Should Non-State Actors Have a Right to Resort to Force in Self-Defense?

An Assessment of Legitimate Authority under Jus ad Bellum

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<tr>
<td>DASR</td>
<td>Draft Articles on State Responsibility for Internationally Wrongful Acts</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILA</td>
<td>International Law Association</td>
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<td>ISIS</td>
<td>Islamic State of Iraq and Sham</td>
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<td>NSA</td>
<td>Non-State Actor</td>
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<td>NTC</td>
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<td>OIC</td>
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<td>Palestine Liberation Organization</td>
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<td>RtoP</td>
<td>Responsibility to Protect</td>
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<td>UNIFIL</td>
<td>United Nations Interim Force in Lebanon</td>
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1 INTRODUCTION

1.1 The legitimate authority of the State to resort to self-defense

This thesis is inspired by one set of fact and one of law. The set of facts is the peculiar dichotomy between Lebanon and Hezbollah, the latter representing the superior military force vis-à-vis the State and whose role, through forceful as well as political measures, has increasingly come to be portrayed as a defender of the State against foreign threats. The set of law relates to jus ad bellum as a domaine réservé for States; the prohibition against the use of force as well as the exception from this rule pursuant to the UN Charter pertains exclusively to States.

The state-centrism of jus ad bellum remains unchallenged. It is indisputable that article 2 (4) of the UN Charter relates only to States, and that article 51 supports, and is seen to support, an exclusive right for States to resort to force in self-defense and that only States are bound by the rules regulating the resort to force pursuant to the Charter.1 This exclusivity serves as a point of departure for one of the fundamental conditions of jus ad bellum, legitimate authority to resort to force in self-defense.2

That only States may possess legitimate authority is natural as the rules under jus ad bellum are accepted as binding only on States. As the prohibition in article 2 (4) does not apply to non-state actors,3 neither does the exception from this prohibition by way of self-defense pursuant to article 51. NSAs do not have a right of self-defense under international law and they are not traditionally considered as subjects of international law, or holders of rights and duties under international law.

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2 One may find a variety of ways to describe this authority of the State in the just war literature, for example proper authority, right authority, competent authority, and sovereign authority, see Reitberger (2013) p. 67; for the purpose of this thesis, “legitimate authority to resort to force” is used synonymously with “the right to resort to force in self-defense.”
3 Hereinafter «NSA» and “NSAs”
1.2 The increased relevance of the non-state actor

It is inherent in the very concept of statehood that States do not desire any impediment to their prerogatives, and so the debate on the role of NSAs under *jus ad bellum* has centered primarily on the right of the State to resort to force in self-defense against such entities. Since the *Nicaragua Case* \(^4\) in 1986, where some of the criteria determining the attribution of State responsibility were articulated, \(^5\) these conditions have been elaborated and probably supplemented by new criteria for justifying the invocation of self-defense. The flame of this discussion was fanned subsequent to the 9/11 terrorist attacks on the USA in 2001, an incident that brought this discussion to the fore and created new grounds upon which States might base a lawful response in self-defense against these actors.

*Jus ad bellum* is still considered a domain of States. The resort to force in international law must therefore be considered within the ambit of statehood exclusively. For a private actor, which could be an armed NSA, to be able to act in self-defense, its actions would need to be attributable to the State. The ILC Draft Articles on the Responsibility of States for International Wrongful Acts \(^6\) may provide valuable guidance on the extent to which the acts of these entities may be considered acts, and violations of international obligations, of States. As only the State is bound by the prohibition against the use of force, the response, although carried out by a NSA, must be attributable to the State for the right of self-defense to arise.

In recent decades, an intensified debate on the legal status of NSAs in international law has taken place. \(^7\) The debate has been, and still is, partly centered on how to conceptualize these entities, whether one may give them an international personality with obligations as well as rights, in a context that is only partly controlled and influenced by States. \(^8\) The question as to how international law may serve to encompass a diverse array of entities and their faculties in conjunction with armed conflicts plays into the core of this debate. As far as international law

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\(^4\) Hereinafter “Nicaragua”
\(^6\) Hereinafter “Draft Articles” and “DASR”
\(^7\) Wagner (2013) paras. 2 and 20; Walter (2007) para. 6.
\(^8\) Wagner (2013) para. 2.
pertaining to NSAs *de lege lata* is concerned, the debate has primarily been limited to the conferring on them of rights and duties in international humanitarian law.\(^9\)

This topic centers on the notion of non-state actors, referred to as “NSA,” in singular, and “NSAs,” in plural. Armed non-state actors, referred to as “armed NSA,” are a particular sub-category of the general category of NSAs. Many such entities possess armed capacity as one of several traits. This study deals with “armed NSAs,” but takes as a starting point the notion of “NSA,” because it is a broader category and because the armed capability of the actor is part of the assessment under the alternative model in chapter 3. The possession of armed capabilities represents part of the discussion on whether legitimate authority should be due or not. However, this discussion will apply the more specific notion of “armed NSA” in contexts where the general notion of “NSA” is not sufficiently precise in covering the issue.

One may discern two approaches in the contemporary international legal discourse when addressing the rights and duties of NSAs under *jus ad bellum*. One way is to address the rights of NSAs by acknowledging or including them as international actors *de jure* or as State surrogates.\(^11\) This approach represents the permeating factor in the Draft Articles, namely the attribution of responsibility to a State. Another way is to address the shift in the state-centric paradigm in international law towards a more horizontal application of the law.\(^12\) This may support the legitimate authority of the NSA under *jus ad bellum*, presumably in a more independent manner.\(^13\)

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\(^9\) For the purpose of this thesis, “de lege lata” is understood as determining the law pursuant to the traditional positivist approach.

\(^10\) The domain of *jus in bello* is not dealt with as such in this thesis. When referred to, it is to make points of general validity in conjunction with the discussion on international legal personality of NSAs in chapter 3.

\(^11\) Both Held and Valls, who maintain that legitimate authority to resort to force in self-defense is reserved for States, take this approach. They argue that also National Liberation Movements may have legitimate authority, despite their use of force being considered terrorism by some. The basic premise here is that the aims pursued by these movements must be justifiable, see Held (2005) and Valls (2000).

\(^12\) Both Magnus Reitberger and Cecilie Fabre seemingly take this approach as they opt for the removal of legitimate authority as a condition for a war to be just and as a requirement under *jus ad bellum* altogether, making the right of self-defense applicable not only to States, but to NSAs as well. They make “justice” and “just war” pursuant to the just war theory their focal points and argue that the war may be “just,” the requirement of legitimate authority notwithstanding, see Reitberger (2013) and Fabre (2008).

\(^13\) This is the way in which this thesis goes about in order to discuss the legitimate authority of the NSA *de lege ferenda* in chapter 3.
A way in which to approach NSAs is through the prism of international legal personality.\textsuperscript{14} This concept, based on the stipulation that all actors of any legal system must have legal personality, presupposes that States are full members of the international legal system.\textsuperscript{15} The concept of international legal personality has increasingly given certain NSAs limited or partial personality, rights and duties, through state conferral.\textsuperscript{16} This is a development particularly reflected by the conferral of rights and duties on international governmental organizations, while it seems more controversial with regard to multinational companies.\textsuperscript{17}

While the concept of international legal personality has been regularly put to use in order to engage NSAs on the international plane, there is considerable skepticism to the granting of rights to NSAs under \textit{jus ad bellum}, confining this debate to a critical analysis of the law.

1.3 \textbf{Research questions}

Due to the broad acceptance (by States) of States as the principal actors of international law, and exclusive entities as far as the resort to force is concerned, there is little State practice, or other international legal sources supporting independent rights for NSAs in this domain; in terms of traditional sources, the discussion of any such right in international law takes place in something close to a legal vacuum.

This thesis acknowledges the state-centric perception of \textit{jus ad bellum lex lata} and presents and discusses some of the core issues related to the right of self-defense in international law as a State prerogative. The starting point for this dissertation is aggression by one State, and the response in self-defense by another. In addition to assessing the right of a State to resort to force in self-defense against a NSA, this thesis also accounts for some of the situations in which the conduct of private actors may be attributable to the State, bringing their acts within the domain of the State, possibly enabling the conduct of the NSA to constitute an act of self-defense pursuant to UN Charter article 51.

\textsuperscript{14} Hereinafter “international legal personality” and “international personality.”
\textsuperscript{15} Walter (2007) paras. 1 and 5; Jennings and Watts (1992) pp. 119-120.
\textsuperscript{17} Crawford (2012) pp. 121-122 and 527-529.
This thesis grapples with the classical questions concerning the use of force in international law and presents the extent of the State’s legitimate authority to resort to force pursuant to article 51. Subsequently, it deals with a wider discussion by addressing the inclusion of NSAs under *jus ad bellum* through a critical analysis drawing on both international law as well as legal philosophy. This assessment is conducted by offering an alternative model, consisting of both legal and philosophical considerations, to enable a systematic argumentation in favor and against extending legitimate authority to NSAs.

This dissertation poses two principal research questions. The first question is general, while the second is particular, testing out the findings in the first research question on a specific case.

The first research question is whether a NSA does\(^\text{18}\) or should\(^\text{19}\) have legitimate authority under *jus ad bellum* to resort to force in self-defense of the target State\(^\text{20}\) by the use of force across the target State’s borders. The second question is whether Hezbollah does or should have legitimate authority to resort to force in self-defense of Lebanon by the use of force across Lebanon’s borders.

Whether a NSA has legitimate authority to resort to force in self-defense *de lege lata*, is answered by presenting the starting point for the rules on the resort to force, as well as by investigating the extent to which the actor’s conduct may be attributable to the State so that self-defense can be claimed on that basis. The question whether a NSA should have legitimate authority to resort to force in self-defense is responded to by means of a critical analysis and the offering of an alternative model for assessing the legitimate authority of such actors *de lege ferenda*.\(^\text{21}\)

\(^{18}\) “does” refers to the law as understood *de lege lata* in accordance with the positivist approach.

\(^{19}\) “should” alludes to the law *de lege ferenda*. It does not refer to the law as how it may be currently interpreted. It is rather employed to indicate that elements of both law and philosophy may be invoked as arguments for a change in the law.

\(^{20}\) “target State” is understood as the State subjected to an armed attack and whose right of self-defense is activated.

\(^{21}\) For the purpose of this thesis, “de lege ferenda” alludes to how elements of both law and philosophy may be invoked as arguments for a change in the law, not that existing law should be adduced as a basis to infer contents of law to this end.
The inquiry as to whether NSAs *should* have legitimate authority is based on the stipulation of a scenario where a State suffers an armed attack, whereby the right of self-defense may be invoked. As it is presupposed that the State is unable to respond to the aggression, it is asked whether a NSA should have a right to resort to force in self-defense pursuant to the Charter article 51.

The use of the term “should” indicates that the dissertation is partly dealing with the questions by way of a critical analysis through offering an alternative model and by highlighting some of the principled, legal and philosophical, challenges associated with a state-centric perception under particular circumstances. The employment of this term as far as the research questions and conclusions are concerned, must therefore not be understood as an indication of personal desirability, but rather as a way in which to describe the outcome of this particular part of the discussion.

The second research question, relating to the application of the findings to Hezbollah is, besides a summary application of the law *de lege lata*, primarily answered by applying the alternative model.

The way in which the research questions are dealt with is elaborated in the following sections 1.2 and 1.3 on structure and methodology respectively.

1.1 **Structure**

This thesis deals with two principal research questions. The first question is general, while the second is particular and relates to the application of the findings in the first research question. The first and broader question is whether a NSA does or should have legitimate authority under *jus ad bellum* to resort to force in self-defense of a State by the use of force across the target State’s borders. The second and particular question is whether Hezbollah does or should have legitimate authority to resort to such force in self-defense of Lebanon by the use of force across Lebanon’s borders.

The thesis builds on a bifurcation of the analysis in accordance with the research questions. With the exception of a summary application to the case of Hezbollah, chapters 2 and 3 both deal with the general questions. Chapter 4 covers the application of the findings regarding the
alternative model to the case of Hezbollah. Finally, a number of conclusions are drawn from the findings and presented in chapter 5.

The discussion in chapter 2 is introduced by providing a general account on the State as the principal actor in international law. This chapter deals briefly with the instrumental role of the State in the international community and includes a presentation of the prohibition against the use of force and a more elaborate account on the exception of self-defense as enshrined in the UN Charter. Moreover, this chapter contends with some of the classical situations of *jus ad bellum*. It commences with the starting point, which is armed conflict between two States, in sections 2.1 and 2.2. It continues with the discussion of the right of States to resort to force in self-defense against NSAs in section 2.2.1. Subsequently, it addresses some of the Draft Articles for state responsibility in order to assess whether NSAs may resort to self-defense by having their acts attributed to the State in section 2.2.2. Finally follows a brief account on Hezbollah’s right, or lack of right, to resort to force pursuant to the sources discussed in chapter 2.

The framework for the alternative model is presented in chapter 3. The model is based on the concept of international legal personality and offers another way in which to deal with NSAs in situations that fall outside the scope of international law as far as *jus ad bellum* is concerned, and discusses whether the NSA should have an independent right to resort to force in self-defense *de lege ferenda*.

The assessment involves an introduction to the concept of legitimate authority in self-defense in contemporary international law in section 3.1, before an analysis of international legal personality follows in sections 3.2 and 3.3. While section 3.2 offers a general overview of the concept of international personality as such, and an introduction to the concept as understood by various scholars, section 3.3 provides the actual framework of this part of the thesis.

In section 3.3, running from sections 3.3.1 to 3.3.3, the alternative model, consisting of the three stipulated criteria for international legal personality, is presented. The three criteria are participation, community acceptance, and needs, the contents of which are explained in section 1.2 on methodology and in chapter 3. Sections 3.3.1 and 3.3.2 deal with the criteria of participation and community acceptance. The third and final criterion, needs, is discussed in section 4.3.3.
Section 4.3.3 grapples with the need that NSAs should have legitimate authority to resort to force in self-defense. It introduces the concept of legitimate authority in a legal philosophical perspective and discusses the conditions for attaining legitimate authority within a variant of legal philosophy. The focal points in the discussion are the two primary components of legitimate authority, namely “power” and “authority.” Through a presentation of views of scholars in legal philosophy, the ways in which “power” is expressed and “authority” is attained are assessed. Next follows an assessment of the needs as expressed by the invoking of law as well as legal philosophy, all in order to further substantiate and nuance the argument that the NSA should have legitimate authority to resort to force in self-defense.

Following the account on the alternative model, the findings are applied to the case of Hezbollah in chapter 4. This section pursues a deductive approach with the criteria discussed under sections 3.3.1-3.3.3. After an introduction in section 4.1, the criterion of Hezbollah’s de facto participation is briefly applied in section 4.2. Section 4.3 addresses the application of the criterion of community acceptance, and section 4.4 the criterion of needs.

As it is the needs that the NSA has legitimate authority that is discussed, the assessment is divided into one dealing with “power” on one side and “authority” on the other. The notion of “power” is subcategorized into accounts on the power of the Lebanese state and the power of Hezbollah as far as their ability to attend to the defense of the State is concerned.

The concept of “authority” is addressed by dealing with the authority of the Lebanese state and Hezbollah on the basis that authority is obtained or lost on moral grounds or on the merits of being regarded as an authority by the domestic community.

Finally, conclusions to the research questions are presented in chapter 5. The conclusions address whether NSAs do or should have legitimate authority under jus ad bellum to resort to force in self-defense of a State by the use of force across the target State’s borders, as well as whether Hezbollah does or should have legitimate authority to resort to force in self-defense of Lebanon by the use of force across Lebanon’s borders.
1.2 **Methodology**

This thesis offers an account on the right of self-defense under *jus ad bellum* as well as a critical analysis of legitimate authority as a condition excluding NSAs, by presenting an alternative model pursuant to which the inclusion of such actors may be contemplated.

1.2.1 **Assessment *de lege lata***

As far as the assessment of international law in chapter 2 is concerned, this dissertation derives its conclusions based on a traditional legal positivist approach. The doctrine of positivism focuses on locating the law *lex lata* rather than making arguments for the law *lex ferenda*, and determines the contents of the law based on what has been consented to by States.\(^22\) The positivist approach has two further implications in this thesis: First of all, the starting point is an understanding of international law as a result of the will of the actors of international law; second, the theory of sources builds on the recognized sources of international law as found in the Statute for the International Court of Justice\(^23\) article 38.\(^24\) Moreover, the sources are subjected to the rules of treaty interpretation in the Vienna Convention on the Law of Treaties\(^25\) articles 31-33, which are also considered as customary international law.\(^26\)

Article 38 of the ICJ Statute lists relevant international legal sources applicable when deciding on a case brought before the International Court of Justice,\(^27\) and is perceived as a reference to the formally recognized sources of international law.\(^28\) These are international conventions, international custom, general principles of law, judicial decisions, as well as teachings of “the most highly qualified publicists.”\(^29\)

The UN Charter is necessary when assessing the rules pertaining to the use of force in international law and constitutes the basis for this thesis. The right of self-defense emanates also

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\(^{23}\) Hereinafter “ICJ Statute”


\(^{25}\) Hereinafter “VCLT”

\(^{26}\) Shaw (2014) p. 676.

\(^{27}\) Hereinafter “ICJ” and “the Court”


\(^{29}\) Crawford (2012) p. 22.
from customary international law. Custom is among the sources of international law listed in article 38, paragraph 1 of the ICJ Statute, which refers in its subparagraph (b) to “international custom, as evidence of a general practice accepted as law.”

While regularly supplementing treaty law, international custom is generally perceived as congruent with the rules on the resort to force as enshrined in the Charter. As far as customary international law is concerned, it is principally the Draft Articles, which have been accepted as international custom, that are employed in this dissertation. Attribution has been a recurrent topic in international arbitral tribunals. Some of these cases are adduced to complement the understanding of the contents in the rules on attribution. Moreover, state practice is adduced by the invoking of positions of both individual States as well as various organs and expert committees of the UN, to determine to what extent the law has been developed in this field by the establishing of international custom. Security Council resolutions, many of which are considered legislative by commentators, as well as United Nations General Assembly resolutions and other UN documents are also adduced and discussed. This thesis acknowledges, however, that the scope of the practice of international organizations, and their resolutions as far as constituting legal sources is concerned, is a topic of wider discussion. While not considered sources of law, it is generally accepted that the General Assembly articulates the contents of customary international law, and that its adopted documents may thus be employed by way of reference.

30 See also the Second report of Special Rapporteur, Michael Woods, on identification of customary international law A/CN.4/672.
34 Crawford (2012) pp. 39-40; Brownlie argues that while the quality of these awards varies, some have contributed to the development of international law, se for example Kenneth P. Yeager v The Islamic Republic of Iran, Iran–U.S.C.T.R., vol 17 (1987). He also notes that the ICJ adduces arbitral awards regularly, see Crawford (2012) pp. 39-40.
36 Wolfrum (2011) para. 43.
International jurisprudence from the ICJ is also relevant when interpreting the rules on the use of force and is invoked to this end in the following. As noted by Shahabudeen, the determination of rules of law by the ICJ may be read as including a determination of new rules of law by a decision of the Court itself, which could in turn be based on earlier judicial decisions or the writings of publicists. Brownlie argues that while judicial decisions are not formal sources of law, they are often seen as evidence of law and important when deciding on a case before the Court, the absence of a doctrine of precedent notwithstanding. Wolfrum has argued that the Court’s adducing of previous rulings is an expression of choice, rather than a sense of compulsion, and that the validity of such decisions as sources of law is questionable. At any rate, the Court is generally conceived to try to obtain consistency in their rulings and may therefore indicate the way in which the law is understood. This thesis departs from this latter notion whereby international jurisprudence is indeed a relevant source of law.

1.2.2 Assessment de lege ferenda

For the purpose of this thesis, writings of international legal scholars are adduced generally. They are, however, especially important in the second part of this dissertation where the alternative model is presented; as the inclusion of NSAs in the sphere of jus ad bellum is regularly considered a legal anomaly, the availability of legal sources are scarce, making contributions from scholars all the more important in order to structure consistent and reasonable arguments de lege ferenda. The advancement of an alternative model is thus chosen due to the lack of legal material addressing critically the condition of legitimate authority; it is not a matter handled by the Court, nor an issue challenged through the development of customary international law. It is rather a condition that is ubiquitously accepted as a prerogative of the State and therefore left alone. While undoubtedly a consequence of the will of States, it is the opinion of the author that the condition is deserving of a more elaborate assessment beyond its declaration as fact.

37 ICJ Statute article 38 (1) d.
40 Wolfrum (2011) para. 46.
42 ICJ Statute article 38 (1) d.
43 See chapter 3.
The critical analysis is presented by offering an alternative model wherein both international law and legal philosophy are drawn upon. A combination of these two elements is chosen in order to address some of situations not covered by the law *de lege lata*. With regard to the international law adduced in this model, it is interpreted pursuant to the positivist approach. However, as they are employed within a framework not accepted to apply to rights of NSAs under *jus ad bellum*, the conclusions derived from them as far as responding to the research questions are concerned, are inherently *lex ferenda*.

What makes this part of the thesis a discussion *lex ferenda* is thus twofold: First of all, the chosen frame of reference for determining international legal personality is not used when dealing with the rights and duties of NSAs under *jus ad bellum*, but rather employed when dealing with NSAs in a more general sense. Second of all, it includes a philosophical piece, which does not express the law, but rather serves to highlight problematic aspects of the law *de lege lata*.

As far as the sections on legal philosophy are concerned, the works of Shapiro and Raz constitute the frame of reference as they both present broad assessments of both “power” and “authority.” This entails approaching the matter of legitimate authority as authority to rule in a more general sense, before molding it into an address of legitimate authority to resort to force particularly.

Regarding the concrete application of the alternative model to the case in point, a sample of writings and articles of various scholars and journalists are adduced to illustrate the challenges arising from a situation such as the one in which Hezbollah and Lebanon find themselves. By using a variety of accounts on Lebanon and Hezbollah, as well as academic articles, in addition to a significant amount of news articles, it has been endeavored to summon information sufficient to paint a general picture of the case to which the findings of the alternative model applies.

Admittedly, this element of the research question challenges a stipulated fact and sound axiom in international law. The intention of this thesis is not to propose the alteration of a condition in a way very few would ever agree to, but rather to analyze parts of the law, offer a theory *de lege ferenda*, and preferably give rise to a principled discussion on the matter. The goal of this thesis is thus not primarily to propose a finalized legal framework which one should
implement as international law *lex lata*, but rather to bring the discussion on the principled implications to the fore, as well as inducing critical thinking about the condition of legitimate authority in international law, by making use of familiar frames of references while employing legal terminology in tandem with philosophical considerations.
2 States as the principal actors of international law

2.1 Introduction

States are the principal actors of international law and the entities which international law seeks to regulate. As States are the primary actors, individuals and entities other than States, are considered secondary actors in international law. As with any other legal system, international law is based on the concept of legal persons with legal personality. The State is considered the traditional and most important subject in international law and an international legal person in its fullest sense. The international person has rights as well as duties within the confines of that legal system. The State has all the rights and duties available in this system, making them international legal persons with full international legal personalities. Meanwhile there is a broad acceptance of NSAs as possessors of partial or limited international legal personality. The starting point, however, is that these entities may only have rights and obligations conferred on them by States.

