


LEGAL IMAGINARIES

RETHINKING THE PROBLEM OF THIRD-STATE INJURIES IN THE SITUATION OF SELF-DEFENCE: JUSTIFICATIONS AGAINST THE HOST STATE AS FOCUS

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When responding to armed attacks by an aggressor state operating within a third state in self-defence, a victim state may inadvertently violate the rights of that host state, including but not limited to their rights to territorial integrity or to freedom of navigation. How can the victim state justify such infringements under current international law? As a legal concept, self-defence has traditionally been perceived as producing legal effects bilaterally, between the aggressor state and the victim state. To justify the victim state's conduct against the host state within this traditional framework of self-defence, solutions have been put forward in contemporary scholarship, relying either on the host state's involvement with the aggressor state or on its violation of the law of neutrality. An alternative method attempts to revamp self-defence under the law of state responsibility into a multilateral concept, expanding its preclusive effects to cover the host state. However, neither this revised approach nor those devised with the traditional perception of self-defence's legal effects surmount the conceptual and pragmatic challenges. This article suggests yet another way of the resort to countermeasures as a circumstance precluding

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wrongfulness to justify third-state injuries caused by the victim state, which can better resolve the problem in the situation of self-defence.

Keywords: circumstances precluding wrongfulness; countermeasures; self-defence; state responsibility; host states; third states.

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I. INTRODUCTION

In 2019, Israel launched a series of attacks on Iranian military infrastructure.¹ One of these operations involved guided missiles that were fired over Lebanese territory, aiming at the elite Quds Force of the Iranian Revolutionary Guards in Syria.² During a United Nations Security Council meeting addressing the situation in the Middle East, Syria and Lebanon lodged complaints against this conduct and urged the organisation to ensure accountability.³ Israel maintained that it was acting in response to an Iranian ‘act of aggression’ in the form of an airstrike from Syrian territory.⁴ This reaction was labelled by some states in the meeting as Israel exercising its ‘inalienable right to self-defence’.⁵

Israel conduct could be recognised as self-defence so long as it satisfies certain procedural and substantive conditions under international law, most important of which are necessity and proportionality.⁶ Generally, this legal

¹ Isabel Kershner, ‘Israel Confirms Attacks on Iranian Targets in Syria’ *The New York Times*, (New York, 20 January 2019) <<https://www.nytimes.com/2019/01/20/world/middleeast/israel-attack-syria-iran.html>> accessed 1 January 2023.

² Jonathan Marcus, ‘Syria War: Israeli Jets Target Iranian Positions Around Damascus’ (*BBC News*, 21 January 2019) <<https://www.bbc.co.uk/news/world-middle-east-46941717>> accessed 1 January 2023.

³ United Nations Security Council (UNSC), ‘Verbatim Record of 8449th Meeting’ (22 January 2019) UN Doc. S/PV.8449 30, 32.

⁴ *ibid* 8–9.

⁵ *ibid* 12, 21.

⁶ For an overview of self-defence’s conditions, see Georg Nolte and Albrecht Randelzhofer, ‘Article 51’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary, Volume 2* (3rd edn, Oxford University Press 2012); James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009), 63–109; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004), 141–187; Robert Jennings and Arthur Watts, *Oppenheim’s International Law* (9th edn, Oxford University Press 1992), 442; Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (World Peace Foundation 1946),

concept of ‘self-defence’ embodies two qualities. Firstly, it is an ‘inherent right’ recognised in customary international law and enshrined in the Charter of the United Nations (UNC).⁷ Secondly, without prejudice to the UNC,⁸ the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) codified by the International Law Commission (ILC) prescribes it as a ‘circumstance precluding wrongfulness’.⁹ These qualities mean that self-defence creates two different legal consequences ensuing from the conduct. The first is to grant the victim state an inherent right to self-defence. This legitimises use of force by the victim state by way of an exception in the general prohibition of force. The second legal consequence can be seen through exerting preclusive effects on potential breaches, or on potential ‘wrongfulness’ as ILC put it, occasioned by the victim state’s self-defensive conduct. The breaches are usually incidental, including but are not limited to those of the rights to territorial integrity, non-intervention, and freedom of navigation and commerce.¹⁰

However, even if the claim of self-defence can be vindicated, Israel’s conduct may still not be fully justified. To illustrate, self-defence as a legal concept is

177–8; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Reports 161, paras 76–7; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14, paras 176, 194.

