

**THE LEGALITY OF EXTRATERRITORIAL USE OF FORCE AGAINST  
A NON-STATE ACTOR WITHOUT THE TERRITORIAL STATE'S  
CONSENT**

**by**

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## Dedication

To my amazing parents Berthilde Gahongayire and Vedaste Rutajoga, thank you for being a constant source of love, support and inspiration.

## Abstract

This dissertation examines the right of a state to use extraterritorial defensive force against a non-state actor without the territorial state's consent. Article 51 of the United Nations Charter provides states with the right to unilaterally use defensive force but only after an armed attack has occurred. This right of self-defence is narrow and does not provide adequate protection to states facing an imminent threat. Fortunately, the right of self-defence is an inherent right that predates the Charter. Indeed, in terms of customary international law, states have the right to defend themselves before a threat materialises, provided the principles of necessity and proportionality are met. Article 51 makes no mention of the identity of the attacker. This is because the only relevant element of the right of self-defence is the gravity of the armed attack not the nature of the attacker. Indeed, despite the International Court of Justice's interpretation of article 51, the attacker can be any subject of international law. In the case of an attack by a non-state actor, attribution to a state is not required for the right of self-defence to be valid. However, since non-state actors often operate from the territory of another state, the defending state must attempt to obtain the consent of the territorial state. If consent cannot be obtained, the territorial state's right to sovereignty and territorial integrity must be balanced with the defending state's right of self-defence. Current state practice demonstrates that this balance is increasingly leaning tipped in favour of the right of self-defence. Unfortunately, states have yet to unite around clear legal standards governing the right to use extraterritorial force against non-state actors. This dissertation provides recommendations aimed at bridging the gap between the current state practice and the legal norms on self-defence.

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## **Chapter I: Introduction**

### **1. Research theme**

In 2014, militants of the so-called 'Islamic State of Iraq and the Levant' (ISIL)<sup>1</sup> began an offensive of vast proportions in Iraq and Syria.<sup>2</sup> The weakened Iraqi and Syrian armies were no match against the sustained and powerful attacks by the well-funded and well-equipped ISIL group. Towards the end of 2014, ISIL was in control of large strips of territories in both Iraq and Syria. Seemingly unstoppable, the group left hundreds of thousands of casualties in its wake.

In October 2014, a United States (US)-led coalition was formed with the purpose to drive back and ultimately neutralise this group, thereby restoring peace and stability in the region.<sup>3</sup> The military operations against ISIL in Iraq are based on the Iraqi government's request for military assistance and, as such, constitute a lawful use of force under international law.<sup>4</sup> The US-led coalition attacks against ISIL in Syria, however, are conducted without the Syrian government's express consent and, as such, the legality thereof is contested.<sup>5</sup> The extraterritorial use of force against ISIL in Syria exemplifies a state using force against a non-state actor without the consent of the territorial state.

The present study is an analysis of the legality of extraterritorial use of force against a non-state actor without the consent of the territorial state. Specifically, it is an exploration of the right to self-defence as a circumstance precluding wrongfulness. In addition, this research project is an attempt to bridge the growing gap between stagnant legal norms and ever-changing state practice.

### **2. Research motivation**

Since the terror attacks of 9/11 and the US' subsequent 'global war on terror',<sup>6</sup> there has been a sharp rise in terror attacks emanating from emerging terrorist groups.<sup>7</sup> These groups often operate either from the territory of a sympathetic state or from ungoverned areas of a state.<sup>8</sup> The current technology enables these groups, regardless of their size or means, to launch powerful attacks aimed at inflicting maximum civilian casualties and property damage. Often, the only way for a state to prevent these attacks and exercise its right of self-defence is by striking the non-state group wherever it is based. With the consent of the territorial state, the defending state

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<sup>1</sup> Also known as 'Daesh' or 'the Islamic State of Iraq and Syria (ISIS)', hereafter ISIL.

<sup>2</sup> 'Al Qaeda-linked group strengthens hold in northern Syria' *CNN* 6 November 2013.

<sup>3</sup> 'U.S. forms anti-ISIS coalition at NATO summit' *Time* 5 September 2014.

<sup>4</sup> S/2014/440, 25 June 2014, Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General.

<sup>5</sup> K Bannelier 'Military interventions against ISIL in Iraq, Syria and Libya and the legal basis of consent'. (2016) 29(3) *Leiden Journal of International Law* 24.

<sup>6</sup> 'Transcript of President Bush's address to a joint session of Congress on Thursday night, September 20, 2001' *CNN* 21 September 2001.

<sup>7</sup> T.M. Franck 'Terrorism and the right of self-defence' (2001) 98 *American Journal of International Law* 840.

<sup>8</sup> A few examples are Al Qaeda in Afghanistan, ISIL in Syria or Al Shabab in Somalia.

can lawfully attack and neutralise the non-state actor without violating the prohibition on the use of force.<sup>9</sup> Unfortunately, the territorial state's consent cannot always be obtained.

This research project examines those instances where a state exercising its right to self-defence cannot obtain the territorial state's consent. In the present study, I analyse the legality of the use of force against non-state actors without the territorial state's consent in light of the general prohibition against the use of force. I examine the scope of the right to self-defence as a circumstance precluding the wrongfulness of use of force.

The prohibition against the use of force as contained in article 2(4) of the United Nations (UN) Charter forbids the threat or use of force against the territorial integrity and/or political independence of a member state. This prohibition has crystallised into customary law thereby binding all states regardless of UN membership.<sup>10</sup> This provision appears to be state-centric and does not regulate the use of force against non-state actors. It does, however, regulate extraterritorial use of force against non-state actors since it involves the territorial integrity of another state.<sup>11</sup> This prohibition is not absolute and allows for permissible use of force in the case of self-defence<sup>12</sup> or a UN Security Council resolution to that effect.<sup>13</sup>

Article 51 of the UN Charter is the main exception to the prohibition against the use of force.<sup>14</sup> This provision recognises the right to self-defence available to a state when it is attacked, regardless of the status of the attacker. In terms of this provision, an attack by a non-state group against a state is enough to trigger the right to self-defence. Unfortunately, this provision has been interpreted traditionally as excluding the right to self-defence against non-state actors unless the attacks can be, to some extent, attributed to a state.<sup>15</sup> This interpretation overlooks the fact that non-state actors are capable of orchestrating and launching attacks without the backing of a state. In addition, it disregards the fact that state involvement, even though present, cannot always be proven since it is done covertly. This restrictive approach leaves states defenceless against attacks by non-state actors and does not constitute a reasonable interpretation of the UN Charter.

The right to self-defence in terms of article 51 is not unconditional; it requires an armed attack to have occurred first. In terms of this provision, a state must first incur an attack before it can lawfully defend itself. It is manifest that this approach is problematic in light of the contemporary threats faced by states. Even with knowledge of an imminent

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<sup>9</sup> Art 2(4) of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Hereafter, UN Charter.

<sup>10</sup> O Corten 'The controversies over the customary prohibition on the use of force: A methodological debate (2006) 16 *European Journal of International Law* 803.

<sup>11</sup> M E O'Connell 'The choice of law against terrorism' (2010) 4 *Journal of National Security Law and Policy* 343,359.

<sup>12</sup> Art 51 of the UN Charter.

<sup>13</sup> A Security Council authorisation pursuant to articles 39 and 42.

<sup>14</sup> Y Dinstein *War, aggression, and self-defence* (2005) 15.

<sup>15</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* ICJ (27 June 1986) (1986) ICJ Reports 70. Hereafter, the *Nicaragua* case.

attack, it is still not permissible for states to use force to prevent the attack. In terms of this provision, states are required to wait for the attack to occur first. The drafters of article 51 did not foresee the evolution of technology and its impact on the warfare landscape. Modern weaponry is capable of bringing down an entire state or cause great damage in one strike. This requirement leaves little room for manoeuvre and does not reflect the reality of present-day threats. In the face of these threats, it is self-evident that states cannot be expected to wait for an armed attack to occur before defending themselves. Consequently, it is commonplace in state practice to prevent attacks by using force if necessary.<sup>16</sup>

Self-defence in terms of the UN Charter is quite restrictive and does not offer adequate protection to states seeking to lawfully defend themselves against imminent attacks. Fortunately for states, the right of self-defence is a customary international law principle that predates the UN Charter.<sup>17</sup> This is confirmed by the wording of article 51 of the UN Charter which recognises the 'inherent nature' of self-defence. The word 'inherent' was specifically chosen to emphasise that self-defence as an exception to the prohibition on use of force is the prerogative of every state. This indicates that article 51 was drafted to preserve a right rather than create one. Moreover, the inherent nature of self-defence was explicitly recognised by the UN Security Council in the preamble of Resolution 1368.<sup>18</sup> The right of self-defence in customary international law offers broader protection to states as it does not require an armed attack to occur first. In customary law, it is permissible for a state to defend itself against an imminent attack provided the requirements of necessity and proportionality are met.<sup>19</sup> Furthermore, attacks by a non-state actor need not be attributed to a state in order to trigger the right to self-defence.

This debate involves the sovereignty of the territorial state as well. State sovereignty is the cornerstone of International law.<sup>20</sup> The inviolability of a state's territory is a crucial component of its sovereignty. Consequently, it is important for defending states to obtain the consent of the territorial state. It is recognised as customary law by all states that consent is an exception to the prohibition on the use of force.<sup>21</sup> However, consent cannot always be obtained for numerous reasons: for example, a state is unable to expressly consent due to political pressure<sup>22</sup>, or due to its failed nature,<sup>23</sup> or while the acts of the non- state actors are not directly imputable to the territorial state, the state is nonetheless harbouring them and is unable or unwilling to give consent. At times, defending states cannot attempt to secure the consent first due to time constraints or

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<sup>16</sup> Dinstein (n 14 above) 62.

<sup>17</sup> The *Caroline* incident of 1837. Hereafter, the *Caroline* case.

<sup>18</sup> UN Security Council, Security Council resolution 1368 (2001) 'Threats to international peace and security caused by terrorist acts' 12 September 2001' S/RES/1368 (2001).

<sup>19</sup> Dinstein (n14 above) 60.

<sup>20</sup> M N Shaw *International law* (2014) 27.

<sup>21</sup> It is an accepted premise of law that the consent of a State to an act precludes that act from qualifying as an 'internationally wrongful act.' G.A. Res. 56/83, Annex, art. 20, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

<sup>22</sup> The case of the US drone strikes in Pakistan' *Washington Post* 24 October 2013.

<sup>23</sup> Somalia is an example of a failed state (according to the Fragile State Index) dealing with an extremist group (Al-Shabaab).

risks of leaks within the territorial state's government which would jeopardise the operation.<sup>24</sup> Therefore, depending on the circumstances, it should be permissible for defending states to abstain from seeking the territorial state's consent.

The territorial state's sovereignty and territorial integrity must be balanced against the defending state's right of self-defence. It is submitted that territorial integrity is not just a right but also a duty. This duty entails that a territorial state must not allow its territory to be used by terrorist groups seeking to attack other states. If the territorial state cannot contain a threat within the confines of its territory, it cannot subsequently claim the right to territorial integrity. Concurrently, the defending state cannot be expected to refrain from protecting its own territorial integrity, just to respect the territorial state's integrity. Moreover, an attack on the non-state actor does not amount to an attack on the territorial state since the latter is not the intended target. The territorial state must either contain the threat or allow the defending state to do so. Failure by the territorial state to effectively stop the non-state actors operating from within its territory, coupled with the refusal to give consent to the victim state should give the defending state reasonable cause to circumvent the consent.

### **3. Research questions**

The study of extraterritorial use of force against non-state actors without the consent of the territorial state incorporates the following questions:

- 1.1 Under what conditions is the extraterritorial use of force against non-state actors permissible?
- 1.2 What should be the circumstances in order for the extraterritorial use of force to be employed legally without the consent of the territorial state?
- 1.3 What international law source on the right to self-defence offers protection to states in the fight against transnational terrorism?

### **4. Assumptions**

The study is premised on the following assumptions:

- a. Firstly, I act on the assumption that the general prohibition on the use of force applies to extraterritorial use of force against non-state actors. This general prohibition is assumed to have crystallised into customary international law.
- b. Secondly, I assume that the right to self-defence as an exception to the prohibition on the use of force is an inherent right. Thus, the right to self-defence is a customary international law norm.
- c. I assume further that the right of self-defence as contained in the UN Charter is merely one type of self-defence and does not restrict the customary international law right of self-defence.

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<sup>24</sup> C Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 17.

- d. Lastly, I assume that no right is absolute. Hence, the right to sovereignty and territorial integrity is to be balanced against the right of self-defence.

## 5. Literature review

The legality of extraterritorial use of force in self-defence is determined by the rules of *jus ad bellum*. These rules stipulate when it is legal for a state to use force thereby meeting the requirements of a 'just war'.<sup>25</sup>

The proposed study on the legality of extraterritorial use of force without the territorial state's consent is a topical subject. The UN Charter and the principles of customary international law provide for permissible use of force by states in instances of self-defence. However, to this day there is no clear consensus about the legality of the use of force against non-state actors among academics. Nonetheless, it is manifest that the once predominant view that international law absolutely prohibits use of force against non-state actors is no longer sustainable. This view cannot be adhered to by states that are constantly under threat from non-state groups. This issue has been polarising among academics, making it difficult to unite around an effective formula that reflects state practice. This state of affairs has led to opinions ranging from a permissive interpretation of article 2(4) and the right to self-defence, to conservative positions favouring a restrictive interpretation of the right to self-defence.