From a State perspective, there is inherent skepticism towards granting NSAs wide-reaching international personality. This skepticism is preponderant in the field addressed in this thesis, jus ad bellum. Armed NSAs are, domestically and internationally, regularly considered illegal and illegitimate actors as they are seen as threats to State rule and stability. These actors are consequently often denied legal personality as it may contribute to legitimating their existence and acts, as well as enhance their role in the State and in the international community writ large. Recognition of rights under jus ad bellum is seen as particularly problematic, as it is a domain to which it is conceived as vital that only States have access. As a consequence,

45 These may be referred to as “non-state actors,” encompassing all actors other than States on the international plane, from individuals to multinational companies, see Wagner (2013) para. 1; Cassese (2005) p.3; Jennings and Watts (1992) p. 16
46 Jennings and Watts (1992) pp. 119-120.
armed NSAs regularly have their international personality limited to the possession of rights and duties under international humanitarian law.

2.2 The State as the principal actor: From Westphalia to the 21th century

Observing the historic development of the international community and international law, one may divide into four main stages; the first runs from the initial and gradual emergence of the global community from the 16th and early 17th centuries to the onset of the First World War; the second from the founding of the League of Nations subsequent to the First World War and till the end of the Second World War; the third from the establishment of the United Nations in 1945 to the fall of the Soviet Union and the end of the Cold War in 1989; and finally, the present stage. 53

A watershed event as far as the first period is concerned is the Peace of Westphalia in 1648, an event which ended thirty years of brutal war on the European continent and ushered in a defining period where modern national States began their rise to prominence. 54 It marked the beginning of an era of international law with States as the primary actors, independent of any other superior authority. 55

The second stage, prompted by the end of the First World War and the establishment of the League of Nations, brought attention to the insufficiencies of the world order and the manner in which States organized their relations. 56 In many ways, the outbreak of the First World War championed the decadence of a “race to the bottom” by States and their constant contest for hegemony by the usurping of colonies around the globe. 57 As this ferocious war came to an end, the warring parties recognized the necessity to rearrange their handling of foreign affairs. 58 In an attempt to coordinate fundamental elements of State behavior, the League of Nations was set up in 1920 to organize international interaction and prevent another round of

57 Ibid.
worldwide conflict. The result, however, was something close to total failure. Long before culminating in the cataclysmic events of the Second World War in 1939, the League had not succeeded in functioning as an effective deterrent to States’ unilateral use of force.\footnote{Crawford (2012) p. 13; Anghie (2005) pp. 123-125; Cassese (2005) p. 36.}

The third stage, framed by the end of the Second World War and the fall of the Soviet Union, marked the beginning of the international legal order as we know it. By the establishment of the United Nations in 1945, lessons had purportedly been learned from the failures of its forerunner, and international peace was again emphasized as the number one priority.\footnote{Cassese (2005) p. 37; it was rather the Kellogg-Briand Pact of 1928 that constituted the main legal instrument promoting peaceful relations between States in the interwar period, see Crawford (2012) pp. 744-746.} The immensity of destruction witnessed during the six years of the Second World War, as well as the development of weapons of mass destruction with the potential to wipe out entire States at impact, served as impetus to coordinate efforts and create a bulwark against repeated hostilities. The creation of the UN through the Charter, the prohibition of the use of force, as well as the enforcement mechanism entrusted to the Security Council, were to become key inventions of international law for decades to come.\footnote{Cassese (2005) p. 39; Crawford (2012) pp. 13-14.} Also important was the establishment of the UN as an expression of the State as the main actor in international law. Through membership and the adoption of the UN Charter, the important role of States, as members of the international community, and as entities which international law sought to regulate, was reconfirmed.\footnote{Jennings and Watts (1992) p. 332.}

Concomitantly with the first decades after the Second World War, a development towards a new perception of international legal persons took place.\footnote{A development in this regard took place already in the 17th century, see Wagner (2013) paras. 6-12.} From being a concept associated with States, more or less exclusively, the \textit{Reparation Case} in 1949 represented a breakthrough as it acknowledged international legal personality for a new entity, the UN, an International Governmental Organization. This granting of competence was, however, predicated\footnote{Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174; hereinafter “Reparation”}
on the express will of States. It was clear that States were still the instrumental actors in international law.\textsuperscript{66}

While the events since the emergence of modern national States in the 16\textsuperscript{th} century have offered a variety of challenges, as well as various modes and strategies to handle them, the concept of the State as the principal actor of international law has remained throughout these tumultuous times. Grounded in a basic premise of international law as state-centric, it is the State that is to control the territory it owns through law-making and executive measures.\textsuperscript{67}

While the State commands \textit{de jure} authority over the territory, other entities may only wield \textit{de facto} power on the entire or parts of the territory. It is supposedly by conferring all rights, duties, and competences on States that order is maintained. Accordingly, the organization of the world seemingly rests on an assertion that the disintegration of this State-led order would cast the international community into chaos and permanent disorder.\textsuperscript{68}

The rise of new actors and entities under the purview of international law must therefore be seen through these state-centric lenses. While the State possesses full legal capacity, emerging actors, be they insurgents, multinational companies, opposition groups or otherwise, may only have limited legal capacity, a capacity which is ultimately contingent on the conferral of legal capability onto them by States.\textsuperscript{69} And when such capability is given to them, they may still only possess legal ability to the extent accepted by States. For such actors to attain full legal capacity, they would have to transform into primary actors of international law - it would require for them to become States.\textsuperscript{70}

2.3 \textbf{General prohibition against the use of force}

State-centricity and the role of the State as the principal actor of international law extend to all areas of international regulation. Perceiving the State as the principal actor is seen as especial-
ly urgent when it comes to the international law regulating the resort to war, as the right of self-defense may be seen to represent the very hallmark of sovereignty.\textsuperscript{71}

The State is intrinsically related to the concept of sovereignty, expressed internally through the supremacy of the governmental institutions and externally through the supremacy of the State as an international legal person.\textsuperscript{72} The sovereignty of independent States is enshrined in the UN Charter article 2 (1) and constitutes a fundamental axiom of international law.\textsuperscript{73} From the notion of sovereignty, the right to territorial integrity and principle of non-intervention is derived.\textsuperscript{74} The convergence of these fundamental principles of international law has long made up the basis for a legitimate resort to force in the event of an armed attack, prompting the right to self-defense – a right considered a State prerogative which traces its origins from natural law and the inherent right of every human being to defend him or herself.\textsuperscript{75}

The point of departure for a legal understanding of legitimate authority to resort to force in self-defense in international law is found in the UN Charter articles 2 (4) and 51. Article 2 (4) codifies the prohibition against the use, as well as threats of use of force in international relations and binds States exclusively. While not seen as applicable to NSAs generally, it is assumed that article 2 (4) extends its application to \textit{de facto} governments and so-called pre-state entities, as well as international military organizations.\textsuperscript{76} Besides constituting the “cornerstone of international law,”\textsuperscript{77} this prohibition against the use of force is also considered customary international law and \textit{jus cogens}.\textsuperscript{78} As far as the contents of article 2 (4) and the parallel pro-

\textsuperscript{71} Alexandrov (1996) p. 10; Walzer argues that defense is the “deepest purpose” of the State, see Walzer (2006) p. 60.
\textsuperscript{72} Shaw (2014) p. 352; Amoureux and Steele (2014) p. 76.
\textsuperscript{75} Walzer (2006) p. 58.
\textsuperscript{76} Including organizations such as NATO and ECOWAS, see Dörr (2011) p. 26.
\textsuperscript{78} \textit{Jus cogens} may be defined as “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,” see VCLT article 53; Frowein (2013) para. 1; Simma et. al (2012) pp. 229-230; \textit{Nicaragua (Nicaragua v. United States of America)}, Merits, Judgment. I.C.J. Reports 1986, p. 14, at 100-101, para. 190.
hibitation in customary international law is concerned, they are generally perceived to be con-
gruent.79

The Charter article 2 (4) refers to “Members,” meaning the sovereign Member States of the
United Nations. The prohibition against the use of force thus presupposes that it is not only
practical, but also a necessity de jure that responsibility to refrain from the use of force lies
with the sovereign States.80 Recognizing that the organization of the world is based on one of
statehood, this sole application to States may be seen as a concrete expression of the fact that
international law primarily seeks to regulate the behavior of these entities. It is generally ac-
cepted that the prohibition of the use of force cannot be seen to extend to other groups or in-
dividual, regardless of their military or other capabilities.81 For the acts of NSAs to become
relevant under article 2 (4), they would have to be attributable to the State.82 As a conse-
quence, the state-centric application of the prohibition against the use of force is essentially
undisputable.

The traditional exceptions from this prohibition are force used when decided upon by the
United Nations Security Council under the UN Charter Chapter VII or when resorted to as a
measure of individual or collective self-defense.83 These grounds are also recognized as Cus-
tomary International Law, the essence of which is congruent with the right of self-defense in
article 51.84 The content and scope of this right, however, remains debated.85

2.4 The right of self-defense pursuant to UN Charter article 51

The right of self-defense is a fundamental exception from the ban on the use of force. This
right, described as the supreme right of sovereign States and the very hallmark of sovereignty,

79 Dörr (2011) para. 9; this has also been presupposed in international jurisprudence, see Nicaragua (Nicaragua
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,
82 Dörr (2011) para. 30
83 UN Charter articles 42 and 51.
84 Greenwood (2011) para. 7.
emanates from article 51 of the Charter and Customary International Law. As an exception from the prohibition in article 2 (4), it premises that the armed attacks originate from a State, and occur in another State, for the target State to be bound by, and derive a right in accordance with, article 51. In the Wall Case, this was put clearly by the Court, stating that article 51 of the Charter recognizes the existence of an inherent right of self-defense in the case of an armed attack by one State against another.

Article 51 regulates the right of self-defense in the event of an “armed attack.” In Nicaragua, the Court remarked that an armed attack may involve actions by regular armed forces across an international border, as well as acts by private actors whose conduct is attributable to the State. The force resorted to, however, needs to amount to an armed attack. The Court expressed that for the aggression to amount to an “armed attack,” the “actions must occur on a significant scale.” Consequently, the magnitude of the use of force necessary to invoke the right of self-defense is greater than the force permitted pursuant to article 2 (4); use of force per se does not give rise to a right to respond with armed force – the initial violation must be significant enough to amount to an “armed attack.”

Article 51 of the Charter stipulates that the armed attack is directed against a “Member of the United Nations” and that the target State obtains a right of “individual or collective self-defense.” Individual self-defense is widely conceived as a right of the State exclusively. This follows from the fact that the Charter is predicated on the concept of sovereign States as

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88 Hereinafter “the Wall”
89 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C. J. Reports 2004, p. 136, at 194, para. 139.
91 Ibid.
94 Ibid. p. 1400.
the actors to which the Charter relates. This is corroborated by the very necessity of considering the exception in article 51 in conjunction with the norm enshrined in article 2 (4), the wording of which refers unequivocally to States. Embarking on an assessment of legitimate authority, it is thus only natural to commence from an understanding that authority is conferred on the State and its formal representatives as far as the resort to force in self-defense is concerned. This was also expressed by the Court in Nicaragua, in conjunction with a reference to the right of collective self-defense, whereby it expressed that it is the State which is victim of the armed attack which must “declare” the view that it has indeed been subjected to such an attack.\footnote{Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, at 103-104, para. 195.}

This shows that UN Charter articles 2 (4) and 51 were construed, and do primarily seek, to regulate the classical constellation in international armed conflicts, namely the conflict between two sovereign States.\footnote{Milanovic, Marco, Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum, February 21, 2010.} In the following, a recurrent scenario, where a NSA subjects a State to an armed attack, and where the target State claims the right to invoke self-defense in accordance with article 51, is discussed.

\subsection{2.4.1 The State’s right of self-defense against non-state actors in response to an armed attack emanating from the territory of another State.}

While the main rule is that the armed attack must be carried out by a State, and the target State has a right to respond to such an attack pursuant to article 51 by way of individual or collective self-defense, article 51 makes no specific mention of the nature of the actor perpetrating the armed attack against the target State. As a response to the increase in use of force by NSAs, and in order to reply to the need for the State to defend itself from such threats, the right to resort to force within the ambit of article 51 has been developed in state practice over the past 30 years.

Since Nicaragua in 1986, the right to respond to armed attacks from NSAs, if their actions could be attributed to a State, has been recognized.\footnote{Kees (2011) para. 8.} Pursuant to the “Nicaragua Doctrine,”
which may be characterized as the traditional approach to this matter, a State may only invoke the right of self-defense if the State from which the NSA operates and directs its attacks, is responsible for its actions through attribution, the rules of which are today derived from the *Nicaragua Case*, the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in 2007, as well as the Draft Articles. In short, when a NSA, rather than the State, perpetrates the armed attack, attribution is necessary for the prohibition against the use of force in article 2 (4) to be conceived as violated and the exception in article 51 activated.

The rules of attribution offer a set of criteria applicable when deciding on a State’s responsibility for the violation of an international norm. In *Nicaragua*, attribution was articulated as a requirement that the State must exert “effective control” over the individual or entity in question, a criterion that heralded attribution as a requirement for self-defense. The test of “effective control” was later maintained in *Genocide*. Here its scope was furthermore elaborated to exclude the cases in which the State had “effective control” only with the “overall actions” of the group. For attribution to be established, “effective control” was required to pertain to the specific operations in which the violation of international obligations took place.

The concept of attribution has been further elaborated and “codified” in the Draft Articles, the provisions of which are widely perceived to constitute customary international law. Based on the Draft Articles, as well as the cases of both *Nicaragua* and *Genocide*, there are today several avenues by which attribution can be established: By the private actor constituting an organ of the State; through the explicit empowerment of an individual or group by the State; in the cases where the private actor carries out necessary governmental functions in the State’s absence; and by subsequent endorsement of its actions as acts of the State by the State. The

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98 hereinafter “Genocide”


102 Ibid.

103 See DASR articles 4, 5, 9, and 11.
requirement of “effective control” as pronounced in Nicaragua and Genocide has been included in Draft Articles article 8.104

Subsequent to the 9/11 terrorist attacks against the US and the armed response in Afghanistan, the conditions of attribution seem to have been supplemented as the right of self-defense against NSAs also seem to have been justified on the basis of a different set of criteria.105 In the following, these developments, as well as cases that lend support to the doctrine of attribution, are discussed in further detail.

2.4.1.1 The question of attribution after the 9/11 terrorist attacks in 2001

After the attacks by members of the international terrorist organization, Al-Qaida, on the USA in 2001, a development has seemingly taken place where resort to force in self-defense has been justified on the basis of other criteria than attribution.

Subsequent to the 9/11 attacks, apparently there was broad international support for a military response to the shocking incident that had killed more than 3000 people and struck fear in the heart of the US.106 One may claim, however, that this support, which was also expressed through various Security Council Resolutions,107 should be viewed as a measure of political support, rather than a support of a right to act in self-defense in that and similar situations.108 Others, however, have argued that the response must be seen as a lawful response in self-defense.109 While the US and Great Britain claimed that they were acting in self-defense and reported invocation of UN Charter article 51 to the Security Council, it is clear that the acts of Al-Qaeda were not attributable to the Taliban regime and Afghanistan, and that the right of

105 Milanovic has argued that attribution is no requirement based on the wording in articles 2 (4) and 51, but that it may be derived from practice, see Milanovic, Marco, Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum, February 21, 2010.
self-defense could thus not be justified on that traditional basis. The question was thus whether the international community considered the response of the US and Great Britain an act of self-defense in accordance with article 51, the lack of attribution notwithstanding. Here, the resolutions passed by the Security Council subsequent to the attacks may provide some guidance as far as laying down some newfound criteria for justifying self-defense against NSAs is concerned.

The day after the attack, and on September 28, the UN Security Council adopted resolutions in response to the attack on the US, recognizing the right of individual and collective self-defense. Before acting in self-defense by resorting to force against Al-Qaeda in Afghanistan, accounts indicate that the US requested the cooperation of the Taliban regime. The details surrounding the communication between the two parties do, however, remain unaccounted for. At the time of adoption of the first resolution, negotiations with the Taliban over the extradition of the attackers had not yet been introduced; neither had the attribution of responsibility to the Taliban government been evoked. This indicates that the responsibility of the State itself was not, even by the US, considered necessary to invoke the right of self-defense. A right of self-defense was seemingly assumed to exist as a right in itself, despite the lack of involvement from the State from where the NSA operated. Through the endorsement of the Security Council, this view was, although tacitly, supported by the international community. At the very least, it constituted strong political support for an armed response.

In the second resolution, adopted September 28, 2001, the Security Council reaffirmed the inherent right of individual self-defense as recognized by the UN Charter and reiterated in resolution 1368 (2001). One may infer that the Security Council, by invoking the right of individual self-defense in response to an attack by the NSA, again simply reiterated a right

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113 Ibid.

114 Ibid. p. 34.

already recognized as extant *in abstracto*, but without considering its applicability to the case at hand. One may argue that the Security Council only confirmed the existence of an inherent right for a State to defend itself, however without going into whether the requirements were satisfied in that particular case.\textsuperscript{116}

In the third resolution, the Security Council reprehended the Taliban for allowing Al-Qaeda to operate from its territory under reference to the two preceding resolutions on the matter.\textsuperscript{117} It has been claimed that this response did not endorse the armed response as an act of self-defense, but rather lent support to the global endeavors to eradicate terrorism more generally.\textsuperscript{118} While these three resolutions did not state that the right of self-defense was intact in this particular case, the support of this notion by the EU and NATO, as well as several individual States, substantiate perceiving the act accepted as an act of self-defense in accordance with article 51.\textsuperscript{119}

If one were to argue that this was a lawful response of self-defense, it must probably be predicated on one of two notions;\textsuperscript{120} either that the acts could be attributed to the State of Afghanistan, however, by an alteration and widening of the scope of the traditional criteria as proposed in *Nicaragua, Genocide*, and the Draft Articles, the new scope of which seems uncertain; or that the attribution requirement was side-stepped by relying on one of three emerging and generally accepted situations in which a State may justify its resort to force in self-defense against NSAs.\textsuperscript{121} These criteria have been articulated as situations where “a) the territorial state was complicit or was actively supporting the NSA in its armed attack; (b) the territorial state failed to exercise due diligence, i.e. it did not do all that it could reasonably have done to prevent the NSA from using its territory to mount an armed attack against another state, or is not doing all it can to prevent further attacks; (c) the territorial state may have exercised due diligence, but it was nonetheless unable to prevent the attack, or to prevent further

\textsuperscript{116} Kravik and Ødelien (2014) p. 595.
\textsuperscript{118} Kravik and Ødelien (2014) p. 595.
\textsuperscript{121} Ibid.
attacks.”\textsuperscript{122} States appear to refer to these grounds as a test whereby the State is judged “unable or unwilling” to prevent the attacks of NSAs originating on their territory, and where the State’s inability or unwillingness justifies a response in self-defense, whereby it may legitimately violate the sovereignty of the home State.\textsuperscript{123}

\textbf{2.4.1.2 Judicial decisions and other state practice}

In two later cases, the \textit{Wall} and \textit{Armed Activities on the Territory of the Congo},\textsuperscript{124} the ICJ touches upon the matter of attribution as a necessity for responsibility and the right of self-defense to be invoked. Passages in these decisions, however, raise doubts as to whether the Court considers attribution an absolute condition in this regard.

\textbf{2.4.1.2.1 The Wall}

In the \textit{Wall}, assessing Israel’s right of self-defense by the building of a wall, the majority of the Court firstly stated that article 51 of the Charter recognizes the existence of an inherent right of self-defense in the event of an armed attack by one State against another, but that Israel did not claim that the attacks against it were imputable to a foreign State - a present impossibility as the Palestinian state is not properly in place.\textsuperscript{125} Rather, the Court noted that Israel exercises control in the Palestinian Territories and that the threat, which Israel regarded as justifying its building of the wall, originated within that territory.\textsuperscript{126} One may conclude that the Court relied on the condition of attribution for an attack to be legitimately directed against a NSA in self-defense, in the way that the attack perpetrated by the NSA must originate in a foreign State and be attributed to that State.


\textsuperscript{123} Kravik and Ødelien (2014) pp. 603-604; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 13 September, 2013 A/68/382; NATO, \textit{Tallinn Manual on the International Law Applicable to Cyber Warfare}, 2013; “home State” is understood as the State in which the NSA operates and from where it mounts its attacks.

\textsuperscript{124} \textit{Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)}, Judgment, I.C.J. Reports 2005, p.168; hereinafter «DRC v. Uganda»


\textsuperscript{126} Ibid.
A part of the advisory opinion that may nuance this understanding is where the Court distinguishes the case from the response against Afghanistan in 2001, claiming that Israel could not, at any rate, invoke the resolutions passed subsequent to the attacks of 9/11 because these attacks did indeed originate in another State, while the attack on Israel did not.\textsuperscript{127} From this it may be inferred that the Court might have reasoned differently had the attack on Israel been carried out from outside its territory. From the Court’s quote, one can argue that had the attack originated from another State’s territory, then Israel could, in theory, also invoke the Security Council resolutions passed in conjunction with the response by the US and Great Britain in Afghanistan. Given that attribution was not seen to exist in that case, this induces a discussion of the Court’s perception of self-defense irrespective of attribution.

As the attack in \textit{the Wall} was not claimed to have originated from outside the territory under Israeli control, the Court did not deem the right of self-defense pursuant to Charter article 51 relevant. The reasoning of the Court by the reference to the case of Afghanistan, however, indicates that the Security Council resolutions passed subsequent to the attacks on 9/11 were deemed relevant to Israel’s right of self-defense.

Judge Higgins furthermore substantiated this view in his separate opinion, whereby he questioned the Court’s understanding of self-defense pursuant to article 51 of the Charter as applicable only when the armed attack is carried out by a State or when it may be attributed to it, arguing that such an interpretation is only predicated on the Court’s assessment in \textit{Nicaragua}.\textsuperscript{128} Higgins rather pointed to the wording of article 51, arguing that there is nothing in it that rules out the application of such a right to cases where actors other than a State carry out the armed attack, even when the action is not attributable to a State.\textsuperscript{129}

The Court’s references to the Security Council resolutions subsequent to 9/11, as well as Higgs’ remarks, lead us to contemplate a possibility that a response in accordance with article 51 need not be based on attribution, but might also include the right of self-defense against NSAs based on other criteria.

\textsuperscript{127} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Advisory Opinion, I. C. J. Reports 2004, p. 136, at 194, para. 139.

\textsuperscript{128} See the separate opinion of Judge Higgins in \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Advisory Opinion, I. C. J. Reports 2004, p. 136, at 215, para. 33.

