

Assessing the legality of the use of force by Ethiopia and Kenya in Somalia

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DECLARATION

I, DJBRIL ISMAIL CHER, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

DEDICATION

To my mother Halima Said for her continuous support in all of my endeavours.

To my sister Mahdia Ismael who has always been at my side.

In memory of my father Ismail Cher who instilled in me a passion for the law.

In memory of my grandmother Halima Daher Olis who encouraged me throughout my childhood.

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ABBREVIATIONS and ACRONYMS

AMISOM	African Union Mission in Somalia
ARPCT	Alliance for the Restoration of Peace and Counterterrorism
CJTF-HOA	Combined Joint Task Force-Horn of Africa
ECOWAS	Economic Community of West African States
ICJ	International Court of Justice
IGAD	Inter-Governmental Authority on Development
NATO	North Atlantic Treaty Organization
OLF	Oromo Liberation Front
ONLF	Ogaden National Liberation Front
PLO	Palestinian Liberation Organisation
PAIGC	African Party for the Independence of Guinea and Cape Verde
R2P	Responsibility to Protect
SWAPO	South West Africa People's Organisation
TFG	Transitional Federal Government
TNG	Transitional National Government
UIC	Union of Islamic Courts
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNITAF	United Nations Task Force
UNOSOM I	United Nations Operation in Somalia
UNSC	United Nations Security Council
USA	United States of America

Chapter 1

Introduction

1.1 Background

The history of Somalia changed to what it is now after the civil war that ousted the authoritarian regime of General Mohamed Syad Barre, which had been in power since 1969. After the collapse of the government of General Syad Barre in 1991, the country was dragged into an unending civil war that rendered the country one of the world's failed state. Somalia government has not been a functional government since 1991.

In December 1992, the prevalent anarchy in Mogadishu (Somalia's capital) and most parts of the country, led to combined United Nations and United States' 'large scale military intervention' code-named 'Operation Restore Hope'.¹ After the end of the United Nations Operation in Somalia (UNOSOM I), the United Nations Security Council² again initiated the United Nations Task Force (UNITAF) which authorised the deployment of 31,000 U.S. Marines and a combined international military force in order to tackle the anarchy, violence and starvation.³ However, the central and southern part of Somali returned into a clan based civil war,⁴ after the three international military interventions successively failed.⁵

Meanwhile, the international community organised numerous peace conferences for Somalia. In 1999, the Arta Peace Conference sponsored by the Republic of Djibouti led to the first Transitional National Government (TNG). The TNG was elected by civil society's delegates coming from various regions of Somalia. The Abdiqasim Hassan Salad's government formed in Djibouti in 2000 was widely supported by the majority population but Ethiopia alleged the TNG to be ' beholden to the Islamists'.⁶ Then Ethiopia pressured the regional economic organisation, the Inter-Governmental Authority on Development (IGAD) to sponsor a peace conference in Kenya. As a result, the Transitional Federal Government (TFG) was formed in 2004. After two years in Kenya, the TFG and Parliament relocated to Baidoa (Northern Somalia).

¹ J Clark 'Debate in Somalia' (1993) 72 *Foreign Affairs* 109.

² United Nations Security Council Resolution 794 (1992). (hereafter UNSC)

³ Clark (n 1 above) 109.

⁴ J Peter Pham 'Somalia: Where a State Isn't a State' (2011) 35 *The Fletcher Forum of World Affairs* 136.

⁵ UNOSOM I (April-December 1992), UNITAF (December 1992-May 1993), UNOSOM II (March 1993-March 1995).

⁶ C Barnes & H Hassan 'The Rise and Fall of Mogadishu's Islamic Courts' (2007) 1 *Journal of Eastern African Studies* 160.

In 2005 the United Islamic Courts (UIC) which was found by members of Sharia courts started to have a great influence in Mogadishu and its environs. Nevertheless, after few months a coalition against terrorism Alliance for the Restoration of Peace and Counterterrorism (ARPCT) backed by USA and Ethiopia started to accuse the UIC of having extremist Islamic terrorists. On the 16th of June 2005, the UIC defeated the ARPCT warlords.⁷ They took control of Mogadishu and reopened the seaport and the airport. Thereafter, they took control of Somalia except the self-proclaimed Republic of Puntland and Somaliland.

By the end of 2006, Ethiopia invaded Somalia in order to act against the Union of Islamic Court which it named as an Islamic extremist and terrorists group. This identification of UIC was stated as giving “legitimacy to the US–Ethiopian intervention in Somalia”.⁸ After defeating the UIC, Ethiopia took control of central and southern Somalia for two years. It withdrew in 2009 after a fierce guerrilla war with Al Shabbab, an Islamic extremist group. In 2011, Kenya intervened in Somalia to act against Al Shabaab which took control of central and southern Somalia after the retreat of Ethiopia. On 28 September 2012, almost one year after the starting of ‘Operation Linda Nchi’, the Kenyan army which later joined the AMISOM troops, seized the port of Kismayo.

Before the collapse of the central authority in Somalia, there was an unsettled territorial dispute between Somalia and Ethiopia over the Ogaden Province. There was also a similar dispute between Somalia and Kenya over the North Frontier District Province. The recurrent intervention by Ethiopia in Somalia may be explained by factors such as the war with Eritrea, the fear for a rebirth of Somali nationalism, the containment of Ethiopian rebellious groups,⁹ and the hegemony control in the horn of Africa. The Kenyan intervention is motivated mainly by economic interests, and more specifically control of the strategic port of Kismayo.¹⁰

The similarity between the intervention by Ethiopia and Kenya is that they both declared exercising their right to self-defence against terrorist groups. By so doing, they invoked the

⁷ G Prunier & B Wilson ‘A World of Conflict since 9/11: The CIA Coup in Somalia’ (2006) 33 *Review of African Political Economy* 749-752.

⁸ R Marchal ‘Warlordism and terrorism: how to obscure an already confusing crisis? The case of Somalia’ (2007) 83 *International Affairs* 1091–1106.

⁹ Ogaden National Liberation Front (ONFL) and Oromo Liberation Group (OLF).

¹⁰ International Crisis Group ‘The Kenyan Military Intervention in Somalia’ Crisis Group Africa Report N°184, 15 February 2012 <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/184%20-%20The%20Kenyan%20Military%20Intervention%20in%20Somalia.pdf> (Accessed on 10 September 2012).

same narrative of the ‘war on terror’ in order to have the political and military support of the USA. In October 2002, the Combined Joint Task Force-Horn of Africa (CJTF-HOA) was established in the Djibouti Camp Lemonier base for the fight against terrorism in the region. In 2003, the USA created a \$100 million East Africa Counterterrorism Initiative.¹¹ The main concern for the United States was that Somalia as a failed state would be a safe haven for Al-Qaeda.¹² It also threatened the territorial integrity and political independence of Somalia, both of which constituted a breach of Article 2(4) of the UN Charter.

This takes us to the main to be addressed in this work: whether the intervention by both Ethiopia and Kenya was justified under the international law.

Before the signature of the Kellogg-Briand Pact in 1928, war or the use of force by states was not outlawed by International law.¹³ States parties to the Kellogg-Briand treaty condemned the resort to war and consented to a pacific settlement of disputes. The Charter of the United Nations, adopted on the 26th of June 1945 at the end of the Second World War, consolidated the outlawry of war and the prohibition of the use of force. Article 2(4) of the UN Charter prohibits both the threat and the use of force. The aim of the drafters of the Charter as mentioned in the Preamble is ‘to save succeeding generations from the scourge of war’. Article 2(4) which is recognised as the ‘cornerstone of the UN Charter’¹⁴ set out a legal obligation for states to refrain from the threat or the use of force in international relations. The ban on the use of force has been widely accepted by the international community with the adoption of four General Assembly Resolutions¹⁵ which strengthen the scope of Article 2(4). It is stated that the principle of the use of force has reached the customary rule of international law.¹⁶ This was confirmed by the International Court of Justice (ICJ) in the *Nicaragua* case.¹⁷ The ICJ stated that the prohibition of the use of force was a rule of customary law and it is recognised by states as a norm of *jus cogens*.¹⁸ However, the practice of states has not always been in accordance with the ban of the use of force.

¹¹ DH Shinn ‘Fighting Terrorism in East Africa and The Horn’ (2004) *Foreign Service Journal* 41.

¹² Marchal (n 8 above) 1091–1106.

¹³ J Dugard *International Law: A South African Perspective* (2011) 495.

¹⁴ *Armed Activities on the Territory of Congo* (2005) ICJ Reports 168 para 148.

¹⁵ 1965 Declaration on Non-Intervention, 1970 Declaration on Friendly Relations, 1974 Definition of Aggression and the 1987 Declaration on the Non Use of Force.

¹⁶ KJ Skubiszewski ‘Use of force by States, Collective Security, Law of War and Neutrality’ in *Manual of Public International Law*, M Sorensen (ed) (1968) 745.

¹⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports (1986) paras 188-192.

¹⁸ Dugard (n 13 above) 496.

During the cold war, the rivalries between the Eastern and Western blocs led to proxy war and armed intervention against sovereign states.¹⁹ These interventions, led by the major superpowers of the different blocs, were motivated by the need to protect their respective vital interest. Other states launched forcible actions for different reasons: to protect their nationals abroad,²⁰ to recover territories allegedly occupied illegally,²¹ and for humanitarian purposes.²² Based on these, the ‘effectiveness’ of the law on the use of force was questioned,²³ which ultimately provoked some academics to predict the demise of article 2(4).²⁴ It appears that states, while resorting to the use of force, generally justified their action under one of the exceptions of the Charter namely the right to self-defence or collective security under Chapter VII. This is sufficient evidence of Member States’ ‘fidelity to article 2(4)’²⁵ as observed by the ICJ, ‘that attitude is to confirm rather than to weaken the rule’.²⁶

Labelled by the Bush administration as a ‘war on terror’, the United States initiated the doctrine of pre-emptive self-defence also known as the ‘Bush doctrine’.²⁷ This doctrine goes far beyond the anticipatory self-defence which enables a state to act forcibly against an imminent attack. In 2003, the USA and UK launched a military attack against Iraq (the attack was code-named ‘Operation Enduring Freedom’). This military offence was not sanctioned by any ‘clear Security Council authorisation’.²⁸ The legitimacy of the attack against Iraq prompted the UN Secretary-General to affirm that ‘this may be a moment no less decisive than 1945 itself when the UN founded’.²⁹ A scholar also asserted that ‘Article 2(4) has died again, and, this time, perhaps for good’.³⁰ However, in its 2005 Report *in larger freedom*, the Secretary-General rejected allegations of the demise and obsolescence of the UN Charter and opined that Charter provisions are adequate to tackle new threats to international peace and security.

¹⁹ Guatemala (1954), Dominican Republic (1965), Grenada (1983), Panama (1989), Hungary (1956), Czechoslovakia (1968) and Afghanistan(1979).

²⁰ Israel’s raid in Entebbe (Uganda) in 1976.

²¹ India intervention in Gao (1961) and Argentine intervention in Falkands (1982).

²² India Intervention in East Pakistan (Bangladesh), 1971 and Tanzania invasion in Uganda, 1979.

²³ C Gray *International Law and the Use of Force* (2008) 25.

²⁴ TM Franck ‘Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States’ (1970) 64 *The American Journal of International Law* 809-837.

²⁵ Y Dinstein *War, aggression and self-defence* (2005) 94.

²⁶ *Nicaragua* case (n 17 above) 186.

²⁷ National Security Strategy (2002).

²⁸ Dugard (n13 above) 513.

²⁹ Secretary-General’s Address to the General Assembly, 23 September 2003.

³⁰ TM Franck ‘What Happens Now? The United Nations after Iraq’ (2003) 97 *The American Journal of International Law* 607-620.

The ‘war on terror’ narrative has been used during recent military interventions,³¹ ‘used to justify a wide right of self-defence against non-state actors’.³² This ‘war on terror’ rhetoric was injected into the African continent not until 2006 when Ethiopian forces invaded Somalia in order to act against the Union Islamic Court which had taken control of central and southern Somalia after defeating an alliance of warlords supported by the USA. The United States and Ethiopia portrayed the conflict as a war on terror, within the broader framework of the war against terror.³³ Arising out of an argument predicated on the right to self-defence against terrorism, Kenya after Ethiopia also invaded Somalia in 2011. The second invasion was provoked by the necessity to confront another non-state actor, Al-Shabaab. The peculiarity of Somalia’s case is explained partly by the existence of an ineffective but recognised Transitional Federal Government (TFG) which co-exists with a non-state actor exercising effective control over the territory and acts as a *de facto* government.

While the Security Council which had the primary role of international peace and stability did not question the force used against Somalia by Ethiopia³⁴ and later against Kenya, it is important to assess the legality under international law of the extraterritorial use of force against non-state actor acting as *de facto* government.

