *Nuclear Weapons* case (n 2) para 71.

¹⁶ *Ibid* paras 66–67.

¹⁷ *Ibid* para 66.

¹⁸ This means that the states in possession of nuclear weapons conducted a policy of deterrence and did not use their nuclear weapons. As I explain further below, Shaw argues that SAS are 'intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law': Shaw (n 4) 58–59.

¹⁹ *Nuclear Weapons* case (n 2) paras 66–67.

that the rule in question was prevented from becoming custom because of the small number of states in possession of nuclear weapons.²⁰

While the element in question here was *opinio juris*, the crucial point that we can draw from the case is that a relatively small number of states might shape elements of customary international law. The example of the *Nuclear Weapons* case confirmed the doctrine that a few states might steer or shape customary international law. On this basis, one might argue that the ICJ considered the states in possession of nuclear weapons to be SAS, without labelling those states as SAS, and used the doctrine to determine whether *opinio juris* and ultimately custom had been established. In the end, one might conclude that the practice by this small number of states confirmed the legality of the use of nuclear weapons in extraordinary circumstances as an exercise of self-defence.

One might use the ICJ's jurisprudence to determine that the SAS doctrine has been applied to decide whether a rule of custom exists.²¹ In addition, the jurisprudence shows that the doctrine is not limited to the element of state practice, but also includes the element of *opinio juris*.²² The next two sections further illustrate that the SAS doctrine is not limited to the element of state practice.

2. States supporting the SAS doctrine

The SAS doctrine has been invoked in practice by states like the US in the *Nuclear Weapons* case. According to the US, 'customary law could not be created over the objection of the nuclear-weapon states, which are the states whose interests are most specially affected.'²³ A review of the US

²⁰ For the purposes of this chapter, I work under the premise that state practice and *opinio juris* cannot be separated in practice.

²¹ *North Sea Continental Shelf* cases (n 5) para 74.

²² See *Nuclear Weapons* case (n 2) para 66.

²³ Letter from Acting Legal Adviser, *Nuclear Weapons* case (n 13) at 9.

government's response to the ICRC study on customary international humanitarian law clarifies the US's position on the SAS doctrine. The US representatives Bellinger and Haynes stated in 2007 that:

In this context, the study asserts, this principle means that 'with respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict.' This rendering dilutes the rule and, furthermore, makes it unduly provisional. Not every state that has participated in an armed conflict is 'specially affected'; such states do generate salient practice, but it is those states that have a distinctive history of participation that merit being regarded as 'specially affected'.²⁴

Bellinger and Hayes further criticised the methodology of the ICRC's study and concluded that:

[T]he study often fails to pay due regard to the practice of specially affected states. A distinct but related point is that the study tends to regard as equivalent the practice of states that have relatively little history of participation in armed conflict and the practice of states that have had a greater extent and depth of experience or that have otherwise significant opportunities to develop a carefully considered military doctrine. The latter category of states, however, had typically contributed a significantly greater quantity and quality of practice.²⁵

The critique by Bellinger and Haynes shows that the US applies the SAS doctrine to the formation of custom and identification of state practice. It is important to note that the US does not argue from the position of being a

²⁴ JB Bellinger III & WJ Haynes II 'A US government response to the International Committee of the Red Cross study of customary international humanitarian law' (2007) 89 *International Review of the Red Cross* 433 at 445 (footnote 4).

²⁵ *Ibid* at 445-446.

powerful state but instead argues using the elements of experience and frequency.²⁶ According to the US, the experience of participation in armed conflicts makes its practice more valuable for the element of state practice than the practice of other states.

The US Law of War Manual by the Department of Defense also indicates strong support for the SAS doctrine. It refers to the US's response to the ICRC study on customary international humanitarian law and defines SAS as-

states with a distinctive history of participation in the relevant matter must support [a] purported rule. States that have had a wealth of experience, or that have otherwise had significant opportunities to develop a carefully considered military doctrine, may be expected to have contributed to a greater quantity and quality of state practice relevant to the law of war than states that have not.²⁷

The US Department of Defense refers to Meron and concludes that SAS could include, depending upon the relevant matter, 'the nuclear powers, other major military powers, and occupying or occupied states'.²⁸ Based on the SAS concept, the US argues that such states may prevent the emergence of custom and concludes that 'specially affected states might decline to ratify [a] treaty and decide to retain the right to use [a] weapon.'²⁹

It becomes clear that the US supports the SAS concept and argues that the practice by states with an enhanced experience in the relevant field should

²⁶ For a preference of powerful states under the doctrine of specially affected states, see T Ruys 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (2010) 45-46.

²⁷ US Department of Defence, Law of War Manual (2015) at 32. See Meron 'The continuing role of custom in the formation of international humanitarian law' (1996) 90 *American Journal of International Law* at 248-249.

²⁸ US Department of Defence, Law of War Manual (2015) at 32; see Meron *ibid* at 249.

²⁹ US Department of Defence, Law of War Manual (2015) at 363.

have a more significant impact, at least on the element of state practice. It appears that the US favours an approach in terms of which more experienced states may prevent a rule from becoming custom. Suppose one transfers this reasoning to the right of self-defence against NSAs: one could argue that the states targeting an NSA at a global level have a more significant impact on the creation of a new rule.

The US is not alone in adopting the view that the SAS concept is relevant for the formation of custom. The comments and observations on the report for the identification of customary international law by the International Law Commission ('ILC') give a good indication of the position of various states.

Belarus stated in the context of particular custom that:

In certain cases, the practice giving rise to a rule of international customary law could depend on technological, scientific, geographical or other State strengths or characteristics. Consequently, it may be appropriate to introduce a category of states 'whose interests are specially affected'.³⁰

Regarding the generality of state practice, China stated that:

It is indicated in the commentary that account should be taken of 'the extent to which those states that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule have participated in the practice'. China is of the view that this essentially endorses the relevant jurisprudence of the International Court of Justice, in which the Court emphasizes the important role of 'specially affected states' with respect to the identification of customary international law. ... As 'specially affected states',

³⁰ International Law Commission, Identification of customary international law: comments and observations received from Governments, 14 February 2018, UN Doc A/CN.4/716 (hereinafter: 'ILC Comments and Observations from Governments') at 56.

such countries can play a role in the formulation of rules of customary international law. China recommends ... to emphasise that the practice and *opinio juris* of 'specially affected states' should be given fuller consideration.³¹

Israel suggested the following regarding the relevant draft conclusion on general practice:

When defining the need for relevant practice to be general, draft conclusion 8 does not include reference to the well-established concept of 'specially affected states'. The Commentary does make some reference to specially affected states, but it does not stipulate that their practice and *opinio juris* must exist for custom to evolve, and it does not adequately stress the importance of giving greater weight to specially affected states when examining state practice and *opinio juris*.³²

Israel further commented that:

With respect to the concept of specially affected states, it is well accepted that specially affected states are crucial to the formation and, accordingly, the identification of customary rules. In cases in which the accumulation of practice and *opinio juris* of specially affected states is not in line with the proposed rule, or does not exist *vis-à-vis* such a rule (for example, because no practice of specially affected states can be identified), this should serve as evidence that no such rule exists. ... Moreover, not only is the practice and *opinio juris* of specially affected states an indispensable element of identifying the existence of a customary international rule, but such practice and *opinio juris* must be given significantly greater weight than the practice of other states.³³

³¹ Ibid at 31.

³² Ibid.

³³ Ibid at 32.

What distinguishes Israel and China's position is that these states accept the application of the specially affected concept not only to the element of state practice but also to the element of *opinio juris*. As I illustrate further below, the SAS concept can indeed be applied to both elements of custom under the positivist approach.³⁴

The Netherlands commented as follows on a draft conclusion regarding the generality of practice:

We consider that the importance of specially affected states in the formation and identification of customary international law should be further elucidated. ... We suggest that a reference to specially affected states be include in draft conclusions 8 and 9 themselves. ... In addition, we propose to state explicitly that practice and *opinio iuris* of such States [specially affected states] must be given greater weight than that of other States.³⁵

The African Union ('AU') also seems to refer to the SAS doctrine in the *Chagos Islands* case. The written comments on other written statements concluded that:

As the Court has underlined in the *North Sea Continental Shelf* case, the practice that is essential to look at when dealing with an issue of international law is the practice of 'concerned states'.³⁶

³⁴ The traditional positivist approach of customary international law and its constitutive elements of state practice and *opinio juris* are to be separated and do not entail a moral element. For a description of the traditional positivist approach, see Shaw (n 4) 36–40; see also J Crawford & I Brownlie *Brownlie's Principles of Public International Law* 8 ed (2012) 24–28; T Bennett & J Strug *Introduction to International Law* (2013) 17–21.

³⁵ ILC Comments and Observations from Governments (n 30) at 33.

³⁶ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for an Advisory Opinion) Written Comments by the African Union on other Written Statements, 15 May 2018, para 23.

From the reference to the *North Sea Continental Shelf* cases, one might argue that the AU meant to invoke the SAS doctrine, even though the AU does not use the explicit terminology. Instead, the AU refers to the practice of ‘concerned states’. One should not disregard the fact that the term ‘concerned states’ appears to set a lower threshold than the term ‘specially affected states’ since any state might be concerned when the rule in question constitutes a universal rule. ‘Specially affected’ appears to require a higher threshold, which usually takes the form of being factually affected by the practice in question. Be that as it may, the explicit reference to paragraph 73 of the ICJ judgment in the *North Sea Continental Shelf* cases suggests that the legal reasoning of the AU is based on the SAS doctrine.³⁷

In the *Marshall Islands* case, India, in its response to a question from Judge Trindade, which addressed the normative value of relevant UN General Assembly resolutions for the element of *opinio juris*, stated that:

The lack of unanimity and the abstention or negative vote of States whose interests are specially affected cast doubt on the normative value of these UNGA resolutions and on the existence of an *opinio juris*.³⁸

The analysis in this section illustrates that a number of states seem to have accepted the SAS doctrine as a legal basis for identifying customary international law. The fact that no state argued against the SAS doctrine further strengthens the notion that the doctrine has been accepted.³⁹ However,

³⁷ Ibid.

³⁸ *Obligations concerning Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, India’s Response to the question from Judge Concado Trindade by the Ministry of External Affairs, 23 March 2016, para 14. India also referred to the SAS doctrine in its submission in the hearing: see *Obligations concerning Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Record of Public Sitting on 10 March 2016, CR 2016/4 at 19.

³⁹ As I demonstrate further below, the silence and/or acquiescence of states has major implications for the application of the SAS doctrine.

this examination also shows differences in how the doctrine could be applied. While China, Israel and the Netherlands argued for an application for the elements of state practice and *opinio juris*, the US, Belarus and the AU argued for an application regarding the element of state practice.⁴⁰ As I illustrated in the previous chapter, the positivist distinction between state practice and *opinio juris* appears to be very difficult to sustain in reality.⁴¹ Therefore, a finding on state practice might also be a finding on *opinio juris*. From an evidentiary standpoint, acts of a state can serve as evidence of both state practice and *opinio juris*.⁴² It is important to note that the SAS doctrine tells us where to look for evidence. According to the premise that state practice and *opinio juris* cannot be distinguished and are circular to the extent that one element of custom proves the existence of the other, the SAS doctrine cannot be limited to state practice since one might also identify SAS for *opinio juris* at the same time.

3. Scholarship

The following questions guide the examination in this section: Is there support for the SAS doctrine in the scholarship? Should the SAS doctrine exist and what speaks against its existence? While there is support for the SAS doctrine in the scholarship, there are different views on the application of the SAS doctrine. For the purposes of this thesis, the question of whether SAS may prevent a rule from becoming custom is less crucial than the question of whether SAS may shape or steer the creation of custom. In addition, I examine arguments by some commentators that the SAS doctrine should not or cannot exist.

⁴⁰ However, it should be noted that states sometimes refer to the element of state practice as including *opinio juris*: see ILC Comments and Observations from Governments (n 30) at 23, 25, 36–43.

⁴¹ See chapter 3.III.3.

⁴² See chapter 3.III.

(a) Scholars who support the idea of the SAS doctrine

As set out in the introduction to this chapter, one view is that SAS may shape or steer customary international law. Another view argues that SAS may prevent a rule from becoming custom, as was the US position in the *Nuclear Weapons* case.⁴³ As this section will show, a preference for one view over the other does not exclude or undermine the other. In addition, I examine whether SAS alone can or should be able to create custom.

(i) Can SAS steer or shape the formation of custom?

A review of the scholarship about the SAS doctrine reveals that the doctrine goes back to the time of Kelsen. Kelsen, a proponent of the positivist approach, pointed out the different impact of practice by states when he concluded that 'it has been applied or recognized in numerous cases by those states which by reason of their size and their culture are the most important for the development of international law.'⁴⁴ Kelsen, therefore, recognised the power of some states to steer or shape international law based on the specific characteristics of the state in question. Even though Kelsen did not call his assertion the SAS doctrine, he cleared the path for the doctrine. In addition, Kelsen's assertion reveals that the origins of the SAS doctrine date back long before the time of the *North Sea Continental Shelf* cases.⁴⁵

De Visscher also recognised the influence of powerful states in the formation process of customary international law when he stated:

⁴³ Letter from Acting Legal Adviser, *Nuclear Weapons* case (n 13) at 8-9.

⁴⁴ See H Kelsen *Pure Theory of Law* (1962) 260; see also H Kelsen *Principles of International Law* (1952) 311-312.

⁴⁵ GI Tunkin 'Remarks on the juridical nature of customary norms of international law' (1961) 49 *Calif L Rev* 419 at 427, referring to Quadri *Diritto Internazionale Pubblico* (1956) 89 and Quadri 'Le fondement du caractere obligatoire du droit international public' (1952) 80 *Recueil des Cours* 583 at 625.

Among the users are always some who mark the soil more deeply with their footprints than other, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way. Thus it happens that the great Powers, after imprinting a definite direction upon a usage, make themselves its guarantors and defenders.⁴⁶

For instance, a field that has not been explored in terms of international law and practice is the law of outer space, which provides a broad canvas for creating new custom. In the context of the customary law of outer space, Thirlway concluded that-

the states whose interests are specially affected would presumably be those which are actually or potentially in control of the economic and scientific assets necessary for the exploration of space.⁴⁷

Danilenko also accepted that the element of state practice may be met through 'an active practice of a limited group of states, who are most interested in a particular matter'.⁴⁸ He further concluded that:

It appears that a new practice can acquire a widespread and representative character with the participation of just a certain representative number of 'specially affected' states.⁴⁹

The latest draft conclusions on the identification of customary international law by the ILC also consider the SAS doctrine. With regard to the generality of practice, the ILC concluded in its comment that-

⁴⁶ C de Visscher *Theory and Reality in Public International Law* (1957) 155.

⁴⁷ H Thirlway *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972) 72.

⁴⁸ Danilenko *Law-making in the International Community* (n 7) 95.

⁴⁹ *Ibid.*

an indispensable factor to be taken into account is the extent to which those states that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule ('specially affected states') have participated in the practice. ... It should be made clear, however, that the term 'specially affected states' should not be taken to refer to the relative power of states.'⁵⁰

This section illustrates that not all practice is the same for the quality of or impact on the element of state practice. The acceptance that not every practice by states equals another is the basis of the SAS doctrine. This is also in line with the ICJ's decision in the *North Sea Continental Shelf* cases and the *Nuclear Weapons* case. Therefore, I submit that the foundation of the SAS doctrine is that not all practice has the same impact on the determination of the constitutive elements of custom.

On the basis that practice by states may differ in quality of or impact on state practice, Henckaerts introduced the SAS doctrine when explaining the methodology of the 2005 ICRC study on customary international humanitarian law. He concluded that in order for the element of state practice to be 'general', there can be no threshold of percentage or number of states.⁵¹ He further stated that 'it is not simply a question of how many states participate in the practice, but also which states.'⁵² According to Henckaerts, this premise has two implications:

(1) if all 'specially affected States' are represented, it is not essential for a majority of states to have actively participated, but they must have at least acquiesced in the practice of 'specially affected states'; and (2) if 'specially affected states' do not accept the practice, it cannot mature into a rule of

⁵⁰ Report of the ILC, 70th Session, 30 April to 1 June and 2 July to 10 August 2018, UN Doc A/73/10 (hereinafter: 'ILC Report 2018') at 136, 137.

⁵¹ J-M Henckaerts 'Study on customary international humanitarian law' (n 3) at 180-181.

⁵² Ibid at 180.

customary international law, even though unanimity is not required as explained.⁵³

Henckaerts showed that the SAS doctrine may affect both sides of custom: creation and prevention.⁵⁴ He further accepted the possibility that not all states have to participate, but that states can also acquiesce to a rule. As I examine further below, inactivity of states is a crucial element of the SAS doctrine, in order to prevent a SAS from creating custom on its own.

MacLaren and Schwendimann elaborated on the ICRC study on customary international law and adopted a very radical view about the position of the US. They argue that state practice would never be 'representative' if it did not include US practice.⁵⁵ Assuming that the SAS doctrine is not based on power but instead on experience and quantity, this conclusion is not logical. Since there are areas of law in which the US does not even qualify as specially affected through either lack of experience or quantity of practice, the conclusion by MacLaren and Schwendimann cannot be sustained. For example, the US as a coastal state is not specially affected by the regime covering landlocked states.

Schmitt and Vihul confirmed the view of the ICRC that there can be no set formula for the number of states that must engage in a practice before it can emerge as custom.⁵⁶ With regard to the report by the International Law Association ('ILA') on the formation of customary international law, Schmitt and Vihul stated:

⁵³ Ibid at 181.

⁵⁴ Ibid.

⁵⁵ M MacLaren & F Schwendimann 'An exercise in the development of international law: The new ICRC study on customary international humanitarian law' (2005) 6 *German LJ* 1217 at 1232-1233.

⁵⁶ MN Schmitt & L Vihul 'The nature of international law cyber norms' 2014 *Tallinn Papers* at 23.

Of particular importance is the diversity of states involved on issues such as their geopolitics and legal systems, and the fact that 'specially affected states' have engaged in the practice or expressed their view of such practice when engaged in by other states. A specially affected state is one upon which the norm will operate with particular resonance.⁵⁷

Schmitt and Vihul, therefore, concluded that the US would qualify as a SAS due to its 'centrality to cyber activities and its development of military capacity in the field.'⁵⁸ Schmitt and Vihul also suggested that SAS or even one specially affected state could prevent the emergence of a customary rule.⁵⁹ Schmitt and Vihul further suggested that if the SAS doctrine exists, those states can prevent the creation of custom. The authors' view further strengthens the argument that SAS can steer custom creation. While I disagree with the view that a single SAS may prevent the formation of custom, I do agree that SAS can steer the custom formation process.

Thus far, the scholarship seems to argue that the very essence of the SAS doctrine is that the practice by those states has a different value from the practice of non-SAS. More importantly, the examination illustrates that the existence of this doctrine is not disputed. The view by Henckaerts, who is one of the main authors of the ICRC's study on customary international humanitarian law, reveals that this doctrine is crucial to identifying the relevant practice in the field. The same rationale applies to the right of self-defence against an NSA. Therefore, it would not make much sense to consider the practice of a state that has never faced the threat of terrorism or targeted terrorist groups in foreign countries under the right of self-defence. As I will

⁵⁷ Ibid at 23–24.

⁵⁸ Ibid at 24. Schmitt and Vihul make this argument with regard to cyberspace which constitutes an area of law that due to its characteristics of fast evolving development provides another area of international law that has not been extensively explored.

⁵⁹ Schmitt & Vihul (n 56) at 25.

illustrate further below, the practice of the participants in the drone strikes in Pakistan and Yemen, as well as those states fighting against ISIS in Syria, is crucial in this respect. At the same time, the behaviour of the territorial states is crucial for the examination of custom.

In 2000, the ILA accepted the significance of the SAS doctrine for the element of state practice within the formation process of custom.⁶⁰ The ILA focused on the representativeness of practice and concluded as follows:

The criterion of representativeness has in fact a dual aspect – negative and positive. The positive aspect is that, if all major interests (‘specially affected states’) are represented, it is not essential for a majority of states to have participated (still less a great majority, or all of them). The negative aspect is that if important actors do not accept the practice, it cannot mature into a rule of general customary law.⁶¹

While the ILA showed that the creation and prevention of custom are two separate questions, the ILA seems to accept that SAS can shape and steer both the creation and the prevention of custom. The ILA further accepts that this argument does not reflect a democratic principle, and points out that ‘customary systems are rarely democratic’.⁶² According to the ILA, international law is not a democratic system and ‘it should be noted that customary systems are rarely completely democratic: the more important participants play a particularly significant role in the process.’⁶³ The report further states:

⁶⁰ ILA Report 2000 (n 2) at 26.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

So, in this regard, customary international law is at least in touch with political reality. In the nature of things, who is 'specially affected' will vary according to circumstances. There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Given the scope of interests, both geographically and *ratione materiae*, they often will be 'specially affected' by a practice; and *to that extent and to that extent alone*, their participation is necessary. However, it will not necessarily be only the major powers who are 'specially affected'.⁶⁴

The approach by the ILC suggests that the SAS doctrine is not tailored only for the most powerful states and that the doctrine is not a hegemonic monster. Tladi, during one of the ILC meetings, confirmed the position that the SAS doctrine is not solely about powerful states.⁶⁵ The element of being specially affected has a more critical role than the powerfulness of the states in question. Therefore, one might argue that the SAS doctrine is not another tool that is developed by hegemonic states to control international law. However, one must acknowledge that in a large number of situations, more powerful states are involved. Therefore, Wolfrum is also not wrong when he doubts that a customary rule for outer space could be established without considering the practice by the US and Russia.⁶⁶

(ii) Can SAS alone create custom?

Shaw described the SAS doctrine as follows:

[I]t is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance.

⁶⁴ Ibid.

⁶⁵ ILC, 70th Session (first part), Provisional summary record of the 3397th meeting, 8 May 2018, UN Doc A/CN.4/SR.3397, at 6, 7; see also ILC, 66th Session (second part), Provisional summary record of the 3225th meeting, 17 July 2014, UN Doc A/CN.4/SR.3225 at 5.

⁶⁶ M Byers & G Nolte *United States Hegemony and the Foundations of International Law* (2003) 359, 360.

This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.⁶⁷

According to Shaw, a more influential and powerful state can not only prevent a rule from becoming custom but can also create custom. Under this premise, it would be possible for SAS to create or change custom on the right of self-defence without the participation of other states. Shaw's approach bears a high risk of abuse by the most powerful states. In the context of the *North Sea Continental Shelf* cases and the scholarship that argues that SAS alone cannot create custom, I disagree with Shaw's approach.⁶⁸ As will be demonstrated further below, the element of widespread and representative support by states that are not SAS is crucial for the formation of custom in this context.

(iii) Conclusion

It is essential to bear in mind that the SAS doctrine does not abolish the elements of state practice and *opinio juris*, nor is it a substitute. The doctrine instead serves as an interpretation tool to identify the relevant state practice and *opinio juris* regarding the relevant rule and indicates where to look for evidence of the constitutive elements of custom. The doctrine may be compared to an amplifier that prioritises and increases the value of the practice by states that are specially affected. While some commentators propose an application of the SAS doctrine to the element of state practice only, others

⁶⁷ Shaw (n 4) 58.

⁶⁸ For a rejection of Shaw's approach see also KJ Heller 'Specially-affected states and the formation of custom' (2018) 112 *American Journal of International Law* 191 at 228-229.

seem to suggest that it should also apply to the element of *opinio juris*.⁶⁹ As previously pointed out, state practice and *opinio juris* form part of a continuum and merge into one another in terms of the positivist approach.⁷⁰ In other words, evidence of state practice can also be regarded as evidence of *opinio juris*. Since the SAS doctrine shows where to look for evidence of state practice, by implication, the SAS doctrine also becomes relevant for *opinio juris*. An isolated application to the element of state practice, therefore, appears to be insufficient. If we accept that a few states might shape or steer the formation of custom, such a doctrine cannot just apply to the element of state practice. It must apply to both constitutive elements of custom equally. Therefore, I submit that the application of the SAS doctrine is not limited to the element of state practice but also includes *opinio juris*.

The scholarship clarifies essential elements of the doctrine. Such clarification was necessary after a very rudimentary description in the *North Sea Continental Shelf* cases. Four main conclusions can be derived from this overview of the scholarship on the question of SAS. First, this section shows that the doctrine may serve as a legal basis for identifying customary international law. Second, the scholarship, by accepting the doctrine, accepts at the same time that not every incident, occurrence or example of practice contributes the same value to the element of state practice or *opinio juris*. Third, SAS can shape or steer the formation of customary international law. Should there also be widespread and representative support by non-SAS, such a rule can then become

⁶⁹ For an application of the SAS concept that is not limited to the element of state practice, see China's and Israel's observations to the ILC: 'ILC Comments and Observations from Governments' (n 30) at 31, 32; J-M Henckaerts *Customary International Humanitarian Law: Volume 1: Rules* (2005) xviii; J-M Henckaerts 'Study on customary international humanitarian law' (n 3) at 180; Kelsen *Reine Rechtslehre* 261; Thirlway *International Customary Law* (n 47) 72; Schmitt & Vihul (n 56) at 22-23; ILC Report 2000 (n 2) at 26; see also Heller 'Specially-affected states and the formation of custom' (n 68) at 227.