⁷ Article 51 of the UNC: ‘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[.]’ The provision is considered the crystallisation of international customary law. See Murray Colin Alder, *The Inherent Right of Self-Defence in International Law* (Springer 2013), 71–90; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange 2000), 791–2.

⁸ Article 59 of the ARSIWA: ‘These articles are without prejudice to the Charter of the United Nations.’

⁹ Article 21 of the ARSIWA: ‘The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.’

¹⁰ See ILC, ‘Second Report of the Special Rapporteur, Mr. James Crawford’ (1999) UN Doc. A/CN.4/498 and Add.1–4 74–5.

traditionally perceived as producing its legal effects bilaterally, that is only between the aggressor state and the victim state.¹¹ It is on this basis that, relying on self-defence, Israel is allowed to resort to force against the aggressor state, Iran and its military forces, without being liable for its use of force and most incidental injuries. For a state under armed attacks, though, repelling such attacks extraterritorially through force may put it at risk of breaching obligations owed to multiple states. In the case of Israel's defensive act, third states, such as Syria or Lebanon, have their right to territorial integrity or to freedom of navigation inadvertently impeded. The legal concept of self-defence seems inadequate to justify such potential breaches.

In reality, states nonetheless often invoke self-defence, as the victim states which suffer armed attacks, to rationalise their use of force against aggressor state's forces or materiel located within the borders of a third state.¹² This quintessential 'third state', namely the host state, and the potential injuries caused to them by the victim state's exercise of self-defence, garner most attention in the practice and literature. This article thus analyses the avenues utilised to justify these third-state injuries, concentrating on the host state. Although the exposition might be relevant for other third states, like Lebanon in the earlier example, they will not be further discussed.

There are of course debates over whether the practice of allowing the incidental infringements on the host state is widespread and consistent

¹¹ As Cassese observes, resort to force in self-defence has been traditionally regarded 'to be exclusively directed to repel the armed attack of the aggressor state'. Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 5, 995.

¹² See *e.g.*, Charles Michel, Ursula von der Leyen and Volodymyr Zelenskyy, 'Joint Statement Following the 24th EU-Ukraine Summit' (2023) <<https://www.president.gov.ua/en/news/spilna-zayava-za-pidsumkami-24-go-samitu-ukrayina-yes-80765>> accessed 5 February 2023; John Kirby, 'Statement by the Department of Defense' (2021) <<https://www.defense.gov/News/Releases/Release/Article/2672875/statement-by-the-department-of-defense/>> accessed 5 February 2023.

enough to shape customary international law.¹³ At any rate, academic discourse has already taken a step forward to shore up the legal footings in that direction. Most arguments are built on the host state's involvement with the aggressor state¹⁴ or its violation of the law of neutrality.¹⁵ With a bilateralist perspective of self-defence's legal effects, these approaches are beset with issues. Efforts have thus been made to reconstruct the legal concept of self-defence under the law of state responsibility.¹⁶ According to this revised understanding, self-defence can generate preclusive effects multilaterally, meaning that they operate not only within the aggressor-victim pairing, but also within the legal relationship between the victim state and the host state to preclude the wrongfulness.¹⁷ Therefore, self-defence is enabled to exonerate the victim state from inadvertently infringing upon the rights of the host state, which is a third state instead of the aggressor state.¹⁸

¹³ See *e.g.*, Wee Yen Jean, 'The Use of Force against Non-State Actors: Justifying and Delimiting the Exercise of the Right of Self-Defence' (2019) 9 *Singapore Law Review* 1, 6–7; Gregory Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 *Wisconsin International Journal of Law* 1, 171–2; UNSC, 'Consideration by Security Council' (9–14 July 1976) UNYB 316, 319.