### Support for permissive use of force

In the article '*Quo vadis jus ad bellum*', Tom Ruys<sup>26</sup> explores the debate surrounding the permissibility of self-defence against attacks by non-state actors. More specifically, to what extent an attack carried out by a terrorist group may permit a forceful incursion into the territory of a state whose authorities seemingly did not participate in the attack. He states that article 51 of the UN Charter does not specify whether the attacker must be a state or not. Unfortunately, the *Nicaragua* case brought about a different interpretation of the article by requiring the acts of a non-state group to be imputable to a state for self-defence to be permissible.<sup>27</sup> He opines that this interpretation is due to the fact that in the era of decolonisation, a distinction had to be made between freedom fighters and terrorists. He submits that this interpretation does not belong in a post-colonial world. He argues that state practice departed sharply from the *Nicaragua* case interpretation after 9/11. In the years following the vastly supported operation 'Enduring Freedom', a number of states have issued statements attesting to a broad right to self-defence against terrorist groups carrying out cross-border attacks. Ruys provides a few examples demonstrating this, such as, the controversial US *National Security Strategy of 2002*,<sup>28</sup> the statements by Australian Prime Minister Howard following the Bali bombing in 2002<sup>29</sup> and the Russian President Putin's

<sup>25</sup> JL Brierly *The law of nations: An introduction to the international law of peace* (1963) 4.

<sup>26</sup> T Ruys '*Quo vadit jus ad bellum? A legal analysis of Turkey's military operations against the PKK in northern Iraq*' (2008) 9 *Melbourne Journal of International Law*.

<sup>27</sup> *Nicaragua* case (n 15 above) para 195.

<sup>28</sup> The National Security Strategy of the United States of America, September 2002.

<sup>29</sup> Ruys (n 26 above) 22.

declarations against the pro-Chechen rebels operating from Georgia.<sup>30</sup> He also cites the 2004 incursion by the Rwandan army in the DRC to fight the Hutu rebels<sup>31</sup> and Israel's 2006 military intervention against the Hezbollah in Lebanon.<sup>32</sup> This, he believes, is evidence that state practice is evolving towards a more permissive approach vis-à-vis the right to self-defence against attacks by non-state actors. Finally, Ruys recommends that legal norms be developed to meet the recent developments in state practice in order to bridge this 'untenable' gap.<sup>33</sup>

Another notable assenting opinion is from Monica Hakimi in her article 'Defensive force against non-state actors: The state of play'.<sup>34</sup> In this article, Hakimi argues for the balancing of the competing sovereignty interests of the territorial state and the victim state. She too believes that an absolute prohibition on the use of force against non-state actors is not feasible in light of the contemporary threats.<sup>35</sup> Hakimi opines that extraterritorial use of force against non-state actors should be permissible under certain circumstances.<sup>36</sup> These circumstances are: 1) if the territorial State actively harbours or supports the non-State actors, or lacks governance authority in the area from which they operate,<sup>37</sup> (2) if the territorial State is unable or unwilling to address the threat that the non-State actors pose,<sup>38</sup> and (3) the threat is located in the territorial State.<sup>39</sup> However, Hakimi concedes that although the claim that international law absolutely prohibits defensive force against non-state actors is losing traction, it is still present to some extent.<sup>40</sup> This, in her opinion is because the claim is based on article 2(4) of the UN Charter which has acquired peremptory status. Consequently, state practice will need to become as strong and as accepted as article 2(4) for that claim to be defeated completely.<sup>41</sup> Unfortunately, states have yet to unite around a particular legal standard that regulates defensive force against non-state actor.

Lastly, Jordan J Paust in his article on the permissibility of the US drone strikes in Pakistan, analyses the requirement of the territorial state's consent.<sup>42</sup> First, Paust argues that self-defence is a customary international right that predates the UN Charter.<sup>43</sup> This is evidenced by the facts of the *Caroline* incident and the subsequent state practice pre-and post- UN Charter. Secondly, on the subject of consent, he claims that neither consent nor attribution to the foreign state is required for the right to self-defence.<sup>44</sup> He asserts that nothing in article 51 of the UN Charter, or customary

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<sup>30</sup> 'Putin ups Georgia strikes warnings' *BBC News (UK)* 12 September 2002.

<sup>31</sup> 'DR Congo troops to repel Rwanda' *BBC News (UK)* 3 December 2004

<sup>32</sup> Ruys (n 26 above) 23.

<sup>33</sup> Ruys (n 26 above) 32.

<sup>34</sup> M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies*.

<sup>35</sup> Hakimi (n 34 above) 4.

<sup>36</sup> Hakimi (n 34 above) 7.

<sup>37</sup> Hakimi (n 34 above) 8.

<sup>38</sup> Hakimi (n 34 above) 12.

<sup>39</sup> Hakimi (n34 above) 15.

<sup>40</sup> Hakimi (n 34 above) 16.

<sup>41</sup> Hakimi (n 34 above) 16-17.

<sup>42</sup> JJ Paust 'Self-defence targetings of non-state actors and permissibility of US use of drones in Pakistan' (2010) 19.2 *Journal of Transnational Law and Policy*.

<sup>43</sup> Paust (n 42 above) 239.

<sup>44</sup> Paust (n 42 above) 249.

international law or even pre-UN Charter practice requires consent of the territorial state.<sup>45</sup> In fact, he opines that a form of consent already exists in advance by way of treaty.<sup>46</sup> This is based on the fact that as parties to the UN Charter, states have consented to the permissible measures under article 51.

### Support for restrictive use of force

It is now generally accepted that use of force against non-state actors is permissible under certain circumstances. However, there are still some dissenting opinions on the subject amongst academics. These academics favour a restrictive interpretation forbidding the use of force against non-state actors. These arguments are mostly based on the International Court of Justice (ICJ) judgements on the matter. The ICJ has traditionally held the view that defensive force against non-state actors is only permissible if the armed attack is attributable to a state.<sup>47</sup>

In her article titled 'Lawful self-defence to terrorism',<sup>48</sup> Mary Ellen O'Connell argues for a restrictive interpretation of article 51 of the UN Charter. She argues that an attack on the territory of a non-consenting state, even if it is directed at a non-state actor amounts to an attack on the territorial state.<sup>49</sup> O'Connell asserts that using defensive force against a non-state actor on the territory of a non-consenting state amounts to a violation of article 2(4), if the acts of the non-state actors cannot be attributed to the state.<sup>50</sup> O'Connell's arguments are based on the ICJ judgments requiring the non-state's acts to be attributable to a state. However, she concedes that the ICJ has not established the relevant rules of evidence.<sup>51</sup> In the *Corfu Channel* case, the ICJ stated that 'proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt'.<sup>52</sup> In the *Nicaragua* case where the issue of evidence was central to the case, the ICJ referred only to the need for 'direct proof'.<sup>53</sup> As argued above by Ruys, these ICJ judgements must be interpreted with a contextual approach.<sup>54</sup> These cases occurred during the decolonisation era when the ICJ was trying to distinguish acts committed in the fight for self-determination from terrorist activities.<sup>55</sup> This interpretation is not suitable for the contemporary world in light of the threats posed by terrorist groups.

Another prominent dissenting view is held by Dire Tladi. In his article on the non-consenting innocent state, Tladi favours a restrictive interpretation of the right to self-

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<sup>45</sup> Paust (n 42 above) 249.

<sup>46</sup> Paust (n 42 above) 250.

<sup>47</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (19 December 2005) (2005) ICJ Reports paras 146 and 168 and the *Nicaragua* case (n 15 above) para 185.

<sup>48</sup> O'Connell (n 11 above).

<sup>49</sup> O'Connell (n 11 above) 900.

<sup>50</sup> O'Connell (n 11 above) 900- 902.

<sup>51</sup> O'Connell (n 11 above) 895.

<sup>52</sup> *Corfu Channel Case (United Kingdom v. Albania)* (9 April 1949) (1949) ICJ Reports paras 108-109.

<sup>53</sup> *Nicaragua* case (n 15 above) para 191.

<sup>54</sup> Ruys (n 26 above) 33.

<sup>55</sup> Ruys (n 26 above) 35.

defence.<sup>56</sup> He argues against using defensive force on the non-consenting state's territory by proposing a good faith and contextual interpretation of article 51.<sup>57</sup> In this article, Tladi concedes that the claim that nothing in the language of article 51 restricts defensive force to attacks by a state is valid.<sup>58</sup> He also agrees with the argument that the right to self-defence is an inherent right as evidenced by the wording of article 51.<sup>59</sup> However, he contends that article 51 must be interpreted in light of the ICJ judgements on the matter.<sup>60</sup> In the *Nicaragua* case, the ICJ held that an armed attack must be attributable to a state to qualify as such.<sup>61</sup> In the *Armed Activities* case, the ICJ was more explicit and held that defensive force against a non-state actor on the non-consenting state's territory is only permissible if the initial armed attack is attributable to the territorial state.<sup>62</sup> Tladi also refutes the claim that the right to self-defence in terms of customary international law is broad and permissive. He opines that the customary international law right to self-defence originates from the *Caroline* case which occurred at a time when use of force was not prohibited. He asserts that the scope of the right to self-defence should not be interpreted in terms of the *Caroline* case.<sup>63</sup> This, in his opinion is due to the fact that during the *Caroline* case era, use of force was not prohibited and self-defence was a claim used for political expediency.<sup>64</sup> Tladi's arguments are based on the ICJ judgement in the *Nicaragua* case but he does not take into account the context of the *Nicaragua* case despite doing so for the *Caroline* case. In the *Nicaragua* case, the ICJ recognised the need for the rules on the use of force to adapt to new threats and not remain static.<sup>65</sup> Tladi's further argument is that before the UN charter, self-defence was claimed for political expediency.<sup>66</sup> This, in my opinion is irrelevant since the customary law right to self-defence has evolved beyond its *Caroline* incident days. Furthermore, political expediency is often one of the motivations behind states' claims to this day. This does not invalidate the legitimacy of those claims.

### Trend observed

The pattern observed throughout the literature review is clear. Those who favour a permissive interpretation of the right to self-defence rely on state practice as evidence of the development of customary law and a contextual interpretation of article 51. On the other hand, those in favour of a restrictive interpretation of the right to self-defence rely on the ICJ's interpretation of article 51 and tend to disregard customary international law.

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<sup>56</sup>D Tladi 'The non-consenting innocent state: The problem with Bethlehem's Principle 12' (2013) 107.3 *American Journal of International Law*.

<sup>57</sup> Tladi (n 56 above) 571.

<sup>58</sup> Tladi (n 56 above) 571.

<sup>59</sup> Tladi (n 56 above) 572.

<sup>60</sup> Tladi (n 56 above) 572.

<sup>61</sup> Tladi (n 56 above)

<sup>62</sup> *Armed Activities* case (n 34 above) para 146.

<sup>63</sup> *Nicaragua* case (n 15 above) para 195.

<sup>64</sup> Tladi (n 56 above) 573.

<sup>65</sup> *Nicaragua* case (n15 above) para 165.

<sup>66</sup> Tladi (n 56 above) 573.

## **6. Significance of study**

The present study works towards offering a workable solution to bridge the gap between the legal norms and state practice on extraterritorial use of force. I consider this study to be an attempt at developing the existing norms to reflect the current practice.

## **7. Research methodology**

The method of research used is a desktop literature study of the sources of international law.<sup>67</sup> This literature study consists of:

1. Relevant legislation including international customary law, international and regional conventions and UN Security Council resolutions.
2. Relevant judicial decisions by the international court of justice and other relevant international tribunals.
3. Journal articles and books focusing on self-defence, non-state actors and the global fight against terrorism.
4. Relevant reports and statements by governments on self-defence and use of force against non-state actors.
5. Relevant news articles on the selected case study.

## **8. Limitations of the study**

This study focuses on the extraterritorial use of force against non-state actors without the territorial state's consent in cases of self-defence only. Therefore, it is an analysis of the right to self-defence as a permissible reason for the use of force without the territorial state's consent. It focuses on those instances where there is no formal consent. In cases where consent might have been given covertly, I assume there is no consent.

The present study is an analysis limited to the *jus ad bellum*. It focuses on the international law norms governing when a state might lawfully use force. This study does not examine the various aspects of *jus in bello* which are the international law rules governing the conduct of hostilities. The focus of the research study deals with whether states can legally use extraterritorial states against non-state actors without the territorial state's consent.

## **9. Structure of study**

### **Chapter two: The right of self-defence in international law**

This chapter consists of a theoretical analysis of the right to self-defence in international law. It is a critical and doctrinal study of the basic principles of the right to self-defence in general. In addition, this chapter includes the historical evolution of the

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<sup>67</sup> Art 38(1) of the Statute of the International Court of Justice of April 1946.

right to self-defence prior to the UN Charter, the impact of the Charter on the right and its co-existence with the pre-existing right under customary international law.

### **Chapter three: Self-defence against non-state actors**

This chapter focuses on the right to self-defence against non-state actors specifically. It is a critical analysis of the right through state practice, conventions and the ICJ judgements. In addition, it is a detailed study of the scope and nature of the right to self-defence against non-state actors. It is also an enquiry into the options available to the state when an armed attack is imminent or has already occurred. This chapter also analyses the limitations of the right to self-defence against non-state actors.

### **Chapter four: Bypassing the territorial state's consent**

This chapter centres around the territorial state's consent. It is an analysis of the permissibility of bypassing the territorial state's consent. This chapter also includes an in-depth study of the unwilling or unable-standard.

### **Chapter five: Conclusions and recommendations**

This chapter provides the conclusions drawn from the arguments made throughout the study. Moreover, it offers recommendations aimed at bridging the gap in the debate on the right to self-defence.

## **Chapter II: The right of self-defence in international law**

### **1. Historical overview on the prohibition on use of force and the right of self-defence**

The right of self-defence as a permissible form of the use of force exists as a result of the prohibition on the use of force. This prohibition is the purpose behind self-defence claims by states. Without this prohibition, there would be little need for states to claim the right of self-defence. Due to this, the historical development of self-defence goes hand-in-hand with the development of the prohibition on the use of force.