⁷⁰ See chapter 3.III.

customary international law.⁷¹ Fourth, the doctrine is not attached to only the most powerful states in the international community.

(b) Should the SAS doctrine exist? Scholars who argue against the existence of the SAS doctrine

According to Akehurst, the notion that the practice of some states is *per se* more important than the practice of others is unacceptable.⁷² Akehurst stated that such an approach is never found in diplomatic correspondence or the judgments of courts.⁷³ Although Akehurst acknowledged that some states have greater influence, through a 'more frequent' and 'better publicized' practice, and are more likely to be imitated by less powerful states, he still rejected the suggestion that some states' practice is more important than the practice of others, based on the potential abuse by powerful states.⁷⁴ In theory, Akehurst's approach makes sense. In a utopian scenario, one state's practice should not be more important than the practice of another. However, such an approach disregards the dynamics of international politics and the power relations therein. This is not to say that international power relations have a direct influence on law. However, a less powerful state might conduct its practice along the lines of more powerful states' conduct. The state practice of more powerful states might, therefore, have at least an indirect effect on state practice by paving the way for future practice.

Another view in the scholarship is that the SAS doctrine is not in accordance with the basic principle of sovereign equality.⁷⁵ Price stated in this context that

⁷¹ See chapter 5.II.2.

⁷² M Akehurst 'Custom as a source of international law' (1976) 47 *British Yearbook of International Law* 1 at 22–23.

⁷³ *Ibid.*

⁷⁴ *Ibid* at 23.

⁷⁵ See D Tladi 'Progressive development and codification of international law: The work of the International Law Commission during its sixty-sixth session' (2013) 38 *South African Yearbook*

'the foundational doctrine of the sovereign and legal equality of states, a cornerstone of international law, is not to be overridden lightly.'⁷⁶ Ratner concluded in this context that-

with respect to customary international law, a stronger version of sovereign equality could conceivably be achieved through a challenge to the doctrine that the support of 'specially affected states' is required for custom to emerge since in many cases such states are powerful states.⁷⁷

However, this position in the scholarship fails to explain why or how the SAS doctrine will violate the sovereign equality of states. Suppose there are states which are specially affected; this does not render the practice or conduct by other states which do not fall into this category meaningless. If I shared the view that the SAS alone could create custom, the concerns raised by some commentators would be legitimate. However, I suggest an approach to SAS that requires an element of widespread and representative support. Therefore, any state, regardless of whether it is a SAS or a non-SAS, is in a position to object to a new rule which will have an impact on the creation or prevention of a customary rule. Heller came to a similar conclusion in response to the approach that argues against the existence of the SAS doctrine.⁷⁸ He pointed out that:

[A] strong argument can be made that sovereign equality actually requires recognizing certain states as specially affected. ... It [SAS doctrine] recognizes

of International Law 124 at 129-130; ME Villiger *Customary International Law and Treaties: A Study of their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (1985) 15; For an overview of this view in the scholarship see Heller 'Specially-affected states and the formation of custom' (n 68) at 201-202.

⁷⁶ R Price *Emerging Customary Norms and Anti-personnel Landmines* (2004) 120.

⁷⁷ SR Ratner *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015) 209, 210.

⁷⁸ Heller 'Specially-affected states and the formation of custom' (n 68) at 202.

that not all practices regulated or potentially regulated by customary international law *affect* all states – much less affect them *equally*.⁷⁹

4. Conclusion

The current examination of the ICJ's jurisprudence, practice by states and the scholarship supports the view that there is a legal basis for the SAS doctrine in terms of identifying custom. The ICJ gave birth to the doctrine and did not revoke it in any of its subsequent decisions. In addition, the doctrine has been adopted by states, and parts of the scholarship also accept the impact of SAS in the formation of custom. A rejection based on the equality of states, as has been suggested, is not convincing. As pointed out, SAS alone cannot create custom; they need the widespread and representative support of non-SAS. Nevertheless, SAS are critical to such formation of custom, which I examine in more detail below. I further submit that the SAS doctrine applies to the element of state practice and *opinio juris*. As the SAS doctrine tells us where to look for evidence, it is only logical that the doctrine applies to both constitutive elements of custom.

II. Criteria for and scope of the SAS doctrine

The previous section illustrated that there is a legal basis for the SAS doctrine and that it might serve as a tool to identify custom. This raises two important questions: Which states qualify as SAS? And how does the SAS doctrine relate to rules of general custom? This section starts with a discussion of which states might qualify as SAS. The next section discusses how the SAS doctrine ties in with general rules on the formation of custom. In addition, I examine what kind of majority is required among SAS and how we should interpret the element of widespread and representative support by non-SAS. The criteria

⁷⁹ Ibid.

laid down in this section constitute the basis of the examination in the following section.

1. Which states qualify as SAS?

Two different kinds of states could be regarded as specially affected in the context of the right of self-defence, namely, states using force and states on whose territory an NSA is found (territorial states). For the purposes of this thesis, territorial states are states in which NSAs are located and on whose territory another state has exercised its right of self-defence against the NSA.

However, how does one determine which states qualify as SAS? The question is what criteria one can use to determine their status as SAS. With regard to the examination of the right of self-defence it is, therefore, crucial to know which states qualify as SAS. As I argue further below, states that use force against an NSA and territorial states qualify as SAS. However, the scholarship is divided on this point. Some scholars argue that only states that engage in the practice of a rule qualify as SAS.⁸⁰ Others argue that, beyond the states that engage in a practice, states that are affected by the practice, i.e. the exercise of a right, are also specially affected.⁸¹ While the former view focuses on the contribution of states to the development of a rule, the latter view concentrates on the criterion of being actually affected by the rule, i.e. states exercising that rule.

⁸⁰ See IF Dekker, HHG Post & H Meijers *On the Foundations and Sources of International Law* (2003) 142; Henckaerts *Customary International Humanitarian Law* (n 69) xlv; Bellinger & Haynes (n 24); Schmitt & Vihul (n 56) at 24; SA Yeini 'The specially-affecting states doctrine' (2018) 112 *American Journal of International Law* 244 at 248-249.

⁸¹ See Heller 'Specially-affected states and the formation of custom' (n 68) at 219; Shaw (n 4) 58-59; WT Worster 'The transformation of quantity into quality: Critical mass in the formation of customary international Law' (2013) 31 *BU Int'l LJ* 1 at 58-59; M Wood *Second Report on Identification of Customary international law* (2014) UN Doc A/CN.4/762 para 54; Danilenko *Law-making in the International Community* (n 7) 95; *Nuclear Weapons* case, dissenting opinion of Judge Weeramantry, at 534, 535.

(a) *States that engage in a practice*

The approach that only states that engage in a practice qualify as SAS would exclude territorial states from SAS status. For instance, Post argued that:

The number of states whose practice is needed depend[s] also on the 'legal scope' of the rule. If an emerging rule in respect to the use of sophisticated weaponry is considered then the practice of only a few states technically capable of production may suffice. For practice regarding an emerging rule on chemical weapons, the practice of many more states is of relevance. In the case of sophisticated weapons, initially only a few relevant nations and their instructions or manuals will play a role.⁸²

Post regarded only states that are in a position to use force as specially affected in terms of an emerging rule. Even though Post did not elaborate on the qualification of territorial states that can become the target of the use of force, the scenario that Post described suggests that states that might become the target of such force do not qualify as SAS.

The ICRC took a similar approach when it stated that:

Who is 'specially affected' will vary according to circumstances. Concerning the question of the legality of the use of blinding laser weapons, for example, 'specially affected States' include those identified as having been in the process of developing such weapons.⁸³

Since the ICRC further emphasised that the decision about which states qualify as SAS depends on the circumstances, it also concluded that with regard to international humanitarian law, 'countries that participated in an

⁸² Dekker, Post & Meijers (n 80) 142.

⁸³ Henckaerts *Customary International Humanitarian Law* (n 69) xliv.

armed conflict are “specially affected” when their practice examined for a certain rule was relevant to that armed conflict.’⁸⁴

Schmitt and Vihul confirmed this assessment with regard to the area of cyberspace and concluded that ‘a specially affected state is one upon which the norm will operate with particular resonance.’⁸⁵ Lewis, Blum and Modirzadeh examined the view that SAS would include states that are affected and concluded that ‘existing scholarly commentary tends to focus on the weapons-possessors, not on the place where the weapons may be used as the “specially affected” states.’⁸⁶

In response, in the ICRC’s study on customary international humanitarian law, the US representatives Bellinger and Hayes stated that:

Not every state that has participated in an armed conflict is ‘specially affected’; such states do generate salient practice, but it is those states that have a distinctive history of participation that merit being regarded as ‘specially affected’.⁸⁷

While Bellinger and Hayes seemed to agree that only states that engage in a practice should be considered as SAS, they suggested an additional criterion, which is a ‘distinctive history of participation’. Even though the authors do not further define a ‘distinctive history of participation’, one might argue that their reference to ‘quantity and quality of practice’ suggests an additional intensity requirement in order to be classified as specially affected.⁸⁸

⁸⁴ Ibid xliv–xlv.

⁸⁵ Schmitt & Vihul (n 56) at 24.

⁸⁶ DA Lewis, G Blum & NK Modirzadeh ‘War-algorithm accountability’ 2016 *Harvard Law School Program on International Law and Armed Conflict* at 59.

⁸⁷ Bellinger & Haynes (n 24) at 445 (footnote 4).

⁸⁸ Ibid.

Yeini suggested going beyond the approach by the ICRC and the US. He argued that the SAS doctrine should be reconstructed, and presented an alternative approach, which he called 'specially affecting states'.⁸⁹ Yeini's approach focused on the states' effect on a rule and not which effect the rule might have on a state.⁹⁰ Yeini defined 'specially affecting states' as states that provide

- extensive relevant practice,
- a notable impact on the formation and formulation of the rule, and
- an ability actually to carry the rule out in practical conduct.⁹¹

In summary, the predominant view in this section is that only states that engage in a practice and that have an impact on the rule qualify as SAS. States that are merely affected by other states' application of a rule do not qualify as SAS. With regard to the analysis in this chapter, this means that territorial states would not qualify as SAS.

I disagree with the view that only states that engage in a practice qualify as SAS, and I also disagree with the authors like Yeini, Bellinger and Hayes, who require a 'distinctive history of participation' or 'extensive relevant practice'. These criteria appear to require a high intensity of practice. Intensity describes how often and to what extent a state engages in a certain practice, and I disagree with that view. Instead, I submit that there must merely be a notable contribution to the formation of a rule through an engagement in practice. For instance, as pointed out in a previous chapter, from an evidentiary standpoint, a verbal practice might not have the same 'weight' as a physical practice.⁹² However, I disagree with the views by commentators that states are

⁸⁹ Yeini (n 80) at 248.

⁹⁰ Ibid at 248–249.

⁹¹ Ibid at 249.

⁹² See chapter 3.III.1(a).

disqualified as SAS simply because their practice does not meet a higher level of intensity even though their practice has a notable impact. While an intensity requirement might provide clarity on the element of consistency within custom,⁹³ using intensity as a qualifier for SAS appears to give preference to states that are more powerful and that have the capacity to engage in a practice more frequently. In addition, Heller pointed out that such an intensity requirement to qualify as an SAS is 'nearly impossible to implement'.⁹⁴

In terms of the approach presented in this section, I submit that states which applied the unwilling or unable test as part of their right of self-defence qualify as states engaging in a practice and therefore qualify as SAS.

(b) States affected by practice or the exercise of a rule

The opposing view in the scholarship qualifies states that are affected by practice as SAS. In other words, the fact that a state is affected by the practice of another state makes the former specially affected. According to this view, in terms of the right of self-defence against NSAs, territorial states qualify as SAS. Among the scholars who take this view, different scholars use different criteria to argue that states which are affected by the practice qualify as SAS. While all the commentators based their argument on the fact that such states are actually being affected by the practice, some commentators, like Shaw or Heller, provided additional criteria to determine which states qualify as SAS.⁹⁵

Shaw stated that SAS would have to be 'intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of practice'.⁹⁶ Using Shaw's approach, the

⁹³ See H Thirlway *The Sources of International Law* 2ed (2019) 76.

⁹⁴ Heller 'Specially-affected states and the formation of custom' (n 68) at 219.

⁹⁵ Shaw requires a 'special relationship with the subject-matter': Shaw (n 4) 58-59. Heller suggests a cost and benefit rationale to determine which of those states qualify as SAS: Heller 'Specially-affected states and the formation of custom' (n 68) at 220-221.

⁹⁶ Shaw (n 4) 58-59.

question is what the linking element or 'intimate connection' is in this examination of the right of self-defence against NSAs. The critical factor appears to be the 'special relationship with the subject-matter', and not wealth or power.

Such a special relationship among SAS could derive from a state's experience of the threat of transnational terrorism. States that use force against an NSA in another country have usually faced an attack by that NSA or claim that the imminent threat of an attack exists. While the threat of transnational terrorism constitutes the subject matter, the states that use force have a special relationship with the subject matter. However, the question remains whether territorial states have a special relationship with the subject matter of the practice. Shaw did not explain how he defined a special relationship in this context. A special relationship might, therefore, derive from being actually affected by the practice of other states. On this basis, territorial states might qualify as SAS. As explained further below, such a qualification faces challenges if one considers the development of custom as driven by states that actually contribute practice to the rule.⁹⁷

Wood's second report on the identification of customary international law described SAS as states that are 'affected or interested to a higher degree than other states' regarding the rule in question.⁹⁸ Worster defined a SAS as a state that 'either specially engages in the practice, where others do not or cannot, or who is affected by the practice to a degree unknown by the others.'⁹⁹

In his dissenting opinion in the *Nuclear Weapons* case, Judge Weeramantry concluded that:

⁹⁷ See chapter 5.II.1(c).

⁹⁸ M Wood *Second Report on Identification of Customary International Law* (2014) UN Doc A/CN.4/762 para 54; see also Danilenko *Law-making in the International Community* (n 57) 95.

⁹⁹ Worster (n 81) at 58–59.

The nuclear states possess the weapons, but it would be unrealistic to omit a consideration of those who would be affected once nuclear weapons are used. They would also be among the states most concerned, for their territories and populations would be exposed to the risk of harm from nuclear weapons no less than those of the nuclear powers, if ever nuclear weapons were used¹⁰⁰

Judge Weeramantry described an equivalent concept to the doctrine of SAS: 'states most specially concerned'.¹⁰¹ Assuming that Judge Weeramantry was addressing the SAS doctrine, I disagree with the wide temporal interpretation of states that 'risk' being affected. Widening the SAS doctrine in such a manner renders the SAS doctrine superfluous, especially with regard to provisions of the *jus in bello* and the *jus ad bellum*.

With reference to the dissenting opinion of Judge Weeramantry in the *Nuclear Weapons* case, Heller pointed out that territorial states might be even more affected under the SAS doctrine.¹⁰² Heller elaborated further on Judge Weeramantry's opinion and stated that:

States that are affected in a distinctive manner by a practice have more to lose than other states if a currently prohibited practice becomes permissible Syria, for example, will suffer a far greater loss of sovereignty than France if the 'unwilling or unable' test for self-defense against non-state actors achieves customary status.¹⁰³

Heller reached this conclusion through his suggested cost and benefit rationale that he also applied to determine which states engaging in a certain

¹⁰⁰ *Nuclear Weapons* case (n 2), dissenting opinion of Judge Weeramantry at 534, 535.

¹⁰¹ *Ibid.*

¹⁰² Heller 'Specially-affected states and the formation of custom' (n 68) at 220-221.

¹⁰³ *Ibid* at 221.

practice qualify as SAS.¹⁰⁴ In respect of states that are affected by practice, Heller suggested that ‘the cost, benefit, and experience rationales apply equally here.’¹⁰⁵ Heller suggested that, under the cost rationale, ‘states that are affected in a distinctive manner by a practice have more to lose than other states if a currently prohibited practice becomes permissible’.¹⁰⁶ Heller further proposed that, under the benefit rationale, ‘states that are affected in a distinctive manner by a practice have more to gain than other states if a currently permissible practice becomes prohibited’.¹⁰⁷ Both rationales are crucial to understanding why Heller suggested that territorial states qualify as SAS.

By including states that are affected by practice, which in this examination are the territorial states, Heller tried to ‘tilt the balance of custom-formation power toward weaker states, because the practice of one specially affected Global North state can create multiple specially affected states in the Global South.’¹⁰⁸ In this regard, one might argue that Heller based his rationale on policy grounds that do not form part of the positivist approach to custom. However, if one accepts that acquiescence might be regarded as a contribution to custom, as is suggested in this thesis, Heller’s cost and benefit rationale supports the view that states that are factually affected by a practice have to be considered as SAS.

¹⁰⁴ Heller suggests three rationales to determine which states qualify as SAS, namely the cost, benefit and experience rationales. Note that for the states that are affected by a practice Heller uses a slightly amended definition of the three rationales. For states that engage in practice, Heller describes the three rationales as follows: (i) Cost rationale: ‘[S]tates that engage in a currently permissible practice have more to lose than states that do not if the practice becomes prohibited’; (ii) Benefit rationale: ‘[S]tates that engage in a currently prohibited practice have more to gain than states that do not if the practice becomes permissible’; (iii) Experience rationale: ‘States that have a history of engaging in a particular practice presumably understand the nature of that practice – its advantages and disadvantages, its benefits and costs – better than states that do not’. Ibid at 209–210, 220–221.

¹⁰⁵ Ibid at 221.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

Therefore, in terms of the arguments presented in this section, one might argue that states that are affected by the practice of a rule also qualify as SAS. On this basis, in the next section I discuss why territorial states also qualify as SAS.

(c) Conclusion: Do territorial states qualify as SAS?

A review of the two opposing views reveals two different criteria that are used to determine which states are SAS. The approach that only states that engage in a practice qualify as SAS uses a criterion that appears legally more relevant since it focuses on the contribution to the development of a rule through state conduct. The opposing view, which goes beyond states that engage in a practice and also includes states that are actually affected, focuses on the criterion of being factually affected by the rule.

With regard to the group of states engaging in practice, I submit that in order to qualify as SAS there must be a notable impact on the development of the rule. I disagree with the views in the scholarship that require a high intensity engagement in practice.¹⁰⁹ Beyond the states that engage in practice, I submit that states that are affected by the rule also qualify as SAS. In other words, territorial states have a substantial interest in the development of the right to self-defence and, therefore, qualify as SAS.

As the ICRC concluded in its analysis, the group of SAS always depends on the circumstances. In other words, the rule in question is crucial for the determination of which states can be characterised as SAS. Considering the right of self-defence against NSAs and the unwilling or unable test under which the territorial state constitutes a crucial stakeholder, one cannot deny that territorial states are SAS. This can be supported further using the original

¹⁰⁹ See chapter 5.II.1(a). Also see Yeini (n 80) at 248; Bellinger & Haynes (n 24) at 445.

wording of the ICJ in the *North Sea Continental Shelf* cases: '[s]tates whose interests were specially affected'.¹¹⁰ One cannot deny the interests of the territorial states with regard to the unwilling or unable test and the right of self-defence against NSAs. In addition, the ICJ's wording does not indicate a clear limitation only on states that engage in a practice. Leaving the classification of SAS to only states that engage in a practice opens the SAS doctrine up to the threat of being governed by powerful states that are in a position to engage in multiple scenarios. While I would not go as far as Heller, who stated that 'recognizing the affect criterion can even tilt the balance of custom-formation' between the Global North and South, characterising states that are affected by practice as SAS enriches the SAS doctrine in a way that makes it more just. In this regard, states engaging in practice and those affected by practice constitute two ends of the same spectrum. One should also not forget that the states that are engaging in a practice also do so on the basis of a factual scenario. In this examination, that fact could be an armed attack that was conducted by an NSA. The affected criterion further enhances the credibility of the group of SAS, as a group of expert states that steers the formation of custom.¹¹¹ Therefore, I submit that the classification as SAS includes states that engage in a practice and those that are affected by that practice. I further submit that the territorial states in the examination in this chapter qualify as specially affected.¹¹²

As the examination in this chapter will show, being an SAS does not necessarily mean that the state contributes any relevant state practice or *opinio juris*. As I illustrate in the example of territorial states below, qualification as a territorial state does not automatically mean that the state contributes any state practice or *opinio juris*, i.e. objects to the use of force on its territory.¹¹³

¹¹⁰ *North Sea Continental Shelf* cases (n 5) para 73.

¹¹¹ See chapter 5.I(d).

¹¹² See chapter 5.II.1(b).

¹¹³ See an examination of post 9/11 situations in chapter 5.III.1.

However, the examination below will also show that some territorial states contribute verbal statements that may contribute to state practice. Therefore, the characterisation as territorial states does not automatically mean that those states are not engaging in practice. In conclusion, I submit that territorial states qualify as SAS but whether those states contribute any state practice or *opinio juris* must be assessed on a case-by-case basis. As illustrated in the previous section, the SAS doctrine shows us first and foremost where to look for evidence of state practice and *opinio juris*. However, the scope of affected states finds its temporal limitation in those states that have been factually affected. States that might be regarded as territorial states in the future do not qualify as SAS. Qualifying potential future territorial states as SAS is too broad and renders the entire SAS doctrine pointless.

2. General rules of custom and the SAS doctrine

Most of the examination in chapter 3 on the formation of custom and the constitutive elements of custom also applies to the SAS doctrine. Therefore, state practice includes verbal acts with the conditions set out previously.¹¹⁴ State practice may also include unlawful acts.¹¹⁵ In addition, inactivity can also be interpreted as acquiescence, or confirmation of a rule under the SAS doctrine. I use rules that apply to general custom in order to spell out further criteria of the SAS doctrine.

(a) *Widespread and representative practice among SAS: What kind of majority is required among SAS?*

After one has identified the group of SAS, the next question is what evidence of state practice and *opinio juris* that group provides. What kind of majority do we require if we want to use the state practice and *opinio juris* of SAS to determine custom? Do we need a majority at all? I submit that there is no exact

¹¹⁴ See chapter 3.III.1(a).

¹¹⁵ Ibid.

number or percentage that answers the question. However, the more states that engage in a certain way in practice and produce *opinio juris*, the more likely it is that such practice represents a widespread and representative state practice.

As pointed out before, rules that apply to the formation of general custom help us to determine the criteria of the SAS doctrine. For instance, it is crucial to address the question whether there is a consistent, widespread and representative practice that can be derived from the group of SAS. This question connects directly with the question of majority among the SAS.

This section, therefore, addresses the question of what kind of majority is required among the SAS or whether a majority is required at all. As discussed in chapter 3 of this thesis, a completely uniform practice by states is a utopian scenario that is very unlikely to occur. However, one still has to ask whether a simple majority, a supermajority, or a higher percentage is required. As illustrated in the previous section, it is also essential to remember that silence might also be interpreted as consent to a certain rule or practice.

In this context, Judge de Castro concluded, in his separate opinion in the *Fisheries* case, that the 12-mile rule had not become custom until every SAS had supported it.¹¹⁶ By contrast, the ILA used a broad interpretation and concluded that there was sufficient participation as long as the 'major interests' were represented.¹¹⁷ Heller pointed out that, in this context, giving a single state the power to prevent a new rule cannot be reconciled with the idea of sovereign equality.¹¹⁸ This view argues in favour of a majority, a

¹¹⁶ *Fisheries Jurisdiction case* (n 12), separate opinion of Judge de Castro, at 90, 91.

¹¹⁷ ILA Report 2000 (n 2) at 26.

¹¹⁸ Heller 'Specially-affected states and the formation of custom' (n 68) at 234–235.

supermajority or a high percentage threshold and against the view proposed by Judge de Castro, which requires complete conformity.

The ICJ concluded in this context that 'state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.'¹¹⁹ Such a statement supports the view that a high percentage or a supermajority might be sufficient among SAS. At the same time, the ICJ's position illustrates that complete uniformity among SAS cannot be required. Judge Lachs adopted the view that a simple majority was already enough when he pointed out in his dissenting opinion in the *North Sea Continental Shelf* cases that 'the majority of states actively engaged in the exploration of continental shelves' was enough.¹²⁰ As Heller pointed out in this context, a joint separate opinion in the *Fisheries* case and a dissenting opinion in the *Nuclear Weapons* case further supported the argument that a simple majority is sufficient in order to determine state practice among the SAS.¹²¹ Unfortunately, the joint separate opinion by Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda in the *Fisheries* case does not provide any reason for their argument, which prevents an in-depth analysis of their reasoning.

