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# The Use of Force against Terrorists: A Reply to Christian J. Tams<sup>†</sup>

Kimberley N. Trapp\*

In his recent article ‘The Use of Force Against Terrorists’,<sup>1</sup> Professor Tams provides a thoughtful overview of developments in the *jus ad bellum* over the past 20 years. His analysis focuses on the right to use force in self-defence, particularly as regards the permissibility of extra-territorial military responses to terrorist attacks by non-state actors. The thrust of Professor Tams’ argument is that the relevant state practice suggests an evolution in the law of self-defence – moving away from a restrictive analysis of Article 51 to a broader interpretation which more easily accommodates anti-terrorist force. In this comment, I will focus on Professor Tams’ approach to questions of ‘attribution’ and the inter-state reading of Article 51, in particular his ‘more moderate (but still important) re-reading’<sup>2</sup> of the standard of attribution applicable in the terrorism context.

## 1 The Inter-state Reading of Article 51

The starting point of Professor Tams’ discussion is that Article 51 must be understood in an inter-state context – ‘as an exception to the comprehensive ban on the *inter-state* use of force’<sup>3</sup> set out in Article 2(4). Professor Tams notes the efforts of some commentators to divorce Article 51 from an inter-state context by positing a right to use defensive force in response to attacks by non-state actors *irrespective of the territorial state’s non-involvement therein*,<sup>4</sup> but remains committed to an inter-state reading of the right to use force in self-defence. I agree entirely with Professor Tams’ approach on this point, as it is the only one which is consistent with the logic of the UN Charter. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state. Using defensive force against the base of operations of non-state terrorist actors within a foreign host state’s territory, even if that force targets only the non-state actors, still amounts to a violation of the host state’s territorial integrity. If Article 51 is to be a

<sup>†</sup> Tams, ‘The Use of Force against Terrorists’, 20 *EJIL* (2009) 359, <http://ejil.oxfordjournals.org/cgi/reprint/20/2/359>.

\* Lecturer in Law, Newnham College, University of Cambridge. Email: [knt22@cam.ac.uk](mailto:knt22@cam.ac.uk).

<sup>1</sup> Tams, ‘The Use of Force Against Terrorists’, 20 *EJIL* (2009) 359.

<sup>2</sup> *Ibid.*, at 385.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

true exception to the prohibition on the use of force as set out in Article 2(4), it must in some way excuse the violation of the host state's territorial integrity.

## 2 An Attribution-based Definition of 'Armed Attack'

The obvious difficulty with maintaining an inter-state reading of Article 51 in an age of terrorism is that terrorist attacks are rarely carried out by states themselves. The more common scenario is for non-state terrorist actors, acting from a foreign host state's territory, to carry out cross-border attacks. Professor Tams adopts the legal mechanism which has traditionally been relied on to preserve an inter-state reading of Article 51, yet accommodate the need to respond to attacks by non-state actors, i.e. that of attribution.<sup>5</sup> By requiring that 'armed attacks' by non-state terrorist actors be attributable to the host state in whose territory defensive force is used, the violation of the host state's territorial integrity is excused.

The further complication with adopting an attribution-based definition of 'armed attack' is that it is difficult to reconcile with recent state practice in the

terrorism context without doing some mischief to the secondary rules of state responsibility. The threshold of attribution which the International Court has set for an armed attack by non-state actors to be attributable to a state for the purposes of self-defence is very high indeed – relying as it does on Article 3(g) of the Definition of Aggression.<sup>6</sup> But, as Professor Tams notes, an attribution-based definition of 'armed attack', coupled with such a high threshold for attributability, fails to account for recent uses of defensive force in response to terrorist attacks. In the state practice Professor Tams reviews briefly,<sup>7</sup> terrorist attacks were carried out by non-state actors from foreign territory, but were not attributable to the host state on the basis of the International Law Commission's Articles on State Responsibility (or Article 3(g) of the Definition of Aggression for that matter). Nevertheless, uses of defensive force in response to these terrorist attacks

<sup>5</sup> Professor Tams notes the argument that nothing in Art. 51 limits 'armed attacks' to those carried out by states (see in particular the Separate Opinion of Judge Higgins in *Wall Advisory Opinion* [2004] ICJ Rep 136, at para. 33), and characterizes the ICJ's re-reading of Art. 51 in *Nicaragua* (defining 'armed attack' as attacks carried out by one state against another) as one which will 'haunt the Court some 15 years later'. He nevertheless maintains attribution as a necessary element of the right to use force in self-defence in response to armed attacks by non-State actors: Tams, *supra* note 1, at 369, 384–385.