¹⁴ See Erika de Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution' (2019) 32 *Leiden Journal of International Law* 91, 103–4; Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 *European Journal of International Law* 563, 579–85.

¹⁵ See Markus Krajewski, 'Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September und seine Folgen' (2022) 40 *Archiv des Völkerrechts* 183, 203.

¹⁶ See Nicholas 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, 804; Federica Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 *Leiden Journal of International Law* 93, 144–5. These articles are grappling with self-defence against non-state actors, but their arguments are largely rooted in and therefore compatible with inter-state self-defence.

¹⁷ Tsagourias (n 16); Paddeu (n 16).

¹⁸ Tsagourias (n 16); Paddeu (n 16).

As will be explicated later, this creative version of self-defence can hardly survive scrutiny from conceptual and pragmatical angles.¹⁹

To resolve the problem of third-state injuries arising from self-defence, an alternative solution might be needed. To achieve that goal, this paper is arranged as follows: Section II investigates the approaches to this problem proposed with the traditional view of self-defence's legal effects as bilateral and their shortcomings. Section III turns to an anatomy of the revised understanding of self-defence's preclusive effects in a multilateral way, providing a critical review of this revamp's validity. Building on that analysis, Section IV goes on to contemplate an alternative solution. By rethinking self-defence in the context of the law of state responsibility, this paper ultimately concludes that, rather than changing the approach to the preclusive effects of self-defence from bilateral to multilateral, this third-state problem in the situation of self-defence can be better tackled by considering countermeasures as a circumstance precluding wrongfulness.

Before delving deeper into the examination, an important caveat must be acknowledged. This paper confines its study of self-defence to the inter-state level. It zeroes in on the host-state problem, as manifested in the case described above, arising from a situation where the host state's territory was used by a group of individuals to launch armed attacks, which are identified with another state instead of the host state.²⁰ In no way does this suggest that the academic discourse about unattributable armed attacks emanating from

¹⁹ See Section III.3.

²⁰ Given the focus of the problem on *third*-state injuries, it is assumed here that the group's behaviour cannot be ascribed to the host state and instead, is 'effectively controlled' by and hence imputable to the aggressor state. This test of attribution is reckoned to be strongly espoused by the ICJ. See *Nicaragua Case* (n 6) para 195; Kowalski Michał, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard' (2010) 30 *Polish Yearbook of International Law* 101, 113–8.

non-state actors in a third state is insignificant.²¹ Quite the contrary, they influence the intellectual landscape profoundly, whose legal reasonings are drawn on as a useful reference.²²

II. TACKLING THE PROBLEM OF THIRD-STATE INJURIES WITH THE TRADITIONAL PERCEPTION OF SELF-DEFENCE'S LEGAL EFFECTS AS BILATERAL

As stated in the introduction to this article, legal effects of self-defence are traditionally seen as having bilateral effects. In other words, self-defence only operates between the victim state and the aggressor state and cannot cover any third state. While scholars have sought to legitimise the potential infringements on the host state's rights by conducts of self-defence through justifications based on the host state's involvement²³ or its violation of the law of neutrality,²⁴ these methods suffer from certain shortcomings within the bilateral bounds of self-defence.

1. *Involvement of the Host State*

States often proffer the explanation that a host state has been involved in the aggressor state's armed attack to support the use of the self-defensive

²¹ There are heated debates about this topic especially post-9/11. See Christian J. Tams, 'Self-Defence against Non-State Actors: Making Sense of the "Armed Attack" Requirement' in Mary Ellen O'Connell, Christian J. Tams and Dire Tladi (eds) *Self-Defence against Non-State Actors* (Cambridge University Press 2019); Kimberley Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010).