\textsuperscript{129} Ibid.
2.4.1.2.2 DRC v. Uganda

Another case is the hostilities addressed in *DRC v. Uganda*. Here the Court conceded that there might have been initial agreement between the governments of Uganda and the Democratic Republic of Congo\(^{130}\) for the former to deploy their troops in parts of the DRC to quell certain NSAs.\(^{131}\) This possible agreement was, however, seen as nullified due to later statements and demands by the incumbent DRC president that all armed forces should leave the country, and that the presence of Ugandan forces constituted aggression. Later, the question arose as to whether Uganda had a right to resort to force in self-defense in eastern DRC in response to attacks on Uganda by NSAs operating from eastern DRC. The majority of the Court concluded that the DRC had not consented to the military activities of the NSAs in Uganda,\(^{132}\) and that the right of self-defense consequently could not be invoked. Judge Kooijmans, however, disagreed with this reasoning, claiming that it was “unreasonable” to deny the target State a right of self-defense against NSAs in general, unless attribution was established, also hinting at the possibility that other criteria beyond attribution may justify self-defense against armed attacks from NSAs.\(^{133}\)

While the majority of the Court denied Uganda a right of self-defense on the merits that no attribution to the DRC existed,\(^{134}\) Kooijmans seemingly made the degree to which this was “reasonable” a priority in resolving the issue.\(^{135}\) He argued that the right of self-defense of a State could be invoked irrespective of the aggression being attributed to a State or not, and that the Court should have taken the opportunity to assess whether attribution was the only way by which to justify a lawful response in self-defense.\(^{136}\) The fact that the Court did not take the opportunity to address the question of attribution was also reproached by dissenting

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130 Hereinafter “DRC“
132 Ibid.
judge Simma. Simma concurred with Koijmans and argued that the decisive matter lay in assessing whether the aggression amounted to an armed attack pursuant to article 51 or not. These points made by Koijmans and Simma, about the unreasonableness of denying the right of a State to resort to force in self-defense against NSAs in general, indicate yet another point, namely an implicit acknowledgment that such a potential right ought not to exist in general, but rather that it should constitute, or at least could, amount to an exception, the denial of which would be unreasonable for a number of reasons. Hence, attribution was, implicitly, seen as the main rule for justifying self-defense. It was, however, also recognized that self-defense should not be limited to attribution in all instances.

2.4.1.2.3 Other state practice and summary

International jurisprudence and state practice support no clear solution one way or the other as far as the doctrine of attribution is concerned. Events subsequent to 9/11 leave room for a discussion on whether States may invoke the right of self-defense in international law against NSAs beyond the doctrine of attribution.

The cases of Israel’s military response to Hezbollah’s aggression in 2006, Turkey’s resort to force against Northern Iraq and the PKK in 2008, as well as the bomb raid against the FARC the same year, are all cases where attribution was not established, but where the attacks were endorsed as acts in self-defense nonetheless. In these three instances, the NSAs, rather than the home States, were perceived as liable for the aggression. Although criticized for not taking additional measures to foil the activities of the NSAs, the home States were thus not held responsible for the acts of the NSAs. The extent to which inability or unwillingness to

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138 Ibid., at 337, para.12.
139 Killean (2010) pp. 36-42; Security Council Resolution S/RES/1701 (2006); eu2008.si, EU Presidency Statement on the military action undertaken by Turkey in Iraqi territory; OAS, CP/RES. 930 (1632/08), March 5, 2008; also more recent attacks by Turkey on the PKK have been described as self-defense, see Gly, Majeed, UN describes Turkish airstrikes against PKK as self-defense, rudaw.net, August 1, 2015
141 Ibid.
prevent NSAs mounting attacks from their territory may justify the use of force in self-defense, however, remains uncertain.

Evidently, there appears to be disagreement on the issue of attribution among the judges of the Court as well as among states. While some ICJ decisions, as well as state practice, support the maintaining of attribution as a requirement, the very same decisions of the Court and other state practice indicate that other criteria are also, under certain circumstances, accepted as basis to justify self-defense against NSAs.

The question whether the scope has indeed been broadened remains a topic of discussion. Many hold the opinion that the principle of attribution still stands. Others have argued that while this seems to be the case, state practice subsequent to *Nicaragua* indicate that there is limited access, beyond the criteria of attribution, to invoke the right of self-defense against a NSA if the home State has contributed to or actively supported an armed attack by this actor, or if it has failed to take reasonable measures to ensure that the territory of the State is not made a safe haven and base from which the NSA may direct its attacks; In short, it seems increasingly accepted that a State may invoke self-defense in the cases where the home State is unable or unwilling to stop these attacks from taking place. This approach seems to necessitate, however, as is the case with attribution, that there is a nexus of sorts between the NSA and the home State. The requirement, as far as the forte of this link is concerned, however, may be perceived as relaxed respondent to these developments. As a consequence, many States predicate their justification of self-defense on whether the home State is unable or unwilling to stop the armed attack from occurring. While the extent to, and manner in which States have deviated from the attribution approach remains a topic for discussion, it seems likely that the law has been developed since *Nicaragua*, enabling the activation of the right of self-defense in situations where the nexus between the home State and the NSA is weaker.

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2.4.2 Right of self-defense pursuant to the Draft Articles

It is widely held that only States are bound by the prohibition against the use of force in UN Charter article 2 (4). Consequentially, NSAs are not bound by the prohibition nor by the exception in article 51; as they are not bound by these rules, NSAs remain free to undertake whatever action, regardless of the regulations and limitations in international law as far as *jus ad bellum* is concerned. This changes if the acts of the NSA are attributable to the State; in such a situation, the nexus may incur responsibility for the State, as the act is perceived as conducted by the State itself.\(^{146}\) The situations in which the acts of NSAs may be considered acts of the State is further elaborated and dealt with in the Draft Articles.

For the NSA to be bound by, and have a right to resort to force in self-defense pursuant to article 51, its actions must be considered acts of the State in that specific regard; if a NSA responds to an armed attack, and its conduct is deemed attributable to the home State, then the exerted force may also be considered an act in self-defense pursuant to article 51.

The following sections address three ways in which the acts of NSAs may be attributed to the State. The situations where the acts of the NSA are directed or controlled by the State, or where the State acknowledges and adopts the conduct of the NSA subsequent to the carrying out of its actions, are not dealt with.\(^{147}\) It is the view of the author that the articles contending with these scenarios envisage situations somewhat removed from the realities giving rise to the discussions in this thesis, namely the more independent role of the NSA. Consequently, only articles 4, 5 and 9 are presented and discussed.

2.4.2.1 DASR Article 4

DASR article 4 states the principle that the State is responsible for the actions of its organs.\(^{148}\) That acts of the State are regularly conducted by state organs may be perceived as the main rule.\(^{149}\) The applicability of such responsibility conditions that the act of the organ is exerted

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\(^{146}\) DASR articles 1 and 2; Crawford (2013) p. 113; Dinstein (2014) p. 116.

\(^{147}\) These scenarios are covered by DASR articles 8 and 11 respectively.

\(^{148}\) DASR article 4 (1); Crawford (2013) p. 116.

on the State’s behalf and in that capacity.\textsuperscript{150} However, the nature and purpose of the organ is irrelevant for the attribution of responsibility to the State.\textsuperscript{151} For that reason, all branches of the State are included.\textsuperscript{152} The inclusion of all branches of the State and the insertion of “any other functions,” is purportedly meant to contend with the diversity of ways in which state affairs are arranged; a restrictive approach including only some of the areas regulated by the State could result in the exempting of the actions of some organs, while including others.\textsuperscript{153}

Display of state power as far as the executive branch is concerned, is regularly seen through the executive government and its armed forces.\textsuperscript{154} An example where the armed forces were considered an organ of a State is the ICJ verdict in \textit{DRC v Uganda} in 2005.\textsuperscript{155} Here the Court noted that the conduct of the private actor in question, the UPDF, “as a whole” was clearly attributable to Uganda.\textsuperscript{156} As the UPDF was considered an organ of the State, the fact that it did not act in such a capacity in the particular circumstances, as well as the extent to which it went beyond its mandate, was rendered irrelevant by the Court.\textsuperscript{157} It was deemed an organ of the State nonetheless.

Concerning what is included in the notion of “organ,” the wording in article 4 (2) evokes an understanding of competence being conferred only through internal law. The commentary of the Draft Articles, however, underscores that competence as an organ may be attained through internal practice as well.\textsuperscript{158} This is due to a desire to tackle strategies by States to abstain from the rendering of such status by the means of law.\textsuperscript{159} In \textit{Nicaragua}, the ICJ took note of this aspect as it expressed that in order for the actor to constitute an organ of the State through internal practice, it had to represent an instrument of the State over which the latter had effec-

\begin{footnotes}
\item\textsuperscript{150} DASR article 4, commentary, para. 1; Crawford (2013) p. 117.
\item\textsuperscript{151} DASR article 4 (1); Crawford (2013) p. 118.
\item\textsuperscript{153} Crawford (2013) p. 118.
\item\textsuperscript{154} Ibid.
\item\textsuperscript{155} Ibid. p. 119.
\item\textsuperscript{157} Ibid., para. 214.
\item\textsuperscript{158} DASR article 4 (2), commentary, para. 11; Crawford (2013) p. 124.
\item\textsuperscript{159} Crawford (2013) pp. 124-125.
\end{footnotes}
tive control. Only then, when the actor has no autonomy vis-à-vis the State, may one speak of attribution to the State through internal practice. Setting a high threshold to satisfy this test seems intuitive; proving that such an actor is indeed an organ of the State means that all the actions conducted by it will incur state responsibility per se; the link between the State and the private actor must thus be one of great proximity.

Article 4 also accounts for the situations in which the private actor becomes the general de facto government in the State. In such a situation, the private actor assumes control and represents the State apparatus and replaces the former government, making the new apparatus the body accommodating the organs of the State pursuant to article 4.

In this latter scenario, the acts of the private actor become governmental through the supplanting of the previous government. Thus, the private character of the actor seemingly becomes subordinated to its character as a State actor, distancing this situation from the essence of the research questions of this thesis. The element of de facto governance may, of course, be evident in other situations as well, but then not to the extent that the actor is considered a replacement of the de jure state apparatus.

2.4.2.2 DASR Article 5

Pursuant to article 5, the acts of an individual or entity may be considered acts of the State under international law, even when they are in fact not organs of the State consistent with article 4. Article 5 necessitates the fulfillment of two criteria: First, the private actor must be empowered by law of that State to exercise elements of the governmental authority; second, the entity must be acting in that capacity in the particular instance.

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163 See Aguilar-Amory and Royal Bank of Canada Claims (Tinoco case) (Great Britain v. Costa Rica) (1923), pp. 381-382 (Award); Frowein (1968) pp. 70-71.
165 DASR article 5.
The commentary expresses a need to consider this conduct as an act of the State, as the establishing of “parastatal” entities is quite common and may be seen as a problematic strategy to circumvent the responsibility of the State through “outsourcing” to other entities.\textsuperscript{166} Contrary to article 4, article 5 constitutes a functional test of attribution, rather than a structural test;\textsuperscript{167} the question is not whether the private actor should be considered part of the State structure, but if is empowered to carry out elements of its functions. However, it may be argued that also the structural element is evident in the formal empowerment, by law or by practice, of the private actor in question.

The necessity of empowerment of the NSA by the State serves both as a requirement as well as a justification. Ascribing state responsibility to the acts of such entities is justified on the basis that the State has chosen to confer a certain governmental authority on the entity by law and that responsibility may only arise if the State has indeed chosen to do so.\textsuperscript{168} This conferral of authority seems to be perceived as a matter of delegation of powers in international law. This was reflected in the replies to the requests for information for the Preparatory Committee for the 1930 Hague Conference, whereby the German Government issued support for this type of attribution and referred to it as a delegation of power which prompts a responsibility for the State.\textsuperscript{169} Inferentially, in a deliberate act of delegation lies also deliberate responsibility and identification.

Moreover, it is necessary to require such formal empowerment, as it is unreasonable to hold a State responsible for acts it has no connection with or has not desired to account for. An act should only be considered an act of the State, and the State only held accountable, if it is indeed an act of the State.

Another instrumental limitation is found in the wording of article 5. It is assumed that only those acts that the empowered entity has been given may be considered acts of the State.\textsuperscript{170} This follows from the choice of words of the article, wherein it is stipulated that the private

\textsuperscript{166} DASR article 5, commentary, para. 1; Kees (2011) para. 20.
\textsuperscript{167} Crawford (2013) p. 127.
\textsuperscript{168} DASR article 5, commentary, para. 5.
\textsuperscript{169} League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, p. 90.
\textsuperscript{170} DASR article 5, commentary, para. 5.
actor must be acting in *that* capacity in the particular instance. This entails that an entity may be given governmental authority in one respect, but lacks such competence in another. The empowerment in one domain does not suffice to render the actor governmental competence in another. For such authority to come about, another conferring of public authority is needed.

The DASR commentary finally underlines that the article represents a narrow category. It is not sufficient to permit the entity to act as part of the ”general regulation of the affairs of the community;” it must rather be distinctively authorized to exercise a particular element of public authority.\(^1\)

### 2.4.2.3 DASR Article 9

Article 9 envisages a scenario where the entity in question has not been empowered by the State, but where it carries out a certain state function nonetheless.\(^2\) For the act to be considered an act of State in accordance with article 9, three criteria must be fulfilled; firstly, the entity must in fact exercise elements of the governmental authority; secondly, the State must be absent or unable to attend to this element itself; finally, it is required that the circumstances ”call for” the exercise of these particular elements of authority.\(^3\)

Article 9 constitutes yet another exception from the main rule that the activities of private actors, such as insurrectionist movements, are not attributable to the State.\(^4\) Article 9 may only rarely be invoked and is considered an even narrower exception than article 5.\(^5\) The principle inherent in article 9 may be traced to the old legal concept originating in the aftermath of the French Revolution in 1789, *levée en masse*.\(^6\) This theory, which means “mass uprising,” was invoked as a call to arms in a situation where the regular State forces were absent.\(^7\) The idea was to bolster the national army by prompting the masses to take up arms

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1. DASR article 5, commentary, para. 7.  
2. DASR article 9.  
3. Ibid.  
4. This main rule was articulated and confirmed in *Sambiagio*, where the conduct of revolutionaries was not considered attributable to the State, see *Mixed Claims Commission: Sambiagio Case (Italy v. Venezuela)* (1903) RIAA 499, p. 512 (Award).  
5. DASR article 9, commentary, para. 1.  
6. Ibid., para. 2.  
against a foreign invader. It was a strategy directed at an intruder to secure the sovereignty and defense of the State. When the French revolutionary regime adopted this concept in the wake of threats against the State from other European countries, it was employed and justified by evoking a state of emergency, the extraordinary situation of which warranted the drafting of all men of military age into the army. Both Napoleon’s France, as well as Poland in 1939, relied on this call to arms to attend to the defense of their borders. This conception gained legal status at the Brussels Conference in 1874 and has since been recognized as a legitimate principle in international law.

_Lévée en masse_ rested on one crucial element and implied yet another; it had to be a spontaneous effort, and it allowed for the keeping of arms among the people in case the need to take up arms arose. This indicates that the doctrine legitimated the keeping of arms by others than those belonging to the armed forces _strictu sensu_. It also indicates that the right was not a permanent one, but rather a dormant right invoked only in the case of emergency. It thus commended an act of self-defense through a mass uprising when this was deemed necessary to defend the State, predicated on the belief that self-defense is a state function so fundamental that all acts to this end should be considered an act of the State.

Firstly, the private actor needs to exercise elements of the governmental authority. Important in article 9 is thus the emphasis on the nature of the function exercised, rather than the formal link between the actor and the State. Here it is the functional, rather than the structural element that is dominant. This distinguishes the situation addressed in article 9 from the situation where the entity is structurally considered an organ of the State or where the private actor has supplanted the government as a _de facto_ regime; an article 9-situation grapples with a situation where a government exists, but where another actor takes on its place or conduct

179 Ibid.
180 This principle is enshrined in article 2 in the _Regulations respecting the Laws and Customs of War on Land_, which is annexed to Hague Conventions II and IV, and by article 4, paragraph a (6) in Geneva Convention (III), see DASR article 9, commentary para. 2, footnote 167; Horvitz and Catherwood (2006) p. 279.
182 DASR article 9.
183 DASR article 9, commentary, para. 4.
on its own initiative in certain instances, and in essence supplements the State through its acts, which are thus seen as acts of the State.\textsuperscript{184}

Concerning the second criterion in article 9, which is the “absence” or “default” of the State, the commentary refers to situations where the State apparatus has collapsed totally or official authorities are not attending to all the functions of the State.\textsuperscript{185} The commentary offers examples of such situations, among them, but potentially not limited to, partial collapse of the State and its loss of control over an area within its borders.\textsuperscript{186} Crawford argues that the second criterion, formulated as “absence” or “default,” alludes to total or partial collapse of the State apparatus only, making express reference to a situation where the State loses control of the territory.\textsuperscript{187} While relating to factual circumstances, this criterion clearly accommodates a notion of need and agency for an actor to take on the functions not attended to by the State.\textsuperscript{188}

The third condition constitutes the most open-ended, but also the most confined criterion in article 9. This condition necessitates that the circumstances must be “such as to call for” the exercise of elements of the governmental functions by private actors.\textsuperscript{189} As pointed out in the commentary of the Draft Articles, “calls for” alludes to the need for a specific governmental function; while one governmental function may be the one that is exercised, it may be another function that is indeed “called for.”\textsuperscript{190} To simply justify the action on the basis that “some” governmental action was called for, is not sufficient to satisfy the test. It is the very function that is exercised which must be called for in the particular case. This notion, as well as when seen in conjunction with the article as a whole, and particularly the stipulated absence of the State apparatus, prompts lawyers to regard this article as offering a solution to a situation giving rise to a need which must be attended to.

A more recent example of activities being perceived as acts of the State pursuant to considerations equivalent to article 9, is the conduct of the so-called Komitehs after the Iranian Revolu-

\textsuperscript{184} DASR article 9, commentary, para. 4.
\textsuperscript{185} Ibid., para. 5.
\textsuperscript{186} Ibid.
\textsuperscript{187} Crawford (2013) p. 169.
\textsuperscript{188} Ibid.
\textsuperscript{189} DASR article 9, commentary, para. 6.
\textsuperscript{190} Ibid.
tion in 1979. These private actors controlled migration and customs at Teheran international Airport. In *Kenneth P. Yeager v The Islamic Republic of Iran*, the Iran-United States Claims Tribunal concluded that the Komitehs, although not empowered by the government of Iran, “exercised elements of governmental authority in the absence of official authorities.” The Tribunal noted, and seemingly also built its conclusion of attribution of responsibility to the State, on the fact that the State was aware of these operations and that it did not specifically object to the activities. One may infer that the State “tolerated and endorsed the violation.” Should this last notion be considered an articulation or elaboration of the third criterion, and with universal validity, then one may argue that article 9 demands that the State objects to such operations if it is aware of them taking place to avoid attribution.

Although a matter possibly conceived as specific in the circumstances of this case, the Tribunal in *Yeager* also remarked that the respondent, in this case the Islamic Republic of Iran, had the burden with regard to showing that these actors were not acting on Iran’s behalf and that they were not exercising governmental authority. Finally, the Tribunal expressed that the government had the burden of showing that it was in no position to “control” their actions. The wording employed in *Yeager* indicated that these ways in which responsibility may be rebutted, were indeed seen as alternative and necessary conditions to avoid attribution pursuant to article 9 in this case; if in no position to control the conduct, then no attribution to the State would arise.

The Tribunal’s notion of “control” also gives rise to different interpretations; it may imply that the State had a desire, but no capacity to control the private actor. Alternatively, it related only to the lack of capacity. Interpreting the text in accordance with VCLT article 31 prompts an objective understanding, whereby the intent of the actor is less relevant. As a consequence, the notion that the State cannot “control” the private actor must mean that it objectively can-

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191 DASR article 9, commentary, para. 2.
192 Hereinafter “Yeager”
195 Kees (2011) para. 7.
197 Ibid.
not control it, its intent and desires notwithstanding. If understood as a necessary condition in itself for attribution to be established pursuant to article 9, then responsibility will not often be the result in situations where strong de facto powers exert functions without regard for a weaker State. In such situations, the State will rarely be in a position to control the conduct of the stronger private actor and State responsibility will not come into play pursuant to this article.

While the criteria in article 9 are relatively clean-cut and objective in their articulation, their scope seems uncertain. This is, beyond the general terminology of the article, due to its invocation being reserved for only exceptional circumstances. The way in which these criteria will be applied in the particular case may therefore be difficult to predict.

Furthermore, as neither article 9 nor its commentary addresses explicitly the question of legitimacy and conflict with sovereignty, an application of these criteria could lead to unreasonable results in practice. It is, prima facie, somewhat troubling that the reasons for the State’s absence are not contended with in neither the article nor the commentary, and that they seem irrelevant for the assessment. For instance, it may come across as unreasonable that the actions of a private actor are to be considered acts of the State if the reasons to the State’s absence are the NSA’s violation of sovereignty to begin with.

Moreover, while the use of the words “absence” or “default” may imply a wide scope of application, this appears to be interpreted as a total or partial collapse of the State apparatus. It is thus unclear if the article may apply to a situation where the State is indeed absent in a certain respect, but where it is anomalous to perceive it as a “collapse” of “State apparatus.” This may, for example, be the case where the State apparatus is intact, but where absence of the State has been forced upon it by a private actor.

2.4.2.4 Application of Draft Articles to the Second Lebanon War in 2006

In 2006, Israel invaded Lebanon in response to Hezbollah’s killing of three and kidnapping of two Israeli soldiers on Israeli soil. While many States acknowledged that Israel had the

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198 DASR article 9, commentary, para. 5; Crawford (2013) p. 169.
right to resort to force in self-defense, the retaliation was also condemned as an overreaction to the initial aggression, and a reaction deemed disproportionate as far as international law is concerned.200

The Draft Articles have been proposed to attribute Hezbollah’s acts in 2006 to Lebanon, as violations of international obligations. However, the attacks by Hezbollah were never in fact attributed to Lebanon.201 It was argued that attribution could not be established based on the articles contained in the Draft Articles and that Israel’s self-defense against Hezbollah and Lebanon had to be justified on other grounds.202

DASR article 4 could not serve as basis for establishing a nexus between Hezbollah and the State, as the former did not act as an organ of the Lebanese State.203 Moreover, attribution based on empowerment by the State or on the State directing or controlling its acts was perceived as misplaced.204 Nor was attribution pursuant to article 9 recognized. Some scholars have, however, invoked article 9 to attribute Hezbollah’s acts to Lebanon, claiming that the three criteria were fulfilled; that the acts were attributable to Lebanon and that State responsibility could be claimed to exist.205 Notwithstanding, the ones favoring such an approach also conceded that applying the third criteria, that is the circumstances “such as to call for” those elements of authority, to Hezbollah’s aggression against Israel, would be over-stretching its scope. Although supportive of the notion that all three criteria were fulfilled, it was thus found that the vagueness of the third criteria did not permit applying it to such a sensitive issue, whereby acts of aggression would be attributed to the State of Lebanon seemingly contrary to its wishes.206

This latter point indicates that the scope of application of these articles, article 9 in particular, is not certain. A main reason for evoking the vagueness of the criteria as problematic is appar-

204 Ibid.; See DASR articles 5 and 8 respectively.
ently the sensitivity of use of force and the unreasonable result that might follow from attributing such acts to a State.

