

# The illegality of extraterritorial use of force against non-state actors or new customary law?



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## Summary

Contemporary conflicts challenge the rules regulating the use of force in international law. The legal framework was not made to regulate a state's conflict with non-state actors. Consequently, states today argue for the right of self-defence against non-state actors often operating from other, uninvolved, 'host' states. This argument is primarily based on interpretations stating that self-defence is permitted if the host state is either unwilling or unable, or in any other way not in control of its territory.

This thesis seeks to explore whether or not existing international law can be interpreted to permit the extraterritorial use of self-defence against non-state actors or whether a new customary norm is evolving to legalise states' extraterritorial self-defence. Although self-defence justifies the use of force, the challenge for states exercising this right against non-state actors, is the foundation of the United Nations Charter, the peaceful co-existence and sovereignty of states.

This thesis concludes by stating that good faith interpretation of the existing legal framework can include self-defence against non-state actors, but the extraterritorial element of self-defence requires approval by the Security Council or consent by the host state. A customary norm is in the making through state practice, but has not yet achieved the required *Opinio Juris*.

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## Abbreviations

9/11	The attacks on September 11, 2001 in New York, Pennsylvania and Washington D.C.
ANC	African National Congress
AU	African Union
DRC	the Democratic Republic of Congo
GA	the United Nations General Assembly
HI	Humanitarian Intervention
ICC	International Criminal Court
ICJ	International Court of Justice
IGO	International Governmental Organisation
ILA	International Law Association
ILC	International Law Commission
ISIL	Islamic State of Iraq and the Levant (a.k.a. IS, ISIS and Da'esh)
IIS	Iraqi Intelligence Service
NAM	Non-aligned Movement
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NK	North Korea
PLO	Palestine Liberations Organization
R2P	Responsibility to Protect
SEC GEN	(United Nations) Secretary General
SC	United Nations Security Council
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
US(A)	United States (of America)
WWII	World War II

## Introduction

New wars or conflicts<sup>1</sup> are not fought between states, as primarily was the case in the 20<sup>th</sup> century and before. The conflicts of today are however, complex mixes of states and non-state actors and different types of warfare, e.g. guerrilla tactics mixed with cyber warfare. In the Cold War the major powers often used proxies to fight their wars (e.g. in support of their communist or capitalist world order as was the case in Vietnam, where the Vietcong substituted the Soviet bloc), which has a resemblance with today's non-state actors that, in some cases, are also state supported.

The state as we know it and the political order established in 1648 at the peace of Westphalia is challenged by especially non-state actors fighting states from either within the state itself or from another, often neighbouring, state. Sovereignty and the state focus is not relevant for the non-state actors, which uses the shield of sovereignty and the existing international law regime to its advantage by scattering its bases and operations to several states, thereby creating dilemmas for the implicated states as to how to cope with the new threat.

Fighting non-state actors in other states challenges the current state vs. state legal frame<sup>2</sup>, which was established in the 20<sup>th</sup> century, since the state "hosting" the non-state actor often is not part of the conflict. This aspect is especially challenging for the concept of sovereignty as mentioned above, which is under continued pressure due to globalization and especially, with regards to this thesis, the use of force by non-state actors, who often seek to exploit the diverging views on international law in their favour. The question of what legal rights a state has when attacked by non-state actors based in another state is difficult to assess. Both states and scholars differ in opinion whether the existing legal frame is adequate or if there is a need for new international law regulating these types of conflicts. Among the states and scholars who find the existing law sufficient some argue toward interpreting the legal texts (e.g. the United Nations (UN) Charter) in a new perspective – making the law "fit" the modern/new wars or that a new customary law has evolved. States and scholars arguing for new international law contend that this is not as was intended by the drafters of the law and therefore the law cannot be applied in good faith.<sup>3</sup>

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<sup>1</sup> The term "war" is in a traditional understanding a state vs. state term. Since states rarely fight each other today, "New wars" or "conflicts" are more common terms used to underline the move away from big military clashes on the battlefield to a more complex mix of actors and weapon types. C. M. Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge, United Kingdom: Cambridge University Press, 2017), p. 7.

<sup>2</sup> Jackson Nyamuya Maogoto, "Walking an International Law Tightrope: Use of Military Force to Counter Terrorism - Willing the Ends," *Brooklyn Journal of International Law* 31, no. 2 (2006): p. 405.

<sup>3</sup> Article 31 of the Vienna Convention on the Law of Treaties: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose...".

This thesis will foremost clarify the current legal framework concerning extraterritorial<sup>4</sup> attacks on non-state actors by analysing the different parameters of international law vis-à-vis the right to use extraterritorial force against non-state actors in host states. My motivation for doing this is that I continue to read books, articles and official announcements by states claiming a legal right to extraterritorially attack non-state actors, which is often based on inadequate or “non-good-faith” interpretation of international law. This is not to say that there is no possibility to use force extraterritorially against non-state actors but doing so in accordance with existing international law including good faith interpretations is needed for this action to be legal.

### Research Question

The illegality of extraterritorial use of force against non-state actors or new customary law?

Is the existing international law permitting the use of force against non-state actors in host states and if it does, on what conditions? If the existing law is not allowing the extraterritorial use of force, is there any new emerging customary law?

### Methodology

First this thesis will clarify the existing law to articulate what the legal status is when arguments for or against extraterritorial attacks on non-state actors are presented. The starting point for this part is the UN Charter (which is the primary source of international law concerning the use of force<sup>5</sup>) with introductions to the articles limiting or authorizing the use of force: 2(4) and 51, followed by an explanation of the Security Council's (SC) possibility for the use of force within the limits defined in Chapter VII of the UN Charter.

Next a more thorough analysis of Article 2(4), Article 51 and Chapter VII along with the customary law principles of necessity and proportionality seeks to clarify whether the extraterritorial use of force against non-state actors are in conjunction with the Charter and if so under which conditions. The first part ends with a conclusion on the above-mentioned areas.

Second this thesis will discuss the arguments for and against the supposed, by some states and scholars, evolving state practice and *Opinio Juris* towards the extraterritorial use of force against non-state actors and the thereby new customary law, which allegedly justifies these attacks. It is important to note that

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<sup>4</sup> Extraterritorial: Not within the territory of the state using force. I will also be using the phrase “in third states” as a synonym for extraterritorial.

<sup>5</sup> Bruno Simma and United Nations., *The Charter of the United Nations : A Commentary*, 3rd ed., 2 vols., Oxford Commentaries on International Law (Oxford: Oxford University Press, 2012). Stephen C. Neff, "A Short History of International Law," in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2014), p. 6.

these arguments are intentionally omitted from the first part as I find the division between interpretation of existing international law and the discussion of evolving or new customary law being two separate areas. The method in the second part will be that used by the International Court of Justice (ICJ) in the case “Jurisdictional Immunities of the State”, to clarify whether or not both the practice of states and the *Opinio Juris* exist and thereby fulfils the criteria of the ICJ regarding the development of custom. Although there are some legal disagreements concerning the creation of customary law, e.g. the International Law Association (ILA) which downplays the importance of *Opinio Juris* arguing: “... if states generally believe that a pattern of conduct is permitted or required by law, this is sufficient for it to be law; but not necessary to prove its existence of such a belief”.<sup>6</sup> The ICJ definition of the development of customary is however preferred due to its general acceptance by states and scholars.

I will initially employ a normative positivist<sup>7</sup> and a traditional legal dogmatic approach<sup>8</sup> using recognized sources of law as defined per Article 38 of the Statute of the ICJ: International conventions, international custom, general principles, judicial decisions and the work of international legal scholars.<sup>9</sup>

UN SC Resolutions adopted under Chapter VII of the Charter are considered binding, in accordance with Article 25 of the Charter, but not law as such.<sup>10</sup> They will also be applied, and to a lesser degree the work of the General Assembly (GA). Other relevant academic material will be used as well as the statements by states, international governmental organisations (IGO) and international non-governmental organisations (NGO). As the latter sources indicate, I will not be completely confined to the normative positivist approach since I find using this approach alone would be conflicting with the development in the world as will be discussed further in this thesis.

The literature and the examples of extraterritorial use of force are foremost western, with a US domination; only one Russian example is used. Opinions of the different SC members and other countries expressing their support or concern are used in this thesis, which seeks to investigate all

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<sup>6</sup> "International Law Association, Final Report of the Committee, Statement of Principles Applicable to the Formation of Customary (General) International Law", (paper presented at the London Conference, 2000), p. 31.

<sup>7</sup> The belief that rules of law are made by states themselves by consent. Rein Müllerson, "Jus Ad Bellum and International Terrorism," in *International Law and the War on Terror*, ed. Fred L. Borch and Paul S. Wilson (Newport, RI: US Naval War College: International Law Studies, 2003), p. 79.

<sup>8</sup> The research of current positive law as per Article 38 of the Statute of the ICJ.

<sup>9</sup> United Nations, "Statute of the International Court of Justice," (18 April 1946): Article 38.

<sup>10</sup> The latter is however an ongoing academic discussion. See e.g. Elvira R. Gadelshina to Kluwer Arbitration Blog, 2013-01-30, 2013, <http://arbitrationblog.kluwerarbitration.com/2013/01/30/on-the-role-of-un-security-council-resolutions-in-international-commercial-arbitration/>.



angles on the subject. The thesis further pursues a non-pro-belligerent bias by employing the law in a neutral manner.

It is important to note that the first part of the thesis deals with the existing law and the interpretation of it. The second part of the thesis deals with the alleged new or developing customary law on the extraterritorial use of force against non-state actors. There will be overlaps and examples reused. This will however be in the two different perspectives of existing law and (alleged) new or evolving law. In other words the first part can be seen as the perspective of the traditional law scholars/states, who primarily read the Charter conservatively and leave no, or little, possibility for flexibility/new custom. The second part gives space for an analysis of the modern approaches and the possibility for developing new law interpretations of the articles in the Charter<sup>11</sup>. As mentioned there will be overlaps as new interpretations of existing conventional law hints at possible development of new customary law.

My focus on cases will primarily be on those conflicts, which involve a non-state actor and where the actions of the non-state actor are not attributable to the host state. Other cases will however be used since they can clarify the interpretation and development of international law.

### Thesis Limitations

The use of force is a widely explored subject of international law. There are several areas which are debated and discussed within international organisations, between states, scholars etc. This thesis will not address all of the areas (e.g. anticipatory, preventive or pre-emptive self-defence), but will focus on those relevant for the research question.

That the state remains the main player in the international legal system<sup>12</sup> will not be questioned or discussed in this thesis. Further, I will not question the validity of the Charter. The UN Charter is still fully valid and defines international law that the member states have to follow in accordance with the Vienna Convention on the law of treaties.<sup>13</sup> Although based on a state vs. state paradigm, there are possibilities to include contemporary conflicts.<sup>14</sup> The development of the law is natural and needed, and since it

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<sup>11</sup> As argued by Alain Pellet: "Like any treaty, the Charter is not a fossilized parchment; it is a living instrument, continuously enriched by interpretation and practice. Alain Pellet, "The Charter of the United Nations: A Commentary of Bruno Simma's Commentary," *Michigan Journal of International Law* 25, no. 1 (2003): p. 138.

<sup>12</sup> Chinkin and Kaldor, *International Law and New Wars*, pp. 62-63, 79. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, New York: Clarendon; Oxford University Press, 1994), p. 39.

<sup>13</sup> UN GA, "World Summit Outcome," ed. United Nations (2005).

<sup>14</sup> Frederik Naert, "The Impact of the Fight against Terrorism on the *Ius Ad Bellum*," *Ethical Perspectives* 11, no. 2-3 (2004): pp. 150, 54-55. High-Level Panel on Threats Challenges and Change, "A More Secure World: Our Shared

seems quite unrealistic that the world community would agree on a completely new UN Charter, the support of the existing foundation of international law with regards to the use of force is vital. As Dr. P.S. Rao states: "While the UN Charter system is not perfect, it is the best we have in the history of nations".<sup>15</sup>

The concept of legitimacy vs. legality is not relevant for answering the thesis' research question. Although achieving increased popularity since the Kosovo conflict this thesis will only be focusing on international law and the legality of extraterritorial use of force against non-state actors. There will therefore not be a comprehensive discussion on this subject.

### Definitions

Non-state actors are often, pending the background of the entity, defined as terrorists. Even states are said to be using terrorism e.g. by the colonies in the de-colonisation process, where the same was claimed the other way around.<sup>16</sup> Several organisations have previously been labelled 'terrorist organisations', but are today accepted as legitimate political parties in their own right or are associated with legitimate political groups, e.g. the African National Congress (ANC), the Irish Republican Army (the political party Sinn Fein), the Palestine Liberation Organization (PLO) and Hamas.<sup>17</sup>

The GA has defined the actions that should be regarded as acts of terrorism. These include e.g.: hijacking, crimes against internationally protected persons and the taking of hostages<sup>18</sup>, but the world community has still to agree upon a single definition. Two of the primary issues which have proven challenging to agree upon are the insistence by many entities that such a definition includes state terrorism and that some groups or individuals are legally permitted to use some of the methods mentioned above because they simply have no other choice to reach their goals.<sup>19</sup> The closest to a definition is in my opinion the work of the SC established High-level Panel on Threats, Challenges and Change, which outlined the following minimum requirement for a terrorist definition: "any action, in addition to actions already specified by the existing conventions... that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act... is to intimidate a

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Responsibility," (New York: United Nations, 2004), Part 3, p. 61. For opposing view read: Maogoto, "Walking an International Law Tightrope: Use of Military Force to Counter Terrorism - Willing the Ends."

<sup>15</sup> Pemmaraju Screenivasa Rao, "Non-State Actors and Self-Defence: A Relook at the Un Charter Article 51," *Indian Journal of International Law* 56, no. 2 (2017): p. 142.

<sup>16</sup> Kimberley N. Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, Oxford Monographs in International Law (Oxford ; New York: Oxford University Press, 2011), p. 1.

<sup>17</sup> Jane Boulden, *The Oxford Handbook on the United Nations* (Oxford ; New York: Oxford University Press, 2007), p. 435.

<sup>18</sup> The thirteen international legal conventions relating to terrorism by the General Assembly.

<sup>19</sup> Boulden, *The Oxford Handbook on the United Nations*, p. 428.

population, or to compel a Government or an international organisation to do or to abstain from doing any act.”<sup>20</sup> One thing is clear though: “Terrorist acts are criminal irrespective of terrorist motives or the cause served.”<sup>21</sup>

Although the actions of some non-state actors meet in whole or part of the definitions above, it is however not all states or scholars who agree which non-state actors are terrorists. An example of this is the Hezbollah and Kurdish groups fighting for a united Kurdistan.

As formulated by Trapp: “A single state may even bear both hats in regard to terrorism, sponsoring or supporting violence in certain contexts (even when it accepts the characterization of such violence as ‘terrorist’) and co-operating in the suppression of such violence in others.”

Because of this, I have not used the term terrorists in the title and will favour the term non-state actor(s). I will however use terrorists/terrorism when citing sources that uses that term and in circumstances where the non-state actors are generally accepted as being terrorists, as in the case of Al Qaeda.

States experiencing an attack by a non-state actor will be defined as the ‘victim state’ and the state in which the non-state actor is based will be defined as the “host state”. In the latter case ‘host’ does not implicate acceptance of the non-state actor by the host state as mentioned in the ‘Thesis Limitations’ paragraph.

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<sup>20</sup> Challenges and Change, "A More Secure World: Our Shared Responsibility," p. 52.

<sup>21</sup> Oscar Schachter, "The Extraterritorial Use of Force against Terrorist Bases," *11 Houston Journal of International Law* 309 (1989): p. 310.

## Part 1: The illegality of extraterritorial use of force

### The Laws of War

The Laws of War are divided into two main categories, *jus ad bellum* and *jus in bellum*, meaning respectively the rules governing when a war is legally justified (international law regulating the resort to force) and the rules governing the conduct of war (law of armed conflict).<sup>22</sup> For this thesis, only *jus ad bellum* is relevant for answering the research question.

The rules governing the use of force in international relations have a long history dating back to the classic Greek and Roman philosophers followed by the doctrine of the just war defined by St. Augustine in the 5<sup>th</sup> century and later St. Thomas Aquinas in the 13<sup>th</sup> century. These rules have evolved over the interceding years to today's position as defined by the Charter of the UN<sup>23</sup> (henceforth the Charter), which sets the normative framework for the use of force and henceforth the starting point of any discussion concerning the use of force in international law.<sup>24</sup>

Initially, it was justified to "avenge" and to punish wrong doings through the use of force, but this was in the 20<sup>th</sup> century halted with the use of force being strongly confined due to the violent history of the two world wars. The intention of the world community after World War II (WWII) with the framework set by the Charter was therefore an intention to limit the use for force to an absolute minimum.

The Charter states in Article 2(4) that

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The principle of the prohibition of the threat or the use of force is accepted as representing customary international law. It has achieved *jus cogens* status and has further been elaborated by the GA in the

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<sup>22</sup> Naert, "The Impact of the Fight against Terrorism on the *Jus Ad Bellum*," p. 145.

<sup>23</sup> The United Nations, "Charter of the United Nations," ed. United Nations. (1945).

<sup>24</sup> Simma and United Nations., *The Charter of the United Nations : A Commentary*. Christine D. Gray, *International Law and the Use of Force*, 3rd ed., Foundations of Public International Law (Oxford ; New York: Oxford University Press, 2008), p. 6.

1970 Declaration on Friendly Relations<sup>25</sup> and the 1974 Declaration on the definition of Aggression.<sup>26</sup> The interpretation of Article 2(4) varies,<sup>27</sup> which I will discuss later in this part of the thesis.

The only exception for a member state on the prohibition on the use of force as stated in Article 2(4) is self-defence as specified in Article 51.

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

The SC interpretation of Chapter VII of the Charter permits the possibility to authorize the use of force (e.g. Korea in 1950, Southern Rhodesia in 1966 and Iraq in 1990) by either establishing an UN force or individually or collectively by the member states on a specific mandate issued by the SC through SC resolutions.<sup>28</sup>

According to the primary source on the use of force, the UN Charter, force is only permitted for the purpose of self-defence or when explicitly authorized by the SC through Articles 39 and 42<sup>29</sup>, when a state wishes to resort to the use of force to settle a dispute e.g. an international disagreement. The reason for the very strict wording of the Charter must be seen in a historical perspective. The two world wars, which were in their nature horrifying events, were too much for the world community to bear. The establishment of the UN and the accompanying treaty, the UN Charter, was a reaction to

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<sup>25</sup> UN GA, "Res 2625: Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations," (1970).

<sup>26</sup> "Res 3314: Definition of Aggression," (1974).

<sup>27</sup> Christine D. Gray, "The Use of Force and the International Legal Order," in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2014), p. 620.

<sup>28</sup> *Ibid.*, pp. 637-38. Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, Studies in International Law (Oxford ; Portland, Or.: Hart Publishing, 2004), p. 257.

<sup>29</sup> Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security." Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

WWII (and the “Great War”/World War I) and an attempt to put an end to the violence, which had marked the 20<sup>th</sup> Century. The foundation of the Charter is therefore ‘peace’, which is important to remember throughout this thesis. The preamble of the Charter clearly states this and especially the beginning of Article 1, which states:

“The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...”

The UN was originally intended to have its own standing forces available, but due to the Cold War and the disagreements within the SC, this was never implemented. Instead, the UN has relied upon the member nations contributing forces to execute the decisions by the SC.

The following sub chapters will analyse the interpretation of the Charter’s articles mentioned above by primarily states’ actions, ICJ judgments and scholars’ academic work. The subchapters will not only look at situations involving non-state actors since other cases might (or might not) prove a change to the interpretation of the articles and Chapter VII, but also at the development of international law.

### United Nations Charter, Article 2(4)

This subchapter will discuss the wording of Article 2(4) and its interpretation by states, the ICJ and scholars. I conclude the chapter by briefly stating my opinion of the legal understanding of Article 2(4).

#### *The threat to use force*

The threat of the use of force is just as illegal as the use of force itself<sup>30</sup> as per the wording of Article 2(4), but the contemporary examples of these are scarce and have not had the same focus of the international community and international law scholars. I will shortly touch on the subject, but pay more attention to the actual use of force since the latter examples are better described in literature and have more international law focus.

Some scholars do not see the threat equal to the actual use of force, while others are more cautious of such a classification due to the equality of the wording of these in Article 2(4).<sup>31</sup> The ICJ adopted the definition, of the threat to use force, by Sir Ian Brownlie in *the Legality of the Threat or Use of Nuclear Weapons advisory opinion*: "...an express or implied promise by a state of a resort to force conditional on non-acceptance of certain demands of that State".<sup>32</sup> I agree with Brownlie and the ICJ in the definition and with the scholars arguing for equality, since the good faith interpretation can only be equality, when reading the following words from Article 2(4): "...from the threat or the use of force...". There is, in my opinion, no distinction between significance of the two or an internal prioritisation. I thereby conclude that the resort to self-defence and the use of force sanctioned by the SC according to Chapter VII is applicable also when based on the threat to use force.