While the traditional element of state practice also does not set up any threshold in terms of a supermajority or complete uniformity, a key element that remains is how widespread and representative the practice in question is.¹²² As pointed out in chapter 3, there is no settled definition of widespread and representative practice in either the ICJ jurisprudence or the

¹¹⁹ *North Sea Continental Shelf* cases para 74.

¹²⁰ *North Sea Continental Shelf* cases, dissenting opinion by Judge Lachs, at 227.

¹²¹ Heller 'Specially-affected states and the formation of custom' (n 68) at 235-236 refers to *Fisheries Jurisdiction* case (n 12), joint separate opinion by Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda, at 221-222; *Nuclear Weapons* case (n 2), dissenting opinion by Judge Schwebel, at 319.

¹²² See *North Sea Continental Shelf* cases (n 5) para 73.

scholarship.¹²³ According to the ILC, while state practice does not have to be uniform, it is not possible to identify the minimum number of states that must engage in a practice.¹²⁴

Nevertheless, taking the scholarship and the ICJ jurisprudence into account, it seems that a widespread, representative and majority requirement appears to be some kind of placeholder for a democratic system, in order to prevent a small number of states from dictating the element of state practice. Therefore, a supermajority of SAS supporting a rule appears to be preferable to a simple majority and more representative, since it includes more states than a simple majority. Thirlway stated that it is 'certain that customary law is not made by simple majority'.¹²⁵ It becomes clear that the question of the majority is not one that can be answered with a precise number. Akehurst pointed out that if practice does not conflict with a rule, 'a very small number of states can create a rule of custom'.¹²⁶ He further stated that in general the kind of majority required depends on the rule in question.¹²⁷ Against the background of a widespread and representative practice, I submit that a supermajority of SAS can determine the element of state practice or *opinio juris* within the group of SAS. However, such an assessment also depends on the rule in question, and such a determination can be conducted only on a case-by-case basis.

(b) Widespread and representative support by non-SAS

In this section I set out my view that SAS alone cannot create custom and that the widespread and representative support of non-SAS is crucial in order to create custom.

¹²³ See chapter 3.III.1(d).

¹²⁴ ILC Report 2018 (n 50) at 136; see also BD Leppard *Reexamining Customary International Law* (2017) 114–115; M Wood *Second Report on Identification of Customary International Law* (2014) UN Doc A/CN.4/762 para 54.

¹²⁵ Thirlway *Sources of International Law* (n 93) 101.

¹²⁶ Akehurst (n 72) at 18.

¹²⁷ *Ibid.*

With regard to the SAS doctrine, some commentators have argued that SAS alone can create custom. Shaw seemed to suggest such a view.¹²⁸ Post also supported such a view, providing the example of a few states that are technically capable of producing certain weapons.¹²⁹ I disagree with the view that SAS alone might be capable of creating custom. Given the universality of custom and the principle of equality in international law, such a view as proposed by Shaw or Post does not seem to be in accordance with those principles.

The starting point of this examination is again the *North Sea Continental Shelf* cases, where the court examined whether a treaty provision, namely Article 6 of the Continental Shelf Convention, created custom, and assessed the participation of states in the convention.¹³⁰ According to the court and its use of the term 'included', the element of widespread and representative support includes the SAS doctrine. By implication, this means that there can be no element of widespread and representative support if that element did not take the practice of SAS into account. Taking the wording of the *North Sea Continental Shelf* cases into account, it seems that the requirement of widespread and representative in the context of state practice is directed or led by SAS. While the practice of non-SAS is still relevant, SAS may determine the direction. Any other more detailed analysis of custom formation must be conducted on a case-by-case basis. Therefore, one could describe the widespread and representative support by non-SAS as the engine of a vehicle that is steered by SAS. Without the engine, that vehicle will not reach its destination, which is the formation of customary international law in this case.

¹²⁸ See Shaw (n 4) 58–59; see also discussion in chapter 5.I.3.

¹²⁹ Dekker, Post & Meijers (n 80) 142. In the example of cyberwarfare, Schmitt and Vihul argue that a rule in that sphere could not emerge without a consideration of practice by the US: Schmitt & Vihul (n 56) at 24. See also discussion in chapter 5.I.3.

¹³⁰ See *North Sea Continental Shelf* cases (n 5) paras 72–73.

Therefore, SAS may function as the 'experts' or the 'critical mass' in the relevant field of law by leading the way for widespread and representative support.¹³¹

According to Heller, in order for custom to emerge under the SAS doctrine, there must be widespread and representative support by the states that do not qualify as specially affected, in addition to the SAS.¹³² Heller, therefore, considered widespread and representative support by non-SAS and SAS as two distinct groups. According to Heller, a certain number of non-SAS must engage in the practice, and participating states must reflect different political, economic and legal concepts from all the continents.¹³³

As pointed out before, the ICJ did not provide a definition of 'widespread and representative', and neither did the ILC in its latest report on this matter.¹³⁴ However, one cannot deny that the term 'widespread and representative' relates to the elements employed in international law to describe state practice, namely, generality, consistency and duration.¹³⁵ The ILC merely concluded in this context that 'the practice of "widespread and representative" does not lend itself to exact formulations, as circumstances may vary from one case to another.'¹³⁶

Another essential question for the examination of non-SAS is, however, the extent to which the silence or inactivity by states can be interpreted as confirming or conforming with a rule. As pointed out in the previous sections, inactivity by states may confirm a certain practice or *opinio juris* if certain

¹³¹ See Worster (n 81) at 58–71.

¹³² Heller 'Specially-affected states and the formation of custom' (n 68) at 228–230.

¹³³ Ibid at 228–230.

¹³⁴ See ILC Report 2018 (n 50) at 136; see chapter 3.III.1(d).

¹³⁵ The ILC uses the terminology of 'widespread and representative' to define a general practice under its draft conclusion 8: see ILC Report 2018 (n 50) at 135–136.

¹³⁶ ILC Report 2018 (n 50) at 136.

preconditions are met.¹³⁷ Such silence as confirmation can be translated to the element of widespread and representative support.

I submit that widespread and representative support by all non-SAS is a crucial factor for the SAS doctrine. Nevertheless, SAS in this context may serve as the 'critical mass' which determines and steers the direction of a certain practice or rule.¹³⁸ Any conclusion under this concept must, therefore, pay tribute to the rationale that the practice of those SAS is more crucial for the formation of customary international law.

III. Application of the SAS concept: Has the customary international law on the right of self-defence against NSAs changed?

This section will apply the doctrine of SAS to the exercise of the right of self-defence against NSAs in the post-9/11 era. This examination will include an analysis of the different situations in which states exercised the right to self-defence against NSAs while disregarding the element of attribution under the right of self-defence.¹³⁹ These situations have occurred over the past 19 years and in various geographical regions: from the drone warfare in Pakistan and Yemen, to the attacks by several states against ISIS over the past four years, and a very recent attack by India in Pakistan.

1. Post-9/11 situations: SAS and the international community

This section describes situations of the post-9/11 era in which states have deviated from the traditional interpretation of the right of self-defence.

¹³⁷ See the discussion on inactivity as practice or *opinio juris* in chapter 3.IV. See also P Starski 'Silence within the process of normative change and evolution of the prohibition on the use of force: Normative volatility and legislative responsibility' (2017) 4 *Journal on the Use of Force and International Law* 14 at 42, 43.

¹³⁸ See Worster (n 81) at 58–71.

¹³⁹ The analysis in this chapter does not include the US attacks on an Iran-backed militia in Syria as these events occurred after the completion of this thesis and the situation was still evolving at the time of completion.

Against the background of the SAS doctrine, I argue that the element of attribution of an NSA to a territorial state is no longer required.

As set out in the previous section, not every state may qualify as a SAS. This section will set out various situations that illustrate the practice by SAS and the reaction by the international community (which comprises non-SAS).

In this context, the first question is which states qualify as SAS, which depends on the rule in question. As noted in a previous section, I submit that states that engage in a practice and states that are affected by the rule can be considered to be SAS.¹⁴⁰ I further submitted that territorial states qualify as SAS.¹⁴¹ With regard to states that engage in a practice, I pointed out that states which applied the unwilling or unable test as part of their right of self-defence qualify as SAS.¹⁴² For the right of self-defence against NSAs, the following may be considered as SAS:

- a victim state that has been attacked by an NSA; when such an attacks reaches the scale and effects of an armed attack or when such an attack is imminent (anticipatory self-defence)
- a victim state that uses its right of self-defence against an NSA and applies the unwilling or unable test
- another state (territorial state) in whose territory such an NSA is based (an NSA that is recognised as a terrorist group)
- a territorial state that lacks full control over its territory
- a territorial state that is unwilling to remove the threat of an NSA in its territory.

¹⁴⁰ See chapter 5.II.1.

¹⁴¹ See chapter 5.II.1(c).

¹⁴² See chapter 5.II.1.

It should be noted that the list above is not exhaustive. The following descriptions illustrate the conduct of states that met at least one of the above-mentioned elements and therefore shaped the practice and *opinio juris* under the SAS doctrine. In addition, the reaction of non-SAS will be presented for each situation.

(a) Invasion of Afghanistan under the regime of self-defence (2001)

In the aftermath of the attacks of 11 September 2001, the US initiated its so-called 'war on terror'. On 12 September 2001, the Security Council explicitly recognised the right of self-defence in accordance with the Charter, by issuing Resolution 1368.¹⁴³ Resolution 1368 explicitly pointed out that 'those responsible for aiding, supporting and harbouring ... will be held responsible'.¹⁴⁴ On the same day, NATO invoked Article 5 of the 1949 Washington Treaty and qualified the terrorist attacks as an 'armed attack'.¹⁴⁵ On 20 September 2001, President Bush declared in a joint session to Congress that 'any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime'.¹⁴⁶ With Resolution 1373, the Security Council reaffirmed the 'inherent right of self-defense' as it was recognised by Resolution 1368 on 28 September 2001.¹⁴⁷ Neither resolution directly links the affirmation of the right of self-defence to the attacks of 9/11. However, given the context and temporal link, several commentators have

¹⁴³ United Nations Security Council Resolution 1368, 12 September 2001, S/Res/1368.

¹⁴⁴ Ibid.

¹⁴⁵ It should be noted that NATO did not attribute the attacks of 9/11 to Afghanistan but rather referred to an armed attack that was directed from abroad. This suggests that NATO did not consider the attribution of those acts via the effective control test to Afghanistan. See NATO Press Release, 12 September 2001, available at <https://www.nato.int/docu/pr/2001/p01-124e.htm> (last accessed 19 February 2018).

¹⁴⁶ President George W Bush, Joint Session to the Congress, 20 September 2001, available at <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> (last accessed 20 February 2018).

¹⁴⁷ United Nations Security Council Resolution 1373, 28 September 2001, UN Doc S/Res/1373.

argued that both resolutions paved the way for the invocation of the right of self-defence by the US.¹⁴⁸

In a letter to the Security Council dated 7 October 2001, the US notified the United Nations that, due to the attacks of 9/11, it was invoking its right of self-defence. This involved the use of force against al-Qaeda in Afghanistan.¹⁴⁹ The US's letter to the Security Council explicitly pointed out that the NSA, in this case, was supported by the Taliban regime of Afghanistan.¹⁵⁰ The result was that US and British forces conducted an aerial campaign on 7 October 2001.¹⁵¹ The invasion of Afghanistan by a US-led campaign was initiated afterwards.

In 2001, it was not publicly known whether the Taliban had supported al-Qaeda or Osama Bin-Laden or even controlled and directed any conduct leading to the attacks of 9/11.¹⁵² Furthermore, the Taliban had not been listed as a 'sponsor' of terrorism until 1999.¹⁵³ However, with respect to attribution, the US argued that the Afghan regime was harbouring al-Qaeda. Therefore, Afghanistan constituted a safe haven for a terrorist group.¹⁵⁴ At this point, it is essential to emphasise that the doctrine of safe haven describes a state that

¹⁴⁸ See SD Murphy 'Self-defense and the Israeli Wall advisory opinion: An ipse dixit from the ICJ?' (2005) 99 *American Journal of International Law* 62 at 67-70; TM Franck 'Terrorism and the right of self-defense' (2001) 95(4) *American Journal of International Law* 839 at 840, 841; E Rosand 'Security council resolution 1373, the counter-terrorism committee, and the fight against terrorism' (2003) 97(2) *American Journal of International Law* 333.

¹⁴⁹ John D Negroponte 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', 7 October 2001, UN Doc S/2001/946.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² JJ Paust 'Use of armed force against terrorists in Afghanistan, Iraq, and beyond' (2002) 35 *Cornell Int'l LJ* 533 at 542.

¹⁵³ Lori Damrosch 'Sanctions against perpetrators of terrorism' (1999) 22 *Hous J Int'l L* 63 at 67-68.

¹⁵⁴ D Jinks 'State responsibility for the acts of private armed groups' (2003) 4 *Chi J Int'l L* 83 at 85; see also S Cenic 'State responsibility and self-defence in international law post 9/11: Has the scope of Article 51 of the United Nations Charter been widened as a result of the US response to 9/11' (2007) 14 *Austl Int'l LJ* 201 at 206-208; ME O'Connell 'Lawful self-defense to terrorism' (2001) 63 *U Pitt L Rev* 889 at 889-901.

might have the power to remove the threat by an NSA but is, for whatever reasons, refusing to do so.¹⁵⁵ Therefore, one may argue that this doctrine embodies an element of unwillingness, which will be discussed further below.

The international community almost uniformly accepted this position. For instance, the European Union stated its 'wholehearted support for the action that is being taken in self-defence in conformity with the UN Charter'.¹⁵⁶ As pointed out by Byers in 2002, such overwhelming support by the international community could be regarded as acceptance of a new standard.¹⁵⁷

(b) Russia in Georgia

In August 2002, Russia repeatedly violated Georgian airspace in order to eliminate Chechen fighters and bomb sites in the Pankisi Gorge region (Chechnya).¹⁵⁸ Russia claimed that fighters from the Pankisi Gorge region were responsible for attacks on Russian territory. Following these events, the Russian representative to the United Nations submitted a letter from President Putin to the Security Council.¹⁵⁹ The Russian letter justified the attacks in the Pankisi Gorge based on Russia's right of self-defence. The letter explicitly pointed out that:

The continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse

¹⁵⁵ See Cenic (n 154) at 214–215.

¹⁵⁶ Ibid at 208.

¹⁵⁷ M Byers 'Terrorism, the use of force and international law after 11 September' (2002) 51 *International & Comparative Law Quarterly* 401.

¹⁵⁸ Stephen Dalziel 'Analysis: Georgia's stand-off with Russia' *BBC News*, available at <http://news.bbc.co.uk/2/hi/europe/2216025.stm> (last accessed 11 November 2019).

¹⁵⁹ Sergey Lavrov 'Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, 12 September 2002', 11 September 2002, UN Doc S/2002/1012 (hereinafter: 'Letter from Russia to the UN Security Council').

circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively.¹⁶⁰

In addition, Russia linked the inability of Georgia to remove the threat by an NSA to Russia's right of self-defence, when it stated that:

If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border, continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the Charter of the United Nations ...¹⁶¹

The letter to the Security Council, therefore, indicates that Russia applied the test of unwilling or unable in its assessment of its right of self-defence. Moreover, Georgia's failed attempts to remove the threat of an NSA support the view that Georgia was incapable of removing the threat after there had been attempts by Georgia to do so.¹⁶²

As the analysis by Reinold illustrated, there was no reaction or clear objection by the international community, apart from the US's general reaffirmation of Georgia's right to territorial integrity.¹⁶³ The same applies to the response by the scholarship.¹⁶⁴

¹⁶⁰ Ibid at 2.

¹⁶¹ Ibid at 3.

¹⁶² See T Reinold 'State weakness, irregular warfare, and the right to self-defense post-9/11' (2011) 105 *American Journal of International Law* 244 at 253-254.

¹⁶³ Ibid at 257.

¹⁶⁴ Ibid at 256.

(c) *Israel in Lebanon*

In 2006, after Hezbollah killed two Israeli soldiers, Israel conducted attacks on the territory of Lebanon, claiming its right of self-defence.¹⁶⁵ In its letter to the Security Council, Israel claimed its right of self-defence against the backdrop of attacks conducted by Hezbollah from the territory of Lebanon.¹⁶⁶ With regard to the element of attribution, Israel stated in the letter that:

Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.¹⁶⁷

The wording of the Israeli letter claims the exercise of a right of self-defence against NSAs without a clear link to a state as would be required under the effective or overall control test. Instead, Israel implied that states like Lebanon are unwilling to remove the threat posed by the NSA. The Lebanese government rejected any responsibility for the acts of Hezbollah that Israel referred to in its letter.¹⁶⁸

The reaction of the international community was mixed. The EU recognised Israel's right to defend itself in this case, but called for proportionate action on

¹⁶⁵ Anthony Shadid & Scott Wilson 'Hezbollah raid opens 2nd front for Israel' *Washington Post*, 13 July 2006, available at <https://www.washingtonpost.com/archive/politics/2006/07/13/hezbollah-raid-opens-2nd-front-for-israel-span-classbankheadlebanese-shiite-fighters-seize-2-soldiers/82dd7a1d-ee0e-4afa-a33f-7c039fd77918/> (last accessed 7 March 2021).

¹⁶⁶ Dan Gillerman 'Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council', 12 July 2006, UN Doc A/60/937-S/2006/515 (hereinafter: 'Letter from Israel to the UN Security Council') at 1.

¹⁶⁷ *Ibid.*

¹⁶⁸ Caroline Ziade 'Letter dated 13 July 2006 from the Charge d'Affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the President of the Security Council', 13 July 2006, UN Doc S/2006/517; see also UN Security Council, 5489th meeting, 14 July 2006, UN Doc S/PV.5489.

the part of Israel.¹⁶⁹ The EU further noted 'the need for the Lebanese state to restore its sovereignty over the whole of its national territory and to do its utmost to prevent such attacks.'¹⁷⁰

On 14 July 2006, Denmark, France, Greece, Peru, Slovakia, the UK and the US all recognised Israel's right of self-defence in the Security Council, while calling for proportionate action.¹⁷¹ Denmark, for instance, recognised Israel's right to self-defence and remarked that Lebanon was not in full control of its territory.¹⁷² The Security Council debate of 14 July 2006 shows that Lebanon was factually not in control of its whole territory.¹⁷³ Therefore, one might argue that there seemed to be an element of inability on the part of Lebanon, in addition to the issue of unwillingness.

The reaction of the international community shows that no state questioned Israel's right to defend itself and that all states merely called for proportionate counter-attacks.¹⁷⁴ On the basis that the Lebanese government had no link or control over the NSA in this case, the international community seemed to agree that Lebanon was not in full territorial control at the time. Against this backdrop, one might argue that the international community accepted the replacement of the requirement of attribution by the inability of the state to remove the threat.

¹⁶⁹ Council of the European Union, 2744th Council Meeting, Press Release No 11575/06, 17 July 2006, at 2, 11.

¹⁷⁰ Ibid at 11.

¹⁷¹ UN Security Council Debate, 5489th Meeting, 14 July 2006, UN Doc SC/8776, available at <https://www.un.org/press/en/2006/sc8776.doc.htm> (last accessed 11 January 2021).

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ See T Ruys, O Corten & A Hofer *The Use of Force in International Law: A Case-based Approach* (2018) 678.

(d) *Turkey in Iraq*

In 2008 Turkey launched attacks on PKK targets in the territory of Iraq.¹⁷⁵ With the support of aircraft and artillery, the Turkish offensive left 240 PKK fighters dead.¹⁷⁶ Turkey did not give a clear legal explanation at the time of the offensive, nor did it inform the Security Council about its conduct. However, it gave a brief explanation in its letter to the UN Human Rights Council, where it stated that the offensive was directed solely at the terrorist presence in northern Iraq. Turkey remained a 'staunch advocate of the territorial integrity and sovereignty of Iraq.'¹⁷⁷ Later in October 2008, President Gül asserted that the PKK in Iraq 'are terrorist nests located in certain northern Iraqi areas, which the Iraqi government is unable to control.'¹⁷⁸

While Iraq did condemn Turkey's actions, it did not bring the matter to the Security Council.¹⁷⁹ Following the operation and the Turkish withdrawal from the Iraqi territory, the Iraqi president stated: '[t]his withdrawal indicates the credibility of the Turkish government's statements that the military operation is limited and temporary.'¹⁸⁰ This statement does not illustrate a clear objection by the Iraqi government that the Turkish use of force was not lawful and did not fall under the right of self-defence. At the same time, Iraq did not consent to the use of force by Turkey. Again, the international community mostly remained silent. While the EU, China and Belgium called for a political

¹⁷⁵ Patrick Cockburn 'The new invasion of Iraq' *INDEPENDENT*, 23 February 2008, available at <https://www.independent.co.uk/news/world/middle-east/the-new-invasion-of-iraq-786142.html> (last accessed 11 November 2020).

¹⁷⁶ Reinold (n 162) at 269.

¹⁷⁷ Note Verbale dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva addressed to the Secretariat of the Human Rights Council, 26 March 2008, UN Doc A/HRC/G/15.

¹⁷⁸ 'Turkey extends Iraqi raid window' *BBC News*, 8 October 2008, available at <http://news.bbc.co.uk/2/hi/7659194.stm> (last accessed 12 November 2020).

¹⁷⁹ T Ruys 'Quo vadit jus as bellum: A legal analysis of Turkey's military operations against the PKK in Northern Iraq' (2008) 9 *Melb J Int'l L* 334 at 345.

¹⁸⁰ 'Turkey urges PKK to end struggle' *BBC News*, 1 March 2008, available at <http://news.bbc.co.uk/2/hi/europe/7272184.stm> (last accessed 12 November 2020).

solution,¹⁸¹ the US did not object.¹⁸² However, it called for a limitation to only PKK targets.¹⁸³

The analysis of this situation shows that Turkey replaced the requirement of attribution in the right of self-defence with inability based on a lack of territorial control by the Iraqi government. While the international community called for a political solution, no state objected on the basis that the justification of Turkey's right to self-defence was unlawful, not even the Iraqi government.¹⁸⁴

(e) Colombia in Ecuador

On 1 March 2009, the Colombian military killed a group of FARC members on the territory of Ecuador.¹⁸⁵ While the Colombian government claimed at first that the killings occurred in 'hot pursuit', it later justified its actions as an act of self-defence.¹⁸⁶ However, the Colombian authorities did not issue a letter to the UN Security Council under Article 51. It should be noted that the Colombian Ministry of Foreign Affairs had previously accused Ecuador of not removing the threat of the NSA.¹⁸⁷ On 6 March 2008, the Colombian Vice President at the time, Francisco Santos, stated that 'Colombia was justified in launching the raid because it had repeatedly asked Ecuador, as well as

¹⁸¹ Reinold (n 162) at 270.

¹⁸² 'Iraq warns Turkey over incursion' *BBC News*, 23 February 2008, available at <http://news.bbc.co.uk/2/hi/7260478.stm> (last accessed 11 November 2019).

¹⁸³ *Ibid.*

¹⁸⁴ An examination of the media and publicly available information did not reveal full text of the Iraqi objection. Media reports cited some statements on this issue.

¹⁸⁵ Ruys, Corten & Hofer (n 174) 702.

¹⁸⁶ See Reinold (n 1) at 273; Ministry of Foreign Affairs of Colombia 'Comunicado No. 081' (2 March 2008) available at <http://historico.presidencia.gov.co/comunicados/2008/marzo/81.html> (last accessed 2 January 2020).

¹⁸⁷ See Ruys (n 26) at 462.

Venezuela, in vain to take action against FARC camps on their territory.’¹⁸⁸ Subsequent evidence established the involvement of Ecuador with the FARC.¹⁸⁹ Ecuador condemned the actions taken by Colombia as a violation of its territorial integrity.¹⁹⁰

While the Organisation of American States (OAS) condemned the actions taken by Colombia as a violation of the sovereignty and territorial integrity of Ecuador, it also declared that each state has the right to protect itself but that such a right ‘does not authorise it to commit unjust acts against another State’.¹⁹¹ This constituted a departure from the previous approach by the OAS in the post-9/11 era, which was that ‘those that aid, abet or harbour terrorist organizations are responsible for the acts of those terrorists’.¹⁹² The spokesperson of the US State Department, Tom Casey, affirmed Colombia’s right to defend itself.¹⁹³ The UN Security Council and the UN General Assembly remained silent on the question of the legality of the right of self-defence by Colombia. The rest of the international community also remained largely silent.

¹⁸⁸ Reuters ‘Colombian official says no risk of war with neighbours’ 6 March 2008, available at <https://www.reuters.com/article/uk-venezuela-colombia-santos/colombian-official-says-no-risk-of-war-with-neighbours-idUKL0632108620080306?edition-redirect=uk> (last accessed 11 January 2020).

¹⁸⁹ See Stephan Kuffner ‘Ecuador officials linked to Colombia rebels’ *Time*, 15 December 2009, available at <https://content.time.com/time/world/article/0,8599,1948040,00.html> (last accessed 10 January 2021); see also Reinold (n 162) at 275.