The fulfillment of these criteria may *prima facie* seem easier to fulfil when the action resorted to, and the act exercised, is self-defense; then it is a response an armed attack, a violation of an international obligation deserving of worldwide condemnation. However, the attribution to the State in this regard must imply a concurrent attribution to the State in the circumstances just discussed, as self-defense is an exception from the prohibition on the use of force. One may possibly conclude that self-defense invoked by Israel against Hezbollah and Lebanon may be justified on the doctrine of inability or unwillingness of Lebanon to stop Hezbollah’s attacks. Then, however, the justification of Israel’s response would not be based on attribution. Consequently, the nexus between the Charter article 2 (4), which may only be activated if the acts of Hezbollah are indeed attributed to the State, and article 51, will be broken. And if there is no activation of the prohibition in article 2 (4), then the question of self-defense cannot be invoked.

When the attacks of Hezbollah are not considered attributable to Lebanon, it seems implausible that a response in consistence with the exception from the main rule should be considered as such. Furthermore, as it is uncertain whether “absence” and “default” requires the total or partial collapse of the State apparatus, one may argue that application to the case of Lebanon will be tricky at any rate. In Lebanon it seems anomalous to speak of a collapse of the State apparatus; at the very least, it does not coincide perfectly with the situation on the ground.

Even contending that the situation in parts of Lebanon may allow for the application of article 9, arguing that Hezbollah’s acts in purported self-defense should be attributed to Lebanon, may also incur several unreasonable consequences. Beyond making Lebanon liable for its acts, it also side steps the issue of legitimacy; this thesis readily stipulates the absence of the State, but the reasons for this absence, as far as Lebanon is concerned, are indeed Hezbollah’s forceful ventures against the State. To deem Hezbollah’s resort to force in self-defense, in a situation it has in part created itself, acts of the State, seems dubious.

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207 See chapter 4 for an elaborate discussion on the matter.
In the same way as the acts of aggression were not attributed to Lebanon in 2006, it is anticipated that Hezbollah’s stipulated resort to force in response to an armed attack on Lebanon may not at present be attributed to Lebanon, and that the regulations of DASR do not suffice to cover the purported use of force exerted by Hezbollah in purported self-defense. If such a situation occurs, it would be international humanitarian law and criminal law that first and foremost regulated Hezbollah’s resort to force.

The act of Hezbollah in response to an armed attack may thus not be considered an act of the State in self-defense.

2.5 The significance of conversion: From non-international to international armed conflict

Protocol (I) to the Geneva Conventions, article 1 (4), enables the converting of a non-international armed conflict into an international armed conflict. However, article 1 (4) is primarily aimed at the applicability of provisions of the Geneva Conventions and not the applicability of international law under *jus ad bellum*. While acknowledging the possibility that applicability of this article may entail an implicit rendering of rights to NSAs under *jus ad bellum*, the criteria listed in article 1 (4) envisage other scenarios than this thesis.

Article 1 (4) lists three situations in which the conflict may be converted into an international armed conflict. However, the alternatives, implying fighting against “colonial domination,” as well as “racist regimes,” do not resemble the situation presupposed in this thesis, that is to say the occurrence of an armed attack and the immediate response to it. Neither the third alternative in the additional protocol, “alien occupation,” corresponds to this situation. According to the commentary of the International Committee of the Red Cross, “alien occupation” is intended to address a partial or total occupation of a territory, but only where this territory has not yet been fully formed as a State.\(^{208}\) The “alien occupation” scenario thus differs from the situation addressed in this thesis, a situation which lies closer to belligerent occupation in the traditional sense where all or part of the territory of a State is occupied by another State.\(^{209}\)

\(^{208}\) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, p. 54, para 112.

\(^{209}\) Ibid.
This latter point notwithstanding, as this thesis deals only with the armed attack and the response to it as a measure of self-defense, article 1 (4) is considered unfit for further deliberation.

In the following, the thesis leaves the situation *de lege lata* and embarks on a discussion *de lege ferenda*, whereby an alternative model for addressing the right of NSAs to resort to force in self-defense is presented. Conceiving article 9 as the periphery of State responsibility, and the limit for the applicability of the UN Charter articles 2 (4) and 51, the following section seeks to justify the right of self-defense by the NSA pursuant to article 51, however released from the nexus to the main rule enshrined in article 2 (4). While acknowledging that this is anomalous *de lege lata*, as the non-applicability of article 2 (4) extends to article 51 as a consequence of the inherent relation between a main rule and an exception, this dissertation opts to discuss the problematic aspects of the non-applicability of self-defense, rather than the prohibition against the use of force.²¹⁰

While DASR article 9 may not be seen to support the right for Hezbollah to resort to force in self-defense of Lebanon, the following chapters acknowledge the problematic scenario envisaged in this article, and presupposes to a great extent the same predicaments. When assessing the legitimate authority of NSAs based on an examination of international legal personality, aspects of article 9 resurface in the shape of criteria of participation, community acceptance, and needs. It is especially the “absence” of the State and the “circumstances such as to call for” particular acts that resemble the considerations that are also made when discussing the needs for the legitimate authority of NSAs in the forthcoming.

The intention in the following is to give rise to a principled debate on the role of NSAs under *jus ad bellum*, making the concrete case of Hezbollah and Lebanon a vantage point from which the critical analysis is made. This discussion commences by presenting and assessing the concept of legitimate authority in international law. Subsequently follows the presentation

²¹⁰ While making no attempt to challenge this perception *lex lata*, the author does not conceive it as ideal to discuss the non-application of article 2 (4) to NSAs more generally in order to advance the discussion of this thesis; arguing that article 2 (4) should apply to NSAs would inferentially lead to the application of the exception of self-defense to such actors as well, however without further ado; they would have a right to resort to force in self-defense *ipso facto* as the one to which the main rule relates is also subjected to the exception from this rule.
and assessment of an alternative model to discuss the theoretical right of NSAs to resort to force in self-defense in chapter 3, before applying these findings to the case of Hezbollah in chapter 4.
Legitimate authority for non-state actors to resort to force in self-defense: An alternative model

3.1 Legitimate authority in international law

The Just War Tradition regularly recognizes five conditions for armed conflict to be justly initiated: Just cause, legitimate authority, right intention, last resort, and proportionality. These criteria trace their origin to the just war tradition, the essence of which has been codified in the UN Charter.

“Legitimate authority” is understood as one of the criteria for resorting to force under *jus ad bellum*, namely the authority making the decision of, or resorts to, self-defense. Whether the armed response in self-defense may be considered to be in accordance with international law, and bound by the rules in article 51, depends on the actor having legitimate authority to take such action. Having authority to do so may be considered the “entrance ticket” to legitimately enter the realm of *jus ad bellum* and for the other conditions in article 51 to be applicable.

For the purpose of this thesis, it is the action in self-defense that is presupposed as the “just cause.” The nature of the entity responsible for the armed attack is not discussed further; although a controversial issue, it is rather stipulated that the attack which has taken place creates a right for the target State to resort to force in self-defense, be the aggressor a state or a non-state actor.

When discussing actors in international law in general, and the laws of war more specifically, one must depart from an understanding based on the interaction between sovereign States and their respective governments. It is the governments of these dominions that are the legitimate authorities and act on behalf of their people and decide whether war should be waged, and it is against them that other States wage their wars, be they defensive or offensive. That legitimate authority is a State prerogative, as far as *jus ad bellum de lege lata* is concerned, is thus not disputed.

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The concept of legitimate authority is no novelty. Thomas Aquinas, Catholic priest, philosopher and theologian of the 11th century, epitomized the notion of power and authority, converged in the condition of legitimate authority in Medieval Europe. He claimed that without legitimate authority, there could be no just war to begin with. Besides the prima facie authority of the sovereign, Aquinas held that the position could also be served by a “judge, or (as a public person) through zeal for justice” – possibly conceding that such authority might be held by others than the representatives of the State itself.

Aquinas’ concept of the “sovereign” may today still serve as a backdrop for understanding legitimate authority under jus ad bellum. More recent assessments of this concept in legal philosophical terms have been made by Scott Shapiro and Joseph Raz, whose assessments are used to construe essential parts of this discussion in section 3.3.3.

This chapter offers an alternative model, predicated on the three criteria of international legal personality, to critically address legitimate authority as a condition under jus ad bellum. In the following, rather than considering the NSA as an anomaly or its conduct attributable to the State, the question is whether the NSA should have legitimate authority to resort to force in self-defense, its lack of attribution to the State notwithstanding.

While section 3.2 provides a general discussion of the criteria for international legal personality, section 3.3 presents and elaborates the framework in accordance with which the discussion is structured when applying the findings to Hezbollah and Lebanon in chapter 4.

3.2 International Legal Personality

Legal personality, and the rights and duties that follow with it, are two sides of the same coin; determining which persons possess rights and duties, the essence of these rights and duties, and in what circumstances they possess them, is also determining legal personality. As far as international legal personality is concerned, there are no clearly fixed limits as to who may

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214 Ibid.
possess it and to what degree. D’Aspremont supports the notion that locating the rights and duties determines whether an actor has international legal personality in a certain respect. Alternatively, one may argue that an assessment of international personality is necessary before addressing what rights and duties the actor possesses. The personality may be one of a full subject, as is the case for States, or limited, as is the case for NSAs, in the sense that the rights and duties ascribed to them will depend on the scope and the character of the law, as well as the will of States to confer legal personality on them. Or as Shaw puts it, a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what rights and duties apply in the particular case.

3.2.1 Criteria for International Legal Personality

There is no single way in which to decide on legal personality in international law. Neither are there clear and objective criteria to determine the existence of international personality. Efforts by legal scholars to provide general guidelines to this end, based on international legal sources, may contribute to the procurement of a rudimentary scheme on the basis of which one may come to grapple with this fundamental notion.

Shaw elucidates the process to detect basic traits of legal personality, claiming that it involves the examination of certain concepts within the law such as status, capacity, competences, as well as the nature and extent of particular rights and duties. He furthermore evokes personality as a relative phenomenon varying with the circumstances. One may argue that the concept of international legal personality is not a settled category dealt with and understood according to a readily made formula, but rather an element of incessant change. Brownlie has described the subject of international law as an entity possessing international rights and obli-

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221 Ibid.
223 Ibid.
gations, having the capacity to maintain its rights by bringing international claims, and being responsible for its breaches of obligations by being subjected to such claims.\textsuperscript{224}

A way in which to include all the notions of Brownlie is by arranging them within Shaw’s definition, which identifies international personality as “participation plus some form of community acceptance.”\textsuperscript{225} The first criterion, “participation,” relates to the activities of the actor and the area in which it operates, and alludes to the concrete actions of the actor.\textsuperscript{226} The second criterion, “community acceptance,” relates to the acceptance of the international community, expressed by the concluding of treaties as well as customary international law.\textsuperscript{227} It also includes the bestowment of rights and duties by individual States on specific NSAs; the latter may, however, not necessarily amount to international custom.\textsuperscript{228} As this criterion depends on the acceptance of the actors of the international community, the nature and extent of the rights and duties concerned are significant. Hence, the context is also of great importance.\textsuperscript{229} States will regularly be less inclined to confer rights under \textit{jus ad bellum} on NSAs as opposed, for instance, to granting other sorts of international rights to international governmental organizations.

The third criterion of international legal personality, by Shaw seen as an offshoot of “community acceptance,” is the element of “needs,” which, for the purpose of this thesis, is understood as the need of the international and the relevant national community, as well as the acceptance of the latter.\textsuperscript{230} In the following this criterion is treated as one of the three main criteria for international personality.

All three criteria, which are supplemented and informed by Brownlie’s approach to the matter, are employed as a frame of reference in the following, to examine whether NSAs general-

\textsuperscript{224} Crawford (2012) p. 115.
\textsuperscript{225} Shaw (2014). p. 143.
\textsuperscript{226} Wagner highlights the importance of this element, claiming that the legal capacity of a NSA is both dependent and limited by its actual function on the international plane, see Wagner (2013) para. 1.
\textsuperscript{227} Shaw (2014). p. 143; ICJ Statute article 38 (1).
\textsuperscript{229} Crawford (2012) p. 126.
\textsuperscript{230} Shaw (2014) p. 143; see section 3.3.3 in this dissertation for an elaborate discussion of needs; this condition may be seen as introduced in \textit{Reparation}. Here it was noted that the nature and extent of the rights of a subject “depends upon the needs of the community,” see \textit{Reparation for injuries suffered in the service of the United Nations}, Advisory Opinion: I.C.J. Reports 1949, p 174, at 178.
ly, and Hezbollah particularly, should have the right to resort to force in self-defense and have limited international legal personality with regard to taking this action.

3.3 Assessing participation, community acceptance, and needs

3.3.1 Participation

The question of participation relates to the actual role played by the actor to which one examines whether limited personality is due or not. Participation is here closely linked to the international domain; an actor may not have international personality if all its actions are domestic. Its international activities are thus necessary, though not sufficient for the legal personality to become internationalized. Participation may refer to the norm-creating activity of actors, which is then immediately linked with the condition of community acceptance; States are generally perceived as the creators of international law and are inferentially subjects of international law. Moreover, participation may be seen to include de facto trans-border activities as well as the engaging with actors possessing international personalities, thus bringing their participation within the ambit of international activities and, at the very least, onto the doorstep of the international plane. Participation may thus be understood as the practical side of having the capacity to act on the international plane.231

The question of participation is indeed part of the assessment of community acceptance; participation with regard to entering into agreements with other States and dealings with other international personalities may also shed light on the acceptance given by the international community through acquiescence to or actual recognition of the role played by the NSAs. For an actor to have de jure capacity to act in a certain respect, the criteria of both community acceptance and needs must also be examined. Locating limited personality, one may take on different, or a mix of several, approaches. In the following, the traditional indicia of international legal personality, as well as the ones listed by Brownlie are addressed. The latter are indicia of international personality in a general sense. However, in order to also accommodate these perceptions of the matter within the framework of this dissertation, they are discussed in the following under the banner of community acceptance.

231 Jennings and Watts (1992) pp. 119-120.
### 3.3.2 Community acceptance

For the purpose of this thesis, “community acceptance” refers to acceptance as law by the international community. The legal role played by, and rendered to NSAs, is not alone expressed in state-by-state practice and by the adoption of UN resolutions, but also indicated by the issuing of statements and reports by UN organs and committees and the work of legal scholars, the efforts of whom may translate into law if consented to by States. In the following, these sources are examined by analyzing documents published by UN expert committees on NSAs, and by assessing a selection of practice and *opinio juris* of States, as well as resolutions and decisions by UN organs.

The traditional indicia of entities that are full subjects, and in possession of all the faculties of international personality, have been listed as “capacity to possess international rights and duties, capacity to maintain these rights by bringing international claims, and conferral of these capabilities by states.” Brownlie has stressed the deficiencies of this traditional indicia approach. In the Hague Report of 2010, his alternative method was noted, whereby Brownlie proposed that international personality should be located by adducing the three situations, or “principal formal contexts,” in which the issue of limited international personality normally arises. According to Brownlie, these are “capacity to make claims in respect of breaches of international law; capacity to make treaties and agreements valid on the international plane; and the enjoyment of privileges and immunities from national jurisdictions.” Brownlie argues that entities possessing all three capacities will be regarded as full subjects of international law, while entities with limited personality will have something less than all three. Lest one lose part of the picture, and due to a lack of authoritative guidance as to the exhaustive contents of any of these criteria, the traditional indicia, as well as the ones listed by Brownlie, are included in the following.

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236 ILA Hague Report (2010) p. 20; Brownlie argues that if the actor is not capable of being subjected to international claims, then the actor may only have very restricted legal personality, see Crawford (2012) p. 115.
While international and non-international conflicts differ extensively as far as the rules of law applying to them are concerned, both are employed in the following in order to detect points of universal validity and relevance. When for instance invoking examples where parties to a civil war enter into agreements under the auspices of the UN, it is not argued that they are entering into treaties or that they command the authority to do so, neither is it claimed that their international personality, as far as making these agreements are concerned, supports the notion that NSAs should have legitimate authority to resort to force in self-defense. Rather, these examples are adduced to highlight some instances in which armed NSAs have been seen to have international personality to certain ends, in order to create a nexus between these cases and the research questions of this thesis. The objective is thus to establish a link between the positivist approach which is regularly employed when dealing with these entities in the sphere of *jus in bello*, and the *ferenda* component predicated on legal philosophy and fundamental principles of international law, considerations of which are inherent in the discussion of the needs for the conferring of rights under *jus ad bellum* to such entities.

In short, by addressing participation and community acceptance, one may demonstrate the existence of limited personality of NSAs in certain areas of international law *de lege lata*. By also discussing the legitimate authority to resort to force in self-defense within the established framework of international legal personality, this thesis offers a theory by which one may argue that the rights of NSAs should be recognized beyond what is in fact accepted by the international community.

In the following, various international legal sources are examined to assess to what extent international personality for armed NSAs may be detected and to what end. The six previously mentioned indicia are made points of reference in these sections on international community acceptance, making them the points of reference at each subsection.

### 3.3.2.1 Capacity of NSAs to possess international duties: Discerning the objects and subjects of international law

One way to detect the existence of international duties for NSAs is by analyzing the wording of Security Council resolutions. Miretski argues that there are three main categories of UN
Security Council resolutions addressing NSAs and their subjectivity in international law. The first is the one applying terms such as “targeted” and “smart sanctions.” 237 Miretski describes this as a category relating only to NSAs as objects of international law, deprived of any international personality. The second category renders the NSAs “some legal personality” by referring directly to them by the use of words such as “urging,” “requesting,” or “encouraging.” 238 The final category renders the NSAs legal personality by making them subjects, rather than objects, of international law. This subjectivity is made apparent by the imposing of duties upon them directly, employing terms expressing that the Security Council “decides” or “demands” that the NSA must take, or refrain from, specific actions. 239 In this context, the threshold for obtaining status as a subject of international law seems no test at all; a subject need not have rights, but merely be subjected to obligations in international law in order to possess some sort of legal personality. In that case, the NSA has international personality as far as being imposed obligations in international law is concerned. Consequently, Miretski’s assessment of subjectivity accounts only for these entities having obligations under international law; they are quite simply actors that the international community needs to be able to “deal with,” but not actors that one must include more extensively by combining these obligations with the conferring of rights on them as well.

In the case of Somalia in 1992, personality was tacitly considered extant with regard to imposing international duties on NSAs. In a resolution on the civil war in Somalia, the Security Council called upon “all parties, movements and factions” to cease hostilities and to maintain the cease-fire. 240 The way in which the NSAs were addressed coincides with Miretski’s second category, rendering the actor some legal personality. They were not made obliged subjects of international law in the sense that obligations to refrain from certain activities were imposed directly, but still dealt with as de facto actors that needed to be a part of the solution and necessarily contended with. This resolution furthermore “requests” of the Secretary-General that he continued his consultations with “all Somali parties, movements and factions” towards the convening of national reconciliation and unity in Somalia. 241 The fact that the General-Secretary was requested to deal with these NSAs adds to the indication that they

238 Ibid.
239 Ibid. p. 27.
241 Ibid.
were not just considered *de facto* actors, but also *de jure* players in the international community and thus legal persons as far as being legally obliged to comply is concerned.

One may not, however, infer that the addresses made to these NSAs by UN organs expressed a desire to confer international personality with regard to positive rights on the international stage, and even less so with regard to *jus ad bellum*. Although widely accepted that NSAs have duties to refrain from violations of *jus cogens* norms, and that insurgents must comply with parts of international humanitarian law, such acceptance is not to have an effect on their position and status in international law more generally.\(^{242}\) An expression of such a desired limitation is found in the last paragraph of article 3 in Geneva Convention (I). This article states that the application of the provisions regarding international humanitarian law “shall not affect the legal status of the Parties to the conflict.”\(^{243}\) Thus it is explicitly noted that the rights and duties of NSAs under *jus in bello*, may not justify rights under *jus ad bellum* – an application of which would precisely alter the legal status of the “Parties.” That NSAs should enter into agreements concerning international humanitarian law is furthermore exhorted in the penultimate paragraph of the very same article,\(^{244}\) making many of the examples to which this thesis directs attention in the following, desired consequences of intentional regulation under international law as far as *jus in bello* is concerned.

### 3.3.2.2 Capacity to make treaties and agreements valid on the international plane and a capacity to possess international rights and duties

The capacity of NSAs to enter into agreements under international law is unquestionable.\(^{245}\) It is, however, principally held that this does not lead to the altering of a state–centric view of the making of international law, because these agreements are not considered treaties.\(^{246}\) Treaties are considered expressions of law-making and NSAs are not law-makers. Others contend that a perception of States as the only actors able to develop international law is a conserva-

\(^{242}\) Geneva Convention (I) article 3; Ryngaert (2011) p. 285; the duty of NSAs to respect international humanitarian law is regularly expressed by the UN Security Council, see for example Security Council Resolution S/RES/1882 (2009).  

\(^{243}\) Geneva Convention (I) article 3.  

\(^{244}\) Ibid.  


\(^{246}\) Ibid.
tive misunderstanding; events in the formative years of international law imply that NSAs have been instrumental in forming and developing international law and that this process represents a continuum, more than a breakthrough of legal modernity.\textsuperscript{247} Regardless of these differences of opinion, it is generally accepted that treaties are concluded between States exclusively and that the entering of NSAs into agreements under international law is not supposed to lead to altering the legal status for the Parties.\textsuperscript{248}

An example of the capacity of NSAs to make agreements valid on the international plane, is a mechanism known as the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action,\textsuperscript{249} a document construed to ensure respect and adherence of NSAs to the norms set out in the Mine-Ban Convention of 1997. Irrespective of the status of the “Deed of Commitment,” the fact that numerous armed groups, for instance in Burma, Burundi, India, Iran, Iraq, the Philippines, Somalia, Turkey, and Western Sahara have since banned such mines, by subscribing to this Deed of Commitment mechanism, demonstrates that NSAs may be subject to obligations in international law by entering into agreements which are valid on the international plane.\textsuperscript{250} This deed lays down some ground rules in \textit{jus in bello} which are conceived as part of the international law of war. This also shows that NSAs may enter into agreements valid under international law, rendering the NSAs which are parties to the deed, international personality with regard to their mutual obligations.

Another example in the sphere of \textit{jus in bello} is agreements regulating the conduct between a State and an insurgent group.\textsuperscript{251} The relation between the two is an internal matter. International law does, however, still apply to certain aspects of such a relation. As pointed to by Clapham, such agreements can be governed by international law under particular circumstances.\textsuperscript{252} He points to an agreement concluded between El Salvador and the rebel group, Frente Farabundo Martipara la Liberacion Nacional (FMLN), which was made in compliance

\textsuperscript{248} Geneva Convention (I) article 3; Crawford (2012) pp. 118-119.
\textsuperscript{249} Geneva Call, \textit{Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action}, genevacall.org, 2000.
\textsuperscript{251} Ibid.
\textsuperscript{252} Ibid.
with the actual capacity of the rebels to fulfill certain obligations under international humanitarian law. This premise, combined with the fact that the agreement was signed by the incumbent UN Secretary General and subjected to UN monitoring, were indicative of it being sought regulated under international law.