²² In this regard, this paper sometimes directly applies legal reasonings extracted therefrom to illustrating the third-state problem among states. Despite similarities, it should be borne in mind that non-state actors have rights and obligations different from states in international law.

²³ de Wet (n 14) 103; Lanovoy (n 14) 584.

²⁴ Krajewski (n 15).

measures on its territory.²⁵ This invites a wide range of rationales grounded in the ‘unwilling and unable’ doctrine, the ‘due diligence’ principle,²⁶ or the rules on complicity,²⁷ to name but a few. Although these narratives may vary, the host state is mainly expected to have failed to uphold some obligation. The issue is, however, that the host state’s breach of such an obligation does not cause it to forfeit its rights to territorial integrity or not to be interfered with.

For instance, it is argued that by virtue of the rules of complicity, the self-defensive force targeting an aggressor state within a host state’s domain will not infringe on the latter state’s rights, since it is complicit in armed attacks unfolding in its territory.²⁸ Yet, the violation here is that of the obligation not to aid or assist in the wrongful conduct of the aggressor state. To put it another way, the host state is only liable for this supportive behaviour, which is a separate wrongful act from the principal’s wrongful act.²⁹ When a failure to fulfil this obligation not to facilitate, aid or assist in a wrongful act leads to state responsibility, the legal consequences for the host state can only be the cessation of its aid or assistance and reparation.³⁰ It will not become accountable for the armed attack orchestrated by the principal actors,³¹ nor will this complicit conduct warrant the conduct of self-defence from the

²⁵ ‘Joint Statement’ (n 12); ‘Statement by the Department of Defense’ (n 12).

²⁶ See, e.g., de Wet (n 14).

²⁷ See, e.g., Lanovoy (n 14).

²⁸ Christian J. Tams, ‘The Use of Force against Terrorists’ (2009) 20 *European Journal of International Law* 373, 385.

²⁹ ILC, ‘Report of the International Law Commission on the Work of Its Fifty-Third Session’ (2001) UN Doc. A/56/10 66.

³⁰ Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 85.

³¹ Nico Schrijver, ‘Regarding Complicity in the Law of International Responsibility from Bernhard Graefrath’ (2015) 48 *Belgian Review of International Law* 444, 445.

victim state, for instance, intruding on the rights to territorial integrity or non-intervention of the host state.³²

In a similar vein, ‘unwilling or unable’ doctrines and the ‘due diligence’ principle are premised on the host state’s ‘obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’.³³ Not fulfilling this obligation may render the host state responsible to cease its inaction and make reparation. It would not result in the host state’s rights to territorial integrity or non-intervention being foreclosed.

Some authors, upon contemplating the legal conception of self-defence from the aspect of the customary condition of necessity in self-defence, alternatively construe the non-compliance with such obligations³⁴ from the host state as a metric of measurement of necessity.³⁵ The use of force in self-defence would be necessary if the host state does not undertake due diligence or is unwilling or unable to conform with the obligation by handling the threat of the aggressor state within its territory. Despite being plausible, this reinterpretation only explains the reason why the victim state is able to rely on self-defence against the aggressor state or its military forces. The potential injuries to the host state cannot be justified since the legal concept of self-defence only delivers its service bilaterally from the victim state to the initial wrongful state that mounts the armed attacks, not to the host state as well.

³² Kimberley Trapp, ‘The Use of Force against Terrorists: A Reply to Christian J. Tams’ (2009) 20 *European Journal of International Law* 1049, 1051.

³³ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Merits) [1949] ICJ Reports 4, 22.

³⁴ *ibid.*

³⁵ Raphaël 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, 207.