War was not always prohibited; in fact, it was a permissible instrument of policy among states.<sup>1</sup> Although states' right to use force among themselves was largely permitted, it was still limited by the rules and laws of a state. This is due to the fact that international law, at the time, did not regulate the use of force among states.<sup>2</sup> This fell within the purview of each state's national laws. The idea of regulating the right to war is not recent, it may be traced back to ancient Rome. The Romans distinguished between 'just war' (*bellum justum*) and 'unjust war' (*bellum injustum*).<sup>3</sup> In order for a war to be deemed just, there were procedural requirements to be met.<sup>4</sup> Any act of war had to be preceded by an official warning or a demand for satisfaction.<sup>5</sup> If the warning or demand for satisfaction was not heeded, then a formal declaration of war was issued.<sup>6</sup> Any war without a formal warning and declaration was considered unjust and, as such, was declared illegal.<sup>7</sup>

At the fall of the Roman Empire, the just war doctrine was adopted by Christian ideology and invigorated as a moral tenet and a legal norm.<sup>8</sup> According to the Christian philosophers, for a war to qualify as just, it had to meet three requirements: firstly, war had to be conducted under governmental authority, thereby forbidding private wars; secondly, there had to be a just cause for the war; lastly, a just cause was not enough, the purpose of the war had to be the promotion of good over evil.<sup>9</sup> However, by the 19<sup>th</sup> century, the just war doctrine had become obsolete as all warring factions claimed to have a just cause.<sup>10</sup> The just war doctrine as a way to restrict the use of force among states was flawed and ineffective. Consequently, it fell into disuse, leaving war to be

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<sup>1</sup> Y Dinstein *War, aggression and self-defence* (2005) 3-4. For the purpose of this section, I will refer to the use of force as 'war'.

<sup>2</sup> MN Shaw *International law* (2014) 11.

<sup>3</sup> A Nussbaum *A concise history of the law of nations* (1954) 10.

<sup>4</sup> Nussbaum (n 3 above) 10-11.

<sup>5</sup> Nussbaum (n 3 above) 11.

<sup>6</sup> Nussbaum (n 3 above) 11.

<sup>7</sup> C Phillipson *The international law and custom of ancient Greece and Rome* (1911) II 329.

<sup>8</sup> Dinstein (n 1 above) 60.

<sup>9</sup> Dinstein (n 1 above) 60.

<sup>10</sup> JL Brierly *The law of nations: An introduction to the international law of peace* (1963) 4.

regulated by the domestic laws of states. War became the right of any sovereign state, making wars of expansion and conquests permissible.<sup>11</sup>

Since war was considered legal, states rarely claimed self-defence as they did not need to justify their use of force. Yet, such a claim was made by the British government in the *Caroline* incident<sup>12</sup> after using force on United States (US) soil while pursuing a group of Canadian rebels. This self-defence claim was made mainly to appease a powerful ally, but the principles enunciated in this affair laid the foundations of self-defence as a doctrine of customary international law. Daniel Webster,<sup>13</sup> in his correspondence with the British, stated that for self-defence to be justified, there must be 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberations'.<sup>14</sup> These principles were quoted in the Nuremberg trial, more than a century after the *Caroline* case, when assessing Germany's claim that it invaded Norway in self-defence.<sup>15</sup>

After World War I (WWI), it became evident that tighter restrictions needed to be imposed on the use of force. Consequently, in 1928, the Kellogg-Briand Pact<sup>16</sup> came into force, outlawing war as an instrument of national policy except in the case of self-defence. Self-defence was not specifically included in the Pact, it was understood to be a crucial exception to the prohibition and, as such, did not need mentioning. This is evidenced by the formal notes reserving the right of self-defence exchanged by the state parties before signing the Pact.<sup>17</sup> Though war as an instrument of national policy was declared unlawful by the Pact, it remained permissible as an instrument of international policy.<sup>18</sup> In addition, war between states parties to the Pact and the non-contracting parties remained legal as well.<sup>19</sup> Ultimately, the right to war was retained to a great extent. As history shows, this loose prohibition on the use of force was manifestly ill-equipped to prevent the Second World War (WWII).

Following WWII, the Charter of the United Nations<sup>20</sup> was enacted with the express purpose to redress the shortcomings of the Kellogg-Briand Pact. In article 2(4), the Charter went further than prohibiting war, it prohibited all use of force and threats of use of force. Unlike the Pact, the Charter included a specific provision on the inherent right to self-defence available to states. In article 51, the Charter recognised the right to self-defence when states are under attack, until the Security Council has adopted measures to restore peace. It is often argued that article 51 has restricted the right to self-defence as it developed from the *Caroline* incident, but there is no evidence of this in the Charter.<sup>21</sup> Presently, the right to self-defence derives from two sources of

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<sup>11</sup> A Kasczorowska *Public international law* (2010) 696.

<sup>12</sup> The *Caroline incident* of 1837 as set out in Dinstein (n 1 above) 62.

<sup>13</sup> The then US Secretary of State.

<sup>14</sup> Letter of Mr Webster to Mr Fox (April 24, 1841), 29 British and Foreign State Papers, 1840-41 at 1137-38 (1857).

<sup>15</sup> G Mettraux *Perspectives on the Nuremberg trials* (2008) 185; International Military Tribunal (Nuremberg trial) Judgement (1946), 1 I.M.T 171.

<sup>16</sup> The general treaty for the renunciation of war as an instrument of national policy of 1928.

<sup>17</sup> Dinstein (n 1 above) 78.

<sup>18</sup> Dinstein (n 1 above) 79.

<sup>19</sup> Dinstein (n 1 above) 80

<sup>20</sup> The Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Hereafter, UN Charter.

<sup>21</sup> Dinstein (n 1 above) 219.

international law, the UN Charter and customary international law. Both are discussed below.

## **2. The right of self-defence under the UN Charter**

As stated above, the right of self-defence was codified by the UN Charter in article 51. This provision determines that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken 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'.

Article 51 is one of the exceptions to the prohibition on the use of force contained in article 2(4) of the Charter.<sup>22</sup> It is also the sole provision in the Charter allowing a state to unilaterally use force against another state or a non-state actor.<sup>23</sup> Article 51 sets out the procedural and substantive requirements for permissible use of force in self-defence.<sup>24</sup> The following is an analysis of the elements of self-defence under article 51.

### **2.1 Individual or collective self-defence**

Individual self-defence is a straightforward concept. It entails the right of an aggrieved state to respond to unlawful force with lawful force. It is the fundamental right of every state to defend itself from an armed attack.<sup>25</sup> This right is not an obligation; a state may opt to either use force in self-defence or use other diplomatic means.

In some cases, a state may not have the means to defend itself against a powerful enemy on its own.<sup>26</sup> For this reason, article 51 provides for collective self-defence to enable allies to help defend an aggrieved state.<sup>27</sup> Collective self-defence refers to the right of states to use military force to defend another state.<sup>28</sup> This right can take two forms: collective self-defence individually exercised and collective self-defence collectively exercised.<sup>29</sup> Whatever form it takes, the legality of collective self-defence is entirely dependent upon the legality of the right of individual self-defence.<sup>30</sup> This means that the claim of self-defence by the aggrieved state must be valid for collective self-defence to be valid.<sup>31</sup> In essence, collective self-defence is not technically self-defence but rather the defence of another state.<sup>32</sup>

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<sup>22</sup> The second exception is a Security Council authorisation pursuant to articles 39 and 42.

<sup>23</sup> C Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al-Qaida and Iraq' (2003) 4:7 *San Diego International Law Journal* 11.

<sup>24</sup> Dinstein (n 1 above) 183.

<sup>25</sup> *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996) (1996) *ICJ Reports* 66 paras 226, 263.

<sup>26</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/mn.html> (accessed on 02/08/2016). According to the CIA World Fact book, there are currently 21 states without armed forces or a standing military.

<sup>27</sup> J Kunz 'Individual and collective self-defence in article 51 of the Charter of the United Nations' (1947) 41.4 *American Journal of International Law* 873.

<sup>28</sup> Shaw (n 2 above) 831.

<sup>29</sup> Dinstein (n 1 above) 222.

<sup>30</sup> Kunz (n 27 above) 875.

<sup>31</sup> Kunz (n 27 above) 876.

<sup>32</sup> Kunz (n 27 above) 877.

The right to assist an allied state defend itself is not unconditional. Indeed, in the *Nicaragua* case,<sup>33</sup> the International Court of Justice (ICJ) made it clear that it is not up to the states defending an aggrieved state to determine whether that state has been a victim of an armed attack warranting collective self-defence.<sup>34</sup> The defending state must be the one determining that it suffered an armed attack and must request the military intervention of its allies. The states claiming collective self-defence cannot of their own accord, help defend another state without a formal request.<sup>35</sup> This view was implicitly confirmed in the *DRC v Uganda* case,<sup>36</sup> when the ICJ held that 'a state may invite another state to assist it in using force in self-defence'. However, the specifics of this invitation are not clearly established. Due to this, it is still unclear whether the invitation must be specifically addressed to the intervening states or whether the invitation can be a general call for help.<sup>37</sup> What is certain however, is that the invitation must emanate from the internationally recognised government of the defending state.<sup>38</sup> This government is not required to have effective control over the entirety of the state.<sup>39</sup> As long as there are no other internationally backed governments within that state, the incumbent government retains the right to request military intervention.<sup>40</sup>

## **2.2 The armed attack requirement**

It is clear from the wording of article 51 that an armed attack is the *conditio sine qua non* of the right of self-defence. This prerequisite is the most important criterion as it is required to trigger self-defence, whether individual or collective.<sup>41</sup>

The requirement that an armed attack has to occur first undoubtedly excludes anticipatory and pre-emptive measures of self-defence in terms of the Charter. The view that the preparation of an armed attack in its final stages constitutes an armed attack in progress and, as such, should be enough to trigger self-defence in terms of article 51, is an attempt to read anticipatory and pre-emptive self-defence into article 51 and unduly broaden it.<sup>42</sup> This is unnecessary, considering the fact that these rights are available under customary international law.

Article 51 requires the attack to be armed to trigger self-defence. The choice of weapon by the attacker is irrelevant.<sup>43</sup> The weapon can be conventional or not, sophisticated or not.<sup>44</sup> This is especially significant in the contemporary world when cyber-attacks

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<sup>33</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (27 June 1986) (1986) *ICJ Reports* 39.

<sup>34</sup> *Nicaragua* case (n 33 above) para 195.

<sup>35</sup> *Nicaragua* case (n 33 above) para 199.

<sup>36</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (19 December 2005) (2005) *ICJ Reports* 168 para 128.

<sup>37</sup> JA Green *The International Court of Justice and self-defence in international law* (2009) 52.

<sup>38</sup> E De Wet 'The modern practice of intervention by invitation in Africa and its implication for the prohibition of the use of force' (2015) 26 *European Journal of International Law* 982-987.

<sup>39</sup> De Wet (n 38 above) 985.

<sup>40</sup> De Wet (n 38 above) 998.

<sup>41</sup> *Nicaragua* (n 33 above) para 195, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ (6 November 2003) (2003) *ICJ Reports* paras 51 and 71, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ (9 July 2004) (2004) *ICJ Reports* 136 para 131.

<sup>42</sup> Dinstein (n 1 above) 178.

<sup>43</sup> Dinstein (n 1 above) 170.

<sup>44</sup> Dinstein (n 1 above) 170.

can cause casualties and damage to property without a single shot being fired. Requiring an attack to be armed excludes threats of use of force as sufficient to trigger the right of self-defence. Even though threats of use of force are proscribed by article 2(4), only actual armed attacks may trigger self-defence in terms of the Charter. Mere threats and even declarations of war that are not accompanied with acts will not trigger the right of self-defence.<sup>45</sup> This is in line with the exclusion of the right of pre-emptive and/or anticipatory self-defence by article 51.<sup>46</sup> Since threats are not enough to trigger self-defence, the threatened state cannot use preventive force to counter such threats.<sup>47</sup> In terms of the Charter, a threatened state's only options are to wait and prepare to counter the attack when it occurs.<sup>48</sup>

The launch of an armed attack, thus, is crucial to the claim of self-defence. Self-defence becomes available to the victim state the minute the armed attack begins.<sup>49</sup> Identifying the start of an attack helps to identify the attacker in instances of competing self-defence claims.<sup>50</sup> The beginning of an armed attack, however, is only the first part of the requirement. The second key component is the scale of the armed attack.<sup>51</sup> There is a minimum threshold for an armed attack to trigger self-defence.<sup>52</sup> It must be more than isolated criminal acts or frontier incidents.<sup>53</sup> The ICJ confirmed this by making a distinction between the gravest forms of use of force that amount to armed attack and other less grave forms.<sup>54</sup> Small-scale uses of force do not amount to an armed attack but an accumulation of said small attacks might cross the threshold and collectively amount to an armed attack for the purposes of article 51.<sup>55</sup>

Article 51 does not specify the required locale of an attack. This is because an attack against a state does not necessarily occur on the state's territory.<sup>56</sup> An attack can be directed at a state's interests outside of its territory, such as an embassy, a ship, a military base, and so on. What matters is the target of the attack itself, not the area of the attack.<sup>57</sup> The most notable example of an attack against a state outside of its territory, is the *Tehran* case.<sup>58</sup> In November 1979, Iranian militants seized the US embassy in Tehran and took the staff as hostages. The ICJ qualified this as an armed attack against the US for the purpose of article 51, even though it did not occur on US soil.<sup>59</sup> The fact that there is no territorial element to the armed attack requirement allows article 51 to cover a new kind of armed attack that did not exist before, namely, cyber-attacks. As I mentioned above, cyber-attacks can cause casualties and property damage and they can be launched and executed from anywhere.

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<sup>45</sup> E Miller 'Self-defence, International law and the 6 days' war' (1985) 20 *Israel Law Review* 58-60.

<sup>46</sup> ME O'Connell 'The choice of law against terrorism' (2010) 4 *Journal of National Security Law and Policy* 346.

<sup>47</sup> Green (n 37 above) 25.

<sup>48</sup> Dinstein (n 1 above) 167.

<sup>49</sup> Dinstein (n 1 above) 169.

<sup>50</sup> Dinstein (n 1 above) 170.

<sup>51</sup> Green (n 37 above) 32.

<sup>52</sup> *Nicaragua* (n 33 above) para 195.