It is by assessing all relevant factors and circumstances of such agreements that one may examine whether, and to what extent, the agreement is to be governed by international law. Clapham points to a crucial aspect for the El Salvador case, namely that it was perceived as an agreement under international law “between an entity recognized as having the requisite international status to assume rights and obligations under international law,” presumably pointing out the insurgent group as having such competence in a more general sense. This conclusion brings important and general aspects to our attention; firstly, the NSA entering into this particular agreement was deemed to possess the requisite international status to enter into the agreement as well as assuming rights under international law. Clapham acknowledged that NSAs may indeed not only have obligations, but also rights in international law. As far as Clapham and the adduced examples are concerned, however, these rights relate solely to the domain of *jus in bello*, not *jus ad bellum*.

In the following sections, examples where NSAs may have been, however tacitly, considered to have legitimate authority to resort to force in self-defense, directly or indirectly, are presented. As attempts to establish customary international law in this regard seems futile, among other reasons because State practice is practically non-existing as far as granting NSAs

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253 Agreement on Human Rights, Annex to UN Doc. A/44/971-Resolution S/21541; ILA Hague Report (2010), p. 10; this thesis does not address respect for international humanitarian law as a criterion for the *ferenda* assessment on whether the NSA should have legitimate authority. The respect for international humanitarian law is seen as a set of rules applicable pursuant to the status of the parties, not a set of rules determining their status.


255 Ibid.

256 Ibid.

257 It seems clear that NSAs have not been rendered rights by States in terms of “fighting privileges.” An exception may be the status conferred on certain National Liberation Movements. This bestowment has apparently not entailed the establishment of customary international law in this regard, see ILA Hague Report (2010) pp. 22-23; Clapham (2006) p. 274.

258 An exception is Protocol (I) article 1 (4).
rights under *jus ad bellum* is concerned, these examples are invoked simply to demonstrate the attitude of some States concerning the status of NSAs in cases somewhat resembling the scenarios in the research questions of this dissertation. And while not arguing that the following examples represent cases of States accepting legal personality for NSAs with regard to rights under *jus ad bellum*, they may demonstrate that States from time to time, through actions like these, seek to authorize, or at least give the impression of authorizing NSAs beyond the sphere of *jus in bello*.

### 3.3.2.3 Ad Hoc Bestowment of Rights on NSAs: Community Acceptance Short of Customary International Law

Practice relating to NSAs often involves subjective, discretionary, or ad hoc bestowment of rights and duties. However, such actions may often be refrained from, as States habitually perceive such groups as challenging their own power or the power of allied States. The recognition by one State of the status of a NSA in another State, for instance as a legitimate opposition or authority, will typically play into a bigger geopolitical context where law converges with realpolitik and an array of national, regional, and global interests.

In the following sections, policies of selected States are presented. In the first example, the US policy in Soviet-occupied Afghanistan, it is a State’s apparent support for a NSA to resort to force in self-defense which is discussed. In the subsequent examples, namely current day Syria and Libya, it is the explicit recognition of entities as legitimate opposition or authority in a wider sense, which constitutes the backdrop.

#### 3.3.2.3.1 Lending legitimacy: The USA policy in Soviet-occupied Afghanistan

The Soviet invasion and subsequent occupation of Afghanistan from 1979 into the late 1980s is an interesting study of state practice by the USA as far as the lending of support to, and concomitant propping up of, the right of a NSA to resort to self-defense is concerned. The

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259 The Geneva Conventions and Protocol (I), including article 1 (4), were accepted as applicable to POLISARIO, the national liberation movement for Western Sahara. This is the first time that the declaration and application to an armed movement has been accepted by the Depositary State, and its conduct possibly regulated under *jus ad bellum*, see Geneva Call, *Geneva Conventions and armed movements: an unprecedented move*, gene-vacall.org, August 4, 2015.
following assessment does not address the purported illegitimacy of the Soviet-backed government in Kabul, or the legitimacy of the US support for the mujahedeen, but focuses rather on how the USA addressed the oppositional resistance as a “legitimate actor” against the foreign aggression from the Soviet Union. It is thus the aspect of giving of support to the NSA, seemingly arguing that it should have, or is considered to possess, the faculty of legitimate authority to act in self-defense in international law, which is most relevant for the purpose of this thesis.

In an address to the UN, the U.S. Representative at the UN expressed support for the General Assembly Resolution that condemned the Soviet invasion of Afghanistan.260 The backdrop to the invasion and subsequent occupation was the overthrow of the Daoud Government in 1978 and installation of Babrak Karmal as president. The Soviet Union had invoked its right of self-defense in accordance with UN Charter article 51, but its resort to force was broadly perceived as illegal aggression and a violation of the principle of non-intervention.261 The U.S. Representative to the UN stated that the Soviet-installed Kabul regime had “no legitimacy whatsoever in the eyes of the Afghan people,”262 and rather expressed its support for the armed opposition. Supporting the fact that the USA indeed considered the legitimate authority of the resistance a case of self-defense in international law, is the representative’s reference to the national uprising, the participants of which were also part of the national resistance, as the only justifiable grounds to invoke the right to self-defense, as “it is defending the independence and very existence of the Afghan nation against a foreign and brutal domination.”263 Alternatively, one could claim that it was perceived as a resistance against occupation. If so, the UN Charter and the rules under *jus ad bellum* would not be applicable, and the issue of legitimate authority would no longer be relevant. Here, however, the focus is on the words used by the US representative at this juncture, indicating a perception of the acts of the resistance as acts of self-defense.

The vociferous US support for the resistance was furthermore substantiated by the U.S. Representative’s final remarks, stating that “it is essential that we and others continue our support

261 Ibid. p. 20.
262 Ibid.
263 Ibid. p. 21.
of the brave struggle by the Afghan resistance” and furthermore stressed that support was needed “until all Soviet troops depart and the Afghan people are free to determine their own future.”

The US policy and support for the resistance is valuable evidence of a State addressing a NSA as the legitimate actor on the international plane. Through these remarks, the US gave an impression that it was not only supportive of the mujahedeen in their struggle, but also, by the words employed, gave the impression that it considered its fight a matter of self-defense. While this case is particular and difficult to apply to a different situation, as all cases differ, and the discerning of customary international law in this regard is not feasible, it may nonetheless indicate that States are not necessarily always hesitant to confer such personality in international law.

3.3.2.3.2 Detecting and recognizing NSAs in Libya and Syria

The policy of recognition in conjunction with the Arab Spring in Libya has prompted many questions regarding the consequences that recognition, and the wording of such utterances, may have de facto and de jure. Swiftly after the start of the uprising against the Gadhafi regime in Libya in 2011, many States moved to recognize the National Transitional Council as a legitimate representative of sorts. Talmon points to the impossible combination of two de jure governments, arguing that one can only have a single de jure government and possibly an additional local de facto government or a representative of the State’s people, a notion also supported by DASR article 4. In such a situation, the question of recognition is a question of pointing out the right authority to act as government. The one that is considered the right authority then takes on the legitimate authority conferred on every State. In Libya, this meant that the Gadhafi regime would remain the sole legitimate authority of the land for as long as it remained in power and no other entity was recognized as legitimized to replace it. Accordingly, States supporting the NTC expressed their support in a different manner, namely by political recognition. This involved a variety of approaches to the NTC, whereby it was designated as “the legitimate representative of the Libyan people” and “the sole legitimate representa-

265 Hereinafter “NTC”
266 Talmon (2011) pp. 2-5.
267 Ibid. p.3.
tive," before the Gadhafi regime was later entirely sidelined and the NTC was offered recognition, for instance by France, as “the only holder of governmental authority in the contacts between France and Libya and its related entities."269

The triggering factor for changing the policies of many States in this regard was the stance taken by the Security Council in its resolution in February 2011, ultimately enabling the ascension of the NTC as the right authority in Libya.270 Besides imposing sanctions on the Gadhafi regime, the Security Council expressed the intention that all frozen assets should befall the Libyan people at a later stage, ultimately preparing the way for the NTC as the legitimate representative of the Libyan people, prompting States to strengthen their ties with the emerging actor.271 An official breakthrough came as the UN General Assembly adopted a resolution giving the seat at the UN to the NTC in September 2011.272 In so doing, the first phase of transition from recognition as a legitimate opposition to one of official representative was completed.

The motive behind political recognition at the expense of the government was due to a wish for the incumbent regime to be toppled and for a new to be installed. While this eventually came about in Libya, although the country has been raged by conflict since, this has yet to occur in Syria. Ever since the outbreak of civil war 2011, the brutal and still ongoing hostilities have contributed to creating a myriad of NSAs fighting against, as well as alongside one another, to attain preeminence in their respective regions and fill the power vacuum left by the piecemeal defeat of the weakened Assad regime. Concurrently, the fighting has prompted a contest for influence among several regional powers, contributing to prolonging the conflict on the ground.

Due to the indiscriminate use of force employed by the Assad regime against his people since day one of the uprising, most States have resorted to a delegitimization of his government, as

269 Ibid. p.3.
271 Ibid.
well as political recognition of emerging factions. While the external supporters of the various factions in Syria have not succeeded in effectively promoting or installing a new government to rule the whole or even parts of the country, many initiatives have been taken in an attempt to point out “friendly” actors that may serve as transitional representatives of Syria amid chaos and lack of resolve.

The discussion concerning which body politic should be deemed the legitimate representative of the Syrian and Libyan peoples, contains parallels to this thesis, as it relates to the practice of States vis-à-vis NSAs in weak and failed States in times of war. However, these cases also exhibit important differences. Firstly, the cases of both Libya and Syria have at some point been approached as questions of political recognition, not legal recognition. According to Talmon, this means that the recognition of the actor as a legitimate representative, either of the aspirations of the people of Syria or the people as such, entails political, but no legal implications. Secondly, the issue of recognizing actors in these cases pertains to a category significantly broader than the questions of this thesis. While this paper addresses exclusively the legitimate authority of the NSA to resort to force in self-defense, the question in Libya and Syria related, and partly still relates, more generally to the issue of recognizing a far wider competence, namely the political recognition of an actor’s suitability and its supporters’ volition that it should represent the people in all matters of politics, ultimately becoming a State rather than remaining a NSA. Observing the way in which States deal with these actors, by regarding them as legitimate representatives of the people, one may argue that they are simultaneously recognizing, however probably only on a moral-philosophical level, their right to all faculties of the State, one among which is the right to resort to force in self-defense.

As far as the connection to DASR article 9 is concerned, the problematic features involved in invoking this article to justify Hezbollah’s armed response as an act of the State in self-defense may be lesser in a situation where, for instance, the Free Syrian Army exerts such force in response to a stipulated incident of foreign aggression against Syria. In that case, the violation of sovereignty, and hence the unreasonable implications of attributing the acts to the

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State, would, possibly, seem less significant. Still, the invocation of DASR in application to the case of Hezbollah remains tricky from a legitimacy perspective.

These accounts on participation and community acceptance show that NSAs may have international personality with regard to certain rights and duties in international law, especially with regard to international humanitarian law. There is, however, no consistent state practice supporting the claim that NSAs may possess legitimate authority to resort to force in self-defense in response to an armed attack, although this may, in practice, seem to be what is in fact supported in some cases through express backing or political recognition of a broader set of competences.

In the next section, the positivist approach is left for the sake of an assessment of the third and final criterion for international legal personality, “needs,” through a philosophical approach, in order to discuss whether NSAs should have a right of self-defense in international law.

The following section commences with a philosophical account on legitimate authority, before continuing with general and principled considerations from both the philosophical and international legal domain that may support the attainment of legitimate authority by NSAs de lege ferenda.

3.3.3 Needs

This section assesses the “needs” for the NSA to have legitimate authority to resort to force in self-defense. By “needs” is understood the needs of both the international as well as the relevant domestic community, in addition to the acceptance of the latter.276

276 While traditionally alluding to the needs of the international community exclusively, this thesis includes these other notions as well to stress the needs of the people suffering under an armed attack. The inclusion of these elements may moreover be traced back to two crucial aspects dealt with in this thesis: First, the needs of the domestic community may be derived as an analogy from DASR article 9, and the criterion necessitating that the circumstances must be “such as to call for” the exercise of elements of the governmental functions by private actors. Secondly, the need for acceptance may be derived from the authority component of legitimate authority, which stipulates a sort of acceptance by the domestic community to the NSA having legitimate authority.
These aspects are examined in the following by presenting and discussing the concept of legitimate authority in legal philosophical terms, as well as by highlighting other aspects that may support or rebut the attainment of legitimate authority de lege ferenda. The following presentation of legitimate authority, and its components, constitutes the basis for the application of the criterion of needs to the case of Hezbollah in chapter 4.

3.3.3.1 Legitimate authority: New assessments of ancient concepts

3.3.3.1.1 Components of legitimate authority

The two main components of legitimate authority are “power” and “authority.” While the former is considered the ability to compel compliance, the latter refers to one’s right to rule. In order to become a legitimate authority, one is in need of both.

One way to obtain legitimate authority is to possess the moral right to rule, and if such a right is exercised, it imposes a moral obligation on the subject to obey. When this moral right to rule exists, one has simultaneously attained legitimacy to impose authority. This formal capacity must then be coupled with the faculty of “power,” the convergence with which establishes legitimate authority. Legitimate authority is thus the fusion of power and the right to rule, either derived from a moral right to rule or from the fact that the actor is regarded as a legitimate authority.

The notion of legitimate authority is linked to what Raz describes as the “service-conception.” This concept presupposes that political authorities possess legitimacy only when, and to the extent that, they serve their subjects. As argued by Raz, this also entails that the legitimacy may be partial, meaning that the authority of an actor may be legitimate with respect to specific areas of regulation and in relation to a certain group of people. One may thus view the service-conception as bound to the notion of partial legitimacy, recogniz-

278 Raz (1986) p. 76.
279 Ibid. p. 27; Shapiro (2002) p. 386.
281 Raz (1986) p. 56.
ing that the legitimate authority is valid only insofar as it serves a purpose and only in relation to that specific end.

Raz contends that, besides establishing the reasons as to why the actor has authority, one must also examine whether there are reasons defeating the reasons supporting this conclusion in the first place.283 The question is whether there are reasons to rebut the potential conclusion that an actor has legitimate authority to take on a particular action. As pointed to by Raz, the degree to which the reasons for or against authority must outweigh one another in order to arrive at a conclusion, cannot be solved by any fixed formula, but is rather subject to concrete discussions in conjunction with the particular cases.284

Pursuant to these considerations, legitimate authority is, broadly put, the fusion of “power” and “authority,” whereby the former represents the ability to compel compliance and the latter is based either on a moral right to rule or on the merits of being considered an authority because it is regarded as such.285 For the purpose of this thesis, it is the legitimate authority to use force that is at question. Thus, the “compelling of compliance” relates to the ability to use force against the aggressor, while the “moral right” to do so is predicated on a sense of general legitimacy, the importance of the interests protected by the act, and the acceptance from the domestic community.

3.3.3.1.2 The need for legitimate authority

Assessing the need for the NSA to possess legitimate authority, a passage from a letter between incumbent Secretary of State, Daniel Webster and British representative, Lord Ashburton, subsequent to the Caroline Incident in 1837, may provide a backdrop to the assessment. Although aimed the question of preemptive self-defense, it may be seen to draw up a general framework for examining the right of self-defense in customary international law, by requiring that “every act of self-defense must depend for its justification on the importance of the interests to be defended, on the imminence of the danger, and on the necessity of the act.”286

284 Ibid. p. 57.
286 Letter from Mr. Webster to Lord Ashburton, August 6, 1842; Bowett (1958) p. 32.
In the following, it is these interests and their fundamental importance, accompanied by the
danger posed and the necessity to act in response to an armed attack, which is reflected upon.

There is a stipulated, general need for a legitimate authority in order to rule, as it establishes
an order that may preclude chaos. The stipulation of such accepted authority is useful for sev-
eral reasons. Forcing people to weigh a balance of reasons every time a moral or other im-
portant decision arise, is not only dangerous, but also wasteful.\textsuperscript{287} In a situation where a State
is under attack there is a general acceptance of the State as the legitimate authority to resort to
force in self-defense. If, however, the regular authority is unable to respond to the peril, the
need for defense is not attended to and the right to self-defense is not realized in practice. For
this fundamental right to be realized, it could be expedient to have established the alternative
authority of an actor with the power to respond to the aggression, and whose right may only
be activated in the event of an armed attack. This may be expedient not only from the per-
spective of the State under attack, but from an international community perspective where
maximum effectiveness with regard to defending fundamental rights, such as the right to self-
defense to guard basic interests, ought to be of pivotal concern. It is thus not only a question
of protecting the interests of the domestic community under attacks, but fundamental princi-
pies of international law.

This thesis stipulates that the State authority is indeed unable to attend to the defense, much in
the same way as presupposed in DASR article 9; it is the absence of the State which creates
the need for the domestic community for defense, and a possible need for accepting the NSA
as a legitimate authority to protect fundamental rights and principles of international law. If
one is aware of the inability of a government to take on its responsibilities, already prior to an
attack, but fails to act on this at any stage, one risks leaving the people in a dangerous situ-
ation and expose the State to assault. One may then face a situation very much like the one
presupposed in the third condition of DASR article 9; an armed attack readily creates a need
to respond with force in self-defense. It might, for this reason, be advantageous and possibly
preferable to establish an additional authority, which, because of the ineptness of the govern-
ment, fills the void, left for foreign domination, without having to attribute its acts to the tar-
get State. Condoning the authority of another actor could then, as a sort of deterrent, contrib-

\textsuperscript{287} Shapiro (2002) p. 388.
ute to preventing or limiting the threat posed to the State and its people. 288 The presumption of the value of resistance follows precisely from the acknowledgment that force is sometimes necessary for rights to be maintained and aggressors deterred. 289

On the other hand, one may infer that the legitimation of such resistance under *jus ad bellum* incites an increase in the use of force beyond established limits. Notwithstanding, if the authority, to which one usually adheres, is inept at action, then the people should reasonably also be rendered the opportunity to submit to another authority with the expertise and skills necessary to safeguard fundamental interests at their own choosing. 290 A conclusion to the contrary may, from a philosophical perspective, come across as unreasonable.

If one were to argue that legitimate authority should be obtained for NSAs under *jus ad bellum*, this would also encompass authority to protect its subjects and a right and duty to do so by resorting to force in self-defense. In the same way as is the case for the State, the right of the NSA may thus be perceived as a privilege. The potential right-holder has a privilege against another to perform an act when the right-holder is not under a duty to that actor not to perform that act, in our case a lack of duty towards the home State not to resort to force in self-defense against an aggressor. 291 As the State possesses legitimate authority to resort to force in self-defense, because it is a State, the NSA would need a different sort of justification for such a right to arise. Consequently, a privilege for the NSA to act in this regard is, pursuant to the framework of this thesis, dependent on the need for such an act to be taken.

The notion of need for this authority may be recaptured as a question as to whether the NSA should have a duty towards the target State, which in this case also represents the home State, not to resist an armed attack. The duty to refrain from such a response would be grounded in the conception of *jus ad bellum* as a domain for States. However, it would also leave the State in a situation calling for the exerting of defense. The potential lack of duty to refrain from

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288 Raz (1986) p. 49; Reitberger argues that the emphasis on legitimate authority as a State prerogative weakens the potential of the other just war criteria to restrain the use of force. One may argue that if the potential aggressor is aware that the State is incapable of offering any resistance, then there is also a lower threshold as far as waging an armed attack is concerned. Knowing that another actor may also resort to force legitimately *may* represent a deterrent to the potential aggressor, see Reitberger (2013) p. 92.


such resistance, or privilege to act, would be derived from the absence of the government, and its consequent failure to attend to its duties, among which is the obligation to protect its population, coupled with the power of the NSA to act. This way, the NSA may attend to the needs of self-defense of the population, as well as realize the right of self-defense as a fundamental right of States in international law. One may evoke the moral imperative of such an act on the basis that there is no actor present to make effective the right a people has to protect itself from an armed attack. A conclusion in support of the legitimate authority of the NSA may thus be made on the basis that the right to rule, understood as the exclusive moral privilege to rule, at least with regard to defense, should be lost from the hands of government when it fails to protect its territory and people.292

Furthermore, the legitimate authority of the NSA would be dependent on a degree of support and acceptance from the domestic community whose needs for defense are attended to. With their acceptance, the NSA would to a lesser degree have a duty not to resist. The actor’s general level of legitimacy, and reasons that may rebut its legitimacy, should also be taken into consideration; the acceptance of the people and the State of another as legitimate authority cannot stem from extortion. If, for example, the absence of the legitimate, State authority is a result of threats and menace from the alternative authority, the conflict with sovereignty comes to the fore. Then one may face a situation pointed out by Raz, whereby there are reasons that rebut the claim to legitimacy. Here, a diverse selection of scenarios may be contemplated. Pursuant to Raz, it is generally assumed that the obtaining of legitimate authority requires, not only that the actor responds to a need for defense, but also possesses a moral right to rule or is regarded as a legitimate authority through a measure of support for its role. In consequence, the attainment of such a position by resorting to extortion, or any other significant measure which may weaken its legitimacy, can hardly be described as authority on the basis of a moral right to act in this respect. One may then not claim that the domestic community has “accepted” the right of the NSA to act to this end.

The potential “new” actor should not, however, supplant the State’s exclusive role in this regard. The original State authority continues to possess a privilege to rule, also with regard to

defending the country. The question is rather if it should continue to have the exclusive privilege of doing so or instead share it with the capable NSA.

Legitimate authorities, as far as legal philosophy is concerned, may be outlined as the ones that have *de facto* ability to force others to comply with their demands and who are essentially morally permitted to exercise this ability. For the purpose of this thesis, the NSA needs both the *de facto* ability to resort to force in self-defense, as well as a moral permission to do so.

3.3.3.1.3 An Hobbesian outlook

The need for legitimate authority has been extant since the inception of statehood. The idea of a social contract between the sovereign and its subjects has for long been fundamental in understanding the State and its rights vis-à-vis its people, as well as its relations with other States. It is by this imagined contract and the institutionalization of state power that the State is considered the only legitimate representative of the people and consequently the only legitimate representative of its people vis-à-vis other States.

The idea that man was once suffering in a state of nature where anarchy reigned and man was subjected to threats to his life, and needed protection, lies at the heart of the social contract and its justification. By giving up freedom to the sovereign, the subjects lose some of their freedom and receive protection from the State in return. The surrender of freedom to act as oneself deems fit, rests on the premise that the State will indeed provide the most fundamental of services, namely physical protection from dangers, internal as well as external. Hobbes expressed the essence of the matter by arguing that “covenant not to defend my selfe from force, by force, is always voyd. For…no man can transferre, or lay down his right to save himselfe from death, wounds, and imprisonment.” Hobbes espoused the defense of the sovereign power unless it ceased to exercise its most fundamental tasks, the upholding of which was fundamental for the subjects to give up their rights in the first place. This may be seen

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294 Rousseau and Cranston (1968) p. 33.
as a notion of a flagrant breach of contract and a philosophical forerunner to the international legal doctrine of Responsibility to Protect; the premise compelling compliance to the sovereign vanishes and the subject is no longer subjected to his will if protection is not offered, prompting the need for the protection of fundamental interests to override the prerogative of the ruler to violate them.