#### *Can force be used without violating the territorial integrity or political independence of a state if the physical presence of foreign troops or weapons in the host state is limited in time?*

One of the main debated issues concerning Article 2(4) is whether the use of force against non-state actors<sup>33</sup> compromises the 'territorial integrity or political independence' of the host state. In regards to this thesis, it is worth investigating whether the use of force against a non-state actor can be possible without violating the territorial integrity or political independence of the state, which deliberately or not hosts the non-state actor and is therefore the state whose territory is 'attacked' (the host state) by the victim state.

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<sup>30</sup> Gray, "The Use of Force and the International Legal Order," p. 621.

<sup>31</sup> Example of a scholar arguing for non-equality: Romana Sadurska, "Threats of Force," *American Journal of International Law* 82, no. 2 (April 1998).

<sup>32</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford;: Clarendon Press, 1963), p. 364.

<sup>33</sup> The thesis primarily uses examples of extraterritorially use of force against non-state actors. Use of force against non-state actors within the territory of states will be explicitly mentioned if examples of such is used, why the word "extraterritorially" is to be implicitly understood if left out.

The meaning of 'territorial integrity and political independence' is the no-interference policy, which the peace of Westphalia was based on; state sovereignty and later the UN Charter regulating the inter-state use of force in order to prevent inter-state wars and to promote peaceful solutions to conflicts. The Charter has been successful in this regard since the number of inter-state conflicts since 1945 are few.<sup>34</sup> Although intended to regulate inter-state relations it is apparent that an attack on a non-state actor within the territory of another state violates the territorial integrity and political independence of the host state. I agree with Professor Oscar Schachter, when he proffers that: "... whenever a foreign State uses force in the territory of another country, without consent of the government of that country, such force is 'against' the territorial integrity or political independence of the State."<sup>35</sup> Contemporary conflicts, primarily the fight against terrorism, have shown a high amount of situations where non-state actors have been attacked without the consent of the hosting state. The US has executed such action through attacking terrorists in multiple states primarily by the use of special operations forces, cruise missiles and drones. The killing of Osama Bin Laden is an example of this, where the US action on the territory of Pakistan was conducted without the consent of the host state.<sup>36</sup>

The following paragraphs will give examples of the violation of the territorial integrity and political independence. Not only those involving non-state actors but also other relevant cases where the argument of a changed interpretation of Article 2(4) provide a state with, in their eyes, validity to legally attack a non-state actor within the territory of another state. The purpose of the examples are to underline the importance and legal understanding of Article 2(4) as articulated by ICJ and legal scholars.

The United Kingdom (UK) violated the territorial integrity and political independence of Albania in the *Corfu Channel Case*, where the UK intervened in Albanian territorial waters to gather evidence as to which state had been laying mines that had destroyed two British warships. The UK argued that there had been no violation of Article 2(4) since its actions did not threaten the territorial integrity or political independence of Albania. The ICJ did however reject the UK claim thereby confirming that the UK's forcible intervention in Albanian territorial waters had comprised Article 2(4): "violating the sovereignty of the People's Republic of Albania".<sup>37</sup> This example shows that even an intension of non-use of lethal force is a violation of Article 2(4), which therefore leaves very little possibility for interpretation.

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<sup>34</sup> E.g. the conflicts between: Iraq and Iran, Iraq and Kuwait.

<sup>35</sup> Oscar Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," in *Terrorism & Political Violence: Limits of Legal Control*, ed. Henry Hyunwook Han (1993), p. 246.

<sup>36</sup> This example is further discussed in the second part of this thesis.

<sup>37</sup> *Corfu Channel Case (United Kingdom V. Albania); Assessment of Compensation*, International Court of Justice, p. 36 (1949).



Other cases of states claiming not to have compromised the 'territorial integrity or political independence' includes among other the Israeli rescue of nationals on a hijacked plane in Entebbe in Uganda in 1976, but the Israelis did not rely on the narrow interpretation of Article 2(4) alone, why this was not seen as a genuine argument. The Israelis thus justified the raid in Entebbe on both the unwilling or unwilling criteria (discussed later in this thesis) and on state complicity.<sup>38</sup>

The rescue of nationals has however often been argued not to compromise the territorial integrity or political independence of the host states as the US e.g. did with the Tehran hostage rescue attempt in April 1980.<sup>39</sup> The rescue of nationals will be further discussed later in the thesis.

Further, numerous justifications have been presented by the US and Israel, primarily initiated as a result of the escalating number of attacks by both state sponsored terrorism and non-state actors against US and Israeli interests commencing in the early 1980s. Examples of these are: US aerial strikes on Tripoli and Benghazi in Libya in April 1986 and the US invasion in Grenada in 1983.<sup>40</sup> Few of these justifications, based on multi-faceted arguments by the US and Israel managed to garner worldwide support from a legal perspective. The justifications were assessed on a combination of a non-violation of sovereignty combined with the right to self-defence.

Drone attacks and targeted killing on non-state actors in third states are also deemed a violation of Article 2(4). Conversely, state sponsored instances of drone attacks and targeted killing are often argued under Article 51 as self-defence and will be dealt with later in the thesis.

The often-seen general argument from states violating other states' sovereignty is that the violating state has no interest in removing the government or occupying the host state in question, which is often the interpretation put forward in the wording of 2(4) by the violating state. This interpretation proffers that since the violating state only had a transient period of actual troop or weapons presence in the host state, then it cannot be seen to be violating the host states' territorial integrity. This argument is in stark contrast to the definition of the principle of sovereignty; sovereignty is understood as "the right and power of the governing body to be the only and exclusive power, without any interference, to make decision on its territory."<sup>41</sup> Using force on the territory of another country can hardly be argued as not making a decision on part of the host state.

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<sup>38</sup> Claus Kreß and Benjamin K. Nußberger, "The Entebbe Raid - 1976," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford: 2018).

<sup>39</sup> Gray, "The Use of Force and the International Legal Order," p. 622.

<sup>40</sup> Ibid.

<sup>41</sup> "Encyclopædia Britannica," <https://global.britannica.com/topic/sovereignty>.

Although extraterritorial use of force missions against non-state actors are limited in scope such as the Israeli mentioned above, it is clear that any type of incursion into the territory of another state is an infringement of the integrity of the state in question.<sup>42</sup> No matter the intension of immediate withdrawal of troops or the argument that the attacks are not against the host nation but are targeted on the non-state actor. As a consequence of this jurisprudence there has been a decline in using the non-violation of Article 2(4) as an argument for the use of force in host states.

*Can force be used without violating the territorial integrity or political independence of a state if the argument is based on humanitarian grounds?*

In the early 1990s another argument on the use of force not violating Article 2(4) emerged. That was the argument of humanitarian intervention (HI); the protection of civilians from their own government.<sup>43</sup> This argument was principally led by the UK, who developed a doctrine of HI, arguing that interpretation of Article 2(4) had changed over time.<sup>44</sup>

The first instance in contemporary conflicts, in which HI was used as an argument for the use of force, was when the Iraqi government neglected to follow the UN resolutions protecting the Kurds in the beginning of the 1990s. This provided primarily the governments of the UK and the US a reason to intervene and protect civilians although no authorization on the use of force had been given by the SC. The UK and the US developed no-fly zones over the north and south of Iraq to protect the Kurds in the north and the Shiites in the south. This was done to protect the Kurds and the Shiites against human rights violations by the Iraqi government, who failed to follow SC resolution 688 demanding Iraq to end the repression of the Kurds and Shiites and allow immediate humanitarian aid.<sup>45</sup> Besides the argument that Iraq did not follow the SC resolutions, the UK further justified the use of force by stating that the HI could be justified without SC approval in extreme humanitarian need. France had initially supported the establishment of the no-fly zones but later withdrew their initial support. China and Russia did not accept the legality of the no-fly zones.<sup>46</sup> Only the UK used the argument of HI where the US Senate

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<sup>42</sup> Maogoto, "Walking an International Law Tightrope: Use of Military Force to Counter Terrorism - Willing the Ends," p. 412. Michael Wood and Noam Lubell, "Use of Force, Report by the Committee on Aggression and the Use of Force," in *Washington Conference (2014)* (International Law Association, 2014).

<sup>43</sup> Sir Nigel Rodley, "'Humanitarian Intervention'," in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford, 2015).

<sup>44</sup> Gray, "The Use of Force and the International Legal Order," p. 622.

<sup>45</sup> UN SC, "Res 688 (1991)."

<sup>46</sup> Gray, "The Use of Force and the International Legal Order," p. 624.

expressed a moral obligation, the US President argued that the operations were consistent with resolution 688 although the resolution did not authorize the use of force.<sup>47</sup>

The non-approval by many of the member states provided two important legal notions for consideration: There was no acceptance of a violation of Article 2(4) based on a state's non-compliance with a SC resolution and there was as well, no acceptance of the HI argument.

Many states, e.g. Russia, China and the Non-Aligned Movement (NAM), have explicitly stated that violations of human rights could not justify the use of force.<sup>48</sup> States would therefore still need the explicit approval of the SC for the use of force under Chapter VII, since Article 2(4) retained its original meaning, thereby leaving no room for the use of force against other states other than in self-defence in accordance with Article 51 or SC approval in accordance with Chapter VII.

The middle of the 1990s saw further challenges against Article 2(4) with more cases seeking to use force on humanitarian grounds as championed by the UK. Civilian massacres in Srebrenica in the former Yugoslavia and in Rwanda highlighted the challenges faced by the UN SC. The forces deployed in these two locations lacked the protection of an adequate UN mandate as well as material and personnel. Consequently, these deficiencies led the UK and other western states to argue for HI as an exemption to Article 2(4) along with self-defence.

The use of force by the North Atlantic Treaty Organisation (NATO) in Kosovo in 1999 further continued the debate on HI<sup>49</sup>, which again challenged the understanding of Article 2(4)<sup>50</sup>. Belgium used the HI argument as one of the levers calling for the legitimacy of the operation before the ICJ<sup>51</sup>. Belgium stated that "the NATO campaign was an action to rescue a population in danger and was not directed against the territorial integrity or political independence of Yugoslavia."<sup>52</sup> As with the no-fly zones in Iraq many countries relied not only on HI, but also on an implied authorization by the SC. Although HI is not related to non-state actors as such it is an important point to make that the pressure to redefine Article 2(4)

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<sup>47</sup> Tarcisio Gazzini, "Intervention in Iraq's Kurdish Region and the Creation of the No-Fly Zones in Northern and Southern Iraq-1991-2003," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford, 2018), p. 471.

<sup>48</sup> Gray, *International Law and the Use of Force*, p. 51.

<sup>49</sup> *Ibid.*, pp. 39-51.

<sup>50</sup> See e.g. Inocencio Arias', former Spanish Ambassador to the UN, essay *Humanitarian Intervention: Could the Security Council Kill the United Nations?*, where criticism of the UN "inaction, inefficiency, and indolence" in the case of e.g. Kosovo by the former UN SEC GEN, Kofi Annan, who in a speech addressed the issue of Humanitarian Intervention and the challenge with the need for SC unity. The speech started the debated which ultimately ended with the R2P.

<sup>51</sup> Gray, *International Law and the Use of Force*, p. 45.

<sup>52</sup> "The Use of Force and the International Legal Order," p. 624.

was high especially in the mid-end 1990s. If there was an acceptance of a new interpretation in this regard then the door was open for further interpretations in accordance with contemporary conflicts in the world involving non-state actors.

It is however clear that HI did not develop as a new legal doctrine<sup>53</sup> since there was little support for HI as an autonomous (unilateral) principle.<sup>54</sup>

Many states still argue that the violation of human rights cannot justify the use of force and thereby violate the principle of non-intervention<sup>55</sup>, whilst no international agreement has been made on the area. I agree with this view, which underlines the world community's firm restriction on the will to loosen the handle on the use of force. The argument of 'Humanitarian Intervention' for the use of force is therefore not viable<sup>56</sup> and it does not open the possibility for new interpretations of Article 2(4) and thereby military operations against non-state actors in, for the purpose of this thesis, other states.

Neither was the case with the Responsibility to Protect (R2P)<sup>57</sup>, which emerged in the beginning of the millennium to prevent mass atrocities.<sup>58</sup> Whether or not the humanitarian argument as such is developing as customary law will be dealt with in the second part since this could influence the general acceptance of new customary laws in conflict with the, in my opinion, current good faith Charter interpretation.<sup>59</sup>

My argument that this is the case is further underlined by the example of the intervention in Libya, which was approved by the SC. In this case, intervention was based on approval by the SC and not by the individual states' view of HI as a right alongside self-defence. That the Libyan intervention later underlined my argument of the non-acceptance of HI as an exemption to Article 2(4) is exemplified by the statements by several states arguing the intervening forces went too far and eventually made it more about regime change, the overthrow of Gadhafi, than actual concern about the people of Libya.<sup>60</sup>

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<sup>53</sup> Ibid., p. 625.

<sup>54</sup> Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005), pp. 174-79, 238.

<sup>55</sup> Naert, "The Impact of the Fight against Terrorism on the *Ius Ad Bellum*," p. 151-52.

<sup>56</sup> Gray, "The Use of Force and the International Legal Order," p. 624. Pellet, "The Charter of the United Nations: A Commentary of Bruno Simma's Commentary," p. 149.

<sup>57</sup> Mehrdad Payandeh, "With Great Powers Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking," *Yale Journal of International Law* 35, no. 2 (2009): p. 482.

<sup>58</sup> R2P is an international security and human rights norm established to protect the international community's failure to prevent and stop genocides, war crimes ethnic cleansing and crimes against humanity (responsibilitytoprotect.org).

<sup>59</sup> Supported by Olivier Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, French Studies in International Law (Oxford ; Portland, Or.: Hart Pub., 2010), p. 549.

<sup>60</sup> Geir Ulfstein and Hege Føsum Christiansen, "The Legality of the Nato Bombing in Libya," *International and Comparative Law Quarterly* 62, no. 1 (January 2013). Michael J. Glennon, "The Limitations of Traditional Rules and

The above discussion has shown that one of the cornerstones of the Charter, Article 2(4), has had numerous attempts at being redefined by states and scholars without significant success. There has been no support from the majority of the world community or the ICJ in accepting a new opening for the use of force within the understanding of Article 2(4) although many have tried.<sup>61</sup> The arguments are however not convincing, since the peaceful intent of the Charter does not intend non-good faith interpretations seeking possibilities for the use of force, but instead the peaceful solution to conflicts.<sup>62</sup>

The non-acceptance of the use of force against the territory of other states is further underlined by the world community's focus on aggression. In 1974 the GA adopted a general definition of the most serious breach of the use of force as prohibited in Article 2(4). GA resolution 3314 states in the preamble that "aggression is the most serious and dangerous form of illegal use of force".<sup>63</sup> Further in Article 3 of resolution 3314 the general definition of aggression is given: "An armed attack by the forces of a state of the territory of another state".<sup>64</sup> Unlike the Charter, resolution 3314 describes an armed attack as: "bombardment and blockades on land, sea or air force, or marine and air fleets of another state".<sup>65</sup> The relevance of aggression lies primarily within *jus in Bellum* and the establishment of the International Criminal Court (ICC) by the Rome Statute of 1998. At the statute review conference in Kampala in 2010, an act of aggression was defined as (which thereby superseded the general definition from 1974): "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations".<sup>66</sup> The ICC's jurisdiction over the crime of aggression was activated in the Assembly of States Parties of the Rome Statute of the ICC in December 2017. The relevance to this thesis is to underline the non-acceptance of the use of force on the territory of other states by the international community.

Leaving no ways for states to circumvent or re-interpret Article 2(4) has led states to rely on Article 51 when resorting to force, with a broad, somewhat accepted, interpretation of self-defence, which the following chapter will discuss.

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Institutions Relating to the Use of Force," in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford, 2015).

<sup>61</sup> E.g. Gareth D. Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test," *The University of New South Wales Law Journal* 36.2 (2013): pp. 619-41.

<sup>62</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 160-97.

<sup>63</sup> GA, "Res 3314: Definition of Aggression," Preamble.

<sup>64</sup> *Ibid.*, Article 3.

<sup>65</sup> *Ibid.*

<sup>66</sup> "Rome Statute of the International Criminal Court (Last Amended 2010)," (1998).

### Article 51 and self-defence against non-state actors?

The right of self-defence existed before the creation of the Charter as customary international law and exists today in parallel with the Charter's Article 51, where customary law is supplemented by the addition of proportionality and necessity.<sup>67</sup> It is clear that Article 51 was meant as the sole exception to Article 2(4), when it comes to a state resorting to the use of force without SC approval or consent from the host state.<sup>68</sup> Article 51 contains several highly debated interpretations including whether or not it can include non-state actors, which the following paragraphs will highlight and discuss. Again, the aim is to clarify whether it is illegal to attack non-state actors extraterritorially.

In general self-defence has shown to be the primary argument for states when it comes to the use of force against non-state actors and the one achieving most support or at least lesser criticism, especially in during and after the US attacks on Al Qaeda and the Taliban.<sup>69</sup> Many interpretations of the right to respond in self-defence have been put forward depending on the justification needs of the victim state, where the often claimed is the continued development of the understanding and interpretation of the Charter as argued by Professor Michael Schmitt: "... it is undeniable that community understanding of law shifts over time to remain coherent and relevant to both current and the global community's normative expectations".<sup>70</sup> Schmitt acknowledges however that although this is the case, both the Vienna Convention on the Law of Treaties as well as a note by the ICJ in *Competence of the General Assembly for the Admission of a State to the United Nations*, state that the Charter, when applied, is to be interpreted according to its original meaning.<sup>71</sup> Thereby displaying the key area where both scholars and states disagree: can the Charter be interpreted as to be applied in good faith, when it comes to the threat/actions of terrorism/non-state actors? Seen from the perspective of the US, the Charter can be interpreted to include the threats by non-state actors although not specifically mentioned.<sup>72</sup> This argument is supported by Professor Jane Boulden who argues that: "The provisions of the resulting Charter... established an organisation and a set of legal obligations whose scope was sufficiently flexible to encompass a whole range of activity packaged into the threats to international peace and security

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<sup>67</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, International Court of Justice, e.g. paras 175, 86 and 94 (1986).

<sup>68</sup> Gray, *International Law and the Use of Force*.

<sup>69</sup> Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, (Garmisch-Partenkirchen, Deutschland: George C. Marshall European Center for Security Studies, 2002). p. 21. Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," p. 247.

<sup>70</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. pp. 9-10.

<sup>71</sup> The United Nations, "Vienna Convention on the Law of Treaties," (1969), Article 31. *Competence of the General Assembly for the Admission of a State to the United Nations*, International Court of Justice (1950).

<sup>72</sup> "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," (United States President, December 2016).

basket".<sup>73</sup> Boulden rightfully mentions all the different initiatives within many different UN bodies to counter the threat of terrorism to support this claim.<sup>74</sup> The use of extraterritorial force against non-state actors is further supported by Schachter, who goes on to define attacks on individuals, vehicles or buildings belonging to the victim state no matter the location, an attack on the victim state.<sup>75</sup> Meaning that an attack on victim state citizens in a third state by a non-state actor, justifies the extraterritorial use of force against the non-state actor by the victim state. The ILA also considers attacks on embassies and warships as attacks on the (victim) state since practice indicate that there is no territorial nexus needed, why attacks on these 'may constitute armed attacks for the purpose of self-defence'.<sup>76</sup>

Professor Olivier Corten however disagrees. Corten argues that the Charter was set out to regulate international relations between states and that no formal agreement about the inclusion of non-state actors has been made. He further argues that extending the Charter's right of self-defence is premature: "Even a broad understanding of the concept of 'international relations' does not seem to cover relations between a State and individuals, whether or not those individuals are brought together under the aegis of a group."<sup>77</sup>

Corten's arguments are however among other based on groups not exercising power over a given territory, which many of today's non-state actors do. This is the case for ISIL, Boko Haram and some extremist Kurdish groups, why I do not find this argument compelling. Discussing contemporary non-state actors must include non-state actors, who control parts of states territory since those groups are the ones posing the main threat to the international community.