<sup>53</sup> Dinstein (n 1 above) 173-176.

<sup>54</sup> *Nicaragua* (n 33 above) para 110.

<sup>55</sup> *Oil platforms* (n 41 above) para 64.

<sup>56</sup> Dinstein (n 1 above) 177.

<sup>57</sup> Green (n 37 above) 43.

<sup>58</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran* ICJ (1980) ICJ Reports 3.

<sup>59</sup> *Tehran* (n 58 above) para 29.

Article 51 does not specify the identity of the attacker.<sup>60</sup> This has led to a fierce debate among scholars about whether an armed attack must emanate from a state or a non-state actor to trigger self-defence.<sup>61</sup> From the perspective of the threshold requirement alone, the identity of the attacker is immaterial.<sup>62</sup> Terrorist groups can carry out attacks grave enough to amount to armed attacks in terms of article 51. A clear example of this is the 9/11 attacks against the US. These attacks were held to be armed attacks even though they were committed by non-state actors.<sup>63</sup> The controversy about the identity of the attacker lies not in the armed attack element but rather its consequences. The victim state using defensive force against a non-state actor, will inevitably direct said force at another state if the non-state actor operates extraterritorially.<sup>64</sup> The identity of the attacker is discussed further in the following chapter.

### **2.3 The Procedural requirements of article 51**

The other requirements of article 51 are procedural in nature. Article 51 requires the state to report the measures taken in self-defence to the Security Council.<sup>65</sup> Furthermore, the right to self-defence must come to an end when the Security Council takes the measures necessary to maintain peace and security.<sup>66</sup>

The duty to report to the Security Council is important for a successful claim of self-defence.<sup>67</sup> Failure to report by a state claiming self-defence does not invalidate the claim, but it carries an evidential burden that weakens its case.<sup>68</sup> Ultimately, the requirement to report is not a *conditio sine qua non* of the right of self-defence. This is evidenced by state practice due to states continuously failing to report self-defence measures to the Security Council.<sup>69</sup>

Due to the second procedural requirement, self-defence in terms of the UN Charter is a temporary right. This requirement is called the 'until clause'<sup>70</sup> because it suspends the right of self-defence when the Security Council has taken measures to restore security. However, it is still unclear what qualifies as Security Council measures taken to maintain peace and security,<sup>71</sup> especially since some measures may not be effective or robust enough to restore peace. For example, economic sanctions imposed by the Security Council in lieu of the necessary military intervention cannot end the right of self-defence. Accordingly, it is evident that not all Security Council

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<sup>60</sup> T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal of Conflict and Security Law* 289, 291.

<sup>61</sup> L Arimatsu & MN Schmitt 'Attacking 'Islamic State' and the Khorasan Group: Surveying the international law landscape' (2008) 9 *Melbourne Journal of International Law* 19-21.

<sup>62</sup> *DRC v Uganda* (n 36 above) para 146.

<sup>63</sup> UN Security Council, Security Council resolution 1368 (2001) 'Threats to international peace and security caused by terrorist acts' 12 September 2001' S/RES/1368 (2001).

<sup>64</sup> The extraterritorial use of force against non-state actor is discussed in detail in another chapter.

<sup>65</sup> Dinstein (n 1 above) 186.

<sup>66</sup> T Ruys 'Quo vadit jus ad bellum: An analysis of Turkey's military operations against the PKK in Northern Iraq' (2008) 9 *Melbourne Journal of International Law* 15

<sup>67</sup> Ruys (n 66 above) 14-15.

<sup>68</sup> *Nicaragua* (n 33 above) paras 105, 121.

<sup>69</sup> Ruys (n 66 above) 16 and Dinstein (n 1 above) 190.

<sup>70</sup> Ruys (n 66 above) 14.

<sup>71</sup> DW Greig 'Self-defence and the Security Council: What does article 51 require?' (1991) 40 *International and Comparative Law Quarterly* 366.

measures suspend the right of self-defence. Some measures by the Security Council merely complement the defensive actions taken by a state.<sup>72</sup>

### **3. The inherent right of self-defence under customary international law**

Since the enactment of the UN Charter and article 51 in particular, there has been a fierce debate among scholars about the scope of the right of self-defence.<sup>73</sup> The views favouring a restrictive right of self-defence argue that article 51 has restricted the right of self-defence.<sup>74</sup> They hold that self-defence is now available only in those instances where an armed attack has already occurred. This school of thought is mainly based on a few quotes from ICJ judgements. Indeed, in the *Nicaragua* case, the ICJ held that an armed attack is a *conditio sine qua non* of the right of self-defence.<sup>75</sup> Similarly, in the *Oil Platforms* case, the ICJ held that a state must first suffer an armed attack in order to qualify for self-defence in terms of article 51.<sup>76</sup> However, these specific quotes should be interpreted contextually. The *Nicaragua* judgment was specifically tailored to the facts of the case. The ICJ made it clear that this judgement was made in the case of self-defence after an attack has already occurred.<sup>77</sup> As such, the ICJ held that this judgment should have no impact on the right to self-defence in case of an imminent attack.<sup>78</sup> The ICJ has never explicitly rejected anticipatory or pre-emptive self-defence.<sup>79</sup> In fact, although the ICJ has not confirmed the lawfulness of anticipatory or pre-emptive self-defence, it did imply that if such force was permissible, it should be lawful in cases of threatened armed attack rather than mere threatened use of force.<sup>80</sup>

Self-defence in terms of customary international law is an inherent right that predates the UN Charter.<sup>81</sup> Article 51 is the codification of one type of self-defence, namely after an armed attack has occurred.<sup>82</sup> There are two other types of self-defence under customary law.<sup>83</sup> The first one is anticipatory self-defence which entails using force to counter an imminent threat. The second one is pre-emptive self-defence which is force taken in response to a more remote threat.<sup>84</sup>

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<sup>72</sup> UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001).

<sup>73</sup> Ruys (n 66 above); M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies*; JJ Paust 'Self-defence targetings of non-state actors and permissibility of US use of drones in Pakistan' (2010) 19.2 *Journal of Transnational Law and Policy*; ME O'Connell 'Lawful self-defence to terrorism' (2002) 63 *University of Pittsburgh Law Review*; D Tladi 'The non-consenting innocent state: The problem with Bethlehem's Principle 12' (2013) 107.3 *American Journal of International Law*.

<sup>74</sup> Dinstein (n 1 above) 168.

<sup>75</sup> *Nicaragua* (n 33 above) para 195.

<sup>76</sup> *Oil Platforms* (n 41 above) paras 51 & 71.

<sup>77</sup> *Nicaragua* (n 33 above) paras 102-106.

<sup>78</sup> *Nicaragua* (n 33 above) para 194.

<sup>79</sup> *Nicaragua* (n 33 above) para 194 and *Oil platforms* (n 41 above) para 143.

<sup>80</sup> *Nicaragua* (n 33 above) 35.

<sup>81</sup> Paust (n 73 above) 242.

<sup>82</sup> C Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *International Law Journal* 13.

<sup>83</sup> Hakimi (n 73 above) 16.

<sup>84</sup> Hakimi (n 73 above) 16.

### **3.1 Anticipatory self-defence**

The concept of anticipatory self-defence is the foundation of self-defence under customary international law.<sup>85</sup> The right to self-defence under customary international law originates from the principles enunciated in the *Caroline* case.<sup>86</sup> The *Caroline* incident involved the use of force by the British to foil an imminent attack by Canadian rebels.<sup>87</sup> It was held in this case, that an armed attack does not need to occur first for the right to self-defence to apply. The *Caroline* principles require the necessity of self-defence to be ‘instant, overwhelming and leaving no choice of means, and no moment for deliberations’.<sup>88</sup>

Modern weaponry has made it increasingly difficult to sustain the claim that article 51 has restricted the right to self-defence by excluding anticipatory self-defence.<sup>89</sup> In terms of article 51, the only options available to a state facing an imminent attack are to prepare and report the attacks to the Security Council. This ignores the fact that ballistic missiles and other weapons of mass destruction can threaten the very existence of a state with one strike. The Israeli Six Days War is an example of a situation where a state’s survival was threatened by an imminent attack.<sup>90</sup> Israel’s claim that it used permissible force against Egypt to prevent an imminent attack was met with approval from the other states.<sup>91</sup>

### **3.2 Pre-emptive self-defence and the ‘Bush’ doctrine**

Pre-emptive self-defence in terms of customary international law entails the use of defensive force in response to a remote threat.<sup>92</sup> The threat is considered to be remote because the exact time and/or location of the attack is uncertain. However, the threat itself is real and states may use force to prevent it.<sup>93</sup>

The gravity of the threat posed by modern weaponry coupled with the danger posed by terrorist groups are the main reasons behind pre-emptive force nowadays.<sup>94</sup> Long-range missiles, nuclear weapons and other weapons of mass destruction have altered the concept of an imminent attack.<sup>95</sup> A state under the threat of a weapon of mass destruction, cannot wait until the weapon has been launched.<sup>96</sup> In fact, a state cannot wait until such weapons are in the possession of dangerous elements.<sup>97</sup> Moreover, it is much more difficult to ascertain the exact time and place of an attack by a terrorist

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<sup>85</sup> L Van den hole ‘Anticipatory self-defence under international law’ (2003) 19.1 *American University International Law Review* 80.

<sup>86</sup> Van den hole (n 85 above) 73.

<sup>87</sup> Paust (n 73 above) 242.

<sup>88</sup> Letter of Mr. Webster to Mr. Fox (April 24, 1841), 29 British and Foreign State Papers, 1840-41 at 1137-38 (1857).

<sup>89</sup> Van den hole (n 85 above) 78.

<sup>90</sup> Greenwood (n 82 above) 14.

<sup>91</sup> Greenwood (n 82 above) 14.

<sup>92</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 55.

<sup>93</sup> Lubell (n 92 above) 56.

<sup>94</sup> Lubell (n 92 above) 60.

<sup>95</sup> Greenwood (n 82 above) 16.

<sup>96</sup> Dinstein (n 1 above) 172.

<sup>97</sup> Dinstein (n 1 above) 172.

group than by a regular army.<sup>98</sup> Thus the need for the right to pre-emptive self-defence against a threat that is remote but certain.

After the 9/11 attacks, a new and broader right to pre-emptive self-defence called the 'Bush doctrine' emerged. Named after former US president George W. Bush, this doctrine entails among other things, the use of preventive wars to neutralise threats against the United States.<sup>99</sup> The first 'codification' of this doctrine is found in the US National Security Strategy.<sup>100</sup> This document describes to some extent what this imprecise doctrine entails. According to the US National Security Strategy, the purpose of the Bush doctrine is to prevent US adversaries from acquiring weapons of mass destruction (WMD).<sup>101</sup> The US government claims it has the duty to anticipate and counter threats before they can materialise.<sup>102</sup> This duty allows the US to use preventive wars to stop 'rogue states and their terrorist clients'<sup>103</sup> from acquiring WMDs. The rationale behind this, is that adversaries, regardless of their nature and motivations are determined to acquire these weapons.<sup>104</sup> Once in possession of said weapons, these adversaries are likely to use them.<sup>105</sup> They argue that the intention to acquire WMDs coupled with a dubious human rights record is enough to empower the US to use force.<sup>106</sup> It is submitted that this right to unilaterally use force against any perceived threats, unduly broadens the right to self-defence and flouts the principles of necessity and proportionality under international law.

Any doctrine of international law must be applicable to all parties and may not deviate from the fundamental structure of international law.<sup>107</sup> However, the Bush doctrine as it stands, may only be applied by the US government.<sup>108</sup> Even if this principle was to be interpreted as giving all states the right to use preventive wars, it would result in the complete annihilation of article 2(4) of the UN Charter. This interpretation would confer on all states the right to unilaterally use force in contravention of the UN Charter and the principles of customary international law.<sup>109</sup>

Despite all the criticism against the Bush doctrine, there are some who argue that the use of preventive wars is permissible under international law.<sup>110</sup> They argue that the Bush doctrine is not a novelty; in fact, the concept of preventive wars has always been part of American strategic thinking.<sup>111</sup> In addition, they claim this concept was endorsed by Winston Churchill himself when he argued that there was no need to put off war when 'the safety of the State, the lives and freedom of their own fellow

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<sup>98</sup> Lubell (n 92 above) 35.

<sup>99</sup> National Security Strategy of the United States of America (17 September 2002) (2002) hereafter, US National Security Strategy.

<sup>100</sup> RG Kaufman *In defence of the Bush doctrine* (2007) 3.

<sup>101</sup> US National Security Strategy (n 99 above) 13.

<sup>102</sup> US National Security Strategy (n 99 above) 14.

<sup>103</sup> US National Security Strategy (n 99 above) 14.

<sup>104</sup> US National Security Strategy (n 99 above) 14.

<sup>105</sup> US National Security Strategy (n 99 above) 13.

<sup>106</sup> US National Security Strategy (n 99 above) 13.

<sup>107</sup> JR Paul 'The Bush doctrine: Making or breaking of customary international law' (2004) 27 *Hastings International and Comparative Law Review* 458.

<sup>108</sup> Paul (n 107 above) 458.

<sup>109</sup> Paul (n 107 above) 459.

<sup>110</sup> RJ Delahunty & J Yoo 'The Bush doctrine: Can preventive war be justified?' (2009) 32 *Harvard Journal of Law and Policy*; P Bobbit *Terror and consent: The wars for the twenty-first century* (2008) and Kaufman (above).