While Hobbes made internal strife and civil war the focal points of his discussion, this paper deals with the relation between a NSA and foreign aggressors pitted against the State in which the former resides. The mere consequences in the scenario depicted by Hobbes, and the one stipulated in this thesis, however, are seemingly congruent. When a State fails to exercise its sovereignty externally in the form of exerting force in self-defense against aggression, the consequence may certainly be the ineptness at defending the people and their human rights. Hobbes’ notion of legitimacy of a government in relation to its subjects may thus also be relevant with regard to the approach of this thesis; the point at which a people, or portions of it, regains its natural right to resort to force against a tyrannical government, may be very similar to the situation where the State fails to defend its people against foreign aggression, the detriment caused to the subjects in the former scenario equaling the one inflicted in the latter.

From the perspective of the need of the international community, one may argue that the legal order should not permit any fragmentation of authority with regard to the use of force in international law, as this may entail elevating the legitimacy of NSAs writ large, undermine the position of States, and possibly promote the use of force. Simultaneously, the need of the international community is also the need of the people who live in it, and the right of self-defense is indeed based on the acknowledgment that the use of force is sometimes necessary. If a State loses its capacity or is not present to exercise its external sovereignty, and its absence causes danger to its population by not being present to protect it, one may possibly argue that the State has, however temporarily and only with respect to a certain domain, abrogated its external sovereignty as far as defending the territory is concerned. This creates pressing need for the protection of the people in the target State. One may also argue that the international community need calls for the conferring of legitimate authority on a capable NSA as

297 See chapter 2 and the account on the State as the principal actor in international law and arguments supporting the maintenance of jus ad bellum as a domain pertaining exclusively to States.
it may bolster the fundamental right of self-defense and make it effective in a situation where the State’s absence causes it to remain idle.

This does not, in any event, mean that another actor should take on the government as a whole and challenge its power permanently, for instance through a coup d’état; that would certainly go beyond the immediate “needs” for self-defense. The question is rather if it at all should be considered a matter of conflict with the notion of sovereignty if a NSA takes action in self-defense, where the government is absent and leaves its population to suffer serious violations of basic human rights at the hands of a foreign power, given that resistance is also supported by the community under attack.

Moreover, when a State is subjected to an armed attack, serious breaches of international law have already occurred; the violation of the principle of non-intervention and the right to territorial integrity being the most obvious, and the people within the borders of the target State risk their lives due to the illegal hostilities, placing the most basic of human rights in jeopardy. Needless to say, the violation perpetrated by the foreign aggressor is not deserving of any understanding or leniency in itself. There is rather a responsibility upon every State to refrain from the recognition of a violation of the prohibition against the use of force and to cooperate to resolve the situation. The consequences of such a violation of a cornerstone in international law may be dire; by so doing, the aggressor challenges the sovereignty of the State, possibly disabling the government’s ability to exercise supremacy over its jurisdiction. It also impairs the right of the people to exercise its right to self-determination, an inherent part of independence which stipulates that every State and its people are to choose for themselves the political and economic system of the State, without any outside interference; in other words, the members of the political community have a collective right to decide on their own matters. To claim that that the people, or parts of the people represented by the NSA, should not be allowed to respond to such aggression, runs seemingly contrary to fundamental moral convictions, given that the objective is the protection of fundamental rights.

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298 See formulations on the right to life in the Universal Declaration of Human Rights (UDHR) article 3 and ICCPR article 6.
299 Dörr (2011) para. 32; DASR article 40 (1).
300 See UN Charter article 2 (1).
301 UN Charter article 1 (2); ICCPR article 1 (1); Gray (2008) p. 62.
Against one may argue that there is no problem involved in the resort of force by private actors in such a situation; international law de lege lata does not apply to their resort to force, so the actors are free to do as they please and defend any interest they desire. However, such an argument does not respond to the principled difficulty associated with the right of self-defense for a State not being realized as such. If the resort to self-defense by any other actor than the State should be inherently unheard of as acts of self-defense, then the likely resort to force will also remain unrestricted and without a name coinciding with realities.

3.3.3.1.4 Sovereignty as a responsibility concept

The aspect of needs has also been addressed through the emergence of a possible doctrine of international law. Through a discussion on the controversial Responsibility to Protect doctrine, the focus in international law has gradually shifted from sovereignty as a concept of control towards a concept of responsibility. “Responsibility” is understood as the responsibility of the State to protect its people. There is thus a presupposed primary responsibility for the State to protect and to refrain from inflicting serious injury on its people. When the State fails to do so, however, RtoP requires that the international community takes on the responsibility to protect the people of that State. Hence, the RtoP doctrine was predicated on a moral imperative to protect basic human rights – ubiquitously accepted core values in the international community.

This proposed legal theory was introduced amid tremendous humanitarian crises in the 1990s when many legal scholars espoused understanding sovereignty as conditional. Pursuant to this concept, respect of a State’s sovereignty was due until that State failed to protect its own people. A quote from one of the scholars supporting this principle communicates the essence of such an understanding:

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303 Hereinafter “RtoP”
307 Dörr (2011) para. 46.
“A government that allows its citizens to suffer in a vacuum of responsibility for moral leadership cannot claim sovereignty in an effort to keep the outside world from stepping in to offer protection and assistance.”

Sovereignty as a responsibility theory, whose expression in the RtoP ostensibly widened the scope of legitimate use of force pursuant to the Charter chapter VII beyond the condition of a threat to international peace and security, developed initially through state practice. In Somalia in 1992 and in Kosovo in 1999, humanitarian grounds were invoked to justify intervention. The international community failed, however, to respond in the same way in Rwanda in 1994 and Bosnia in 1995, the former resultant in the deaths of approximately 800,000 people, the latter in the abhorrent massacres at Srebrenica, killing 7000 people. The responsibility to protect as a legitimate basis for resorting to force to protect the people of another State pursuant to the UN Charter was also endorsed by the UN General Assembly in 2005. The decision on the use of force in accordance with the doctrine remains, however, at the discretion of the Security Council. Today, the legal standing of the doctrine remains controversial and can probably not be deemed a rule of customary international law.

The RtoP doctrine has evidently gained ground, going from being a moral imperative to gaining at least a measure of support as a principle of international law. At any rate, the moral imperative found in the justification of the RtoP doctrine may be of relevance when arguing that NSAs should have legitimate authority to resort to force in self-defense. While the circumstances of RtoP-situations differ, especially because it addresses the response of States, it was nonetheless this moral imperative, and the needs for action, that prompted the development of the responsibility to protect as a doctrine in the first place. The moral and philosophical imperative grounded in this legal doctrine may thus also be applied when discussing the legitimate authority of NSAs to protect the very same interests \textit{de lege ferenda}; as a State suffers an armed attack, and the target State fails to respond the threat, the people in that target

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309 Deng et. al. (1996) p. 33.
311 UN General Assembly 2005 World Summit Outcome, A/60/L.1, paras 138-139; UN General Assembly Resolution on the responsibility to protect A/RES/63/308 (2009).
312 UN General Assembly 2005 World Summit Outcome, A/60/L.1, para 139; Crawford (2012) p. 756.
State may risk as fundamental and as serious violations of basic human rights as may arise in a situation which RtoP stipulates. The needs for protection are thus the same.

3.3.3.1.5 A right to respond?

The question as to whether the NSA should have legitimate authority to resort to force in self-defense depends on a variety of factors and is an inherently abstract examination. In the end, it is a process by which one must consider the pros against the cons of conferring such status on the NSA. While it may correspond better to realities on the ground to do so, and possibly make effective the rights at question, it can also constitute a measure in conflict with the desired framework of the international community of law.\textsuperscript{314}

Proposing that the NSA should have a right to respond to an armed attack could be predicated on the same notions that are projected to repulse the legitimacy of such actors, namely independence, sovereignty, territorial integrity, the principle of non-intervention, and \textit{jus ad bellum} as a \textit{domaine reservé} for States; one may argue that when a government fails to protect the State and the people from foreign aggression within the borders of the target State, it is simultaneously failing to protect its sovereignty. For a NSA, with an ability to respond, to do nothing in this situation, could \textit{de facto} contribute to cementing the violation already perpetrated against the target State. By remaining servile, the State may, subsequent to being attacked, suffer invasion and even occupation by the foreign force and become subjected to lasting domination. Refraining from the use of force in self-defense, then, poses potentially a greater threat to sovereignty and the territorial integrity of a State, than if a domestic NSA had resisted.

A right potentially conferred on a NSA with regard to legitimate authority in self-defense should, however, not entail other consequences. Permitting other legal implications could easily entail going beyond responding to the “needs” stipulated in this thesis. Granting such a right only insofar as it is acting in defense of the State could, however, arguably lead to its legitimation at the expense of the government in other respects as well. The intention with this assessment, though, is not to argue that the NSA should be given powers at the expense of the

government; the objective is rather to address a very grave and specific need and to describe the armed response by the use of legal terminology.

Moreover, the potential and temporary authority of the NSA should not be granted at the expense of the government to do the same; the government should retain its right to resort to force in self-defense at all times. It is thus not a situation as envisaged in DASR article 4, where the private actor becomes the *de facto* government and its organs identified with the State. The issue is rather a variant of sovereignty as responsibility where the State fails to fulfill its obligation to protect, leading to the potential suffering of its people. In accordance with the basic assumption that a State should not have the privilege to neglect the physical integrity of its people, and arguing that the need of the people should be given first priority, it might be preferable for a domestic, although non-state, actor to attend this need, as long as this is accepted by the community which the NSA alleges to protect. At the same time, the reasons representing arguments against the legitimacy of the NSA may prompt reconsidering the conferral of such authority nonetheless. How to balance the scales, and decide what elements of these “needs” are deserving of most deference, however, is currently subject to philosophical contemplations.

In the following chapter, the findings in chapter 3 are applied by addressing whether Hezbollah should have legitimate authority to resort to force in self-defense of Lebanon by the use of force across Lebanon’s borders.
Chapter 4 Application to the case of Hezbollah

4.1 Introduction

Besides the possibility that Israel may use armed force in Lebanon to facilitate the demise of Hezbollah, as a response to the latter’s aggression or on its own initiative, Lebanon is currently facing imminent threats from various NSAs in Syria, many of which have already directed attacks against Lebanese targets. For now, aggression against Lebanon is mainly witnessed in the border region, especially centered in the vicinity of the eastern city of Arsal, but also through repeated infighting in the northern city of Tripoli, Lebanon’s second biggest city, and recurrent bomb attacks in Beirut’s southern suburbs. As a consequence, Lebanon remains exposed to armed attacks from beyond its borders, and is a potential launch pad for future attack by Hezbollah into Israel and Syria. Its military, however, remains weak and its capability to attend to the defense of Lebanon is frequently questioned.

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315 bbc.com, Three killed as Israel and Hezbollah clash on Lebanese border, January 28, 2015; Amir, Noam and Maariv Hashavua, Israel defense chiefs see war with Hezbollah as matter of ‘when’, not ‘if’, August 20, 2015; jpost.com, Report: Israeli Air Force attacked Hezbollah targets in Syria, October 31, 2015; Kershner, Isabel, Israel Says Hezbollah Positions Put Lebanese at Risk, nytimes.com, May 12, 2015; Khoury, Jack and Gili Cohen, Israeli Strike in Syria Kills Late Hezbollah Leader’s Son, Sources Say, haaretz.com, January 18, 2015; Solomon, Ariel Ben, Israel still top priority for Hezbollah, August 10, 2015; the ongoing dispute concerning an offshore gas field contributes to fueling the tension, whereby Hezbollah is taking the lead on Lebanon’s behalf, see Raz, Hila and Avi Bar-Eli, Hezbollah: Offshore Gas Is Lebanese, haaretz.com, June 15, 2010; Torbey, Carine, Political impasse stops Lebanon exploiting oil resources, bbc.com, February 24, 2015; Kahn, Gabe, Hizbullah Mulls Attacking Israeli Gas Interests, israelnationalnews.com, October 10, 2011.

316 aljazeera.com, Lebanon border blast kills eight as army targets rebels, October 19, 2015; america.aljazeera.com, As ISIL surge, could Lebanon be the next domino to fall? June 30, 2014; Samaha, Nour, Lebanon gears up for spring war against armed groups, aljazeera.com, April 4, 2015; O’ Brien, Alexi, Lebanon army struggles to protect border from ISIL, aljazeera.com, March 22, 2015; Mortada, Radwan, ISIS and Al-Nusra Declare War on Lebanon, al-akhbar.com, January 25, 2014.

317 Crooke, Alastair, If Syria and Iraq Become Fractured, So Too Will Tripoli and North Lebanon, January 6, 2015; Strickland, Patrick, Tripoli: a microcosm of Syria’s war in Lebanon, October 4, 2015; Strickland, Patrick, Meet the Lebanese fighting next door in Assad’s army, aljazeera.com, October 10, 2015.

318 ISIS struck at the southern suburbs of Beirut the day before staging the attacks in Paris, killing 43 people and wounding 249, see Samaha, Nour, Day of mourning in Lebanon after deadly Beirut bombings, aljazeera.com, November 13, 2015; naharnet.com, IS Claims Bourj Barajneh Bombing, Identifies its Attackers, November 13, 2015; human rights watch, Lebanon: Deadly Attack Kills Dozens, hrw.org, November 13, 2015. From 2013-2014, such attacks were recurrent in this area, see for example bbc.com, Car bomb rocks south Beirut suburbs, July 9, 2013.
The following sections employ the alternative model to assess whether Hezbollah should have legitimate authority to resort to force in self-defense of Lebanon in the event of an armed attack, by the use of force across its borders.

4.2 Participation

From its inception in 1982, Hezbollah has functioned as both a resistance against Israeli occupation and as Lebanon’s de facto defense against Israel in the south.\(^{319}\) Its repeated confrontations with the latter, ignited variably by both parties since first clashing together in the beginning of the 1980s, are proof of Hezbollah’s role as a fighting force constantly challenging Israel, and recurrent participant in hostilities with its southern neighbor.\(^{320}\) After Israel’s withdrawal in 2000, Hezbollah has continued its resistance, as it considered, and still considers, the Sheeba Farms area, which is currently under Israeli control, and widely perceived as land occupied from Syria.\(^{321}\) The continued tension between the two parties turned into all-out war in the summer 2006.\(^{322}\) Over the last years, Hezbollah has been instrumental in the Syrian war, allied with Syrian president, Bashar Al-Assad; a move which has taken Hezbollah to new battle grounds and brought the conflict back home to Lebanon.

One may conclude that Hezbollah has indeed participated in hostilities with Israel, and that it is likely that these two will be opponents again in a future conflict. It is also clear that Hezbollah participates in combat operations in the current conflict in Syria. Regardless the reasons for Hezbollah’s regular involvement in armed conflict, it will here be stipulated that the criterion concerning Hezbollah’s de facto participation on the international stage, as far as the use of military force in response to an armed attack is concerned, is fulfilled.

\(^{319}\) Young (2010) p. 68.
\(^{320}\) Harik (2011) pp. 48-49.
\(^{323}\) Hereinafter "2006 war" and "Second Lebanon War"
4.3 Community acceptance

While it is clear that there is no general community acceptance of NSAs and their legitimate authority to resort to force in self-defense, an assessment of the attitude of the international community may still provide arguments as to what extent limited international personality is accepted for Hezbollah in other respects, as well as constitute arguments in favor or against the notion that it should attain legitimate authority to resort to force as well.

In a resolution passed in 2004, the Security Council demanded the withdrawal of Syrian troops, as well as the disbanding of all militias in Lebanon.\(^{324}\) As all except one of the militias participating in the civil war surrendered their weapons and dismembered their military organizations subsequent to its end, the resolution was in effect only aimed at Hezbollah. The wording of the Security Council, where it “calls for the disbanding and disarmament of all Lebanese and non-Lebanese militias,” may be seen as a way by which to address the militia directly as well as, or rather, conferring an obligation on the Lebanese state to attend to its disarmament. Considering the superior power of Hezbollah, and the inferior power of the Lebanese Armed Forces, it is plausible to argue that the “call” was directed towards the NSA directly; the Lebanese army was not, and is not till this day, in a position to enforce the disarmament of Hezbollah by its own means. However, as it is the Lebanese state and its government which is considered the legitimate authority in Lebanon, such an address by the UN is expected to be made to this State actor formally, its inability to act on the request notwithstanding. Hence, one may argue that this UN inquiry was one formally aimed at the Lebanese state, but in reality contingent on Hezbollah voluntarily acquiescing to the terms.

As hostilities broke out between Hezbollah and Israel in 2006, the Security Council addressed Hezbollah, not Lebanon, as a party to the conflict, while taking into consideration the views of the Lebanese government, which in the eyes of the Security Council is the right and legitimate authority there.\(^{325}\) The 2006 war was concluded with a ceasefire agreement between Israel and Hezbollah as parties; Lebanon as such was not a party to the deal and the acts of

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Hezbollah were not attributed to Lebanon. The two rivals are currently communicating via UNIFIL, the peacekeeping force in Lebanon under the auspices of the UN.

The Security Council resolutions pertaining to the issue of Hezbollah and Israel that were passed in conjunction with the 2006 war contain no recognition of a particular right for Hezbollah to resort to force in self-defense. As far as the 2006 war was concerned, the UN held that Hezbollah had used illegitimate force against Israel in the first place, which gave Israel a right to respond, but that Israel had done so disproportionately. The way in which the UN addresses Hezbollah gives no indication that it considers it to perform a legitimate function of self-defense in the situations where it is not itself the aggressor; on the contrary, Security Council resolutions have repeatedly urged the deployment of the Lebanese army in order for the State to attain a monopoly on the use of armed force and to reclaim dominance in areas in which the State has been regularly absent. This was reiterated again in the resolution authorizing the extension of the UNIFIL mission in 2014. In short, the UN approach to Hezbollah is one of slandering its actions and promoting its disarmament, while also encouraging the deployment and attaining of monopoly on the use of force by the army.

Regarding the Security Council’s dealings with the use of force between Hezbollah and Israel, the approach recurrently represents a circular argument where Hezbollah is seen as the actor provoking the attacks, Israel as the State with a legitimate right to respond, but also the one whose response is eventually deemed disproportional. Maybe because it is inherently unthinkable as a topic of discussion, or because Lebanon is seen as allowing Hezbollah to use its territory as a launch pad, the Security Council has evaded any reference to the right of Lebanon to protect itself from Israeli aggression, and instead presupposed Hezbollah’s acts as justifying Israel’s response. In the end, there is nothing in the wording of these resolutions that supports a legitimate right for Hezbollah to resort to force in self-defense in a situation where

329 Hereinafter “Lebanese army,” “army,” and “Lebanese Armed Forces.”
this right may indeed be invoked by Lebanon, but where the army fails to fulfill its protective duty towards its people.

While the UN has not listed Hezbollah as a terrorist organization, many States have. While Iran and Assad’s Syria are the only two States explicitly recognizing and supporting the Party, others have refrained from labeling it at all, or chosen to designate parts or all of the organization as a terrorist entity. Hezbollah’s most vociferous opponents are Israel and the United States, both of which have listed it as a terrorist organization in its entirety. The same view has been adopted by the Netherlands, Canada, Bahrain, as well as the 6 State member organization of the Gulf Cooperation Council. Others, among which are the EU, the UK, France, and New Zealand, consider only Hezbollah’s military wing a terrorist entity. Australia, for its part, considers the External Security Organization of Hezbollah a terrorist organization. The Arab League has condemned Hezbollah’s involvement in the Syrian conflict and exhorted it to end its combat operations there. During the 2006 war, however, other voices surfaced, one of which belonged to the incumbent foreign minister of Malaysia. Malaysia then chaired the Organization for Islamic Cooperation, an organization with 57 member States, and expressed that the organization should consider arming Hezbollah in its fight against Israel. But he also stressed that all actions taken would have to be in accordance

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334 Hereinafter “GCC”; timesofisrael.com, Dutch FM urges EU to place Hezbollah on terror group list, September 7, 2012; publicsafety.gc.ca, Currently listed entities, October 20, 2014; Weinthal and Solomon, Bahrain parliament names Hezbollah a terror group, jpost.com, March 26, 2013; Al-Tamimi, GCC: Hezbollah terrorist group, arabnews.com, June 3, 2013.
338 Hereinafter “OIC”
339 oic-oci.org, Organization of Islamic Cooperation, 2015.
340 freerepublic.com, OIC should consider arms for Hezbollah: Malaysian minister, August 9, 2006.
with international norms and principles.\textsuperscript{341} The OIC as such has refrained from supporting Hezbollah explicitly, but has rather chosen to focus on Security Council resolutions pointing the finger at Israel and emphasizing Israel’s responsibilities, thereby aspiring to remain staunch in its support of Lebanon’s sovereignty, independence, and territorial integrity.\textsuperscript{342}

These factors indicate an acceptance of sorts by the international community of Hezbollah. It is, however, primarily an acceptance of an obligation for Hezbollah to refrain from the use of force and to disarm. As far as the UN is concerned, the approach to Hezbollah seems to be one of political necessity, rather than juridical recognition. The main obligation placed on Hezbollah, and the measure which most States seem to agree on, is that it must lay down its weapons. This may support a claim that Hezbollah’s international personality is first and foremost seen as one obtained through the conferral of an obligation on it to disarm.

The policies of most states call for a very restrictive approach to Hezbollah’s potential legal personality. The listing of the organization as a terrorist organization, or alternatively parts of its structure as a terrorist entity, begets the conclusion that its international legal personality may be questionable per se.\textsuperscript{343} The express support from only Iran and Syria, and the Malaysian foreign minister in 2006, as well as a much more implicit acceptance of certain functions by the broadly based OIC, can hardly rebut the fact that most States do not recognize Hezbollah’s right to much more than participation in mainstream politics.\textsuperscript{344} The position of the OIC, although it may be seen as an expression of support, amounts to little more than a focus on apportioning guilt exclusively to Israel, and by so doing, leave atrocities by Hezbollah out of the picture.\textsuperscript{345} Instead of considering the OIC a backer of Hezbollah, the organization may thus be seen to have made a choice to regard the Party as the lesser of two evils, keeping in mind also that its diverse membership prompts it to be cautious in voicing strong political support.