2. Violation of the Law of Neutrality

It is proposed by other authors that for justifying potential injuries to the host state's rights, the law of neutrality should be taken into account.³⁶ This corpus of law sets out that a neutral state enjoys certain rights in wartime. Simultaneously, however, certain duties are imposed on them, such as the duty of non-participation.³⁷ If a neutral state breaches that duty by supporting a belligerent to the level of 'constitutes an illegal armed attack', then it must tolerate encroachment from another belligerent to use force on its territory.³⁸ As self-defence may be viewed as the use of force between the victim state and the aggressor state, the host state might as well be a neutral state to their armed conflict, whose behaviour should be governed by the law of neutrality.³⁹ In this case, the host state's contribution to the aggressor state's armed attacks must in itself constitute 'an illegal armed attack' for the victim state to resort to the use of force against it. Due to the high threshold of imputing the aggressor state's armed attacks to the host state, it is almost as difficult to meet as that of validating a claim of self-defence against the host state individually,⁴⁰ and thus cannot effectively resolve the problem of third-state injuries.

III. TACKLING THE PROBLEM OF THIRD-STATE INJURIES WITH THE REVISED PERCEPTION OF SELF-DEFENCE'S PRECLUSIVE EFFECTS AS MULTILATERAL

As traditional imagination restricts the capability of the methods above in dealing with the problem of third-state injuries, re-imagination may be

³⁶ Krajewski (n 15).

³⁷ *ibid* 614.

³⁸ *ibid* 611.

³⁹ Michael Bothe, 'The Law of Neutrality' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (4th edn, Oxford University Press 2021), 602.

⁴⁰ It returns the exposition to examining the test of attribution, which would lead to the conclusion that the conduct is not imputable to the host state as assumed in this paper.

required. To put it differently, the preclusive effects stemming from the ARSIWA can become multilateral. This would mean that self-defence can preclude wrongfulness of certain violations on the host state's rights when the self-defensive conduct is taken in conformity with the UNC. By doing so, the injuries inflicted on the host state in the course of self-defence against the aggressor state can be legitimised. Proponents bolster this argument in two steps: first, by cataloguing the legal effects of self-defence in terms of the obligations owed to the aggressor state which a self-defensive conduct may contravene, and second, by widening the scope of the preclusive effects of self-defence to operate between the victim state and the host state as well.

1. Legal Effects against the Aggressor State: The Obligations Categorised

The legal effects of self-defence are split into different facets in the legal relationship between the aggressor state and the victim state by the ILC.⁴¹ The legal effects of self-defence, specifically in relation to the obligation deriving from the rules on the use of force, are entirely subject to the UNC and customary international law. If a victim state employs forcible measures in self-defence accordingly, there will be no latent breach of the obligation not to use force *ab initio*.⁴² At the same time, other obligations, such as the protection of the aggressor state's territorial integrity and freedom of navigation, may be encroached upon in an accidental way during the self-defensive conduct,⁴³ and yet the potential breaches thereof are precluded by virtue of the law of state responsibility.⁴⁴

Still, there are obligations that states must abide by regardless of whether they are undertaking self-defence or not, namely the obligations that are 'expressed or intended to apply as a definitive constraint even to States in armed conflict'.⁴⁵ These include the obligations of *jus in bello*, particularly

⁴¹ UN Doc. A/56/10 66 (n 29) 74–5.

⁴² *ibid.*

⁴³ UN Doc. A/CN.4/498 (n 10) 74–5.

⁴⁴ UN Doc. A/56/10 66 (n 29) 74.

⁴⁵ *ibid* 74–5.

those under international humanitarian law, and the protection of non-derogable human rights.⁴⁶ These obligations, being of an absolute nature are often identified as the obligations *erga omnes*.⁴⁷ It is crucial to acknowledge that the victim state is prohibited from violating these obligations owed to third states too, but these obligations will not be factored into our analysis of the third-state problem here since their non-derogable characteristic is definite.

2. Preclusive Effects against the Third States: The Scope Broadened

The previous fragmentation of self-defence's legal effects appears to have been presented bilaterally.⁴⁸ The ILC's attitude towards bilateralism might not be that lucid on the level of the law of state responsibility, as an intriguing shift during the drafting stages of the ARSIWA appears to suggest.