<sup>111</sup> Delahunty (n 109 above) 4.

countrymen, to whom they owe their position, make it right and imperative in the last resort.<sup>112</sup> This statement is often quoted out of context by the pro-Bush doctrine camp. Winston Churchill was not arguing for the use of preventive war against a remote, uncertain and unlikely threat. Rather, he was arguing against the policy of appeasement in the context of the WWII.<sup>113</sup> He argued for using war to prevent a certain and imminent threat and only as a last resort. This is a far cry from the Bush doctrine which allows the use of war because a potential adversary might acquire WMD and might use them against the US.<sup>114</sup>

Another common argument for the Bush doctrine lies in the intent behind preventive wars. It is argued that preventive wars are used by the US with the aim to protect civilians.<sup>115</sup> Indeed, they claim that these wars prevent dangerous elements from acquiring WMD and using them to kill innocent civilians. They claim that as such, preventive wars are fundamentally the same as humanitarian interventions.<sup>116</sup> This absurd conjecture disregards the fact that humanitarian interventions are for those situations where the threat is imminent or has already materialised.<sup>117</sup> Humanitarian interventions are aimed at ending or preventing widespread and grave human rights violations.<sup>118</sup> During these interventions, only the force necessary to protect the civilians is used.<sup>119</sup> In contrast, the Bush doctrine advocates the unilateral use of war to prevent a threat that may never materialise and ignores the principles of necessity and proportionality.

In a bid to sway public opinion on the Bush doctrine, the pro-Bush doctrine camp has gone as far as questioning the binding nature of the UN Charter.<sup>120</sup> They argue that countless wars have been fought without the backing of a UN Security Council Resolution and in direct contravention of the UN Charter.<sup>121</sup> They reason that this practice by states calls into doubt whether the UN Charter is still legally binding.<sup>122</sup> This amounts to questioning whether widespread non-compliance with a rule of international law can crystallise into customary international law.<sup>123</sup> Regardless of whether or not it is possible for a rule-breaking practice to evolve into customary international law, the rule in question is the prohibition against the use of force. This prohibition is a peremptory norm of international law<sup>124</sup> and, as such, no derogation is permitted.<sup>125</sup> Besides, a peremptory norm of international law can only be modified by a subsequent norm of the same nature.<sup>126</sup> In the unlikely event that the Bush doctrine

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<sup>112</sup> WS Churchill *The Gathering Storm: The Second World War* Volume 1 (1948) 320.

<sup>113</sup> RJ Evans *The Third Reich in Power* (2006) 646–58.

<sup>114</sup> US National Security Strategy (n 99 above) 14.

<sup>115</sup> Delahunty (n 110 above) 5.

<sup>116</sup> Delahunty (n 110 above) 5-7.

<sup>117</sup> JL Holtzgreve & R Keohane *Humanitarian intervention: Ethical, legal and political dilemmas* (2003) 15.

<sup>118</sup> D J Shaffer 'Towards a modern doctrine of humanitarian intervention' 23 *University of Toledo Law Review* (1992) 266.

<sup>119</sup> Holtzgreve & Keohane (n 117 above) 18.

<sup>120</sup> Delahunty (n 110 above) 4.

<sup>121</sup> Delahunty (n 110 above) 3.

<sup>122</sup> Delahunty (n 110 above) 3-6.

<sup>123</sup> Paul (n 107 above) 462.

<sup>124</sup> JA Green 'Questioning the peremptory status of the prohibition of the use of force' (2011) 32 *Michigan Law Review* 220.

<sup>125</sup> Article 53 of the Vienna Convention on the Laws of Treaties (VCLT) of 23 May 1969.

<sup>126</sup> Article 53 of the VCLT.

manages to evolve into customary international law, it would still be unable to replace a peremptory norm of international law.<sup>127</sup>

#### **4. Necessity and proportionality in self-defence**

The principles of necessity and proportionality are the standard requirements of any action in the international law sphere.<sup>128</sup> Any defensive force, undertaken in terms of article 51 or customary international law, whether collective or individual, needs to be proportional and necessary.<sup>129</sup> These principles impose limits on all forms of self-defence.<sup>130</sup>

The principle of necessity requires a state to only use force as a last resort.<sup>131</sup> The defending state must have no other options than to use force. If the desired results can be achieved through diplomatic means, the defending state has the duty to opt for the more peaceful avenue.<sup>132</sup> The proportionality requirement on the other hand, is meant to ensure that the defending state's response corresponds to the initial attack or to the threatened attack.<sup>133</sup> This does not mean that the defending state needs to use the same weapons used in the initial attack or the same style of attack.<sup>134</sup> It means that the defending state must use just enough force to defend itself and restore peace and security.<sup>135</sup> The right to self-defence does not give a state leave to engage in a retaliatory or punitive campaign.<sup>136</sup>

The requirement that defensive force needs to be necessary and proportionate originates from the *Caroline* case.<sup>137</sup> Indeed, the *Caroline* case laid the foundations for the necessity and proportionality test.<sup>138</sup> In terms of this case, any force used in self-defence must be in response to a threat that is imminent and there must be no other alternative available.<sup>139</sup> Moreover, the use of force must be proportionate to the threat. The authority of the necessity and proportionality test set by the *Caroline* case has long been the subject of many debates among academics.<sup>140</sup> However, it cannot be denied that the so-called '*Caroline test*' has had a significant impact on the use of force debate, especially in the post-Charter era. The *Caroline* test has been invoked by numerous states claiming they used necessary and proportional defensive force.<sup>141</sup>

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<sup>127</sup> *Prosecutor v Furundzija* International Criminal Tribunal for the Former Yugoslavia (ICTY) (1998) International Law Reports (2002) 213 para 121, where it was held that 'peremptory norms cannot be violated by any state through international treaties or local or special customs or even general customary rules not endowed with the same normative force'.

<sup>128</sup> J Gardam *Necessity, proportionality and the use of force by states* (2004) 3.

<sup>129</sup> *Nicaragua* (n 33 above) para 103, *Legality of threats* (n 25 above) paras 226,245; *Oil Platforms* (n 41 above) paras 161,183; *DRC v Uganda* (n 36 above) paras 168,223.

<sup>130</sup> *Legality of the threat* (n 25 above) para 141; *Nicaragua* (n 33 above) para 237.

<sup>131</sup> Gardam (above) 5.

<sup>132</sup> J Crawford *Bownlie's principles of public international law* (2008) 749.

<sup>133</sup> Gardam (n 128 above) 5.

<sup>134</sup> Dinstein (n1 above) 209.

<sup>135</sup> Green (n 1 above) 95.

<sup>136</sup> Dinstein (n 1 above) 203.

<sup>137</sup> Green (n 124 above) 70.

<sup>138</sup> Green (n 124 above) 72.

<sup>139</sup> Green (n 124 above) 72.

<sup>140</sup> KN Trapp 'Back to basics: Necessity, proportionality and the right to self-defence against non-state terrorist actors' (2007) 56 *International and Comparative Law Quarterly*; Kretsmer D 'The inherent right to self-defence and proportionality in *Ius Ad Bellum*' (2013) 24 *European Journal of International Law*.

<sup>141</sup> Green (n 124 above) 78.

In 1980, Iraq specifically invoked the *Caroline* test to justify its use of force against Iran.<sup>142</sup> Likewise, both Israel and Uganda used the *Caroline* test with regards to the hostage situation at the Entebbe airport in 1976.<sup>143</sup> Israel was defending its actions in protecting its nationals while Uganda was condemning them as unnecessary and disproportionate.<sup>144</sup>

Although necessity and proportionality are requirements for the use of defensive force, they have had a great impact on the legitimacy of the self-defence claim itself.<sup>145</sup> In the *Nicaragua* case, the invalidity of the self-defence claim by the US was confirmed when it failed the necessity and proportionality test.<sup>146</sup> This means that while the necessity and proportionality test was meant to limit the violence, it has now evolved into a tool used to assess the legality of the use of force.<sup>147</sup> The UN Security Council often avoids taking a stance on the scope of self-defence by assessing the legality of the use of force based on the necessity and proportionality test.<sup>148</sup> Therefore, rather than have a self-defence claim judged on its merit and consequently adopt a formal position on the scope of self-defence, the validity of the claim will rest on whether the force used was necessary and proportionate.<sup>149</sup> However, this practice is not all bad since it has led to using the necessity and proportionality test to help distinguish between lawful self-defence from unlawful reprisals.<sup>150</sup> Reprisals are not acts of defence, they are deliberate and wrongful acts of revenge.<sup>151</sup> The intent behind reprisals is not to defend a state but rather to punish another state for breaking a rule of international law.<sup>152</sup> Reprisals are not necessary or proportionate to the attack suffered. An illustration of this can be found in the so-called 'pinprick theory' otherwise known as the 'accumulation of events theory'. The pinprick theory entails the claim that a state that has suffered repeated cross-border incursions may use defensive force not in response to each small incursion but rather in response to the accumulation of incursions that amount to a significant armed attack.<sup>153</sup> Essentially, this claim would allow states to use a disproportionate amount of force in response to small scale cross-border incursions. To this day the stance of the Security Council on this theory is still unclear as it has not issued an explicit condemnation or approval of the theory.<sup>154</sup> The Security Council has had the opportunity to adopt a position on this issue three times and failed to do so.<sup>155</sup> While it did condemn the unnecessary and disproportionate responses by South Africa, Israel and Portugal, it only did so based strictly on the facts of these cases.<sup>156</sup> It avoided addressing any of the doctrinal issues pertaining to the scope of self-defence and the requirements of necessity and

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<sup>142</sup> UN Doc. S/PV.2250 (1980) para 23-25.

<sup>143</sup> UN Doc. S/PV.1939 (1976) para 57.

<sup>144</sup> UN Doc. S/PV.2282 (1981) paras 6-7.

<sup>145</sup> C Gray *International law and the use of force* (2000) 106.

<sup>146</sup> *Nicaragua* (n 33 above) paras 141, 143.

<sup>147</sup> Gray (n 145 above) 107.

<sup>148</sup> Gray (n 145 above) 107.

<sup>149</sup> Gray (n 145 above) 107.

<sup>150</sup> Gray (n 145 above) 107.

<sup>151</sup> Dinstein (n 1 above) 195.

<sup>152</sup> Dinstein (n 1 above) 194.

<sup>153</sup> Gray (n 145 above) 108.

<sup>154</sup> FM Higginbottom 'International law and the use of force in self-defence and the Southern Africa conflict' (1987) 25 *Columbia Journal of Transnational Law* 529.

<sup>155</sup> Higginbottom (n 154 above) 530.

<sup>156</sup> Higginbottom (n 154 above) 529- 530.

proportionality.<sup>157</sup> A similar approach was adopted by the ICJ in the *Nicaragua* case when it recognised that the pinprick theory was possible but only based on the facts of each case.<sup>158</sup> This is due to the fact that there was very little information about whether there had been an accumulation of events that amounted to an armed attack.<sup>159</sup> The ICJ also adopted a similar approach in the *Oil Platforms* case<sup>160</sup> and in the *Cameroon v Nigeria* case<sup>161</sup> when it reaffirmed the possibility that an accumulation of events may amount to an armed attack. However, even then, the ICJ stressed that it depended on the fact of each case.

The necessity and proportionality test has also been used to reject the use of a self-defence claim as a valid title to the territory of a sovereign state.<sup>162</sup> Therefore, a state cannot use its right to self-defence, however legitimate it might be, to occupy a portion of the territory of another state. This is due to the fact that an occupation in self-defence does not meet the necessity and proportionality test.<sup>163</sup> Consequently, states that use the right to self-defence as justification for occupation, often see their claims denied. This was the case when Israel claimed its occupation of a portion of South Lebanon from 1978 to 2000 was part of its defensive strategy.<sup>164</sup> Similarly, South Africa used the same claim to justify its presence in Angola from 1981 to 1988.<sup>165</sup> Both claims were universally condemned as unnecessary and disproportionate measures of self-defence.

Necessity and proportionality are the requirements of any use of force in international law. This is especially important in cases of self-defence due to the fact that non-compliance with these requirements might have an invalidating effect on the claim. The importance of these requirements cannot be understated; they constitute the difference between lawful use of force in self-defence and unlawful reprisals and punitive campaigns.

## **5. Conclusion**

The right of self-defence in international law is the prerogative of every threatened state. As such, it cannot be unduly restricted by an erroneous interpretation of article 51. It is evident that article 51 was never intended to replace the pre-existing right of self-defence but rather to highlight a specific form of self-defence. Article 51 was drafted specifically for those instances when a state has suffered an armed attack. For those states facing an impending threat, there is the right of self-defence as provided for by customary international law. However, as are all uses of force in international law, the right of self-defence is limited by the requirements of necessity and proportionality.

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<sup>157</sup> Higginbottom (n 154 above) 530.

<sup>158</sup> *Nicaragua* (n 33 above) para 231

<sup>159</sup> *Nicaragua* (n 33 above) para 110.

<sup>160</sup> *Oil Platforms* case (n 41 above) paras 71-72.

<sup>161</sup> *Case concerning land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* merits ICJ (2002) ICJ Reports 9 paras 323-324.

<sup>162</sup> Dinstein (n 1 above) 239.

<sup>163</sup> Dinstein (n 1 above) 139-140.

<sup>164</sup> G Luft 'Israel's security zone in Lebanon – a tragedy?' (2000) 7 *Middle East Quarterly* 14.

<sup>165</sup> Higginbottom (n 154 above) 530.



## **Chapter III: Self-defence against non-state actors**

### **1. Introduction**

Since January 2016, there have been approximately 1000 terrorist attacks perpetrated by various extremist groups worldwide.<sup>1</sup> These attacks often target civilians in order to pressure or influence states' policies.<sup>2</sup> If these attacks were committed by states, they would unquestionably have triggered the right of self-defence in terms of the rules of customary international law and article 51 of the UN Charter.<sup>3</sup> However, the fact that the attacker is a non-state actor renders the issue slightly more complex.

International law has always been a body of rules meant to regulate inter-state relationships, including maintaining peace and security among states.<sup>4</sup> Article 2(4) of the UN Charter which contains a prohibition on the use of force among states exemplifies the state-centric nature of international law. Since the 9/11 attacks on US soil, it has become increasingly evident that non-state actors presently constitute the biggest threat to international peace and security. The threat posed by the emergence of various terrorist groups across the globe coupled with the proliferation of weapons of mass destruction have altered the structure of international law.<sup>5</sup> Relations between states and non-state actors are at the forefront of all modern-day international law debates.