¹⁹⁰ Rodrigo Riofrio ‘Letter dated 3 March 2008 from the Charge d’affaires a.i. of the Permanent Mission of Ecuador to the United Nations addressed to the President of the Security Council’, 3 March 2008, UN Doc S/2008/146.

¹⁹¹ Declaration of the Heads of State and Government of the Rio Group on the Recent Events Between Ecuador and Colombia, 7 March 2008, available at <https://www.oas.org/consejo/Docs/RC00089E01.DOC> (last accessed 10 January 2020).

¹⁹² Permanent Council of the Organization of American States, Convocation of the 23rd Meeting of Consultation of Ministers of Foreign Affairs, 19 September 2001, CP/RES.796 (1293/01).

¹⁹³ Tom Casey, US State Department, 4 March 2008, available at <https://www.c-span.org/video/?204289-1/state-department-daily-briefing> (last accessed 5 January 2020).

(f) *US drone warfare in Pakistan and Yemen*

The US commenced its drone strikes with an unmanned Predator drone in Yemen in 2002.¹⁹⁴ Those strikes targeted non-US citizens as well as US citizens.¹⁹⁵ Drone strikes at the time constituted a part of counter-terrorism measures by the US. From 2002 to 2016, the U.S. conducted 163 drone strikes in the territory of Yemen, targeting suspected terrorists.¹⁹⁶ From 2017 to 2019, the number of US drone strikes amounted to at least 166.¹⁹⁷ The significant increase in drone strikes was connected to the outbreak of a civil war in Yemen. In 2004, the US started conducting drone strikes in Pakistan. From 2014 to 2019, the US conducted at least 430 drone strikes that targeted suspected terrorists in Pakistan.¹⁹⁸

A White Paper by the US Department of Justice on the use of drones gives further details on the situations in which a drone strike might be conducted. With regard to the legal justification, the White Paper stated that:

[A] lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted ... after a determination that the host nation is unable or unwilling to suppress the threat¹⁹⁹

¹⁹⁴ Jane Mayer 'The predator war' *The New Yorker*, 26 October 2009, available at <https://www.newyorker.com/magazine/2009/10/26/the-predator-war> (last accessed 5 March 2021); Greg Miller 'CIA said to use outsiders to put bombs on drones' *LA Times*, 13 February 2009, available at <https://www.latimes.com/archives/la-xpm-2009-feb-13-fg-uspakistan13-story.html> (last accessed 18 December 2020).

¹⁹⁵ Ibid.

¹⁹⁶ The Bureau of Investigative Journalism 'Drone strikes in Yemen' available at https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=yemen&from=2002-1-1&to=2017-1-1 (last accessed 2 February 2019).

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ US Department of Justice *White Paper on the Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Qa'ida or an Associated Force* (hereinafter: *White Paper*) available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf> (last accessed 12 January 2020) at 2.

Again, the US justification shows the detachment of the right to self-defence from the traditional attribution test, which requires effective or overall control by the state. Furthermore, it shows that the US had already applied the unwilling or unable test in the context of drone warfare, years before targeting ISIS in Syria.

In the case of Yemen, after 2012, Special Rapporteur Emmerson stated in its report that:

The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels, and that where consent is withheld, a strike will not go ahead.²⁰⁰

In February 2012, Abd-Rabbu Mansour Hadi took office as the President of Yemen.²⁰¹ The Special Rapporteur's report referred to a report by Human Rights Watch (HRW), which stated that there was an unwritten agreement between the US and Yemen that would permit such strikes.²⁰² The HRW, however, also states that a Yemeni government official and a senior government official under the previous president 'were unaware' of such an agreement.²⁰³ If such an undertaking exists, it is unclear when such consent

²⁰⁰ B Emmerson *Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (11 March 2014) UN Doc (2014) A/HRC/25/59 (hereinafter: 'Emmerson Report 2014') para 29.

²⁰¹ Laura Kasinof 'Yemen gets new leader as struggle ends calmly' *The New York Times*, 24 February 2012, available at <https://www.nytimes.com/2012/02/25/world/middleeast/yemen-to-get-a-new-president-abed-rabu-mansour-hadi.html> (last accessed 18 January 2021).

²⁰² Emmerson Report 2014 (n 200) para 29, referring to Human Rights Watch 'A wedding that became a funeral' 19 February 2014, available at <https://www.hrw.org/report/2014/02/19/wedding-became-funeral/us-drone-attack-marriage-procession-yemen> (last accessed 18 January 2021).

²⁰³ Human Rights Watch 'A wedding that became a funeral' *ibid*.

was sought by the US authorities. Ultimately, it appears that force was used for many years without the host state's consent.

In the case of Pakistan, there appears to have been no consent to the conduct of targeted killings.²⁰⁴ While there have been reports that Pakistani officials might have received classified briefings on drone strikes from 2007 until 2011, the spokesperson for Pakistan's Foreign Ministry stated that the Prime Minister at the time, Nawaz Sharif, was adamant that 'the drone strikes must stop.'²⁰⁵ Moreover, Sharif stated in a speech at the US Institute of Peace that '[t]his issue has become a major irritant in our bilateral relationship as well. I will, therefore, stress the need for an end to drone attacks.'²⁰⁶ In this context, the US ambassador in Pakistan was summoned to the Foreign Ministry on the instruction of the Prime Minister in June 2013.²⁰⁷ At that meeting, the government of Pakistan condemned the US's violation of its territorial sovereignty. Based on these facts, one cannot argue that there was official consent by Pakistan. In addition, neither can one argue that there was a clear objection from Pakistan.

So far, the international community has not raised any objections to the drone strikes. Several states, such as Germany and Italy, still support the US strategy by allowing their territory to be used for US bases. On 18 December 2013, the General Assembly merely adopted Resolution 68/178 without a vote, which urged the international community to ensure that drone strikes comply with

²⁰⁴ Greg Miller & Bob Woodward 'Secret memos reveal explicit nature of US-Pakistan agreement on drones' *The Washington Post*, 24 October 2013, available at http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html (last accessed 16 April 2020).

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ See M Lewis 'Pakistan's official withdrawal of consent for drone strikes' 10 June 2013, available at <http://opiniojuris.org/2013/06/10/guest-post-pakistans-official-withdrawal-of-consent-for-drone-strikes/> (last accessed 24 February 2019).

international law.²⁰⁸ Since the resolution was adopted without a vote, it is difficult to determine each state's position on the issue of US drone strikes in Pakistan and Yemen. It is further unclear whether the resolution addresses the drone strikes in Yemen and Pakistan as the wording remains vague and general.²⁰⁹ Therefore, one might argue that Resolution 68/178 does not indicate a clear objection to the US drone strikes. For instance, Kronstadt showed that, in Pakistan, it was a combination of both unwilling and unable, since Pakistan lacked the resources to remove the threat and the political will to do so.²¹⁰ As Reinold shows, such a factual assessment can be linked to the US's use of the right of self-defence.²¹¹

With regard to the element of widespread and representative support by the international community, the analysis above illustrates that there has not been a significant objection to drone strikes.

(g) The fight against ISIS: Syria

In addition to the discussion of the fight against ISIS in Syria in the previous chapter, this section will provide a more detailed factual analysis.²¹² The practice in question by all states except Syria can be summarised as targeting an NSA without requiring any traditional attribution to the territorial state. In the fight against ISIS in 2014, the US conducted attacks on Syrian territory

²⁰⁸ T Ruys, R Buchan, P Butchard, K Chan, D Joyner, B Murphy, R van Steenberghe & S Verhoeven 'Digest of State Practice 1 July–31 December 2013' (2014) 1 *Journal of the Use of Force and International Law* 149 at 188; UN General Assembly resolution 68/178 (2013).

²⁰⁹ UN General Assembly resolution 68/178 (2013), para 6(s).

²¹⁰ KA Kronstadt *Pakistan-US Relations* (2009) Library of Congress Washington DC Congressional Research Service, at 6–8, 12; see also AS Deeks "'Unwilling or unable': Towards a normative framework for extraterritorial self-defense' (2012) 52 *Virginia Journal of International Law* 483 at 485.

²¹¹ Reinold (n 162) at 276–284.

²¹² For a previous discussion, see chapter 4.II.2.

under the unwilling or unable test.²¹³ In this case, the US led a coalition of states, which included Saudi Arabia, the United Arab Emirates, Jordan, Bahrain and Qatar.²¹⁴ Later, other states joined the coalition, and the number of states increased.²¹⁵ The former Prime Minister of the UK invoked the unwilling or unable test on two occasions in 2015.²¹⁶ In December 2015, the UK conducted military attacks on ISIS targets in Syria.²¹⁷ In total, until 2016, 13 states have explicitly or implicitly endorsed the unwilling or unable test in Syria. One might argue that all major contributors to the fight against ISIS in Syria carried out a consistent practice. All these states explicitly or implicitly accepted that either Syria was unable to remove the threat or ISIS had territorial control over a limited area.²¹⁸ Either justification addresses the same

²¹³ See Samantha Power 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' 23 September 2014, UN Doc S/2014/695 (hereinafter: 'Letter from the US to the Security Council'); US White House 'Statement by the President on Airstrikes in Syria' 23 September 2014, available at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria> (last accessed 6 December 2020).

²¹⁴ US White House 'Statement by the President on Airstrikes in Syria' 23 September 2014, available at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria> (last accessed 6 December 2020).

²¹⁵ See O Corten 'The "unwilling or unable" test: Has it been, and could it be, accepted?' (2016) 29 *Leiden Journal of International Law* 777 at 780.

²¹⁶ See UK, HC, *Parliamentary Debates*, vol 602, col 1489, 1491, Prime Minister's Statement, 26 November 2015, available at <https://www.gov.uk/government/speeches/pm-statement-responding-to-fac-report-on-military-operations-in-syria> (last accessed 5 December 2020); UK, Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-2016: The Extension of Offensive British Military Operations in Syria', November 2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480073/PM_Response_to_FAC.pdf (last accessed 5 December 2020).

²¹⁷ See Matthew Rycroft 'Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council', 3 December 2015, UN Doc S/2015/928 (hereinafter: 'Letter from the UK to the UN Security Council').

²¹⁸ See Heiko Thoms 'Letter dated 10 December 2015 from the Charge d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council', 10 December 2015, UN Doc S/2015/946 (hereinafter: Letter from Germany to the UN Security Council); Benedicte Frankinet 'Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council', 7 June 2016, UN Doc S/2016/523 (Letter from Belgium to the UN Security Council); Letter from the US to the UN Security Council (n 213); Letter from the UK to the UN Security Council (n 217); Ib Petersen 'Letter dated 11 January 2016 from the Permanent

issue: an inability by the territorial state to remove the threat. In addition, states like the US, Australia, the UK, the Netherlands and Turkey took the view that Syria was unwilling to remove the threat posed by the NSA.²¹⁹ A remark by the UN Secretary General at the time, Ban Ki Moon, further confirmed this assessment when he noted with regard to strikes against ISIS in Syria that ‘the strikes took place in areas no longer under the effective control of that Government.’²²⁰ In addition, member states of the Gulf Cooperation Council (Egypt, Iraq, Jordan, Lebanon and the US) declared that they would stand together in the fight against ISIS, which included ISIS in Syria.²²¹

With regard to the reaction by the international community, Scharf concluded that there was no convincing rejection that questioned the legality of the right

Representative of Denmark to the United Nations addressed to the President of the Security Council, 13 January 2016, UN Doc S/2016/34; see also the list of states provided by Chachko and Deeks: E Chachko & A Deeks ‘Who is on board with “unwilling and unable”?’ (10 October 2016) available at <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> (last accessed 1 February 2021).

²¹⁹ Letter from Germany to the UN Security Council *ibid*; Letter from Belgium to UN Security Council *ibid*; Letter from the US to the UN Security Council *ibid*; Letter from the UK to the UN Security Council’ *ibid*; G Bird ‘Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council’, 9 September 2015, UN Doc S/2015/693 (hereinafter: ‘Letter from Australia to the UN Security Council’); David Cameron’s full statement calling for UK involvement in Syria air strikes *The Telegraph*, 26 November 2015, available at <http://www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Camersons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html> (last accessed 18 December 2020); Dutch government’s answer to question 75 presented by Dutch Parliament’s Permanent Committee of Foreign Affairs, available at <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test#TheNetherlands>; Levent Eler ‘Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council’, 24 July 2015, UN Doc S/2015/563 (hereinafter: ‘Letter from Turkey to the UN Security Council’).

²²⁰ UN Secretary General Ban Ki Moon ‘Remarks at the Climate Summit press conference (including comments on Syria)’ 23 September 2014, available at <https://www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria> (last accessed 18 November 2020).

²²¹ US Department of State, Jeddah Communiqué, 11 September 2014, available at <https://2009-2017.state.gov/r/pa/prs/ps/2014/09/231496.htm> (last accessed 10 December 2020).

of self-defence in this case.²²² Starski reached the same conclusion and stated that most of the 193 internationally recognised states remained silent on the issue of pre-emptive self-defence or the unwilling or unable test.²²³ In the context of the unwilling or unable test and fighting ISIS in Syria, Starski concluded:

If we nevertheless assume that these actions and contestations indicate nascent normative dynamics with regard to Art. 51, the process of norm evolution could have been potentially accelerated by the US initiative against ISIL starting in September 2014, which tied itself to the 9/11 legality-narrative.²²⁴

What remains is a lack of objection to the consistent practice that attribution as traditionally understood did not have to be established in cases where a state that was unable to remove the global threat posed by an NSA. Not even Syria objected to this point on the right of self-defence. Instead, the Syrian letter to the Security Council points out the following with regard to Article 51:

Among the conditions required by Article 51 are that there should be an ongoing and effective act of aggression on the part of an armed force against a Member State, that the response should be temporary, and that it should respect the authority and responsibility of the Security Council. The military

²²² MP Scharf 'How the war against ISIS changed international law' (2016) 48 *Case W Res J Int'l L* 15 at 66.

²²³ P Starski 'Silence within the process of normative change and evolution of the prohibition on the use of force: Normative volatility and legislative responsibility' (2017) 4 *Journal on the Use of Force and International Law* 14 at 42.

²²⁴ *Ibid* at 42, 43.

actions taken by Britain and other States in Syria do not meet those conditions.²²⁵

(h) Indian attacks on Pakistan's territory

On 14 February 2019, more than 40 members of the Indian paramilitary force were killed in a suicide attack by an NSA that was based in Pakistan.²²⁶ This was the first suicide attack in the region in 20 years.²²⁷ In response, the Indian authorities attacked that NSA in Pakistan on 26 February 2019.²²⁸ In a statement on the same day, the Foreign Secretary of India stated:

The existence of such massive training facilities capable of training hundreds of jihadis could not have functioned without the knowledge of Pakistan authorities.

India has been repeatedly urging Pakistan to take action against the [Jaesh-e-Mohamed] JeM to prevent jihadis from being trained and armed inside Pakistan. Pakistan has taken no concrete actions to dismantle the infrastructure of terrorism on its soil.

Credible intelligence was received the JeM was attempting another suicide terror attack in various parts of the country, and the fidayeen were being trained for this purpose. In the face of imminent danger, a preemptive strike became absolutely necessary.

...

²²⁵ Bashar Ja'afari 'Identical letters dated 29 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council', 29 December 2015, UN Doc A/70/673-S/2015/1048 (hereinafter: 'Letter from Syria to the UN Security Council') para 4.

²²⁶ Michael Safi 'Dozen of Indian paramilitaries killed in Kashmir car bombing' *The Guardian*, 15 February 2019, available at <https://www.theguardian.com/world/2019/feb/14/indian-paramilitaries-killed-in-suicide-car-bombing-in-kashmir> (last accessed 8 March 2019).

²²⁷ Ibid.

²²⁸ Asad Hashi 'India foreign secretary says jets hit Jaish-e-Mohammed camp in Pakistan, but Islamabad denies casualties in air raids' *Al-Jazeera News*, 26 February 2019, available at <https://www.aljazeera.com/news/2019/02/pakistan-military-accuses-india-violating-air-space-190226040437318.html> (last accessed 8 March 2019).

The Government of Pakistan had made a solemn commitment in January 2004 not to allow its soil or territory under its control to be used for terrorism against India. We expect that Pakistan lives up to its public commitment and takes follow up actions to dismantle all JeM and other camps and hold the terrorists accountable for the actions.²²⁹

The Indian justification for the strikes on the territory of Pakistan is derived from an assessment that Pakistan was either unable or unwilling to remove the threat of a terrorist group. This assessment was the justification that the Indian authorities used to take measures of self-defence. Pakistan called the Indian conduct an 'act of aggression'.²³⁰

The international community remained quiet about the legality of the right of self-defence in this case. The Australian Foreign Minister stated that:

Pakistan must take urgent and meaningful action against terrorist groups in its territory It [Pakistan] can no longer allow extremist groups the legal and physical space to operate from its territory.²³¹

France further affirmed India's right of self-defence and stated:

²²⁹ Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp at Balakot, Indian Ministry of External Affairs, 26 February 2019, available at https://mea.gov.in/press-releases.htm?dtl/31091/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot (last accessed 8 March 2019).

²³⁰ Elizabeth Roche 'Pakistan foreign minister Qureshi calls IAF strike "act of aggression"' *Mint*, 26 February 2019, available at <https://www.livemint.com/politics/news/pakistan-foreign-minister-qureshi-calls-iaf-strike-act-of-aggression-1551166736497.html> (last accessed 2 February 2021).

²³¹ Outlook Web Bureau 'Australia asks India, Pak to "exercise restraint", engage in dialogue' available at <https://www.outlookindia.com/website/story/world-news-australia-asks-india-pak-to-exercise-restraint-engage-in-dialogue/326180> (last accessed 16 January 2020).

France recognizes India's legitimacy in ensuring its security against cross-border terrorism and calls on Pakistan to put an end to the activities of the terrorist groups established in its territory.²³²

Other states like Canada,²³³ China,²³⁴ Indonesia,²³⁵ Sri Lanka,²³⁶ the UAE,²³⁷ the US,²³⁸ Iran²³⁹ and Turkey²⁴⁰ called on both states to exercise restraint in their actions without any remarks on the legality of a right of self-defence.

2. State practice: The emergence of a new rule

The proponents of the view that customary international law regarding the right of self-defence against NSAs has not changed argue that there is no practice that is consistent and widespread enough in order to meet the

²³² French Foreign Ministry, Press release dated 26 February 2019, available at <https://www.diplomatie.gouv.fr/en/country-files/india/news/article/india-fight-against-terrorism-26-02-2019> (last accessed 4 April 2020); see also Julien Bouissou 'Escalade depuis une « frappe » contre un camp terroriste au Pakistan' *Le Monde*, 26 February 2019, available at https://www.lemonde.fr/international/article/2019/02/26/le-pakistan-accuse-l-inde-d-incursion-aerienne-au-cachemire_5428279_3210.html (last accessed 5 May 2020).

²³³ Canadian Office of the Minister of Foreign Affairs 'Canada calls for de-escalation between India and Pakistan' 27 February 2019, available at <https://www.canada.ca/en/global-affairs/news/2019/02/canada-calls-for-de-escalation-between-india-and-pakistan.html> (last accessed 15 January 2020).

²³⁴ India Today 'China goes soft on Pakistan, says it has always opposed terrorism' 27 February 2019, available at <https://www.indiatoday.in/world/story/china-soft-on-pakistan-always-opposed-terrorism-1466070-2019-02-27> (last accessed 16 January 2020).

²³⁵ Riyaz ul Khaliq 'Indonesia calls on India, Pakistan to reduce tensions' 28 February 2019, available at <https://www.aa.com.tr/en/asia-pacific/indonesia-calls-on-india-pakistan-to-reduce-tensions/1405064> (last accessed 16 January 2020).

²³⁶ Daily Mirror 'Ensure stability of entire region: SL tells India, Pakistan' 27 February 2019, available at https://www.dailymirror.lk/breaking_news/Ensure-stability-of-entire-region:-SL-tells-India--Pakistan/108-163001 (last accessed 16 January 2020).

²³⁷ NDTV 'Abu Dhabi Crown Prince calls PM Modi, Imran Khan amid rising tensions' 28 February 2019, available at <https://www.ndtv.com/india-news/abu-dhabi-crown-prince-calls-pm-modi-imran-khan-amid-rising-tensions-2000876> (last accessed 16 January 2020).

²³⁸ US Department of State, Press Statement 'Concern regarding India-Pakistan tensions' 26 February 2019, available at <https://www.state.gov/concern-regarding-india-pakistan-tensions/> (last accessed 16 January 2020).

²³⁹ SAMAA 'Iran offers mediation between Pakistan and India' available at <https://www.samaa.tv/global/2019/02/iran-offers-mediation-between-pakistan-and-india-amid-rising-tensions/> (last accessed 16 January 2020).

²⁴⁰ Tribune 'Turkey offers mediation between Pakistan, India as tensions escalate' 27 February 2019, available at <https://tribune.com.pk/story/1919584/9-turkey-offers-mediation-pakistan-india-tensions-escalate> (last accessed 7 March 2021).

requirement of state practice.²⁴¹ While much of the scholarship is based on the traditional positivist approach to state practice and *opinio juris*, this chapter examines those elements by applying the SAS doctrine. This doctrine provides a different approach to what might be considered as consistent, widespread and representative state practice and *opinio juris*.

The situations presented in this chapter illustrate the extent to which state practice in the field of self-defence against NSAs has changed. A general question that arises from the examined situations is whether the traditional element of attribution, including the effective control test or overall control test, has any relevance when it comes to exercising the right of self-defence against NSAs without the involvement of the host government.²⁴²

(a) *An analysis of state practice by SAS*

As set out at the beginning of this section, all states engaged in the situations above qualify as SAS.²⁴³ As discussed, the element of state practice might also include unlawful practice by states.²⁴⁴ This means that even if a specific

²⁴¹ See Kevin Jon Heller 'Ashley Deeks' problematic defence of the "unwilling or unable" test', 15 December 2011, available at <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> (last accessed 7 December 2020); Corten 'The "unwilling or unable" test' (n 215) at 789; J Brunnée & SJ Toope 'Self-defence against non-state actors: Are powerful states willing but unable to change international law?' 2017 *International and Comparative Law Quarterly* 1 at 15; D Ahmed 'Defending weak states against the unwilling or unable doctrine of self-defence' (2013) 9 *J. Int'l L & Int'l Rel.* 1 at 10, 11.

²⁴² As Kooijmans points out in his separate opinion in the *Armed Activities* case, while the ICJ concluded in its judgment that a right to self-defence against NSAs exist if those acts are attributable to the host state, it did not answer the question whether such a right exists without the involvement of the host state: see *Armed Activities on the Territory of Congo (DRC v Uganda)*, ICJ, Judgment, 19 December 2005 (hereinafter: *Armed Activities* case), separate opinion of Judge Kooijmans, para 26.

²⁴³ See chapter 5.III.1. For the right of self-defence against NSAs, the following may be considered as SAS: (i) a victim state that has been attacked by an NSA, when such an attack reaches the scale and effects of an armed attack or when such an attack is imminent (anticipatory self-defence); (ii) a victim state that uses its right of self-defence against an NSA and applies the unwilling or unable test; (iii) another state (territorial state) in whose territory such an NSA is based (an NSA that is recognised as a terrorist group); (iv) a territorial state that lacks full control over its territory; and (v) a territorial state that is unwilling to remove the threat of an NSA in its territory.

²⁴⁴ See chapter 3.III.1(a).

practice might be unlawful at the time, it does not mean that it has no relevance for the formation of custom at a later stage. In addition, the SAS doctrine does not require complete uniformity of practice. In this respect, a majority or supermajority might already be enough to determine the practice within the SAS group.²⁴⁵ With regard to the widespread and representative support by the international community, the examination above further showed that silence and inactivity by states could be interpreted as acquiescence or acceptance of a new rule or practice.²⁴⁶ The examination further revealed that the mere inactivity of a state could not constitute an objection to a rule.

The following table shows states that used force in self-defence against NSAs, with reference to the reliance on the unwilling or unable test, the reaction of the territorial state, and the international community's reaction to each situation discussed in the previous section.

Overview of SAS with regard to the use of self-defence under the concept of 'unwilling or unable'					
Situation	Specially affected state (SAS)	Territorial state unwilling to remove the threat	Territorial state unable to remove the threat	Objection to the right of self-defence and 'unwilling or unable' justification by the territorial state (SAS)	Reaction by international community (non-SAS)
US invasion of Afghanistan	United States	X		(Afghanistan) No ²⁴⁷	Widespread support
Russian attacks	Russia	X	X	(Georgia) No	No reaction or objection

²⁴⁵ See chapter 5.II.2.

²⁴⁶ See chapter 3.IV and chapter 5.II.2.