In the first reading of the draft articles, it was expressed by members of the ILC that allowing self-defence to be used against third states 'could certainly not have been the intention of the drafter' and 'the neutrality of a third State must in principle be respected'.⁴⁹ The commentary also exhibited the prevalent stance that 'the interests of a third State [...] *must obviously be fully protected*'.⁵⁰

⁴⁶ *ibid.*

⁴⁷ See *e.g.*, Marco Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations *Erga Omnes* and *Erga Omnes Partes*' (2018) 23 *Journal of Conflict and Security Law* 383, 391–9; Yoram Dinstein, 'The *Erga Omnes* Applicability of Human Rights' (1992) 30 *Archiv Des Völkerrechts* 16, 16–21.

⁴⁸ In the commentary, it is underscored that 'the principal effect' of self-defence 'is to preclude the wrongfulness of conduct of a State in self-defence *vis-à-vis the attacking State*'. (n 29) 75 (emphasis added).

⁴⁹ ILC, 'Summary Record of the 1620th Meeting' (1980) UN Doc. A/CN.4/SR.1620 189.

⁵⁰ ILC, 'Report of the International Law Commission on the Work of Its Thirty-Second Session' (1980) UN Doc. A/35/10 61 (emphasis added).

The wording of this provision was adjusted ahead of the second reading. According to the ILC, a victim state during self-defence against an aggressor state ‘might be entitled to take action against third States’ as well. Without delving deeper, the opposability of self-defence against third states had been diverted to the realm of ‘the relevant primary rules’, which was believed sufficiently adequate to cover it, rather than rely on the secondary rules of the law of state responsibility.⁵¹ Later in the commentary, the ILC annotated that the language of this provision ‘leaves open all issues of the effect of action in self-defence vis-à-vis third States’.⁵² The ILC has not provided a concrete view on this legal issue. Anchoring themselves to the vagueness surrounding self-defence and third states, some authors contend that there is room reserved for a re-imagination of self-defence. This would mean that self-defence would be open to extension to the host state to preclude the victim state’s wrongfulness of incidentally injuring the host state.⁵³ These scholars draw on the practice of establishing maritime exclusion zones on the high sea.⁵⁴ In these instances, states have resorted to self-defence, thereby justifying its intrusion into the navigation freedom of all other states.⁵⁵ It has been argued that the rationale for the invocation as such, namely certain ‘involvement between the third state and the aggressor’, should be adopted to decide whether self-defence’s preclusive effects can be expanded or not.⁵⁶ Moreover, the level of involvement should coincide with the ‘extent to

⁵¹ ILC, ‘Summary Record of the 2587th Meeting’ (1999) UN Doc. A/CN.4/SR.2587 141.

⁵² (n 29) 75 (emphasis added).

⁵³ Tsagourias, (n 16) 821; Paddeu (n 16) 113.

⁵⁴ See Christopher Michaelsen, ‘Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved’ (2003) 8 *Journal of Conflict and Security Law* 2, 388; Sandesh Sivakumaran, ‘Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice’ (2016) 92 *International Law Studies* 1, 177–81.

⁵⁵ For an example, see United Kingdom Parliament, ‘Falkland Islands Volume 22: Debated on Wednesday 28 April 1982’ (1982) <<https://hansard.parliament.uk/Commons/1982-04-28/debates/03f1abe8-1b23-49a6-ab51-dc740649cc5e/FalklandIslands>> accessed 5 February 2023.