1.2 Problem statement

Article 2(4) of the UN Charter prohibits states from using force against the territorial integrity and political independence of another state. Despite such express prohibition of the use of force, several states have used military force against Somalia on a number of occasions, for example, Ethiopian Armed Forces intervened in 2006 in Somalia against UIC. In 2011, Kenyan Armed Forces also intervened against Al-Shabaab. The two states intervene in a country without effective government justifying their actions against a threat by non-state actors namely, the UIC and Al-Shabaab. However, the international community, particularly the UN Security Council and the African Union, did not question such use of military force. This study intends to ascertain the legality of military intervention in light of the prohibition of the use of force in international law as embodied in Article 2(4) of the UN Charter.

³¹ Israel against Hezbollah in Lebanon, Turkey against the PKK in Iraq and Ethiopia against UIC in Somalia

³² Gray (n 23 above) 1-2.

³³ n 23 above 249.

³⁴ n 23 above 253.

1.3 Research questions

This research seeks to find answers to some important questions. As a recurrent issue in international law, the use of force is specifically addressed in the Charter of the UN. However, the practices of states have expanded the scope of legitimate use of force in international law. It is through these lenses (UN Charter and practices of states) that the paper intends to examine whether use of force against Somalia is in line with established rules of international law, or it creates a new precedent. As a result, the author intends to find answers to the following questions:

- i. Is the use of force by Ethiopia and Kenya against Somalia justifiable in international law?
- ii. Does the extraterritorial use of force against a non-state actor acting as a *de facto* government fall under the scope of Article 2(4) of the UN Charter?

1.4 Research methodology

The questions posed in the preceding subsection would be answered through a thorough research. First, this comprises an examination of existing literature on the use of force. The paper will examine the relevant international instruments on the use of force as well as contributions of experts on the subject. Secondly, it will take a close look at the different situations in international relations where force was used, and find whether the reasons for going to war have any legitimate basis. Finally, the paper will be able to conclude whether the invasion of Somalia was in compliance of established principles of international law regulating the use of force, or it sets a new precedence thereby contributing to the jurisprudence on the subject.

1.5 Definition of key terms

Throughout this paper, I make use of some legal words and phrases which need to be defined for the sake of clarity. These words are:

‘Use of force’ means acts of a state against another state through military forces under its command.³⁵

‘*Jus ad bellum*’ is defined as the law(s) regulating the use of force.³⁶

³⁵ Skubiszewski (n 16 above) 747.

‘*Jus in bello*’ means the law(s) regulating the conduct of (an) armed conflict(s).³⁷

‘*Jus cogens*’ means a peremptory norm of international law from which no derogation is permitted.³⁸

‘*Extraterritorial use of force*’ refers to the use of force which occurs in the territory of another state.³⁹

‘*Non-state actor*’ is defined as individuals or groups who are not acting on behalf of a state.⁴⁰

‘*Customary international law*’ is a recognised source of international law as provided in section 38 of the Statute of the ICJ which also defines a custom as an ‘evidence of a general practice accepted as law’.⁴¹

1.6 Limitation of the study

This paper is not a comprehensive assessment of foreign military intervention against Somalia. It does not cover interventions authorised by the United Nations Security Council such as AMISOM,⁴² peacekeeping force or the combat against piracy.⁴³ This paper only focuses on the *jus ad bellum* with a case study of unilateral military interventions against Somalia. It does not also address the law of armed conflict or *jus in bello*.

1.7 Overview of chapters

This paper is structured into five chapters. Chapter One sets out the contextual background of the entire study. Chapter Two analyses the legal framework of the use of force under the UN Charter and under customary international law. Chapter Three addresses the extraterritorial use of force against non-state actor. Chapter Four assesses the legality of Ethiopia and Kenya’s use of force against Somalia. Chapter Five summarizes the findings of the study and makes recommendations.

³⁶ Dugard (n 13 above) 519.

³⁷ n 13 above 19.

³⁸ n 13 above 38.

³⁹ N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010) 13.

⁴⁰ n 39 above 14.

⁴¹ Section 38 of the Statute of the ICJ.

⁴² UNSC Resolutions 1744(2007).

⁴³ UNSC Resolutions 1816, 1846, 1851(2008), 1897(2008) and 1950(2010).

1.8 Literature review

When assessing intervention in civil wars, Professor Dugard makes a distinction between situations where rebels are not externally assisted and where rebels are externally assisted. He adds that the right of self-determination prevents intervention in domestic matters even when a civil war occurs. If the rebels are externally assisted, he affirms that states may intervene to assist the government victim of attack. This external assistance means an illegal use of force and therefore triggers collective self-defence under article 51.⁴⁴

According to Tanca,⁴⁵ if the consent of the state which requests the intervention is valid, it precludes the application of the prohibition of the use of force. The validity of the consent or the invitation is subject to two requirements: first, it must be a valid expression, and secondly, the expressed consent must be internationally attributable to a state.⁴⁶ He concludes that ‘in internal conflict no authority may consent to an external armed intervention unless it is fully effective’.⁴⁷ Allo propounds that the invitation by the Transitional Federal government to Ethiopia is not valid because it lacks the requirement of effectiveness and legitimacy.⁴⁸

According to Professor Gray, an academic debate opposes scholars about the scope of the right of self-defence.⁴⁹ Bowett affirms that the phrase ‘inherent right’ in Article 51 preserves the pre-Charter customary right and authorises anticipatory self-defence. Brownlie however adopts a narrow approach and argues that only armed attack triggers the right of self-defence. Gray concludes that ‘the majority of states remained firmly attached to a narrow conception of self-defence’.⁵⁰ Gray points out that the ‘Ethiopian claim of self-defence was clearly not self-defence against an armed attack by government forces but apparently self-defence as part of the “war of terror” against the threat posed by the Union Islamic Courts and against its past terrorist attacks’ and ‘there was no report to the Security Council under 51’. Gray also observes that Ethiopia fails to justify their action as an intervention upon the ‘invitation of the legitimate (though ineffective) government supported by the UN, in response to prior foreign intervention as set out in the UN Reports’. The Ethiopian Prime Minister in a Press Conference six months after the intervention spoke about ‘intervention on behalf of the UN-

⁴⁴ Dugard (n 13 above) 515-516.

⁴⁵ A Tanca *Foreign armed intervention in internal conflict* (1993) 19.

⁴⁶ n 45 above 15.

⁴⁷ n 45 above 50.

⁴⁸ AK Allo ‘Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia’ (2009) 3 *Mizan Law Review* 201.

⁴⁹ Gray (n 23 above) 118-119.

⁵⁰ n 23 above 166.

backed Transitional Federal Government'.⁵¹ Gray also noticed that the legality of the Ethiopian intervention has not been addressed by the Security Council, and questioned if the terrorist attacks on the USA on 11 September 2001 and the resultant US intervention against Afghanistan 'should be seen as a turning point in the development on the law of use of force'.⁵² Gray concluded that 'majority states were not willing to accept the very wide doctrine proposed by Israel, the USA and the UK'.⁵³

Noam Lubell questioned the possibility of self-defence against non-state actors. The author observed that 'unlike other articles in the UN Charter (such as Article 2(4) on the prohibition of the use of force) which specifically mentions that they refer to states, Article 51 does not mention the nature of the party responsible for the attack. It only mentions that of the entity which has the right of response'.⁵⁴ Lubell restated the Separate Opinion of Judge Higgins in the *Nicaragua* case and the respective opinions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* which disagreed with the ICJ's reluctance to accept that armed attacks can be committed by non-states actors.⁵⁵ Dinstein also affirmed that a state victim of armed attack from non-state actor is entitled to exercise its right of self-defence against the non-state actor in the territorial of state from which it operated.⁵⁶

According to Allo, Ethiopia's claim to self-defence does not fulfill the requirements set out by the UN Charter, namely: the occurrence of an attack of a significant scale and effect prior to the exercise of self-defence. Ethiopian action fails to meet the criteria of necessity, proportionality and immediacy.⁵⁷

⁵¹ n 23 above 251.

⁵² n 23 above 252-253.

⁵³ n 23 above 253.

⁵⁴ Lubell (n 39 above) 32.

⁵⁵ As above.

⁵⁶ Dinstein (n 25 above) 245.

⁵⁷ AK Allo 'Ethiopia's armed intervention in Somalia: The legality of self-defence in response to the threat of terrorism' (2010) 39 *Denver Journal of International Law & Policy* 167.

Chapter 2

From *jus ad bellum* to *jus contra bellum*

2.1 Introduction

An assessment of the legality of foreign military intervention requires either the legal framework on *jus ad bellum* or the laws regulating the resort to armed force.

Treaties and customary international law are the two main applicable sources of law with regard to the use of force. The Kellogg-Briand Pact signed in 1928 set out the outlawry of war or the use of force by states in international law. States parties to the Kellogg-Briand treaty renounced the use of war and consented rather to the pacific settlement of disputes. The United Nations' Charter prohibits war and use of force. Article 2(4) of the UN Charter prohibits both the threat and the use of force. The main aim of this article was to redress 'the shortcomings of the Kellogg-Briand Pact which became the first treaty which outlaws war and the recourse to force.'⁵⁸ Numerous international instruments, even at regional levels, have not departed from this principle (which has evolved to the status of *jus cogens* in international law).⁵⁹ A customary international rule on the ban of the use of force is widely recognised as found in the *Nicaragua* case by the International Court of Justice.⁶⁰

2.2 Prohibition of the Use of Force

Article 2(4) of the UN Charter prohibits the use of force. In the following discussion, the paper will examine the meaning, scope of, and limitations to Article 2(4) of the UN Charter.

2.2.1 The meaning of Article 2(4)

Article 2(4) of the UN Charter provides as follows:

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

⁵⁸ Dinstein (n 25 above) 85.

⁵⁹ Article 301 United Nations Convention on the Law of the Sea 1982. See also Article 4 (h) of the African Union Constitutive Act.

⁶⁰ *Nicaragua* case (n 17 above) para 188-192.

The meaning of Article 2(4) should be clarified first. It should be noted that Article 2(4) makes reference to the use of force in ‘international relations’. However, scholars stated that this Article is read and therefore relates to conflicts between states. As such, intrastate conflicts fall outside the scope of Article 2(4).⁶¹ Another point which needs to be clarified is the meaning of the word ‘force’. Some Member States have argued that Article 2(4) encompasses even economic force.⁶² But there is a consensus that the term ‘force’ is construed to be limited to ‘armed force’ or ‘military force’.⁶³ Unlike the Kellogg-Briand Pact, Article 2(4) of the UN Charter prohibits not only the use of force, but also the threat of use of force. This was reaffirmed by the International Court of Justice (ICJ) in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* where it was held that, ‘if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal’.⁶⁴ There is a recurrent development from by some Member States towards adopting a restrictive reading of Article 2(4). They argue that the use of force against a state is prohibited only in cases where such use of force results in a violation of the ‘territorial integrity’ or ‘political independence’ of the state attacked. A close scrutiny of Article 2(4) suggests that this argument is still very distant from unanimous adoption. A review of the *Travaux Préparatoires* shows that the phrases ‘territorial integrity’ and ‘political independence’ were subsequently added in order to emphasise this rule.⁶⁵ The intention of the drafters of the Charter, ‘were directed at removing force as means of settling all international disputes and therefore the ban equally covers situations where territory or independence are not at stake’.⁶⁶ The ICJ in the *Corfu Channel* case rejected the arguments of the United Kingdom, that its use of force did not threaten the territorial integrity or the political independence of Albania.⁶⁷ The rejection of this argument has been interpreted differently it stands, ‘either as a complete rejection to a narrow interpretation of Article 2(4) or as a more limited rejection of the UK’s claim on the particular facts’.⁶⁸ The phrase ‘or another manner inconsistent with the purpose of the United Nations’ was designed to serve as a useful catch-all provision, filling any possible remaining gaps.⁶⁹ According to Skubiszewski stated that the

⁶¹ Dinstein (n 25 above) 85.

⁶² n 25 above 86.

⁶³ As above.

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226 para 246.

⁶⁵ Dinstein (n 25 above) 87.

⁶⁶ Skubiszewski (n 16 above) 746.

⁶⁷ *Corfu Channel* (1949) ICJ Reports 4 para 34.

⁶⁸ Gray (n 23 above) 32.

⁶⁹ L Moir *Reappraising the Resort to Force* (2010) 9.

principle of effectiveness requires Article 2(4) to be read as prohibiting all threat or use of force unless, the Charter in other provisions expressly permits its use.⁷⁰ Dinstein also refuted a narrow approach of this provision and asserted that ‘any use of interstate force by Member States for whatever reason is banned, unless explicitly allowed by the Charter’.⁷¹

2.2.2 The scope of Article 2(4)

The practices by Member States demonstrate the willingness to depart from, or set limitations to the scope of Article 2(4) of the UN Charter. The underlying reasons vary from the right to self-determination, protection of nationals abroad, recovery of territory allegedly occupied illegally and pro-democratic intervention to humanitarian intervention.