Further, dealing with contemporary conflicts without a legal frame, such as the Charter, risks the possibility of keeping states within boundaries that might not be exactly as was initially expressed, but which still gives the international community a means of avoiding complete anarchy. This is especially true for conflicts involving non-state actors where there needs to be a possibility to include an accepted self-defence option within the existing framework until the international community is able to provide a more accurate legal framework that encompasses non-state actors. I thereby agree with the decision made by the SC on the issue (9/11) and with scholars such as Schmitt and Boulden on the part that self-

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<sup>73</sup> Boulden, *The Oxford Handbook on the United Nations*, p. 427.

<sup>74</sup> Ibid.

<sup>75</sup> Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," pp. 243-66.

<sup>76</sup> Wood and Lubell, "Use of Force, Report by the Committee on Aggression and the Use of Force," p. 4.

<sup>77</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 160-97.

defence according to the Charter's Article 51 can include non-state actors.<sup>78</sup> It is however one thing to accept that there exist a right of self-defence against non-state actors. Another complicated part is the extraterritorial aspect, which will be discussed later in the thesis.

### Ongoing or cumulative?

The US, the UK and some scholars further accept a change from the customary premise of self-defence against an on-going attack as defined by Secretary of State, Daniel Webster in the 19<sup>th</sup> century in the discussions following the Caroline incident<sup>79</sup>, requiring an immediate reaction to an attack<sup>80</sup>, to a preventive or destructive attack against the source as a whole, to make the source unable to perform further attacks in the future.

This was the case concerning the approach to the attacks on Al Qaeda and the Taliban in Afghanistan<sup>81</sup>, which, from a US perspective, was the only viable course of action due to the history of attacks against the US by Al Qaeda<sup>82</sup> and the expectations of future attacks to come if nothing was done about the threat. The US initially received widespread support for the proclamation of self-defence in the world community as well as from legal scholars.<sup>83</sup> Schachter argues: "self-defence would be legitimate where there was evidence of a continuing intent to carry out further attacks" and "The continuing activities of a group of terrorists, and their threats against target governments which have already been attacked by them, would support the legality of retaliatory acts of self-defense...".<sup>84</sup>

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<sup>78</sup> Further supported by the ILA: Wood and Lubell, "Use of Force, Report by the Committee on Aggression and the Use of Force."

<sup>79</sup> The Caroline was a ship used by Canadian insurgents based in the US fighting for a more democratic Canada. The British government (of Canada) dispatched troops into the US in pursuit of the insurgents. The insurgents suffered casualties and the destruction of the Caroline, which was sent burning over the Niagara Falls. Following the incident the US objected to the armed Canadian raid into US territory and following diplomatic correspondence led to the often cited phrase that self-defence, according to international customary law, is justified in cases which are 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.

<sup>80</sup> Antonio Cassese, "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law* 12, no. 5 (2001): p. 997.

<sup>81</sup> "Letter Dated 20 August from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council," (S/1998/780. 20 August 1998). "Letter Dated 2001/10/07 from the Chargé D'affaires A.I. Of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council," (S/2001/947. 7 October 2001).

<sup>82</sup> Al Qaeda confirmed attacks on the US up to and including 9/11: Embassies in Nairoobi and Dar es Salaam August 1998, USS Cole in October 2000 and 9/11. Other examples include attacks such as the Yemen Hotel Bombings in 1992 and the planned, but unsuccessful, attack on the USS The Sullivans January 2000

<sup>83</sup> E.g. Schmitt, *Counter-Terrorism and the Use of Force in International Law*.

<sup>84</sup> Schachter, "The Extraterritorial Use of Force against Terrorist Bases," p. 312.



This is a change from the original meaning of customary law, which only allowed for an immediate response to the on-going attack to break the will of the attackers, forcing a surrender or retreat in order for the attack to end.

The purpose of Al Qaeda, as officially proclaimed<sup>85</sup>, is to remove the US presence in the Middle East. Besides from being overly ambitious, the US (and the world community as a whole) is unlikely to commence negotiations with an actor that does not comply with international law and who is not averse to killing innocent civilians. Showing a tendency towards acceptance of the demands of an organisation like this would probably inspire others with similar views to act in the same way, which would be unacceptable for the world community and destructive for international law.

Since an attack by a non-state actor often ends the same time as it started, e.g. suicide bombers, it seems reasonable to view self-defence against non-state actors in a cumulative way especially when a series of attacks from the same non-state actor occur. A cumulative approach to evaluating a non-state actor as a threat should be accepted, especially when the victim state provides sufficient evidence as to the capability and intent of the non-state actor to the international community and SC; intent based on proclamations by the non-state actor and intelligence gathered by the victim state. Important to note, is that if Al Qaeda had not had a history of attacks against the US including spoken intentions of more, then self-defence would have been questionable since it would have had a retaliatory nature.<sup>86</sup>

Otherwise, it would not be possible to defend against attacks by non-state actors since self-defence would, in an original international law context, often not be possible. This is also underlined by the fact that attacks by non-state actors are often conducted against civilian targets, where the presence of military troops are non-existent or at best minimum and used more in a law enforcement posture. This makes such attacks more of a national criminal law issue rather than an international law issue and why self-defence from an international view is not likely, in its original international law meaning, to be permitted against non-state actors.

Since the US did not receive criticism against their actions against Al Qaeda and the Taliban, and further received the recognition of the SC for the right to use force in self-defence, there seems to have been a

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<sup>85</sup> Barry R. Posen, "The Struggle against Terrorism: Grand Strategy, Strategy, and Tactics," *International Security* 26, no. 3 (March 30, 2006).

<sup>86</sup> Gazzini, *The Changing Rules on the Use of Force in International Law*, pp. 191-93. Greg Travalio and John Altenburg, "Terrorism, State Responsibility, and the Use of Military Force," *Chicago Journal of International Law* 4, no. 1 (2003): p. 116.

development in customary law from the Caroline definition of “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”<sup>87</sup> to a claim of self-defence being (cumulatively) accepted against non-state actors.<sup>88</sup>

#### Time limit on self-defence?

Further, it is worth discussing how long self-defence can last in time. In the original ‘Caroline incident’ meaning it would most likely be a matter of hours or a few days before a state would have fended off an attack from another state. In the case of non-state actors, it can drag out for years as seen with Al Qaeda. This is a highly discussed issue since it is moving the norm of self-defence even further away from its original customary law meaning. Accepting extraterritorial self-defence against a non-state actor is one-step, but what when the self-defence drags out for years and when it spreads to other states? Al Qaeda is believed to be present in around 100 countries<sup>89</sup> and would be impossible to defeat by conventional means. The huge difference of opinion between the different entities (e.g. the US and Al Qaeda) makes it unlikely to result in an agreement of peace, which will challenge and stretch the customary rule of self-defence further in the future. Many scholars, such as Professor Myra Williamson do not accept this premise: “From the point at which the attack ended on 11 September, or at least from the point when the Security Council adopted Resolution 1373 on 28 September, the authorisation of the Security Council was thereafter required to legitimise any use of force against Afghanistan”. The SC has however not addressed the issue, why self-defence at this time seems ‘open ended’.<sup>90</sup>

#### Interpreting the wording of the Article 51

As per the wording of Article 51, states have an ‘inherent’ right to self-defence despite the Charter’s *raison d’être* - the peaceful settlement of disputes (see preamble, Articles 2(3) and 2(4)). There are however quite a few conditions which must be met in order for self-defence to be legitimate. These are: “... if an armed attack occurs against a Member... until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members... shall be immediately reported to the Security Council...”. The following paragraphs will in detail discuss the meaning of the wording used and the different interpretations of these parts of Article 51.

<sup>87</sup> Gray, *International Law and the Use of Force*, pp. 148-49.

<sup>88</sup> For a more thorough discussion on anticipatory and pre-emptive self-defence, and imminence read: Onder Bakircioglu, "The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement," *Indiana Journal of Global Legal Studies* 19, no. 1 (2009).

<sup>89</sup> Jayshree Bajoria and Greg Bruno, "Al-Qaeda (A.K.A. Al-Qaida, Al-Qa'ida)," Council on Foreign Relations, <https://www.cfr.org/backgrounder/al-qaeda-aka-al-qaida-al-qaida>.

<sup>90</sup> Boulden, *The Oxford Handbook on the United Nations*, p. 434.

### *An armed attack*

The first requirement of Article 51 is that the attack which initiates the self-defence must rise to the level of an armed attack.<sup>91</sup> Not further specified/defined in the Charter, the good faith interpretation of an armed attack would seem to be an attack on a state using weapons, being in the allegedly intended meaning; a force of regular soldiers from an organized military of a state physically attacking another state. However already in the 1960s there was an understanding of a broader definition: As long as the agency employing force was connected to and acting on behalf of a state, the agency could have the form of armed bands or groups of insurgents operating on the territory of another state.<sup>92</sup> In the 1980s, with the rise of terrorist groups not associated with states, it was still the view of scholars and states that an armed attack had to have a close connection to the host state before the victim state could legally attack the non-state actor on the territory of the host state.<sup>93</sup> It was as well quite clear that an armed attack had to have occurred, the threat alone was not enough.<sup>94</sup>

Examples of inter-state armed attacks are clear cases of the original meaning of the Charter as a system to regulate conflicts between states<sup>95</sup>. For example: The Iraq attack on Iran on 22 September 1980 and the Iraq attack on Kuwait on 2 August 1990. Examples of insurgencies are covert operations by the major powers especially during the Cold War, e.g. performed by intelligence organisations such as the Central Intelligence Agency and the Komitet Gosudarstvennoj Bezopasnosti (KGB).

Contemporary conflicts/new wars have introduced state and scholar interpretations challenging the requirement of forces originating from a state. This poses a challenge for international law when the forces attacking are non-state actors since they often originate from the territory of other states and thereby exploit the restrictions posed on member states in Article 2(4).<sup>96</sup> That is, an attack by the victim state on the non-state actor is, in the original meaning of the Charter, an attack on the host states territorial integrity.

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<sup>91</sup> Travalio and Altenburg, "Terrorism, State Responsibility, and the Use of Military Force," p. 102. For counter arguments read: Guy B. Roberts, "Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals," *Case Western Reserve Journal of International Law* 19, no. 2 (1987).

<sup>92</sup> Brownlie, *International Law and the Use of Force by States*, pp. 361-68, 73.

<sup>93</sup> Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," p. 256.

<sup>94</sup> *Ibid.*, p. 245. *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.

<sup>95</sup> Maogoto, "Walking an International Law Tightrope: Use of Military Force to Counter Terrorism - Willing the Ends," p. 405.

<sup>96</sup> A later chapter will discuss the responsibility of the state regarding non-state actors operating from within its territory.

The continued discussion on the source of an armed attack, whether it can originate from a non-state actor or only a state, has divided scholars and states alike. According to the ICJ in the Court's advisory opinion, in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Israeli Wall Advisory Opinion)* the right of self-defence requires that the armed attack originates from a state.<sup>97</sup> The views of the judges were however divided which can be read in the separate opinions of judges Buergenthal, Koojiman and Higgins, whom all hold that Article 51 is not only relevant for attacks from states.<sup>98</sup> Additionally, Koojiman argues that the resolutions 1368 and 1373 recognize the right of self-defence despite the attacks origin with no reference to the 'state' as the source of an armed attack.<sup>99</sup>

Further there exists the question of how much use of force is needed to reach the threshold of an armed attack. The ICJ has partially defined this threshold based on the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. US)*<sup>100</sup>, for when an attack can be regarded as an "armed attack", in the meaning of Article 51 (a.k.a. the 'Nicaragua definition'):

"The prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another state, *if* such an operation, because of its *scale and effect*, would have been classified as an armed attack rather than as a mere frontier incident had it been conducted by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes only acts by armed bands where such acts occur on a *significant scale* but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."<sup>101</sup>

Scale and effect is decisive in evaluating whether or not a use of force has reached the threshold of an armed attack. The court thereby set a fairly low threshold since the attack by armed bands is also considered to be able to reach the scale and effect of an armed attack.<sup>102</sup> In military terms an armed band is not a heavily armed group of soldiers, but on the contrary a group of 'soldiers' lightly armed with light weapons. That is without armoured vehicles or artillery.

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<sup>97</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (2004).

<sup>98</sup> *Ibid.* Separate opinions of Judges Buergenthal, Higgins and Koojiman.

<sup>99</sup> *Ibid.* Separate opinion of Judge Koojiman.

<sup>100</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.

<sup>101</sup> *Ibid.*, para. 195

<sup>102</sup> Supported by Schmitt; Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 26.

It is however still unclear whether injury to personnel is the effect required to reach the threshold or if damage to property can suffice. The threshold of effect has therefore yet to be defined adequately. I would argue that damage to property would suffice although it would take considerably more property damage compared to that of injury to personnel to reach the threshold. Each instance of a potential armed attack needs to be considered on its own merits, with a thorough analysis made on the scale and effect of the operation. Applying a 'one rule fits all' to this analysis would be unfeasible given the scale and effect would vary depending upon the make-up of the victim state.

The ICJ has not yet stated whether non-state actors are capable of performing an armed attack. The court has avoided the question until now although it did have an opportunity to answer following the *Armed Activities on the Territory of the Congo (DRC vs. Uganda)*.<sup>103</sup> The opinion of the ICJ is fundamental in order to be able to argue whether an attack can be seen as reaching a good faith interpretation of Article 51.

Frontier incidents or border incidents are often seen in tense areas around the world e.g. between North and South Korea or between India and Pakistan. These incidents are normally defined by being short incursions into the territory of the other state or by being intended or unintended firing of small arms into the territory of the opposing state. Incidents of this scale which result in an effect causing injury to personnel or damage to property could be within the notional, face-value definition of an armed attack, but deemed not to meet the specific threshold of scale and effect that actually defines it as an armed attack.

Frontier incidents are correctly explained by Schmitt as: "characterized by a minimal level of violence, tend to be transitory and sporadic in nature, and generally do not represent a policy decision by a state to engage an opponent meaningfully. They are usually either 'unintended' or merely communicative in nature."<sup>104</sup>

A highly relevant and discussed interpretation with regard to contemporary conflicts is the meaning of 'arms'. Originally meaning weapons, arms in contemporary conflicts can arguably also be the use of e.g. computers as it the case in cyber warfare. The usage of cyber means by non-state actors in contemporary conflicts has not yet reached the threshold of armed attack. This is primarily due to the nature of cyber-attacks which are often covert and do not have the necessary high visibility to the general populace that an armed assault would deliver. What is needed to carry out a cyber-attack

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<sup>103</sup> Gray, *International Law and the Use of Force*, p. 134.

<sup>104</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 26.

causing injury or damage to property is difficult to assess, but with the continued reliance on computers and networks in the modern society, there is potential for a non-state actor with the right skillset. Due to the lack of cases, where Cyber Warfare crosses the threshold of armed attack, it is not considered relevant for this thesis, since the existing examples of conventional warfare fully suffice.<sup>105</sup>

I agree with scholars arguing that non-state actors are capable of performing an armed attack<sup>106</sup> on a state despite the ICJ reluctance to broach the subject in its rulings. The threshold assessment is not purely a mathematical equation to solve but should be assessed individually in each case of the use of force by non-state actors to evaluate whether the threshold has been crossed. Given the lack of guidance from the ICJ, the decision for defining the threshold could be brought before the courts of the victim state.

It seems quite clear and well beyond doubt that the attacks on September 11, 2001 in New York, Pennsylvania and Washington D.C. (9/11) reached the threshold of an armed attack.<sup>107</sup> This is supported by Professor Tarcisio Gazzini who implicitly argues that since the SC passed resolutions authorising individual and collective self-defence against Al Qaeda, it automatically follows that an armed attack has occurred, since this is a prerequisite for self-defence according to Article 51.<sup>108</sup>

I will argue that it depends on the scale and effect of the attack. Scale: If we would see a similar case of civilian and to a lesser degree material losses, the reaction from the international community will be the same and the SC will support the victim state in self-defence. Effect: Al Qaeda succeeds in shooting down Air Force One with the US President on board as well as members of the Senate, family etc. Although this attack has a much lesser scale, its effect equals that of 9/11, I would argue.

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<sup>105</sup> For more literature on the use of cyber means in contemporary conflicts and e.g. the threshold with regards to meeting the requirement of an armed attack read e.g.: Michael N. Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Second edition. ed. (2017). Marco Roscini and Leverhulme Trust., *Cyber Operations and the Use of Force in International Law* (Oxford: Oxford University Press, 2014). Jens David Ohlin, Kevin Govern, and Claire Finkelstein, *Cyber War: Law and Ethics for Virtual Conflicts* (Oxford, 2015).

<sup>106</sup> Schachter, "The Extraterritorial Use of Force against Terrorist Bases," p. 311. Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, 2nd ed. (2014), pp. 25-82. Antonio Cassese, *International Law*, 2nd ed. (Oxford University Press, 2005), p. 469.

<sup>107</sup> Naert, "The Impact of the Fight against Terrorism on the *Ius Ad Bellum*," p. 145-46.

<sup>108</sup> Gazzini, *The Changing Rules on the Use of Force in International Law*, pp. 76, 180-84.

Due to this uncertainty surrounding whether or not an armed attack by a non-state actor has occurred, there is a need for an approval<sup>109</sup> by the SC in each instance, when the cumulative approach to self-defence is chosen. In the instance of an ongoing attack, the victim state can obviously proclaim self-defence to fend of the ongoing attack. The former follows the approach by the US after 9/11.

#### *Necessary measures by the Security Council*

Following actions of self-defence, the SC can decide appropriate measures to be taken to obtain international peace and security. An example of a measure taken by the SC is the establishment of a peacekeeping force. It is important to note that when the SC has decided on actions to be taken the state claiming self-defence is to follow the directions from the SC. The right to self-defence exists as per the wording of Article 51, until the SC has taken appropriate measures. These measures do not necessarily mean that the victim state (the state claiming self-defence) is no longer permitted to exercise its right to self-defence. In cases where the SC e.g. adopts economic sanctions against a state (e.g. Iraq in 1990) the right to militarily exercise self-defence still exists.<sup>110</sup> The SC has to explicitly prohibit the use of force if the intention is to stop the use of force by the victim state.<sup>111</sup>

#### *Immediately reported*

In order for states to be successful in their argument for self-defence the use of force, in this regard, has to be immediately reported to the SC, "Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council..."<sup>112</sup> Examples of retrospective self-defence claims are not convincing when states fail to report the use of self-defence immediately after the use of force. E.g. in the raid on the Bin Laden Compound in 2011.<sup>113</sup> In other cases, this has been done as per the Charter definition, e.g. the US and the UK in the attacks on Al Qaeda and the Taliban,<sup>114</sup> where the US reported their actions as self-defence in accordance with Article 51 to the SC.

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<sup>109</sup> Contrary to the intension of Article 51, where the victim states itself determines whether or not an armed attack has occurred and initiates self-defence accordingly. Pellet, "The Charter of the United Nations: A Commentary of Bruno Simma's Commentary," p. 147.

<sup>110</sup> De Wet, *The Chapter VII Powers of the United Nations Security Council*, p. 262.

<sup>111</sup> Thomas M. Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States," *The American Journal of International Law* 64, no. 5 (October 1970): p. 823.

<sup>112</sup> United Nations, "Charter of the United Nations," Article 51.

<sup>113</sup> Further discussed later in this thesis.

<sup>114</sup> "Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council," (S/2001/946. 7 October 2001). "Letter Dated 2001/10/07 from the Chargé D'affaires A.I. Of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council."

Unreported or late reporting of self-defence to the SC may indicate that the victim state itself is not fully convinced that it is acting according to Article 51.<sup>115</sup>

### The rescue of nationals

Extraterritorial self-defence to rescue e.g. kidnapped nationals in host states is seen by many states and scholars as being legal in accordance with the Charter. This stance was taken by the US, who argued, after the Israeli Entebbe rescue, that the right to rescue was “flowing from the right to self-defence” pending the host states’ inability or unwillingness to protect the persons in question. This has further been affirmed by the ILC as an excusable violation of Article 2(4), because of the necessity requirement. The ILC thereby states that due to the necessity to act fast, an exception to Article 2(4) is legitimate, but also states that it is a violation of Article 2(4).<sup>116</sup> Gazzini goes further with regards to rescuing nationals abroad and argues: “... the use of force to rescue nationals abroad... have gained the general acceptance... to lead to the emergence of a new legal ground to resort to force”.<sup>117</sup>

The ILA argues that the use of force to rescue nationals in other states is a violation of Article (2(4) unless self-defence is proclaimed. The latter however still requiring the existence of an armed attack and the adherence to the proportionality and necessity criteria.<sup>118</sup>

I fully concur with both the ILC and the ILA in that a rescue of nationals is a violation of Article 2(4) unless an armed attack occurs. Host nation involvement is necessary to proclaim self-defence and hereafter rescue nationals. Gazzini bases his argument on a lack of criticism and condemnation from the host states, which I find misunderstood since both the Entebbe raid and the US rescue attempt in Iran raised condemnations and not just from the host states.<sup>119</sup>

Concluding on Article 51 the challenge for states with regards to self-defence against non-state actors is primarily the right to attack non-state actors extraterritorially since self-defence against non-state actors have to be consented.<sup>120</sup> Without the approval of the host state, such action violates Article 2(4) of the Charter since the host state’s involvement in the conflict between the victim state and the non-state actor is often the undeliberate and unsupported hosting of the non-state actor.