⁵⁶ Paddeu (n 16) 113.

which third state rights are impaired'.⁵⁷ In this respect, when the right to territorial integrity is infringed, the standard will be that the host state is actually involved in the armed attack as proved by evidence.⁵⁸ Based on this model, a formula for the third-state problem has been recommended. While the use of force against the aggressor state is permitted as per Article 51 of the UNC, the wrongfulness of collateral damages caused by it to the host state is eliminated by self-defence codified in Article 21 of the ARSIWA, whose preclusive effects are envisaged multilaterally.⁵⁹

This revised perception of self-defence's legal effects can mitigate the difficulties encountered by the solutions trapped in the bilateral understanding of self-defence in international law when it comes to the host state. The function of circumstances precluding wrongfulness is designed to absolve states of *prima facie* breaches of the obligations, irrespective of their substantive contents.⁶⁰ Furthermore, it sets a flexible threshold for the preclusive effects to stretch to the host state, which is lower than what is demanded in the context of the law of neutrality⁶¹ when it comes to rights to territorial integrity and freedom of navigation.

3. Observational Notes

All said, modifying the preclusive effects of self-defence to encompass the host state as a third state faces challenges from both conceptual and pragmatic standpoints.

To begin with, there is a conceptual lacuna in this re-imagination of self-defence's preclusive effects that might be overlooked in the discussion. The law of state responsibility does not have a say in deciding the legal effects of self-defence concerning the obligation not to use force. In the situation of

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.* 113–4.

⁶⁰ UN Doc. A/56/10 66 (n 29) 71.

⁶¹ See Section II.2.

self-defence against the aggressor state's military forces located within the host state's territory, does the victim state violate this obligation owed to the host state? If so, can self-defence's legal effect in terms of the obligation not to use of force oppose third states too? Neither Article 51 of the UNC nor its commentaries furnish useful clues to these questions.⁶² But the possibility remains that certain interpretations of the 'use of force' removes the risk of violation for the victim state. If only when the forcible measures are undertaken with an intent to threaten the host state's territorial integrity or political independence do they constitute the 'use of force' in Article 2(4) of the UNC against that state,⁶³ then there can be leeway for the victim state to argue that the obligation not to use force is not breached at all. Indeed, it is baked into the legal concept of self-defence that the victim state needs to carry out its self-defensive conduct in a restrictive and temporary manner, for the objective of coercing the aggressor state into halting its armed attacks. The victim state typically emphasises through political announcements that its purpose is to target the group specifically, rather than the host state.⁶⁴

⁶² Jean-Marc Thouvenin, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010), 464.

⁶³ Article 2(4) of the UNC: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' For the argument, see Travalio (n 13) 166; Olivier Corten, *The Law Against War* (Bloomsbury Publishing 2011), 85–90. It is also seen as implied in *Nicaragua Case* (n 6) para 231.

⁶⁴ For some examples, see Israel, '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' (2006) UN Doc. S/2006/515; Turkey, 'Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council' (2018) UN Doc. S/2018/53. There are also opposite claims. For an example, see United States National Security Council, 'The National Security Strategy of the United States of America' (2002) <<https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss3.html>> accessed 1 January 2023: 'We make no distinction between terrorists and those who knowingly harbor or provide aid to them.'

Based on this interpretation, no breach of the obligation not to use force is committed and no justification is needed for the victim state against the host state.

The conceptual doubt over this re-imagination has not been completely dispersed, as it still puts in jeopardy the coherence of the understanding of circumstances precluding wrongfulness. Other defences in this category all explicitly or implicitly define their preclusive effects with a bilateral configuration, exemplified by countermeasures. To elaborate, any countermeasures causing damages to third states, no matter if it is implemented against them or directed at the initial wrongful state, will bring about responsibility for the enforcing state.⁶⁵ It is also noteworthy that the conduct of countermeasures can only be non-forcible, which would if allowed, pose less of a threat to third states than a self-defensive conduct involving the use of force. By analogy, it seems disproportionate for self-defence's preclusive effects to yield a wider reach.

From the perspective of practicality, this re-imagination is far from clear about how the flexible the threshold for expanding self-defence's preclusive effects fluctuates in light of diverse obligations the victim state might breach. This re-imagination is advanced with an example of legitimising the potential injuries to the host state's right of territorial integrity when its level of involvement is actual and proved by evidence. It is then natural for us to inquire what the degree of involvement with the aggressor state is that can submit the host state to the infringement of non-interference with political independence in self-defensive conduct. How about the intrusion into freedom of commerce? The list can be infinite. This idea, lacking elaboration from the practice and research, is not yet to mature so far and carries with it the unpredictable legal consequences for states.