²⁴⁷ The recognised government of Afghanistan did not object to the right of self-defence by the US. In addition, the Taliban regime did not formally object to the right of self-defence by the US.

against Chechen fighters					
Israel against Hezbollah in Lebanon	Israel	X	X	(Lebanon) No	No state questioning of the right of self-defence by Israel; call for proportionate action under the right of self-defence
Turkey against PKK (Iraq)	Turkey		X	(Iraq) No	No reaction or objection
Colombia against FARC (Ecuador)	Colombia	x		(Ecuador) Yes	Objection by OAS; Rest of international community: no reaction
US drone warfare	US	X	X	(Yemen: No) (Pakistan: No)	No objection
Fight against ISIS in Syria	US UK Germany France Belgium Australia Turkey Netherlands Denmark Canada	X	X	(Syria) Yes	No objection
India fighting JeM	India	X	X	(Pakistan) Yes ²⁴⁸	No objection

The table above illustrates that, on 17 occasions, the states that used force against an NSA applied the test of unwillingness or the test of inability. The table further shows that only three territorial state have objected to the use of force on its territory. The eight situations result in 26 states that qualify as SAS. While 17 SAS endorsed the test of unwilling or unable, six territorial states have not explicitly objected to such use of force under the unwilling or unable test. The result is that 65 per cent of SAS support the unwilling or unable test. Interpreting the inactivity of the six territorial states as acquiescence to the

²⁴⁸ Pakistan described the Indian conduct an 'act of aggression': Roche (n 230).

interpretation by the other 17 SAS, the percentage of SAS supporting the rule amounts to 85 per cent.²⁴⁹

The state practice of the SAS shows clear support for the application of the unwilling or unable test while acting in self-defence against NSAs. The situations of the US in Afghanistan, Israel conducting attacks against Hezbollah in Lebanon, India attacking JeM in Pakistan, US drone warfare in Pakistan and Yemen, and the fight against ISIS in Syria support the notion that states have a right of self-defence if the territorial state in which the NSA is located is unwilling to address the conduct of the NSA. In these situations, the attacking state claimed that the territorial states were unwilling to remove the threat posed by the NSA. Therefore, the traditional attribution test has been replaced by the test of unwillingness in those situations. As examined above, the international community did not object to the use of the unwilling or unable test. It also did not object to the lawfulness of the right of self-defence at the time.

For instance, in the case of Afghanistan, there was widespread support from the international community. In the case of Lebanon, the international community questioned the proportionality of the conduct by Israel under the right of self-defence. However, no state or supranational body questioned Israel's right of self-defence *per se*. Therefore, if the attribution test were a requirement of the right of self-defence, the post-9/11 era illustrates that no state has objected to the exercise of self-defence by SAS. The same can be said about the other situations where the concept of unwillingness was applied. Therefore, state practice by SAS supports the concept of unwillingness as a substitute for the traditional attribution test that requires effective control. In

²⁴⁹ The requirements for such an interpretation are set out in chapter 3.IV and chapter 5.II.2.

addition, the silence of the international community can be interpreted as widespread and representative support.²⁵⁰

With regard to the concept of inability (states that are unable) as a substitute for the traditional attribution test, the state practice examined above is consistent. Six out of eight situations represent a consistent practice, which is that the test whether a state is unable to remove the threat posed by an NSA replaced the traditional attribution test.²⁵¹ Each situation where a state invoked the right of self-defence by referring to the territorial state's inability resulted from a lack of control by the territorial state.²⁵² In none of the situations was the territorial state in a position to remove the threat posed by the NSA. While none of the territorial states in the examined situations officially consented to the use of force, it is only in the situation of ISIS in Syria, Ecuador, and Pakistan that one could argue that there was an objection by the territorial state. In the case of Syria, it should be noted that Syria did not object to the unwilling or unable test or the attribution test, but instead focused on the requirement of an armed attack.²⁵³ Pakistan's response to the use of the unwilling or unable test appears to be inconsistent. While it did not explicitly object to the unwilling or unable test during the US drone warfare, it did call the Indian behaviour in February 2019 an 'act of aggression'.²⁵⁴ As pointed out earlier, a territorial state's contribution to the element of state practice can be limited from an evidentiary standpoint.²⁵⁵ Pakistan's verbal act of state

²⁵⁰ See chapter 3.IV and chapter 5.II.2.

²⁵¹ See the table above: Russian attacks Chechens in Georgia, Turkey attacks PKK in Iraq, US drone warfare in Pakistan and Yemen, fight against ISIS in Syria, India fighting JeM in Pakistan – what all these situations have in common is that there was a lack of territorial control on the part of the territorial state. The traditional attribution test refers to the effective control test which was developed by the ICJ: see *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ, Judgment, 27 June 1986 (hereinafter: *Nicaragua* case) para 115.

²⁵² See the examined situation in Lebanon, Iraq, Georgia, Pakistan, Yemen and Syria.

²⁵³ Letter from Syria to the UN Security Council (n 225) para 4.

²⁵⁴ See Roche (n 230); Miller & Woodward (n 204); see also analysis in chapter 5.III.1.(f) and (h).

²⁵⁵ See chapter 5.II.1(b) and (c).

practice might, therefore, not constitute a clear objection or endorsement of the unwilling or unable test. In summary, one could argue that more than a supermajority of the SAS agree with the concept of inability resulting from a lack of territorial control and amounting to a right of self-defence against an NSA.²⁵⁶

(b) Reaction by non-SAS

The examination of the reaction by the international community shows that there was no objection to such justifications, apart from the reaction of the OAS to Colombia's actions in Ecuador. Even in this case, most of the international community remained silent.²⁵⁷ As set out earlier, for inactivity to be considered as confirmation or acceptance, certain criteria must be met.²⁵⁸ First, the interests of the inactive state have to be affected. With regard to the only exception to the prohibition on the use of force, one might expect that all states should at least have a legal interest that might be affected. Second, a state must be aware of the legal obligation and that its inaction might be interpreted as consent.²⁵⁹ As Danilenko pointed out, this element of awareness does not require positive knowledge by the inactive state.²⁶⁰ Given the importance and gravity of the conduct in question, such as the drone warfare in Pakistan and Yemen, the fight against ISIS, or the invasion of Afghanistan, one might expect non-SAS to have followed the legal reasoning of the SAS. Still, in none of the examined situations has there been a significant objection from the

²⁵⁶ With regard to the situation on the concept of inability this results in 85 per cent of SAS that confirmed or acquiesced to this concept.

²⁵⁷ For a discussion about why the statement by NAM states does not constitute an objection to the unwilling or unable test, see chapter 4.II.2.

²⁵⁸ See chapter 3.IV.

²⁵⁹ Ibid.

²⁶⁰ GM Danilenko 'The theory of international customary law' (1988) 31 *German YB Int'l L* 9 at 40, referring to the *Fisheries case (United Kingdom v Norway)* ICJ, Judgment, 18 December 1951 (hereinafter: *Fisheries case*) at 138, 139; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, ICJ, Judgment, 20 January 1984 (hereinafter: *Gulf of Maine case*) at 304.

international community. In addition, it appears that no state has consistently objected to the use of the unwilling or unable test throughout the years.

(c) Conclusion

Under the SAS doctrine, one can argue that the state practice of the SAS supports the replacement of the traditional attribution test with the requirement that the territorial state of the NSA is unable or unwilling to remove the threat posed by that NSA. While three territorial states objected, two of those state's conduct cannot be interpreted as an explicit objection to the unwilling or unable test.²⁶¹ As the examination above proves, this practice has not been rejected by the international community. Based on the theoretical interpretation of widespread and representative support by the international community in this chapter, one can therefore argue that the practice in question met this standard. The assessment of a state that is unwilling to remove the posed threat by an NSA is also supported by the practice of SAS. In seven out of the eight examined situations, the territorial state was assessed as unwilling.

The state practice of self-defence against NSAs in the post-9/11 era is therefore clear. The attribution test of the NSA to the territorial state has not been applied by any SAS in any of the eight situations. There has instead been a shift to the extent that states apply the test of unwillingness or inability of the territorial state when they assess the right of self-defence against an NSA. All the situations above show that the force used was directed at the NSA and not at the territorial state. The fact that there has been no real objection to such an interpretation and to the application of the unwilling or unable test further supports the argument that there is widespread and representative support

²⁶¹ See discussion of objections by Syria and Pakistan in chapter 5.III.3(a); Letter from Syria to the UN Security Council (n 225).

for this practice. The next section will further highlight what the *opinio juris* is with regard to the right of self-defence against NSAs.

3. *Opinio juris*: The confirmation of a new rule

With regard to the legal obligation, the SAS doctrine delivers further insights that are crucial for identifying a new customary international rule. As illustrated in a previous section, some states concluded in their commentaries on the ILC Draft Conclusions on the formation of custom that the SAS doctrine should not be limited to the element of state practice.²⁶² As stated in chapter 3, I agree with Koskenniemi that there is no clear distinction between state practice and *opinio juris*.²⁶³ Therefore, the fact that specific behaviour or conduct by a state constitutes evidence of state practice does not automatically exclude that evidence from being relevant for the determination of *opinio juris*. However, I discuss the constitutive elements of custom in separate sections since the predominant view in the scholarship is that the elements must be separated.

From the legal justifications that were provided by the SAS over the past 19 years, it appears that two main tests have been applied in respect of exercising the right of self-defence against NSAs. Those two tests are the test of unwillingness to remove the threat of an NSA, and the test of inability to remove the threat of an NSA. The US, the UK, Israel, Russia, Turkey, Belgium, India, Australia, the Netherlands and Canada all interpreted the right of self-defence as including the unwilling or unable test.²⁶⁴ The letters to the Security

²⁶² China and Israel argued in favour of an application regarding the element of *opinio juris*: see International Law Commission, Identification of customary international law: comments and observations received from Governments, 14 February 2018, UN Doc A/CN.4/716 at 31, 32.

²⁶³ See chapter 3.III.3 and chapter 3.V.

²⁶⁴ See Letter from Germany to the UN Security Council (n 218); Letter from Belgium to the UN Security Council (n 218); Letter from the US to the UN Security Council (n 213); Letter

Council as well as public speeches given by the representatives with regard to the right of self-defence show the legal obligation that those states felt at the time and are evidence of *opinio juris*. For instance, the letters sent to the Security Council by the states that engaged in the fight against ISIS indicate that the unwilling or unable test formed part of the criteria that have to be met in order to use force in self-defence against NSAs.

At this point, it is crucial to distinguish between an unwilling state and a state that is unable to remove the threat of an NSA. As Reinold concluded, based on a confidential interview with a US legal staff member in the White House:

[T]he distinction between unwillingness and inability determines whether force may be used against the state itself or only against the terrorist actor operating on its soil.²⁶⁵

This statement bases the right to use force on the *target* of the self-defence. It further appears that it treats unwillingness and inability as two different regimes for the use of force. I disagree with such a view since it overlooks the fact that victim states limit their use of force to force against the NSA, even if the territorial state is unwilling.²⁶⁶

from the UK to the UN Security Council (n 217); Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, 12 July 2006, UN Doc A/60/937-S/2006/515 at 1; Letter from Turkey to the UN Security Council (n 219); Letter from Russia to the UN Security Council (n 159) at 2; Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp (n 229); Letter from Australia to the UN Security Council (n 219); Dutch government's answer to question 75 (n 219); see also Dutch Foreign Minister Letter to Parliament on the use of force in against ISIS in Syria, 26 June 2015, available at <https://www.documentcloud.org/documents/3124025-NETHERLANDS-SYRIA-ISIL-6-26-2015.html>; Michael Grant 'Letter dated 31 March 2015 from the Charge d'Affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council', 31 March 2015, UN Doc S/2015/221.

²⁶⁵ Reinold (n 162) at 268.

²⁶⁶ See chapter 5.III.2.

(a) *Criteria for unwillingness*

The test of unwillingness in this context describes a state that is, to some degree, accommodating or harbouring an NSA that poses a threat to a third state.²⁶⁷ The letters to the Security Council reporting the exercise of the right of self-defence provide further clarification of what states understand to be an unwilling territorial state. Russia described Georgia in its letter to the Security Council dated 11 September 2002 about its use of force against Chechen fighters in the Pankisi George region as follows:

If the Georgian leadership ... continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation ... we reserve the right to act in accordance with Article 51 of the Charter of the United Nations.²⁶⁸

The statement by Russia implies that Georgia could tackle the threat by the NSA if it were inclined to do so. This is further supported by an earlier statement in the same letter where Russia raised the question of why the fighters or terrorists in the Pankisi region have not been arrested, put on trial, extradited or deported from Georgia, even though there was clear knowledge of terrorists in the Pankisi George region.²⁶⁹ What Russia also indicates is that Georgia had knowledge of the threat of NSAs in its territory. Despite that knowledge, Georgia did not act in order to remove the threat, which might be interpreted as a refusal to remove the threat.

In this context, Israel, while reporting its exercise of the right of self-defence against Hezbollah in Lebanon, criticised the inaction of Lebanon in combatting

²⁶⁷ See Reinold (n 162) at 246.

²⁶⁸ Letter from Russia to the UN Security Council (n 159) at 3.

²⁶⁹ *Ibid.*

Hezbollah for many years.²⁷⁰ Israel's statement in this context refers to a certain period of time that has passed and further implies that the territorial state has not been active in trying to remove the threat.

The US stated with regard to its drone warfare that an unwilling state is a territorial state that is 'unwilling to suppress the threat posed by the individual target'.²⁷¹ With regard to the fight against ISIS in Syria, the US described Syria as a state that will not 'confront' safe havens.²⁷² Australia stated with regard to its action against ISIS that Syria demonstrated its unwillingness 'by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria'.²⁷³ Turkey confirmed that Syria had become a safe haven for ISIS and concluded that Syria was not 'willing to prevent these threats emanating from its territory'.²⁷⁴ In such a context, the concept of safe haven might be interpreted as a situation that results when a state that might have the power to remove the threat posed by the NSA refuses to do so.²⁷⁵ What the fight against ISIS reveals is that all the states discussed in this section suggest that Syria had knowledge of the threat by ISIS. While knowing about the threat by the NSA, the letter sent to the Security Council by the US, Australia and Turkey indicates that Syria refused to remove the threat, instead providing a safe haven for ISIS.

India stated the following with regard to the situation in Pakistan and the description of an unwilling state:

India has been repeatedly urging Pakistan to take action against the JeM to prevent jihadis from being trained and armed inside Pakistan. Pakistan has

²⁷⁰ Letter from Israel to the UN Security Council (n 166) at 1.

²⁷¹ US Department of Justice *White Paper* (n 199) at 5.

²⁷² Letter from the US to the UN Security Council (n 213).

²⁷³ Letter from Australia to the UN Security Council (n 219).

²⁷⁴ Letter from Turkey to the UN Security Council (n 219).

²⁷⁵ See chapter 2.III.1.

taken no concrete actions to dismantle the infrastructure of terrorism on its soil.

...

The Government of Pakistan had made a solemn commitment in January 2004 not to allow its soil or territory under its control to be used for terrorism against India.²⁷⁶

The statement by India confirms that the test of an unwilling state entails a criterion of inaction over a reasonable period of time. India claimed that Pakistan had over 12 years to remove the threat of the NSA and refused to do so. The statement by India further implies that Pakistan knew about the threat during that entire period. In addition, the wording of the Indian letter suggests that Pakistan was in a position to act if it had decided to do so.

Therefore, the conduct by the SAS in the examined situations reveals the following criteria for the unwilling test: (1) knowledge of the threat posed by the NSA; (2) the territorial state is in a position to act against the NSA; (3) knowledge of the threat over a reasonable period of time; and (4) refusal to remove the threat posed by the NSA.

With regard to the first criterion, a territorial state must have knowledge of the threat posed by the NSA in its territory. Knowledge of the NSA entails an assessment of the NSA's capacity to trigger the right of self-defence of another state. As discussed in this section, the situation in Afghanistan, Lebanon, Ecuador, Iraq, Syria, Pakistan and Georgia indicates that each territorial state had knowledge of the NSA acting from its territory. A territorial state that does not have knowledge of the NSA cannot be regarded as unwilling.

²⁷⁶ Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp (n 229).

Regarding the second criterion, the unwilling test requires the territorial state to be in a position to act against the NSA. It is crucial to note that this requirement does not require a likelihood of *succeeding* in removing the threat posed by the NSA. The situations examined above indicate that, according to the victim states, the territorial states were in a position to act against the NSA. With regard to the situations examined in this chapter, the behaviour by Pakistan or Syria, for instance, supports such a criterion. In this context, the military and security capabilities of the territorial state might play a larger role, as indicated by some of the letters sent to the Security Council.

The third criterion for the unwilling test requires the passage of a reasonable period of time. It is difficult to determine the exact period of time that has to pass before a territorial state may be regarded as unwilling. The time period in the situations examined ranged from one year to 12 years. However, in these situations, one may conclude that several weeks or even months might not be enough to meet this requirement. Taking the examined situations into account, one can see that, in all situations, the territorial state knew about the NSA and its capacity to conduct an attack on another state over the period of one year.²⁷⁷ While this is not a strict minimum, it clearly gives an indication of when this requirement is satisfied. In the end, this requirement must be determined on a case-by-case basis.

The final criterion is the refusal of the territorial state to remove the threat posed by the NSA.²⁷⁸ As this requirement does not require an explicit refusal to remove the threat posed by the NSA, one might argue that such refusal to act can also be implied from the behaviour of the territorial state. At this point, a sufficient indication for such a refusal to remove the threat posed by the NSA

²⁷⁷ See the situation in Afghanistan, Georgia, Lebanon, Pakistan, Syria and Yemen in chapter 5.III.1.

²⁷⁸ See Reinold (n 162) at 246.

could be seen in a territorial state that meets the criteria noted in (1) to (3) above. The relevant situations examined above showed that an unwilling territorial state indicated its refusal to remove the threat either through a statement or by fulfilling the other three requirements of the test. Therefore, the analysis of post-9/11 situations reveals the various criteria of the unwilling test regarding self-defence against an NSA.

What also results from the statements by the SAS above is that no state used the effective control, or the overall control, test in order to attribute the conduct of the NSA to the territorial state. The unwilling or unable test appears to have replaced the traditional attribution requirement regarding the use of force against an NSA. In this context, a state that provides a safe haven for an NSA, such as Pakistan, would usually not meet the threshold that the effective control test requires.²⁷⁹ Therefore, the actions of NSAs are usually not attributable to a territorial state under the effective or even the overall control test, which sets a lower threshold.²⁸⁰ In addition, certain criteria can be derived from the reporting letters to the Security Council with regard to the test of an unwilling state.

(b) Criteria for inability

By contrast, the test of a state that is unable describes a state that is generally willing, but lacks the means and capacity to do so or is not in control of the territory where the NSA is located.²⁸¹ All the situations that have been examined show that the attacking state claimed a lack of territorial control by the state in whose territory the NSA was located. However, the examination showed that in none of the examined situations was explicit consent given for the use of force on the territory of the host state.

²⁷⁹ See the post 9/11 situations discussed in chapter 5.III.1: the US in Afghanistan, Israel in Lebanon, US Drone Warfare, the fight against ISIS in Syria, and India fighting JeM in Pakistan.

²⁸⁰ See *Prosecutor v Dusko Tadic*, ICTY, Case No IT-94-1 paras 124–145.

²⁸¹ Reinold (n 162) at 246; Deeks (n 210) at 506.

The legal justification by the US for the drone warfare in Pakistan and Yemen explicitly stated that if a state is regarded as unable to remove the threat of an NSA, then it is lawful to conduct an attack in that state's territory. The attacks against ISIS in Syria reinforced this position.²⁸² As I discussed in the previous section, almost all the states that were involved in the attacks against ISIS in Syria explicitly or at least implicitly accepted that Syria was unable to remove the threat based on its lack of territorial control.²⁸³ In addition, the British Prime Minister stated that ISIS operates from an 'ungoverned space' and that Syria is not the target of its operations.²⁸⁴ UN Security Council Resolution 2249 also calls upon states to take all necessary measures on the territory under the control of ISIS in Syria and Iraq.²⁸⁵ This underlines the idea that if a state is unable to remove the threat based on a lack of territorial control, that state's sovereignty recedes. However, while a lack of territorial control might be one indicator of a territorial state that is unable to remove the threat posed by an NSA, the test of inability can also take other factors into account. Therefore, the inability of a territorial state might also arise from the inability of a territorial state's military and security forces to remove the threat.²⁸⁶

(c) Reaction by non-SAS

With regard to support by non-SAS, there has not been a significant objection to the legal justification or interpretation of the right of self-defence against NSAs by SAS. Based on the interpretation of silence within the formation

²⁸² Letter from Germany to the UN Security Council (n 218); Letter from Belgium to the UN Security Council (n 218); Letter from the US to the UN Security Council (n 213); Letter from the UK to the UN Security Council (n 217); see also the list of states provided by Chachko & Deeks (n 216).

²⁸³ See chapter 4.II.2 and chapter 5.III.1(g).

²⁸⁴ UK Prime Minister's Office 'Memorandum to the Foreign Affairs Select Committee, Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-2016: The extension of Offensive British Military Operations to Syria' 26 November 2015, at 9.

²⁸⁵ UN Security Council resolution 2249 (2015), UN Doc S/RES/2249 (2015).

²⁸⁶ See the situation in Georgia in chapter 5.III.1(b).

process that has been adopted in this thesis, one could, therefore, argue that the requirement of widespread and representative support by non-SAS has been met. As set out earlier in this thesis, crucial factors to take into account concerning the element of *opinio juris* are the passage of a reasonable time to react, the fact that the state must be in a position and have the ability to react, and the fact that the circumstances called for a reaction. Given the technological developments in the 21st century in the form of the internet, one might argue that states and their respective ministries can easily access public information about a certain practice that affects such states. Therefore, non-SAS are in a position to react and one must assume that such states have positive knowledge. Considering the timeline, which dates back to 2001, one might further argue that non-SAS have had enough time to react or to object to the unwilling or unable test. As all the situations that were examined showed, there was no clear objection by non-SAS to the unwilling or unable test.²⁸⁷ On this basis, one might argue that the majority of non-SAS acquiesced to the rule in question.

(d) Conclusion: The belief has changed

Therefore, one might argue that the effective control test embodying the traditional interpretation of attribution is no longer an absolute requirement of the right of self-defence when it comes to targeting NSAs in foreign territories. The examination of *opinio juris* under the SAS doctrine reveals that there has been a shift in what states believe to be lawful. This belief, which has changed and is not the same as it was at the beginning of the 21st century, was not objected to by the international community. This belief also includes the unwilling or unable test if the armed attack emanates from an NSA and the act of self-defence is directed only against an NSA.

²⁸⁷ See the analysis in chapter 5.III.1.

IV. Conclusion: The emergence of a new rule

I submit that there is a legal basis for using the SAS doctrine to identify custom. As presented, the SAS doctrine gives a unique perspective on the formation of customary international law. In this chapter I established the scope of this doctrine and described the circumstances under which states may qualify as SAS. Contrary to the assertions of some commentators, I further submit that SAS alone cannot create a new customary rule. Therefore, the reaction of the wider international community is still relevant in this respect.

In applying the SAS doctrine to various situations in the post-9/11 era, the examination revealed that the parties in these situations qualify as SAS. The examination of the state practice on the right of self-defence against NSAs further showed that the practice by SAS is consistent. The analysis revealed that the unwilling or unable test regarding a territorial state has replaced the traditional attribution test.²⁸⁸ The reactions by the international community also did not display any significant objections to the situations. As discussed, such behaviour might be interpreted as supporting these developments concerning the right of self-defence.

1. Significant secondary sources

At this point in the examination, it is important to recapitulate and highlight the status of the law at the beginning of this century. A key judgment in the context of self-defence against NSAs is the ICJ's *Armed Activities* judgment. In this case, the court was faced with the question of whether a state might exercise its right of self-defence if an NSA conducted the armed attack. The court concluded that a state would be entitled to act in self-defence if the activities of the NSA were attributable to the host state.²⁸⁹ However, as Judge

²⁸⁸ For the traditional effective control test for attribution, see the *Nicaragua* case para 115.

²⁸⁹ *Armed Activities* case (n 242) paras 146–147; In the *Nicaragua* case the ICJ concluded that the effective control test is the one that determines whether the requirement of attribution is satisfied: *Nicaragua* case (n 251) para 115.

Kooijmans correctly points out: '[T]he court does not answer the question as to the kind of action a victim State is entitled to take if ... no involvement of the "host Government" can be proved.'²⁹⁰

According to Judge Kooijmans, the court avoided taking a position on the question of whether a right of self-defence exists if the actions by the NSA are not attributable to the host state. Judge Kooijmans further pointed out that if the actions by the NSA qualify as an armed attack, 'there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defence.'²⁹¹ Judge Simma agreed with Judge Kooijmans that a lack of territorial control had become one key characteristic of territorial states that face the issue of NSAs.²⁹² He further agreed with Judge Kooijmans that:

[I]f armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it 'would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require'.²⁹³

Therefore, the separate opinions by Judge Simma and Kooijmans show that, at the beginning of the century, there was a gap in the law on the right of self-defence against NSAs. The ICJ, in its main judgment, did not address the question of self-defence against NSAs. The post-9/11 situations, therefore, constitute a reaction by states to fill the gap when exercising the right of self-defence against NSAs.