<sup>115</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, paras 200, 32-36.

<sup>116</sup> Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," p. 251.

<sup>117</sup> Gazzini, *The Changing Rules on the Use of Force in International Law*, p. 238.

<sup>118</sup> Wood and Lubell, "Use of Force, Report by the Committee on Aggression and the Use of Force," pp. 12-14.

<sup>119</sup> Kreß and Nußberger, "The Entebbe Raid - 1976," pp. 222-25. Mathias Forteau and Alison See Ying Xiu, "The US Hostage Rescue Operation in Iran," *ibid.* (Oxford), pp. 308-10.

<sup>120</sup> Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001* (Ashgate, 2009), p. 158.



This aspect will be discussed later in the thesis and is the basis for scholars arguing for the right to use force extraterritorially as was the case with 9/11.

### Security Council approval/authorization

The SC has assessed international terrorism as a threat to international peace and security. A decision confirmed by the GA, the UN Secretary General (SEC GEN), several terrorism suppression conventions<sup>121</sup> and the world leaders after the 2005 World Summit. It is however worth investigating whether or not the fight against non-state actors falls within the Chapter VII enforcement framework and whether further steps are required before it is deemed to conform with the Charter, e.g. the authorisation to the extraterritorial use of force.

The legal mandate for the SC to authorize the use of force is documented in Articles 42 and 48(1) of the Charter. These articles allow the SC to adopt measures, beyond that of the state's right to self-defence, to maintain international peace and security. When the SC authorizes the use of force there is no requirement of the occurrence of an armed attack. The only requirement of the SC is the assessment of a threat to international peace and security.<sup>122</sup>

Some scholars argue that only the original strict intended meaning of the Charter is applicable and interpretations concerning contemporary conflicts, e.g. those involving non-state actors, are not viable. It is however evident that the wording used in the Charter gives a high degree of flexibility for the SC since it can: "... determine the existence of any threat to the peace...".<sup>123</sup> The SC is not limited determining what it regards as a threat to international peace and security. The use of force against non-state actors is therefore possible, based on a SC decision. However, I deem such a decision as unlikely, which is explained below.

The focus of the SC on international terrorism commenced in 1970, when the SC condemned acts of international terrorism although the SC did not use the term terrorism per se, but on actions that the world community today describe as terrorist acts: "... the threat to innocent civilian lives from the hijacking of aircraft..." and "Calls on States to take all possible legal steps to prevent further hijackings...".<sup>124</sup> In 1989 the SC used the term terrorism and called "*upon* all states to co-operate in devising and implementing measures to prevent all acts of terrorism...".<sup>125</sup> In the beginning of the 1990s

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<sup>121</sup> See the chapter: *Opinio Juris* and the obligation to stop terrorism.

<sup>122</sup> De Wet, *The Chapter VII Powers of the United Nations Security Council*.

<sup>123</sup> United Nations, "Charter of the United Nations," article 39.

<sup>124</sup> UN SC, "Res 286 (1970)."

<sup>125</sup> "Res 635 (1989)."

the SC reacted to the Lockerbie case, and in 1998 to the case of UTA Flight 722, as threats to international peace and security and affirmed the right of all states to protect their nationals from international terrorism.<sup>126</sup> In 1999 the SC further condemned "all acts of terrorism, irrespective of motive..." and were: "Determined to contribute, in accordance with the Charter of the United Nations, to the efforts to combat terrorism in all its forms," and expressed "its readiness to... take necessary steps in accordance with its responsibilities under the Charter of the United Nations in order to counter terrorist threats to international peace and security".<sup>127</sup>

It can be argued that Article 39 and Chapter VII as such do not limit the SC to states and conflicts between member states. This means that the SC is entitled to decide on measures to take if a threat to peace, breach of the peace or an act of aggression occurs no matter the nature of the entity.<sup>128</sup> Before 9/11 most scholars argued that self-defence was limited to a response to the use of force by states....<sup>129</sup> The SC did however, before the actions of the UK and the US against the Taliban and Al Qaeda, define the actions of 9/11, as well as other acts by non-state actors, as threats to international peace and security as mentioned above. The Council's understanding of Article 51, and the remaining part of the Charter, is therefore that self-defence against non-state actors is legally permissible. It is important to note however, that the SC did not mention the extraterritorial part of the right to self-defence in the case of 9/11 thereby leaving it up to the interpretation by states whether or not the extraterritorial part was implicit in the resolutions.

The responsibility of states was also mentioned in several of the resolutions<sup>130</sup>, which left no doubt that states were to refrain from financing, organizing, instigating, assisting or participating in terrorist acts. This was e.g. the case in the resolutions decided with regards to Libya's failure to comply with the SC resolutions in connection to the Lockerbie case<sup>131</sup> and also with the case concerning the Taliban's harbouring of terrorists in a pre-9/11 resolution. State responsibility will be further discussed later in this thesis.

Defining terrorism 'a threat to international peace and security', as well as highlighting the responsibility of states not to be involved with terrorists, entitles the SC to: "... decide what measures shall be taken in

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<sup>126</sup> "Res 731 (1992)."

<sup>127</sup> "Res 1269 (1999)."

<sup>128</sup> United Nations, "Charter of the United Nations," Article 39.

<sup>129</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*.

<sup>130</sup> E.g. UN SC, "Res 1368 (2001)." and "Res 1373 (2001)."

<sup>131</sup> "Res 731 (1992)." "Res 748 (1992)."

accordance with Articles 41 and 42...". This includes the use of force as per Article 42.<sup>132</sup> Although the SC has been liberal in exercising its authority for the use of force since the end of the Cold War, the SC has yet to authorize the use of force against non-state actors.

Referring to 9/11, Schmitt argues that: "... it is unquestionable that the Security Council could have elected to mount enforcement operations...".<sup>133</sup> I do not agree with Schmitt in this assessment. Since the fight against non-state actors is so closely linked to the sovereignty issue, which is deeply founded in the Charter, I find it highly unlikely that the SC would ever authorize the use of force under its Chapter VII jurisdiction against non-state actors. The SC acceptance and acknowledgment of the right of self-defence provides the SC with a rationale for authorising the use of force, but it is likely that it will take attacks close to the scale and effect of the Al Qaeda attacks on 9/11, before the SC does so. The posing of sanctions on states not complying with resolutions regarding a state's responsibility not to be involved in terrorism, will also still be implemented in clear cut cases such as the sanctions placed on Libya and Sudan for permitting non-state actors to operate from within their territory.<sup>134</sup>

Based on the above history of the SC's focus on terrorism it is safe to say that the lead up to the resolutions implemented after 9/11 were well founded. The reactions from the international community to the SC's focus on international terrorism/non-state actors have been scarce and trust in the SC's ability to handle situations has been expressed by most states. There seems to be a unity in the world against the acts of violence against civilians no matter the motive, which only grew larger after 9/11.

The 9/11 attacks were a game changer because of the magnitude of the attacks which astonished the world community and served to galvanise a feeling of unity with the US. The case remains the only one where the SC has recognized the right of self-defence against a non-state actor in accordance with the regime of lawful force in the Charter.<sup>135</sup> Scholars disagree whether 9/11 was an actual shift in international law with regards to an acceptance of self-defence against non-state actors or if it was a unique "one time only" case mostly caused by the shock of the international community of the attacks which proportions went far beyond anything a non-state actor had ever achieved before. Boulden e.g. states that: "The Council's reaffirmation of the right to self-defence in the immediate aftermath of the 9/11 attacks was much more a gesture of solidarity than it was a legal requirement."<sup>136</sup> The SC resolutions served to move the world community closer to a general acceptance of the right to use self-

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<sup>132</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. pp. 22-23.

<sup>133</sup> *Ibid.*, p. 23.

<sup>134</sup> SC, "Res 748 (1992)." "Res 1054 (1996)."

<sup>135</sup> "Res 1368 (2001)." "Res 1373 (2001)."

<sup>136</sup> Boulden, *The Oxford Handbook on the United Nations*, p. 433.

defence against non-state actors. Further the resolutions provided steps against international terrorism in general, e.g. with regards to the illegality of financing and denying safe havens. All these steps, incl. many later resolutions<sup>137</sup> and the continued issuance of multiple terrorism suppression conventions showed a keenness to accept an interpretation of the Charter's Article 51 to also be applicable to non-state actors. By not condemning and continuing to express support for the 'effort to root out terrorism', the SC silently accepted extraterritorial attacks against a non-state actor.

The SC did however, as mentioned above, only reaffirm the right to self-defence based on the attacks and did not give an explicit right to extraterritorial self-defence. In the given case there was no other way to interpret the SC's resolutions since it was well known that Al Qaeda was hosted by the Taliban in Afghanistan. That it was done in this case does however not mean that a general acceptance of the extraterritorial use of force has been given<sup>138</sup> nonetheless a precedence has been set.

NATO invoked Article 5 of the Washington Treaty, which further substantiates the acceptance beyond the expansion of the traditional state view of the UN Charter articles to also include non-state actors. Self-defence following 9/11 was further concurred by a multiple of other IGOs such as The Organisation for the Islamic Conference and The Organization of American States.<sup>139</sup> Three interesting questions concerning this thesis are then, what is the argument for supporting attacks on a host state? Moreover, what is the argument for not condemning attacks on a host state? What does it take to pass the threshold of sovereignty and allow attacks in and even against a host state? These questions will be discussed in the chapter "Extraterritorial self-defence against non-state actors".

On the question of whether SC resolutions are regarded as being legally binding, the answer is yes. According to Professor Erika de Wet: "The presumption of legality attached to resolutions of the Security Council implies that only very clear evidence to the contrary would result in finding of illegality."<sup>140</sup> Wet also states that even the SC is not above the law. If the SC resolutions are not following international law, then the ICJ can, if the case is brought before the court, decide on the illegality of the resolution in question, which thereafter will no longer be binding on the affected states, who can refuse to implement the respective resolution.<sup>141</sup>

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<sup>137</sup> UN SC, "Res 1378 (2001)." "Res 1386 (2001)."; "Res 1390 (2002)."

<sup>138</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 181-82.

<sup>139</sup> Tom Ruys, *'Armed Attack' and Article 51 of the Un Charter : Evolutions in Customary Law and Practice*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010), pp. 436-37.

<sup>140</sup> De Wet, *The Chapter VII Powers of the United Nations Security Council*, p. 372.

<sup>141</sup> *Ibid.*, p. 373.

It is lastly important to note that even though the SC delegates a military mandate to a regional defence organisation such as NATO, the authorization to use force always rests with the SC. There has to be a clear mandate from the SC before the use of force is initiated.<sup>142</sup>

### Necessity and proportionality

Extraterritorial attacks against non-state actors are quite difficult to fit within the original meaning of the customary law of necessity and proportionality. The necessity criterion, in its original meaning, is especially hard if not impossible to satisfy as this chapter will argue, unless the principle is altered to fit the way non-state actors operate.

The notion of self-defence includes the adherence to necessity and proportionality. Necessity in this sense means that the actions taken need to be necessary to repel an attack. Proportionality is the actions taken shall be proportional to the ongoing attack. Both criteria will be further explained in the following paragraphs.

The Caroline incident (or the Caroline affair) in 1837 set the standard for both proportionality and necessity within customary international law and has since been recognized by e.g. the ICJ as such in its rulings in both the *Nicaragua vs. US* and the *Nuclear Weapons advisory opinion*.<sup>143</sup> Daniel Webster stated that in order to reach the principle of necessity for self-defence it had to be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”<sup>144</sup> The use of force in self-defence can therefore only take place when all other options seem exhausted in order to repel the armed attack. These options can be exhausted instantly in a case where an attack occurs without previous warning of any kind. In this case, the use of force to repel the attack is permitted.

It can be argued that the necessity criteria of the Caroline incident are very inter-state oriented/used and not in sync with today’s threat by non-state actors<sup>145</sup> but seen with regard to the violation of the sovereignty of another nation it seems relevant still and is frequently quoted by the ICJ. The ICJ has

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<sup>142</sup> Ibid., p. 308.

<sup>143</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua. Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (1996). As well in the view of several scholars e.g. Thomas Nichols, *The Coming Age of Preventive War* (University of Pennsylvania Press, 2008), p. 2.: “Thus the destruction of an insignificant ship in what one scholar has called a “comic opera affair” in the early 19th century nonetheless led to the establishment of a principle of international life that would govern, at least in theory, the use of force for over 250 years.” Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 27.: “... Secretary of State Daniel Webster set out the standard that has since achieved nearly universal acceptance”.

<sup>144</sup> Gray, *International Law and the Use of Force*, pp. 148-49.

<sup>145</sup> Travalio and Altenburg, “Terrorism, State Responsibility, and the Use of Military Force.”

repeatedly stated that the use of force in self-defence must be necessary and proportional<sup>146</sup>: "... self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it."<sup>147</sup> Both necessity and proportionality are considered customary law principles.

#### Law enforcement as an alternative

In the case of extraterritorial use of force against non-state actors, it is prudent to view the law enforcement angle as the obvious alternative to the use of force in self-defence. Since the size and the armament of the non-state actor is often not substantial, the use of law enforcement should have first priority in order to counter further attacks. Following 9/11 the international cooperation within law enforcement has been significantly improved and several terrorists have been arrested.<sup>148</sup> The use of law enforcement has however not removed the threat due to several factors, notably an unwillingness from certain states, the geography of the terrain and the inability by some states to withstand and apprehend the threat. These are some of the reasons as to why the extraterritorial use of force in certain situations is preferred. Schmitt states that: "The state may only act against the terrorists if classic law enforcement reasonably appears unlikely to net those expected to conduct further attacks before they do so". The important point to notice here is that the use of force is only permissible if law enforcement is not able to prevent future attacks. Self-defence is of course not to be used as revenge/retribution, why the expectation of future attacks has to be real and proven.

The international community has, according to Schmitt, accepted this combination of the use for criminal and international law.<sup>149</sup> Although others accept the use of international law when dealing with non-state actors it can be argued as being out of context to include non-state actors or private groups in international relations. However, the events of 9/11 largely changed this way of thinking due the amount of destruction and death caused by Al Qaeda as will be argued later in the thesis.

#### Necessity

Schmitt argues that the Charter can be interpreted to allow the use of force against non-state actors, where the example of Al Qaeda is used by arguing that the history of attacks by Al Qaeda on the US and the following expectations of further attacks to come, can fulfil a contemporary interpretation of the

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<sup>146</sup> E.g. in the following cases: *Case Concerning Military and Paramilitary Activities in and against Nicaragua*. *Case Concerning Oil Platforms*, International Court of Justice (2003). *Case Concerning Armed Activities on the Territory of the Congo*, International Court of Justice (2005).

<sup>147</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, para. 176.

<sup>148</sup> "Terrorism, State Responsibility, and the Use of Military Force," p. 118. Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 31.

<sup>149</sup> *Counter-Terrorism and the Use of Force in International Law*. pp. 34-36.

Charter and thereby a change to the customary law criteria of necessity.<sup>150</sup> With focus on this criteria I agree with Schmitt that a state should not be limited by an old inter-state customary law interpretation when it deals with the threat from non-state actors, especially when it is evident that a given organisation is more than likely to attack again. Al Qaeda had both by history of multiple attacks and by statements announced that it was indeed capable and had intentions to attack the US again.<sup>151</sup> Although it cannot be said that an imminent threat exists by way of military forces standing ready across the border or an attack is actually happening, the non-state actor threat can be said to be imminent by the history of previous acts and spoken intentions.<sup>152</sup> If these two criteria (history and intent) are not fulfilled I will however not assess an attack on a non-state actor as conforming with the necessity criteria.

### Proportionality

Proportionality was stated by Webster as that the defensive acts were not to be “unrealistic or excessive”.<sup>153</sup> Proportionality has not had the same academic and legal focus as the necessity criteria since proportionality is clearer and does not change pending the opponent. In order to be proportional, it is however worth noting that there is no requirement to use the same type or size of weapons as of the attacker or to only inflict the same amount of damage or human fatalities. The important point to note is that the use of force required in self-defence in order to repel an attack, is the amount of force suitable as to fulfil the necessity criteria.<sup>154</sup> Schmitt argues that with regards to terrorism: “... the proportionality standard allows only that degree of force necessary to fend off a terrorist attack and protect oneself from a future continuation thereof.”<sup>155</sup> No doubt that this may require huge amounts of troops and materiel in order to ascertain that the non-state actor is no longer capable of attacking the victim state. Using Al Qaeda as an example Schmitt argues that the use of force against Al Qaeda has clearly not been disproportionate since Al Qaeda is still performing operations against the US in Afghanistan and other countries around the world. Judge Higgins supports this viewpoint: “... the concept of proportionality on self-defence limits a response to what is needed to reply to an attack... the concept of proportionality referred to was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response...”<sup>156</sup>

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<sup>150</sup> Ibid.

<sup>151</sup> For Al Qaeda history of attacks on the US and statements in this regards, see *ibid.*, p. 11.

<sup>152</sup> Schachter, "The Extraterritorial Use of Force against Terrorist Bases," pp. 312-14.

<sup>153</sup> "Letter from Daniel Webster to Lord Ashburton," British and Foreign Papers 1129, 1138 (1840-1) (August 6, 1842).

<sup>154</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 28-29.

<sup>155</sup> *Ibid.*, p. 30.

<sup>156</sup> *Legality of the Threat or Use of Nuclear Weapons*. Dissenting Opinion of Judge Higgins, para 5.

### Imminence

Imminence with regard to self-defence is as well an often-discussed issue related to necessity and proportionality. It can be easily argued that Webster's use of the word "instant" means that the self-defence reaction must happen in reaction to the actual attack triggering the right of self-defence. In traditional warfare this was more likely to be possible since an enemy attack often had the form of an invasion lasting several days or weeks. In contemporary warfare against non-state actors an initial attack can be over the instant it has begun. The initial attack is however, with regards to non-state actors, often the first of a series of attacks from the same source as seen with e.g. Al Qaeda and ISIL. A non-state actor's larger campaign against an opponent is often not difficult to prove since the non-state actor uses different types of media, e.g. social media, to promote the attack(s) and promises more of the same against their enemies. This is why self-defence against the use of force by non-state actors does not require the same degree of imminence as customary law interpretation to an inter-state conflict. Some scholars argue for a high degree of imminence such as Schachter.<sup>157</sup> I do however not agree with Schachter since the cumulative factor cannot be omitted in contemporary conflicts with non-state actors. It is in this regard also worth noting that the chapter written by Schachter is from a time before Al Qaeda, ISIL and other major non-state groups. As Schmitt argues: "Once the first of the related attacks has been launched, the question becomes whether the victim state has sufficient reliable evidence to conclude that further attacks are likely, not whether those further attacks are themselves imminent".<sup>158</sup>

I have in this chapter argued that the fulfilment of the necessity and proportionality criteria is possible in contemporary conflicts against non-state actors including that of imminence. What now remains to be discussed is whether or not the extraterritorial part of the self-defence can be fulfilled concerning the use of force against non-state actors. The following chapter will discuss this issue.

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<sup>157</sup> Schachter, "The Extraterritorial Use of Force against Terrorist Bases."

<sup>158</sup> Schmitt p. 32.



### Extraterritorial self-defence against non-state actors

I have until now argued that self-defence and the use of force against non-state actors is permissible, providing that certain criteria has been fulfilled, e.g. the actions of the non-state actor reaching the threshold of an armed attack. The remaining is whether this can be done extraterritorially, in other states. Article 51 states that the right of self-defence is inherent and is an exception to Article 2(4) that precludes the use of force against other states. Since Article 51 does not mention that self-defence has to be against a state, it could seem straightforward to conclude that it is, according to the Charter and international customary law, legal to attack non-state actors in host states. The ICJ has however, in its rulings thus far, referred to self-defence as being only against states when interpreting Article 51. This was the case in the *Israeli Wall Advisory Opinion* where the ICJ stated that: "Article 51 of the Charter... recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State".<sup>159</sup> The same was the case in *Nicaragua vs. US* as argued by Doctor Kimberly Trapp: "The ICJ held that the legitimate exercise of the right of self-defence required that an armed attack by rebel groups be attributable to the state *against which* defensive force was used."<sup>160</sup>

Although mentioning the right of self-defence by one state against another state, the ICJ has avoided to directly addressing the possibility for an extraterritorial attack against a non-state actor. It has until now not been necessary since the cases brought before the court has been ruled upon without the necessity to answer the question directly. It is further important to note the year of the rulings of the relevant cases included in this thesis. One is old (e.g. *Nicaragua vs. US*) and I would argue, do not fully represent the situation in contemporary conflicts and in customary law today<sup>161</sup>, which is supported by the separate opinions of ICJ judges in later cases. E.g. Judge Koojiman in the *Israeli Wall Advisory Opinion*, who stresses that the position of the ICJ in the *Nicaragua vs. US* in 1986 should be reconsidered.<sup>162</sup>

ICJ jurisprudence, states and scholars agree that situations where the actions of the non-state actor are attributable to the host state are clear state vs. state 'Charter textbook examples'. As stated by Trapp: "A majority of the ICJ has consistently held that use of force in response to an attack by non-state actors

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<sup>159</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para 139.