⁶⁵ UN Doc. A/56/10 66 (n 29) 129–30.

IV. RETHINKING THE PROBLEM OF THIRD-STATE INJURIES IN THE SITUATION OF SELF-DEFENCE: JUSTIFIABLE VIA COUNTERMEASURES

Regrettably, careful examination of the current solutions to justifying the possible injuries inflicted on the host state reveals a lack of conceptual and practical viability. Taking an outset in the criticism of those solutions provided above, I propose that the legal concept of countermeasures may be a better avenue towards justifying the possible injuries inflicted on the host state in the exercise of self-defence.

Countermeasures, as a legal concept, come from the same pool of norms where self-defence belongs to in the law of state responsibility, entitled ‘circumstances precluding wrongfulness’.⁶⁶ As pointed out as a merit of the re-imagination of self-defence, the purpose of circumstances precluding wrongfulness absolves states of *prima facie* breaches of the obligations, no matter what their substantive contents are.⁶⁷ According to the ARSIWA, countermeasures may be applied to preclude the wrongfulness of a state’s potential breach of the obligations owed to another state. However, these countermeasures only apply when the conduct is carried out in response to an internationally wrongful act committed by the other state and is meant to encourage the other state to comply with its obligation.⁶⁸

Now, it should be recalled that for the rationales of the host state’s involvement, the main dissatisfaction is a mismatch between the state responsibility generated from the host state’s wrongdoing and the outcome that the victim state’s self-defence produces.⁶⁹ This mismatch will not be an issue if we draw on the legal concept of countermeasures to dissolve the victim state’s *prima facie* breaches of most obligations owed to the host state. If the host state is found breaching its obligation not to aid or assist, then the

⁶⁶ UN Doc. A/56/10 66 (n 29) 27.

⁶⁷ UN Doc. A/56/10 66 (n 29) 71.

⁶⁸ *ibid* 129–30.

⁶⁹ See Section III.1.

victim state's potential infringements on its rights to territorial integrity and non-intervention can be rendered as not wrongful by countermeasures.

Needless to say, the implementation of countermeasures is not unbridled. It is submitted to certain procedural and substantive requirements, for instance, that its goal must be inducing the host state's cessation of aid or assistance.⁷⁰ These requirements also await a more detailed study of the problem of third-state injuries in the situation of self-defence. Nevertheless, the blank area that needs to be filled is much smaller than that of overhauling the legal concept of self-defence, with a reservoir of well-founded practice and research on countermeasures in international law.

V. CONCLUDING REMARKS

The Great Gatsby ends with this: 'So we beat on, boats against the current, borne back ceaselessly into the past.'⁷¹ For tackling the problem of justifying third-state injuries in the situation of self-defence, re-envisioning self-defence in a multilateral way is boating against the current of the mainstream perception of self-defence's legal effects. It pushes the boundaries of that bilateralism which is well established under the law of state responsibility in the direction of the multilateralism, after pinpointing what are flawed in those solutions in the traditional framework. But re-imagination does not always guarantee a success. The revised approach in our case experiences assaults on the fronts of logic and practicalities. Therefore, with the reflection on the drawbacks the previous methods expose, we rethink and fabricate another potential path for this problem built on the traditional framework of self-defence, which is to resort to countermeasures. We are borne back into

⁷⁰ UN Doc. A/56/10 66 (n 29) 129–30. For an overview of countermeasures' conditions, see Federica Paddeu, 'Countermeasures' (September 2015) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedias of International Law* (online edn) paras 17–34.

⁷¹ Francis Scott Fitzgerald, *The Great Gatsby* (Scribner 2020), 180.

the traditional perception of self-defence's legal effects, but then we beat on, re-living and transcending the past into the better route.