A. War of national liberation

The Non-Aligned states and the Soviet Union have repeatedly stated that wars of national liberation or the use of force by a people struggling for their right to self-determination are in accordance with the UN Charter. States proclaim also the right to use force in support of national liberation movements. According to these Member States, use of force in such circumstances does not constitute a breach of Article 2(4). This exception is stipulated in Article 7 of the UN Charter the Definition of aggression.⁷² However, the Declaration on ‘Friendly Relations’⁷³ avoids confirming the right of a people to use force and for states to support them forcibly. There is consensus among Member States for the prohibition of the use of force against people exercising their right to self-determination rather than the use of force by a national liberation movement.⁷⁴ The war of national liberation is difficult to legitimize because Article 2(4) does not provide for exceptions other than those mentioned in the UN Charter. Judge Schwebel, in his dissenting Opinion in the *Nicaragua* case, asserted the illegality of a state to intervene with force to support a people fighting for self-determination.⁷⁵ He affirmed that ‘it is lawful for a foreign state to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign state.... to intervene in that struggle with force’.⁷⁶

⁷⁰ Skubiszewski (n 16 above) 746.

⁷¹ Dinstein (n 25 above) 88.

⁷² Definition of Aggression UN General Assembly Resolution 3314 (1974).

⁷³ Declaration on Principles of International Law Concerning Friendly Relations UNGA Resolution 2625 (1970).

⁷⁴ Gray (n 23 above) 61.

⁷⁵ *Nicaragua* case (n 17 above) para 351.

⁷⁶ *Nicaragua* case (n 26 above) para 351.

B. Recovery of disputed territories

Few states also affirmed that it was perfectly legal in the light of Article 2(4) to recover territories allegedly belonging to them and illegally occupied by another state. In fact, according to such states, there is no violation of the territorial integrity of another state when such a right is exercised. This was the approach adopted by India in 1961 and Argentina in 1982 for the recovery of the territories of Goa and the Falkland Islands occupied by the Portugal and the United Kingdom. Respectively, India and Argentina seemed to ignore their violation of the territorial integrity of States exercising sovereignty over these territories. Insofar as it concerns territorial disputes, the best way to resolve them would be by peaceful means with particular reference to Article 2(3) of the UN Charter. It appears therefore that there is partial support from states for such claims to be in accordance with Article 2(4) and ‘there has been general agreement that irredentist claims did not justify the use of force’.⁷⁷ The latest example is the position of the UN Security Council which declared null and void the annexation of Kuwait by Iraq.⁷⁸

C. Protection of nationals abroad

The protection of nationals abroad was used as one of the grounds for use of force against another state. Some states claim the right to intervene to protect their nationals like United Kingdom, France, the United States and Israel.⁷⁹ Israel undertook a military operation to rescue their nationals who had been held hostage at the Entebbe airport in Uganda in 1976. One may argue that a limited rescue mission would not breach the territorial integrity or the political independence of a state. But this was not the legal justification presented by the Israeli Ambassador before the UN Security Council on the Entebbe case. He justified the intervention on the ground of self-defence as provided in Article 51 of the UN Charter and not the suggested re-interpretation of Article 2(4).⁸⁰ Only the United States supported the view of Israel which she considered as an act of self-defence requiring temporary violation of the sovereignty and territorial integrity of Uganda.⁸¹ In the Entebbe scenario, many states saw

⁷⁷ Gray (n 23 above) 65.

⁷⁸ UNSC Resolution 662 (1990).

⁷⁹ Intervention of England and France in Egypt in 1956 (Suez crisis), US interventions in the Dominican Republic in 1965, Grenada in 1983, Panama in 1989 and Israel intervention in Uganda (Entebbe) in 1976.

⁸⁰ O Schachter ‘The Legality of Pro-democratic Invasion’ (1984) 78 *American Journal of International Law* 649.

⁸¹ H McCoubrey & ND White *International Law and Armed Conflict* (1992) 122.

the actions of Israel as constituting unlawful use of force and therefore a violation of Article 2(4) of the UN Charter.⁸²

D. Pro-democratic interventions

Another claim raised by states was the right to intervene to support pro-democracy movements. In 1989, the United States intervened in Panama after General Noriega rejected the results of elections which proclaimed President Endara the winner. But in the Panama debate at the UN Security Council, the United States justified its intervention as self-defence and the protection of its citizens rather than a pro-democratic intervention.⁸³ It demonstrated that pro-democracy intervention was a baseless legal justification. The United Nations intervened with force in Haiti in 1991, following the overthrow of the democratically-elected President Aristide. Similar action taken by the Economic Community of West African States (ECOWAS) when they intervened in Sierra Leone in 1998 at the invitation of the democratically-elected President Ahmed Tehjan Kabbah. The cancellation of results of democratic elections in many states has not led to the intervention of United Nations. This 'seems to go too far to argue that these instances of UN and regional action show a right for states unilaterally to use force to restore democratic government'.⁸⁴ Schachter contradicts the argument of Reisman⁸⁵ about the legality of pro-democratic intervention and concludes that it would undermine the normative restraint of use of force embodied in Article 2(4).⁸⁶ The view that democracy can be imposed by force is unsustainable as illustrated by the chaos that followed the invasion of Iraq in 2003.

E. Humanitarian intervention

Humanitarian intervention has been the subject of a huge debate whether the violations of human rights could justify the use of force. According to Bazylar,⁸⁷ humanitarian intervention is defined as 'the forceful intervention in the affairs of another nation to protect that nation's inhabitants from inhumane treatment by their sovereign'.⁸⁸ This doctrine or argument

⁸² As above.

⁸³ Gray (n 23 above) 57.

⁸⁴ n 23 above 59.

⁸⁵ WM Reisman 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 *The American Journal of International Law* 642-645.

⁸⁶ Schachter (n 80 above) 650.

⁸⁷ MJ Bazylar 'Re-examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia' (1987) 23 *Stanford Journal of International Law* 547, 548.

⁸⁸ D Eisner 'Humanitarian Intervention in the Post-Cold War Era' (1993) 11 *Boston University International Law Journal* 195.

obviously is debatable. Such intervention would be in conflict with the principles of state sovereignty, non-intervention and the prohibition of the use of force embodied in Article 2(4) of the UN Charter. A minority of scholars like Nanda assert that, ‘for a humanitarian intervention to be considered valid it is usually undertaken for a limited purpose and duration; it should not impair the political independence or territorial integrity of the target state’.⁸⁹ Teson⁹⁰ also asserts that Article 2(4)'s prohibition does not apply to humanitarian interventions.⁹¹ However, Show argues that there is a difficulty of reconciling Article 2(4) of the Charter and the concept of “territorial integrity” unless a new artificial definition is put as a criterion in order to permit temporary violations or posits the establishment of the right in customary law.⁹² Nevertheless, it may be legitimate for states to intervene in another state in cases of extreme humanitarian crisis. Such was the case of the intervention of the United States, the United Kingdom and France to protect civilians in Iraq after the Gulf War. The justification of the legality of the intervention by the North Atlantic Treaty Organization (NATO) relied ‘on a doctrine of implied authorisation by the Security Council’.⁹³ While unilateral humanitarian intervention from states or regional organisations has not been condemned by the UN Security Council,⁹⁴ ‘it does not, however, indicate a fundamental change in the law to give wholesale permission to states to do that which is textually prohibited’.⁹⁵ The International Court of Justice in the *Nicaragua* case rejected the United States’ claim of a ‘right of military intervention against Nicaragua on the grounds of alleged human rights violations’.⁹⁶ In 1978, the invasion of Cambodia by Vietnam resulting in the overthrow of the Pol Pot regime was condemned by the UN General Assembly.⁹⁷ Finally, the right to intervene for humanitarian reasons was excluded by the Declaration on Friendly Relations and rejected in the Definition of Aggression. The later resolution provides that ‘no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression’.⁹⁸ It thus appears that there is little support from states

⁸⁹ VP Nanda and et al ‘Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia- Revisiting The Validity of Humanitarian Intervention under International Law- Part II’ (1998) 26 *Denver Journal of International Law and Policy* 864.

⁹⁰ FR Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (1988) 131.

⁹¹ Eisner (n 88 above) 197.

⁹² MN Shaw *International Law* (2008) 1155.

⁹³ Gray (n 23 above) 41.

⁹⁴ 1971 India’s intervention in East Pakistan (Bangladesh), 1979 Tanzania’s invasion in Uganda, NATO intervention in the Federal Republic of Yugoslavia(1999) and ECOWAS interventions in Liberia (1990-1991) and Sierra Leone (1997-1999).

⁹⁵ T Frank *Recourse to force: State Action Against Threats and Armed Attacks* (2002) 172.

⁹⁶ *Nicaragua* case (n 17 above) para 268.

⁹⁷ UNGA Resolution 34/22 (1979).

⁹⁸ Gray (n 23 above) 34.

to recognize the legality of the humanitarian intervention doctrine. It can be illustrated by the opposition of China, Russia and the Non-Aligned Movement for an intervention without a UN Security Council authorisation and the reticence of UK and the USA to rely on humanitarian intervention as a legal justification in Iraq and Afghanistan.⁹⁹

F. Responsibility to protect

The failure of the international community to respond to the massacre of Srebrenica or the Rwanda genocide led to the emergence of the new doctrine of the ‘Responsibility to Protect’ (‘R2P’) endorsed by the UN General Assembly¹⁰⁰ and approved by the UN Security Council.¹⁰¹ It affirms a duty on states to protect their citizens from genocide, war crimes, ‘ethnic cleansing’ and crimes against humanity.¹⁰² But according to Gray, ‘the responsibility to protect was exercisable by the Security Council authorizing military intervention’.¹⁰³

The African Union, in terms of Article 4 (h)¹⁰⁴ of the Constitutive Act also provides the right to intervene in states in cases of war crimes, genocide, and crime against humanity. This statutory provision will certainly be in conflict with the UN Charter. Kuwali however suggests that this provision ‘can be interpreted as a general *a priori* invitation to intervene in the face of mass atrocity crimes’.¹⁰⁵

With the advent of a unipolar world the USA as the only super power, there are still further attempts from states not to comply with the prohibition on the use of force as articulated in Article 2(4) of the UN Charter. However, the practices of states show that they ‘have not challenged the core principle of Article 2(4)’.¹⁰⁶

2.3 Limitations to the prohibition to the use of force

⁹⁹ n 23 above 51.

¹⁰⁰ World Summit Outcome Document Resolution A/RES/60/1 (2005).

¹⁰¹ UNSC Resolution 1674(2006).

¹⁰² World Summit Outcome Document (n 100 above) para 138-139.

¹⁰³ C Gray ‘A Crisis of Legitimacy for the UN Collective Security System?’ (2007) 56 *International and Comparative Law Quarterly* 167.

¹⁰⁴ The African Union Constitutive Act of (2000).

¹⁰⁵ D Kuwali ‘The end of humanitarian intervention: Evaluation of the African Union’s Right of Intervention’ (2009) 9 *African Journal on Conflict Resolution* 57.

¹⁰⁶ ME O’Connell ‘Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy’ (1998) 36 *Columbia Journal of Transnational Law* 476.

States mostly justify their actions under the exceptions provided by the UN Charter which are either self-defence or use of force under Security Council authority. The practice of states recognised also the justification of intervention upon invitation. Therefore, any threat or use of armed force against a state outside these exceptions is illegal.

2.3.1 Self-defence

A. Self-defence under the UN Charter

Article 51 provides the only escape from the prohibition on the use of force; and it states that ‘states have sought to expand its terms generously to permit recourse to force in a wide range of situations’.¹⁰⁷

i. Meaning of Article 51 of the UN Charter

Like Article 2(4), Article 51 is subject to debate among legal experts about the scope of the right to self-defence.¹⁰⁸ In fact, there are two opposing views. First, there are those who adopt an extensive approach while referring to the term ‘inherent’ as mentioned in Article 51 of the UN Charter. They refer to a pre-existing customary right of self-defence which is broader than Article 51 of the UN Charter. In the *Nicaragua* case, the ICJ recognised also a pre-Charter customary right of self-defence.¹⁰⁹ Others refute this argument by insisting on the clarity of the meaning of the provision. According to these scholars, the right of self-defence can only be exercised in case an armed attack occurs. This restrictive interpretation is valid insofar as Article 51 is recognised as an exception to the prohibition of the use of force under Article 2(4) of the UN Charter.¹¹⁰

The scope of the right formulated by the UN Charter is narrow if compared to the customary right of self-defence. The exercise of the right of self-defence as provided by Article 51 is subjected to the requirement of an ‘armed attack’ and the duty to report to the UN Security Council.

¹⁰⁷ Dugard (n 13 above) 501.

¹⁰⁸ Gray (n 23 above) 118-119.