<sup>160</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, p. 49.

<sup>161</sup> Travalio and Altenburg, "Terrorism, State Responsibility, and the Use of Military Force," p. 105.

<sup>162</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Separate opinion by Judge Koojiman.

is a legitimate exercise of rights under Article 51 of the UN Charter if (and only if) the armed attack is attributable to the state in whose territory defensive force is used.”<sup>163</sup>

The “and only if” is however arguable since the ICJ has not mentioned this in their cases. It is an interpretation by Trapp which is contested by other scholars, e.g. Professor Yoram Dinstein who argues that the 9/11 reactions removed all doubt as to the applicability of Article 51 to non-state actors.<sup>164</sup> Professor Sean D. Murphy goes on to argue that the SC did authorize the use of force in Afghanistan.<sup>165</sup> The argument is however not compelling since the SC did not state this explicitly and is not supported by ICJ jurisprudence. Further, Trapp, supported by Corten, argues that: “... there is nothing to lead to the radical conclusion that self-defence [Article 51]... would henceforth allow military operations to be conducted in the territory of another State that was not guilty [implicit in attacks on the victim state]...”.<sup>166</sup> It is indeed a complex case if the state and the non-state actor are evidently separated and the host state clearly disputes the actions of the non-state actor. The ICJ has not ruled out the use of defensive force by victim states against non-state actors in host states as mentioned above but has as well never ruled in favour of the use of force in host states.<sup>167</sup>

I agree with Trapp and Corten. It would seem to be terminating the Charter completely by allowing sovereignty and territorial integrity being breached in this way although, as argued by some, the host state is not fulfilling its duties according to a multiple of terrorism conventions. Even though no unity has been reached regarding Syria, ISIL would still legally be fought by Syria and Russia (by invitation) even if the west were not attacking ISIL in Syria (the Syria case will be further explored later in the thesis). There must therefore, in my opinion, be a SC resolution with reference to Chapter VII and a clear authorization for the use of force before a victim state legally can use force in a host state.

The international community has defined certain responsibilities for states to fulfil regarding terrorism, which will be discussed in the following paragraph about state responsibility. This will help determine

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<sup>163</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, p. 48. Travalio and Altenburg, "Terrorism, State Responsibility, and the Use of Military Force," p. 102.

<sup>164</sup> Yoram Dinstein, *War, Aggression, and Self-Defence*, 5th ed. (New York: Cambridge University Press, 2012), p. 227. The Leiden Policy Recommendation support Dinstein in arguing that Article 51 encompasses attacks from non-state actors. "Leiden Policy Recommendations on Counter-Terrorism and International Law," *Netherlands International Law Review* 57, no. 3 (2010).

<sup>165</sup> Sean D. Murphy, "Terrorism and the Concept of Armed Attack in Article 51 of the Un Charter," *Harvard International Law Journal* 43, no. 1 (2002): pp. 44, 88.

<sup>166</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 166, 96-97.

<sup>167</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, p. 51.

whether or not the non-fulfilment of these criteria by a host state can amount to the use of force by a victim state.

### State responsibility

When justifying the use of force against non-state actors in host states the victim state often refers to the international law on state responsibility and the principle of unwilling or unable. This paragraph discusses the legal concept of state responsibility concerning non-state actors and whether or not the neglect of parts of the concept can justify the use of force in a host state according to international law.

Customary law has a long history of imposing an obligation on states to not knowingly allow the use of its territory for acts contrary to the right of other states.<sup>168</sup> The primary contemporary framework of state responsibility is the International Law Commission (ILC) Articles on State Responsibility.

The responsibility of states concerning non-state actors is by the ILC interpreted as applying to states in circumstances where the acts of a non-state actor are attributable to the host state.<sup>169</sup> If the host state is in breach of its responsibility, it entails two obligations for the breaching state: to cease the internationally wrongful act according to Article 30 and to make full reparation for the injury according to Article 31. As noted in the introduction, since this makes the host state responsible for the wrongful act according to the ILC articles on State Responsibility, the ILC articles will not be discussed more in this thesis. Further, the use of force is beyond the scope of the ILC articles since they deal with a legal relationship between the parties concerned. Although there is a grey area between the legal aspect and the Chapter VII obligations, this is also considered as being beyond the scope of this thesis and will not be discussed further in detail than that provided in the chapter on law enforcement as an alternative.<sup>170</sup> I am of course aware of the fact that the SC can treat a breach of the framework as a threat to international peace and security and thereby authorize the use of force. The framework in itself cannot.

Other frameworks/conventions have been made. The GA adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, on 24 October 1970 during a commemorative session to celebrate the

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<sup>168</sup> Ibid., p. 64. Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country." Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, Chapter 3.

<sup>169</sup> International Law Commission, "Responsibility of States for International Wrongful Acts," (2005), Articles 8-9.

<sup>170</sup> See Trapp, *State Responsibility for International Terrorism : Problems and Prospects.*, chapter 3 for a comprehensive discussion of the subject.

twenty-fifth anniversary of the UN.<sup>171</sup> This framework is important to help the SC in the interpretation of the law, but it is not a punitive tool in itself. It is still up to the SC to decide whether or not a non-fulfilment of the framework amounts to a threat to the peace and thereby ultimately to an authorization to use force by member states.<sup>172</sup>

Although this is the case, states have nevertheless been using the neglect of the international responsibility of specific states to argue for the use of force against non-state actors in the host state in self-defence without approval by the SC. Various scholars have supported this argument.<sup>173</sup> The mere harbouring of non-state actors responsible for an armed attack is by some seen as complicity. This is primarily a post 9/11 view, where the failure to show due diligence and thereby prevent terrorism is seen as acquiescence, which brings us to the unwilling or unable criteria/test/doctrine, which will be explored in the second part of the thesis since I do not consider it to be part of existing customary international law.

The ICJ has in its cases referred to state responsibility. As early as the *Corfu Channel Case* in 1949, the ICJ stated that: "... every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."<sup>174</sup> Other cases which mention the responsibility include among other the *Armed Activities Case* and *Case Concerning United States Diplomatic and Consular Staff in Tehran*.<sup>175</sup>

### Concluding on the illegality of extraterritorial use of force against non-state actors

The prohibition of the use of force according to Article 2(4) in the Charter exists in customary international law and has received *Jus Cogens* status. As argued, there is no possibility to circumvent the wording in the Article regarding the sovereignty and integrity of states. Any presence in the territory of another (host) state by forces of the sending (victim) state is illegal without consent of the host state. There is no legality as to the concept of HI or R2P without SC approval. Further, the threat of, or the actual use of force, are equally illegal according to the Charter.

Article 51 of the Charter and customary international law does not imply that self-defence must be conducted against a state. No details are written about the nature of the entity, which self-defence is conducted against although the Charter is initially built on a state vs. state framework. The limitations

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<sup>171</sup> GA, "Res 2625: Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations."

<sup>172</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 50.

<sup>173</sup> Tal Becker, *Terrorism and the State : Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), Chapter 6.

<sup>174</sup> *Corfu Channel Case (United Kingdom V. Albania); Assessment of Compensation*, p. 22.

<sup>175</sup> Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test," p. 628.

on the use of force in Article 2(4) refer to members (=states), but this is not true for Article 51 and the SC has, in its resolutions after 9/11, recognized the inherent right of self-defence also against non-state actors. Although the SC is not a legislative entity, SC resolutions are often referred to by the ICJ in its judgments, hence the implications of the resolutions after 9/11 can be argued to have a legislative nature and would most likely be referred to by the ICJ in similar future conflicts. Unless being contrary to existing law, SC resolutions are legally binding.

The concept of self-defence has evolved from that of repelling an on-going attack against another state to an acceptance of a cumulative approach, to attacks from non-state actors. This is due to the nature of contemporary attacks by non-state actors, which are often frequent, short in duration and often executed against multiple states. With the cumulative approach it follows that there is no time limit on the opportunity to exercise of self-defence.

An armed attack can be performed by a non-state actor as recognised by the SC after 9/11. The threshold and nature of an armed attack is still not explicitly clear, why the recognition of the occurrence of an armed attack has to be approved by the SC. This is especially relevant when an act of self-defence follows the cumulative approach.

Self-defence has to follow the customary principles of necessity and proportionality, but imminence has evolved as a consequence of the acceptance of the cumulative approach. Necessity and proportionality are unchanged from their original meaning and allow for the use of force to repel an attack. Since self-defence has a cumulative nature against non-state actors, proportionality needs to be considered in every attack against the non-state actor. Due to a changed view on imminence, necessity no longer stops when an individual attack has been repelled, but when the non-state actor no longer has the capability or intent to mount any further attacks.

Extraterritorial use of force against non-state actors has not yet been explicitly approved by the SC or the ICJ, which is why it has to be approved by the SC in each circumstance in order to be legal. Meaning that despite proportionality and necessity being met, it would still be deemed illegal to attack non-state actors in self-defence, unless the SC has approved such action.

The reference to state responsibility as a prerequisite for the unilateral use of self-defence is not legal.

In summary, the use of self-defence by a victim state against non-state actors in a host state, can be concluded as being legal if the following criteria are satisfied. First, the victim state proves that the attack has passed the threshold of an armed attack, and has this acknowledged by SC authorisation to

use self-defence. Additionally the SC needs to acknowledge that the host state is not willing to assist in any way or the victim state requires the approval of the host state to attack the non-state actor in the host state. Second, the victim state reports the use of self-defence to the SC, when the actual use of force commences. Third, the victim state argues adequately for the fulfilment of the necessity and proportionality criteria. If these conditions are met, then the extraterritorial use of self-defence is legal against a non-state actor. The above mentioned criteria also include cases where states proclaim self-defence to rescue nationals (hostage situations).

The SC has yet to authorize the use of force in host states and it is unlikely that it will happen unless the host state is linked to the non-state actor and thereby attributable for the actions of the non-state actor. The principle of sovereignty in international law still has a significant importance and support in the world community.

Whether or not a new customary law is evolving will be discussed in the second part of this thesis.

## Part 2: Development of new Customary Law?

Part 1, of this thesis has thoroughly discussed the different interpretations of *Jus ad Bellum* and I have argued that interpretation of the law can change over time. Although this has been the case it is, according to existing international law, illegal to attack non-state actors in host states without the consent of the state in question or an SC approval.

Part 2 of the thesis will analyse the growing tendency towards a higher acceptance within the world community of the extraterritorial use of force against non-state actors. The chapter will conclude with whether this evolving acceptance is currently evolving.

To evaluate this possible evolving state practice and *opinio juris*, I will investigate whether or not there has been a new defining of customary law as to justify the extraterritorial use of force against non-state actors. In order to evaluate state practice and *opinio juris*, the ICJ, in “Jurisdictional Immunities of the State”, stated the following:

“... State practice of particular significance is to be found in the judgments of national courts... the legislation of those States... the claims to immunity [a right to use self-defence extraterritorially] advanced by States before foreign courts and the statements made by States... the extensive study of the subject by the International Law Commission... *Opinio juris*... in the assertion by States claiming... [the right of the extraterritorial right of self-defence] in the acknowledgment... [by other states]...”<sup>176</sup>

Seen in the context of this thesis, there are no judgments from national courts available or any other national legal documentation highlighting the extraterritorial use of force against non-state actors in the context of international law. State practice in this regard will however be discussed by using examples of actual usage of force by states, official governmental publications and military manuals and the work by the ILC and legal scholars. In this regard and to supplement the ICJ definition, it is important to note how the ILC defines state practice as needing to be widespread and representative, and generally consistent.<sup>177</sup> The practice does not need to be universal since not all states have the possibility to apply a given rule, but the participation needs to be broadly representative.<sup>178</sup>

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<sup>176</sup> *Jurisdictional Immunities of the State*, International Court of Justice (2012).

<sup>177</sup> Special Rapporteur Michael Wood, "Second Report in Identification of Customary International Law" (2014), para 59.

<sup>178</sup> *Ibid.*, para 52.

*Opinio juris* in the context of this thesis is difficult to assess since the “active” use of force extraterritorially by states is not conducted as a consequence of “international law imposes upon them an obligation to do”. Rather, it is conducted as a consequence of a state asserting that: they have a legal right to the extraterritorial use of force under certain conditions; this right is being acknowledged by other states as *Opinio Juris*; and that there is an obligation understood by the host state to stop the evolvment of terrorism on its territory (unwilling or unable criteria). The latter can further be shown by the involvement of the state in the international work against terrorism or other actions initiated by the host state against terrorism. This assertion by states is reflected within states’ governmental publications and military manuals.

This part of the thesis will first take a closer look on the state practice of extraterritorial use of force, which will be investigated through analysis of modern examples and opinions of these by: international legal scholars, the ILC, proclamations by states (*Opinio Juris*) and associated governmental publications. Thereafter the thesis will cover *Opinio Juris* in more detail, exploring the unwilling or unable criteria, the assertion of states and the obligation to stop terrorism.

### Historical examples of state practice

The following paragraphs provide examples of state practice on the use of extraterritorial use of force. Most examples will be in self-defence and most against non-state actors, but the point of the paragraphs is primarily to display the extraterritorial use of force and the reaction of the international community to such an order to establish whether new customary law is developing or is already existent.

### The Caroline Incident

The 1837 attack on the Caroline has been mentioned as the customary law, defining case of the requirements concerning self-defence - primarily necessity and imminence. This was in the primary topic of the then ongoing discussions between the British Foreign Office and the US State Department, not whether the use of extraterritorial force was legal or not. Although similar respect for sovereignty, as provided in Article 2(4), was mentioned by both US Secretary of State Daniel Webster: “That act is of itself a wrong, and an offense to the sovereignty and the dignity of the United States...” and UK Special Minister Lord Ashburton: “Respect for the inviolable character of the territory of independent nations is the most essential foundation of civilization”.<sup>179</sup>

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<sup>179</sup> Michael Wood, "The Caroline Incident - 1837," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (2018), pp. 8-9.



Since the discussion in 1837 did not focus on the extraterritorial part of the use of force against a non-state actor, but instead the self-defence criteria in customary law, Schmitt argues that the Caroline incident supports extraterritorial use of force against non-state actors under the conditions of self-defence in customary law as was shaped by the Caroline incident.<sup>180</sup>

That Daniel Webster, the US Foreign Minister, did not challenge his British counterpart's argument about the justification of the extraterritorial premise, but focused more on the necessity requirement, does not implicitly dictate that this was not as well an issue.

Not all scholars agree with Schmitt's argument that the extraterritorial premise was not challenged, but fail to provide reference to the correspondence justifying this. Williamson refers to the work of Sir Robert Yewdall Jennings<sup>181</sup> in arguing: "The US objected... on the grounds that the British has violated American sovereignty."<sup>182</sup> Jennings does however not mention this argument or refers hereto in his article and Williamson, in my opinion, fails to argue sufficiently for the non-acceptance of extraterritorial use of force against non-state actors.

Concluding on the Caroline incident it is evident that extraterritorial use of force against non-state actors was left out of the diplomatic correspondence between the British and the US governments, which is why it can be argued in this case that there was no condemnation of this issue but rather the self-defence principles (proportionality, necessity and imminence).

#### [United States vs. Pancho Villa in Mexico](#)

During the Mexican revolution, US General John Perkins lead 10,000 soldiers across the Mexican border in search of the revolutionary general Francisco "Pancho" Villa, who was responsible for the death of 18 American soldiers in a raid in New Mexico in 1916. Mexico was at that time in the middle of a revolution and its government was incapable of controlling Villa. The US raid in Mexico was unsuccessful and was not approved by the Mexican government, which was supported by the US. The Mexican government asked the US to withdraw its troops after 3 months in Mexico, but the US refused on the basis of Mexico's inability to control Villa.

Although being, as well as the Caroline incident, an example before the present conventional international law on the use of force, this example shows that states at that time were very protective

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<sup>180</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. pp. 43-44.

<sup>181</sup> R.Y. Jennings, "The Caroline and McLeod Cases," *The American Journal of International Law* 32, no. 1 (January 1938).

<sup>182</sup> Williamson, *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001*, pp. 88-89, note 107.

of their own sovereignty. Even though the US supported the government of Mexico, the Mexican government disapproved of the US raid.

#### United States vs. Cambodia during the Vietnam War

During the Vietnam War US forces crossed the border into Cambodia performing both ground and air attacks against the Viet Cong, who had established supply routes in Cambodia.

The criticism followed was according to Schmitt more a general anti-war criticism than a normative/international law critique.<sup>183</sup> Professor W. Michael Reisman argue that the criticism received by the US was more a general objection to the war as a whole and not of the extraterritorial nature of the attacks against North Vietnamese forces.<sup>184</sup>

#### South Africa vs. African National Congress groups in Angola

In the 1970s South Africa pursuit of the ANC groups in Angola, Schmitt and Reisman again argue for political unacceptability instead of normative (the illegality of extraterritorial use of force) concern. The legal condemnation was more a dislike of South Africa and the condemnation of its apartheid system.<sup>185</sup> This case illustrates, in my opinion, how the political arguments often outweigh the legal ones or at least diminishes the legal arguments.

#### Israel vs. Palestine Liberation Organization in Tunisia

Israel performed air strikes against PLO bases in Tunisia on 1 October 1985 killing more than 30 Palestinians and Tunisians.<sup>186</sup> The PLO was allegedly using Tunisia as a base for their operations in Israel. Israel justified the attack by citing the murder of three Israeli tourists in Cypress one week earlier and several other attacks by PLO against Israel within the previous 45 days.<sup>187</sup>

Tunisia strongly condemned the Israeli strike as an act of aggression and the attack was as well strongly condemned by the world community including an almost united SC (the US abstained), which agreed that the attack was a violation of Tunisia's sovereignty and territorial integrity contrary to international law and the Charter. Israel argued for the complicity of the host nation, Tunisia, who allegedly harboured members of the PLO in a rural area of Tunis. Israel invoked Article 51 as a 'legitimate

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<sup>183</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 41.

<sup>184</sup> W. Michael Reisman, "International Responses to Terrorism," *Yale Law School Legal Scholarship Repository* (1999): p. 53.

<sup>185</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 41. Reisman, "International Responses to Terrorism," p. 53.

<sup>186</sup> Frank J. Prial, "Israeli Planes Attack P.L.O. In Tunis, Killing at Least 30; Raid 'Legitimate,' U.S. Says," *The New York Times*, 1985-10-02 1985.

<sup>187</sup> E. Ponbje, F. Declercq, and R van Steenberghe, "Israeli Raid against Plo Headquarters in Tunis," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford, 2018).

response to acts of terrorism'.<sup>188</sup> Since Tunisia deliberately hosted a non-state actor who, as claimed by Israel, had planned several hundreds of attacks on Israel from its base in Tunis, Tunisia could not claim the protection of sovereignty. Israel further claimed that Tunisia was aware of the fact that the 'base' was used to plan attacks on Israel.<sup>189</sup>

Although Israel claimed self-defence there was no report to the SC after the attacks. Further the SC criticized the lack of proof of PLO implication in the accused attacks as well as a variety of other considerations including the disproportionate character of the attack.<sup>190</sup>

Schmitt argues again that the criticism was not necessarily minded on the normative law aspect (the illegality of extraterritorial use of force), but could arguably be a general response to the protection of international peace and security.<sup>191</sup> The latter was one of the considerations by the SC, but only one among many. Schmitt is however correct when stating that there was no direct mentioning by the SC on the legality of extraterritorial use of force. It was however, in my opinion, implicit in the mentioning of violation of Tunisia's sovereignty and territorial integrity contrary to international law and the Charter. I will argue that this case was a case of a condemnation of extraterritorial use of force against a non-state actor, from the international community of extraterritorial attack without any support to Israel at all.