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\textsuperscript{341} freerepublic.com, \textit{OIC should consider arms for Hezbollah: Malaysian minister}, August 9, 2006.
\textsuperscript{343} This does not exempt Hezbollah from their duty to respect international humanitarian law. Allegedly, Hezbollah is committing and contributing to flagrant violations of humanitarian law and possible war crimes in conjunction with its involvement in Syria, see for example amnesty.org, \textit{‘In Madaya you see walking skeletons’: Harrowing accounts of life under siege in Syria}, January 8, 2016; Tamimi, Azzam, \textit{Madaya: A huge concentration camp where Hezbollah starves people to death}, middleeastmonitor.com, January 8, 2016; glob-lr2p.org, \textit{Syria}, Global Centre for the Responsibility to Protect, 2015.
\textsuperscript{345} Ibid.
\end{flushleft}
There is a striking lack of international community acceptance for Hezbollah’s right to resort to force in self-defense. While this merely confirms the lack of a general acceptance of such a right as a rule of customary international law, this reluctance of the international community towards Hezbollah may also constitute arguments against conferring legitimate authority on it _de lege ferenda_.

### 4.4 Needs

The widespread rejection of rights of NSAs under _jus ad bellum_ in general, and the negative attitude of the international community towards Hezbollah particularly, is not just evidence of its legitimate authority being unobtainable as a matter _de lege lata_; they also represent arguments against rendering it such a role _de lege ferenda_. As this lack of international acceptance is anticipated, and also represents an important reason for posing the research questions in the first place, it is argued that this criterion should not be decisive as far as the conclusions are concerned _de lege ferenda_.

The question in this section is whether the “needs” support Hezbollah’s legitimate authority to resort to force in self-defense. The question is firstly dealt with by assessing Lebanon’s and Hezbollah’s ability, and subsequently their authority to resort to force in self-defense. The first question is whether Hezbollah has _de facto_ ability to resort to force in self-defense, before addressing whether it is morally permitted to exercise this ability.\(^{346}\)

#### 4.4.1 Power assessment: Marginalization of the State and the rise of Hezbollah

##### 4.4.1.1 The State’s ability to defend Lebanon

The weakness of the Lebanese state has been one of the most conspicuous of traits since its enforced nationhood. Already before the Lebanese civil war broke out in 1975, the Lebanese government was unable to attend to the defense of the State.\(^{347}\) Government power was more frequently employed to oppress domestic dissent, instead of pitting its force against aggres-

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\(^{347}\) Traboulsi (2012) p. 175.
The government repeatedly neglected the call of many Lebanese for defense of the south, a defense necessitated by the attacks of the Palestine Liberation Organization into Israel and the latter’s forceful responses.

For a while, the need for defense was purportedly attended to by Syria through the agreement on a joint defense treaty between the two States concluded in 1974, rendering Syria privileges for committing to defend Lebanon upon the latter’s request in the event of Israeli attacks. As it would turn out, this agreement was but a prelude to times to come when Syria established de facto rule in Lebanon, until its military withdrawal in 2005. Already when civil war broke out in 1975, the Lebanese army was weak and divided.

The Lebanese government was set on avoiding dragging the country into the larger Arab-Israeli conflict and tried to ensure security by representing a neutral voice amid the hostilities. The former Lebanese politician, Pierre Gemayel, preferred this role for Lebanon, claiming that “Lebanon’s strength (lie) in its weakness.” Nonetheless, Lebanon was eventually swallowed into regional power politics, facing invasion by Israel, Syrian army presence or invasion, depending on the beholder, and inter-sectarian fighting for 15 years. As Israel moved approximately 25,000 troops into Lebanon in 1975 to neutralize some hundred Palestinian guerillas, the Lebanese army was in no position to confront the violation of their sovereignty, a violation already perpetrated by the PLO operating in southern Lebanon.

Lebanon’s need for a defense had proven more than a mere axiom of States in general; it was an issue of utter urgency to ensure its very survival. Construed first and foremost to defend a system rather than the State, the Lebanese army failed repeatedly to attend to its responsibility to protect the homeland. Its frequent resort to force to repress its people instead, tarnished

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349 Hereinafter “PLO”
351 Ibid. p. 188.
354 Ibid. p. 175.
the trust in the system and the armed forces.\footnote{Traboulsi (2012) p. 176.} Amid revelations and financial scandals, core issues that remain the crux of army legitimacy till this day, emerged. First of all, the weapons purchased were unfit for national defense purposes, but suitable for crushing internal opposition.\footnote{Ibid.} Second of all, national defense was in an inferior position because of sectarian thinking and politics – there were sincere doubts as to whether the army was there to target the “leftists,” the Palestinian militants operating from Lebanon, or others.\footnote{Ibid.} In the end, the inability of the army reflected the general paralysis of the Lebanese political system, a system built on the attribute of division rather than unity.

At the heart of this issue lies the still extant challenge of deep-seated sectarianism and suspicion between the various groups. Lebanon is quite simply not a nation bound primarily by the strength of common understanding of self, heritage, and identity, but a nation of different and rivaling political entities.\footnote{Young (2010) pp. 8-10.} These factors continue to contribute to the frailty of the State and pave the way for other actors to take advantage of its deficiencies.

Years would pass, from the initial calls for defense, before national troops of a certain magnitude were deployed in the burdened southern region of Lebanon subsequent to the 2006 war, then in competition as well as cooperation with the forces of Hezbollah.\footnote{Waage (2013) pp. 245-246; unifil.unimissions.org, UNIFIL Operations, 2015; Kverme, Kai Egon, e-mail, May 6, 2015.} Till this day, the power of the army and the ability of the State to attend to self-defense remain questionable. Although a complex picture, it will in the following be stipulated that the State of Lebanon is absent as far as resorting to force in self-defense is concerned.

\subsection*{4.4.1.2 Hezbollah’s ability to defend Lebanon}

In terms of military capacity, few will argue against Hezbollah being the supreme force in Lebanon. It has repeatedly proved its capabilities and resilience, beginning with the Israeli invasion in 1982 when it contributed to forcing the Israeli Defense Forces to a retreat, eventu-
ally leaving the Israelis in control only of the southernmost parts of Lebanon. While the early failure of the Lebanese army may be partly credited to the civil war, and certainly to the systemic challenges of Lebanese politics and Hezbollah’s exploitation of its shortcomings, Hezbollah’s filling the void left by the government, and simultaneous success in challenging the foreign aggression from Israel, demonstrated its military capacity. Until Israel decided to withdraw from Lebanon in 2000, it was Hezbollah that functioned as a deterrent to Israel and its Lebanese allies. Hezbollah’s compelling of the Israeli forces to withdraw in 2000 was immediately viewed as a victory of Hezbollah over Israel that bolstered the standing of the former in Lebanon and the Arab world. This pattern was seemingly reconfirmed in the 2006 war when Israel eventually had to retreat, handing Hezbollah yet another, at least in part victory over the presumably superior enemy.

The most recent example of Hezbollah’s military might is its involvement in the conflict in Syria. While the Lebanese state has disassociated itself from the war, Hezbollah is currently fighting alongside President Bashar Al-Assad in the Qalamoun region, just across the border from Lebanon, and elsewhere in Syria. The involvement of Hezbollah in Syria has seemingly been crucial to keep Assad in power; with his own forces exhausted after several years of war, the well-trained soldiers of Hezbollah have proven indispensable assets for the Assad regime. By claiming to foil various extremist groups from reaching Lebanese land, Hezbollah argues that it is fighting a war in the interests of the Lebanese.

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367 Aid, Matthew M., Syria’s Assad Regime Now Dependent on Hezbollah Forces for Its Survival, May 19, 2015.
368 news.yahoo.com, Hezbollah announces battle with IS on Syria-Lebanon border, June 10, 2015.
In the summer of 2015, Hezbollah’s Secretary-General, Hassan Nasrallah, announced another battle against ISIS on the border between Lebanon and Syria, stating that “the Resistance” will not cave before the threat is removed. Hezbollah’s confrontation with ISIS and the Nusra Front in Syria, and on the Syrian-Lebanese border, has again brought attention to the inability of the State to do what it should, namely defend the country. Nasrallah has capitalized on this notion, stating that if the army is not there to properly defend the State, Hezbollah will do it for them. While one may argue that the army does play a part in the defense of the country, it currently seems that Hezbollah will remain a key defender of the State against actors such as ISIS and the Nusra Front, especially in the event that they penetrate deeper into Lebanon, the latter organization possibly representing the gravest threat to Lebanon in the near future. Meanwhile, however, the Lebanese army and state intelligence have succeeded in exposing and arresting individuals with alleged ties to the terrorist groups and thus avoided new attacks on Lebanese targets.

It is currently a domain of speculation to predict what would happen if these extremist groups were to succeed in reaching deep into Lebanon and ultimately bring the war to its population at large. The question as to who would be there to defend the population remains, however, quite a pertinent and principled question. As far as the inability of the State and the capability of Hezbollah are concerned, it seems evident that the State may be absent in the case of armed attacks and that Hezbollah has the power to attend to defensive measures, against state as well as non-state actors.

369 Acronym for “Islamic State in Iraq and Sham”
370 news.yahoo.com, Hezbollah announces battle with IS on Syria-Lebanon border, June 10, 2015.
371 Bergman, Ronen, Hezbollah 3.0: How Israel’s No. 1 enemy is preparing for the next Lebanon war, ynet-news.com, July 26, 2015.
4.4.2 Authority assessment: With a moral right to rule or on the grounds of being considered an authority

4.4.2.1 Domestic needs: Hezbollah’s legitimacy derived from the defense of Lebanon.

Despite strong international pressure to disarm, Hezbollah has reiterated its right and duty to protect Lebanon and to resist aggressors, describing its resistance as defensive.\(^{375}\) Although the “resistance” spoken of by Hezbollah’s leadership is historically conceived as converged with the resistance of the Arab World in general, and Palestine in particular,\(^{376}\) this denomination has eventually come to allude increasingly to the modern State of Lebanon. While the ultimate goal is the liberation of all of historical Palestine, and at the pinnacle of it, “Holy Jerusalem,” Hezbollah’s main role now seems, at least in part, redefined to be a protector of Lebanon’s national sovereignty.\(^{377}\)

From the onset, Hezbollah fortified its legitimacy by responding to the illegal Israeli invasion and subsequent occupation in 1982. The failure of both the State and the PLO to counter the aggression, initially provoked by Palestinian guerilla attacks, pushed many from the Shi’a\(^{378}\) community to take matters into their own hands and establish the new resistance.\(^{379}\) It was indeed the Israeli occupation which gave the emerging armed group the legitimacy needed to resist interference in Lebanese matters.\(^{380}\) The invasion offered Hezbollah \textit{in spe} an opportunity to prove its power and gain legitimacy as it responded to attacks on Lebanese civilians.\(^{381}\)

Southern Lebanon has eventually been liberated, leaving the Sheeba Farms the only remaining territory disputed by Hezbollah and Lebanon.\(^{382}\) Despite the completed liberation of Leb-

\(^{376}\) Harik (2011) p. 16.
\(^{378}\) Understood as adherents to Shi’ism, the second biggest denomination in Islam, see Utvik (2013) p. 43.
\(^{379}\) Young (2010) p. 90.
\(^{381}\) Harik (2011) p. 49.
anon, Hezbollah argues that it may legitimately resort to force to liberate the Sheeba Farms and Palestine.\textsuperscript{383} As far as the UN position on the legal aspects of the case is concerned, however, the military quest for the Sheeba Farms is premised on dubious grounds.\textsuperscript{384} It is, still, a pretext on which Hezbollah relies and from which it draws domestic legitimacy.

The Party’s deputy secretary-general, Naim Qassem, has argued that Hezbollah is an instrument of the State and thus a support for it and its institutions.\textsuperscript{385} Others claim that Hezbollah weakens, rather than strengthens Lebanese state institutions on a general level and undermines its sovereignty.\textsuperscript{386} Qassem holds that “any group” contributing to the defense of Lebanon is legitimated to act. But he also believes that the “resistance” of Hezbollah must be seen within a wider context and that its legitimacy depends on the consensus of the people and that it serves Lebanon with regard to strengthening its defense.\textsuperscript{387} As far as Qassem is concerned, however, Hezbollah satisfies these requirements.

Hezbollah often refers to the need for their force in self-defense.\textsuperscript{388} Young opines that this line of argument can only be considered a pretext, as Hezbollah’s strategy rests on a different premise, namely that the force resorted to is not merely a question of military force, but methodology.\textsuperscript{389} Young claims that Hezbollah will not cease to exist and use force when the pretext of its existence, namely liberation of the land, dissipates; the concept employed by Hezbollah will rather remain an enduring vision in constant conflict with the future dominance of national institutions.\textsuperscript{390} Hence, one may argue that Hezbollah will continue to resort to force irrespective of these “needs.” Moreover he argues that Hezbollah’s actions fuel instability and breed the perennial dissonance between the two main lairs of Lebanese politics.\textsuperscript{391} So while one may argue that Hezbollah in practice resorts to force, and that its acts may possibly be described as self-defense, this may also be claimed to represent an ulterior motive employed to attain hegemony.

\textsuperscript{385} Qassem (2010) p. 53.  
\textsuperscript{386} Young (2010) p. 92.  
\textsuperscript{388} Samaha, Nour, 'Scores killed' in clashes between Hezbollah and ISIL, aljazeera.com, June 11, 2015  
\textsuperscript{389} Young (2010) p. 121.  
\textsuperscript{390} Ibid.  
\textsuperscript{391} Ibid.
Simultaneously, supporters of the Party believe that it constitutes the engine of a wider resistance to protect Lebanon, by Qassem labeled a “resistance society.” In the upper echelons of the Party, it is deemed an individual duty upon every Lebanese to protect the country, rather than a chore imposed on the army alone. This vision has plausibly been articulated to fit within the framework of traditional international law, the Party leadership claiming that Hezbollah reinforces the independence and sovereignty of the State. The alternative, according to Hezbollah, would be creating a weak State, unable to deter outside aggression, quite simply because the national army is not capable of addressing potent threats; a predicament which was crucial for invoking the principle of levée en masse during Napoleon.

4.4.2.2 Domestic acceptance: Political support for, or acquiescence to, Hezbollah’s use of force

The army’s inability to deter foreign aggression and guarantee the State’s security is partly due to the army being the product of a political compromise of minimum standards – a national defense in an otherwise non-national, but sectarian, society. The army’s ineptness is also in Hezbollah’s interest and the alliance between Hezbollah, Syria, and Iran continues to uphold the Party’s dominance in Lebanon at the expense of the State. So while part of Hezbollah’s function may be to represent some sort of defense of the State, its conduct does not seem to be in accordance with the desires of the people at large, whose support for a strong national defense seems undisputable; the peoples’ support for the army may even be considered exceptionally strong by Lebanese standards. This support has indeed contributed to the Lebanese Armed Forces becoming the most trusted of all Lebanese institutions. So far, though, this support has not been reflected in a turning of the tables of power and ability. Meanwhile, Hezbollah can maintain the mantra that it is attending to a need for defense that would otherwise not be taken care of.

393 Ibid.
394 Dyke, Joe, Strengthen the Lebanese Armed Forces: Lebanon’s most popular institution needs more support, executive-magazine.com, March 7, 2014; executive-magazine.com, Need for transparency in $3 billion: LAF grant Impact of Saudi investment in the army could be mitigated by conditions, February 5, 2014.
The role of Hezbollah and its weapons have been frequent topics of discussion, and several statements and state documents have revealed a peculiar ambivalence when the Lebanese government addresses Party matters. In an attempt to blur the lines in the wording of the Security Council Resolution which demanded the disarmament of all Lebanese militias,395 former Lebanese prime minister, Najib Mikati, argued that Hezbollah is considered a political party and a resistance, not a “militia.”396 The uncertainties surrounding the government’s position were utterly enhanced as Mikati stated that Hezbollah would only have to disarm “to a certain extent.”397 This lack of resolve was sustained subsequent to the forming of a new government after the 2005 elections when the cabinet issued a statement voicing support for what it refers to as “the Resistance.”398 The government, for the first time including a Hezbollah member, declared support for the “brave resistance” and emphasized the need to continue the struggle against Israel as well as strengthening Lebanon on a general level.399 The statement furthermore stressed the importance of the resistance by describing it as a “true and natural expression of the national right of the Lebanese people to liberate their land and to defend their honour in the face of Israeli aggression and threats and ambitions,” and that it considered it as working for the “complete liberation” of Lebanon.400

A subsequent government crisis and the Cedar Revolution in 2005 forced the political parties to reorient their alliances, a process resulting in the forming of the March 8 and March 14 alliances.401 This shift led to the cooperation between Hezbollah and the Christian-dominated Free Patriotic Movement, both partners in the March 8 Alliance and both representing relatively broad segments of their respective sects.402 The two parties came to an understanding through a joint memorandum, expressing that there was a need for the weapons and forces of Hezbollah in order to assure the efficient defense of Lebanon in the future, at that time predicated exclusively on the threat posed by Israel.403

399 Ibid.
400 Ibid.
401 norway-lebanon.org, Oversikt over det politiske systemet i Libanon, August 12, 2011.
402 Aoun, Michel and Hassan Nasrallah, Memorandum of understanding by Hezbollah and Free patriotic movement, voltairenet.org, February 6, 2006; Qassem (2010) p. 32.
Prior to the devastating war between Israel and Hezbollah in the summer of 2006, members of the Chamber of Deputies in the Lebanese parliament held a conference where they addressed the issue of Hezbollah’s weapons again, however without concluding on the matter.\footnote{Qassem (2010) p. 32.} These talks indicated that the Lebanese wanted to decide on their defense strategy themselves, without outside interference. At this juncture, Hezbollah was implicitly, although reluctantly, accepted as a military capacity, while the establishment of superior and national armed forces was seen as the ideal solution.\footnote{Ibid. p. 35.} Qassem argued that this arrangement was one obtained “through dialogue and agreement.”\footnote{Ibid. p. 36.} Still it was clear that the March 14 alliance wanted Hezbollah to disarm and surrender all weapons to the State.\footnote{Ibid. p. 37.} The lack of actual decision-making to the contrary has contributed to maintaining Hezbollah’s air of somewhat unresolved legitimacy in its continuous struggle against Israel. This may be seen as the result of inability of the State to control what is actually a stronger force, as it is the power of Hezbollah that forces the government to comply and remain absent in parts of Lebanon. Simultaneously, this may also indicate an acknowledgment of the function served by Hezbollah in its alleged defense of Lebanon. This way, the State may be seen as opting to yield because Hezbollah is regarded, although unwillingly, as an indispensable actor as far as defending the borders is concerned.

During the 2006 war, groups from all over Lebanon rallied behind Hezbollah against Israel, although only temporarily.\footnote{Waage (2013) p. 246.} Subsequent to the passing of Security Council Resolution 1702 in 2006, which urged the deployment of army forces in the south in cooperation with UNIFIL,\footnote{Security Council Resolution S/RES/1701 (2006).} the army has, for its part, engaged in a relation of cooperation with Hezbollah rather than one of animosity.\footnote{Norton (2007) p. 142.} It has also been argued that confrontation with Hezbollah would yield few results when it comes to creating a strong national army and disarming the militias;\footnote{Ibid. p. 141.} such confrontation could instead make reconciliation and a future led by strong state institutions illusive, as it may contribute to aggravating hostilities between the Party and the
State, possibly also destabilizing an already volatile situation which may lead to small-scale repeats of former conflict, or even worse, full-fledged civil war. This army-Hezbollah cooperation, coupled with the fact that there is no likeliness in the State taking effective steps to disarm Hezbollah, reveals a Lebanese “strategy” quite contrary to several regional powers’ wishes and seeming interests. Currently, this strategy provides guidance concerning the position of Hezbollah in Lebanon; for as long as Hezbollah exists, it will, at the very least purportedly, constitute part of the national defense and probably respond in case of aggression, be that aggression in the right sense of the word or because of force provoked by Hezbollah in the first place.

Alliances with, and attitudes towards Hezbollah are factors of constant change. Currently, two of Lebanon’s major political players, Amal and the Free Patriotic Movement, recognize Hezbollah’s role as a protector of the State from foreign dangers. Recent talks between Hassan Nasrallah and leader of the Free Patriotic Movement, Michel Aoun, have contributed to the sustaining of Hezbollah’s purported legitimacy to attend to the defense of Lebanon amid current threats to its security. Aoun has conceivably expressed his “full support for any steps Hezbollah might take to fight terrorists.” By “terrorists,” Aoun is primarily referring to the fighters affiliated with various extremist groups that have entered and challenged Lebanese sovereignty as a consequence of the civil war in Syria, especially the Nusra Front and ISIS. While Aoun’s remarks do not include a general blessing for Hezbollah to take on the responsibility of national defense, they do acknowledge Hezbollah’s strength, the need for it to defend the State against certain foreign fighters at home and abroad, and the consent of the Free Patriotic Movement to it playing this role.

Although the alliances with Amal and the Free Patriotic Movement have come to constitute important pillars in the alleged legitimacy of Hezbollah and its role as protector of Lebanon, the significance of the latter seems to wane. The popular support for the Free Patriotic Movement has been drastically reduced; while it received 70 % of all Christian votes in 2005, this number plummeted to 40 % in 2009. Seen in conjunction with Hezbollah’s decreasing le-

413 Ibid.
414 Ibid.
gitimacy because of its intervention in Syria, and the fact that supporters of the Free Patriotic Movement are inclined to support the disarmament of Hezbollah, its resort to force in self-defense of Lebanon has seen a simultaneous drop in support and legitimacy among the population at large. ⁴¹⁶

Whereas Hezbollah enjoys support from its March 8 allies, the March 14 alliance unequivocally opposes the Party’s involvement in Syria, an opposition that has been expressed as a general policy of disassociation from hostile developments in the region through the Baabda Declaration. ⁴¹⁷ The disagreement between the two alliances may be traced back to the pro-Syrian sentiments of the former alliance and the anti-Syrian tendency of the latter, a divide that was cemented in the aftermath of the killing of Hariri. The involvement on the side of Bashar al-Assad, going clearly beyond the traditional role of Hezbollah as a resistance movement confronting Israel and defending Lebanon, the Party has not only exposed Lebanon to new attacks in retaliation for Hezbollah’s involvement; once again it has circumvented the official decision-making process of the State and side-lined the political establishment in Lebanon, prompting its legitimacy to dwindle at home.

The “neutral” stance of the Lebanese government concerning the Syrian conflict was recently expressed in conjunction with the Arab League summit in Cairo. While the Arab League condemned Hezbollah’s involvement in Syria, the Lebanese government refused to comment on the statements. ⁴¹⁸ While all foreign ministers, from all member States, voted in favor of this decision, Lebanese foreign minister Gebran Bassil, a member of the Free Patriotic Movement, objected, ostensibly to avoid disrupting Lebanese unity. ⁴¹⁹ While possibly nothing but a consequence of Hezbollah’s superior power and extortion, this incident confirms the pattern where a lack of concerted vociferous statements from the Lebanese government ensues, and where the government only reluctantly acquiesces to Hezbollah’s use of force.

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⁴¹⁹ Ibid.
Admittedly, there is a serious problem arising from the fact that more than half of the political spectrum, as well as central actors in the government, not to mention the population at large, seem to acknowledge that the State’s absence in parts of Lebanon is merely dictated by the Party. The very same spectrum of Lebanese society is probably inclined to support the strengthening of the national army and consequent disarmament of Hezbollah. The legitimacy purportedly derived by Hezbollah from its armed acts, and the acquiescence given to its playing this role, is thus, not at all, unrivalled.