<sup>6</sup> *Nicaragua*, Merits [1986] ICJ Rep 14, at para. 195; *DRC v. Uganda*, Judgment of 19 Dec. 2005, available at: [www.icj-cij.org/docket/files/70/6503.pdf](http://www.icj-cij.org/docket/files/70/6503.pdf), at para. 146. Professor Tams refers to the 'effective control' test as a basis for attributing non-state armed attacks to a host state: Tams, *supra* note 1, at 385–386. In neither *Nicaragua* nor *DRC v. Uganda*, however, does the Court rely on the 'effective control' test as a basis for attribution in the self-defence context. 'Effective control' is the standard of attribution which the Court formulates in *Nicaragua* in the context of US responsibility for an internationally wrongful act (in particular the humanitarian law violations committed by the *Contras*) – not in the context of US claims to have been acting in collective self-defence of El Salvador. This is not to say that 'effective control' could not be used as a basis for attributing non-state armed attacks to the host state, just that the Court has not done so.

<sup>7</sup> Tams, *supra* note 1, at 379–381.

were widely accepted as legitimate by the international community.

In order to square the legitimacy of these defensive operations against an attribution-based definition of 'armed attack', Professor Tams argues that the threshold for attribution is evolving downwards, and he resuscitates a long-rejected basis for attributing non-state conduct to a state – aiding and abetting or complicity.<sup>8</sup> If complicity is a basis for attribution in the terrorism context, so the argument goes, then a state's support for terrorists acting from its territory (whether active or passive) effectively makes the complicit (and host) state the author of any terrorist attack launched from its territory, and thereby excuses the violation of that state's territorial integrity when defensive force is used against the non-state terrorist actors operating therefrom, consistent with an inter-state reading of Article 51. Professor Tams qualifies his re-reading of the standard of attribution as a 'more moderate (but still important) re-reading'<sup>9</sup> when compared with the alternative ways of accommodating recent state practice, which he characterizes as 'radical'.<sup>10</sup> Indeed Professor Tams' complicity approach is more moderate than the one alternative he considers – namely dispensing with the attribution requirement set out in *Nicaragua* without, however, replacing that requirement with some element which preserves an inter-state reading of Article 51 (i.e. excuses the violation of the host state's territorial integrity).<sup>11</sup> Professor Tams describes the radical approach as

one which results in a right to use force in self-defence 'against all types of armed attacks, irrespective of any state involvement', which provides 'a justification for the attack on terrorists, [but does not] explain why states were entitled to violate the territorial sovereignty of the state in which they were based'.<sup>12</sup> In considering only the one 'radical' alternative, however, Professor Tams presents us with a false choice – either maintain legal coherence by qualifying complicity as a basis of attribution or abandon the inter-state reading of Article 51.

### 3 The Alternative

There is, however, a second alternative which squares recent state practice in the terrorism context against the International Court's jurisprudence, while maintaining an inter-state reading of Article 51, without doing mischief to the rules of attribution (which mischief I will discuss further below). First, as I have argued elsewhere,<sup>13</sup> a careful reading of the International Court of Justice's (ICJ's) jurisprudence reveals that it does not actually require armed attacks by non-state actors to be attributable to the host state before defensive force can be used against (and only against) those non-state actors in the host state's territory. The alternative reading of the Court's jurisprudence suggested below is context-sensitive, and does not divorce the Court's pronouncements on the applicable law from the factual context which the Court was addressing.

<sup>8</sup> *Ibid.*, at 385–386.

<sup>9</sup> *Ibid.*, at 385.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at 383–385.

<sup>12</sup> *Ibid.*, at 385.

<sup>13</sup> See Trapp, 'Back to Basics: Necessity, Proportionality and the Right of Self-Defence against non-State Terrorist Actors', 56 *ICLQ* (2007) 141.

In *Nicaragua* and *DRC v. Uganda*, most often cited for the attribution-based definition of ‘armed attack’, the uses of defensive force either targeted government forces and installations or were far removed from the border area from which non-state actors launched their attacks. In *Nicaragua*, the ICJ considered whether American assistance to the Nicaraguan *contra* forces amounted to a legitimate exercise of the right of collective self-defence. The US claimed to be acting (primarily) in defence of El Salvador, which was the victim of armed attacks by rebel groups allegedly supplied with arms through Nicaragua with the active support, or at the very least complicity, of the Nicaraguan government.<sup>14</sup> Although the *contras*’ main targets were Sandinista troops, there were numerous reports of attacks on non-combatants,<sup>15</sup> and Nicaragua alleged a US-devised strategy for the *contras* to attack ‘economic targets like electrical plants and storage facilities’ in Nicaragua.<sup>16</sup> The ICJ noted that to defend El Salvador against rebel attacks the US might have arranged ‘for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua’, and that ‘it is difficult to accept that [the US] should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte in the exercise of the right of self-defence’.<sup>17</sup> In *DRC v. Uganda*, the Court considered

whether Uganda’s use of force in the DRC’s territory, ostensibly in response to armed attacks by anti-Ugandan rebel groups, was a legitimate exercise of self-defence. The ICJ emphasized that Uganda’s defensive measures were carried out against the DRC,<sup>18</sup> particularly noting the fact that Ugandan military action was directed largely against towns and villages far removed from the territory from which anti-Ugandan rebels operated.<sup>19</sup>