#### Turkey vs. Kurds in Iraq

Turkey has a long history of violence between the Turkish government and Kurdish extremists (non-state actors) fighting for a united Kurdistan. Throughout the 1990s and after the US lead coalition's removal of Saddam Hussein from power in 2003, the Turks have fought Kurdish non-state actors. Today Turkey is both engaged in fighting these forces in Iraq and in Syria. The international response to the Turks intrusion into both Iraq and Syria is diminishing, but in the 1990s, the international community was largely unsupportive of Turkey's actions, driven by other factors than the normative framework such as interference in the relief and no-fly zones in northern Iraq and alleged Turkish violation of human rights against the Kurds.<sup>192</sup> Turkey did not invoke the right of self-defence against the Kurdish

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<sup>188</sup> *Ibid.*, p. 396.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*, p. 397.

<sup>191</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 41.

<sup>192</sup> *Ibid.*, pp. 41-42.

non-state actors and the legal position of Turkey remained unclear.<sup>193</sup> Although publicly having stated, in 1996, that Iraq was unwilling or unable there was no mention of self-defence.<sup>194</sup>

The later instability of the region primarily caused by the 2003 war, which weakened the control of the Iraqi border region with Turkey, the incursions have proved to be more acceptable on an international scale. The Iraqi government has accepted the Turkish fight against the Kurds within their country and the US has generally accepted the Turkish use of extraterritorial use of force in Iraq.<sup>195</sup> At least until the US involvement in Syria, where the US has provided support to some Kurdish groups fighting ISIL and the Syrian Government.

This long Turkish fight against Kurdish extremists has not raised many condemnations by the international community based on the extraterritorial use of force, but on other considerations primarily concerning *Jus in Bellum*. Although not explicitly declared as an extraterritorial right of self-defence against a non-state actor, Turkey has consistently fought the Kurdish extremists in Iraq in what they have understood as a legal right.

#### The United States vs. Iraq

Responding to an alleged assassination attempt on then former US President George Bush by the Iraqi Intelligence Service (IIS), the US launched twenty-three Tomahawk cruise missiles against the Iraqi Military Intelligence Headquarters on 26 June 1993. The US justification for the attack was self-defence in accordance with Article 51 of the Charter in response to the failed assassination attempt.<sup>196</sup> Iraq obviously condemned the attack and the NAM<sup>197</sup> urged restraint.<sup>198</sup> The SC showed a general acceptance and respected the decision by the US to resort to the use of force.<sup>199</sup> Japan supported the US as well, but criticism followed from primarily Muslim states, such as Egypt, Turkey and Saudi Arabia, which ordinarily are supportive of the US. Iran and Libya provided the strongest condemnation, calling

<sup>193</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, p. 184. Gazzini, *The Changing Rules on the Use of Force in International Law*, pp. 206-07, 09.

<sup>194</sup> Ashley S. Deeks, "Unwilling or Unable. Towards a Normative Framework," *Virginia Journal of International Law* 52 (2012): p. 487.

<sup>195</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, pp. 58-59.

<sup>196</sup> Dino Kritsiotis, "The Legality of the 1993 Us Missile Strike on Iraq and the Right of Self-Defence in International Law," *The International and Comparative Law Quarterly* 45, no. 1 (January 1996): p. 162.

<sup>197</sup> The non-aligned movement consists of more than 100 states formed during the Cold War as an organisation of States which did not support either the US or the Soviet counterpart.

<sup>198</sup> "Letter Dated 27 June 1993 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council," (S/26004. 27 June 1993), p. 2. Kritsiotis, "The Legality of the 1993 Us Missile Strike on Iraq and the Right of Self-Defence in International Law," p. 164.

<sup>199</sup> "The Legality of the 1993 Us Missile Strike on Iraq and the Right of Self-Defence in International Law," p. 163.

the attack an act of aggression. Support was also received from western states such as Germany, the UK and Austria.<sup>200</sup>

The case attracted a large number of condemnations<sup>201</sup> and the invocation of self-defence was not fulfilled since it did not, in my opinion, reach the threshold of scale and effect required to be an armed attack. Reaching “scale” is the only possible argumentation, but would in my opinion necessitate a successful assassination of a head of state. In this case the alleged attack was not initiated before it was, allegedly, stopped and the involvement of the Iraqi authorities was not entirely clear.<sup>202</sup> This example clearly shows the issue with defining the threshold of scale and effect in contemporary conflicts. The Nicaragua definition no longer suffices.

The attack by the US, I will argue, falls short of self-defence. It takes more the form of a reprisal or retaliatory action, which is supported by the British Foreign Minister in a speech to the House of Commons using the words: “... a necessary warning to Iraq...”.<sup>203</sup> It seems difficult to argue for necessity in the given case unless, as will be later argued in relation to Al Qaeda, there were previous incidents and future ones expected. An argument that the US did not use, because this was the first case of (alleged) hostility of the IIS and there was no proof of further attacks to come. Williamson concurs: “... one of the most poorly argued instances of ‘self-defence’ in this era...”.<sup>204</sup> I would further argue that this was another example of ‘politics before international law’. Iraq was unpopular in the eyes of the world community, why condemnations from some states might have been withheld.

### The United States vs. Al Qaeda in Afghanistan and Sudan

As a response to the bombings of the US embassies in Nairobi and Dar Es Salaam in August 1998, the US launched a cruise missile attack against alleged Al Qaeda facilities in Afghanistan and Sudan based on self-defence in accordance with Article 51 of the Charter.<sup>205</sup> The international criticism following the attacks was not so much focused on the legality of the attacks in a *Jus ad Bellum* context, as on the target type in Sudan, where US intelligence had identified the Shifa pharmaceutical plant as being involved in the production of chemical weapons, but this was widely contested.<sup>206</sup>

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<sup>200</sup> Ibid., p. 164-65.

<sup>201</sup> Paulina Starski, "The Us Airstrike against the Iis Headquarters," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (2018), p. 510.

<sup>202</sup> Ibid., p. 505.

<sup>203</sup> "HC Hansard Vol 227 Cc657-65," (28 June 1993).

<sup>204</sup> Williamson, *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001*, p. 157.

<sup>205</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 177-78.

<sup>206</sup> Ruys, 'Armed Attack' and Article 51 of the Un Charter : *Evolutions in Customary Law and Practice*, p. 426-27.

The League of Arab States condemned the US attack on Sudan as: "a blatant violation of the sovereignty of a State member of the League of Arab States, and of its territorial integrity, as well as against all international laws and tradition, above all the Charter of the United Nations."<sup>207</sup> The League's criticism was not followed by other states.

The focus was therefore, argued by Schmitt, not on the legality of the extraterritoriality of the attack and the subsequent violation of Sudanese territory<sup>208</sup>. Since this was the case it can be argued that the use of force against non-state actors in host-state was already in the end of the 1990s 'silently' accepted by the world community. This seems however, to be a premature conclusion since a US letter to the SC stated the following: "... These attacks were conducted only after repeated efforts to convince the Government of the Sudan and the Taliban regime... to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organisation"<sup>209</sup>. The letter thereby connects the state and the non-state actors, which is why the use of self-defence was not invoked against the non-state actor alone.

### The Kosovo War

The NATO bombing campaign in Kosovo was not justified on the basis of a violation of Article 2(4) or self-defence/Article 51.<sup>210</sup> The campaign had a humanitarian aspect and was one of the first of its kind following the events in the middle of the 1990s in Rwanda. The inability of the SC to reach agreement made NATO go against existing international law and justify its actions on humanitarian grounds.

Professor Harold Koh argues that it is legal to threaten or use force for humanitarian purposes as NATO did in Kosovo. His argument is based on the inability of the SC to make decisions due to the veto right and the following non-acceptance and fear by some states of a new Rwanda or Srebrenica.<sup>211</sup> Although Koh's arguments quickly were disputed by several other scholars<sup>212</sup>, it is evident that more and more states, especially western, and more scholars advocate for an exception to Article 2(4) based on Humanitarian considerations. It does however not change the fact that the concept of HI is illegal under international law.

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<sup>207</sup> "Letter Dated 21 August 1998 from the Charge D'affaires A.I. Of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council," (S/1998/798. 21 August 1998).

<sup>208</sup> "Letter Dated 20 August from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council." Kimberly Trapp agrees with Schmitt in his evaluation of this case, see Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, p. 52.

<sup>209</sup> "Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council."

<sup>210</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, p. 133.

<sup>211</sup> Harold Hongju Koh to JustSecurity.org, 2013, <https://www.justsecurity.org/1506/koh-syria-part2/>.

<sup>212</sup> See e.g. Kevin Jon Heller to OpinioJuris.org, 2013, <http://opiniojuris.org/2013/10/02/four-thoughts-kohs-defense-unilateral-humanitarian-intervention/>. David Kaye, "Harold Koh's Case for Humanitarian Intervention," *JustSecurity.org* (2013).

This example is used to exemplify the move away from the laws of war to a more political and humanitarian use of force.

#### Uganda and Rwanda vs. Hutu guerrillas in Democratic Republic of Congo

In August 1998 Ugandan and Rwandan forces allegedly followed Hutu guerrillas into the territory of the Democratic Republic of Congo (DRC)<sup>213</sup> in response to the killing of tourists in Uganda by guerrillas. The pursuit later resulted in the establishment of an UN peacekeeping force but did not draw international condemnation at the time of the intervention.<sup>214</sup> This was most likely due to the nature of the attacks by the guerrillas on the tourists highlighting the most common and most frustrating fact by many legal scholars which is the international community does not focus firstly on the law, but rather on the given case and whether or not the gravity of the acts performed by the non-state actor are worse than the violation of the laws of war.

The ICJ argued in the *Armed Activities Case* that Uganda did not have the right to self-defence since the armed attack it had suffered could not be attributed to the DRC, but to a non-state actor (a Ugandan-based rebel group). The court decision in 2005 is remarkable in the way that it was the first time that the court found a state in violation of Article 2(4). Although not necessary for the judgment, it is further important to notice that the court did not bow to the post 9/11 pressure to include non-state actors in Article 51. The court mentioned that this aspect was not necessary to respond to "since the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present."<sup>215</sup> Separate opinions of some of the judges expressed the view that self-defence was also permissible although the attacker was not a state.<sup>216</sup>

#### The United States vs. Taliban and Al Qaeda

9/11 has been mentioned several times due to its unique character as an attack clearly crossing the threshold of an armed attack as discussed in the first part of the thesis and because of the international community's willingness or acceptance of the US attack on Al Qaeda and the Taliban.

Some states and scholars argue that the attack on Afghanistan was the only example of the acceptance of the extraterritorial use of self-defence against a non-state actor, in a case where the host state was

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<sup>213</sup> James A. Green, "The Great African War and the Intervention by Uganda and Rwanda in the Democratic Republic of Congo - 1998-2003," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (2018).

<sup>214</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 42.

<sup>215</sup> *Case Concerning Armed Activities on the Territory of the Congo*, para 147.

<sup>216</sup> Green, "The Great African War and the Intervention by Uganda and Rwanda in the Democratic Republic of Congo - 1998-2003," p. 588.

not involved in the attacks on the victim state<sup>217</sup>. The discussion by most focusses on the difficulty of assessing whether this was a one-time-only case or if it was a (another) brick in the development of new customary law. Corten in contrast argues that 9/11 did not change international law, which still keeps the Charter as “regulating the use of force in an essentially inter-State perspective.”<sup>218</sup> This is due to the fact that the attacks were conducted just as much against the Taliban as against Al Qaeda, assuming that the Taliban was the acting government of Afghanistan at the time of the attacks. Although Al Qaeda was the root cause, the Taliban was equally mentioned as supporting Al Qaeda in the self-defence justification presented by the US.<sup>219</sup>

I would argue that if a new attack by a non-state actor reaches the same, or higher, amount of damage and injury the reaction and acceptance by the international community will be the same. Meaning that the threshold for an armed attack will be reached and extraterritorial use of force accepted thereby applying maximum pressure on the host state. That is, a general acceptance to the extraterritorial use of force in self-defence. Of course, it is case dependent and especially dependent on the reaction by the host state and its willingness to act against the non-state actor or allow/invite the victim state or an international coalition to attack the non-state actor. The point Corten makes is completely valid and I concur with his conclusions so far as to acknowledge that the attacks were not solely a state vs. non-state actor case, but (almost) equally a state vs. state in the Charters originally intended framework.<sup>220</sup>

Scholars disagree of the importance of the 9/11 attacks and the reactions, but the doctrinal or *Opinio Juris* effect in several states has been huge. According to Schmitt, state practice after 9/11 supports the applicability of self-defence against non-state actors.<sup>221</sup> Schmitt uses the argument that since NATO invoked Article V and the SC was united, this was the case. But is this a broader section of the world community? NATO is not, since NATO members only represent the western industrial developed countries. The non-permanent member of the SC were Mali, Tunisia, Mauritius, Bangladesh, Singapore, Jamaica, Colombia, Ireland, Norway and Ukraine. The unity of the SC can also be seen as a sense of unity with the US and astonishment of the actions of Al Qaeda as mentioned earlier in the thesis. The argument presented by Corten has not been echoed by many states or scholars, why 9/11 is primarily

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<sup>217</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, p. 54.

<sup>218</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, p. 179.

<sup>219</sup> "Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council."

<sup>220</sup> *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, p. 179.

<sup>221</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 34.



seen as a state vs. non-state actor case. Corten does however imply a framework such as unwilling or unable is needed without mentioning the exact expression.<sup>222</sup>

#### Israeli attacks in Syria and Lebanon

As a response to an attack by the non-state actor 'Ein Saheb', at a café in Haifa in 2003, Israel accused Syria of complicity and attacked targets within Syrian territory. Although stating that the attacks were targeting an Ein Saheb base, the attack was eventually condemned by a large part of the international community, including EU member states, thereby indicating that the 9/11 acceptance did not provide a general, *carte blanche* reason to extraterritorially attack non-state actors in self-defence.<sup>223</sup>

In July 2006 Israel again reacted to attacks by a non-state actor, when Hezbollah abducted two Israeli soldiers and launched several rockets against Israeli cities. Israel responded by launching a large military campaign in Lebanon, again claiming to be acting against the non-state actor, Hezbollah, and not the state, Lebanon. The scale and nature of the attacks were however condemned by the international community as excessive, although a majority of the SC members recognized Israel's right to defend itself. The SEC GEN also recognised this right, which shows the case as being an example of an acceptance of the use of Article 51 against non-state actors in host states, when the amount of force applied is held within the necessity and proportionality limits.<sup>224</sup> This since there was no arguments against the attacks as such, only the execution and excessive use of force that was used.

#### Russian attacks in Georgia

In the summer of 2002, Russia attacked Chechen separatist forces in Georgia due to the alleged harbouring by Georgia of these forces, which while fighting Russian forces, had escaped to Georgia.<sup>225</sup> The Chechen separatist forces had also conducted 'terrorist' attacks in Russia against civilian targets.

Inspired by the US attacks in Afghanistan, Russia invoked Article 51 justifying their attacks in Georgia as being necessary due to the Georgian inability to effectively police their own state. Stating that Georgia was unwilling or unable to counter act the terrorist threat. Georgia in return accused Russia of violations

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<sup>222</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*.

<sup>223</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, p. 54. Gray, *International Law and the Use of Force*, p. 236.

<sup>224</sup> Trapp, *State Responsibility for International Terrorism : Problems and Prospects*, pp. 55-56.

<sup>225</sup> *Ibid.*, p. 58, note 210.

of its sovereignty.<sup>226</sup> The US encouraged Russia to dialogue with Georgia<sup>227</sup> and, according to Gray, criticised the attacks as violations of Georgian sovereignty.<sup>228</sup>

Again, this conflict has shown that the world leaders apply the law of war selectively as with previous conflicts in Chechnya in the late 1990s.<sup>229</sup> The US was in a position where the support of Russia after 9/11 politically made it impossible to strengthen the development of a new customary law legalizing the use of extraterritorial force against non-state actors. The US only needed to support the Russian justification and refer to the right of extraterritorial use of force against non-state actors. Instead, the US choose to condemn the use of force both in Chechnya and in Georgia, which emphasizes the importance of politics vs. international law. As seen in other conflicts the US seem to claim rights for itself, which it is unwilling to provide for others.<sup>230</sup>

In a later inter-state conflict between Russia and Georgia in 2008, where Russia invaded parts of Georgia due to an internal Georgian conflict involving a Russian minority, the international community reacted diversely. Russia and Georgia accused one another of the use of force and later aggression, but later again both states changed justifications blurring the picture for the international community and raising doubt as to the good faith of the two states.<sup>231</sup>

The US reacted by condemning the attacks from Russia as 'dangerous and disproportionate', but otherwise not commenting on the laws of war.<sup>232</sup> The reactions to the use of force extraterritorially was limited and only reactions from Australia,<sup>233</sup> Austria,<sup>234</sup> and Canada<sup>235</sup> referred to the non-use of force as stated in Article 2(4) by respecting the territorial integrity of Georgia. Several states did however refer to the need to respect the sovereignty of states, e.g. Denmark<sup>236</sup> and Japan<sup>237</sup>, but did not explicitly condemn the actions of Russia.

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<sup>226</sup> Gray, *International Law and the Use of Force*.

<sup>227</sup> Steven Lee Myers, "Georgia Hearing Heavy Footsteps from Russia's War in Chechnye," *The New York Times*, 15 August 2002.

<sup>228</sup> Gray, *International Law and the Use of Force*, pp. 230-31.

<sup>229</sup> Peter Daniel DiPaola, "A Noble Sacrifice? Jus Ad Bellum and the International Community's Gamble in Chechnya," *Indiana Journal of Global Legal Studies* 4, no. 2 (1997).

<sup>230</sup> Gray, *International Law and the Use of Force*, p. 231.

<sup>231</sup> "The Conflict in Georgia - 2018," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (2018).

<sup>232</sup> "Us Condemns 'Dangerous' Russian Responce in South Ossetia," *The Guardian* 10 August 2008.

<sup>233</sup> "Australia Calls for Ceasefire in Georgia," *The Sydney Morning Herald* 10 August 2008.

<sup>234</sup> "Plassnik Demands Russian Ceasefire," *Wiener Zeitung* 11 August 2008.

<sup>235</sup> "Minister Emerson Issues Statement on Continuing Hostilities in Georgia," ed. Ministry of Foreign Affairs (10 August 2008).

<sup>236</sup> "Fogh Støtter Georgien," (9 August 2008), <https://www.dr.dk/nyheder/politik/fogh-stoetter-georgien>.

<sup>237</sup> "On the Intensification of South Ossetia Situation," (8 August 2008), [http://www.mofa.go.jp/mofaj/press/danwa/20/dga\\_0808.html](http://www.mofa.go.jp/mofaj/press/danwa/20/dga_0808.html).

Both examples of the use of force by Russia show diverse reactions from the world community. Most important to the evaluation of the development of customary law is the criticism from the US, because it shows again that there is no common thread from the major powers in recognizing the extraterritorial use of force against non-state actors.

#### Iraqi coalition vs. Islamic State of Iraq and the Levant in Syria

Extraterritorial attacks against non-state actors were again in focus when the Iraqi government on 25 June 2014, asked the world community to support it in its fight against ISIL.<sup>238</sup> Initially, a US led coalition supported Iraq within the Iraqi borders; however, as ISIL was also present in Syria and continued to pose a significant military threat to Iraq from Syrian territory as well as sponsor terrorist acts across the rest of the world, part of the coalition expanded its mission to include attacks on ISIL in Syria in September 2014.<sup>239</sup> The US coalition attacking ISIL in Syria initially comprised Jordan, Saudi Arabia, Bahrain, Qatar and the United Arab Emirates (UAE) and was later supported by western states; France, Germany, Denmark and the UK.<sup>240</sup> Many states in the coalition whilst content to conduct operations within Iraq, did not extend this to attacking ISIL in Syria, primarily due to a reluctance to engage with the Syrian government - Australia is an example of a state engaged in Iraq but not in Syria.

The Syrian government officially invited states to cooperate with the Syrian government in the fight against ISIL, as Iraq had done, but due to the international community's unwillingness to cooperate with the Syrian government the invitations were never formally accepted. Not until September 2015 where Russia, and to lesser extent Iran, joined Syria in the fight against ISIL. Although mentioning his criticism of the US led coalition's attacks on Syrian territory in different interviews, President Bashar al-Assad and the Syrian government never officially condemned the coalition's effort to combat ISIL in Syria. Although the Assad government had been clear that extension of the US coalition's operations into Syrian territory without prior coordination with the Syrian government would be an act of aggression violating Syria's sovereignty.<sup>241</sup>

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<sup>238</sup> "Letter Dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General," (S/2014/440. 25 June 2014).

<sup>239</sup> Martha Raddatz, Luis Martinez, and Lee Ferran, "Airstrikes 'Successful' against Isis Targets in Syria, Us Military Says," *ABC News*, 2014-09-23 23 September 2014. Spencer Ackerman, Martin Chulov, and Paul Lewis, "Us Confirms 14 Air Strikes against Isis in Syria," *The Guardian* 23 September 2014.