Non-state groups have inflicted untold damage upon states and they remain a great threat to international peace and security.<sup>6</sup> As such, it should be evident that states have the right to defend themselves against these attacks. However, international law rules are unclear about the right to use defensive force against non-state actors. Due to this, there is uncertainty about whether non-state actors are capable of committing armed attacks in terms of article 51. There are still debates as to whether state involvement is a prerequisite for the right of self-defence. States have the right to defend themselves against non-state actors and this right should not be dependent upon the involvement of another state. Presently, non-state actors are capable of planning and launching attacks on unsuspecting states without the backing of any other state. The present-day debate surrounding the impact that the identity of the attacker has on the right of self-defence is due to the extraterritorial element of the attacks. Non-state actors often plan and launch attacks from the territory of another state. Consequently, when defending itself, the victim state will inevitably infringe upon the sovereignty of the territorial state. In essence, this debate is about whether the

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<sup>1</sup> <http://storymaps.esri.com/stories/2016/terrorist-attacks/> (accessed 16/08/2016).

<sup>2</sup> L Arimatsu & MN Schmidt 'Attacking 'Islamic State' and the Khorasan group: Surveying the international law landscape' (2014) 53 *Columbia Journal of Transnational Law Bulletin* 10.

<sup>3</sup> Y Dinstein *War, aggression and self-defence* (2001) 192.

<sup>4</sup> J Crawford *Brownlie's principles of public international law* (2008) 13.

<sup>5</sup> T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal of Conflict and Security Law* 291.

<sup>6</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, U.N. Doc. S/2014/695 (23 September 2014).

threat posed by non-state actors is great enough to allow the balance to tip in favour of the right of self-defence as opposed to the other state's right to territorial integrity.

This section will demonstrate that states have the right to defend themselves against non-state actors in terms of customary international law and article 51 of the UN Charter. This self-defence right is not conditional to the involvement of another state.

## **2. Armed attacks by non-state actors and state involvement**

The current debate about whether non-state actors are capable of carrying out armed attacks in terms of article 51 is rather about the consequences of the self-defence right rather than the armed attack itself.<sup>7</sup> It is fairly evident in a post 9/11 world, that non-state actors are capable of carrying out armed attacks on a massive scale. If these non-state groups operated and launched attacks from within the victim state's territory, this would be a law enforcement issue.<sup>8</sup> Article 51 is not applicable to those law enforcement issues that lack an international element.<sup>9</sup> Domestic terrorism belongs to the realm of municipal laws. Unfortunately, it is common for non-state actors to operate from the territory of another state. These attacks and their consequences, therefore, fall within the ambit of international law.<sup>10</sup>

Unlike article 2(4) which is explicitly state-centric, article 51 of the UN Charter makes no mention of the identity of the attacker. Article 51 states that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken 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'. From the wording alone, it is clear that the only identity that matters is that of the holder of the self-defence right. Only a UN member may use force in self-defence against an armed attack.<sup>11</sup> The nature of the attacker is not mentioned in this provision because what matters is the scale and effect of the attack.<sup>12</sup> It would be absurd to deny a state under attack the right to defend itself solely based on the nature of the attacker. The *travaux préparatoires* of the UN Charter are a great indication of the intent behind the wording of article 51.<sup>13</sup> Initially, it was argued that the UN Charter needed a provision on legitimate self-defence against the attacks of another state.<sup>14</sup> In the end, states chose a wording that did not specify the nature of the attacker. It was understood that an armed attack may emanate not only from another state but any other subject of international law as well.<sup>15</sup>

Although a state that has suffered an attack from a non-state group has the right to defend itself is clear from the wording of article 51, the ICJ has consistently interpreted this provision differently. Indeed, the ICJ has always held that the right of self-defence

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<sup>7</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 31.

<sup>8</sup> Crawford (n 4 above) 747.

<sup>9</sup> JP Cot et al *La Charte des Nations Unies : Commentaire article par article* (2005) 71.

<sup>10</sup> Lubell (n 7 above) 15.

<sup>11</sup> Lubell (n 7 above) 32.

<sup>12</sup> Lubell (n 7 above) 32.

<sup>13</sup> JP Cot (n 9 above) 77.

<sup>14</sup> JP Cot (n 9 above) 1331.

<sup>15</sup> JP Cot (n 9 above) 1333.

as contained in article 51 is only available if the acts of the non-state actor may be attributed to a state.<sup>16</sup> In the *Israeli Wall* case, the ICJ held that the right of self-defence in terms of article 51 is only available if a state has been attacked either by another state or by a non-state group acting on behalf of a state.<sup>17</sup> This interpretation of article 51 in the *Israeli Wall* findings was based on the ICJ's judgment in the *Nicaragua* case.<sup>18</sup> In the *Nicaragua* case, the ICJ declared that the right to use force in self-defence against non-state actors was only permissible if there was substantial involvement of another state.<sup>19</sup> Indeed, in the *Nicaragua* case, the ICJ acknowledged only two forms of state involvement: direct action by a state which entails the sending of regular armed forces and indirect action which entails the sending of irregular forces.<sup>20</sup> The ICJ claimed that the indirect action of a state will entail its responsibility only if the sending state had 'effective control' over the actions of the non-state actor.<sup>21</sup> By requiring the sending state to have effective control over the actions of the non-state actors, the ICJ implied that those actions outside the control of the sending state did not amount to armed attacks in terms of article 51.

The *Israeli Wall* findings were severely criticised for relying on the *Nicaragua* findings without taking into account the context of the *Nicaragua* judgment.<sup>22</sup> In the *Nicaragua* case, the ICJ was tasked only with examining the issue of attribution to a state and its consequence on the right of self-defence.<sup>23</sup> The Court did not examine the right to self-defence against attacks by non-state actors without the involvement of another state. The ICJ's view in the *Israeli Wall* case that non-state actors cannot commit armed attacks in terms of article 51 was criticised by Judge Kooijmans and Judge Buergenthal in their separate opinions.<sup>24</sup> In his separate opinion, Judge Kooijmans reminded the Court that the UN Security Council had adopted resolutions which recognised the inherent right to individual or collective self-defence without referring to the nature of the attacker.<sup>25</sup> He contended that although for decades, article 51 had been largely interpreted as requiring the attack to be attributable to a state, this was no longer the case.<sup>26</sup> It is now generally accepted that states have the right to defend themselves against attacks by terrorist groups without the involvement of another state. Judge Kooijmans argued that this new approach should have been acknowledged by the Court, especially since it was not excluded by the wording of article 51.<sup>27</sup>

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<sup>16</sup> ICJ judgments in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (27 June 1986) (1986) ICJ Reports 39 hereafter *Nicaragua* case; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) (2004) ICJ Reports 131 hereafter *Israeli Wall* case; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (19 December 2005) (2005) ICJ Reports 168 hereafter *Armed Activities* case.

<sup>17</sup> *Israeli Wall* case (n 16 above) para 139.

<sup>18</sup> Lubell (n 7 above) 33.

<sup>19</sup> *Nicaragua* case (n 16 above) para 195.

<sup>20</sup> *Nicaragua* case (n 16 above) para 195.

<sup>21</sup> *Nicaragua* case (n 16 above) para 195.

<sup>22</sup> Lubell (n 7 above) 32; Ruys & Verhoeven (n 5 above) 301; JA Green *The International Court of Justice and self-defence in international law* (2009) 45.

<sup>23</sup> *Nicaragua* case paras 131, 195, 229.

<sup>24</sup> Separate opinions of Judge Kooijmans and Judge Buergenthal in the *Israeli Wall* case (n 16 above).

<sup>25</sup> Separate opinion of Judge Kooijmans (n 23 above) para 35.

<sup>26</sup> Separate opinion of Judge Kooijmans (n 23 above) para 35.

<sup>27</sup> Separate opinion of Judge Kooijmans (n 23 above) para 35.

The ICJ missed another opportunity to clarify its position on self-defence against non-state actors in the *Armed Activities case*.<sup>28</sup> The Court's position in this case was undecided at best. In assessing whether Uganda had the right to defend itself against the Allied Democratic Forces (ADF) group operating from the DRC, the Court focused on attribution rather than the right to self-defence itself.<sup>29</sup> Instead of examining whether ADF's actions amounted to an armed attack against Uganda, the Court focused on whether ADF's actions were attributable to DRC. After finding that the actions of ADF could not be attributed to DRC, the Court held that Uganda had no right to exercise self-defence.<sup>30</sup> The Court did not attempt to assess whether the attacks by ADF could amount to armed attacks according to article 51, based solely on their scale and effects. This implies that without state involvement, there can be no right of self-defence against non-state actors.

Despite the ICJ's flawed interpretation of article 51, the current practice among states demonstrates the support for the right of self-defence against non-state actors without the involvement of a state. This is evidenced by UN Security Council Resolutions 1368 and 1373,<sup>31</sup> wherein the right of self-defence against terrorist attacks was recognised regardless of the identity of the attacker. Both resolutions declared acts of international terrorism to be threats to international peace and security giving rise to the inherent right of individual or collective self-defence.<sup>32</sup> They were aimed at affirming the right of the US to defend itself against Al-Qaeda's attacks. These resolutions were adopted prior to the attempts at negotiating with the Taliban government for the extradition of Bin Laden and his accomplices. The failure of said negotiations led the acts of Al-Qaeda to be attributed to Afghanistan.<sup>33</sup> This means that the Security Council affirmed the right of self-defence against Al-Qaeda prior to attributing its actions to the Taliban government.

Attributability to a state as a prerequisite for the exercise of self-defence has no basis in article 51 or customary international law. It mostly emanates from the ICJ's interpretation of article 51. It is submitted that the ICJ has erred in adding state involvement as a pre-condition to the exercise of self-defence. The findings of the *Nicaragua* case may be reasonable due to the fact that the ICJ was only tasked with assessing the degree of state involvement required to trigger self-defence in terms of article 51. The ICJ did not analyse those situations wherein a non-state group is operating without any state involvement because it was not relevant to the facts of the case. In addition, the facts of the *Nicaragua* case happened in the late seventies to the early eighties when non-state groups did not represent the same threat as they do today. For the ICJ to still require a degree of state involvement as a precondition for the right of self-defence as it did in *Armed Activities* and the *Israeli Wall* cases is unreasonable. The facts of these cases occurred mid-2000s at a time when it was already manifest that non-state actors presented a grave threat to international peace

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<sup>28</sup> *Armed Activities case* (n 16 above) paras 146, 147.

<sup>29</sup> *Armed Activities case* (n 16 above) paras 131- 135.

<sup>30</sup> *Armed Activities case* (n 16 above) para 147.

<sup>31</sup> UN Security Council Resolution on 'Threats to international peace and security caused by terrorist acts' S/RES/1373 (2001).; UN Security Council Resolution on 'Threats to international peace and security caused by terrorist acts' S/RES/1368 (2001).

<sup>32</sup> Preambles of S/RES/1368 (2001) and S/RES/1373 (2001).

<sup>33</sup> Lubell (n 7 above) 34.

and security. The ICJ ignored the prevalent state practice post 9/11 that did not require any level of state involvement for the right of self-defence. Moreover, the ICJ missed an opportunity to provide a clear interpretation of article 51 in relation to non-state actors at a time when it was crucial.

### **3. Threatened attacks by non-state actors**

The right to use force to thwart an imminent attack is the prerogative of any threatened state.<sup>34</sup> Unlike the right of self-defence after an armed attack has occurred which is regulated by article 51 of the UN Charter, anticipatory self-defence is a right rooted in customary international law.<sup>35</sup> The advantage that customary international law confers on the right of self-defence is that it is flexible and adapts to the changing circumstances. Article 51 has been interpreted in such a state-centric way because it is an exception to the very state-centric prohibition on the use of force contained in article 2(4). The right of self-defence in terms of customary international law as a right that predates the Charter is not burdened by such restrictions.

The right of anticipatory self-defence is considered to have its origins in the principles enunciated in the *Caroline* case.<sup>36</sup> Considering the facts of the *Caroline* case, it is evident that in terms of customary international law, the nature of the attacker has no impact on the right. The *Caroline* incident occurred due to the British using force against a rebel group on US territory.<sup>37</sup> This rebel group called the 'Patriotic Army', had been operating from the US and launching attacks in Canada. The British, who were not under attack at that moment only used force to prevent future attacks. However, an American civilian died as a result of the British operation in the US. While the US strongly protested against the use of force within the territory of a 'power at peace',<sup>38</sup> there was no argument as to whether attacks by a non-state group may trigger the right of self-defence. It was considered evident that only the scale and effect of the attack mattered, not the identity of the attacker. Additionally, the British never claimed that the US government was involved in the actions of the so-called Patriotic Army.

The *Caroline* incident essentially was a case of anticipatory self-defence against a non-state actor without any state involvement. The only pre-conditions to the permissible exercise of the right were that the necessity of the use of force be 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.<sup>39</sup>

### **4. Conclusion**

The nature of the attacker should have no impact on the right of self-defence. It is submitted that it is absurd to expect a state under attack to refrain from defending itself due to the identity of the attacker. Article 51 did not specify the nature of the attacker

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<sup>34</sup> L Van den hole 'Anticipatory self-defence under international law' (2003) 19 *American University International Law Review* 77.

<sup>35</sup> Van den hole (n 33 above) 75.

<sup>36</sup> Green (n 21 above) 72.

<sup>37</sup> The *Caroline* incident of 1837.

<sup>38</sup> British and foreign state papers Vol XXVI (1837-1838) at 1376 from Van den hole (n 33 above) 76.