In both cases, the Court held that a use of defensive force would have been legitimate only if the non-state actors had been sent by or on behalf of the state against which defensive force was used. The Court’s insistence that armed attacks be attributable to a state before they give rise to a right to use force in self-defence, however, has to be understood in the context of its findings of fact. These decisions should be read as drawing a distinction between uses of defensive force *against* a host state – in which case the armed attacks being responded to must be attributable to that state – and uses of defensive force against (and only against) non-state actors *within* a host state’s territory, without pronouncing on the legitimacy thereof (as the issue, on the facts, was not before the Court). Indeed, in *DRC v. Uganda*, the Court expressly refused to rule on the circumstances in which the latter use of force would be legitimate<sup>20</sup> – suggesting perhaps that attribution would not be required. Professor Tams does note that the Court seems to leave the question of defensive force against irregulars open in *DRC v. Uganda*. But rather than read the jurisprudence as

<sup>14</sup> The ICJ held that Nicaragua was not in fact responsible for the arms traffic, to the extent that such arms traffic existed: see *Nicaragua*, Merits, *supra* note 6, at paras 154–155.

<sup>15</sup> *Ibid.*, at para. 113.

<sup>16</sup> *Ibid.*, at para. 105.

<sup>17</sup> *Ibid.*, at para. 156.

<sup>18</sup> *DRC v. Uganda*, Judgment, *supra* note 6, at paras 118 and 147.

<sup>19</sup> *Ibid.*, at paras 81–86.

<sup>20</sup> *Ibid.*, at para. 147.

suggested above, he maintains attributability as a necessary requirement for all acts of self-defence (even those directed exclusively at non-state actors within a foreign state's territory) and re-introduces complicity as a standard of attribution.

The question remains: without attributability, how is the inter-state reading of 'armed attack' to be preserved – in particular, how can a use of defensive force directed against non-state terrorist actors in a foreign host state's territory be squared with that host state's territorial integrity? The customary international law requirement of necessity answers the call.<sup>21</sup> If a host state is doing everything possible to prevent its territory from being used as a base for terrorist operations, then a use of defensive force in that state's territory is simply not necessary – and the matter should be addressed through cooperative arrangements with the host state. If a state is complicit in its territory being used as a base for terrorist operations, then a use of defensive force in response to terrorist attacks by non-state actors from that state's territory is necessary, and the complicity provides the justification for the violation of the host state's territorial integrity. Professor Tams makes the point himself that 'the international community is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state. Instead the debate has shifted towards issues of necessity and proportionality. . .'.<sup>22</sup> He further refers to this potential mechanism for preserving an inter-state reading of Article 51 in footnote 176, noting that some (unnamed) commentators 'typically refer

back to the arguments about the unwillingness (or even inability) of the territorial state to prevent terrorist activities – conduct which in turn means that the territorial state had to accept the use of force against its territory'. But Professor Tams then asserts that 'this however means that at some level issues of state involvement re-enter the debate'. Precisely! Issues of state involvement have to enter the debate if an inter-state reading of Article 51 is to be maintained. The question is whether that state involvement needs to be qualified as anything more than it is. Indeed, Professor Tams concludes that 'contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defence directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory – either because of its support below the level of direction and control [i.e. generally accepted bases of attribution] or because it has provided a safe haven for terrorists'. Professor Tams clearly recognizes that complicity plays a role in excusing a violation of the host state's territorial integrity but, having so recognized, he takes the unnecessary step of subsuming that complicity within attribution in order to maintain the framework he has adopted.

The requirement that armed attacks be attributable to the host state is nothing more than a mechanism for maintaining an inter-state reading of Article 51 and ensuring that defensive force is a true exception to the prohibition on the use of force against the territorial integrity or political independence of another state. But the attribution requirement is derived from a reading of the ICJ's jurisprudence which is divorced from the factual context of the relevant decisions and cannot be

<sup>21</sup> Trapp, *supra* note 13.

<sup>22</sup> Tams, *supra* note 1, at 381.

squared with recent state practice in the terrorism context without resuscitating long-rejected bases of attribution (as discussed further below). Professor Tams distorts the level of state involvement in terrorism (complicity pure and simple) by labelling it a basis of attribution (with all that this implies about ‘who done it’) when there is an alternative framework available which preserves an inter-state reading of Article 51 without muddying the conceptual waters.