²⁹⁰ *Armed Activities* case *ibid* para 26.

²⁹¹ *Armed Activities* case *ibid*, separate opinion of Judge Kooijmans, 19 December 2005, para 29.

²⁹² *Armed Activities* case *ibid*, separate opinion of Judge Simma, 19 December 2005, para 12.

²⁹³ *Armed Activities* case *ibid*, separate opinion of Judge Simma, 19 December 2005, para 12, referring to *Armed Activities* case, separate opinion of Judge Kooijmans, 19 December 2005, para 30.

This view was also acknowledged by the German Federal Constitutional Court when it stated that the German justification for exercising its right of self-defence was *inter alia* the unwilling or unable test.²⁹⁴ In this case, a parliamentary group, DIE LINKE, of the German Bundestag sought a declaration that, by approving the deployment of the armed forces against ISIS, the government had violated the rights of parliament. Even though the Federal Constitutional Court of Germany did not consider the application in this case as admissible, it elaborated on the status of the right of self-defence against NSAs.²⁹⁵ The court held that the applicant lacked *locus standi* and further stated that it did not see the possibility of a violation of the rights of the parliament through the exercise of self-defence against an NSA.²⁹⁶ With reference to the separate opinions of Judges Simma and Kooijmans, the court denied the possibility of a violation of international law regarding the exercise of self-defence by Germany against an NSA (in this case, ISIS).²⁹⁷ On this basis, one might argue that the German Federal Constitutional Court, although knowing that Germany used the unwilling or unable test, did not object to this test. By implication, one might argue that the court accepted the unwilling or unable test as part of the right of self-defence against NSAs. This constitutes only one example of how national courts can confirm a legal view that reflects the state practice of the post-9/11 era.

It is also crucial to include ‘the teachings of the most highly qualified publicists’ as such views might have an impact on the *opinio juris* of states.²⁹⁸

²⁹⁴ Federal Constitutional Court of Germany (17 September 2019), Order of the Second Senate, 2 BvE 2/16, para 6. It should be noted that a finding on *locus standi* also requires an examination of the possibility of an infringement of rights. Within this examination, the court discussed the current status of the right of self-defence against NSAs.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid* para 49.

²⁹⁷ *Ibid* paras 49–51.

²⁹⁸ For the relevance of ‘the teachings of the most highly qualified publicists’ when interpreting *opinio juris* see Thirlway *The Sources of International Law* (n 93) 143–146.

In 2003, Stahn confirmed a move towards the unwilling or unable test and identified 'attacks against terrorist bases from which the attack was launched or directed' as the 'least problematic proposition'.²⁹⁹ The Chatham House Principles of 2005 stated that a state might use force in self-defence if the territorial state is unable or unwilling to 'deal with the non-state actor itself'.³⁰⁰ In 2010, Ruys concluded as follows with regard to Israel's use of force against Hezbollah in Lebanon:

[I]t appears to constitute an important precedent recognizing that attacks by non-State actors may exceptionally constitute 'armed attacks' in the sense of Article 51 UN Charter, warranting defensive measures when the territorial State is unwilling or unable to prevent cross-border attacks.³⁰¹

The Leiden Policy Recommendations on Counter-terrorism and International Law of 2010 further interpreted the right of self-defence to include the right to use force against NSAs in a foreign territorial state if the territorial state is unwilling or unable to remove the threat.³⁰² In 2012, Deeks also proposed criteria regarding the unwilling or unable test. She used the law of neutrality and pointed out that the test might have become custom.³⁰³ Considering the timeline of those views by highly respected scholars of international law and

²⁹⁹ C Stahn 'Terrorist acts as armed attack: The right to self-defense, article 51 (1/2) of the UN Charter, and international terrorism' (2003) 27 *Fletcher F World Aff* 35 at 47, 48.

³⁰⁰ Principle 6 of the Chatham House Principles of International Law on the Use of Force by States in Self-Defence, October 2005, available at <https://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf> (last accessed 28 July 2020).

³⁰¹ Ruys (n 26) at 454–455.

³⁰² Nico Schrijver & Larissa van den Herik 'Leiden Policy Recommendations on Counter-terrorism and International Law' 1 April 2010, University of Leiden, paras 32, 51–32, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/42298/LeidenPolicyRecommendations1April2010.pdf?sequence=1> (last accessed 27 July 2020).

³⁰³ Deeks (n 210) at 503, 519–533. Such criteria include (i) the nature of the threat posed by the NSA; (ii) a request to address the threat and time to respond; (iii) a reasonable assessment of the territorial state's capacity and control; (iv) proposed means to suppress the threat; and (v) prior interaction with the territorial state.

the post-9/11 application of the right to self-defence, one cannot deny that the scholars strengthened the argument for a new rule.

2. Crystallisation of a new customary right to self-defence against NSAs:
Replacing the attribution requirement

In this chapter, I submit that the customary right of self-defence against NSAs has developed and filled a gap that existed at the beginning of the century. Customary international law has developed to a stage where the traditional attribution test is no longer required if a state acts in self-defence against an NSA and the territorial state is unwilling or unable to remove the threat. Therefore, the customary right of self-defence against NSAs has deviated from the customary right of self-defence against states. As pointed out, the unwilling or unable test must be separated into two components with different requirements. It should be noted that this development of customary international law does not affect the right of self-defence against another state.³⁰⁴ The examination in this chapter showed the immense effect of the SAS concept on the formation of customary international law on the right of self-defence. This raises the question whether there is a counter-argument to this interpretation of customary international law. The next chapter will, therefore, discuss how this development fits into the paradigm of international law.

Given that the unwilling or unable test forms part of the customary right of self-defence, one must also discuss whether the test replaces the attribution test, constitutes a new requirement specifically for the exercise of self-defence against NSAs, or forms part of the necessity assessment as part of the *Caroline*

³⁰⁴ See US White House press statement which distinguishes between state targets and NSA targets: Press Statement by Press Secretary Jen Psaki and Homeland Security Advisor and Deputy National Security Advisor Dr Elizabeth Sherwood-Randall, 26 February 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/26/press-gaggle-by-press-secretary-jen-psaki-and-homeland-security-advisor-and-deputy-national-security-advisor-dr-elizabeth-sherwood-randall/> (last accessed 27 February 2021).

requirements. While one might argue that the unwilling or unable test is still a form of the attribution test, neither the effective control test nor the overall control test refers to the unwilling or unable test. This shows that the traditional attribution tests are not equipped to address the issue of transnational NSAs.³⁰⁵ The same can be said about the attribution provisions of the Draft Articles of State Responsibility. The commentary on the ILC's Draft Articles of State Responsibility do not provide any guidance for the unwilling or unable test nor for the situation of transnational NSAs committing an armed attack.³⁰⁶ If one were to accept the unwilling or unable test as an attribution test, it might allow the victim state to use force against the territorial state, which appears to extend the scope of the unwilling or unable test and the right of self-defence. I disagree with such a view that the unwilling or unable test determines attribution to use force against another state or constitutes another attribution test. Instead, I submit that attribution is no longer required with regard to self-defence against an NSA and if the attack comes from an NSA. I argue that the unwilling or unable test is applicable only if a victim state uses force under the right of self-defence that is directed at the NSA. In other words, force under the right of self-defence is permissible if the territorial state is unwilling or unable to prevent the NSA from carrying out such attacks. If the victim state uses force against another state, the traditional attribution test still applies.

This is also in line with the discussion in chapter 2 that the attribution requirement is superfluous with regard to self-defence against NSAs in another state's territory if that state is not involved in any way in the

³⁰⁵ See R van Steenberghe 'Self-defence in response to attacks by non-state actors in the light of recent state practice: A step forward?' (2010) 23 *Leiden Journal of International Law* 183 at 195.

³⁰⁶ See ILC 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) (hereinafter: 'ILC Draft Articles on State Responsibility') available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 29 November 2020) at 38–40, 49. For a rejection of the unwilling or unable test as an attribution test, see also P Starski & R Wolfrum 'Right to self-defence, attribution, and the non-state actor' (2015) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*.

operations of the NSA.³⁰⁷ If one accepts that an NSA can mount an armed attack, the use of self-defence has to be directed against that NSA and cannot be directed against another state.

I submit that the unwilling or unable test instead replaces the attribution test in situations of NSAs conducting an armed attack. The post-9/11 era showed that the threat by NSAs is evolving and that the legal framework in terms of the effective or overall control test is no longer adequate. The situations examined in this chapter further highlighted that the conduct of NSAs cannot always be attributed to a territorial state by the traditional attribution test. Therefore, victim states find themselves in situations where the attribution tests from the *Nicaragua* case or the *Tadic* case are inadequate for dealing with the threat of an NSA. The unwilling or unable test should rather be seen as a replacement of the attribution test when it comes to using force under the right of self-defence against NSAs.³⁰⁸

In addition, for situations as they have been presented in this chapter, the unwilling or unable test may also form part of the necessity test under the right of self-defence.³⁰⁹ There are also commentators who see the unwilling or unable test as part of necessity as a stand-alone justification for the use of force as stated in Article 25 of the Draft Articles on State Responsibility.³¹⁰ I disagree with the latter view and agree with the view that the unwilling or unable test

³⁰⁷ See KN Trapp 'Can non-state actors mount an armed attack?' in *The Oxford Handbook on the Use of Force in International Law* (2015) 686; Stahn (n 299) at 42. See also the discussion in chapter 2.III.1.

³⁰⁸ See also Stahn (n 299) at 42–43 who argues that if we accept that an armed attack can emanate from an NSA, the requirement of attribution is superfluous.

³⁰⁹ For a qualification of the unwilling or unable test as part of the necessity requirement, see Van Steenberghe (n 305) at 207; KN Trapp 'Back to basics: Necessity, proportionality, and the right of self-defence against non-state terrorist actors' (2007) *International and Comparative Law Quarterly* 141 at 146–147; CJ Tams & JG Devaney 'Applying necessity and proportionality to anti-terrorist self-defence' (2012) 45 *Isr L Rev* 91 at 98–101; Deeks (n 210) at 199–202.

³¹⁰ See J Vidmar 'The use of force as a plea of necessity' (2017) 111 *AJIL Unbound* 302; Article 25 of the ILC Draft Articles on State Responsibility.

forms part of the necessity test under the right of self-defence. Necessity as a stand-alone justification does not provide the guarantees that the right of self-defence does, such as the requirement of an armed attack or the element of proportionality. In other words, applying the unwilling or unable test as part of the necessity justification under Article 25 of the Draft Articles results in an almost limitless application of that right to use force.

As illustrated in a previous chapter, the element of necessity as part of the right of self-defence requires that the act of force in terms of the right of self-defence must be necessary to prevent further attacks and that it must be the only option.³¹¹ As part of the necessity test, the unwilling or unable test therefore provides a link to the territorial state.³¹² As Trapp pointed out, integrating the unwilling or unable test as part of the necessity requirement speaks to the inter-state prohibition on the use of force.³¹³ It must be noted that it is not the unwilling or unable test that justifies the self-defence. The key requirement in that context is the armed attack. However, if a territorial state is unwilling or unable to remove the threat posed by the NSA, then the use of force is the only option to remove the threat.

Using the unwilling or unable test as part of the necessity test within the right of self-defence and as a replacement of the attribution requirement, the unwilling or unable test limits the force used in self-defence against the NSA that is operating within a territorial state. This thesis started out with the question whether the customary right of self-defence has developed and whether the unwilling or unable test forms part of that development. In this

³¹¹ See chapter 2.II.2(b).

³¹² See Van Steenberghe (n 305) at 207; Trapp 'Can non-state actors mount an armed attack?' (n 307) at 694–695.

³¹³ Trapp 'Can non-state actors mount an armed attack?' (n 307) at 694–695. Trapp argues that 'states are under an obligation to cooperate in the prevention of at least terrorist activities from their territory: see also KN Trapp *State Responsibility for International Terrorism* (2011) section 3.1.

regard, this thesis focused on the questions of how the unwilling or unable test affects the right of self-defence, ie whether a victim state is allowed to use force against an NSA in a third state. Based on this chapter, one can see that the unwilling or unable test affects the right of self-defence in two ways. First, the unwilling or unable test affects the question of whether a right of self-defence exists. Second, the test affects the question of how to exercise an act of self-defence.

Chapter 6. Constraints on the formation of the customary right of self-defence resulting from the SAS doctrine

The examination in the previous chapter revealed a crucial development in terms of the right of self-defence under customary international law. Through the lens of the doctrine of specially affected states ('SAS'), I illustrated that the unwilling or unable test has replaced the traditional requirement of attribution with regard to the right of self-defence against a non-state actor ('NSA'). This chapter will examine whether international law provides appropriate tools to limit or guide this new rule of custom.

As the previous chapter showed, state practice may become very influential in the formation process of customary international law. The application of the SAS doctrine illustrated how that kind of influence might be amplified. In the example of the right of self-defence, the examination revealed how the element of state practice can be directed by states that are specially affected, and how those states also determine the respective *opinio juris*. It further appears that within the dynamic of state practice and *opinio juris*, the former has become the predominant and driving force in the process of custom formation.¹ What results is a situation that leaves a window for SAS to determine in which direction new custom may develop. At the same time, we must consider whether we need to rethink an element within the process of custom formation to prevent a development led by SAS that might go against the principles of international law. As the examination of the constituent elements of custom in chapter 3 showed, there is no settled definition of *opinio juris*, which leaves it open to interpretation. In addition, we must ask whether international law

¹ See chapter 5.III and IV.

provides any other sources of limitation that could prevent such a formation of custom.

This chapter examines alternative interpretations of the element of *opinio juris* that differ from the prevailing interpretation as described in chapter 3. I examine to what extent the element of *opinio juris* can be employed to limit the formation of custom based on elements that go beyond state consent. Therefore, I discuss the application of elements such as necessity, juridical conscience or morality as part of *opinio juris*. In addition, I also examine how a deductive approach to the element of *opinio juris* may function as a limiting factor within the process of custom formation. While chapter 3 addressed the problem of proving *opinio juris*, this chapter focuses on the constitutive elements of *opinio juris* that can function as limiting factors for the formation of custom. Such limitations might be crucial for limiting the destructive potential of the unwilling or unable test.

Outside the constitutive elements of customary international law, I discuss the extent to which general principles of international law might be able to limit the formation of custom. General principles of international law constitute a separate source of international law under Article 38 of the International Court of Justice ('ICJ') Statute.² In addition, I discuss the concept of *jus cogens*, which is not listed under Article 38 of the ICJ Statute but appears to be a part of custom if one considers Article 53 of the Vienna Convention on the Law of Treaties ('VCLT'). I explain the concept of *jus cogens* and consider whether it can limit the formation of custom in more detail below. Referring to the conclusion in the previous chapter that the right of self-defence against NSAs has evolved, I further discuss the extent to which the constraints discussed here might be able to limit the newly evolved rule.

² Article 38(1)(c) of the ICJ Statute.

On the basis of the findings in this chapter, I also discuss the extent to which the constraints presented could have limited the creation of custom, i.e. the unwilling or unable test, as argued in chapter 5.

I. *Opinio juris*: A limiting element in the formation process of custom?

This section examines whether *opinio juris* can be employed to limit the process of custom formation under the SAS doctrine. In this context, I discuss whether the element of *opinio juris* should be re-thought so that it becomes less dependent on states' consent, and becomes a more objective element. I focus on two points in more detail. First, the element of *opinio juris* must be established separately. Second, on the basis of this more separate approach to *opinio juris*, I examine how *opinio juris* might limit the formation of custom under the SAS doctrine, i.e. the right of self-defence against NSAs.

As the sliding scale theory by Kirgis showed with regard to state practice and *opinio juris*, one element is usually more dominant than the other.³ However, such a determination depends on the rule in question and the development of the respective state practice and *opinio juris*. In the *Nuclear Weapons* case, for example, *opinio juris* appeared to be the more dominant element within that assessment of customary international law.⁴ As discussed in chapter 3, state practice and *opinio juris* are not clearly distinguishable, and the evidence for either constitutive element of custom can come from the same source. To

³ FL Kirgis Jr 'Custom on a sliding scale' (1987) 81 *Am J Int'l L* 146 at 147-151.

⁴ See *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996 (hereinafter: *Nuclear Weapons* case) paras 64-73. Kirgis illustrates that: 'On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* established a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.' *Ibid* at 149-151.

prevent custom from becoming a pure apology for state conduct, the positivist approach to custom seems to need a more separate approach that adopts a more independent interpretation of the elements of state practice and *opinio juris*.⁵ In this regard, I focus on the element of *opinio juris*. As set out in chapter 3, there are traditional and non-traditional ways of interpreting *opinio juris*.⁶ Tunkin argued that the element of *opinio juris* should be completely independent of, and irrespective of, any state practice.⁷ However, as most scholars have argued and as the ICJ's jurisprudence has confirmed, such a distinction is not always possible to sustain in practice.⁸

The primary objective of this section is to determine whether *opinio juris* could serve as a limiting factor for the creation of custom, as illustrated in the example of the right of self-defence under the SAS doctrine.⁹ Under the assumption that *opinio juris* is not purely determined by states' consent, one might argue that there is something more normative or objective about the element of *opinio juris*, which is often described as the subjective element.¹⁰ On this basis, this section suggests an approach to *opinio juris* that moves beyond state consent.

⁵ See M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (2006) chapter 6; M Koskenniemi 'The normative force of habit: International custom and social theory' (1990) 1 *Finnish Yearbook of International Law* 77 at 90. Koskenniemi points out a contradiction in positivist international law when he states that the positivist dogma is that international law is purely based on consent of states and that state practice and *opinio juris* are indistinguishable. See also the discussion in chapter 3.III.3.

⁶ See chapter 3.III.2.

⁷ See chapter 3.III.2.(a)(i); GI Tunkin *Theory of International Law* (1974) 132.

⁸ See the examination of state practice and *opinio juris* in chapter 3.III.

⁹ See chapter 5.

¹⁰ For a traditional interpretation of the element of *opinio juris*, see chapter 3.III.2.

1. *Opinio juris*: The relevance of natural law for the interpretation of *opinio juris*

Opinio juris is a very contested concept, and neither the jurisprudence nor the scholarship has produced a clear definition of it so far.¹¹ As international law adopted a modern positivist approach in the past century, it appeared that the rules of international law emanated predominantly from the consent of states.¹² This view constituted a clear departure from the natural law approach, which derived the law from elements that are not dependent on state consent.¹³ However, this does not mean that the natural law approach has no relevance for contemporary international law. As Wolfke ascertained, customary international law, for instance, tends to fall within the paradigms of natural law and positivism.¹⁴ Lauterpacht seemed to support this observation when he concluded that the norms of customary international law are actually the norms of natural law.¹⁵ Trindade concluded as follows in this regard:

A continuous 'rebirth' of natural law has been constantly identified though this latter has never disappeared. ... It is no longer a return to classic natural law, but rather the affirmation or restoration of a higher standard of justice, whereby positive law is assessed.¹⁶

¹¹ See Mendelson 'The subjective element in customary international law' (1996) 66 *The British Year Book of International Law* 177; J Kammerhofer 'Uncertainty in the formal sources of international law: Customary international law and some of its problems' (2004) 15 *European Journal of International Law* 523; C Dahlman 'The function of *opinio juris* in customary international law' (2012) 81 *Nordic J Int'l L* 327.

¹² T Bennett & J Strug *Introduction to International Law* (2013) 2-5; H Lauterpacht *International Law: Being the collected papers of Hersch Lauterpacht* (1970) 239; Dahlman (n 11) at 331.

¹³ For a shift from natural law to positivism see A Anghie *Imperialism, Sovereignty and the Making of International Law* (2005) 42-48, 52-53; see also MN Shaw *International Law* 8 ed (2017) 24-29.

¹⁴ K Wolfke *Custom in Present International Law* 2ed (1993) 46, referring to GF Puchta *Das Gewohnheitsrecht* (1828) 33-39.

¹⁵ See H Lauterpacht *International Law* (n 12) 239; Dahlman (n 11) at 331. Natural law in this context describes a source of law that is not made through the consent by states. It rather describes a concept that includes elements such as morality or consciousness as elements of the law-making process.

¹⁶ AAC Trindade *International Law for Humankind: Towards a New Jus Gentium* (2010) 135-136.

On this basis, one might argue that elements of natural law are still influential when it comes to the interpretation of positivist concepts such as *opinio juris*. Nevertheless, the most recent International Law Commission ('ILC') report on the formation of customary international law adopted an approach that builds on states' consent. Draft Conclusion 9 states in this context that:

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.
2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.¹⁷

The act of acceptance that the ILC describes requires consent by states. With regard to the number of states that have to consent, the ILC states in its commentary on Draft Conclusion 9 that such consent does not require all states to consent.¹⁸

As shown in the example of the unwilling or unable test, state conduct can reveal *opinio juris*. By implication, the premise that state conduct may reveal *opinio juris* also illustrates the major problem of separating state practice and *opinio juris*. At the same time, the problem of separation reveals that the formation of custom is heavily based on consent by states. Such a result raises the question of whether the notion of *opinio juris* could be interpreted differently.

¹⁷ Report of the ILC, 70th Session, 30 April – 1 June and 2 July to 10 August 2018, UN Doc A/73/10 (hereinafter: 'ILC Report 2018') at 138.

¹⁸ Ibid at 139.

The next section discusses the element of *opinio juris* from a perspective that is not dependent on state consent but rather attempts to anchor the element of *opinio juris* in normative or moral elements. As I discuss further below, a communal understanding of the element of *opinio juris* is crucial. In addition, including normative elements might also enable a clearer separation of the two constitutive elements of custom. As I show in this section, natural law forms an essential part of the view that *opinio juris* must be ascertained objectively and without depending on state consent.

Elements that go beyond state consent might prove useful to employing the element of *opinio juris* to limit the process of custom formation under the SAS doctrine.¹⁹ As I demonstrate in the next section, elements such as necessity, morality²⁰ or juridical conscience²¹ might be crucial in that context and can be linked to the original terminology of *opinio juris sive necessitatis*. Such a view also constitutes a departure from the notion of *opinio juris* as a purely subjective element that depends on state consent.

2. *Opinio juris*: An element that goes beyond state consent

As I agree that *opinio juris* is an indispensable element of custom, I argue that *opinio juris* has its own objectively ascertainable content that goes beyond consent by states. In this section I illustrate how the scholarship and the ICJ's jurisprudence support the view that the element of *opinio juris* goes beyond mere state consent and includes objectively ascertainable content. Assuming that *opinio juris* is driven by the will or feeling of states, I argue that such a will

¹⁹ For a description of such an element see Mendelson 'The subjective element in customary international law' (n 11) at 194–202.

²⁰ For a definition of morality see AE Roberts 'Traditional and modern approaches to customary international law: A reconciliation' (2001) 95 *American Journal of International Law* 757 at 762.

²¹ For the purpose of this thesis, a juridical conscience derives from basic principles of a legal system such as the nature of norms and their position in that normative system. See chapter 6.I.3(b).

or feeling is based on some kind of value-based and objective system. This argument finds evidence in the scholarship and in the ICJ's jurisprudence.

For instance, Koskenniemi described what he termed the 'descending' approach as one in which the binding force of international law can derive 'from normative "ideas" called rules'.²² Koskenniemi pointed out that 'justice, common interests, progress, nature of the world community or other similar ideas ... are anterior, or superior, to State behaviour, will or interest.'²³ Koskenniemi's 'descending' approach, while developed to explain the binding nature of international law, might also apply to the element of *opinio juris*.

In addition, Dahlman stated that *opinio juris* embodies the belief that a certain practice is a norm of international law and that '[a] state "recognises" the legal right or duty to act in accordance with the practice as a matter of fact.'²⁴ The ICJ described the element of *opinio juris* in the *North Sea Continental Shelf* cases as follows:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.²⁵

In this passage, the ICJ seemed to suggest that *opinio juris* consists of a belief that the law requires or allows certain conduct. Zimmermann confirmed this

²² Koskenniemi *From Apology to Utopia* (n 5) 60.

²³ *Ibid* 59.

²⁴ Dahlman (n 11) at 330. See also O Sender & M Wood 'A mystery no longer? *Opinio juris* and other theoretical controversies associated with customary international law' (2017) 50 *Israel Law Review* 299 at 301.

²⁵ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ, Judgment, 20 February 1969 (hereinafter: *North Sea Continental Shelf cases*) para 77.

observation when he described the element of *opinio juris* as the psychological element driven by the 'will' or 'feeling' of states.²⁶ Let us assume that *opinio juris* is truly a psychological element on the international plane. In that case, that psyche acts upon a value-based system that might be regarded as something similar to the conscience of a human mind.