<sup>39</sup> Letter of Mr. Webster to Mr. Fox (April 24, 1841), 29 British and Foreign State Papers, 1840-41 at 1137-38 (1857) from Green (n 21 above) 72.

because the right was not dependent on the attacker but rather the attack itself. Similarly, article 51 did not require the involvement of a state as a precondition to the exercise of self-defence. It is unfortunate that the ICJ has consistently interpreted article 51 in a more restricted manner than which was intended by the drafters. The ICJ missed the opportunity to clarify article 51, thereby improving its observance by states. By ignoring state practice and failing to develop the law, the ICJ has jeopardised the binding nature of the UN Charter. Luckily, customary international law norms are adaptable and flexible enough to address the contemporary issues faced by states. However, it is illogical that states would be allowed to use self-defence in anticipation of a threat from a non-state actor and at the same time, not be allowed to defend themselves when under attack by a non-state actor.

## **Chapter IV: Bypassing the territorial state's consent**

### **1. Introduction**

In December 2004, Rwandan troops entered the territory of the neighbouring Congo with the aim of neutralising the so-called 'Democratic Forces for the Liberation of Rwanda' (FDLR), a Hutu extremist group.<sup>1</sup> This was in response to repeated border attacks by this terrorist group.<sup>2</sup> While Rwanda's self-defence right was uncontested, it was the extraterritorial exercise of this right without DRC's consent that attracted controversy. Although Rwanda never attributed the attacks against it to the DRC, it argued that the failure by the Congolese government and the MONUC (UN peacekeeping mission in DRC)<sup>3</sup> to prevent these attacks forced them to enter the territory of DRC.<sup>4</sup> Rwanda declared it had the right to take the measures necessary to protect its borders and pledged not to engage the Congolese troops.<sup>5</sup> Although the UN Security Council requested that Rwanda withdraws its troops from the DRC, there was no express condemnation of Rwanda's actions.<sup>6</sup> In fact, the Security Council implicitly approved Rwanda's actions by acknowledging that the FDLR represented a grave threat to peace and security in the region and as such there was a duty on DRC to do all possible to disarm the rebels.<sup>7</sup>

Cases like that of Rwanda are rife in a post-9/11 world. Unfortunately, it is commonplace for terrorist groups to operate from a 'safe haven' state and launch attacks on the territory of another state. For example, the so-called 'Islamic State' has taken advantage of a war-torn Syria and a weakened Iraq to use these territories as their base of operations.<sup>8</sup> Similarly, Al-Qaeda has established a relatively strong presence in Yemen, prompting the US to regularly use Predator strikes on Yemeni soil.<sup>9</sup> It is alleged that the US drone strikes have killed more civilians in Yemen than Al-Qaeda.<sup>10</sup> The US claims these strikes are part of the on-going global war on terror. While it may be argued that the Yemeni government may have covertly consented to some of the strikes, there has been no formal consent from Yemen.<sup>11</sup> Consent from the territorial state cannot be implied from its conduct or from its lack of objection.<sup>12</sup>

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<sup>1</sup> 'Rwanda army masses on Congo border' *Global Policy Forum* 28 November 2004.

<sup>2</sup> 'DR Congo troops 'To Repel RWANDA'' *BBC News* 3 December 2004.

<sup>3</sup> Renamed MONUC as of 1 July 2010 [www.un.org/en/peacekeeping/missions/past/monuc/](http://www.un.org/en/peacekeeping/missions/past/monuc/) (accessed 25/08/2016)

<sup>4</sup> DRC and MONUC were under the obligation to disarm the FDLR in terms of Security Council Resolution 1565 (2004).

<sup>5</sup> DR Congo troops (n 2 above).

<sup>6</sup> 'Secretary-General disturbed by increasing tension between Democratic Republic of Congo, Rwanda', Press Release SG/SM/9631 AFR/1076; S/PRST/2004/45.

<sup>7</sup> 'Security Council calls on Rwandan rebel group to disarm, leave DR of Congo' *UN News Centre* 4 October 2005.

<sup>8</sup> L Arimatsu & MN Schmidt 'Attacking 'Islamic State' and the Khorasan Group: Surveying the international law landscape' (2014) 53.1 *Columbia Journal of Transnational Law Bulletin* 3.

<sup>9</sup> 'US drone strike kills civilians in central Yemen' *Reuters* 23 December 2011.

<sup>10</sup> 'The UN says US drone strikes in Yemen have killed more civilians than Al Qaeda' *Vice News* 15 September 2015.

<sup>11</sup> 'U.S. Says Yemen Aided Missile Strike' *The Daily Gazette* 26 November 2002.

<sup>12</sup> L Arimatsu & MN Schmidt (above) 10.

The state's consent needs to be explicit and as such mere quiescence is not sufficient.<sup>13</sup>

In order to use force on another state's territory, the defending state needs to attempt to obtain the consent and cooperation of the territorial state.<sup>14</sup> However, in many instances, consent cannot be obtained due to a variety of reasons. The absence of consent should not bar the exercise of the right of self-defence.<sup>15</sup> The concept of consent is as important in international law as it is in domestic laws.<sup>16</sup> Consent precludes wrongfulness in most instances including use of force in terms of article 2(4).<sup>17</sup> The ability to consent to a military intervention on one's territory is a staple of state sovereignty.<sup>18</sup> Without the consent of the territorial state, the extraterritorial defensive force by the defending state may amount to a violation of the state's territorial integrity. However, as no right is absolute, the right to sovereignty and territorial integrity of a state needs to be balanced with the right of self-defence.<sup>19</sup> It is submitted that the right to territorial integrity comes with the corresponding duty of not allowing the territory of the state to be used to launch terrorist attacks. Providing a safe haven to these terrorist groups amounts to forfeiting the right to territorial integrity to some extent. This is due to the fact that the territory of the state is used as a tool to threaten and violate the territorial integrity of other states. In addition, the territorial integrity of the territorial state is infringed by the very presence of these terrorist group. Consequently, the territorial state cannot claim the respect of a territorial integrity that was not there in the first place since some areas are beyond its jurisdiction.

The following section is an analysis of those circumstances that contribute to tipping the balance in favour of the victim state's right of self-defence over the territorial state's right of sovereignty and territorial integrity. These circumstances are concentric and they often overlap. Moreover, this section will examine the limits to the right of bypassing the territorial state's consent. While the circumstances may allow a state to use extraterritorial defensive force, the consent of the territorial state is still a crucial requirement. As such, it cannot be circumvented lightly and there are some limits to the bypassing of the territorial state's consent.

## **2. Attributability to the territorial state**

In international law, it is accepted that an international wrong by a state entails its international responsibility.<sup>20</sup> If a wrongful conduct can be attributed to a state, the wrongful state will have to bear the consequences of that conduct. When non-state actors operate from the territory of another state, often they benefit from some support from the territorial state. When that support exceeds the threshold of passive support, it can incur the responsibility of the territorial state.<sup>21</sup> Thus, if the conduct of the non-state actor can be attributed to the territorial state to a certain extent, the defending

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<sup>13</sup> Arimatsu (n 12 above) 13.

<sup>14</sup> Y Dinstein *War, aggression and self-defence* (2005) 113.

<sup>15</sup> Dinstein (n 14 above) 63.

<sup>16</sup> Dinstein (n 14 above) 62.

<sup>17</sup> Art 20 of the Draft Articles on State Responsibility for Internationally Wrongful Acts (DASR) of 2001

<sup>18</sup> MN Shaw *International law* (2014) 45.

<sup>19</sup> Shaw (n 18 above) 45-46.

<sup>20</sup> Art 1 of DASR.

<sup>21</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 39.

state should be permitted to bypass consent from the territorial state. This is in line with my argument that state involvement should not be a precondition to the right of self-defence but rather a circumstance allowing the defending state to bypass the territorial state's consent.

The rules on state responsibility were codified in the Draft Articles on State Responsibility for Internationally Wrongful Acts (DASR) by the International Law Commission in 2001. These secondary rules of responsibility are crucial to the understanding of the extent of support to non-state actors that entails the responsibility of the territorial state. Indeed, it is not every form of support that would entail the responsibility of the territorial state, there is a threshold to be met.<sup>22</sup> Article 8 of the DASR states that 'the conduct of a person or groups of persons shall be considered an act of a state...if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state...'. In the context of the present debate, this means that if the non-state group was acting under the instructions or direct control of the territorial state, then the territorial state would be responsible for the attacks by the non-state group. However, the extent of the required control in terms of article 8 of DASR is still unclear. In the *Nicaragua* case, on which article 8 is based,<sup>23</sup> the ICJ held that the state had to have 'effective control' over the actions of the non-state group.<sup>24</sup> This means that the actions of the group must be an integral part of the state's operations.<sup>25</sup> However, this threshold was lowered by the International Tribunal for the Former Yugoslavia (ICTY) in its judgement of the *Tadic* case.<sup>26</sup> The ICTY claimed that in lieu of effective control, mere overall control would suffice to establish the responsibility of the state.<sup>27</sup> The Tribunal held that as long as the support goes beyond mere logistical support, control over every action of the non-state group is not required for the actions to be attributed to the state.<sup>28</sup> In a subsequent case, the ICJ criticised the ICTY for overstepping its jurisdiction in the *Tadic* judgement and reinstated the effective control requirement.<sup>29</sup> Indeed, in the *Bosnia Genocide* case, the ICJ reaffirmed the requirement that the state needs to give specific instructions to the non-state group for each specific wrongful act.<sup>30</sup> Consequently, in terms of article 8, the territorial state can only be held responsible for the non-state actor's attacks, if it gave specific instruction with regards to each specific act. Article 8 places a high threshold on the attributability requirement and, consequently, state involvement in terms of this provision is hard to prove. A state that would be so involved in the unlawful actions of a non-state actor would do so covertly. However, if attributability in terms of article 8 can be proven, the victim state would most likely use defensive force against both the

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<sup>22</sup> Commentary on the Draft articles on the Responsibility of States for Internationally Wrongful Acts, 2001, 59(1).

<sup>23</sup> T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) *Journal of Conflict and Security Law* 300.

<sup>24</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (27 June 1986) (1986) ICJ Reports 39 para 115 hereafter *Nicaragua*.

<sup>25</sup> *Nicaragua* case (n 24 above) paras 114-116.

<sup>26</sup> *Prosecutor v. Dusko Tadic* (Appeal Judgement) IT-94-1-A International Criminal Tribunal for the former Yugoslavia (ICTY) (15 July 1999) hereafter *Tadic* case.

<sup>27</sup> *Tadic* case (n 26 above) para 115- 125.

<sup>28</sup> *Tadic* case (n 26 above) para 120.

<sup>29</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* ICJ (26 February 2007) (1996) ICJ Reports 2 paras 400-413 hereafter *Bosnia Genocide* case

<sup>30</sup> *Bosnia Genocide* case (n 29 above) para 438.

non-state actor and the territorial state. In that case, there would be no need to obtain consent from the territorial state as it would be a legitimate target in terms of article 51 of the UN Charter.

A more common scenario is covered under article 9 of the DASR. This provision states that the private acts of a non-state actor will entail the responsibility of a state if they are 'exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'. This provision addresses those situations involving failed states and ineffective governments that have lost control over portions of the state. Often, non-state actors take advantage of a failed state or ungoverned areas of a state to use this as their base.<sup>31</sup> Al-Shabab uses the ungoverned areas of Somalia, a failed state, as an operating base to launch attacks in Kenya.<sup>32</sup> In those areas controlled by Al-Shabab, the group exercises elements of governmental authority by imposing Sharia laws, establishing tribunals and other institutions.<sup>33</sup> Likewise, while operating from the territory beyond the Syrian government's control, ISIL established an illegitimate state and exercised various elements of governmental authority.<sup>34</sup> Therefore, in terms of article 9, the actions of Al-Shabab and ISIL may be attributed to the respective territorial states thus giving the defending states the right to use defensive force without consent. Similarly, the above mentioned FDLR were operating from the ungoverned areas of DRC to launch attacks into Rwanda. In the same way, Al Qaeda used portions of the Yemeni territory to threaten American and Western interests.<sup>35</sup> However, unlike Al-Shabab and ISIL, there is no evidence that Al Qaeda and the FDLR were exercising elements of governmental authority in those ungoverned areas. Thus, the actions of the FDLR cannot be attributed to the DRC. This is probably why Rwanda used the broader unable or unwilling-standard rather than claim attributability in terms of article 9 of the DASR.

A third situation whereby the acts of a non-state actor entail the responsibility of a state is found in article 11 of the DASR. In terms this provision, the actions of a non-state group will be imputable to a state 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'. The threshold for article 11 is very high; it requires a state to formally acknowledge the conduct of the non-state actor, endorse it and adopt it as its own. This is a very rare occurrence as states will rarely endorse the terrorist acts of a non-state actor and formally adopt them. However, such a case occurred in the *Tehran* case when the ICJ attributed the conduct of hostage-takers to the Iranian state in 1980.<sup>36</sup> In its judgement, the ICJ found that while the initial hostage-taking could not be attributed to Iran, Iran's subsequent policy of not ending the hostage situation in order to pressure the US amounted to an official acknowledgement and endorsement of the hostage takers actions in terms of article 11 of DASR.<sup>37</sup> As such, the ICJ held that the hostage situation in Iran, though

<sup>31</sup> M Hakimi 'Defensive force against non-state actors: The state of play' (2005) 91 *International Law Studies* 9.

<sup>32</sup> 'Who are al-Shabab?' *Al Jazeera News* 1 July 2013.

<sup>33</sup> 'Who are al-Shabab?' (n 33 above).

<sup>34</sup> EM Saltman & C Winter *Islamic State: The changing face of modern Jihadism* (2014) 29.

<sup>35</sup> 'U.S.'s Yemen embassy attacked by militants; 16 Killed' *Bloomberg* 17 September 2008.

<sup>36</sup> *United States Diplomatic and Consular Staff in Tehran Case (United States v Iran)* (1980) ICJ Reports 3 hereafter *Tehran* case.

<sup>37</sup> *Tehran* case (n 36 above) paras 73- 74.

perpetrated by a non-state group could be attributed to Iran thereby permitting the US to mount a rescue mission without the Iranian state's consent.<sup>38</sup>

If the actions of a non-state actor can be attributed to the territorial state, it would be a clear circumstance excluding the wrongfulness of using extraterritorial force without the territorial state's consent. Furthermore, the defending state would have the right of self-defence against both the non-state actor and the territorial state. As such, when exercising its self-defence right, the defending state would not need the consent of its legitimate target in terms of article 51 of the UN Charter. It would be absurd to expect a state to obtain the consent of its legitimate target before employing defensive force.