#### 4 Mischief to the Rules of Attribution

Early codification efforts and arbitral decisions did not unambiguously distinguish between state responsibility based on the attributability of un-prevented or un-punished private conduct and responsibility based on the failure to prevent or punish private conduct where there was an international obligation to do so. But this artificial way of linking private conduct to the state, rather than focusing on whether the state had an independent obligation to prevent or punish the conduct, was gradually abandoned in the period between World War I and World War II.<sup>23</sup> The International Law Commission (ILC), in its Articles on State Responsibility, and international jurisprudence have since firmly rejected complicity or acquiescence in private conduct as a basis of attribution.<sup>24</sup>

As customary international law matured, primary obligations were more clearly articulated: states are under an obligation themselves to refrain from engaging in certain conduct (for instance terrorism), to refrain from supporting such conduct, and to prevent private actors from engaging in such conduct from their territory. There was therefore no need to hold a state directly responsible for supported or un-prevented private conduct via attribution through its complicity therein, because the state could be held responsible for the independent breach of its obligations to refrain from supporting or to prevent international terrorism.

The distorting effect of Professor Tams’ argument on attribution is even clearer in the state responsibility context.<sup>25</sup> While there is a driving force behind Professor Tams’ reading down of the rules of attribution in the *jus ad bellum* context – namely to preserve the inter-state reading of Article 51 – there is absolutely no reason at all to label complicity a basis of attribution in the state responsibility context. If applied in the state responsibility context, Professor Tams’ argument collapses a primary rule into a secondary rule of state responsibility. States

<sup>23</sup> See in particular *Janes Case (US v. Mexico)*, United States and United Mexican States General Claims Commission, Opinion of Commissioners, IV Reports of International Arbitral Awards (1926) 82.

<sup>24</sup> See *Genocide Case*, Merits, judgment of 26 Feb. 2007, available at: [www.icj-cij.org/docket/files/91/13685.pdf](http://www.icj-cij.org/docket/files/91/13685.pdf), at para. 420, in which the ICJ considered state responsibility for complicity in genocide, an ancillary offence under the Genocide Convention, and clearly distinguished it from a standard of attribution.

<sup>25</sup> Professor Tams discusses his proposed ‘departure’ from the ‘effective control’ test of attribution in the context of the ILC’s Articles on State Responsibility and the ICJ’s decision in the *Genocide Case* (Tams, *supra* note 1, at 386) – both of which are obviously about state responsibility and not Art. 51. He also refers to aiding and abetting as broadening ‘the forms of support which trigger a territorial state’s responsibility’, *ibid.* Both of these statements suggest that Professor Tams considers complicity *qua* attribution to be a *lex specialis* which operates in both the *jus ad bellum* and state responsibility terrorism contexts – even though the focus of his article is the *jus ad bellum*.

are under customary international law and treaty obligations to refrain from engaging in terrorist activities, to refrain from supporting such activities, and to prevent terrorist activities within their territories.<sup>26</sup> Complicity in terrorist activities, whether the result of support for or a deliberate failure to prevent terrorism, is in breach of an independent obligation under both customary international and treaty law. An argument that states should be held directly responsible for positive conduct (the commission of a terrorist act) on the basis of attributability, when all they may be 'guilty' of is an omission (a however deliberate failure to prevent) renders many of the primary rules of international law in the terrorism context redundant – and is difficult to distinguish from that (in)famous Bush-ism, 'we will make no distinction between the terrorists who committed these acts and those who harbor them'. Professor Tams does of course note that his reading down

of the rules of attribution in the terrorism context is not necessarily a positive development, but nevertheless considers his position (at least in the *jus ad bellum* context) to be a 'more moderate (but still important) re-reading'<sup>27</sup> than the alternatives. Given the alternative suggested above, which preserves an inter-state reading of Article 51 by relying on the customary international law elements of self-defence (and therefore surely could not be characterised as 'radical') – this is simply not the case. Special Rapporteur on State Responsibility Ago's widely acknowledged stroke of genius was to draw a clear distinction between the primary and secondary rules of state responsibility. The conceptual clarity which thereafter emerged in the ILC's work on state responsibility should be celebrated, not undermined. Surely collapsing the distinction in the terrorism context is what amounts to a 'radical re-reading'.

<sup>26</sup> The treaty basis for the obligation to refrain from engaging in terrorist activities or supporting such activities is the series of terrorism suppression conventions adopted under the auspices of the ICAO, IMO, and UN (for instance the Terrorist Bombing Convention) which require states to prevent certain acts of international terrorism. Based on the ICJ's decision in the *Genocide Case*, Merits, *supra* note 24, an obligation to prevent implies an obligation to refrain from engaging in the conduct to be prevented and to refrain from ancillary crimes in reference to such conduct (such as aiding and abetting or supporting).

<sup>27</sup> Tams, *supra* note 1, at 385.