¹⁰⁹ Dugard (n 13 above) 500.

¹¹⁰ ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security’.

ii. The nature and scope of an armed attack

The nature and scope an armed attack contain three important elements: requirements of the armed attack, the armed attack shall be attributed to a state, and gravity of the attack.

- *Requirement of an armed attack*

The victim state is entitled to exercise its right of self-defence only ‘if an armed attack occurs’.¹¹¹ The wording of Article 51 indicates that the occurrence of an armed attack is a prerequisite for a lawful exercise of a right self-defence. The armed attack is the act that triggers the exercise of the right of self-defence. The ICJ found in the *Nicaragua* case and in the *Oil Platforms* case that an armed attack is a condition *sine qua non* for self-defence.¹¹²

While Article 51 requires that ‘an armed attack occurs’, a state relying on anticipatory self-defence may request the right to act forcibly against another state’s imminent attack. This doctrine was derived from the *Caroline*¹¹³ case where the US Secretary Webster formulated that the exercise of the right of self-defence was lawful if only it met the requirements of ‘necessity, proportionality and immediacy’.¹¹⁴ Scholars like Bowell argue that the words ‘inherent right’ mentioned in Article 51 authorise anticipatory self-defence.¹¹⁵ The United States claimed a right to ‘exercise anticipatory self-defence’ in response not only to a ‘hostile’ act but even to a ‘hostile intent’.¹¹⁶ However, the UN Security Council did not approve the claim of anticipatory self-defence made by Israel during the 1967 Six-day War as it blamed it for the destruction of Iraq’s nuclear reactor Osirak.¹¹⁷ Furthermore, Dinstein puts forward a new theory of ‘interceptive self-defence’ to attempt a justification of Israel’s claim of self-defence during the Six-Day War.¹¹⁸ The ICJ in the *Nicaragua* case asserted that ‘in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack’ and therefore ‘precludes any anticipatory right in the face of a threat of an armed attack’.¹¹⁹ However, in his dissenting Opinion, Judge

¹¹¹ Article 51 of the UN Charter.

¹¹² JA Green *The International Court of Justice and Self Defence in International law* (2009) 26.

¹¹³ Dinstein (n 25 above) 237.

¹¹⁴ n 25 above 249.

¹¹⁵ Gray (n 23 above) 118-119.

¹¹⁶ Dinstein (n 25 above) 182.

¹¹⁷ UNSC Resolution 487(1981).

¹¹⁸ Dinstein (n 25 above) 192.

¹¹⁹ McCoubrey (n 100 above) 94.

Schwebel rejected a narrow interpretation of Article 51 concerning the prerequisite of an armed attack to trigger a right of self-defence.¹²⁰

In the aftermath of the September 11, 2001 terrorist attacks against the USA, the Bush administration launched the doctrine of pre-emptive action which enabled the USA to act in pre-emptive self-defence against an imminent threat.¹²¹ This doctrine of pre-emptive strike goes beyond the doctrine of anticipatory self-defence against an imminent attack. According to Dinstein, ‘a preventive use of force in response to sheer threats’ will not comply with Article 51 of the UN Charter.¹²² A right of pre-emptive self-defence is excluded because it lacks the pre-requisite of an armed attack as provided by the UN Charter. In the *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory*¹²³, the ICJ found that ‘the construction of the “security wall” in the Palestinian Territory could not be justified on the ground of self-defence against possible attacks by Palestinian militants’.¹²⁴ Similarly, in *Armed Activities in the Territory of the Congo*¹²⁵, the ICJ held that the argument in support of Ugandan intervention in the Democratic Republic of Congo could not be justified under self-defence because its action was “essentially preventative”. According to Article 51 of the UN Charter the use of force by a state to protect perceived security interests is not allowed.¹²⁶ Therefore, there is a consensus among scholars that the use of force in cases of the ‘right of self-defence should not be freely allow in anticipation of an attack or in response to a threat’.¹²⁷ It is fully recognized that the existence of the requirement of an armed attack triggers the right of self-defence.

Despite the apparent clarity of language of Articles 2(4) and 51 of the UN Charter, the practices of states reveal some difficulties which we are going to examine below.

- ***Armed attack shall be attributable to a state***

¹²⁰ *Nicaragua case* (n 17 above) para 347.

¹²¹ US National Security Strategy (2002)

¹²² Dinstein (n 25 above) 183.

¹²³ *Advisory Opinion Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory* (2004) ICJ Reports 136 para 194.

¹²⁴ Dugard (n 13 above) 502.

¹²⁵ *Armed Activities* (n 14 above) para 143-144.

¹²⁶ Dugard (n 13 above) 503.

¹²⁷ O Schachter ‘The Right of States to Use Armed Force’ (1984) 82 *Michigan Law Review* 1634.

Article 51 of the UN Charter provides the right of self-defence by a state against an armed attack by another state. The ICJ rejected Israel's claim of exercising self-defence against armed attacks which emanated from non-state actors. The ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* recognised 'the existence of an inherent right of self-defence in the case of an armed attack by one state against another state'.¹²⁸ The ICJ adopted a similar approach in *Armed Activities in the Territory of the Congo*.¹²⁹ Another issue that arises is the case of interventions of non-state actors operating from another state. For example, in 2006, Israel attacked Lebanon after a Hezbollah operation in the boundary line even though Lebanon was not involved in the act. Israel, Portugal and South Africa also intervened militarily in neighbouring states against national liberation movements such as the PLO, PAIGC, and SWAPO, etc. Their 'claim to be acting in self-defence was generally not accepted by the Security Council'.¹³⁰

- ***Gravity of armed attack***

Every wrongful act does not constitute an armed attack. A minor incident cannot be qualified as an armed attack. The ICJ in the *Nicaragua* case made a distinction between the use of force with regard to the scale of gravity. It asserted that, it is 'necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.¹³¹ An assessment of the 'gravity threshold' is required to determine an armed attack. In the *Case Concerning Oil Platforms*,¹³² the ICJ reaffirmed the gravity requirement and found that the use of force by Iran did not constitute armed attacks justifying action in self-defence by the United States.¹³³

iii. The duty to report to the UN Security Council

Article 51 provides two requirements which must be met by the state invoking the right of self-defence. Firstly, the state has a duty to report acts of self-defence to the UN Security Council. Secondly, the right of self-defence is granted 'until the Security Council has taken

¹²⁸ *The Palestinian Wall* (n 123 above) para 194.

¹²⁹ *Case Concerning Oil Platforms* ICJ Reports (2005) 168 para 106-147

¹³⁰ Gray (n 23 above) 138.

¹³¹ *Nicaragua* case (n 17 above) para 191.

¹³² *Oil Platforms* case (n 129 above) para 51-52.

¹³³ As above.

measures necessary to maintain international peace and security'.¹³⁴ Then the right is suspended once the UN Security Council has taken such measures.

The ICJ found that 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence'.¹³⁵ As the ICJ held in the Nicaragua case, 'a failure to report to the Council may be a factor to be taken into account in assessing the validity of a state's claim to action in self-defence'.¹³⁶ During the debate of the UN General Assembly about the intervention of the USSR in Afghanistan, the United Kingdom questioned the validity of the Soviet Union's claim of self-defence without a report to the Security Council.¹³⁷ More recently, Ethiopia did not report to the UN Security Council on its intervention in Somalia in 2006 despite having claimed that it acted under self-defence.¹³⁸ A failure to report will certainly question the good faith of the state claiming this right.

Secondly, Article 51 provides that the right to self-defence is exercised until the UN Security Council has taken all necessary measures to maintain international peace and security. It follows that this right is suspended or terminated once the UN Security Council has taken all necessary measures. Article 51 clearly expresses this duty when asserting that 'measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council'.¹³⁹ The drafters of the UN Charter gave the UN Security Council a monopoly over the use force in order to restore the peace and security. But the practice of states indicates that states comply rarely with this obligation to suspend the exercise of the right of self-defence until after a UN Security Council Resolution. During the Falklands War, the UK after the vote of the UN Security Council Resolution 502 refused to suspend its right to self-defence, as it argued that the perpetrator Argentina was in possession of the Islands.¹⁴⁰

¹³⁴ Article 51 of the UN Charter.

¹³⁵ *Nicaragua* case (n 17 above) para 200.

¹³⁶ McCoubrey (n 100 above) 101.

¹³⁷ Gray (n 23 above) 122.

¹³⁸ Gray (n 23 above) 250.

¹³⁹ Article 51 UN Charter.

¹⁴⁰ Gray (n 23 above) 125.

B. Self-defence and customary international law

The customary right of self-defence existed prior to the UN Charter. It appeared in the *Caroline* case in 1837 when the US Secretary of State Daniel Webster affirmed that a legitimate action of self-defence has ‘to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation’ and that the action was neither ‘unreasonable nor excessive’.¹⁴¹ Thus, self-defence is legitimate if these criteria of necessity and proportionality are fulfilled. These requirements were upheld by the ICJ in the case of *Armed Activities on the Territory of the Congo*.¹⁴² Gray further confirms that though these requirements are not expressly mentioned in the UN Charter they are part of customary international law.¹⁴³

i. Necessity

The state invoking self-defence shall demonstrate whether it is necessary for it to act forcibly. It means that the use of force ‘must be by way of a last resort after all peaceful means have failed’.¹⁴⁴ Such requirement complies with the rule of prohibition of the use of force.

ii. Proportionality

The action in self-defence must be proportionate to the attack. It means that the response by the state invoking self-defence should not be excessive and shall be reasonable. According to Higgins,¹⁴⁵ ‘the action in self-defence is proportionate, in nature and degree, to the prior illegality or the imminent attack’.¹⁴⁶

iii. Immediacy

A state may not invoke self-defence long after an armed attack. But the practice of state supports a justifiable delay, for example, like the incident in 1991 in Iraq and in 1982 in the Falklands Islands.¹⁴⁷

¹⁴¹ Dugard (n 13 above) 500.

¹⁴² *Armed Activities* (n 14 above) 147.

¹⁴³ Gray (n 23 above) 150.

¹⁴⁴ J Gardam *Necessity, Proportionality and the Use of Force by States* (2004) 5.

¹⁴⁵ R Higgins *The Development of International Law Through the Political Organ of the United Nations* (1963) as cited Gardam (n 144 above) 12.

¹⁴⁶ Gardam (n 144 above) 12.

¹⁴⁷ Dinstein (n 25 above) 243.

2.3.2 Intervention under the UN Security Council's authority

In Chapter VII, the drafters of the United Nations Charter conferred on the UN Security Council a primary role in collective security: 'The Security Council was given broader authority to use force: it could respond to threats of aggression as well as to breaches of international peace'.¹⁴⁸

A. UN Security Council's mandate for forcible intervention

Under Article 24(1) of the UN Charter Member States confer the Security Council with the primary responsibility to maintain international peace and security.¹⁴⁹ Similarly, Article 39 of the UN Charter provides that the UN Security Council with the power 'to determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'.

Additionally, the UN Security Council according to Article 42 is empowered to 'take military action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. This also includes demonstrations, blockade and other operation by Member States. Article 43 also obliges Members states to make available to the Security Council 'armed force, assistance, and facilities, including the rights of passage'.

It should be noted that the rights of UN Security Council to intervene is not without limitation. According to Article 2(7) of the UN Charter the Security Council is restricted from intervening in the internal affairs of a state such as civil war between different groups of a state. However, this limitation does not affect the application of enforcement measures under Chapter VII. It also stated that when Article 39 and Article 2(7) are read together they limit the power of the UN Security Council to intervene in intrastate conflicts.

¹⁴⁸ O'Connell (n 106 above) 480.

¹⁴⁹ Article 24 (1) of the of the United Nations Charter (1945) 'In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

B. Express Authorisation

According to Corten,¹⁵⁰ the UN Security Council has explicitly authorized the use of force in humanitarian interventions,¹⁵¹ to restore democratically elected governments,¹⁵² liberate an invaded and occupied state,¹⁵³ consolidate peace,¹⁵⁴ and implement peace agreements.¹⁵⁵ Reference can be made to the two recent cases in Africa, the intervention to protect civilians in Libya¹⁵⁶ and to enforce the results of democratic elections in Ivory Coast.¹⁵⁷

The UN Security Council Resolution which authorises forcible action should comply with the UN Charter. The UN Security Council must determine whether under Article 39 there is a threat or breach of the peace or act of aggression which is the only condition to trigger an action under Chapter VII. Accordingly, the military action should first be authorised by the UN Security Council and should be conducted in accordance to the terms of the Resolution adopted.

C. Implied authorization

The other situation that has been put forward by some states and organisations to intervene militarily in other states is the implied authorization of the UN Security Council.¹⁵⁸ There is no provision in the UN Charter which supports this argument and many states rejected it particularly during the invasion of Iraq in 2003. Virally stated that, ‘a custom cannot be transformed into a rule of law if it encounters the opposition of a proportion of the states comprising the international community’.¹⁵⁹ According to this assertion the implied authorisation does not have significant influence in issues related to intervention by states.