<sup>240</sup> Raddatz, Martinez, and Ferran, "Airstrikes 'Successful' against Isis Targets in Syria, Us Military Says." Olivier Corten, "The Military Operations against the 'Islamic State' (Isil or Da'esh)-2014," in *The Use of Force in International Law: A Case-Based Approach*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (2018), pp. 874-75.

<sup>241</sup> Christian Henderson, "Editorial Comment: The Use of Force and Islamic State," *Journal on the Use of Force and International Law* 1, no. 2 (2014).

More states joined the coalition fighting in Syria when ISIL executed terrorist attacks in several European states in 2015.<sup>242</sup> Terrorist activities condemned by the SC, culminating in a French offensive in Syria in cooperation with US forces.<sup>243</sup> The outcomes of the ISIL terrorist activities in Europe against coalition member were intensified attacks by the victim states against ISIL.<sup>244</sup>

The legal issue relating to this thesis is the extraterritorial use of force by the western states in Syria. The initial attacks against ISIL in Iraq were legal since they were performed by invitation and consent from Iraq, but since the later attacks in Syria were executed without accepting the Syrian invitation and thereby not officially by Syrian consent, the legality is questionable.

The western states generally argued self-defence against ISIL in Syria, which was neither endorsed nor challenged by the SC. The explanation to the latter seems obvious and in line with previous conflicts having a political split within the SC. Neither side is capable of getting a resolution endorsed by all members of the SC. The following paragraphs divide the arguments by the western states in four parts.

First, the US espoused self-defence in an official letter to the SEC GEN. The letter argued that the threat ISIL posed was worldwide and affected Iraq as well as many other states in the coalition. Further, the US argued that the Syrian regime is both unable and unwilling to counter ISIL, which is why the attacks on Syrian territory are legal according to Article 51 of the Charter.<sup>245</sup> The US completely ignored the Syrian invitation in the letter to the SEC GEN.

Justifying the extraterritorial use of force based on unwilling or unable will be discussed later in this thesis. The following states endorsed the US argument of unwilling or unable: Australia, Canada and Turkey.<sup>246</sup>

Second, Germany expressed the inability of Syria to exercise effective control of its territory, why the actions taken, without Syrian consent, were considered legal as long as only ISIL was the target. Belgium and Norway expressed similar views.

Third, France, following the terrorist attack in Paris, argued that ISIL had performed an armed aggression against France, thereby justifying French attacks on ISIL in Syria. France did not endorse the unwilling or

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<sup>242</sup> E.g. January 2015: Hostage situation in a Paris grocery resulting in four deaths. November 2015: Multiple attacks in Paris kills more than 100 people wounding more than 350.

<sup>243</sup> UN SC, "Res 2249 (2015)." Alissa J. Rubin and Anne Barnard, "France Strikes Isis Targets in Syria in Retaliation for Attacks," *The New York Times*, 2015-11-15 15 November 2015. Ben Doherty, "France Launches 'Massive' Airstrike on Isis Stronghold in Raqqa," *The Guardian* 16 November 2015.

<sup>244</sup> Corten, "The Military Operations against the 'Islamic State' (Isil or Da'esh)-2014."

<sup>245</sup> *Ibid.*, p. 880.

<sup>246</sup> *Ibid.*

unable argument presented by the US, thereby maintaining that Article 51 is only state vs. state applicable and hence requires state involvement in the actions of the non-state actor, in this case ISIL. France used instead the uncertainty of the ICJ in the *Threat or Use of Nuclear Weapons advisory opinion* and quoted part of the courts concluding remarks: "... the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".<sup>247</sup>

Fourth, The UK and Denmark invoked in general Article 51. The latter also referring to the SC Resolution 2249 in which the SC called on all states to "eradicate the safe haven that ISIL has established over significant parts of Iraq and Syria".<sup>248</sup>

The four paragraphs above show an overall unity regarding self-defence, but deeper arguments are diverse. This indicates, in my opinion, that the states have an unconvincing legal case, especially considering the pending invitation from the Syrian government. Looking past the Syrian invitation, the divergent self-defence arguments are illustrative of the issue with the law as it is, when states believe that what they are doing is right, although they are not really doing the right thing (as in following the law).

Scholars argue that the attacks were legal based on self-defence of Iraq according to Article 51. Evolving customary international law and state practice is argued to provide a legal framework for the attacks on ISIL in Syria.<sup>249</sup> I agree that self-defence is legal against non-state actors as previously argued, but in the case of Syria, I do not agree with the above proposition due to the inconsistency in states arguments, which, in my opinion, falls back on the not-accepted Syrian invitation. There is no common thread in the case of Syria, when states proclaim self-defence outside the frame of a state vs. state conflict.

The attacks against ISIL in Iraq were conducted by invitation and therefore in compliance with international law. The attacks in Syria were not consented by the Syrian government and therefore not legal according to the Charter and existing customary law.<sup>250</sup> I agree with scholars arguing that ISIL's attacks amount to an armed attack, but reference to the unwilling or unable criteria (not mentioned as

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<sup>247</sup> Ibid., p. 881. *Legality of the Threat or Use of Nuclear Weapons*, Para 97. p. 263.

<sup>248</sup> SC, "S/Res/2249."

<sup>249</sup> Ranj Alaaldin and Bilal Khan to LSE US Centre's daily blog on American Politics and Policy, 2014-10-01, <http://blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/>.

<sup>250</sup> Henderson, "Editorial Comment: The Use of Force and Islamic State."

such but implied) is questionable and can hardly be valid international law.<sup>251</sup> Whether I am correct will be further discussed later in the thesis in the unwilling or unable chapter.

France sought to exploit an area of the law, which does not have a definite answer although it has been brought before the ICJ. Although it is interesting from an academic point of view it seems unclear as a legal argument. To compare the fight against ISIL, based on terrorist attacks in France, to an extreme circumstance of self-defence, which by the ICJ was stated in relation to nuclear weapons, seems unconvincing to me. It is hard to see how France could argue that their very survival was at stake from ISIL following the Paris attack in 2015, although France faced and still faces challenges with the integration of Muslims in the Country.

#### United States vs. Pakistan

On 2 May 2011, US Special Forces flew from Afghanistan to Pakistan to raid the compound of Osama bin Laden, who was subsequently killed during the attack.

The US did not warn or obtain consent from Pakistan before the raid. It was thus conducted without the knowledge of the host state. The argument presented by the US for not notifying Pakistan was that the US feared details pertaining to the raid would be leaked by elements of the Pakistani intelligence service to members of Al Qaeda.<sup>252</sup>

The US justification for the raid was self-defence arguing that Osama bin Laden was the leader of Al Qaeda, a network responsible for multiple attacks on the US. The US failed however to report the act of self-defence to the SC pursuant to Article 51.

The reactions from the world community were in general positive in favour of the action taken by the US; however, the Pakistani government strongly condemned the raid as “an unauthorised unilateral action” further stating that: “Such an event shall not serve as a future precedent for any state...”.<sup>253</sup>

In my opinion, this case was illegal due to the non-involvement of Pakistan. The host state was a partner in the so-called war on terror and there was no consent from the host state or authorization from the SC. Although not explicitly challenged in the specific case it is evident that this is as well the opinion of many. E.g. the European Parliament, which in a resolution on the use of drones stated that: “drone strikes outside a declared war by a state on the territory of another state without the consent of the

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<sup>251</sup> Pert Alison, "Are Air Strikes against Is in Syria Lawful?," <http://www.abc.net.au/news/2015-08-24/pert-are-air-strikes-against-is-in-syria-lawful/6720658>.

<sup>252</sup> Daavid Kretzmer, "Us Extra-Territorial Actions against Individuals," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford, 2018), pp. 768-69.

<sup>253</sup> Jane Perlez and David Rohde, "Pakistan Pushes Back against U.S. Criticism on Bin Laden," *The New York Times* May 3, 2011.

latter or of the UN SC constitute a violation of international law and of the territorial integrity and sovereignty of that country".<sup>254</sup> This view is supported by a multiple of NGOs and academic institutions.<sup>255</sup>

#### United States airstrikes on Syria in 2017

Due to the alleged use of chemical weapons by the Syrian regime against civilians in Syria resulting in more than 80 deaths, the US military attacked the Syrian air base from which the alleged chemical attack originated. The US attack consisted of cruise missiles launched from naval ships in the Mediterranean.<sup>256</sup>

The attacks were condemned by Russian President Vladimir Putin as an "aggression against a sovereign state in violation of the norms of international law...".<sup>257</sup> Iran condemned the attacks as well without referring to international law.

The attacks were positively received by Turkey, Saudi Arabia, UK, the European Union, Australia, Bahrain and UAE. None of these states referred to international law as such, but stated primarily, that the attacks were rightful in the view of the war crimes (alleged chemical attacks against civilians) committed by the Syrian President Assad. The US attack seemed punitive by nature, which is underlined by the then UK Defence Secretary, Michael Fallon, stating that: "We fully support this strike... designed to target the aircraft and the equipment... used in the chemical attack; and to deter President Assad from carrying out future chemical attacks".<sup>258</sup>

#### United States, United Kingdom and French airstrikes on Syria 14<sup>th</sup> April 2018

In response to another alleged use of chemical weapons by Syria against its own population, the US, UK and France attacked Syria. The targets were primarily chosen due to their involvement in the chemical weapons attack and consisted of air bases and a scientific research facility.

The airstrikes were condemned by Russia, who failed to secure a SC resolution condemning the attacks.<sup>259</sup> The Syrian ambassador to the UN, unsurprisingly, accused the US and its western allies of undermining international peace and security. Further, the Iranian Supreme Leader, Ayatollah Ali Khamenei, stated that he US and its allies had committed a "major crime" in Syria. Conversely, the rest of the international community was mostly supportive of the airstrikes.

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<sup>254</sup> European Parliament, "Use of Armed Drones," (2014/2567. 27 February 2014).

<sup>255</sup> Kretzmer, "Us Extra-Territorial Actions against Individuals."

<sup>256</sup> Tara John, "How the World Reacted to President Donald Trump's Air Strike on Syria," *Time*, 2017-04-07.

<sup>257</sup> Ibid. Madison Park, "Who's with the Us on Syria Strike and Who Isn't," *CNN*, 2017-04-09.

<sup>258</sup> John, "How the World Reacted to President Donald Trump's Air Strike on Syria."

<sup>259</sup> Ray Sanchez and Laura Smith-Park, "After Syrian Airstrikes Comes Finger-Pointing and Condemnation," *CNN*, 2018-04-15.

The US use of force in both the above described cases does not have a legal basis in international law. Whilst the US administration has not tried to give any international legal basis for their actions, it seems clear that their actions are not legal in the current international legal framework.<sup>260</sup> The US's use of force without explaining a legal basis, is in direct opposition to the framework, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, published in 2016.

#### Other examples of state practice

There has been some discussion among scholars about the legality of the French intervention in Mali in January 2013, against several non-state actors, due to a variety of legal justifications initially presented by France. The fact that France felt the need to invoke several different legal justifications (collective self-defence, intervention by invitation and UN SC authorization) could imply an uncertainty of the legality of their intervention. Although not officially stated from the Malian authorities, it does seem clear that the French support was greatly appreciated by both Mali (consent) and the UN and there was no condemnation of the intervention.<sup>261</sup>

#### Concluding on the historic examples of state practice

Concluding on the above given examples of extraterritorial use of force, from the arguments by victim states and the reactions by the world community, it can be argued that extraterritorial self-defence against non-state actors is not generally accepted as a customary rule. Further, the unable and unwilling criteria is not being consistently accepted as a means for lawful interference in third states. As illustrated in the above examples the argument of unwilling or unable is often used in contemporary conflicts, but it is not consistently used. It is often followed by additional arguments and often overshadowed by political agendas. If one state finds it politically convenient to use unwilling or unable as an argument in a case involving its own use of force, the state can in the next case involving a political adversary argue against the use of the unwilling or unable criteria although the conflicts are clear cut examples of the use of the criteria.

The protection of civilians has, since the Kosovo conflict, gained significant importance. When states criticize extraterritorial uses of force it is often with an argument relating to proportionality if civilian casualties are high. Further, in the recent actions that could be argued as a 'punishment' for President

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<sup>260</sup> John B. Bellinger II, "Prepared Statement of John B. Bellinger II," *The Council on Foreign Relations*: p. 8. Milena Sterio to IntLawGrrls, April 9, 2017, April 9 2017, <https://ilg2.org/2017/04/09/syria-the-illegality-of-the-united-states-use-of-force-against-assad/>.

<sup>261</sup> Karine Bannelier and Theodore Christakis, "The Intervention of France an African Countries in Mali-2013," in *The Use of Force in International Law*, ed. Tom Ruys, Olivier Corten, and Alexandra Hofer (Oxford, 2018).



Assad's use of chemical weapons against his own people, there has been no mention of international law, but only reference to the unacceptability of using chemical weapons against civilians on humanitarian grounds. States are thereby moving from attempting to prove legality to simply politically stating unacceptable losses of civilian lives, thereby using *Jus in Bellum* arguments to justify *Jus ad Bellum*.<sup>262</sup>

### The International Law Commission and legal scholars

The ILC described customary international law in its 67<sup>th</sup> session (2015) as the primary practice of states, and international organisations in the form of resolutions, treaties, tribunals etc. Further, ILC stated that the practice had to be general and constant, meaning that it had to be applicable to most and representative. Important to note is that if the practice was general, there would be no exact duration requirement.<sup>263</sup>

The description by the ILC is similar to the ICJ description in the "Jurisdictional Immunities of the State", but includes as well the comment about duration as mentioned above.<sup>264</sup> This is also seen in the argument by some scholars of an "instant custom", which describes the situation in which customary law is instantly created by a given event that is recognized by the world's community. In this thesis it has been argued that 9/11 was such a case, but the argument has not been consistent and recognized by most states or scholars.<sup>265</sup>

The ILA states that Article 51 can apply to non-state actors and that there is a growing recognition, including through state practice, that a state, under given circumstances, has the right to self-defence. The ILA goes further argues that this right may be extraterritorial, but does not conclude that it is. Recognizing the challenge of the violation of sovereignty in allowing extraterritorial self-defence, the ILA points out the possible violation of Article 2(4) in cases where the host state is not guilty of an unlawful act. The ILA argues that the victim state may have a right to self-defence against the non-state actor, but not the host state.<sup>266</sup> The ILA thereby fully acknowledges the right to self-defence by victim states but stresses that self-defence is not permitted in a host state, which is not associated with the non-state actor since this will comprise Article 2(4).

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<sup>262</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 132-33.

<sup>263</sup> Sean D. Murphy, "The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission," (2015).

<sup>264</sup> *Ibid.*, p. 3, Draft Conclusion 8.

<sup>265</sup> Cassese, "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law," p. 997. *International Law*, p. 475.

<sup>266</sup> Wood and Lubell, "Use of Force, Report by the Committee on Aggression and the Use of Force."

## Official governmental publications and the assertion by states

### Governmental publications

The US published a legal and policy framework on the use of military force in 2016. The framework was one of the last accomplishments of the then US president Barack Obama. The framework emphasised the importance of adhering to international legal standards on the use of force, which are built on the standards of sovereignty and self-defence rooted in the UN Charter. However, the framework explicitly mentioned the extraterritorial use of force against non-state actors: "The inherent right of self-defence is not restricted to threats posed by States... self-defence applies to the use of force against non-State actors on the territory of another State".<sup>267</sup> The framework further mentioned the unwilling or unable criteria, although only superficially.<sup>268</sup> The criteria will be further discussed in the next chapter.

The UK counter terrorism strategy does not mention the use of force extraterritorially, but aims more on a criminal law solution: "The purpose is to... stop terrorist attacks... This means... disrupting terrorist activity before... and... prosecuting those responsible".<sup>269</sup> Further the strategy is primarily focusing on domestic solutions than the extraterritorial view. The UK does not have any other official (unclassified) state documents (e.g. military manuals) that deal with the use of force in third states.

In Denmark, a military manual was published in September 2016. The manual primarily deals with *Jus in Bellum*, but has in its chapter 2 described the *Jus ad Bellum* aspect stating that individual or collective self-defence can be executed against both states and non-state actors. The latter argued using the SC decision following 9/11.<sup>270</sup> The manual does not discuss the threshold of an armed attack, but just refers to an 'attack'. HI without SC mandate is a further possibility if there is an extreme humanitarian situation demanding immediate action, all possibilities for a UN mandate has failed and the military use of force is applied with respect to the customary norm of proportionality and limited in time.<sup>271</sup>

Participating in a use of force with a background in R2P needs a UN mandate though.

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<sup>267</sup> "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," p. 9.

<sup>268</sup> *Ibid.*, p. 10.

<sup>269</sup> HM Government, "Contest: The United Kingdom's Strategy for Countering Terrorism," ed. Home Department (2011).

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97995/strategy-contest.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97995/strategy-contest.pdf)

<sup>270</sup> "Militærmanual Om Folkeret for Danske Væbnede Styrker I Internationale Militære Operationer," (September 2016), p. 36.

<sup>271</sup> *Ibid.*, p. 39.

Military manuals published by other states (e.g. the Czech Republic) focus on *Jus in Bellum* and are therefore not relevant for this thesis. Further, government documents such as the US, describing a policy regarding the use of force against non-state actors, have not according to my knowledge and research been published by other states than the ones discussed above.

#### Assertions by states

The British Attorney General, The Rt Hon Jeremy Wright QC PC, held a speech on 11 January 2017 titled 'The Modern Law of Self-Defence'.<sup>272</sup> In the speech, the Attorney General expressed the British view on self-defence in modern conflicts involving non-state actors.

Wright stated that the UK intends to follow the principles of Sir Daniel Bethlehem<sup>273</sup>, but did not in his speech define the UK interpretation of the principles in detail.<sup>274</sup> Wright's primary focus was Principle 8, which expands the traditional view on imminence and brings it closer to the US pre-emptive definition than the anticipatory definition.

Wright's interpretation of Principle 8 caused him to postulate that the "... absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defence, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent".<sup>275</sup>

Although Wright does not mention the cumulative or ongoing approach, it is understood from his speech that self-defence is permitted against a non-state actor, who has not yet attacked the UK, but in a situation where there is credible proof that an attack will occur somewhere somehow.<sup>276</sup>

I find the UK approach to self-defence, as argued by Wright, moving the limit of imminence in the direction of pre-emption and the Bush Doctrine.<sup>277</sup> Although a few other states follow the same belief, I find it to be outside the present development of international customary law on extraterritorial self-defence against non-state actors in the world community as a whole.

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<sup>272</sup> Jeremy Wright, "Transcript: Attorney General's Speech at International Institute for Strategic Studies: The Modern Law of Self-Defence," (11 January 2017).

<sup>273</sup> Daniel Bethlehem, "Self-Defence against an Imminent or Actual Armed Attack by Nonstate Actors," *The American Journal of International Law* 106 (2012).

<sup>274</sup> James A. Green to European Journal of International Law, January 13 2017, <https://www.ejiltalk.org/initial-thoughts-on-the-uk-attorney-generals-self-defence-speech/>. Monica Hakimi *ibid.*, January 12 2017, <https://www.ejiltalk.org/the-uks-most-recent-volley-on-defensive-force/>.

<sup>275</sup> Wright, "Transcript: Attorney General's Speech at International Institute for Strategic Studies: The Modern Law of Self-Defence," pp. 16-17.

<sup>276</sup> Green Initial Thoughts on the Uk Attorney General's Self-Defence Speech. Monica Hakimi *ibid.*, January 12 2017, <https://www.ejiltalk.org/the-uks-most-recent-volley-on-defensive-force/>.

<sup>277</sup> "The National Security Strategy of the United States of America," ed. The White House (September 2002).

Australia however directly supports the UK in this approach, which was confirmed by the Australian Attorney General, The Hon George Brandis QC, in a similar speech to that of his British counterpart.<sup>278</sup> It is worth noting that Brandis distances Australia from the pre-emptive perspective and mentions Australian commitment to anticipatory self-defence. As mentioned above I find the UK and Australian view on imminence as moving away from anticipatory towards pre-emptive self-defence. If it had followed the cumulative principle, which Bethlehem included as his principle 3, I would have found it appealing, but in the view of the UK and Australia there does not need to have been a previous attack from a non-state actor, since there is no requirement that all principles are fulfilled before self-defence is legal.

Besides from Australia there is no doubt that the US as well supports the UK approach and as Wright implies the remaining two parties of the 'five eyes', New Zealand and Canada, does as well. Hereafter it becomes blurry which states would as well follow the same path since assertions are missing similar to those of UK and Australia.