With regard to the will of states, Judge Trindade provided a communal understanding of *opinio juris* which is guided by the 'juridical conscience' and concluded that:

Conscience stands above the 'will'. The universal juridical conscience stands well above the 'will' of individual states, and resonates in resolutions of the UN General Assembly, which find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole²⁷

Another approach to the element of *opinio juris* can be derived from the historical school of jurisprudence. As Mendelson pointed out, this approach is based on Savigny, who proposed that law represented the national spirit (*Volksgeist*) of the people concerned and therefore emerged from the juridical conscience of the people.²⁸ Due to the fact that public international law deals with states as the main subjects of international law, Mendelson rejected this approach as being unhelpful in defining the role of *opinio juris* in the context of customary international law. Nevertheless, as the ICJ's description in the

²⁶ A Zimmermann, CJ Tams, K Oellers-Frahm & C Tamuschat *The Statute of the International Court of Justice: A Commentary* (2012) Article 38, paras 223–230.

²⁷ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, ICJ, Judgment, 5 October 2016 (hereinafter: *Marshall Islands case*), dissenting opinion of Judge Cancado Trindade, para 312; for a more detailed discussion of 'juridical conscience' see chapter 6.I.2(b)(1).

²⁸ Mendelson 'The subjective element in customary international law' (n 11) at 195–196.

North Sea Continental Shelf cases suggests, states can have a will.²⁹ Even though such a will might be subjective, one might argue that the fundamental values of the international community might guide it. For instance, Wolfke ascertained that Puchta translated the concept of *Volksggeist* in the context of international law into an expression of the legal conscience of the nation (*Volksüberzeugung*), which amounts to doing 'what is right'.³⁰ On this basis, Wolfke concluded that *opinio juris* has a tinge of natural law.³¹ Interpreting *opinio juris* in this way may, therefore, include a value-based system that might limit the creation of *opinio juris* based on the SAS doctrine.

On this basis, I submit that the element of *opinio juris* can be determined using a perspective beyond the consent of states, which might prevent a group of SAS from dominating the determination of what the *opinio juris* of a certain rule is. I argue that there is something more to the element of *opinio juris* than mere state consent. As I analyse the original terminology of *opinio juris sive necessitates* further below, I show that the element of necessity forms part of the 'subjective' element of custom.³² This perspective also allows for the inclusion of concepts that introduce a value-based or objective component. Such an approach also reveals the new potential of the element of *opinio juris*, which can serve to limit unlawful state practice if such practice violates the fundamental values of international law.

3. Elements that go beyond state consent: Necessity, juridical conscience and the interactional approach

In the previous section I illustrated that there is possibly something more to the element of *opinio juris* that is not dependent on state consent. However,

²⁹ *North Sea Continental Shelf* cases (n 25) para 77.

³⁰ K Wolfke *Custom in Present International Law* (n 14) 46, referring to GF Puchta *Das Gewohnheitsrecht* (1828) 33–39.

³¹ *Ibid.*

³² See Mendelson 'The subjective element in customary international law' (n 11) at 195.

what is this ‘something more’ that has an objective content? I argue that the approaches presented in this section support an objective approach to *opinio juris*. I agree with Roberts, who argued that morality is synonymous with what is often called normative when she stated that:

By morality, I am again referring to commonly held subjective values about actions that are right and wrong, and have been recognised by a representative majority of states in treaties and declarations. While these values are often called ‘normative’, I call them ‘moral’ so as not to confuse the distinction between descriptive/normative justification and facilitative/moral consent. I use the term ‘normative’ to describe a statement about what the practice should be, rather than to reflect the inherent moral content of a rule.³³

Under an objective approach to *opinio juris*, I argue that *opinio juris* can limit the formation of custom. In the next section I use different approaches to describe such a non-traditional approach to *opinio juris*, and it becomes clear that all approaches are in favour of an objective approach. Traces of this position can be found in the scholarship and the jurisprudence. I illustrate that, in the example of the right of self-defence, such an objective approach reveals that general principles and a systematic interpretation of the right of self-defence are crucial for *opinio juris* to function as a limitation.

(a) *Necessity and the international community*

In order to ascertain the objective interpretation of *opinio juris*, I start with the original Latin phrase for *opinio juris*. In this section I show that the element of necessity is linked to general principles of international law. According to Mendelson, the interpretation of *opinio juris* is rooted in the terminology *opinio juris sive necessitatis*, which can be translated as ‘a belief in (or claims as to) the

³³ Roberts (n 20) at 762.

legally permissible or obligatory nature of the conduct in question or its necessity.³⁴ The translation of the term reveals a fascinating notion of *opinio juris* that includes the element of necessity. I argue that the element of necessity relates to the needs of the international community, which makes it a more objective and moral element. Since *opinio juris* represents a communal element in the formation of custom, 'necessity' must relate to the interests of the international community. Thirlway stated that-

the requirement of *opinio juris* is equivalent merely to the need for the practice in question to have been accompanied by either a sense of conforming with the law, or the view that the practice was potentially law, as suited to the need of the international community.³⁵

With regard to the international community, necessity describes what the community needs to function. In order to function, the international community is guided by basic principles, which can, for instance, be found in the UN Charter. Principles like equality,³⁶ the prohibition on the use of force,³⁷ the maintenance of international peace³⁸ or the rule of law constitute such principles. Therefore, one might argue that 'necessity' also refers to the international community's fundamental values. Therefore, fundamental values could provide a normative and objective element for the element of *opinio juris*, which might then go beyond the mere consent of states.

³⁴ Mendelson 'The subjective element in customary international law' (n 11) at 195. The direct translation of the term, therefore, suggests that something can have an obligatory nature for all states before it becomes law. However, it remains unclear what the basis of such an obligation would be.

³⁵ H Thirlway *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972) 53-54.

³⁶ Article 2(1) of the UN Charter.

³⁷ Article 2(4) of the UN Charter.

³⁸ Article 2(6) of the UN Charter.

Mendelson made a similar observation when he introduced his alternative approach of what he termed 'social necessity'. Returning to the terminology of *opinio juris sive necessitatis*, Mendelson proposed that state practice must have a 'social necessity'.³⁹ Under this approach, *opinio juris* determines whether a certain practice is 'reasonable and just'.⁴⁰ As Mendelson illustrated, this approach includes what he describes as 'extralegal' elements, such as necessity and reasonableness, as part of the subjective element, even though he acknowledged that 'extra-legal necessity and reasonableness are not themselves sufficient to make law.'⁴¹ Thirlway further confirmed that the elements of necessity and consistency are crucial for such an understanding of *opinio juris*.⁴² What this means is that even though elements such as necessity cannot be the driving force for *opinio juris*, they seem to be capable of guiding the formation of *opinio juris* objectively.

(b) *Juridical conscience*

While necessity of the international community constitutes one objective element to which the will of states orientates itself, Judge Trindade suggested another anchor of *opinio juris*, which he described as juridical conscience. Judge Trindade's approach is derived from the historical school in his dissenting opinion in the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case.⁴³ In his dissenting opinion, Judge Trindade concluded as follows with regard to *opinio juris*:

[O]*pinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Thus, already in the XIXth century, the so-

³⁹ M Mendelson 'The subjective element in customary international law' (n 11) at 197.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² H Thirlway *The Sources of International Law* 2ed (2019) 97–98.

⁴³ *Marshall Islands* case (n 27) dissenting opinion of Judge Cancado Trindade, para 303.

called 'historical school' of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the 'will' of the States by shifting attention to *opinio juris*, requiring practice to be authentic expression of the 'juridical conscience' of nations and peoples. With the passing of time, the acknowledgement of conscience standing above the 'will' developed further, as a reaction against the reluctance of some states to abide by norms addressing matters of general or common interest of the international community.⁴⁴

Judge Trindade confirmed that there is a communal form of *opinio juris* which he described as *opinio juris communis*.⁴⁵ In addition, Judge Trindade proposed an understanding of *opinio juris* that goes beyond a purely subjective understanding. According to Judge Trindade, the will of states is a key element of *opinio juris*, which is guided by the 'juridical conscience' of the international community.⁴⁶

In Judge Trindade's view, the juridical conscience that may be derived from general principles of international law stands above the will of states.⁴⁷ This constitutes a clear departure from the understanding that *opinio juris* depends solely on the consent of states. Judge Trindade's remarks introduce a normative element to the element of *opinio juris*. This underlines the notion of *opinio juris* as something that cannot violate the fundamental values of the international community. Regarding the use of force under the right of self-defence, the prohibition on the use of force might constitute a fundamental value and is, therefore, a manifestation of the juridical conscience.⁴⁸ Moreover, Judge Trindade's understanding of *opinio juris* formed part of the law of conscience when he stated that:

⁴⁴ Ibid.

⁴⁵ Ibid para 305.

⁴⁶ Ibid.

⁴⁷ Ibid para 312.

⁴⁸ See Trindade (n 16) 55.

Opinio juris communis came thus to assume 'a considerably broader dimension than that of the subjective element constitutive of custom.' *Opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful states, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.⁴⁹

It becomes clear that Judge Trindade supported the view that *opinio juris* can be ascertained on the basis of objective elements that form part of his understanding of juridical conscience.⁵⁰ His dissenting opinion further supported the argument that there are elements within *opinio juris* that go beyond the consent of states and are rooted in a concept of conscience. According to Judge Trindade, juridical conscience is anchored by normative principles such as the general principles of international law.⁵¹ If one accepts that general principles represent values about right or wrong, the juridical conscience informs us in a normative way about what is right or wrong. On this basis, the juridical conscience aligns with the definition of morality set out above.⁵²

(c) *A re-interpretation based on the interactional approach*

Building on the view that *opinio juris* incorporates the moral needs of the international community, I argue that the content of such a view can be derived from Brunnée and Toope's interactional approach, which goes back to Lon Fuller.⁵³ Brunnée and Toope argue in favour of an interactional understanding of international law that goes beyond an isolated view of state

⁴⁹ *Marshall Islands* case (n 27) dissenting opinion of Judge Cancado Trindade, para 304.

⁵⁰ See the discussion of Wolfke and Puchta above.

⁵¹ *Marshall Islands* case (n 27) dissenting opinion of Judge Cancado Trindade, paras 303, 312.

⁵² See chapter 6.I.2(b).

⁵³ See J Brunnée & SJ Toope *Legitimacy and Legality in International Law: An Interactional Account* (2010) 88–124.

consent and instead includes a diversity of actors.⁵⁴ It should be noted that Brunnée and Toope did not develop their interactional approach to determine the element of *opinio juris*. However, I submit that the interactional approach, with its strong reliance on normative elements, provides a unique perspective on how one could determine *opinio juris*.

According to Fuller, law evolves through a social process and is not hierarchical by definition.⁵⁵ Therefore, rules are understood to be legitimate when they are connected to practices and shared understandings in society.⁵⁶ Against this backdrop, Fuller set up eight legality requirements, which he described as 'internal' requirements and which distinguish law from mere social rules.⁵⁷ According to Fuller, the binding nature of the law derives from those internal requirements and not from external measures such as a hierarchical authority.⁵⁸ Fuller further concluded that the eight criteria of legality constitute what he described as the 'morality of law'.⁵⁹

Brunnée and Toope translated Fuller's theory to the sphere of international law in order to explain the binding power of international law. The outcome of this is their interactional theory,⁶⁰ which is primarily a theory of obligation.⁶¹

The interactional theory is based on three pillars: shared understandings, criteria of legality, and practice of legality.⁶² Shared understandings within the

⁵⁴ Ibid 45, 81–83.

⁵⁵ LL Fuller *The Morality of Law* (1969) 63; see also Brunnée & Toope *Legitimacy and Legality* (n 53) 23.

⁵⁶ See also GJ Postema 'Implicit law' (1994) 13 *Law and Philosophy* at 361.

⁵⁷ Fuller (n 55) 33–94, 152–186. Fuller proposes eight criteria: generality, promulgation, non-retroactivity, clarity, non-contradiction, not requiring the impossible, relative constancy over time, and congruence between legal norms and actions of officials operating under the law.

⁵⁸ Ibid 46–91, 155.

⁵⁹ Ibid 96–97; see also Brunnée & Toope *Legitimacy and Legality* (n 53) 29.

⁶⁰ Brunnée & Toope *Legitimacy and Legality* (n 53) 88–124.

⁶¹ Ibid 124.

⁶² Ibid 56–124.

international community in this context constitute the basis for social norms to emerge.⁶³ Once shared understandings exist, they become the background knowledge for how actors perceive themselves and the world, and they might become the basis for legal norms.⁶⁴ The criteria of legality under the interactional theory are found in eight specific requirements.⁶⁵ Brunnée and Toope argued that since Fuller relied strongly on law's horizontal nature, his theory is particularly relevant for international law.⁶⁶ Under the interactional theory, the criteria of legality are not imposed externally. Instead, legality derives from a legal obligation that is based on the principle of reciprocity within the international community.⁶⁷ For a rule to develop any influence, that rule or obligation must be practised by the community.⁶⁸

If we apply the interactional approach to the element of *opinio juris*, it provides content to the idea of *opinio juris* as communal morality. Elements like shared understandings, criteria of legality and the practice of legality, while providing a diverse pool of actors, also represent a normative anchor if one applies the interactional approach to determine *opinio juris*.

The interactional approach might provide another perspective on how the element of *opinio juris* could be anchored by normative elements. Within their interactional approach, Brunnée and Toope set out the criteria of legality which translated Fuller's eight criteria into the sphere of international law.⁶⁹ When we consider the proposed criteria, such as non-contradiction or

⁶³ Ibid.

⁶⁴ Ibid 65–86.

⁶⁵ J Brunnée & SJ Toope 'Self-defense against non-state actors: Are powerful states willing but unable to change international law?' 2017 *International and Comparative Law Quarterly* 1 at 16.

⁶⁶ J Brunnée & SJ Toope 'Persuasion and enforcement: Explaining compliance with international law' 2002 (13) *Finnish YB Int'l L* 273 at 294.

⁶⁷ Ibid at 287.

⁶⁸ Ibid. See also Brunnée & Toope *Legitimacy and Legality* (n 53) 194, 195.

⁶⁹ For a discussion of the interactional approach see chapter 4.II, see Brunnée & Toope 'Self-defense against non-state actors' (n 65) at 16; see also Fuller (n 55) 33–94.

congruence between legal norms, they require the legal system to be coherent and deductive. Therefore, the interactional approach appears to provide an even more concrete perspective on how the element of *opinio juris* could become more objective and normative.

In addition, Brunnée and Toope's interactional approach illustrates that states' legal obligation in international law is not solely dependent on an external or hierarchical institution. In the context of the horizontal structure in international law, this approach offers a solution to the problem of legality that the traditional approach faces in ascertaining something that is becoming law. The interactional approach might help with identifying a rule that is becoming law.

(d) Interpreting opinio juris under the deductive approach

So far, all three approaches argue in favour of a systematic interpretation of *opinio juris* guided by the general principles of international law. An approach that fits in with the three approaches and strengthens the argument for a systematic interpretation is the deductive approach. A deductive approach can be defined as–

inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle. Deduction is a process of going from the general to the specific.⁷⁰

Talmon emphasised that the deductive approach is not limited to identifying rules of customary international law, but that it could also be employed to confirm and strengthen results reached by the inductive approach.⁷¹ Roberts

⁷⁰ S Talmon 'Determining customary international law: The ICJ's methodology between induction, deduction and assertion' (2015) 26 *European Journal of International Law* 417 at 420.

⁷¹ *Ibid* at 420.

considered the deductive approach to be a form of 'modern custom' that can produce new rules faster than the traditional inductive approach.⁷² As Roberts explained, the deductive approach places more emphasis on the element of *opinio juris*.⁷³ Alvarez-Jimenez argued that the deductive approach allows for a more flexible interpretation of the element of *opinio juris* to the extent that *opinio juris* is not exclusively dependent on states' beliefs but can instead derive from communal forums such as General Assembly resolutions.⁷⁴ Thirlway made a similar observation when he asserted that an element of judgment might be introduced to the element of *opinio juris*.⁷⁵ Thirlway defined the element of judgment as follows:

Traditionally, this [element of judgment] was limited to an assessment of the posited rule as desirable because of its convenience, its *necessitas*, because of its consistency with other rules and principles, and – *a la rigueur* – because of its fairness, as between international actors, that is.⁷⁶

While Thirlway did not use the term 'deductive approach', he appeared to be describing a main characteristic of the deductive approach, namely, consistency with other rules or principles. As the deductive approach requires new rules to be deduced from existing rules, this, in turn, results in consistency between all rules.

The assumption that new rules could only derive from existing laws creates a systematic limitation that can be translated to the element of *opinio juris*. In this

⁷² Roberts (n 20) at 758–759.

⁷³ *Ibid* at 758.

⁷⁴ A Alvarez-Jiménez 'Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000–2009' (2011) 60 *International & Comparative Law Quarterly* 681 at 687. For the normative value of General Assembly resolutions, see the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ, Judgment, 27 June 1986 (hereinafter: *Nicaragua* case) para 188.

⁷⁵ Thirlway *The Sources of International Law* (n 42) 97.

⁷⁶ *Ibid*.

context, the right of self-defence derives from the prohibition on the use of force as stipulated in Article 2(4) of the UN Charter. Deriving a rule from a provision that generally prohibits the use of force means that such a rule must be interpreted narrowly if one does not want to render the primary rule of prohibition pointless. In addition, one might argue that any interpretation of the right of self-defence might also derive from the peremptory principle of state sovereignty.

This means that any interpretation of the right of self-defence cannot violate those principles and must respect them under the deductive approach. If the exception to a rule gravely violated principles that the rule represents, such an exception might not represent a process that goes from the general to specific anymore. For instance, if Article 51 of the UN Charter were to be interpreted in a way that renders Article 2(4) of the UN Charter obsolete, the deductive approach would not allow such an interpretation. Such an interpretation would violate the deductive principle that requires us to move from the general rule to the specific rule without undermining the general rule. In this example, Article 2(4) of the UN Charter constitutes the general rule that any use of force is prohibited. Article 51 of the UN Charter constitutes a specific rule. As has been demonstrated, it can be argued that customary international law regarding the right of self-defence has developed to allow for a much wider scope of application of the right.⁷⁷ In such a case, one could argue that the exception to the rule, the right of self-defence, does not represent a specific exception to the general prohibition anymore. Instead, it appears that in such a scenario, the exception, the right of self-defence, takes over the force regime and renders the prohibition on the use of force obsolete. In this case, I submit that the specific rule might also violate other principles, such as state sovereignty. It should be noted that this conclusion is based on a view that is

⁷⁷ See chapter 5.

outside the positivist approach to custom. On this basis, I submit that the deductive approach requires a systematic limitation of the *opinio juris* on the right of self-defence within the paradigm of the use of force in international law.

4. Conclusion

What does this mean for the re-interpretation of *opinio juris*? This section submits two major points about how the element of *opinio juris* could be re-thought. First, *opinio juris* can be ascertained as something that goes beyond state consent, which includes an objectively ascertainable content. Second, in order to answer the question about what that something is that is not dependent on state consent, I described four approaches. As I illustrated, understanding *opinio juris* as a communal element allows us to introduce concepts such as necessity, juridical conscience or morality as part of *opinio juris*. All these concepts relate to fundamental values of the international community, in other words, values and principles that the international community needs to function. Such concepts suggest a normative understanding of *opinio juris* that is limited by the systematic interpretation of a rule. I submit that all these concepts offer an objective and normative approach to the element of *opinio juris* and are synonymous with a more objective and normative approach.

For instance, as Roberts pointed out, morality might be described as normative principles that refer to commonly held views of right or wrong.⁷⁸ As the interactional approach further concludes, the eight criteria of legality can serve as further guidance for *opinio juris*. Under the interactional approach, non-contradiction or congruence are crucial for the interpretation of *opinio juris*. As Judge Trindade further concluded with regard to his concept of juridical

⁷⁸ See Roberts (n 20) at 762.

conscience, normative elements can also derive from general principles of international law. While general principles of international law themselves do not represent a constitutive element of the formation of custom, I agree with Judge Trindade that such general principles have an impact on the interpretation of the element of *opinio juris*. Therefore, an interpretation of *opinio juris* that obviously violates a general principle of international law might not be acceptable. As Thirlway explained, such principles might derive from domestic legal systems or might be specific to international law.⁷⁹ For instance, the principle *singularia non sunt extunda*, according to which the exception to a rule has to be interpreted narrowly, could be regarded as such a general principle.⁸⁰

Based on the normative approach presented, one could argue that there is a systematic limitation to *opinio juris*. For instance, juridical conscience or the morality of a rule might derive from the nature of the rule that one is examining. In addition, the interactional approach and deductive reasoning provide a systematic limitation that is crucial for the limitation of *opinio juris*. In this regard, Trindade stated that:

[T]he universal juridical conscience has helped to set necessary limits to excesses of those who hold public power, whose decision were identified as the 'will' of the States. This latter has often appeared as a disaggregating factor, accounting for incongruencies and contradictions in State practice.⁸¹

Trindade further emphasised that the juridical conscience 'unlike the voluntarist [state consent] conception, has consistently given expression to the

⁷⁹ Thirlway *The Sources of International Law* (n 42) 108–112.

⁸⁰ Under the principle of *singularia non sunt extunda*, an exception to a rule has to be interpreted narrowly; see ME O'Connell *The Art of Law in the International Community* (2019) 11. For self-defence and the prohibition on the use of force, see ME O'Connell, CJ Tams & D Tladi *Self-defence against Non-state Actors* (2019) 180.

⁸¹ Trindade (n 16) 156.

fundamental principles of International Law.⁸² Such fundamental principles may include an interpretation of the law in good faith or an interpretation of an exception that does not undermine the prohibition on the use of force. I discuss both general principles further below. The interactional approach, which uses Fuller's understanding of the morality of law, comes to the same conclusion if one considers criteria of legality such as congruence and non-contradiction. This approach provides a normative anchor for the element of *opinio juris*.

What does this all mean for the right of self-defence? Articles 2(4) and 51 of the UN Charter form part of the force regime under the UN Charter. The force regime under customary international law could be described as a system that generally prohibits the use of force. The right of self-defence is, therefore, an exception to that general rule. It becomes clear that foundational concepts such as conscience or morality constitute complex concepts, and their meaning might differ for each rule. On this basis, one might argue that the *opinio juris* for a particular rule should not go against its very nature, assuming that the rule in question has a specific character.

In the example of the right of self-defence, I submit that such a character might be that this right is a defensive one, not an offensive one. As illustrated in the previous chapter, the unwilling or unable test has the potential to change the very nature of the right of self-defence and widen it to such an extent that it would be contrary to the juridical conscience. In this context, the prohibition on the use of force is crucial for determining the juridical conscience. From a systematic perspective, the prohibition on the use of force limits the interpretation of the right of self-defence to make it narrow and purely defensive.

⁸² Ibid 157.

II. *Jus cogens* and general principles of international law

With regard to a limitation or guidance of customary international law, one must also consider other sources of international law. The question is whether the general principles of international law or the concept of *jus cogens* are equipped to conduct such a task. Therefore, in this section I examine the extent to which general principles can guide the formation of custom and which principles might be relevant in the case of the right of self-defence. In addition, I demonstrate how the concept of *jus cogens* in the form of the prohibition on the use of force can be applied to limit an extraordinarily broad interpretation. As I explain further below, I agree that *jus cogens* is some form of custom, but this does not prevent it from constituting a limiting factor in the process of developing customary international law.

1. General principles of law under Article 38(1)(c) of the ICJ Statute

The general principles of law are listed under the sources of international law in Article 38(1)(c) of the ICJ Statute.⁸³ Since international law does not provide a judicial precedent for every case, judges find themselves in a situation where they deduce a rule to find a solution in a case either from an analogy or directly from general principles.⁸⁴ As Judge Tanaka pointed out in his dissenting opinion in the *South West Africa Cases*, general principles represent an element of natural law that is not dependent on states' consent and, therefore, go 'beyond the limit of legal positivism' by binding all states, regardless of their consent.⁸⁵

⁸³ Article 38(1)(c) of the ICJ Statute.

⁸⁴ See Shaw (n 13) 72-73; see also Thirlway *The Sources of International Law* (n 42) 107.

⁸⁵ *South West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa)*, ICJ, Judgment, 18 July 1966, dissenting opinion of Judge Tanaka, at 298-299.