¹⁵⁰ O Corten *Le Droit Contre La Guerre* (2008) 486-487.

¹⁵¹ UNSC Resolutions 794 (1992) Somalia, 929 (1994) Rwanda, 1080 (1996) Zaire, 1114 (1997) Albania and 1264 (1999) Timor oriental (1999).

¹⁵² UNSC Resolution 940 (1994).

¹⁵³ UNSC Resolution 678 (1990).

¹⁵⁴ UNSC Resolutions 1031(1995) Bosnia, 1244 (1999) (Kosovo), 1386 (2001) Afghanistan, and 1511(2003) Iraq.

¹⁵⁵ UNSC Resolutions 1125, 1136 (1997) 1152, 1155 (1998) Republic of Central Africa, 1484 (2003) Congo and 1464 (2003) 1527, 1528 (2004) Ivory Coast.

¹⁵⁶ UNSC Resolution 1973(2011).

¹⁵⁷ UNSC Resolution 1975 (2011).

¹⁵⁸ United Kingdom and USA intervention in Northern Iraq in 1991, NATO intervention in Yugoslavia 1999 and the invasion of Iraq in 2003.

¹⁵⁹ M Virally ‘The Sources of International Law’ in M Sorensen (ed) *Manual of Public International law* (1968) 135.

2.3.3 Intervention by invitation

It is a common practice for a state to give consent to another state to intervene forcibly in its territory. Such intervention is justified by the consent of the state where the intervention takes place. The legality of intervention by invitation is supported by academic experts.¹⁶⁰ Wippman supports the view that ‘consent may validate an otherwise wrongful military intervention into the territory of the consenting state is a generally accepted principle’.¹⁶¹ Lauterpacht affirms also that ‘if a government invites another State to act in a manner which would otherwise constitute derogation from the rights of the former, the presence of consent negates the possibility of wrong’.¹⁶²

In addition to what has stated above the *rapporteur* Ago in his Report on the Draft Articles on State Responsibility of the International Law Commission included consent as a circumstance precluding wrongfulness.¹⁶³ Accordingly, this Report recognises the principle of *volenti non fit injuria* which means that the responsibility of a state which violates its international obligation is excluded if the injured state had consented to the injury.¹⁶⁴

Thus, it is important to consider two important points in cases of intervention by invitation. First, the validity of consent as a justification for an armed intervention and secondly, the conditions under which it may expressed. These two stages are discussed below:

A. Consent as a valid justification for armed intervention

There are two ways of giving consent, first, *ad hoc* consent and secondly, consent through a prior agreement.

i. *Ad hoc* consent

It is important to note that one may question the validity of consent given by a state to another state in order to intervene militarily in its territory. This justification may *prima facie* be in conflict with the rule on the prohibition of the use of force. Indeed, the rule prohibiting

¹⁶⁰ L Doswald-Beck ‘The Legal Validity of Military Intervention by Invitation of the Government’ *British Yearbook of International Law* (1985) 189.

¹⁶¹ D Wippman ‘Military Intervention, Regional Organizations, and Host-State Consent’ 7 *Duke Journal of Comparative & International Law* 209.

¹⁶² E Lauterpacht ‘The Contemporary Practice of the United Kingdom in the Field of International Law-Survey and Comment, V’ (1958) 7 *International and Comparative Law Quarterly* 103.

¹⁶³ Corten (n 150) above 391.

¹⁶⁴ Tanca (n 45 above) 15.

the use of force embodied in Article 2(4) of the UN Charter has not only become a rule of customary international law but has evolved to acquire the status of *jus cogens*.

If a state has validly expressed consent for another state to use armed force on its territory, it may be argued that such intervention would not be against the territorial integrity and political independence of the state: Thus Wippman stated that ‘the prohibition on the use of force contained in Article 2(4) of the UN Charter, for example, should be understood as a prohibition on the coercive use of force, that is, on force used without the consent of the affected state’.¹⁶⁵ Therefore, it does not fall within the scope of the prohibition of the use of force embodied in Article 2(4) of the UN Charter. The question that arises is how may consent waive a peremptory norm of international law (or *jus cogens*)? According to Corten, consent does operate either as a circumstance excluding wrongfulness or as an exception to the rule. Rather it precludes the application of the prohibition’s rule.¹⁶⁶ Tanca also asserts that ‘armed intervention, if consented to by the target state, would not be *against* it’ and therefore ‘the peremptory norm would be inapplicable’.¹⁶⁷ While *ad hoc* consent is accepted as a valid justification, consent through prior agreement should be addressed.

ii. Consent pursuant to treaty

At first glance, it is possible for a sovereign state to enter into an agreement with another state which enables the latter to intervene forcibly on its territory. In this case, consent is expressed before the intervention occurs. According to Wippman, there are two different approaches regarding the treaty-based consent.¹⁶⁸ Accordingly, he stated that states can put restriction to their sovereignty by accepting treaty-based restrictions.¹⁶⁹ The validity of such treaty-based consent is questionable in the light of the rule prohibiting the use of force embodied in Article 2(4) and recognized as a *jus cogens* norm. It appears doubtful whether a bilateral treaty may derogate from a peremptory norm of international law.

Further, Article 103 of the UN Charter provides that ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present

¹⁶⁵ D Wippman ‘Treaty-Based Intervention: Who Can Say No?’ 62 *The University of Chicago Law Review* (1995) 623.

¹⁶⁶ Corten (n 150 above) 396.

¹⁶⁷ Tanca (n 45 above) 22.

¹⁶⁸ Wippman (n 165 above) 610.

¹⁶⁹ As above.

Charter shall prevail'.¹⁷⁰ The supporters of the second approach consider that a treaty based consent which enables a state to intervene forcibly in another state is 'void *ab initio* because it violates peremptory norms of international law protecting the sovereignty, territorial integrity, and political independence of all states'.¹⁷¹ This argument is consistent with Article 53 of the Vienna Convention which provides that a 'treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.¹⁷² Conclusively, therefore the treaty-based consent as a justification for armed intervention is void because it violates Article 2(4) and Article 103 of the UN Charter.¹⁷³

Two conditions need to be met: first, the consent must be validly expressed and it must be internationally attributed to a state.¹⁷⁴ It must be clearly expressed and should not be presumed. The agent or organs to express the consent should be seen as the will of the state. The organ or agent should be competent to act on behalf of the state.

B. Legitimacy and effectiveness of state

The criterion of effectiveness is relevant to the validity of consent. A government without effective control over its territory cannot give a valid consent. Tanca supports the view that effectiveness is the only criterion to assess the legitimacy of the inviting authority.¹⁷⁵ It was a consensus about scholars and state practices that it is the right of a recognised government to request invitation in case of rebellion. This argument contradicts the right of internal self-determination if the state suppresses it with the assistance of a foreign state. It also breaches a peremptory norm as the right of self-determination is recognised as *jus cogens* norm.

¹⁷⁰ Article 103 of the UN Charter.

¹⁷¹ Wippman (n 165 above) 610-611.

¹⁷² Article 53 of the Vienna Convention on the Law of Treaties (1969).

¹⁷³ Wippman (n 165 above) 610.

¹⁷⁴ Tanca (n 45 above) 15.

¹⁷⁵ n 45 above 48.

Chapter 3:

Extraterritorial use of force against non-state actors

3.1 Introduction

Following the terrorist attacks on the United States on 11 September 2001 and the resultant war on terror launched by the United States (and most of its allies), states have increasingly used force outside their frontiers against non-state actors.¹⁷⁶ Examples of this are notably, the Israeli use of force against the Hezbollah in Lebanon, the United States intervention against Al-Qaeda in Yemen, Pakistan and Somalia, and Turkey against the Kurdish Workers Party in Iraq. The non-state actors named in the given examples are different with regards to their ideologies, purposes, tactics and capabilities. Armed non-state actors encompass terrorists, rebels, pirates, warlords, mercenaries, separatists, guerrillas, militias and freedoms fighters. Extraterritorial use of force against non-state actors can take many forms: drone attacks,¹⁷⁷ fight against pirates (for example, on Somalian territorial waters),¹⁷⁸ and invasions.¹⁷⁹ Furthermore, the non-state actors against whom the use of force conducted include not only sub-national actors acting at national level, but also trans-national actors with global agendas like Al-Qaeda. It should also be noted that the collapse of communism and the complete break-down of governments in former Soviet-Union and former Yugoslavia created a fertile ground for non-state actors to flourish. Moreover, the advancement of technology gave these groups to conduct transnational attacks indifferent ways.

Use of force against non-state actors in the territory of another state is still a subject that needs an in-depth analysis of the concept and principles of the use of force. However, no one can deny the controversy and debate it has brought about in the area of international law. It is clearly underlined in the previous chapter that military actions carried out against a non-state actor in another state without its consent is prohibited by Article 2(4) of the UN Charter. Consequently, any unilateral use of force, unless exceptions are provided by the UN Charter, will result in a breach of Article 2(4) of the UN Charter. In addition, the International Court

¹⁷⁶ Lubell (n 39 above) 4.

¹⁷⁷ United States in Afghanistan, Pakistan, Yemen, Somalia

¹⁷⁸ Lubell (n 39 above) 4.

¹⁷⁹ United States in Afghanistan (2001), Israel in southern Lebanon (2006) and Ethiopia (2006) and Kenya (2011) in Somalia.

of Justice in the *Nicaragua Case* held that the ban on the use of force is both a rule of customary international law and *jus cogens*.¹⁸⁰

States attempt to adopt a broader interpretation of Article 51 of the UN Charter because it ‘provides the only escape from the prohibition of use of force’.¹⁸¹ Extraterritorial use of force against non-state actor is mostly justified on the grounds of self-defence.¹⁸² This requires a compendious discussion on the legality of self-defence when used by states against non-state actors (within the territory of another state).

3.2 Non-State actors and right of self defence

Following the terrorist attacks on the USA on 11 September 2001, the USA attributed the responsibility to Al-Qaeda, a terrorist network of global reach and under the leadership of Osama Bin Laden.¹⁸³ The attacks against the US were perpetrated on US territory (New York and Pennsylvania). However, the terrorist group was based in Afghanistan where much of the planning, recruitment and training of Al-Qaeda terrorists took place. The question that arises here is: did the actions of Al-Qaeda (a non-state actor) amount to an armed attack against the US to trigger the right of self-defence as provided in the UN Charter? In other words, where a non-state actor (say Terrorist Group A) based on the territory of a state (say State X) launches an attack against another state (say State Y), does such an attack by the terrorist group (Group A) suffice for the attacked state (State Y) to exercise the right to self-defence?

3.2.1 State involvement

Article 51 of the UN Charter provides that a state may exercise a right of self-defence against another state. However, it fails to mention the nature of the party responsible for the attack or action triggering this right to self-defence.¹⁸⁴ The International Court of Justice found that ‘Article 51 of the Charter thus recognised the existence of an inherent right of self-defence in the case of armed attack by one state against another state’.¹⁸⁵ From this ruling, it can be deduced that a state may not exercise its right to self-defence against another state when there is no evidence of the latter’s involvement in actions perpetrated by non-state actors. In *Armed Activities* case, the International Court of Justice rejected Uganda’s claim of

¹⁸⁰ *Nicaragua case* (n 17 above) para 190.

¹⁸¹ Dugard (n 13 above) 84.

¹⁸² Lubell (n 39 above) 29.

¹⁸³ Moir (n 69 above) 43.

¹⁸⁴ Lubell (n 39 above) 31.

¹⁸⁵ *The Palestinian Wall* (n 123 above) para 139.

self-defence on the ground that attacks, while emanating from the territory of the Democratic Republic of Congo, were not directly attributable to this state.¹⁸⁶ However, Judges Koojmans and Burgenthal in their respective Opinions in the *Advisory Opinion on the Wall* disagreed with the ICJ's reluctance that armed attacks can be perpetrated by non-state actors.¹⁸⁷ In this same case, Judge Higgins in her Separate opinion noted that, 'nothing in the text of Article 51... stipulates that self-defence is available only when an armed attack is made by a State'.¹⁸⁸ Dinstein supports the view that, 'an armed attack can be carried out by non-State actors'.¹⁸⁹ It may be considered that UN Security Council Resolution 1368 which authorised the use of force in Afghanistan was an implicit acceptance to the right of self-defence against non-State actors. In this case, 'the SC Resolution did not make any reference to possible state involvement'.¹⁹⁰ UN Security Council Resolutions 1368 and 1373 did not mention that an armed attack occurred.¹⁹¹ Some scholars interpreted these resolutions as indicating only that 'states' right of self-defence in the absence of (proof of) substantial state involvement exists only in cases where the right has been asserted by the Security Council'.¹⁹²

One scholar asserted that, after the US military response to the terrorist attacks on 11 September 2001, 'the attribution threshold has been lowered from 'effective control' to providing 'sanctuary and support''.¹⁹³ The threshold 'sanctuary and support' seems to follow the terms of the 2002 US National Security Strategy which proclaims that the United States 'will make no distinction between terrorists and those who knowingly harbour or provide aid to them'.¹⁹⁴ Another scholar by the name Green stated that, the ICJ uses a different degree of collaboration on the part of the host state in assessing 'the involvement test' all cases of self-defence is invoked.¹⁹⁵

Since the *Nicaragua* case, the jurisprudence of the ICJ indicates that an armed attack has to be attributable to a state. In the absence of 'effective control' or 'substantial involvement', the host state cannot be held responsible for an armed attack on the victim state and it cannot be

¹⁸⁶ Green (n 112 above) 18.