### **3. Unwilling or unable-standard**

Due to the importance of the territorial state's right of sovereignty and territorial integrity, there are certain requirements that need to be met before bypassing the territorial state's consent. This means that before launching an extraterritorial defensive force against a non-state actor, the defending state must first ascertain whether the territorial state is able and willing to neutralise the non-state actor.<sup>39</sup> Hence the need for the unwilling or unable-test before exercising the extraterritorial right of self-defence against a non-state actor.

In its simplest form, the unwilling or unable-standard is a concept whereby a defending state is required to ascertain whether the territorial state is able and willing to thwart the threat posed by a non-state group on its territory<sup>40</sup>. If the territorial state is demonstrably able and willing to neutralise the threat, the defending state no longer needs to use extraterritorial force. However, should the territorial state be found unable or unwilling to contain or neutralise this threat, the defending state has the right to use extraterritorial force with or without the territorial state's consent.<sup>41</sup> Thus if the territorial state actively supports the non-state actor or cannot prevent them from operating from its territory, it is obviously unwilling or unable to effectively neutralise the non-state actor. This standard covers those instances where the territorial state is either a failed state or is actively supporting the non-state actor or the non-state actor operates from the ungoverned areas of a state.<sup>42</sup>

The unwilling or unable-standard is much broader than the attribution to the state requirement.<sup>43</sup> Indeed, attribution to the territorial state is a strong indication that there is unwillingness to address the threat. However, this is not a requirement for the unwilling or unable test.<sup>44</sup> This means that even if the actions of the non-state actor cannot be attributed to the territorial state, the state might still be deemed unwilling or unable to neutralise the threat posed.<sup>45</sup> In fact, the defending state can claim the

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<sup>38</sup> *Tehran* case (n 36 above) para 74.

<sup>39</sup> AS Deeks 'Unwilling and unable: Towards a normative framework for extraterritorial self-defence' (2012) 52.3 *Virginia Journal of International Law* 486.

<sup>40</sup> AS Deeks (n 39 above) 487.

<sup>41</sup> JJ Paust 'Self-defence targetings of non-state actors and permissibility of US use of drones in Pakistan' (2010) 19 *Journal of Transnational Law and Policy* 251.

<sup>42</sup> ME O'Connell 'Lawful self-defence to terrorism' (2001) 63 *University of Pittsburgh Law Review* 905.

<sup>43</sup> Hakimi (n 31 above) 12.

<sup>44</sup> Hakimi (n 31 above) 13.

<sup>45</sup> AS Deeks (n 39 above) 488.

unwilling or unable-standard even in those instances where the territorial state has taken measures to stop the non-state group but those measures are ineffective.<sup>46</sup> A good illustration of this is found in Turkey's 2008 incursion into Iraq in its fight against the Kurdish rebels. Turkey claimed Iraq was unwilling or unable to prevent the Kurdish rebels from attacking Turkey despite the fact that Iraq was working with the Turkish government to address the Kurdish rebels issue.<sup>47</sup> Similarly, Russia used the unwilling or unable-standard to justify two incursions into Georgia, in 2002 and 2007.<sup>48</sup> Just like the Iraqi government, Georgia was actively working to suppress the threat posed by the Chechen rebels. However, the Georgian measures were taking too long to produce results.<sup>49</sup> The reactions to the Russian and Turkish incursions into neighbouring states were notably muted.<sup>50</sup> This is due to the fact that the majority of states support the unwilling or unable-standard but they have yet to legitimise this test with clear legal language.<sup>51</sup> Indeed, this standard is not mentioned in any legal instruments and has never been assessed by the ICJ or any other international court.<sup>52</sup> The standard is the result of the codification of prolific state practice whereby states explain their use of extraterritorial force as a consequence of the territorial state providing a safe haven for terrorist groups.<sup>53</sup>

Despite the abundant state practice regarding the unwilling and unable-standard, states have yet to coalesce around a clear legal standard. This leads to confusion as to the exact content of the standard.<sup>54</sup> On the one hand, a broad formulation of the unable or unwilling-test would lead to the undue infringement of the territorial state's sovereignty and territorial integrity. On the other hand, a narrow interpretation of this test would lead to the right of self-defence being undeservedly restrained.

#### **4. Limits of the right to bypass state consent**

Assessing whether a defending state has the right to bypass the territorial state's consent is essentially an act of balancing the right of self-defence with the right of sovereignty and territorial integrity. A boundless right to bypass consent would tip the balance too much in favour of the right of self-defence.<sup>55</sup> Hence, the need for imposing certain limitations to the right to bypass consent even in the presence of circumstances that would otherwise allow a state to circumvent said consent.

The defending state needs to first attempt to obtain the territorial state's consent.<sup>56</sup> This attempt to obtain consent is an acknowledgment of the territorial state's right to territorial integrity and sovereignty. Moreover, it gives the territorial state the

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<sup>46</sup> Hakimi (n 31 above) 13-14.

<sup>47</sup> 'Turkey Invades Northern Iraq' *Economist* 28 February 2008; Hakimi (above) 13.

<sup>48</sup> AS Deeks (n 39 above) 527.

<sup>49</sup> AS Deeks (n 39 above) 527-528.

<sup>50</sup> R van Steenberghe 'Self-Defence in response to attacks by non-state actors in light of recent state practice: A step forward?' (2010) 23 *Leiden Journal of International Law* 183, 193.

<sup>51</sup> Hakimi (n 31 above) 4,14,30.

<sup>52</sup> O Corten 'The unwilling or unable test: Has it been or could it be accepted' (2016) 29 *Leiden Journal of International Law* 780.

<sup>53</sup> Corden (n 52 above) 780-785.

<sup>54</sup> AS Deeks (n 39 above) 545.

<sup>55</sup> D Tladi 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12' (2013) 107.3 *The American Journal of International Law* 570-576.

<sup>56</sup> AS Deeks (n 39 above) 539-540.

opportunity to demonstrate that it is able and willing to neutralise the threat posed by the non-state group.<sup>57</sup> The territorial state can thereby accept the request and cooperate with the defending state in order to eliminate the threat.<sup>58</sup> Otherwise, it can provide the defending state with its own detailed plan to stop the non-state group.<sup>59</sup> In which case, the defending state would only be allowed to bypass the territorial state's consent if those measures prove to be ineffective.<sup>60</sup> However, there are inherent difficulties in attempting to obtain the territorial state's consent first. The defending state cannot be expected to inform the territorial state of its intention to strike a particular target if there is substantial risk of leaks within the government.<sup>61</sup> For example, Israel could not be expected to inform the Lebanese government prior to its defensive operations against Hezbollah in 2006.<sup>62</sup> This is due to the fact that the Lebanese government was actively supporting Hezbollah to such an extent that the Hezbollah was granted representation in the government and is one of the biggest political parties in Lebanon.<sup>63</sup> It was evident that Israel could never obtain Lebanon's consent and that should it share its plans with the Lebanese government, there was a great risk of a leak.

The requirement to first attempt to obtain consent is waived if the actions of the non-state actor can be attributed to the territorial state.<sup>64</sup> This is due to the fact that if the attacks by the non-state actor can be attributed to the territorial state, the defending state will have the right of self-defence against both the non-state actor and the territorial state. As such there would be no need to attempt to obtain consent from a legitimate target in terms of article 51 of the UN Charter.

Another difficulty with attempting to obtain consent arises when dealing with a failed state, a state with multiple governments or a state embroiled in a full blown war.<sup>65</sup> When dealing with a failed state such as Somalia or a state at war such as Syria, it is still unclear whether consent from such states would be valid.<sup>66</sup> Especially considering the fact that the Syrian government has lost much of its territory and the Somali government virtually has no power in many parts of the country.<sup>67</sup> This uncertainty is also present when trying to obtain consent from a state with more than one government. This is the case with Libya which has two governments and harbours several dangerous non-state groups including ISIL.<sup>68</sup>

A further limit to the right to bypass the territorial state's consent, in my opinion, lies with the willingness (or lack thereof) of the territorial state to eliminate the threat. This

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<sup>57</sup> AS Deeks (n 39 above) 526.

<sup>58</sup> AS Deeks (n 39 above) 519.

<sup>59</sup> AS Deeks (n 39 above) 525- 527.

<sup>60</sup> AS Deeks (n 39 above) 527.

<sup>61</sup> C Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al Qaeda and Iraq' (2003) 4 *San Diego International Law Journal* 17.

<sup>62</sup> AS Deeks (n 39 above) 486.

<sup>63</sup> 'Lebanon's religious mix' *PBS Frontline World* 1 April 2005.

<sup>64</sup> JJ Paust (n 41 above) 251.

<sup>65</sup> Hakimi (n 31 above) 13.

<sup>66</sup> Hakimi (n 31 above) 15.

<sup>67</sup> 'Syria: Mapping the conflict' *BBC News* 10 July 2015; 'Chronology of Somalia's collapse' *Reuters* 1 January 2007.

<sup>68</sup> 'Libya's self-declared National Salvation government stepping down' *Reuters* 5 April 2016. From 2014 to April 2016, Libya had two concurrent governments: The Tobruk government and the National Salvation government.

means that the defending state can only bypass the consent in so far as the territorial state's measures to neutralise the threat have been unsuccessful. Therefore, if the territorial state is effectively neutralising the non-state group, the defending state may not bypass its consent until those measures no longer are effective. However, if those measures have very little chance of success, the defending state cannot wait until they become effective or the threat materialises.

## **5. Conclusion**

It is becoming increasingly evident that due to the extreme threat posed by terrorist groups today, there is very little tolerance for states that harbour them. Looking at state practice, it is apparent that the balance between the right of self-defence and the right of sovereignty is increasingly leaning tipped in favour of the right of self-defence. As controversial as this may sound, it is not necessarily a bad thing. The fight against terrorism is a global fight and it is the duty of every state to contribute to maintain international peace and security. A state that has a terrorist group operating from its territory should either effectively contain the threat or allow threatened states to do so. Failing to contain the threat or give consent to some extent is contributing to terrorism and as such the balance should rightfully lean in favour of the right of self-defence.

## **Chapter V: Conclusions and recommendations**

As stated above, the main threat faced by states emanates from non-state terrorist groups. In fact, terrorist groups have entirely altered the dynamic of modern warfare which traditionally involved two or more states.<sup>1</sup> These terrorist groups indiscriminately use violence against perceived 'soft targets' to influence states' policies by inflicting maximum casualties.<sup>2</sup> Terrorist attacks are not restricted to one territory; presently, all states are at risk of these attacks regardless of their foreign policies and affiliations. These terrorist groups operate from so-called 'safe haven' states to launch attacks into the territories of other states. The main debate among scholars and politicians, currently, surrounds the legality of the extraterritorial use of force against these terrorist groups.

Considering the prolific state practice of extraterritorial use of force against non-state groups, there should be clear and concise legal standards governing this use of force. Unfortunately, states have yet to unite around distinct legal rules governing the use of defensive force against non-state actors. There is a clear lack of will to formulate binding norms regulating the extraterritorial use of force against non-state actors without the consent of the territorial state. This is partly due to the fact that the Security Council is paralysed by the veto right.<sup>3</sup> Indeed, the Security Council is often limited by the competing interests of the various powers at the Council. As a result, the Security Council has not taken a clear stance on the scope of the right of self-defence. Instead, it has opted to judge the legitimacy of self-defence claims based mostly on the necessity and proportionality of measures taken in self-defence.<sup>4</sup> Without an explicit condemnation or approval of one approach over another, the uncertainty surrounding the scope of the right of self-defence against non-state actor remains.

The Security Council is not the only entity that has contributed to the ambiguity in the laws governing the right of self-defence against non-state actors. The ICJ has missed multiple opportunities to clarify the law and bridge the gap between the current state practice and the legal norms on self-defence. Article 51 of the UN Charter makes no mention of the identity of the attacker, thereby allowing states to invoke this provision when defending themselves against non-state actors. However, the ICJ widened the gap by interpreting article 51 as available to states only if the attacks by the non-state actor may be attributed to another state. The ICJ has consistently applied this interpretation, thereby preventing the law to develop in order to reflect the current state practice. As a result, states have taken advantage of this gap to apply any position that suits their interests at any given time.

The current state practice demonstrates that several states actively condone the use of extraterritorial use of force against terrorist groups with or without the consent of the territorial state. Despite this practice, states have been reluctant to formulate clear and

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<sup>1</sup> T Ruys 'Quo vadit jus ad bellum: An analysis of Turkey's military operations against the PKK in Northern Iraq' (2008) 9 *Melbourne Journal of International Law* 20.

<sup>2</sup> 'Terror attacks timeline: From Paris and Brussels terror to most recent attacks in Europe' *Express News* 27 July 2016.

<sup>3</sup> 'The veto charade' *Znet News* 7 November 2006.

<sup>4</sup> Y Dinstein *War, aggression and self-defence* (2001) 239.

binding legal norms, preferring not to be limited by these rules. Indeed, the current uncertainty has been advantageous to the states advocating for a very broad, yet exclusive right of self-defence. The Bush doctrine exemplifies a broad right of pre-emptive self-defence available only to the United States. It is evident that clear and unanimously agreed-upon legal rules would limit these very broad interpretations of the extraterritorial right of self-defence against non-state actors.

An equitable balance between the right of self-defence and the right to territorial integrity needs to be established by developing the current customary international law. The ICJ has a crucial role to play in bridging the gap between state practice and legal norms. Indeed, the polarising debate regarding the right of self-defence against non-state actors could be partially solved by an ICJ judgement that takes into account recent state practice and the current political climate. However, the gap can only be entirely bridged by the crystallisation of the current state practice into customary international law. As such, states need to unite around clear and binding legal norms that reflect the contemporary international law landscape.

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