General principles are not limited to a domestic or international source of law. As Thirlway stated, general principles under Article 38(1)(c) of the ICJ Statute may include principles from municipal systems and principles that derive from the international law itself.⁸⁶ Therefore, some commentators argue that general principles under Article 38 of the ICJ Statute are principles that are applicable only to international law.⁸⁷ However, principles such as *pacta sunt servanda*, which is a principle of international law and a principle of domestic contract law, show that this distinction is difficult to sustain. Other commentators argue that general principles under Article 38 are principles that derive from municipal legal systems.⁸⁸ As Shaw has illustrated, this approach has been applied in several cases by the ICJ.⁸⁹

Before I discuss whether general principles might limit or guide the custom formation process, the question of whether general principles are capable of doing so has to be answered. In this context, Ford illustrated that general principles of law as defined under Article 38 of the ICJ Statute can complement customary international law to a certain extent.⁹⁰ Bassiouni and Kolb further argued that general principles can serve as a guide in interpreting the rules of customary international law.⁹¹ Bassiouni concluded that:

‘General Principles’ can be utilised to interpret ambiguous or uncertain language in conventional or customary international law, but, foremost, they can be relied upon to determine the rights and duties of the States in the contextual, conventional, customary law. This is particularly the case, for

⁸⁶ Thirlway *The Sources of International Law* (n 42) 108–112.

⁸⁷ Ibid 109. See also RY Jennings & A Watts *Oppenheim's International Law* (1996) 13; Shaw (n 13) 73–75.

⁸⁸ Thirlway *The Sources of International Law* (n 42) 108–112; see also Shaw (n 13) 73–75.

⁸⁹ Shaw (n 13) 74–76.

⁹⁰ CA Ford 'Judicial discretion in international jurisprudence: Article 38(1)(c) and general principles of law' (1994) 5 *Duke J Comp & Int'l L* 35.

⁹¹ MC Bassiouni 'A functional approach to general principles of international law' (1989) 11 *Mich J Int'l L* 768 at 777–778; R Kolb 'Principles as sources of international law (with special reference to good faith)' (2006) 53 *Netherlands International Law Review* 1 at 30–33.

example, with respect to such principles as 'good faith' and 'equitable performance'.⁹²

As this section illustrates, principles of interpretation such as good faith might also serve as a guiding factor for a custom. With regard to principles that might have the status of a peremptory norm, Bassiouni argued that general principles 'can be interpreted as a source of law that overreached other positive sources of international law, and eventually superseded it.'⁹³ Therefore, one might argue that general principles can influence the interpretation of customary international law, which is not very specific by itself. I submit that such principles could, therefore, prevent the abuse of unclear or vague rules of custom. This raises the question of what kind of general principles could be regarded as limiting factors to guide the formation of custom regarding the right of self-defence.

The first principle I discuss in this context is the principle of *singularia non sunt extunda*. Under this principle, an exception to a rule has to be interpreted narrowly.⁹⁴ The principle originates from Roman law: applying an exception analogously was prohibited.⁹⁵ Lesaffer has illustrated the impact of Roman law on the development of modern international law.⁹⁶ The principle that an exception to a general rule has to be interpreted restrictively or narrowly has

⁹² Bassiouni *ibid* at 776.

⁹³ *Ibid* at 776–777. See also H Lauterpacht *The Development of International Law by the International Court* (1982) 166–167.

⁹⁴ R Kolb *Advanced Introduction to International Humanitarian Law* (2014) 92; ME O'Connell *The Art of Law in the International Community* (2019) 11. For an application on the right of self-defence and the prohibition on the use of force see O'Connell, Tams & Tladi (n 80) 180.

⁹⁵ K Muscheler 'Singularia non sunt extendenda' (2001) 70 *Festschrift für Heinrich Wilhelm Kruse zum 70. Geburtstag* at 135–137.

⁹⁶ Randall Lesaffer 'Roman law and the intellectual history of international law' in A Orford, F Hoffmann & M Clark *The Oxford Handbook of the Theory of International Law* (2016).

also found application in the jurisprudence of the last decades.⁹⁷ In order to apply the principle of *singularia non sunt extunda*, one has to consider the relationship between the prohibition on the use of force and the right of self-defence. Looking at the prohibition on the use of force and exceptional cases under which force may be exercised, Saul pointed out that

[r]esolutions authorising force must be construed narrowly ... so that the Council can control its own process and limit the use of force in accordance with the design and principles of the Charter.⁹⁸

Following Saul's reasoning, it becomes clear that the prohibition on the use of force in international law is so important and influential on other rules that any situation or rule that allows an exception from this rule must be interpreted narrowly, even if that exception derives from a Security Council resolution. In terms of the right of self-defence, O'Connell made the same argument that the exception to the prohibition on the use of force, the right of self-defence, must be interpreted in a narrow and strict way.⁹⁹ According to O'Connell, the need to interpret the right of self-defence narrowly results from the *jus cogens* nature of the prohibition on the use of force and not from the right of self-defence itself.¹⁰⁰ O'Connell assumed in this context that such a rule of *jus cogens* by its nature requires a narrow interpretation of any exception to it.¹⁰¹ While I will discuss the concept of *jus cogens* further below, it is essential

⁹⁷ German Federal Supreme Court (*Bundesgerichtshof*) 15 December 1951, II ZR 173/50; German Federal Supreme Court (*Bundesgerichtshof*) 17 June 2015, VIII ZR 249/14, para 33; *Claudette Van Belle v Council*, European Court of Justice, Judgment, Case number C-176/73, 5 December 1974, para 24; *Leclerc v Au ble vert*, European Court of Justice, Judgment, Case number C-229/83, 10 January 1985, para 30; *Novartis Pharma GmbH v Apozyt GmbH*, European Court of Justice, Judgment, Case number C-535/11, 11 April 2013, para 46.

⁹⁸ B Saul 'The legality of the use of force against Iraq in 2003: Did the coalition defend or defy the United Nations' (2003) 8 *UCLA J Int'l L & Foreign Aff* 267 at 315; see also A Cassese *The Current Legal Regulation of the Use of Force* (1986) 4-5.

⁹⁹ O'Connell *The Art of Law* (n 80) 152-185.

¹⁰⁰ *Ibid* 154-157.

¹⁰¹ *Ibid* 11.

to acknowledge the peremptory status of the prohibition on the use of force to apply the principle of *singularia non sunt extunda*.

Assuming that the principle of *singularia non sunt extunda* constitutes a general principle under international law, and those general principles as stipulated under Article 38(1)(c) of the ICJ Statute may guide the interpretation of customary international law, I submit that the right to self-defence should be interpreted strictly and narrowly. Applying a narrow understanding of the right of self-defence leaves no space for an interpretation that would not only extend the scope of the right and lower its threshold of application, but also change its nature entirely by giving it an offensive character. Such developments may be expected if we consider the conclusions about the unwilling or unable test in the previous chapter.

I further argue that states that use an interpretation of custom as set out above might act in bad faith and thereby violate the principle of good faith. As Kolb illustrated, an interpretation of the law in good faith is a vital pillar of the international legal system and constitutes a fundamental general principle.¹⁰² Kolb concluded that:

The principle of good faith is here not merely a source of obligation. It is also a source of law, for it objectively develops the law, it seeks to push it to some form of subsidiary responsibility of member states of international organizations.¹⁰³

On this basis, good faith could also play a crucial role in interpreting the right of self-defence. As already mentioned, the unwilling or unable concept might change the nature of the right of self-defence and enable states to attack NSAs

¹⁰² Kolb 'Principles as sources of international law' (n 91) at 13-25.

¹⁰³ Ibid at 25.

on a much wider scale. This would result in an offensive nature of the right of self-defence which could be interpreted as an abuse of the right. In terms of interpreting customary rules in good faith, the principle of *singularia non sunt extunda*, therefore, might express a good faith interpretation that would also be in line with the *jus cogens* nature of the prohibition on the use of force. An interpretation of custom that goes against the narrow limits of interpretation for an exception and changes the nature of the rule so that it facilitates offensive action would constitute a breach of the principle of good faith. As a general principle of international law under Article 38 of the ICJ Statute, the principle of good faith may, therefore, guide the formation of new custom by SAS.

2. *Jus cogens* as limitation of custom

As the discussion so far has revealed, the peremptory status of the prohibition on the use of force might have a crucial influence on the formation of custom.¹⁰⁴ I discuss the extent to which a peremptory norm (*jus cogens*) could guide the formation of custom. Therefore, in this section I discuss *jus cogens* as a part of custom, albeit higher ranking than ordinary customary international law.¹⁰⁵

¹⁰⁴ *Nicaragua* case, dissenting opinion of Judge Schwebel, para 88; *Oil Platforms case (Iran v US)* ICJ, Judgment, 6 November 2003 (hereinafter: *Oil Platforms* case), separate opinion of Judge Simma, para 6 and separate opinion of Judge Kooijmans, para 46; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004 (hereinafter: *Wall* case), separate opinion of Judge Elaraby, para 3.1; see also JA Green 'Questioning the peremptory status of the prohibition of the use of force' (2010) 32 *Mich J Int'l L* 215 arguing that the ICJ concluded in the *Nicaragua* case that 'the prohibition of the use of force was a peremptory norm'.

¹⁰⁵ Report of the ILC, 71st session, 29 April – 7 June and 8 July – 9 August, UN Doc A/74/10 (hereinafter: ILC Report 2019) Chapter V, Peremptory norms of general international law (*jus cogens*) at 159, 161; see also *Prosecutor v Furundzija*, IT-95-17/1-T, ICTY Judgment, 10 December 1998, para 153; A Orakhelashvili *Peremptory Norms in International Law* (2008) 8; GM Danilenko 'International jus cogens: Issues of law-making' (1991) 2 *Eur J Int'l L* 42. While custom forms the most common basis for a *jus cogens*, such treaty provisions or general principles of international law may also be the basis of such norms: see ILC Report 2019 (n 105) at 161–163.

Jus cogens 'protects fundamental collective values and interests which are of elementary importance for the whole international community and give rise to obligations *erga omnes*'.¹⁰⁶ In general, any violation of a peremptory norm is unlawful and cannot become lawful under any circumstances.¹⁰⁷ According to Article 53 of the Vienna Convention on the Law of Treaties ('VCLT'):

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁰⁸

This article may be regarded as authoritative for the existence of *jus cogens* rules.¹⁰⁹ In addition, the use of passive language in Article 53 of the VCLT is significant in determining the nature of *jus cogens*. Article 53 describes *jus cogens* 'as a norm from which no derogation is permitted', which raises the question of who or what is not permitting such derogation.¹¹⁰ It appears to be unclear whether it is states that are not permitting such derogation or whether an element of morality or normativity does not permit such derogation. Given the previous reference in Article 53 to the international community, one might argue that the international community will not permit a derogation from *jus cogens*. As I discussed earlier, one might argue that fundamental values guide the international community. Commentators have pointed out the connection

¹⁰⁶ ILC 'Responsibility of states for internationally wrongful acts' (2001) Commentary to Draft article 26, para 4, at 208; James Crawford *Brownlie's Principles of Public International Law* 8 ed (2012) 515; L Hannikainen *Peremptory Norms (jus cogens) in International Law - Historical Development, Criteria, Present Status* (1988) 4; O'Connell, Tams & Tladi (n 80) 245-247.

¹⁰⁷ See Hannikainen *ibid*. See also International Law Commission 'Responsibility of states for internationally wrongful acts' (2001) Commentary to Draft article 26, at 208.

¹⁰⁸ Article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969.

¹⁰⁹ Thirlway *Sources of International Law* (n 42) 174; S Kadelbach 'Genesis, function and identification of *jus cogens* norms' (2016) *Netherlands Yearbook of International Law* 2015 at 166; L Hannikainen *Peremptory Norms* (n 106) 5-12.

¹¹⁰ Article 53 of the VCLT.

between *ius cogens* and fundamental values.¹¹¹ For instance, Hannikainen concluded that

a legal community may find it necessary to establish peremptory norms for the protection of such overriding interest and values of the community itself.¹¹²

While the scholarship does not define fundamental values, it indicates that the normative and moral background of a *jus cogens* rule is grounded in the public order of the international community.¹¹³ In other words, *jus cogens* can be interpreted as norms that protect the fundamental values of the international community.

An overview of international jurisprudence further supports this notion that *jus cogens* is closely linked to fundamental values of the international community. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the ICJ described *jus cogens* as 'obligations which protect essential humanitarian values'.¹¹⁴ The ICTY also emphasised the 'importance of the values it [*jus cogens*] protects' and stated that '[c]learly, the *jus cogens* nature of the prohibition against torture

¹¹¹ R Kolb *Peremptory International Law – Jus Cogens: A General Inventory* (2015) 32; K Hossain 'The concept of jus cogens and the obligation under the UN Charter' (2005) 3 *Santa Clara Journal of International Law* 72 at 73.

¹¹² Hannikainen *Peremptory Norms* (n 106) 2.

¹¹³ See A Pellet 'Comments in response to Christine Chinkin and in defense of jus cogens as the best bastion against the excesses of fragmentation' (2006) 17 *Finnish Yearb Int Law* 83 at 87; C Tomuschat 'The Security Council and jus cogens' (2015) 36 *The Present and Future of Jus Cogens* 8; H Ruiz Fabri 'Enhancing the rhetoric of jus cogens' (2012) 23 *European Journal of International Law* 1049 at 1050; M den Heijer & H van der Wilt 'Jus cogens and the humanization and fragmentation of international law' (2016) *Netherlands Yearbook of International Law* 2015 15; ILC Report 2019 (n 105) at 152–153.

¹¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007, para 147.

articulates the notion that the prohibition has now become one of the most fundamental standards of the international community'.¹¹⁵

As the ILC concluded in its latest report on 'Peremptory norms of general International Law (*jus cogens*)', such 'norms of general international law are hierarchically superior to other norms of international law.'¹¹⁶ In terms of their relationship to customary international law, rules of *jus cogens* supersede customary rules and, therefore, might constitute a limiting factor. This also implies that any rule of customary international law cannot violate the fundamental normative and moral background of the peremptory norm in question.

If one accepts the unwilling or unable test as being part of custom, one could argue that the customary right of self-defence appears to be more extensive since it replaces the attribution test and seems to make it easier for states to use force. Taking the relationship between a general rule, the prohibition on the use of force, and an exception, the right of self-defence, into account, the latter may not be interpreted in a way that renders the general rule obsolete. Interpreting the right of self-defence in an offensive way may render the prohibition on the use of force pointless when it comes to using force against NSAs.¹¹⁷

¹¹⁵ *Prosecutor v Furundzija*, IT-95-17/1-T, ICTY Judgment, 10 December 1998, paras 153–154. For a connection between fundamental values and *jus cogens* see also *Al-Adsani v The United Kingdom*, Application no. 35763/97, ECtHR Judgment, para 30; *Case of Goiburú, et al v Paraguay*, IACtHR Judgment, 22 September 2006, para 128; see also *Michael Domingues v United States*, Case 12.285, IACHR, 22 October 2002, para 49 where the commission stated that *jus cogens* rules 'derive their status from fundamental values held by the international community'.

¹¹⁶ ILC Report 2019 (n 105) at 152–153.

¹¹⁷ See also T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal of Conflict and Security Law* 289 at 319; O'Connell, Tams & Tladi (n 80) 248–249, 253.

As the *jus cogens* nature of the prohibition on the use of force illustrates, a peremptory norm might, in this case, constitute a limiting factor on the formation of customary international law under the SAS doctrine. Since peremptory norms are grounded in the international community's fundamental values, an interpretation of custom that violates fundamental values of the international community and thereby *jus cogens* cannot be aligned with the very basic nature of peremptory norms. However, the question is whether the evolution of the customary right of self-defence against NSAs, as suggested above, violates the *jus cogens* norm of the prohibition on the use of force and, if so, the extent to which *jus cogens* then reformulates the formation of custom.

III. Conclusion: To what extent can the formation of the new customary right of self-defence be limited?

This chapter started by recognising the growing influence of SAS and the new formation of custom in the example of the right of self-defence against NSAs. Traditional interpretations of the elements of custom, namely state practice and *opinio juris*, have proven to be incapable of preventing such a formation of custom. While the approaches in this chapter do not represent the prevailing view, they provide a useful perspective for guiding the development of the customary right of self-defence under the SAS doctrine.

Against this background, this chapter focused on alternative interpretations of *opinio juris*. As I illustrated, the element of *opinio juris* may include objectively ascertainable concepts such as juridical consciousness, necessity and morality. Such concepts are reflected in the value system of the international community, together with general principles of international law, and may prevent an interpretation of *opinio juris* that would constitute a change in the inherent nature of a rule. In the case of the right of self-defence, such a change might mean that the nature of the norm becomes an offensive right rather than

a defensive one. In addition, all the approaches presented establish the element of *opinio juris* in an objective way, which includes a strong reliance on normativity and a systematic interpretation of rules.¹¹⁸

General principles of international law have proven to be a useful tool in limiting the interpretation of custom, but also in interpreting its constituent elements of state practice and *opinio juris*. I submit that the principles of good faith and *singularia non sunt extunda*, in particular, impact the interpretation of *opinio juris*.

Another source that might limit the formation of custom is *jus cogens*. *Jus cogens* in the form of a prohibition on the use of force cannot be ignored when interpreting the right of self-defence. Due to the strong connection between the prohibition on the use of force and the right of self-defence, any customary interpretation of the latter cannot violate core principles of the former. This means that the right of self-defence must be interpreted in a narrow way that does not render the *jus cogens* rule obsolete. Otherwise, such an interpretation of the right of self-defence renders the prohibition on the use of force pointless.

However, the question in this respect is the extent to which the identified constraints might affect the formation of custom as illustrated in the previous chapter.

The discussion in this thesis illustrated that, in the post-9/11 era, if one applies the SAS doctrine to situations in which states used their right of self-defence against NSAs, one can argue that the customary right of self-defence has developed. As illustrated, one can argue that the unwilling or unable test has

¹¹⁸ See chapter 6.I.

replaced the traditional attribution test that was developed by the ICJ in the *Nicaragua* case, namely, the effective control test.

As set out in this chapter, general principles of international law such as the principle of good faith and *singularia non sunt extunda* support the view that any new interpretation of custom cannot violate those principles by extending the scope of the right of self-defence. The examination of *jus cogens* revealed a similar outcome: any new formation of custom cannot render the prohibition of Article 2(4) of the UN Charter meaningless. In this respect, the discussion of the element of *opinio juris* concluded that the subjective element of custom includes an element of necessity. *Opinio juris* requires a communal interpretation, which includes an element such as a juridical conscience. Therefore, I submitted that any customary development of the right of self-defence and Article 2(4) of the UN Charter must provide a narrow interpretation of the right of self-defence, given that it is an exception to the prohibition on the use of force. In addition, any interpretation of the customary right of self-defence may not change the nature of the force regime, which stipulates that the use of force in self-defence is an exception.

The question that then arises is whether the development of the customary right of self-defence against NSAs in terms of the unwilling or unable test goes against the very nature of the force regime and the prohibition on the use of force. In this context, the unwilling or unable test replaces the element of attribution. In other words, the core requirements of the right of self-defence, such as an armed attack or the *Caroline* requirements, do not change. Therefore, I submit that the nature or character of the force regime does not change, and nor does the nature of the right of self-defence. Accepting the new formation of custom does not result in an offensive right of self-defence. Therefore, the character of the right of self-defence has not developed in the opposite direction. In addition, it also does not allow for attacks on NSAs

anywhere in the world. As set out in the previous chapter, the unwilling or unable test entails different requirements that must be met before a state can apply this doctrine in order to conform with the requirement of attribution as set out in the ICJ's jurisprudence.

Another question is whether the unwilling or unable test violates the principle *singularia non sunt extunda* or the principle of good faith. The evolution of the right of self-defence does not extend the scope of the right of self-defence excessively and does not render Article 2(4) of the UN Charter pointless when it replaces the element of attribution in relation to using force against NSAs. As illustrated in the previous chapter, this does not result in an arbitrary use of the right of self-defence. Instead, the evolution of the customary right constitutes an adaptation to the threats of the 21st century. Since the requirement of an armed attack and the *Caroline* requirements must still be satisfied, the right of self-defence is not being interpreted to form an overbroad exception to the rule. Therefore, such a formation of custom also does not constitute a violation of the principle of good faith. As illustrated previously, the character of the right of self-defence remains the same. The unwilling or unable test is subject to requirements such as a lack of territorial control or a refusal to remove the threat posed by an NSA over a reasonable time period.¹¹⁹ In other words, the right of self-defence still constitutes the exception to the prohibition on the use of force, and the unwilling or unable test embodies an interpretation of the exception. Therefore, the general principle of *singularia non sunt extunda* is not violated in this case.

I therefore submit that when one applies the safeguards through a re-interpretation of *opinio juris*, the general principles of international law, and *jus cogens*, such constraints do apply to the formation of the new customary

¹¹⁹ See chapter 5.IV.

right of self-defence against NSAs. However, they do not reveal that the new customary right violates any of those constraints. Instead, the examination in this chapter further supports the argument that state sovereignty is still respected since the new rule limits force to the targeted NSA and is not directed against the territorial state itself.¹²⁰

¹²⁰ See the US White House press statement which distinguishes between state targets and NSA targets: Press Statement by Press Secretary Jen Psaki and Homeland Security Advisor and Deputy National Security Advisor Dr Elizabeth Sherwood-Randall, 26 February 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/26/press-gaggle-by-press-secretary-jen-psaki-and-homeland-security-advisor-and-deputy-national-security-advisor-dr-elizabeth-sherwood-randall/> (last accessed 27 February 2021).

Chapter 7. Conclusion: The evolution of the right of self-defence

This thesis started with an overview of the origins, requirements and significant developments in respect of the right of self-defence. The overview of developments in the practice of states and the discussions of the scholarship illustrated that the legal framework was insufficient to cover the situation of NSAs operating transnationally. While some commentators might argue that the law should not follow each factual development, one might also argue that there was a need for customary international law to evolve in order to prevent a legal *lacuna*. Therefore, I submit that the development and application of the unwilling or unable test constitutes an inevitable outcome of the needs of state security. Chapter 2 also revealed that the ICJ's decision in the *Armed Activities* case early in the 21st century did not address the question of whether a right of self-defence exists if the conduct of an NSA cannot be attributed to a territorial state.¹ State practice therefore filled a gap in the legal framework. At the end of chapter 2, we were left with the question of whether the unwilling or unable test has gained the status of customary international law after two decades.

The discussion of the legal framework for the formation of custom revealed that the positivist notion of custom formation could not be sustained in practice. I agree with Koskenniemi's observation that the two constitutive elements of the traditional, positivist conception of custom are indistinguishable, and I submit that this has crucial implications for the formation of custom under SAS doctrine. The evidence we have for the

¹ See KN Trapp 'Can non-state actors mount an armed attack?' in *The Oxford Handbook on the Use of Force in International Law* (2015) 694; *Armed Activities on the Territory of Congo (DRC v Uganda)*, ICJ, Judgment, 19 December 2005, separate opinion of Judge Kooijmans, para 26.

element of state practice in terms of the unwilling or unable test can thus also be used for determining *opinio juris*. The discussion of the theoretical framework also revealed how the inactivity of states can be interpreted as confirmation of a rule. As I showed in chapter 5, the submission from chapter 3 was crucial for the main argument of this thesis.

Chapter 4 revealed the concerns about the predominant view in the scholarship that the customary right of self-defence has not changed. A major concern was the criterion of widespread and representative state practice which did not appear to be fulfilled due to a lack of consistent state practice. While I identified flaws in the lines of argument, I generally agreed with the scholarship. As an alternative approach to the traditional positivist determination of custom, I also discussed Brunnée and Toope's interactional approach. While the interactional approach provides a unique perspective on the formation of custom and its constitutive elements, it reached the same conclusion as the scholarship.

Chapter 5 introduced the SAS doctrine, which allows a group of states to steer and shape the formation of custom if there is widespread and representative support by non-SAS. After I set out the requirements of the SAS doctrine, a re-assessment of the post-9/11 era situation revealed that one can argue that the customary right of self-defence relating to NSAs has changed. The analysis of state practice and *opinio juris* under the SAS doctrine confirms that the unwilling or unable test has replaced the traditional attribution test and deviates from an inter-state legal regime on the right of self-defence. As illustrated in chapter 5, various criteria must be satisfied before a territorial state can qualify as unwilling or unable. As explained, the acceptance of the unwilling or unable test does not undermine the other requirements of the right of self-defence that still have to be satisfied. Therefore, elements like an

armed attack, necessity and proportionality are still crucial for the existence of such a right, as well as its exercise.

This submission was further confirmed by chapter 6, which analysed potential constraints on the evolution of the customary right of self-defence. As I submitted in chapter 6, even if one re-thinks the element of *opinio juris*, this does not reverse the customary development illustrated in the previous chapter. In addition, I examined the extent to which general principles of international law or the concept of *jus cogens* could potentially limit an abusive development of custom, contrary to the fundamental values and principles of international law. However, once again, the discussion revealed that even if one applies such constraints to the formation of custom, this does not reverse the development of custom.

Therefore, the main submission of this thesis is that the customary right of self-defence has evolved in respect of the threat of transnational NSAs and includes the unwilling or unable test. However, as stated in chapter 4, this does not mean that the concerns supporting the argument that the customary right has not changed or should not change are not valid. The scope of this thesis was, however, limited and aimed to show how one could argue that the customary right under the doctrine of SAS has changed. It remains to be seen how the right of self-defence and the SAS doctrine will evolve further in the 21st century.

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