¹⁸⁷ Lubell (n 39 above) 32.

¹⁸⁸ Dinstein (n 45 above) 204.

¹⁸⁹ As above.

¹⁹⁰ T Ruys & S Verhoeven 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 *Journal of Conflict & Security Law* 297.

¹⁹¹ Moir (n 69 above) 53.

¹⁹² Ruys & Verhoeven (n 190 above) 312.

¹⁹³ B Michael 'Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence' (2009) 16 *Australian International Law Journal* 134.

¹⁹⁴ Ruys & Verhoeven (n190 above) 298.

¹⁹⁵ Green (n112 above) 49.

the target of a military operation taken in self-defence.¹⁹⁶ The ICJ also put forward another criterion – the gravity threshold – in order to assess the validity of self-defence against non-state actors.¹⁹⁷

3.2.2 Scale of armed attack

Article 51 of the UN Charter makes it permissible for a state to exercise its right to self-defence in response to an armed attack. It is obvious that ‘not all uses of force will reach this threshold’.¹⁹⁸ Indeed, the impact on the victim state and its response will be different if it is a minor border incident or a large-scale armed intervention. Thus, in the context of self-defence against non-state actors, the issue that arises with acuity is whether the action of a non-state actor will be qualified as an armed attack, the sole condition to trigger self-defence.

The ICJ found in the *Nicaragua* case that, indirect military action in the form of provision of weapons to rebels constitutes a use of force rather than an armed attack.¹⁹⁹ In this case, the ICJ held that, it is ‘necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’.²⁰⁰ In the *Case Concerning Oil Platforms*, the International Court of Justice reaffirmed the ‘gravity threshold’, holding that the use of force by Iran did not constitute armed attacks to justify the right to self-defence by the United States.²⁰¹ According to Moir, it is acknowledged that ‘the actions of non-State actors could represent an armed attack when they were equivalent in terms of gravity to the activities of regular armed forces’.²⁰²

Generally, an action by a non-state actor is more qualified as minor incidents than large scale actions. Many states like Israel argue that an accumulation of minor incidents also known as ‘accumulation of events’ should or could amount to an armed attack. In the context of the actions of the Palestinian Liberation Organisation (PLO), Israel claimed a right to self-defence based on ‘the accumulation of events’. This argument has often been rejected and condemned by the UN Security Council.²⁰³

¹⁹⁶ Moir (n 69 above) 152.

¹⁹⁷ n 69 above 22.

¹⁹⁸ As above.

¹⁹⁹ *Nicaragua* case (n 17 above) para 195.

²⁰⁰ n 17 above para 191.

²⁰¹ *Oil Platforms* (n 129 above) para 51-52.

²⁰² Moir (n 69 above) 23.

²⁰³ Lubell (n 39 above) 51.

According to Lubell, “the ‘accumulation of events’ approach itself constitutes a problematic basis for claiming a right to self-defence, unless involving current on-going armed attack or imminent threat one”.²⁰⁴ While claiming a right of self-defence against non-state actors, states’ actions might be described as reprisals, which are unlawful.

If the scale of non-state action is sufficiently grave to be considered as an armed attack, then the state invoking the right to self-defence must demonstrate that its action is in accordance with the *Caroline* requirements of necessity, proportionality and immediacy.

3.2.3 *Caroline* test

In the *Caroline* incident Webster the US Secretary of State put forward the requirements of ‘necessity, proportionality and immediacy’.

He asserted that the victim of an armed attack shall respond with ‘no moment of deliberation’ in order for self-defence to be legitimate. Immediacy means that there should not be a delay between the attack and the response of the target state. This condition was not fulfilled by the USA which launched military operation in Afghanistan on 7 October 2001, almost one month after the attacks.

The phrase ‘leaving no choice of means’, in the opinion of Webster, implies action taken by the states on the grounds of necessity. It means that forcible action should be taken only if there is no alternative option. In the case of non-state actors attack operating from a state, the victim state, before taking military action, may contact the host state in order to prevent further attacks. The failure of a victim state to try this option can indicate that the requirement of necessity has not been fulfilled and its response could be in violation of the UN Charter’s prohibition on the use of force.²⁰⁵ For example, with regards to the invasion of NATO invasion of Afghanistan on behalf of NATO, the USA requested the cooperation of the Taliban (the then regime of Afghanistan) to fulfil the necessity requirement. Others support the view that the Taliban’s unwillingness to take necessary measures to turn in the non-state actors (Al-Qaeda) enabled NATO’s intervention in compliance with the principle of necessity.²⁰⁶

²⁰⁴ n 39 above 54.

²⁰⁵ n 39 above 46.

²⁰⁶ Moir (n 69 above) 61.

The element of proportionality requires ‘that there should be equivalence between the force used and the response in self-defence’.²⁰⁷ Regarding the legitimacy of self-defence against non-state actors, the principle of proportionality ‘relates not to the armed attack that has taken place, but rather to the continuing threat that the use of force is designed to counter’.²⁰⁸

Military operations carried out by states in order to prevent future threats are sometimes excessive compared to the initial attack. The United States’ intervention was disproportionate because the removal of the Taliban regime goes far beyond the exercise of self-defence. Change of regime was contrary to international law because it threatens not only the political independence of states but also the principle of self-determination. In 2006, Israel’s response to Hezbollah’s actions was also excessive. By bombarding targets beyond the area controlled by Hezbollah, Israel’s disproportionate use of force ‘exceeded the limits of the right to self-defence’.²⁰⁹

The fact that Hezbollah had representatives in the Lebanese government raised the question whether it was to be considered as a state or a non-state actor. Another issue to be addressed is the case of non-state actors acting as *de facto* government.

3.3 Non-state actors and a state without effective government

It is important to do an analysis of the issue of self-defence against a non-state actor operating within a state without effective government. It is also necessary to assess the possibility of self-defence against a non-state actor exercising effective control in a state and thus acting as a *de facto* government.

3.3.1 Non-state actors and ‘failed states’

According to Shaw, ‘the designation of “failed state” is controversial and, in terms of international law, misleading’.²¹⁰ International law recognises only states without any adjectives. Once a state meets the factual requirements of statehood, it is still recognized as a state even after the loss of an effective control of its territory. There is no support from the practice of states that a ‘failed state’ should cease to be a state.²¹¹ The case of self-defence

²⁰⁷ Gardam (n 144 above) 160.

²⁰⁸ Moir (n 69 above) 69.

²⁰⁹ T Ruys ‘Crossing The Thin Blue Line: An Inquiry Into Israel’s Recourse to Self-Defence Against Hezbollah’ 43 *Stanford Journal of International Law* (2007) 292

²¹⁰ Shaw (n 92 above) 202.

²¹¹ Dugard (n 13 above) 84.

against a non-state actor operating from within a state without a central government is an issue that needs to be addressed.

Self-defence against a host state is justified if it is involved in an attack carried out by a non-state actor.²¹² If under the ‘effective control’ test founded by the ICJ in the *Nicaragua case* a non-state actor’s action is ‘imputable’ to a state, the victim state is entitled to invoke a right of self-defence against the host state. One author argues that states support the exercise of self-defence against a non-state actor attack in the case the host state's lacks effective control over its territory.²¹³ He bases his argument on the practice of states before the adoption of the UN Charter.²¹⁴ Before the UN Charter, the principle of prohibition of the use of force in international relations was not a peremptory norm. The practice before the advent of the UN Charter is currently unlawful. It also refers to some examples of the Charter era. References cited in these cases were never accepted as lawful.²¹⁵ The exercise of the right of self-defence against non-state actor operating from within a state without effective government is not lawful because it lacks the ‘effective control’ test. In this case, the host state is unable or unwilling to prevent attacks. It is however insufficient to amount to a right of self-defence for the victim state. The ICJ found in the case of *Advisory Opinion on Palestinian Wall* that, non-state actors cannot themselves commit armed attacks and that acts of self-defence cannot legally be taken against them as such in response to such attacks. US officials asserted *ad vitam aeternam* the risk of ‘failed states’ to become a safe haven for terrorists.²¹⁶ Since the demise of the regime of President Syad Barre, Somalia has been without an effective central government. Consequently, many non-state actors such as Al-Shabaab operated within the territory. It seemed difficult for Somalia to be held responsible for the cross-border acts of Al Shabaab due to its inability to exercise an effective control over the territory. The host state has no power to control the country and cannot provide executable instructions since it did not have any control over the operations of Al-Shabaab. An armed attack or a national security threat against a foreign state by this organisation should not be imputable to Somalia. Consequently, any extraterritorial military intervention in Somalia against Al-Shabaab should not be justified as self-defence under Article 51 of the UN Charter. In addition, Somalia has

²¹² Lubell (n 39 above) 40.

²¹³ B Finucane ‘Fictitious States, Effective Control, and the Use of Force Against Non-State Actors’ (2012) 30 *Berkeley Journal of International Law* 71-81.

²¹⁴ United States intervention in Spanish Florida (1817), USA pursuit of Francisco "Pancho" Villa in Mexico (1916) and the *Caroline* incident (1837).

²¹⁵ Israel intervention in Lebanon (1982) (2006), Turkey intervention against PKK in northern Iraq

²¹⁶ JA Piazza ‘Incubators of terror: Do failed and failing states promote transnational terrorism?’ (2008) 52 *International Studies Quarterly* 469.

not lost its legal personality or its sovereignty. Therefore, any unilateral use of force against this state will be in contradiction with the prohibition of the interstate use of force embodied in Article 2(4) of the UN Charter. It may be considered that an attack which targets only Al-Shabaab does not breach the political independence and territorial integrity of Somalia. This restrictive approach of the rule of the prohibition of the use of force is not sustainable because this rule is a peremptory norm of international law. Between 2009 and 2012, Al-Shabaab has exercised effective control over Southern and Central Somalia. The UIC had also controlled the same regions from 2006 to 2007. The peculiarity of these two non-state actors is that they acted as *de facto* regimes, which raises the question on the possibility of the use of force against a non-state actor acting as *de facto* regime

3.3.2 Non-state actor acting as *de facto* regime

There are two opposing doctrines about recognition of governments: the Tobar doctrine or doctrine of legitimacy and the doctrine of the effectiveness.²¹⁷ The latter provides that a new government which exercises effective control of a territory with a ‘prospect of permanency’ should be recognised as *de jure* government.²¹⁸ A recognition as *de facto* government is an acknowledgement by other states about its effectiveness. In 2006, the Union of Islamic Courts took control of Mogadishu and many parts of Somalia. The UIC received in Mogadishu delegations from the United Nations like the Special Envoy of the Secretary-General of the UN, Francois Losseny Fall and Louis Michel from the European Union. It may be deduced that the UIC was acting as *de facto* government alongside a recognised but ineffective Transitional Federal Government which controlled only the town of Baidoa.

It is relevant to analyse whether an attack from the UIC could be attributed to the Somali state. The answer is no because the TFG had no control over the UIC. Its actions could not be imputed to the host state. If the attack could not be attributed to the state, no action of self-defence against the non-state actor was possible. The state can be held responsible only for its inability to prevent attacks perpetrated by the non-state actor. A possible solution for the victim state is to request the consent of the recognised government which is a circumstance precluding the wrongfulness of the act.

²¹⁷ N Mugerwa ‘Subject of international law’ in M Sorensen (ed) *Manual of Public International law* (1968) 271.

²¹⁸ Dugard (n 13 above) 115.

After 2009, another non-state actor took power in the capital and most parts of Somalia. Al-Shabaab is considered by Ethiopia and the USA as a terrorist group. There was also a recognised but ineffective TFG which controlled only a small part of Mogadishu. Attacks committed by Al-Shabaab could not be attributed to the Somali state represented by the recognised government. No action of self defence against the non-state actor is permitted by international law without a substantial state involvement.

In the case where a non-state actor acts as *de facto* regime, and where there is no *de jure* government in the state, its acts should be considered as acts of the state. Article 10 of Drafts Articles on State Responsibility provided that a conduct of an insurrectional group which becomes a new government of a state shall be considered an act of this state. For instance, acts of Al-Shabaab or the UIC would be attributable to Somalia in absence of another competing faction internationally recognised. A victim state may be entitled to exercise the right of self-defence against the *de facto* regime.