4.4.2.1 Domestic acceptance: General support and political participation

Demographically, Hezbollah draws primary support and legitimacy from its traditional constituencies, the Shi’a community of Lebanon. The Shi’a are today considered the largest minority in Lebanon, estimated to constitute more than 30% of the total population.\footnote{Hamzeh (2004) p. 13; CIA Factbook puts the figure at 27 %, see cia.gov, Middle East: Lebanon, January 7, 2015. The last census was conducted in 1932, see norway-lebanon.org, Oversikt over det politiske systemet i Libanon, August 12, 2011; Hamzeh (2004) p. 12.} Geographically, compact majorities of the Shi’a have gathered in the suburbs of Beirut, southern Lebanon, as well as parts of the Beqaa Valley in the east. These areas have also become the main strongholds of Hezbollah’s civil and military power.

Hezbollah’s transformation from a resistance movement into a diverse, albeit controversial political organization is expressed through its gradual entry into national politics, and participation in parliamentary elections.\footnote{Qassem (2010) p. 322; Hamzeh (2004) pp. 113-115.} The Party’s indulgence in mainstream politics has enabled it to take seat in all parliamentary committees and given it a hand on the wheel in budget discussions, ensuring the promotion of deprived regions – an important issue for Hezbollah since its establishment.\footnote{Qassem (2010) p. 322.} Meanwhile, sticking with its ultimate aim to impose Islamic rule over all of Lebanon, the Party has made it clear that its participation in parliament and state institutions is a means to support Hezbollah, rather than a support for the state institutions as such.\footnote{Waage (2013) p. 241; Cleveland (2004) p. 390; Hamzeh (2004) p. 112.} According to Qassem, Hezbollah’s participation in the political system of Lebanon was only made possible because the Party was not required to swear allegiance to the Leba-
nese state. This suggests that the paramount and final goal was, and is still, not first and foremost to attain legitimacy in Lebanon within the confines of the current system, but rather to obtain a leading role in a State which may eventually be formed in accordance with its ideology. This way, obtaining such legitimacy may be seen as a means to a greater end.

As far as political participation within the formal political system is concerned, Hezbollah submits lists for all elections, parliamentary as well as municipal and regional elections. Hezbollah’s cooperation with Amal has involved the presenting of collaborative coalition lists. Their decision to forge an alliance in the 2000 elections represented a strong message that the two major Shi’a parties would unite to boost their power and influence in Lebanese politics. Today, Hezbollah holds 12 seats in parliament won in the 2009 elections, amounting to more than a third of the seats ascribed to Shi’a representatives in the 128-member parliament. Although previously opting to stay out of government, Hezbollah has recurrently been part of government since 2005, and is now represented by two ministers in the ministries of agriculture and state. Including these ministers, the Hezbollah-led March 8 alliance, of which Amal is part, holds 8 minister portfolios in the current unity government of altogether 24 ministers, a government currently plagued by parliamentary deadlock and a refusal to elect a new president since Michel Suleiman’s term expired in May 2014.

Through prominence because of popularity in the region and effective take-over of power in Lebanon, either through elections or by force, Hezbollah has slowly established a state within the State where Party policies prevail, rather than the ones of the State. While the State has failed to meet many of the demands of the people in several regions, Hezbollah’s provision of

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426 Ibid. p. 117.
427 Due to enduring disagreement, the 2009-parliament has extended its own mandate twice, see Samaha, Nour and Alia Chugtai, Lebanon: At the crossroads, aljazeera.com, 2015; Harik (2011) p. 52.
services has enhanced its support at the expense of the State,\textsuperscript{430} while the Lebanese state has not been able to provide its people with social welfare, health care, as well as education for the poor, Hezbollah has taken advantage of this ineptness by offering services in the areas under its control.\textsuperscript{431}

There are many nuances that may moderate the picture of Hezbollah as the savior of the deprived, and the Lebanese state as the negligent parent. A recent surge in crime in Beirut’s southern suburbs has prompted Hezbollah to call on and allow Lebanese police forces to maintain a presence in order to reestablish law and order in areas where the Party was attempting to rule without state interference.\textsuperscript{432} These recent developments notwithstanding, Hezbollah’s political participation and social achievements have reinforced the image of and popular support for Hezbollah in the areas under its control, further exposing the incapacitation of the government.\textsuperscript{433} Hezbollah is, however, not in an exclusive situation in this regard; due to the political system of Lebanon, a range of services has become private enterprises, attended to by the various sects rather than by the State.\textsuperscript{434}

\textbf{4.4.2.2 Hezbollah’s domestic display of power and alliances: Rebutting legitimacy?}

Besides rising to power through the military display of its abilities against foreign threats, as well as through its political position, Hezbollah has also ensured increased influence by arrogating power domestically. This has been witnessed through the driving out of government and other forces from Party strongholds to secure dominance in these areas, and through the confrontation with the army and other state institutions, prompting the absence of the State in parts of Lebanon.\textsuperscript{435}

In 1983, the incumbent president Amin Gemayel attempted to curb the Party’s dominance in Baalbek, a region in eastern Lebanon, only to suffer defeat at the hands of Hezbollah, con-

\begin{enumerate}
\item Young (2010) p. 85.
\item Kverme, Kaj Egon, May 6, 2015.
\item Jawad (2012) pp. 88-89 and 116-118; it may, however, be argued that Hezbollah has taken the pole position in this regard, see Harik (2011) pp. 81-83.
\end{enumerate}
firming the latter’s upper hand vis-à-vis the national army and handing the latter yet another devastating blow. The Lebanese army made similar attempts in 1989 when it bombed the Hezbollah stronghold in the southern suburbs of Beirut, causing the leader of Amal to urge Shi’a members of the army to resign. This ultimately led to further disintegration and close to total obliteration of the army. The abortive attempt to curtail Hezbollah’s power seemed to fortify its standing in Lebanon and instantly entailed a Party takeover of the army barracks in Baalbek, routing the army from Hezbollah-held territory. The latter event brought the entire Baalbek-Hermel region into Hezbollah’s fold, effectively depriving the Lebanese state of any say in this region.

The end of the 2006 war prompted the deployment of the Lebanese army in the south for the first time since the establishment of Hezbollah. This was a move that found support across sectarian divides. Since then, however, little has changed in terms of who is militarily in charge in this area. Hezbollah remains the stronger party in its arrangement with the State, permitting army presence only insofar as it does not impair Hezbollah’s position as the de facto ruler of the south and de facto defender of this part of Lebanon. As a result, the State remains absent in many areas in which Lebanon may be subjected to armed attacks.

The strength of Hezbollah and the weakness of the Lebanese army were, and are still, very much due to the policies of the former’s ally, Syria. Syria’s direct meddling in Lebanese affairs and military presence go back to the 1970s, and while it withdrew in 2005, it has continued its propping up of and support for Hezbollah, together with its major regional ally, Iran. Partly because of the support given to Hezbollah by Iran and Syria, the Lebanese Armed Forces have not been able to initiate the necessary development towards a total take-over of

437 Ibid.
438 Ibid.
442 Kverme, Kai Egon, e-mail, May 6, 2015; Bergman, Hezbollah 3.0: How Israel's No. 1 enemy is preparing for the next Lebanon war, ynetnews.com, July 26, 2015; Samaha, Nour, 'Scores killed' in clashes between Hezbollah and ISIL, aljazeera.com, June 11, 2015.
military hegemony in Lebanon.\textsuperscript{444} Although some progress may now be seen in this regard, the alleged allies of the Lebanese state have been reluctant to bolster the capacity of the army at the expense of Hezbollah, primarily due to the priority given to Israeli supremacy in the region, a factor contributing to undermining the Lebanese army further.\textsuperscript{445}

Expositions of Hezbollah’s will and ability to oppose State decisions contrary to Party interests, the Beirut Clashes of 2008 were dreadful reminders of the \textit{de facto} entrapment of both the Lebanese Armed Forces and the government.\textsuperscript{446} As the Siniora government decided to crack down on Hezbollah’s private communications system, which allowed it to maintain a strong grip on its strongholds in eastern and southern Lebanon via its headquarters in the southern suburbs of Beirut, and also staged the forced resignation of the head of security at Beirut International Airport, Hezbollah moved into Sunni-dominated Western Beirut to impose authority, pointing their guns against their own, the Lebanese.\textsuperscript{447} The clashes that ensued, as well as the army’s lack of ability to confront Hezbollah, prompted the devastating learning of two lessons; first, the Lebanese army was not yet able to play lead as far as the monopoly on the use of armed force was concerned; second, it was the first instance at which Hezbollah had so openly resorted to force against fellow countrymen since the end of the civil war. This confrontation with its own people represented a water-shed incident, causing its legitimacy among the population to drop.

While Hezbollah claims that its present involvement in the Syrian war is a matter of preemptive self-defense,\textsuperscript{448} the decision to do so is clearly contrary to national aspirations.\textsuperscript{449} This conduct has also given rise to heightened tension in Lebanon. The expression of dissent and bursts of violence found in Arsal, the continuous instability in Tripoli, as well as repeated bombings in the southern suburbs of Beirut, are, however, not the only reasons that the Lebanese should remain vigilant; in June 2015, the leader of the Nusra Front, Abu Mohammed al-

\textsuperscript{444} Nerguizian (2009) pp. 7-9, 22-23 and 26.
\textsuperscript{446} Nerguizian (2009) pp. 18-20.
\textsuperscript{447} Smyth, Gareth, Tackling Islamic State: a message from Lebanon, theguardian.com, November 7, 2014.
\textsuperscript{448} Daher, Aureli, Hezbollah and the Syrian Conflict, mei.edu, November 4, 2015.
\textsuperscript{449} See the Baabda Declaration, Annex to UN Doc. - A/66/849– Resolution S/2012/477.
Joulani, stated that Lebanon is their next target, but not a priority for the group at the time being. His threats were reiterated in a tweet on 7 July when he expressed his disdain for Hezbollah, saying that they will not be safe “from our rage any time in the future.” It has also been claimed that ISIS plans to invade Lebanon because of Hezbollah’s involvement in Syria. While the ability of these groups to materialize such threats and aspirations may be questioned, it does not seem prudent, and may rather be naïve, to rule out attacks by these or similar groups in the future.

All these events and involvements indicate that the Party does not see itself as compelled by the State to act as the State commands. Although Hezbollah may not always interfere with state affairs, but rather operates within the limits of an understanding reached with the other confessional groups, the reason for doing so seems to be one of self-interest more than a sense of compulsion. Its involvement in mainstream politics since the elections in 1992 is an example of how the Party chose to alter its strategy, probably to accommodate and support its own interests, not first and foremost to evade mounting pressure from the State to adapt. Hezbollah’s choice to enter parliamentary politics may have reduced some of the friction with the population, as it seemingly took the affairs of the others more seriously and respected the constitutional order of the State. The Party’s choice not to disarm, despite repeated calls from the international community and Lebanese political actors to do so, however, reveals the other side of interest politics; maintaining its armed capability is seen to be in Hezbollah’s best interest.

It seems apt to suggest that Hezbollah has proved its superiority vis-a-vis the State, both in regard to its ability to attend to force in self-defense, as well as to subdue state aspirations at home through the use of force. While the function served by Hezbollah by resorting to force in self-defense of the State may support the legitimate authority of Hezbollah, its display of power, both abroad and at home, also represent arguments against its legitimacy; not only because it undermines its own legitimacy vis-à-vis the people by acting like a state actor

450 Samaha, Nour, Lebanon gears up for spring war against armed groups, aljazeera.com, April 4, 2015; O’Brien, Lebanon army struggles to protect border from ISIL, aljazeera.com, March 22, 2015.
451 Bergman, Ronen, Hezbollah 3.0: How Israel’s No. 1 enemy is preparing for the next Lebanon war, ynetnews.com, July 26, 2015.
452 Aziz, Jean, ISIS poses serious threat to Lebanon, English.al-akhbar, July 10, 2014.
against them if opposed, but also because it challenges the sovereignty of Lebanon by maintaining its autonomous conduct in disregard of the State.

4.4.2.2.1 Hezbollah’s adherence to wilayat al-faqih

Since its emergence, Hezbollah has aimed beyond the Lebanese state system. In pursuit of its aim to establish an Islamic order in Lebanon, Hezbollah has enforced Islamic law in accordance with the theory of wilayat al-faqih,\(^{453}\) imposing religious rule by the establishment of sharia courts in areas under its control.\(^{454}\) The level of its influence has led some to conclude that Hezbollah has established an Islamic state on a local level, in which Hezbollah is the de facto authority and from where it is able to exert its power through autonomous enclaves.\(^ {455}\)

There is little doubt that the Islamic Republic of Iran and its religious establishment are shown great deference by Hezbollah.\(^ {456}\) The connection between the theory of wilayat al-faqih and Hezbollah is expressed in the Party’s formal and actual submission to the supreme leader of Iran and his governance. Hezbollah subscribes to this doctrine of clerical supremacy based on Khomeini’s writings.\(^ {457}\) Submitting to this doctrine means submitting to the comprehensive authority of Iran’s supreme leader,\(^ {458}\) including the authority to resort to force.\(^ {459}\) This has also been confirmed by Nasrallah, who claims that the decision of peace and war is in the hands of the jurisconsult, the governance of which has been described as the spinal cord of Hezbollah.\(^ {460}\) The subscription to this theory is a consequence of a shared perception of exegesis, making submission a duty upon adherents. This religious duty is also a legal matter, in the sense that the commands emanating from the jurisconsult are seen as binding on Hezbollah.\(^ {461}\) In consequence, Hezbollah is in fact perceived as an extension of the dominion of the

\(^{453}\) Translates “guardianship of the jurisconsult” and is a specific doctrine in Twelver Shi’a Islam, see Hamzeh (2004) p. 175; it is also the official religious doctrine and part of the structural foundation of the Islamic Republic of Iran, see The Constitution of the Islamic Republic of Iran, articles 107 and 110.


\(^{455}\) Ibid. pp. 108 and 113.

\(^{456}\) Harik (2011) p. 16.


\(^{458}\) Hereinafter “faqih” and “jurisconsult”

\(^{459}\) Qassem (2010) p. 95.


\(^{461}\) Ibid.
faqih and the Islamic umma, and is consequently under the command of the faqih in Iran. This structure, binding the Party to the Islamic Republic of Iran, necessitates Hezbollah’s seeking of approval from the jurisconsult before resorting to force.

The doctrine of wilayat al-faqih is also a legal doctrine invoked as part of Hezbollah’s overall policies and actions on the ground. As the leadership of Hezbollah turns to the faqih to ask for permission to resort to force, the permission given serves as what Hezbollah conceives to be legitimation in accordance with the theory of wilayat al-faqih. No surprise, then, that religious terminology is often used and invoked when declaring and justifying Hezbollah’s military actions.

Hezbollah’s references to and invoking of military jihad are commonplace and have been since the 1980s. As a reaction to the 1982 Israeli invasion and subsequent occupation, it has been argued that many Shi’a saw the struggle as a holy, rather than a national matter, lending their support for the waging of jihad against the enemy. In the 1980s, Hezbollah regularly highlighted the need for jihad against Israel and did so under the banner of Islam. In 2000, in conjunction with the US decision to relocate its embassy in Israel to Jerusalem, a decision which sparked fire in the resting embers of the resistance in Lebanon, Hassan Nasrallah urged all members of the umma to “turn to the logic of resistance and the logic of jihad.”

Hezbollah considers this jihad to be of a defensive nature. As the umma is seen to extend to occupied Palestine, attacks against the occupying power are considered nothing short of a defense of the umma. The ideological and doctrinal foundation of Hezbollah has been expressed by the description of the Party as a “struggle movement of faithful Lebanese who be-

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463 Qassem (2010) p. 34.
464 Qassem (2010) p. 34.
466 Here understood as “armed struggle against enemies,” see Hamzeh (2004) p. 172. “Jihad” means “holy struggle” and is often bifurcated into the “greater holy struggle” and the “lesser holy struggle,” whereby the former refers to the struggle of a person’s soul against evil and the latter to the armed or unarmed struggle against enemies, see Hamzeh (2004) p. 172; see also Harik (2011) p. 58.
469 Ibid. p. 40.
lieve in Islam, resistance, and liberation of the land,” the latter notion presumably hinting not only at Lebanon, but the umma at large.\textsuperscript{470}

The very core of the doctrine of wilayat al-faqih is that its supporters believe in one legitimate and comprehensive authority with absolute powers. As a consequence of such a view, the Party maintains its commitment to the “doctrinal instruction” of the faqih, rather than swearing allegiance to the Lebanese state, predicated on a belief that the commands from the faqih may not be challenged.\textsuperscript{471} Hezbollah is thus obligated, as well as legitimated, through the wali al-faqih, the authority in which God has supposedly vested the divine right to rule, to resort to force in defensive jihad. This belief in one divine authority, conspicuously also the head of another State, leads one to question Hezbollah’s loyalty to Lebanon. While clearly a participant in Lebanese politics and an actor renowned for inciting national rhetoric, it is clear that Hezbollah’s primary loyalty is with Iran.

\textsuperscript{470} Hamzeh (2004) p. 45.

\textsuperscript{471} Ibid.
5 Conclusion

The first conclusion responds to whether a NSA has legitimate authority under *jus ad bellum* to resort to force in self-defense of the target State by the use of force across the State’s border.

It is undisputed in traditional doctrine that only States have legitimate authority to resort to force in self-defense under *jus ad bellum*. UN Charter articles 2 (4) and 51 constitute the sources from which the exclusive application to States is derived. Simultaneously, the right of the State to resort to force in self-defense against NSAs has been accepted on the basis of attribution, as well as an emerging doctrine permitting use of force when the home State of the NSA is “unable or unwilling” to stop attacks emanating from its territory.

To render a NSA legitimate authority to resort to force in self-defense, however, is considered a legal anomaly. As the prohibition on the use of force pertains only to States, the exception inherent in article 51 may not be invoked by other entities, making their resort to force actions regulated by international humanitarian law and criminal law, not *jus ad bellum*. For NSAs to resort to force in self-defense, their conduct must thus be attributed to the State.

The second conclusion responds to whether Hezbollah has legitimate authority to resort to force in self-defense of Lebanon by the use of force across Lebanon’s border.

It is not accepted that NSAs may have legitimate authority to resort to force. As a consequence, Hezbollah may not have such a right independently pursuant to a traditional positivist approach. It may, however, obtain such a right if its acts in self-defense are considered acts of the State. Previous accounts, however, especially on the Second Lebanon War, indicate that Hezbollah’s military actions are not attributable to Lebanon. While it could be argued that DASR article 9 may *prima facie* be fulfilled in the presupposed situation where Lebanon is subjected to an armed attack and Hezbollah resorts to force in the State’s absence, the reasons for the State’s absence seem to necessitate a conclusion rebutting the satisfaction of this condition. When it is presumed, and widely held, that Hezbollah’s violation of Lebanon’s sovereignty is a main reason for the absence of the State, it appears unreasonable to deem its actions acts of State. A conclusion to this end is also supported by the general ambiguity of article 9, making the scope of its application uncertain.
The third conclusion responds to whether a NSA should have legitimate authority under *jus ad bellum* to resort to force in self-defense of the target State, by the use of force across the State’s border.

The attainment of such a right is predicated on the satisfaction of the criteria of international legal personality to the extent that it may have partial international personality to this end. The NSA must firstly participate, *de facto*, on the international by the use of force. Secondly, there must be a measure of international community acceptance for this status. It is, however, evident that the right to resort to force under *jus ad bellum* is not accepted by States in general and does not constitute a rule of customary international law. As this only confirms the law *de lege lata*, the assessment *de lege ferenda* is ultimately dependent on the fulfilment of the third criterion, needs.

The fulfillment of needs is dependent on the actor having the ability to act in self-defense and being morally permitted to perform this act. This criterion involves philosophical as well as legal reasoning. Should one establish that the actor participates by resorting to force, and in due course has the ability, and is morally permitted to resort to force, one may also argue that the actor should have legitimate authority to resort to force in self-defense. However, there may also be reasons that rebut its legitimacy, whereby the moral permission to act is lost. In the end, there are no sound conclusions to either end. The employment of the criteria of international legal personality to discuss this right may, however, highlight both positive and negative aspects associated with the excluding, as well as the including of NSAs, in the sphere of *jus ad bellum*. By redirecting focus towards the needs of the international and domestic communities, as well as the acceptance of the latter, one may at least enable a more principled assessment of the condition of legitimate authority as a whole.

Another issue is if the NSA only resorts to force within the borders of the target State. By acquiescing to such use of force, one is merely acknowledging that the NSA should be able to defend basic interests, while at the same time maintaining a clear distinction between the inherent primary status of States and the secondary status of NSAs in international law. Such a response would, however, not relate to the use of force in self-defense as far as article 51 is concerned, a measure which stipulates the use of force across the borders. Emphasizing the legitimacy of projecting force in this manner may still contribute to relativize the potential
actions of the NSA by not simply slandering its conduct, but also concede that even the acts of such actors may have value. Such an emphasis may also highlight the element of needs; the need is for the people to be protected, not for the NSA to rise to state-like prominence.

The fourth conclusion responds to whether Hezbollah should have legitimate authority to resort to force in self-defense of Lebanon by the use of force across Lebanon’s border.

It is clear that Hezbollah participates on the international stage through its armed activities and that this would be the case in a stipulated scenario where it resorts to force in response to an armed attack. It is, however, not likely that it may ever satisfy the criterion of community acceptance as state practice does not accept legitimate authority for NSAs under *jus ad bellum*. Moreover, the negative attitude of the vast majority of States towards Hezbollah counters the argument that it should have legitimate authority *de lege ferenda*.

With regard to the criterion of needs, it is clear that Hezbollah has the military capabilities and derives a legitimacy of sorts from its military confrontations with foreign threats. Its authority is bolstered by its political participation and general legitimacy. Also, the need for someone to act is enhanced by the anticipated and stipulated absence and inability of the State.

Other factors, however, rebut Hezbollah’s authority. One may argue that Hezbollah creates the need for additional defense through its close alliance with, and the meddling of, Syria and Iran. Coupled with Hezbollah’s exploitation of the weakness of the sectarian system in Lebanon, the State has not been rendered a chance to thrive and grow strong enough to attain monopoly on the use of force domestically, nor to attend to the defense of the State. Hezbollah’s arrogation of power in Lebanon, its employment of arms not only to repulse foreign aggression, but also to quell opposition, the occasional provocation of potentially devastating retaliation from Israel, and its involvement in the Syrian war contrary to the aspirations of the Lebanese, resemble violations of State sovereignty and elements threatening its territorial integrity, rather than services for the sake of the nation and measures to defend fundamental rights.

While the military power of Hezbollah and its ability, possibly, to attend to the defense of Lebanon amidst foreign threats, are weighty arguments, many of Hezbollah’s actions are problematic to the extent that they should rebut its authority, the needs in the stipulated situation notwithstanding. Without prejudice to the conclusions, it seems apt, however, to
acknowledge the need for a more principled discussion on the use of force by such actors, admitting that while they readily represent threats, they may also serve certain functions.
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