The NAM counts 120 primarily developing states (April 2018)<sup>279</sup> with a number of objectives, one being the rejection of the threat of or use of force in international relations against the sovereignty, territorial integrity and independence of Non-Aligned states. Including unilateral military actions, pre-emptive attack, foreign occupation and other breaches of peace by any state or group of states.

NAM has a principle of non-intervention or non-interference into the internal affairs of another state, but as well a principle of the right of all states to defend itself in accordance with the Charter. NAM has not published any work on the extraterritorial use of force in self-defence, but sanctions the use of force when permitted by the SC.<sup>280</sup>

### Unwilling or Unable

The supposed custom criteria of unwilling or unable (or the Unwilling or Unable Doctrine) has evolved due to the threat of non-state actors operating extraterritorially, attacking states of other territorial origin. The doctrine is almost self-explanatory but needs to be examined in detail since it is by many

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<sup>278</sup> George Brandis, "Transcript: The Right of Self-Defence against Imminent Armed Attack in International Law," (The University of Queensland, 11 April 2017).

<sup>279</sup> "The Nuclear Threat Initiative," <http://www.nti.org/learn/treaties-and-regimes/non-aligned-movement-nam/>.

<sup>280</sup> Zivojin Jazic, "The Non-Aligned Movement Yesterday and Today - in the Process of Globalization: Critical View," *Croatian International Relations Review* (April 2005): p. 64.

seen as an exemption to the Charter's prohibition on the use of force and an expansion of the right of self-defence, according to Article 51 and customary international law.<sup>281</sup>

The criteria states that if a (victim) state has been attacked by a non-state actor residing in another (host) state, then the victim state can legally attack the non-state actor. If and only if the victim state is capable of proving that the host state is unwilling or unable to take appropriate action against the non-state actor, then the victim state has the right to attack the non-state actor in the host state. As mentioned previously it is provided that the host state has no links to the non-state actor, because the use of force in that case would be a legal state vs. state self-defence according to the Charter.<sup>282</sup>

The controversy regarding the criteria, as mentioned throughout the thesis, is the clash between two fundamental rights in international law: the right of self-defence and the right of territorial integrity/sovereignty.

The unwilling or unable criteria have been used by several states engaged in the fight against non-state actors. E.g. when justifying the US use of force in Syria, the Permanent Representative to the UN, ambassador Samantha Powers wrote the following after confirming that the US acted upon invitation from Iraq: "States must be able to defend themselves... when... the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."<sup>283</sup>

The criteria are not part of the Charter or any other convention<sup>284</sup>. It seems that the criteria were first used by US State Department Legal Adviser John Stevenson during the Vietnam War, when US forces entered Cambodia to fight the Viet Cong. Stevenson stated: "Should the neutral state be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerents may be justified in attacking the enemy forces on this territory."<sup>285</sup> Since then 'unwilling or unable' has been an expression used by many states, when the use

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<sup>281</sup> Travaglio and Altenburg, "Terrorism, State Responsibility, and the Use of Military Force," p. 113. Deeks, "Unwilling or Unable. Towards a Normative Framework."

<sup>282</sup> Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test," p. 625.

<sup>283</sup> "Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General," (S/2014/695. 23 September 2014).

<sup>284</sup> "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test."

<sup>285</sup> John R. Stevenson, "Text of a Statement on Legal Aspects of U.S. Military Action in Cambodia by John R. Stevenson, Legal Advisor of the U.S. Department of State to the Nyc Bar Association New York City, May 28, 1970," ed. Press and Publications Branch U.S. Information Service (May 28 1970), p. 5.

of force extraterritorially is deemed necessary. The criteria appear in the work of states, IGOs<sup>286</sup> and scholars, but are not uniformly clear.<sup>287</sup> Most scholars agree on the definition that a state can be either unwilling or unable<sup>288</sup>, while some scholars argue that a state must be both unable and unwilling.<sup>289</sup> This clearly shows that it is not completely clear what exactly is meant by the unwilling or unable criteria, which is further evident, when describing the criteria more in depth.

Besides the most accepted definition, there is still a degree of unwillingness to consider. How much is expected from the host state in this regard? Does the host state need to act decisively right away or can the actions taken against non-state actors be a long term strategy to bring them to justice? This is unclear and has not been defined precisely because the criteria are not, as stated above, conventional law or, in my opinion, has not yet received customary law status as will be explained later in the thesis.

The criteria can be summarised to include the following: Besides the illegality of extraterritorial use of force as mentioned in the first part of the thesis, the criteria must be based on self-defence according to Article 51 after an armed attack from the territory of the host state. The use of force against the non-state actor must be necessary, proportionate and immediate. The SC must be informed according to Article 51 and the use of force must be a last resort after consent and cooperation with the host state has been tried, and clearly proving that the host state is unwilling or unable to deal with the non-state actors by itself.<sup>290</sup>

The criteria thereby clearly states that the use of force is an absolute last resort and tries to make it a true exception. It is however clear by the examples given, and following later in the thesis, that the criteria are often used without the above being fulfilled.

Being unable is also debatable. It seems unlikely that a state being unable would not welcome the help of others if states offer to support the host state in its fight against a non-state actor not complying with

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<sup>286</sup> E.g. Chatham House, "The Chatham House Principles of International Law on the Use of Force in Self-Defence," *The International and Comparative Law Quarterly* 55, no. 4 (October 2006).

<sup>287</sup> Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test." Deeks, "Unwilling or Unable. Towards a Normative Framework," p. 546.

<sup>288</sup> "Unwilling or Unable. Towards a Normative Framework."; Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test."

<sup>289</sup> Louise Arimatsu and Michael Schmitt, "Attacking 'Islamic State' and the Khorasan Group: Surveying the International Law Landscape," *Columbia Journal Transnational Law* 53, no. 1 (2014).

<sup>290</sup> Deeks, "Unwilling or Unable. Towards a Normative Framework," p. 247. Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test," p. 623. Dinstein, *War, Aggression, and Self-Defence*, pp. 101-16.

international law.<sup>291</sup> There can be political reasons as seen in Syria, where the US would not accept an invitation due to the long history of disagreement with the Syrian regime and the strategy to remove Assad from power. Syria did on the other hand invite Russia to collectively fight ISIL, which proves willingness and thereby renders the criteria of unwilling or unable irrelevant in my opinion. Even though this is the case many western countries still use this argument for their presence and attacks on ISIL in Syria.

If a host state proves that it has taken actions against a non-state actor, which is guilty of violating international law, then the criteria of unwilling or unable is rendered invalid<sup>292</sup>, as mentioned above in the Syria case.

Further the host state needs to be given the opportunity to react and show its consent and cooperation. Victim states must, according to the criteria, give the host state the possibility to respond to the non-state, as the US did with the Taliban in Afghanistan.

Using the US 9/11 reaction as an example, the US, although not recognizing the Taliban as the legitimate government of Afghanistan, issued a series of demands<sup>293</sup> with regards to Al Qaeda and the Taliban's alleged support for international terrorism. Since the Taliban did not meet these demands or fulfilled the SC resolution to hand over Osama Bin Laden<sup>294</sup>, they were, per the definition of the criteria, 'unwilling'; unwilling to cooperate and support the US in the fight against Al Qaeda, a non-state actor responsible of an armed attack on the US. Due to this the US attacked both Al Qaeda and the Taliban, which at first can be seen as out of proportion, since a text book example of a state's unwillingness, I would argue, should only include attacks on the non-state actor harboured by the unwilling state.

In this case however, the US had a history of being hit by Al Qaeda attacks and were therefore in a situation, where they had to make Al Qaeda unable to perform further operations against them, since just hitting a few targets of opportunity, e.g. training facilities or individuals, would not stop the non-state actor from performing further attacks (it had been tried before<sup>295</sup>). They therefore needed to gain ground in Afghanistan and effectively root out Al Qaeda to make them unable to plan and perform new operations against the US. The Taliban were not offering the US the possibility to do this, why the US saw no other way than to attack both the Taliban and Al Qaeda.

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<sup>291</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, p. 170.

<sup>292</sup> Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test."

<sup>293</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 13.

<sup>294</sup> UN SC, "Res 1267 (1999)."

<sup>295</sup> E.g. the response to the embassy bombings as mentioned earlier.

The non-compliance of the Taliban in this case was regretful, but not complying with SC resolutions does not provide member states a *carte blanche* for the extraterritorial use of force. It is generally accepted that SC Chapter VII resolutions are binding on states, but the wording of the resolution has to authorise the use of force if member states are to follow this path. Schachter argues that non-compliance with the GA's resolution on "Measures to prevent international terrorism..."<sup>296</sup> is a violation of the state's obligation in this regard and a violation of customary international law<sup>297</sup>. It is therefore questionable whether the Taliban broke international law by not following the GA resolution, but it does not change the law on the use of force in international relations as mentioned earlier and as will be further elaborated below.

The SC did *recognize* "the inherent right of individual or collective self-defence in accordance with the Charter"<sup>298</sup>, which by some states and scholars has been interpreted as the acceptance by the SC of the extraterritorial use of force in Afghanistan.

Schmitt argues that: "... if capable, but unwilling, the Taliban would be responsible for their failure under the international law of state responsibility."<sup>299</sup> Even though this was the case, a state in international law is not supposed to act as the executive and the judiciary entity. No doubt, that state responsibility concerning terrorism is clear by the start of the new millennium<sup>300</sup>, but this does not empower a state to judge another state for its wrongdoings and failure under state responsibility, does not permit the use of force by other states.

It is clear however that the US would have a good case, *vis-à-vis* state responsibility, if brought before the ICJ, but the argument for attack on the Taliban who were not complying with international law, is not legally compelling. This is also recognised by Schmitt: "... the existence of state responsibility for an international wrong does not justify the use of force in self-help to remedy the wrong." And "... it is generally agreed that countermeasures employing armed force are prohibited."<sup>301</sup> The latter is clearly stated in Article 50 on State Responsibility: "Countermeasures shall not affect... the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations".<sup>302</sup>

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<sup>296</sup> UN GA, "Res 40/61: Measures to Prevent International Terrorism Which Endangers or Takes Innocent Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes (a/40/1003)," (1985).

<sup>297</sup> Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," p. 245.

<sup>298</sup> SC, "Res 1368 (2001)."

<sup>299</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 48.

<sup>300</sup> See the chapter: "*Opinio Juris*; the obligation to stop terrorism"

<sup>301</sup> Schmitt, *Counter-Terrorism and the Use of Force in International Law*. p. 50.

<sup>302</sup> Commission, "Responsibility of States for International Wrongful Acts," Article 50.



In 2005 the African Union (AU) adopted the African Union Non-Aggression and Common Defence Pact, which in Article 1c of the Pact specifies that an act of aggression can be executed by a non-state actor. The Pact came into force in December 2009.

The Pact does not however, include any reference to the unwilling or unable criteria and what Corten rightfully argues is that Article 2 of the Pact specifies that the objective of the Pact is “to define a framework under which the Union may intervene or authorise intervention, in preventing or addressing situations of aggression...”.<sup>303</sup> The Pact thereby provides a possibility for the AU to make a decision regarding the use of force against non-state actors in host states. A decision that the SC did not explicitly make after 9/11 as argued in this thesis due to the, I will argue, state vs. state framework of the Charter.

A doubtful argument, by supporters of the Unwilling or Unable criteria, is that the Rome Statute of the International Criminal Court contains a reference to being ‘unwilling or unable’, which therefore can be equalled to the same in *Jus ad Bellum*. The Rome Statute specifies that: “... the court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;...”.<sup>304</sup> It is however two different areas of law, why I find it unconvincing.

The theory and the actual examples of the unwilling or unable criteria seem unclear and not well defined in a way that can justify a customary rule. Even supporters of the criteria admit that it is quite uncertain how it is supposed to be used: “... one is left with the certainty that the test exists, but puzzlement about how states should apply it”.<sup>305</sup>

Unless consent has been given by the host state, authority by the SC or if the armed attack is attributable to the host state, then there seems to be no possibility for legally using force by the victim state.<sup>306</sup>

### *Opinio Juris; the obligation to stop terrorism*

The obligation to stop terrorism, I will argue, is shown in the state’s engagement and participation in different forums, conventions and cooperative activities to prevent and fight terrorism. If for instance a state through these has shown a willingness and keenness to fight terrorism and later shows the

<sup>303</sup> Corten, *The Law against War : The Prohibition on the Use of Force in Contemporary International Law*, pp. 167-68. AU, "African Union Non-Aggression and Common Defence Pact," (2005), Article 2.

<sup>304</sup> GA, "Rome Statute of the International Criminal Court (Last Amended 2010)," Article 17(1).

<sup>305</sup> Deeks, "Unwilling or Unable. Towards a Normative Framework," p. 505. Williams, "Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test," p. 640.

<sup>306</sup> Tom Ruys and Sten Verhoeven, "Attacks by Private Actors and the Right to Self-Defense," *Journal of Conflict & Security Law* 10, no. 3 (2005).

opposite in its practice, it affects the development of a new customary law negatively. There has to be a consistency between what states say and what they do. Otherwise, it proves that a customary law is not evolving (or has evolved).

The following paragraph will give an overview of the main efforts by the international community to counter terrorism to stress the expectations and focus by all states on countering terrorism. No state in the world community can claim not to be heavily involved in the cooperation to stop terrorism since all the provided examples are UN products.

#### [Declaration on Principles of International Law Concerning Friendly Relations...](#)

Although states and IGOs as early as the 1930s attempted to suppress terrorism<sup>307</sup>, the international community's comprehensive work on the subject did not intensify until 40 years later, when "The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations", was adopted by the GA in 1970.<sup>308</sup> The resolution focuses as per the title on peaceful solution to conflicts and on terrorist acts:

"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts..."<sup>309</sup>

No mentioning of the responsibility for states in situations where there is no connection to a non-state actor operating on the territory of the state.

#### [Declarations on Measures to Eliminate International Terrorism](#)<sup>310</sup>

GA Resolution 49/60 pronounces measures to prevent international terrorism by describing the importance of co-operation among states in fighting terrorism, which, in my opinion, serves to encourage states not to be unwittingly accused of supporting terrorist organisations operating with their sovereign borders. The resolution further emphasises the harmonization of domestic legislation with international conventions and the apprehension and prosecution or extradition of terrorists.

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<sup>307</sup> Roberts, "Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals," p. 260.

<sup>308</sup> GA, "Res 2625: Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations."

<sup>309</sup> Ibid., Principle 1.

<sup>310</sup> "Res 49/60: Declaration on Measures to Eliminate International Terrorism," (1994).

The declaration was supplemented in 1996 by a further declaration<sup>311</sup>, which confirmed the text of resolution 49/60. The supplement stressed the need for international co-operation between states and IGOs and the need for states to adopt further measures to prevent terrorism.

The resolutions mentioned underline the involvement of all member states in the active fight against terrorism and illustrates *Opinio Juris* in that there is an obligation on all states to stop the acts of terrorism. Consequently, all states have to take action if non-state actors conduct terrorist activities on their territory, which in theory will eliminate the risk of a state being unwilling or unable. States deemed unable are obliged to co-operate with other states and ask for help in combatting non-state actors operating within their sovereign borders, who are responsible for terrorist activities.

#### United Nations Global Counter-Terrorism Strategy

Following the 2005 World Summit Outcome, the UN Global Counter-Terrorism Strategy<sup>312</sup> was adopted by all member states of the UN. The Strategy comprises 4 pillars:

1. Measures to address the conditions conducive to the spread of terrorism.
2. Measures to prevent and combat terrorism.
3. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard.
4. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

Whilst such an initiative is welcome, the Strategy fails to address what is meant by terrorism. The lack of a clear definition of terrorism weakens the strategy in my opinion in that it does not provide signatories with a clear understanding of the scope of the terrorist that they are attempting to combat. The Strategy stresses the need for the states to prevent and combat terrorism, through use of quotes such as: "... the international community should... take... steps... to enhance cooperation to prevent and combat terrorism" and "... to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens." However, the initiatives in the Strategy for the prevention and combat of terrorism, of which there are many, are not legally binding as such. Following this it is evident that even though a state may not follow one of

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<sup>311</sup> "Res 51/210: Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism," (1997).

<sup>312</sup> "Res 60/288: The United Nations Global Counter-Terrorism Strategy," (2006).

the initiatives, it does not justify the use of force by another state against that state, which is unwilling or unable to follow one or more initiatives which it has committed itself to.

### Concluding on the development of new customary law

Part 2 has discussed state practice and *Opinio Juris* of the world community to argue whether a customary norm is developing.

The historical examples of state practice show that there are multiple instances of the extraterritorial use of force against non-state actors. In these cases, the victim states have mostly claimed self-defence using a variety of arguments, which in contemporary times primarily have been the, yet undefined, criteria of unwilling or unable.

Arguments for the use of force have often been inconsistent and not confined to one single legal justification. Furthermore, extraterritorial use of force against non-state actors has been used without explicit justification through a SC resolution, but on claims stating that attacks were executed due to the host states non-compliance with international agreements on the prevention of terrorism. However, current international agreements do not provide a legal basis for the use of force, which thus renders the use of force illegal.

Although the arguments for the extraterritorial use of force against non-state actors have not been consistent, the use of force has been widespread and representative. Whenever a state, in the given examples, has been attacked by non-state actors, it has responded by military force in self-defence even though the legal justification misses a consistent argumentation. This is the case even though the SC never explicitly authorized the use of force against non-state actors in third states. From the perspective of the victim state, this proves *Opinio Juris*, but based on the reactions from the world community it does not. Condemnations have in all examples but 9/11, been swift and importantly, even by those states which themselves in other examples have claimed the right to use force extraterritorially against non-state actors. The criticism against/for the use of force have been inconsistent with states taken different positions dependent upon the circumstances of the case, with many states expressing a political perspective vice legal stance in *Jus ad Bellum*.

The ILC has not officially published work on the right to extraterritorial use of force in self-defence, but the ILA argues that state practice shows a tendency towards a right to extraterritorial self-defence. This right is pending on actions attributable to the host states; otherwise, it will be a violation of Article 2(4).

The host states in the examples are all, through the work in the GA, involved in the international work against terrorism. There is a common will in the world community to fight the acts of terrorism although the challenge of agreeing on an exact definition seems difficult so overcome. That all states continue to commit, strengthens the SC possibility to authorise the use of force in cases where states are not able to or will not fight terrorism.

Some states have published documentation that implies a right to use force extraterritorially against non-state actors. Although this can be viewed as state practice, it is confined to a limited number of states (two at this time), which can hardly be said to prove general practice. Military manuals and governmental strategies with references to the extraterritorial use of force are uncommon, with most that exist focussing on *Jus in Bellum*. Only the US and Denmark have defined the possibility for extraterritorial use of force.

A few states (US, UK and Australia) have, in addition, publicly asserted a right to extraterritorially use force in self-defence.

## Conclusion

Part 1 of this thesis discussed the illegality of the use of force according to existing international law. The interpretation of the UN Charter was the primary issue along with the existence of the customary principle of 'unwilling or unable'. Analysis has shown that international law does not provide the possibility for extraterritorial self-defence against non-state actors without explicit authorization from the SC, but that there is a customary tendency towards the unwilling or unable criteria, which the second part of the thesis investigated further.

Part 2 revealed that state practice has been consistent in the extraterritorial use of force against non-state actors. Conversely, states have been inconsistent in claiming this right through official publications. Furthermore, the ILC has not defined a legal position and scholars disagree about the legality of extraterritorial use of force against non-state actors.

*Opinio Juris* has been consistent in that states have argued for a legal right to extraterritorial self-defence against non-state actors, but inconsistent with their arguments for this right. Moreover, states have, in contemporary conflicts, primarily confined themselves to the unwilling or unable criteria, but have not defined the criteria in detail. Other arguments have been presented highlighting inconsistency and disagreement in the international community about the legality of the extraterritorial use of force.

Further, although some cases are similar in nature the responses from other states have varied depending on which states proclaims the right. This indicates a political angle, which is contrary to an objective application of the law. The political approach is especially clear in the two attacks on Syria in 2017 and 2018, where no reference to *Jus ad Bellum* has been made.

I conclude that consistency is lacking in parts of both state practice and mostly *Opinio Juris*, which is why it cannot be said that a customary norm exist. As certain states disapprove of the notion of unwilling or unable, it is obvious that a customary norm has not been achieved. It might be in the making, but it is not established.

Extraterritorial use of force against non-state actors is illegal according to international law unless explicitly authorised by the SC, or consented by the host state, and a customary norm has not yet been developed. The latter seem difficult to realise given differences in *Opinio Juris* among states and although I consider it in process of being made, the question is if it will ever crystalize.

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