3.4 Conclusion

In conclusion, extraterritorial use of force against a non-state actor is prohibited unless it perpetrated a large scale attack with an involvement of the state. If the action of the non-state actor amounted to an armed attack but there is no state attribution for this action, the victim state shall request the cooperation of the host state in order to prevent future attacks. If the state intervenes forcibly without requesting the assistance of the host state, it fails to meet the test of necessity and its claim of self-defence will not be considered as lawful.

In the case of a non-state actor acting as *de facto* regime in a state, its action will be considered as actions emanating from the state. Therefore, victim state may exercise a right of self-defence against its attacks.

Chapter 4

Ethiopia and Kenya's use of force in Somalia

4.1 Introduction

In the previous chapters, we have examined the legal framework on the use of force. The prohibition of the use of force is a peremptory norm of international law. Exceptions to this principle are those provided by the UN Charter which are: self-defence and use of force under the authority of the UN Security Council. International law considers that the prohibition of the use of force does not apply if a state exercising effective control on its territory expresses an ad hoc consent for another state to intervene on its territory.²¹⁹ we also noted that it was not possible to invoke a right of self-defence against a non-state actor unless the latter perpetrated an armed attack attributed to that state.

In this Chapter, we proceed to two case studies: firstly, the military intervention of Ethiopia against the Islamic Courts in 2006 and secondly, the (military) intervention of Kenya against Al Shabaab in 2011. Before being attacked by the two neighbouring states, both non-state actors respectively controlled the Somali capital (Mogadishu) and most Somalian territories except the autonomous regions of Puntland and Somaliland. Finally, we will conclude by assessing the lucidity and legality of the justifications raised by these two states (Ethiopia and Kenya) namely, self-defence and the invitation of the ineffective but recognized Transitional Federal Government (TFG).²²⁰

4.2 The validity of claim of intervention upon invitation

A state can legally intervene militarily in another state upon invitation.²²¹ In such cases, the inviting state must express a valid consent. Such an invitation may raise a few questions in order to assess the lawfulness of the state's consent. Some of these questions are: the author's consent; the manner in which it is expressed; the time it is expressed; the organ or the official expressing the consent; and whether it is empowered to act on behalf of the state; whether it is recognised as a state by other states and the exercise of an effective control over the territory and how such effective control is exercised – implicit, explicit, presumed? If it is expressed, is it *a priori* or *a posteriori*?

²¹⁹ Corten (n 150 above) 396.

²²⁰ Allo (n 57 above) 202-203.

²²¹ Doswald-Beck (n 160 above) 189.

4.2.1 Kenya's intervention and the TFG consent

On 16 October 2011, the Kenyan Foreign Minister, Moses Wetangula, affirmed that Kenya crossed the Somali border at the request of the ineffective but recognised TFG to act against Al-Shabaab, a group considered responsible for the kidnapping of four Europeans.²²² Despite the Kenyan Government's statement of intervening upon invitation from the TFG, Somali President Sheikh Sharif criticized the Kenyan intervention.²²³ On 18 October 2011, two days after the Kenyan army intervened deeply in Somali territory, the Kenyan Minister of Foreign Affairs and the Minister of Defence Yusuf Haji, held a meeting with the President and Prime Minister of Somalia in order to request the consent of the Somali government.²²⁴

If Somalia is considered as in the situation of civil war where a government is challenged by a rebellion, then the TFG as the recognised and legitimate government is entitled to request the intervention of another state. International law restricts intervention in support of rebellion as held by the ICJ in the *Nicaragua* case.²²⁵ The intervention upon invitation of a state which lacks recognition is illegitimate and unlawful under the rule of prohibition of use of force.²²⁶

As acknowledged by the Kenyan Minister of Foreign Affairs, the TFG is internationally recognized but ineffective. At the time of intervention, it controlled a few neighbourhoods of Mogadishu while the majority of Central and Southern Somalia was controlled by Al-Shabaab. The TFG government enjoyed international legitimacy but lacked effectiveness. In the event that the rebels gained an upper hand on the legitimate government, an invitation by the latter would not be permitted because a government which lacks effectiveness cannot give a valid consent.²²⁷

Kenyan authorities argued that their intervention was at the request of the TFG government. However, the Somali President who has the legal capacity to act on the behalf of the state

²²² W Ross 'Kenya sends troops into Somalia to hit Al-Shabaab' 17 October 2011 BBC News <http://www.bbc.co.uk/news/world-africa-15331448> (accessed on 10 September 2012).

²²³ R Abdi and EJ Hogendoorn 'Kenya: Risks and Opportunities in Kenya's Intervention in Somalia' Daily Nation (19 November 2011) <http://www.nation.co.ke/News/politics/Risks+and+opportunities+in+Kenyas+intervention+in+Somalia/-/1064/1276082/-/item/0/-/sf3rurz/-/index.html> (accessed on 10 September 2012).

²²⁴ P Leftie 'Kenya, Somalia seal pact to hit Shabaab' Daily Nation (18 October 2011) <http://www.nation.co.ke/News/Kenya+Somalia+seal+pact+to+hit+Shabaab+/-/1056/1257888/-/47jh0r/-/index.html> (accessed on 10 September 2012).

²²⁵ *Nicaragua* case (n 17 above) para 209.

²²⁶ L Mon "Unilateral Intervention by Invitation in Civil Wars" (2003) 35 *New York University Journal International Law and Politics* 754.

²²⁷ Tanca (n 45 above) 23.

denied having consented and even criticized the intervention. If the President denied having given his consent, the Kenyan government's claim based on invitation becomes invalid. For consent to be valid, it should have been expressed or given before the intervention.²²⁸ On 30 October 2011, the Somali government gave an *a posteriori* consent to the intervention after Kenyan authorities summoned the Somali Prime Minister Abdiweli to Nairobi.²²⁹ Such consent called into question the manner in which it was granted.

The justification of intervention by invitation invoked by Kenya at the beginning of operations may be invalid. Kenya's military actions in the territory of Somalia without a prior and *ad hoc* consent of the inviting state were unlawful. They constitute a violation of the principle of the prohibition of use of force embodied in Article 2(4) of the UN Charter.

4.2.2 Ethiopia's intervention and the TFG consent

After two years of a peace process in Nairobi, the Somali delegates elected a Transitional Federal Government led by Abdillahi Yusuf. The Government settled in Baidoa from June 2005 until December 2006. In June 2006, the Union of Islamic Courts (UIC) took control of the capital and most parts of Somali territory with the exception of the autonomous regions of Puntland and Somaliland. On 21 July 2006, one day after the Ethiopian troops crossed the Somali border; the UIC declared war on Ethiopia but the latter launched a major offensive on 24 December 2006.²³⁰

Prime Minister Zenawi justified the intervention in Somalia by the invitation of the recognised TFG under the leadership of Abdillahi Yusuf.²³¹ According to Samatar, during the Somali Peace Conference in Kenya in 2004, Ethiopia promoted the nomination of the President Yusuf and the Prime Minister Guedi.²³² One year after being elected by the delegates, the Government relocated to Baidoa with the protection of the Ethiopian army. Its dependence on Ethiopian regime may have undermined its legitimacy. The TFG was recognized as a legitimate government by the African Union, the Arab League, and the United Nations. However, it lacked internal legitimacy because its ascension to power was

²²⁸ Corten (n 150 above) 416.

²²⁹ ICG 'The Kenyan Military Intervention in Somalia' Crisis Group Africa Report N°184, 15 February 2012 <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/184%20-%20The%20Kenyan%20Military%20Intervention%20in%20Somalia.pdf> (Accessed on 10 September 2012)

²³⁰ ZW Yihdego 'Ethiopia's Military Action Against the Union of Islamic Court and Others in Somalia: Some Legal Implications' (2007) 56 *International and Comparative Law Quarterly* 667

²³¹ Allo (n 57 above) 214.

²³² AI Samatar 'Ethiopian Invasion of Somalia, US Warlordism & AU Shame' (2007) 34 *Review of African Political Economy* 156.

not in line with the constitutionally prescribed rules and methods. The other faction, the UIC, was not recognised but it initiated dialogues with representatives of international and regional organizations. The UIC had talks in the capital city of Mogadishu, with Louis Michel of the European Union as well as Francois Losseny Fall, Special Envoy of the Secretary-General of the UN. The UIC also enjoyed broad popular support among Somalia people.²³³ It was difficult to determine which of the factions had legal capacity to speak on behalf of the Somali state. The recognised TFG had more external legitimacy than the UIC to request an invitation to another state relay on the recognition criteria. Yihdego considered that Ethiopia's intervention based on the invitation of the recognised TFG was lawful.²³⁴

The criterion for recognition or external legitimacy is necessary but not sufficient to determine the legal capacity to express a valid consent to a state – the criterion of effectiveness is also required.²³⁵

Since June 2006, the UIC acting as a *de facto* government has exercised an effective control of most parts of Central and Southern Somalia. Taking into consideration the effectiveness test, the TFG can be considered as ineffective since it controls only the town of Baidoa, while the Union of Islamic Courts control most of the country. The TFG was unable to sustain itself without the external support of Ethiopia.²³⁶ It is doubtful for an entity which is unable to sustain itself to express a valid consent.²³⁷ Only the UIC fulfilled the requirement of effectiveness.

Tanca supports the view that, the intervention based upon invitation of an ineffective government is unlawful.²³⁸ Allo also asserts that, the TFG lacked the legal authority to make a valid consent for an invitation to Ethiopia.

In conclusion, it may be considered that the TFG's consent to invite Ethiopia was not valid and could not preclude the breach by Ethiopia of the prohibition of the use of force embodied in Article 2(4) of the UN Charter.

²³³ Allo (n 57 above) 219.

²³⁴ Yihdego (n 230 above) 669.

²³⁵ Allo (n 57 above) 220.

²³⁶ n 57 above 222.

²³⁷ Tanca (n 45 above) 23.

²³⁸ As above.

4.3 The validity of claim of self defence

Kenya and Ethiopia claim a right of self-defence against non-state actors, the UIC in 2006 and Al Shabaab in 2011, respectively.

4.3.1 Kenya's claim of self defence

After the beginning of military operations within the Somalia territory, Kenyan Minister of Defence Yusuf Haji emphasized that its government was exercising the right of self-defence under Article 51 of the UN Charter against Al Shabaab. The non-state actor was held responsible for the abduction of several Europeans on the Kenyan territory.

The validity of the justification of self-defence against a non-state actor should be assessed by taking into account the law of self-defence under the UN Charter, customary international law as well as the jurisprudence of the ICJ. The jurisprudence of the ICJ requires that only a grave armed attack attributable to a state triggers a right of self-defence of the victim state.

A. Prior armed attack against Kenya?

Under Article 51 of the UN Charter, Kenya's claim of a right of self-defence is valid only if an 'armed attack occurs'. Every wrongful act does not constitute an armed attack. It is difficult to consider that the abductions of foreigners by Al-Shabaab are sufficiently grave to qualify as an armed attack. These several attacks were more likely to be considered as cross-border incidents than an armed attack. The threshold of gravity found by the ICJ in the *Nicaragua Case* should be fulfilled for Kenya to trigger a right of self-defence. In the *Nicaragua Case*, the ICJ held that only, 'the most grave forms of the use of force' amounted to an armed attack.²³⁹ This means that only actions with sufficient 'scale and effects' by non-state actors amounted to armed attacks.²⁴⁰ In the *Oil Platforms*, the ICJ held that any use of force did not constitute an armed attack.²⁴¹ In the absence of a prior armed attack Kenya could not invoke a right of self-defence. Similarly, the ICJ found the criterion of state attribution to assess the validity of a claim of self-defence.

²³⁹ *Nicaragua case* (n 17 above) para 191.

²⁴⁰ Green (n 112 above) 34.

²⁴¹ *Oil Platforms* (n 129 above) para 51-52.

B. Armed attack Attributable to Somalia?

Al Shabaab operates from Somali territory. Its actions however cannot be attributed to Somalia as it (Somalia) is represented by the internationally recognized TFG. Attacks would be attributable to Somalia only if the TFG exercises ‘effective control’ over Al-Shabaab. The ICJ also found in the *Palestinian Wall* that Article 51 of the UN Charter should be read as an ‘armed attack by one state against another state to another state’.²⁴² It rejected the Israel’s claim of a right of self-defence against a non-state actor. Scholars such as stated that Article 51 of the UN Charter does not mention that the attack must be attributable to a state.²⁴³ There is no general acceptance of the right of self-defence against a non-state actor. The ICJ also adopted the same approach in *Armed activities*.²⁴⁴ One may argue that the US and NATO’s intervention in Afghanistan was a recognition of a right to self-defence against a non-state actor. This was not a unilateral action but it has undertaken under the UN Security Council’s authority.

Al Shabaab had effective control over most of parts of the territory and acted as a *de facto* government. It lacked however the legal capacity and international recognition to speak on behalf of Somalia. These acts would be attributed to it if there was no *de jure* government. As found by the ICJ in *Palestinian Wall*, if there is no armed attack emanating from another state, the claim of self-defence is not valid.²⁴⁵ In addition, some abduction of four Europeans can be qualified as cross-border incidents rather than armed attacks.²⁴⁶

C. *Caroline* test

It may be considered that the requirement of the criterion of necessity was not fulfilled because Kenya seemed to have set aside any alternative option to address this issue. The invasion of a sovereign state and the occupation towards the end of 2011 of the (sea) port and airport of Kismayo demonstrate that the military actions of Kenya were disproportionate. Therefore, the intervention of Kenya on behalf of the auto-defence against Al-Shabaab without the consent of Somalia would be considered as illegal.

²⁴² *The Palestinian Wall* (n 123 above) para 139.

²⁴³ Lubell (n 39 above) 32.

²⁴⁴ *Armed Attacks* (n14 above) para 146-147.

²⁴⁵ *The Palestinian Wall* (n 123 above) para 139.

²⁴⁶ Corten (n 150 above) 219.

4.3.2 Ethiopia's claim of self defence

On 24 December, 2006, the Ethiopian Prime Minister acknowledged that its army had launched a war against the Union of Islamic Courts. Article 51 of the UN Charter requires that only an armed attack can trigger the right of self-defence. Self-defence against a non-state actor requires a prior grave armed attack attributable to a state.

A. Prior armed attack against Ethiopia?

Self-defence as invoked by Ethiopia would be valid only if Ethiopia demonstrated that it was the victim of a grave attack. Ethiopian troops crossed the border and entered the territory of Somalia on the 20th of July 2006, one month after the UIC took control of Somalia. The UIC declared war on Ethiopia on the 21st of July 2006, one day after the Ethiopian invasion. This non-state actor with effective control of Somalia did not attack Ethiopia before its intervention in Somalia. Without prior attack, Ethiopia could not invoke the right to self-defence under Article 51.

The ICJ reiterated the criterion of gravity of the attack and the necessity to differentiate a mere incident from a major attack.²⁴⁷ In a Parliamentary debate on Ethiopian intervention in Somalia, Ethiopian Member of Parliament Beyene Petros spoke about 'sporadic incursion' rather than an occurrence of an armed attack which justifies an intervention.²⁴⁸ Pursuant to Article 51 of the UN Charter, Ethiopia was not entitled to exercise its right of self-defence where it was not the victim of an armed attack.

B. Armed attack attributable to the Somalia?

The wording of Article 51 of the UN Charter does not stipulate that a non-state actor's attack shall be attributed to a state in order to trigger self-defence. The ICJ ruled in the *Palestinian Wall* and in the *Armed Activities* that the right of self-defence could not be invoked against a non-state actor in the absence of state involvement. The UIC actions could not be attributed to the TFG, the recognized representative of Somalia. Apart from the intervention against the Taliban and al Qaeda, which were authorized by the UN Security Council, there is no acceptance of the exercise of self-defence against a non-state actor. The ICJ, in the *Nicaragua* case decided that a right to self-defence is invoked against a non-state actor if there is evidence of an 'effective control' of the host state over the non-state actor.

²⁴⁷ *Nicaragua* case (n 17 above) para 191.

²⁴⁸ Yihdego (n 230 above) 670.

The nature of the non-state actor status of the UIC acting as *de facto* government may trigger a right of self-defence against it. But the fact that the UIC lacked the legal capacity to act on behalf of the state of Somalia however, made impossible the requirement of state attribution for its acts.

C. *Caroline* test

The customary right of self-defence requires that states invoking a right of self-defence should fulfil the criteria of necessity, proportionality and immediately.

Ethiopia did not demonstrate that an armed attack occurred. There was also no evidence of an imminent danger to launch an invasion as mentioned by the Ethiopian MP. The UIC declared war on Ethiopia after Ethiopia sent troops in Somalia. Therefore, the criterion of immediacy was not met. But the intervention was based more on a possible threat caused by the support of Eritrean UIC and more especially, the fear of terrorist attacks as well actions of Ethiopian rebel groups, the Oromo National Liberation Front or Oromo Liberation Front.²⁴⁹

The fact that Ethiopia had attacked without seeking another alternative may also be considered as a defect of the necessity test. The major offensive of Ethiopia was necessary because Ethiopian troops had already crossed the border on 20 July 2006.

Finally, the fact that Ethiopia pushed up its offensive to the capital Mogadishu showed that the self-defence claim was not proportional. The claim of self-defence by Ethiopia did meet neither the requirement of Article 51 of the UN Charter nor the *Caroline* test.

4.4 Conclusion

Ethiopia and Kenya claimed a right of self-defence against non-state actor without any occurrence of an armed attack. The two states seemed to take a pre-emptive action against future attacks by the UIC or Al-Shabaab. Since the launching of the global ‘war on terror’ by the Bush Administration, many states like the USA, Israel and Turkey have claimed a new justification of self-defence against terrorism. These states put forward the possibility to attack a non-state actor and even against the territorial state where it operates. Many authors support a change of the law of self-defence after the attacks of 11 September 2001 and the invasion of Afghanistan. Professor Gray affirms that the ‘massive state support for the legality of the US claim to self-defence constitutes instant customary law and a re-

²⁴⁹ Allo (n 57 above) 159.

interpretation of the Charter'.²⁵⁰ Professor Dugard refutes this assertion and states that self-defence against terrorism in order to prevent future attacks is permissible only with prior UN Security Council's approval.²⁵¹

The unilateral intervention of Ethiopia and Kenya to act pre-emptively against a non-state actor without prior UN Security Council was unlawful.

²⁵⁰ Dugard (n 13 above) 506.

²⁵¹ As above

Chapter 5

Conclusion and recommendation

5.1 General conclusion

At first we clarified the scope of the rule of prohibition of the use of force under Article 2 (4) of the UN Charter. Article 2(4) makes reference to the use of force in ‘international relations’. Article 2(4) of the UN Charter prohibits not only the use of force, but also the threat of use of force.

We discussed the evolution of this rule in light of the practices of states. There have been several attempts by states to restrict the scope of this rule. It was argued that an intervention was lawful if there was no violation of the territorial integrity and the political independence of the state. These attempts were not successful and even this rule has become a rule of customary law and a *jus cogens* norm.

Despite the abrogation of Article 2 (4), states still adhered to it. They justified their action under one of the exceptions provided by the UN Charter or by the consent of the inviting state. Therefore, any threat or use of armed force against a state outside these exceptions is illegal. The state practice seems not to be in accordance with this peremptory rule but the practice is not accompanied by the mental element or *opinio juris* required for the emergence of a new customary rule.

The scope of self-defence was also discussed under the UN Charter and customary international law. The right of self-defence formulated by the UN Charter is narrow compared to the customary international law. The exercise of the right of self-defence as provided by Article 51 is subjected to the requirement of an ‘armed attack’ and the duty to report to the UN Security Council. The nature and scope of an armed attack contain three important elements: requirements of armed attack, the armed attack shall be attributed to a state, and gravity of the attack. The wording of Article 51 indicates that the occurrence of an armed attack is a prerequisite for a lawful exercise of a right of self-defence. The armed attack is the act that triggers the exercise of the right of self-defence. The customary right of self-defence existed prior to the UN Charter and recognised an inherent for states to exercise it is in line with the requirement of *Caroline* criteria of necessity, proportionality and immediacy.

The justification of intervention upon invitation has been evoked. It is a common practice for a state to give consent to another state to intervene forcibly in its territory. Such intervention is justified by the consent of the state where the intervention takes place. It is important to consider two important points in cases of intervention by invitation. Firstly, the validity of consent as a justification for an armed intervention and secondly, the conditions under which it may be expressed. There are two ways of giving consent, first, ad hoc consent and secondly, consent through a prior agreement. It was found that the criterion of effectiveness is relevant to the validity of consent. A government without effective control over its territory cannot give a valid consent.

The events of September 11 can be seen as a turning point in the *jus ad bellum*. The Security Council has adopted resolutions 1368 and 1373 for the first time, authorizing the use of force against a non-state actor Al Qaeda operating from Afghanistan and suspected to have committed terrorist acts in the United States. Some have considered it as an “instant custom”. States have increasingly used force outside their frontiers against non-state actors. However, as it is clearly stated in the previous chapter, military actions carried out against a non-state actor in another state without its consent is prohibited by Article 2(4) of the UN Charter. Accordingly, any unilateral use of force, unless exceptions are provided by the UN Charter, will result in a breach of Article 2(4) of the UN Charter. The International Court of Justice in the *Nicaragua* case held that the ban on the use of force is both a rule of customary international law and *jus cogens*. Extraterritorial use of force against non-state actor is mostly justified on the grounds of self-defence. States’ unilateral interventions invoking self-defence against terrorism and targeting non-state actor were not considered lawful.

When states invoke self-defence, they fail to demonstrate the requirement of Article 51 namely; proof to be a victim of an armed attack and the obligation to report to the Security Council. They also ignore the jurisprudence of the ICJ which requires that a state involvement or attribution is required in order to trigger self-defence against non-state actors. Those who invoke Article 51 consider that the rule of prohibition of the use of force embodied in Article 2(4) applies also to non-state actor despite this provision refers to conflicts between states. The ICJ has twice in *the Palestinian Wall* and in *Armed Activities* rejected the possibility of invoking self-defence against a non-state actor.

In most cases, states invoking self-defence are more victims of border incidents below to the threshold of gravity found by the ICJ in the *Nicaragua* case. It was found in this case that

only a grave armed attack is required to invoke a self defence against non-state actors. States may intervene without an occurrence of an armed attack or even an imminent threat and decide to operate a pre-emptive action. There is no wide support for this doctrine of pre-emptive self-defence as it is not accepted by states.

The exercise of the right of self-defence against non-state actor operating from within a state without effective government is not lawful because it lacks the ‘effective control’ test found by ICJ in the *Nicaragua* case. In this case, the host state is ‘unable or unwilling’ to prevent attacks. It is however insufficient to amount to a right of self-defence for the victim state. A possible solution for the victim state is to request the consent of the recognised government which is a circumstance excluding the wrongfulness of the act. Extraterritorial use of force against a non-state actor is prohibited unless it perpetrated a large scale attack with the substantial involvement of the state. If the action of the non-state actor amounts to an armed attack but there is no state attribution for this action, the victim state shall request the cooperation of the host state in order to prevent future attacks. If the state intervenes forcibly without requesting the assistance of the host state, it fails to meet the test of necessity and its claim of self-defence will not be considered as lawful.

In the case of a non-state actor acting as *de facto* regime in a state, its action will be considered as actions emanating from the state. The conduct of an insurrectional movement which become the new government of a state shall in terms of Article 10 of the Drafts Articles on State Responsibility be considered as an act of that state. The victim state may exercise a right of self-defence against its attacks.

In the case of the intervention of Ethiopia and Kenya against non-state actor, they both failed to demonstrate an occurrence of an armed attack. It seems more to be a pre-emptive action against future attacks which has little support among states. Their action would be lawful if the acts of the UIC and Al-Shabaab should be attributable to the state of Somalia. As there is the internationally recognised government TFG, neighbouring states intervention breached Article 2(4).

After the launching of the war against terrorism states like USA considered that UN Charter is unable to address these new challenges, but the United Nations Secretary-General in his report ‘In Larger Freedom’ confirmed that the UN Charter is perfectly appropriate to deal with these challenges.

5.2 Recommendations

- **Security Council**

There has been no condemnation or debate in the Security Council concerning the intervention of Ethiopia and Kenya in Somalia. The lack of condemnation of the unilateral action or even an assessment of its legality may be considered by states as a valid intervention. Therefore:

- The Security Council should condemn Ethiopia's unilateral action which violated Article 2 (4).
- The Security Council should not give *ex post facto* authorization to states which unilaterally intervene in another state. Thus, the Security Council should not permit Kenya to join the peacekeeping force mission in Somalia after its unilateral intervention because this may be interpreted as *ex post facto* authorisation of a patently illegal act.

- **UN Member States**

- States must avoid any unilateral action outside the framework of the Charter. They should avoid any attempt to limit the scope of Article 2(4).
- States shall push the UN General Assembly to request the ICJ for an 'Advisory Opinion on the legality or otherwise of the plea of self-defence against non-state actors'.
- States shall demand that Chapter VII of the UN Charter shall be reformed in a way that allows the UNSC Resolutions to be reviewed by a judicial body such as the ICJ.

- **UN General Assembly**

- The UNGA shall request the ICJ to clarify the meaning of Article 51 of the UN Charter regarding the identity of the attacker in relation to self-defence.

- **Scholars**

- Scholars shall avoid interpreting the UN Charter in a manner inconsistent with the object and purposes of the United Nations.

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